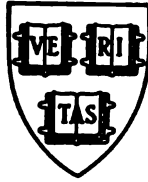


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**DICTIONARY AND DIGEST**

**OF THE**

**LAW OF SCOTLAND**

**WITH SHORT EXPLANATIONS OF**

**THE MOST ORDINARY ENGLISH LAW TERMS.**

**BY THE LATE**

**WILLIAM BELL, ESQ., ADVOCATE.**

**REVISED AND CORRECTED, WITH NUMEROUS ADDITIONS,**

**BY**

**GEORGE ROSS, ESQ., ADVOCATE.**

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## P R E F A C E .

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THE work, of which a New Edition is now presented to the public, was, on its original publication, and still continues to be, a most valuable contribution to the Legal Literature of Scotland. Indeed, a more valuable aid to all engaged in the practice, as well as in the study, of the law of Scotland, could not have been furnished. One of the great merits of the work is, that it gives the law applicable to the subjects of its various articles in the language of the Institutional Writers themselves, so that the legal student or practitioner who may consult it has at once brought before him an authoritative abstract of the law. No other work of a similar kind is equal to it, and indeed no other work has ever attempted to rival or displace it. A New Edition has been called for, both on account of the former impression being exhausted, and also on account of the various changes in the law which have taken place during the last twenty years of legislation. These changes, which relate principally to Conveyancing, have been incorporated in the present Edition. A few articles are almost, or entirely new, such as that of "APPROBATE and REPROBATE," which also comprehends the English doctrine of "ELECTION." The article "ASSIGNATION" is considerably enlarged, and that of "ASSIGNMENT" is almost entirely new. In the former of these articles the law relating to Latent Trusts is more fully set forth; and in the latter the English law of Notice in the case of Assignments is attempted to be explained. The article "COMPENSATION" is also considerably enlarged, and the various cases in which the plea of compensation may arise with reference to debts due to or by a Company, and debts due to or by its Partners, are pointed out. Under the article "STATUTES" will be found an Index to the important Statutes which have been passed during the present reign.

In consulting the earlier Articles, it is important to observe that they were sent to Press before the passing of some of the recent Statutes introducing changes in the law. This circumstance will account for no notice having been taken of these changes, but in subsequent Articles, opportunities were afforded for remedying the omission.

The article "TITLES TO LAND" is entirely new, and details the various successive alterations that have been made in conveyancing since 1845. At the close of this article, there is also indicated what still remains to be done, in order to free the transfer of land of all the feudal hindrances with which

it may still be considered to be fettered. The change suggested is a very simple, but at the same time a very important one. It is simply this, that in future there should be no recurrence to the Superior for an entry, by a Vassal's heir or disponee, but that the decree of service in favour of the former should be pronounced, and that the conveyance in favour of the latter should be granted, under burden of all the superior's rights, contained in the Original Charter of the lands, or in any subsequent Charter by Progress, recorded in the Books of Council and Session, or in the Register of Sasines, and subject also to those rights which are the legal incidents of a right of Superiority. By this means all the substantial rights of superiors would remain intact, with this additional advantage provided to them, that every proprietor whose name appears on the Register of Sasines should be held to be the vassal in the lands on the death of the former vassal, and thus the heir of the former vassal would be prevented from offering to enter as vassal, and so depriving the superior of his composition.

A less violent change on the present system could not possibly be proposed, and yet complete freedom in the transfer of land from all feudal trammels would be effected. Superiors and vassals would have it in their power, as now, to transact in regard to the sale and purchase of the duties and casualties exigible by a superior, but a compulsory sale of those rights would not be enforced. If a superior were to be compelled to sell his feuduties, the creditor in a ground-annual must equally be compelled to sell his right of ground-annual; and on the same principle, too, a landlord should be compelled to sell his right under a long lease. This, however, would be an unnecessary interference with the rights of property, for it is difficult to furnish a satisfactory answer to the question—Why should annual payments out of land not be permitted, if parties choose to create such rights? When it is the interest of both parties that such payments should be redeemed, their redemption will be effected. To facilitate their redemption, heirs of entail who are superiors ought to be authorised to sell, and those who are vassals to purchase, rights of superiority—the price in the case of a superior selling being invested in the purchase of lands, and in the case of a vassal purchasing, being imposed as a burden on the entailed estate, in the same manner as is authorised by the Titles to Land Act in the case of Writs of Investiture. Where the rights of superiority are sold to the vassal, a Writ of Discharge should be granted in his favour by the superior, and that writ, on being recorded in the Register of Sasines, would free the land for ever of all the duties discharged by it.

The existence of a feu-duty, ground-annual, or other annual payment, is no obstacle to the free transfer of land. On the contrary, where the annual payment is considerable, the burden may be considered as a means of facilitating its transfer. For what is a reserved annual burden but a part of

the price unpaid by the purchaser and secured upon the land, with this important difference, that the purchaser can never be called on to pay the principal sum reserved? To compel, therefore, a sale of feu-duties or ground-annuals against the will of the party in right of them, is to interfere unnecessarily with the private pactions of individuals; and it may be doubted whether, if such an interference were authorised by the Legislature, many vassals would avail themselves of their statutory privilege of redemption.

In the case of Vassal Corporations, where the rights of the superior are not discharged, the superior should be entitled to payment of a composition from the Corporation, not only on the death of the last vassal from whom the Corporation may have purchased the land, but also at every twenty-fifth or thirty-third year from the payment of the last composition.

The Crown rights of superiority stand in a different position from those of Subject Superiors. In regard to these, therefore, a sale compulsory on the part of the Crown, but optional on the part of the vassal, ought to be authorised; and on a sale taking place, a Writ of Discharge should be granted, and thereafter an entry by the Crown should no longer be required. The price to be paid by a Crown vassal for a Writ of Discharge might be fixed at twenty years' purchase of the annual feu-duty, along with the amount of a single composition. Where the feu-duty is not payable in money, but in grain or other articles in kind, such duties might be converted into money in the same manner as they are now converted in Exchange when such duties are exacted from a vassal.

If the suggestion now proposed were adopted, the Feudal system of Conveyancing would be entirely abolished. No vestige of it would then remain. Charters, and Writs, of Confirmation and of Resignation, Charters of Sale and of Adjudication, Precepts, and Writs of Clare Constat, would all follow in the train of those once equally powerful instruments of Feudal machinery—Obligations to infeft by a double manner of holding, Procuratories and Instruments of Resignation, Precepts and Instruments of Sasine. The change, too, would be a voluntary one. For one of the distinguishing features of all recent legislation in regard to the forms of conveyancing is, that it permits, but does not compel,—it creates, but does not destroy,—it introduces something new, but does not abolish what is old. A right to elect between the old and the new forms is conferred, and thus the merits of the latter are tested before the former are entirely laid aside.

Although, however, the Feudal system of Conveyancing would be virtually abolished, the substantial rights of superiors would not be interfered with. That system is based on the relation of Superior and Vassal, and on requiring a formal acknowledgment to be granted on every change of vassal. If the

relation were abolished, the more simple one of Landlord and Tenant as under a perpetual Lease, or that of debtor and creditor as under a Contract of ground annual, would be substituted instead. In neither of these cases is any renewal of the original deed required. A lease, however long, endures until its term of duration expires. A contract of ground-annual can always be enforced. Why, then, should any renewal of a grant of land be necessary? A vassal is nothing else than a holder of land under an irrevocable grant, with certain annual and other payments to make to the granter, in consideration of his right. What is this but a tenant of land under a perpetual lease? This is the modern character of a Feu right. Formerly, a vassal could renounce his feu against the will of his superior. Modern notions refuse to recognise any such right. Both superior and vassal are bound by the original grant. The one cannot revoke, the other cannot renounce. This doctrine, although now fully established, was at one time strongly opposed by some who deemed it an unwarrantable innovation on the pure principles of the Feudal system.

The rights and obligations of the two parties interested in the land would thus remain as before. The annual feu-duty would just be a ground-annual, which is the form the transaction assumes when subinfeudation is prohibited. The casualties of Composition and Relief would also be exacted as formerly. A superior may perhaps object that, when the lands are sold, he has no means of ascertaining the death of his former vassal, on which event depends his right to exact a composition. To such an objection it is answered, that, under the present system, a superior is constantly exposed to the same inconvenience, as the new vassal seldom demands an entry from the superior, but waits until an entry is demanded of him. There might, however, be no objection to benefit the superior so far, as to allow the composition to carry interest from the death of the last vassal. Or perhaps it might be an advantage to both parties to allow a composition at fixed periods, as suggested in the case of corporations; but with this *proviso*, that not more than one composition should be demanded from the same vassal.

The effect of the change now proposed would be considerable. All feudal hindrance to the free transfer of land would be removed. There would be no recurring to the superior for an entry in any case. All the valuable rights of the superior would remain, but the feudal dignity of granting Charters by Progress would cease. That being accomplished, the owners of land would have no ground of complaint, and the transfer of land might become as simple as it was in the earlier ages of conveyancing.

JANUARY 1, 1861.

# DICTIONARY AND DIGEST

OF THE

## LAW OF SCOTLAND.

### ABA

**Abandoning an Action.** It is competent to a pursuer, after the record is closed, to abandon the cause on paying full expenses to the defender, and to bring a new action if otherwise competent; 6 *Geo. IV.*, c. 120, § 10. But this regulation only applies to the case where the abandonment is made before an interlocutor has been pronounced, assoilzieing the defender in whole or in part, or leading, by necessary inference, to such absolvitor; *A. S. 11th July 1828*, § 115. It would seem that an abandonment of the cause before closing the record, although competent, is not held to fall under the above statutory regulation; *Caledonian Foundry v. Clyne*, 14th Dec. 1831, 10 *S. & D.* 133; and so the giving or refusing expenses is a matter of discretion with the Court, in such a case.

As to a statutory abandonment after the record is closed, see *Shirreff*, 24th May 1836, 14 *S.* 825, in which case the Lord Ordinary, instead of dismissing the action, having *assolzieid* without any reservation of a right of new action, the pursuer was, nevertheless, allowed to bring a new action. The pursuer is liable for expenses taxed only as between party and party; *Lockhart*, 15th July 1845, 7 *D.* 1045. The minute of abandonment must be ratified by the judge, in order to give it effect in putting an end to the process; *Muir*, 2d Feb. 1849, 21 *Jurist*, 139; *Cormack*, 25th June 1846, 8 *D.* 889; and a new action cannot be insisted in, unless the expenses of the previous one have been either paid or consigned; *Lawson*, 1st July 1845, 7 *D.* 960. By *A. S. 10th July 1839*, § 61, a pursuer before the Sheriff Courts may, upon paying full expenses, enter upon record an abandonment of the cause, "before any interlocutor of absolvitor is pronounced." See *Shand's Prac.* 333; *McGlashan's Sheriff Court Prac.* 333; *Shaw's Digest*, ii. 992; iii. 354. See *Amendment of Libel*.

### ABA

**Abandonment;** in the law of insurance, is the relinquishment, by the insured, to the underwriters, of all claim to the subject saved. This right may be exercised wherever there is such a loss as to make the voyage not worth pursuing; or where the thing saved has lost its chief value; where the salvage is very high; or where further expense is necessary, which the insured does not choose to undertake. The election to abandon must be made as soon as the insured has obtained correct information as to the loss; and reasonable notice of the abandonment must be given. In this country no particular form of notice is required; in some countries it is by protest. *Bell's Princ.* § 484, and *authorities there cited; Illust.* § 485, *et seq.*; *Shaw's Digest*, p. 284.

The actual annihilation of a ship is not necessary to constitute a total loss. It is sufficient, if the expenses of repairs would exceed the value of the ship when repaired. Where, therefore, the damage to the ship is so great, from the perils insured against, that the owner cannot put her in a state for repair necessary for pursuing the voyage, the insured, except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon and treat the loss as a total loss. Although, however, the assured may claim upon a total loss where the ship is not actually annihilated, if they do so, they must abandon the vessel to the underwriters, and give up along with the vessel all benefit and advantage belonging or incident to it. One of the incident advantages or benefits is the freight which the vessel has earned, and this falls to be given up to the underwriters paying for a total loss, as much as the vessel itself, or any matter of value incident to it. In *Berson v. Chapman*, 6 *M. & G.* 792, *TRINDALL*, C. J., observed:—"The assured has sustained a total loss of the freight if he

abandons the ship to the underwriters, and is justified in so doing; for, after such abandonment, he has no longer the means of earning the freight, or the possibility of ever receiving it, if earned, such freight going to the underwriters on ship." In *Case v. Davidson*, 5 M. & S. 79, Lord TENTERDEN observed:—"I have never heard of an instance in which the assured, after abandoning the ship to the underwriters, has stepped in and claimed the freight as against the underwriters. On the contrary, the practice has been uncontested, that the abandonee has received the freight." In the case of the "*Laurel*," the owner had insured the vessel with one company, and the freight with another. The cargo consisted of timber, and the vessel, on her voyage from Quebec to Liverpool, was seriously damaged by an iceberg. She, however, reached Liverpool, and delivered her cargo to the consignees, by whom the freight was paid. The owners then gave notice of abandonment to the underwriters, and brought an action claiming as for a total loss. The jury found "that the vessel was a total loss, irrespective of the decayed timber and deficient sails." The underwriters then claimed the freight, on the ground that, having paid the full value of the ship, they had acquired right to all her earnings. This claim the Court sustained, and their judgment was affirmed. Lord COTTENHAM, C., observed:—"Where a ship has received such repairs as entitles the owners to treat her as actually lost, and where the owner consequently abandons her to the underwriters, they come in as assignees, and so are entitled to all freight afterwards earned." *Stewart v. Greenock Insurance Company*, 8 D. 323, 1 Macqueen 328.

Where, however, the owners elect to abandon the vessel to the underwriters, and where freight has been actually earned, and the underwriters on the vessel have deducted the freight from the sums assured, the owners have no claim against the underwriters on the freight. In the case of the "*Laurel*," the owners having been compelled to surrender the freight to the underwriters on the vessel, raised an action against the insurers on the freight, on the ground that, as the underwriters on the ship had been found entitled to the freight, it must be considered as lost to the assured, and consequently recoverable from the underwriters on the freight. The Court sustained the claim of the owners, but their judgment was reversed, on the ground that what the underwriters on the freight undertook was, that the voyage should be performed, so that the owners should be able to deliver the cargo, and be in a condition to assert their title to the freight, and

that the underwriters on the freight had undoubtedly performed this contract. Lord COTTENHAM observed:—"The underwriters on freight engaged that the ship should not be prevented by perils of the sea from enabling the owners to earn her freight. The right of the underwriters on the ship to claim that freight arose, not from perils of the sea, but from the election made by the owners, after the freight had been earned, to treat the ship as wholly lost." *Turner v. Scottish Marine Insurance Company*, 13 D. 652, 1 Macqueen, 334.

The owners of a vessel may be deprived of their right of abandonment, and of claiming as for a total loss, where the master elects to repair the damage caused to the vessel. The duty of the master, in the case of damage to the ship, is to do all that can be done towards bringing the adventure to a successful termination—to repair the ship if there be a reasonable prospect of doing so, at an expense not ruinous—and to bring home the cargo, and earn the freight, if possible. Unless, therefore, it is shown that the master, in repairing the ship, acted improperly, the mere fact that the expenses of repair ultimately prove to be greater than the value of the ship, will not be sufficient to show that he acted beyond the scope of his authority, for he is held to have authority to act as a provident uninsured owner would have done. This law was applied by the House of Lords in the case of *Benyon v. Chapman*, 1849, 2 C. & F. 696, where the vessel was repaired by the master, and the expenses exceeded the value of the ship and freight. It was held that the case was one of constructive total loss, and that the master might have abandoned; but that as he had elected to repair, he must be treated for that purpose as the agent of the owner, whose acts bound the owner.

**Abbey.** Prior to the Reformation, an abbey was a monastery or religious house, where religious persons, whether men or women, resided under the direction and control of an Abbot or Abbess. In Scotland, the word abbey is also used colloquially, to signify the sanctuary against personal diligence afforded by the Abbey of Holyroodhouse, as having been a royal residence. See *Sanctuary*.

**Abbot.** An Abbot was the head and governor of a religious house or abbey. He had commonly a Prior under him; and, before the Reformation, Abbots sat *ex officio* in the Scotch Parliament. *Ersk. B. i. tit. 5, § 4.*

**Abbreviate of Adjudication;** an abridgment or abstract of the decree of adjudication, containing the names of the creditor and debtor, and of the lands adjudged, with the amount of the debt. This abbreviate used formerly to be authenticated by the signature

of the Lord Ordinary by whom the decree was pronounced; but is now signed by the Extractor; (1 and 2 *Geo. IV.*, c. 38, § 18.) The abbreviate must be recorded within sixty days. The register of abbreviates is kept by the clerks of the bills, and the certificate of registration is written on the abbreviate. A copy of the abbreviate is also appended to the extract of the decree, on which likewise the recording is certified. An abbreviate is necessary in all adjudications, whether in payment or in implement; but, where led before the Sheriff on decrees *cognitionis causa*, the abbreviate need not be signed or recorded. An omission to record the abbreviate will have the effect of postponing the adjudication, in competition with another adjudication duly recorded, but does not infer nullity in a question with the debtor. No horning against superiors can be obtained unless the abbreviate be recorded; but if infetment have followed on the adjudication, the omission to record the abbreviate is of no consequence in a question with creditors adjudging posterior to the sasine. *Ersk. B. ii. tit. 12, § 26; 1661, c. 31; Reg. 1695, c. 24; A. S. 18th Jan. 1715; A. S. 2d Dec. 1742; A. S. 10th July 1811; Bell's Com., i. 704, 722, 746; Shand's Prac. ii. 700, and authorities there cited; Mr More's Notes on Stair, p. cccvi; Bank. vol. ii. p. 222, § 50; Bell's Princ. § 825; Kames' Stat. Law Abridg. voce Registration; Shaw's Digest, p. 6; Jurid. Styles, 2d edit., vol. iii. p. 888. See Adjudication.*

**Abdicate**; to resign. Generally applied to the case of a magistrate or other functionary giving up or quitting his office before his term of service is expired. *Tomlins, h. t.*

**Abduction of Women**; is the unlawful taking away of the person of a woman, whether child, wife, ward, heiress, or woman generally. In England, the abduction of a wife, whether by open violence or by fraudulent practices, (which are held equivalent to constraint), is punishable by fine and imprisonment, as a crime, and may also found a civil action for damages. A similar action will lie in the case of abduction of a ward, the guardian being accountable to the ward for the damages recovered; although the more usual remedy for such a wrong, is by an application to the Court of Chancery, as the supreme guardian of all persons in England who are under age. The abduction of an heiress, or of any woman who has property in possession or expectation, from motives of lucre, with intent to marry her, is declared, by 9 *Geo. IV.*, c. 31, as to England, and by 10 *Geo. IV.*, cap 34, as to Ireland, to be felony, punishable by transportation, penal servitude, or imprisonment. If marriage has followed, though ostensibly voluntary, yet it

will be held in law to have been forcible, as having proceeded on a consent fraudulently obtained. Generally, indeed, the abduction in order to marriage of women is a felony; and the woman who has been thus married may bear evidence as to her abduction against her husband, contrary to the ordinary rule of law. Under the same statutes, the abduction of an unmarried girl under sixteen years of age is a felony, punishable by fine and imprisonment. In Scotland, the crime of abduction of women is punishable arbitrarily. In one case, the forcible abduction and marriage of an heiress of fifteen years of age was punished by transportation for fourteen years. *Hume on Crimes, i. 310; Tomlins, h. t.; Russell on Crimes.*

**Abduction of Voters.** The abduction of voters at an election is an offence at common law, and punishable with an arbitrary pain; *Alison's Princ. p. 642.* But, although this was one ingredient in a successful petition against a return, the effect of abduction *per se* on the election has not yet been decided. It is apprehended, however, that the name of a voter should be added to the roll, there appearing to be no distinction in principle between this case and that of any other wrongful excluded vote. *Warren's Law of Election Committees, 368; Chambers on Elections, h. t.*

**Abettor**; one who incites, instigates, encourages, or who commands, or counsels another to commit felony. In most cases an abettor is considered as much a principal as the actual felon. *Tomlins, h. t.*

**Abeysance**; an English law term, importing that a freehold or inheritance is vested in any one, but is in expectation, and ready to descend upon him who shall first acquire the character required by the particular quality of the estate. This abeyance or suspension being repugnant to the general principles of the English law of tenure, is not allowed except when it is unavoidable. It has been compared to the *hereditas jacens* of the civil law. *Tomlins' Dict. h. t.*

**Abiding by.** In an action of reductio in probationem, where the main reason of the action is forgery or falsehood; or in any other action where either party founds on a deed or writing to which the objection of falsehood or forgery is proposed either by way of action or of exception, the party founding on the deed may be required by the adversary to *abide* by it,—that is, to declare judicially that he abides by the deed, if the writing challenged or objected to, as true and genuine. If he refuse, decree of certification will be pronounced against the writing as improbativè or false. The party abiding by the deed does so *sub periculo falsi*; i. e. at the risk of the punishment of forgery, if the

forgery be proved; and regularly the *abider* by the deed ought to appear in court for the purpose; although, in the case of extreme age or of necessary absence from Scotland, a commission to take his declaration will be granted. It was formerly the practice to admit parties to abide by deeds *qualificate*, as it was expressed,—that is, with explanations tending to show that the deed came fairly into the party's possession. This practice, however, has gone into desuetude; but it is still competent and usual for the abider to protest that he shall be at liberty to prove facts and circumstances as to the manner in which the deed came into his hands, and as to his belief of its being genuine, which, even if it turn out to be a forgery, may free him of accession to the crime. After a party has thus abidden by a deed, he cannot be asked how the deed came into his hands; and the form of process is to make up the record in the cause, by ordering a condescendence of articles improbatory, and answers containing articles approbatory. The writ question is also identified by the signatures of the party abiding by it, and of the judge commissioner. *Stair*, B. iv. tit. 20, § 19; *sk. B. iv. tit. 4, § 69*; *Bank. B. i. tit. 10, § 4*; *Act of Sederunt*, 11th July 1828, § 53; *and's Prac. ii. 642, et seq. and cases there cited, and notes*; *Hume*, i. 157. See *Articles Probatory*.

**Abjuration, Oath of**; an oath asserting the title of the present Royal Family to the crown of England. The statutes enjoining are 13 Will. III., c. 6, 1 Geo. I., c. 13, and Geo. III., c. 53. By this oath the swearer recognises the right of the Sovereign under the Act of Settlement; engages to support her or her to the utmost of his power; promises to disclose all traitorous conspiracies; and expressly disclaims any right to the crown of England by the descendants of the pretender. This oath is ordered to be taken by all persons holding offices in Scotland, civil or military,—by Peers before voting in the election of Scotch Peers, or taking their seats in the House of Lords,—by judges, advocates, and practitioners,—by the heads and other members of colleges,—by the clergy of the Church of Scotland, and by schoolmasters. Quakers and Moravians are allowed to make an affirmation to the same effect, in lieu of the oath. 8 Geo. I., c. 6; 6 Geo. III., c. 53; and 4 Will. IV., c. 49, § 2. The oaths of abjuration and allegiance are repealed in every case as to Roman Catholics; and by 5 and 6 Will. IV., c. 36, no elector in England is to be required, at any election, to take them, or any oath required by any act to be taken in lieu of them. Members of Parliament (except Roman Catholics) must take

them before they sit or vote, after the Speaker is chosen, otherwise the election is void; 13 Will. III., c. 6; and Roman Catholics elected members must take an oath in lieu of the oaths of abjuration, allegiance, and supremacy, according to a formula prescribed by 10 Geo. IV., c. 7, § 2. *Ersk. B. i. tit. 2, § 33*; *Swinton's Abridgment, voce Oaths*; *Blair's Justice Manual, h. t.*; *Chambers' Election Law, h. t.*; *Hutch. Justice of Peace*. See also *Oaths. Affirmation*.

**Abortion**; the offence of administering medicine or applying force to a pregnant woman, in order to procure abortion, is not murder of the child *in utero*, whether quick or not. But where the mother dies from the effect of the potion or operation used to destroy or expel the *fœtus*, there seems to be room for a charge of murder against the perpetrator. An attempt to procure abortion is a relevant charge. *Hume*, i. 186, 263; *Alison, Princ. 72*.

**Abroad**; persons resident abroad, that is, out of Scotland, are not, generally speaking, subject to the jurisdiction of any Scotch court. But to this rule there are several exceptions. A native Scotchman, who goes abroad *animo remanendi*, leaving no property, either heritable or moveable, behind him, does not remain subject to the jurisdiction of the Scotch courts *ratione originis*. If a party resident abroad have heritable property in Scotland, or, whether he be a native or not, if a jurisdiction has been created by arresting his moveables in Scotland *jurisdictionis fundandæ causa*, he may be cited (except in questions of *status*) in the Scotch courts. In the case of a landed estate, the *lex rei sitæ* is the rule; and the law presumes that the owner of such an estate, whether native or foreigner, if resident abroad, has employed some one resident in this country to look after his interests in his absence. Hence, not only in the case where there is an arrestment to found a jurisdiction, but also where there is jurisdiction *ratione rei sitæ*, edictal citation, on induciæ of twenty-one days, is competent against the party, to the effect of making him amenable to the Court of Session in Scotland. Parties resident abroad, and charged with the commission of crimes in Scotland, may also be cited as furth of the kingdom. The effect of absconding, or going abroad for the purpose of evading payment of debt, or of escaping punishment for a crime, will be considered under other heads.

In the case of *Grant v. Pedie*, 5th July 1825, 1 *W. & S.* 716, which, overruling the judgment of the Court below, found that a native of Scotland domiciled abroad was not amenable to the jurisdiction of the Courts in Scotland *ratione originis*, there was no



personal citation. Where, however, a native of Scotland domiciled abroad is cited personally in Scotland, he is amenable, although he may be in Scotland only on a visit, and may not have resided there for forty days continuously. *Ritchie v. Fraser*, 9th Dec. 1852, 15 D. 205. It would rather seem, therefore, that the moment that a Scotsman returns home, the jurisdiction of his native courts revives, although he be at home transiently only, provided he be cited personally. On this ground the judgment in the case of *Caldar v. Wood*, 19th Jan. 1798, M. 2250, may be doubted. There the defender was a native of Scotland domiciled abroad, and had been at home on a visit for more than forty days, but the citation was left at his lodging-house after he had quitted it, and when he was on his road to England two or three days before the citation was given. The older case of *Wylie v. Muirhead*, M. 4814, appears to have been correctly decided, for there the defender, although domiciled in England, was a Scotsman by birth, and was personally cited in Scotland. So soon as a party leaves his residence in Scotland, with the intention of establishing himself elsewhere, he may be cited edictally as being furth of Scotland, although he may not have acquired another domicile elsewhere; *Brown v. Blaikie*, 1st Feb. 1849, 11 D. 474. In that case Lord Jeffrey observed: "It is a great mistake to suppose that the domicile for citation is the same as that which regulates succession; and that no domicile for citation can be lost until a new one is acquired. This is an error, for such domicile may be lost in the course of twenty-four hours by going forth from the realm, and by intimating to all the lieges that the party does not mean to come back. The only proper form of citation from that time forth is edictal citation."

On the subject of this article generally, see *Ersk. B. i. tit. 2, § 17, et seq.* and *Ivory's Notes*; and *B. iii. tit. 9, § 4*, and *tits. 3, § 33*, and *10, § 18*; also, *B. iv. tit. 1, §§ 6 and 41*; *Bell's Com. vol. ii. 168*; *Kames' Law Tracts*, vii. p. 217; *Hume on Crimes*, ii. 259; *Shand's Practice*, pp. 9, 163; 13 and 14 *Vict.*, c. 36, §§ 21, 22. See also *Foreigner. Judicial Factor. Edictal Citation. Reconvention. Backing Warrant. Absconding. Meditatio Fugæ. Border Warrant. Jurisdiction. Fugitation. Domicil Forum. Mandatary. Bankrupt. Arrestment jurisdictionis fundandæ causa. Absence. Abrogate.* To abrogate a law is to repeal or recall it.

**Absconding.** The act of absconding or fleeing, in order to evade payment of debt, is one of the equivalents of legal bankruptcy, under the act 1696, c. 5, and under the bankruptcy statutes. *Burton on Bankruptcy*, p. 203.

Absconding is also one of the indications of guilt usually libelled on in indictments and criminal letters. If a witness mean to abscond, in order to avoid giving evidence at a trial, he may be apprehended and imprisoned, till he find caution for his appearance. *Hume on Crimes*, ii. 375. The prosecutor (or pannel, as the case may be) must give in a regular application, and support it by oath, that he has good cause for believing that the witness means to abscond in order to disappoint the course of justice. *Alison's Prac.*, 398. *Dickson on Evidence*, 951. See *Bankrupt. Meditatio Fugæ.*

**Absence.** Where a defender, although duly cited, has failed to appear, the Court, on the ground that by means of the citation he has had lawful notice of the demand, accompanied by certification of what will ensue if he fail to make appearance, is in use, on the pursuer's motion, to pronounce a decree in terms of the conclusions of the summons or libel, which is called a *decree in absence*. In order to warrant such a decree, the Court must have jurisdiction over the defender, and the decree must be in terms of the libel; or, at least, the only admissible variation must be of the nature of a *restriction* on the demand in the summons, not of an amendment of the libel. The principle on which this rests is, that the absent defender is presumed to have laid his account with a decree in the terms concluded for; while, if he had been made aware of the variation, he might have appeared and opposed it. Where a libel contains alternative conclusions, the decree must be made to bear reference to one or other of them. In consistorial actions, generally, the pursuer must prove his case before getting decree, though the defender has failed to appear. In criminal process no procedure of the nature of trial, conviction, or sentence, can take place in absence of the accused; although, if he fail to appear on the day to which he is cited, sentence of fugitation or outlawry may be pronounced against him in his absence, whereby his person is forfeited in law, and his moveables escheated. The effect of absence where the party has no domicile or *forum* in Scotland, or where he has lost his original *forum* and domicile by leaving the country *animo remanendi*, is, that he is not amenable to the Scotch courts in any process, civil or criminal, except under the circumstances explained in the article *Abroad*. A decree in absence not being held as *res judicata*, the party may be reponed against its effects, in the manner pointed out under the article *Decree*. As to the mode of providing for the management of the estate or affairs of an absent party, see *Judicial Factor*; and as to the manner in which he must sue an

action, see *Mandatory*. For the mode of citing him when he has a Scotch forum, see *Edictal Citation*. As to decrees in absence in Sheriff Courts, see 16 and 17 Viet., c. 80, § 2.

Where a decree in absence is sought to be reduced, the pursuer, as a condition of his being allowed to insist in the action, must first pay the expenses decreed for in the previous decree. If he is successful in the reduction, he is not entitled to claim repayment of these previous expenses, as forming part of the expenses of the action of reduction. A different judgment appears to have been pronounced in one case, but it does not appear to be supported by the opinion of the majority of the judges who, as reported, were against the claim. The judgment bears that the pursuer of the reduction was entitled to repayment of the expenses of the principal action under the deduction of the expenses of enrolling and obtaining decree, the taxation, and extract; and this appears to have proceeded on the ground that these were the only expenses caused by the pursuer of the reduction not appearing in the previous action. By his not appearing, however, the summons itself was rendered useless, and having been unsuccessful in the reduction, he had to pay the expense of the summons of reduction—the expense of which was caused by the non-appearance of the pursuer in the previous action. It would appear, therefore, that his claim for the previous expenses ought to have been disallowed *in toto*; see *cales v. Wigton*, 22d May 1852, 14 D. 780.

On the subject of the article generally, see the following authorities: *Stair*, B. iv. tit. 38, 27; *Ersk.* B. i. tit. 2, § 16; B. iv. tit. 3, § 6, and tit. 4, § 83; *Bank.* vol. i. p. 461; *Hume*, 269; *Shand's Practice*, 305, *et seq.*; *Macbrlaine's Jury Practice*, pp. 26, 154, 246; *Glashan's Sher. Court Prac.* 195. See also *Amendment of Libel. Domicil.*

**Absolute Disposition** is a conveyance unqualified by any reservation in favour of the disponent or of any other party; in contradistinction to a conveyance containing *in græmio* a power of reversion, or any other limitation or qualification of the right. In Scotch law language, however, the term *absolute disposition* is generally used in relation to heritable property, and in connection with that is called a *back-bond*; that is, a right *ex facie* absolute is qualified by a separate deed declaring a trust, or importing a security, by making the disponent bound to redispone to the disponent, or his representatives, on repayment of a particular loan or advance of money, or on being relieved of certain obligations contracted on the disponent's account. This is a form of security sometimes given for future advances, or for securing obligations of relief.

When the relative back-bond is published by registration in the record of sasines and reversions, it becomes, from the date of registration, a *real* qualification on the disponent's right, which will be effectual against the disponent's creditors and against third parties. And after such registration, or after judicial production of the back-bond, the parties cannot disburden the disponent's right merely by cancelling or restricting the back-bond. The registration of the back-bond in the record of sasines and reversions is held to be a feudal limitation of the disponent's right; and in order effectually to discharge it, the discharge, like the burden, must appear on the record. While the back-bond remains unrecorded, the disponent is exposed to the risk of the disponent's bankruptcy; and if it should never be recorded, then on the face of the records, and feudally speaking, the disponent will be the absolute proprietor, subject only to a personal obligation to denude or account, in terms of the back-bond. Although the holder of a disposition qualified by a recorded back-bond is virtually no more than an heritable creditor to the disponent entitled to redeem, yet it seems to be doubtful whether the disponent can state himself as in right of a *debitum fundi*, to the effect of entitling him to point the ground of the lands comprehended in the absolute disposition in his favour. Pointing of the ground is a remedy competent to the holder of a *debitum fundi*, but not competent, it would seem, to a party holding a title, in virtue of which he can enter into the natural possession of the lands. *Ross's Lectures*, vol. ii. p. 430, and authorities there cited; *Bell's Com.* i. 672; *Princ.* § 913, and authorities there cited. See *Burdens. Bankrupt. Wadset. Pointing of the Ground.*

An absolute disposition qualified by a back-bond acknowledging the disposition to be in security merely, covers all advances made by the disponent, either before or after the date of the disposition. If, however, the disposition be recorded, or produced judicially, it will then operate as a security merely for the sums advanced at the date of the recording, or of the judicial production. *Riddel v. Nibblie's Creditors*. 16th Feb. 1782, M. 1154; *Keith v. Maxwell*, 8th July 1795, M. 1163.

There exists an important distinction between a disposition which *in græmio* contains a trust and sets forth certain specific trust-purposes, and a disposition which is *ex facie* absolute, but is qualified by a separate back-bond by the disponent, containing a general declaration of trust. The first does not divest the granter, but merely burdens his right until the back-bond has been recorded; the latter does divest him, leaving him merely the creditor on the disponent's obligation to re-

convey. The donee who possesses under a title *ex facie* absolute, when required to denude in favour of the truster, is entitled to retain the subject until the obligations incumbent on the truster towards him shall be fulfilled. Where the back-bond is perfectly general in its tenor, the security created by the trust not being limited either expressly or by implication, the donee is entitled to refuse to denude until he is relieved of all advances made or obligations incurred for the truster, prior, as well as posterior, to the date of the disposition. Where, too, the back-bond is not perfectly general, but specifies particular obligations, still in so far as regards subsequent advances by the donee to or for the truster, he is entitled to retain the subjects for his relief of these. The presumption of law in such a case is, that the truster in obtaining these subsequent advances contemplated the extension of the trust, and that the donee holding the subjects under an *ex facie* absolute title, made these subsequent advances for the truster in reliance on the security actually held by him. Where, however, it appears from the back-bond that the absolute disposition has been granted in security of a particular debt specially named, and the donee is taken bound to reconvey on the particular debt being repaid, in security of which the disposition was specially granted, the disposition will not be held to cover debts previously due. In such a case the trust created will be held to be a new transaction, and its nature and terms will fall to be determined by the intention of the parties as ascertained by competent evidence; for an absolute conveyance with a back-bond, though a trust or security most favourable for the trustee, is still but a trust or security, and its terms, like those of any other transaction, are a fit subject of judicial inquiry. In so far, however, as regards subsequent advances in such a case as that now supposed, these will be held to be covered by the security, on the principle that there was an implied extension of the trust-purposes, to the effect of securing such subsequent advances. *Robertson v. Duff*; 14th Jan. 1840, 2 D. 279.

An *ex facie* absolute disposition, qualified by a back-bond, does not exclude the widow of the disposer from claiming her terce out of the lands conveyed, on the ground that the transaction, as declared by the back-bond, was nothing more than an heritable security over the lands, and that beyond the extent of the sum secured the infestment of the donee was truly the infestment of the disposer. *Bartlett v. Buchanan*, 21st Feb. 1811, F. C. In the case of *Gardyne v. Bank of Scotland*, 8th March 1851, 13 D. 912, the Court, by a majority of three, held that an *ex facie* absolute donee

of a subject held burgage, was liable to the creditor of a ground-annual secured over the subjects, although he had put upon record a back-bond, granted by him at the same time that he received the disposition, which set forth that the conveyance was to him in security merely of a debt, and although he afterwards executed and put on record a discharge and renunciation of the security. This judgment was clearly erroneous, on the ground that the creditor in the ground-annual had no claim against any donee to whom the lands out of which the ground-annual was payable were or might have been conveyed; and, accordingly, on this ground, the judgment was reversed in the House of Lords: See *Ground-Annual*. But independently of this ground, on which alone the reversal proceeded, the soundness of the judgment may be doubted, on the additional ground that so soon as a back-bond qualifying an *ex facie* absolute disposition is put on record, the donee ceases to be proprietor, even nominally, and becomes an heritable creditor merely.

Lord MONCREIFF dissented strongly from the judgment, and observed, "If the transaction had been completed by an ordinary disposition in security and infestment by resignation, bearing the quality of the right in the body of it, there could not, I presume, have been any doubt that it would have been nothing but a title in security, which never could have given the pursuer any right to the ground-annual as against the creditor so infest, or deprived him of the benefits of his author's personal obligation for payment of it. But I have long believed it to be a settled principle in the law, that a security constituted in the form of an absolute disposition, but qualified by a back-bond, declaring this title to be limited to a definite security, forms neither more nor less than an heritable security for debt. It clearly is so in any question with the granter, and it is clearly so with any other party as soon as the back-bond has been recorded in the register of sasines and reversions. The title of the granter of the disposition remains entire, subject only to the burden so constituted. Nothing hinders him to sell the property to another, subject to the security; nothing hinders him to create other postponed securities, either in the same form or in any other. And his title remains entire for other purposes, in regard to the rights of other parties. This point was surely determined in the most deliberate manner in the case of *Bartlett v. Buchanan*, 21st Feb. 1811, in which it was held that a widow's right of terce remained untouched by such an absolute disposition with infestment, qualified by back-bond recorded. The Court unanimously found that the husband's infest-

ment remained entire, subject to the heritable debt, without which there could have been no terce, the husband's seisin being the measure of the wife's terce. And it is accordingly universally so laid down, that a title constituted in this form creates nothing but an heritable debt." The joint opinion of some of the majority of the Court contains the following observation: "The fallacy on the other side lies in dealing with the right of the back-bond, as if in legal construction it were one of security only, and not a proprietary right. That, in one sense, though not in the ordinary sense, it may operate to the effect of a security, is true enough. But in its conception and legal constitution, it is not a security, which is a mere burden in favour of one party on the radical *jus dominii*, continuing separately to exist in the person of another. It is, on the contrary, the proper *jus dominii* itself, transferred by divestiture of the former into the person of the new proprietor, who in this way comes by independent investiture into his author's place *quoad* the entire substance and *universitas* of the real right." In reference to these remarks, Lord MONCREIFF observes, "I see it is said in the opposite opinion, 'The fallacy on the other side lies in dealing with the right of the bank, as if in legal construction it were one of security only, and not of proprietary right.' With all deference it appears to me that the whole fallacy in the argument lies in assuming that it is anything else but a right in security. In its original constitution, if the disposition and the back-bond be read together, beyond all question the only right constituted is nothing else but a right in security. No doubt, as the disposition is absolute in its terms, the qualification effected by the back-bond, though referred to in the disposition, could have no effect against third parties until it was registered in the register of sasines; but as soon as it was so registered, the disposition and the registered back-bond constituted but one title, and that a title in security merely. I shall only farther remark that I can conceive no greater fallacy in reasoning upon a feudal title, than to mistake the mere form in which a security for debt is created for the substance of the right; and that is what I think the Court are now in great danger of doing."

**Absolute Warrandice.** See *Warrandice*.

**Abstracted Multure.** This term is applied to that evasion of the servitude of thirlage which consists in fraudulently or illegally carrying the grain of the servient lands to be ground elsewhere, or otherwise disappointing the right of the dominant mill. The remedy competent to the proprietor or tenant of the mill, against the proprietor or

tenant of the abstracted lands, is an action for abstracted multures, which may be raised either before the Judge Ordinary or in the Court of Session; and the conclusion of which is alternative, either for delivery of the multure of the abstracted grain, or for a sum of money in lieu thereof. Multures prescribe in five years from the time they become due; 1669, c. 9. Where the right of thirlage is disputed this action is combined with a declarator of thirlage, which can be competently brought only in the Court of Session. *Ersk. B. ii. tit. 9, § 32; Bell's Princ. § 1030; Jurid. Styles, iii. 83; Boyd's Jud. Proceedings, p. 216; Hunter's Landlord and Tenant, p. 561, et seq.*

**Acceptance;** in its general acceptation, is the act whereby a party agrees to any terms, offer, or proposal made to him, or undertakes a trust, office, or duty. Acceptance in this sense may be either express or tacit, verbal or written; or provable by facts and circumstances inferring acceptance, and not reconcilable with rejection. The evidence, however, whatever it may be, must amount to a clear indication of an intention to accept. Thus, the mere possession of a deed containing a condition will not be held as acceptance. But, on the other hand, the proposal or offer may be so made that, if not rejected, acceptance is implied. An order in trade does not require acceptance to bind the party giving the order; and it will also bind the party to whom it is addressed, if not rejected in course of post, if in the line of his particular trade; *e.g.*, an order for goods to a dealer, or for insurance to an insurance-broker, or the delivery of goods to a common carrier for transport to the place of its destination. *Bell's Princ. § 74, et seq.; Ersk. iii. t. 2, § 45; Stair, B. i. tit. iii. § 9, and tit. 10, § 5; Mr More's Notes, p. lxii.; Bank. vol. i. p. 288, § 9, and 342, § 6; Bell's Com. 5th edit., vol. i. p. 326, et seq.; Bell's Illustrations, §§ 73, 76, 80; Tait on Evidence, p. 172, 3d edit.; Jurid. Styles, vol. i. p. 368, 2d edit.; Kames' Princ. of Equity (1825), p. 127. See *Delivery. Offer. Carrier.**

A retraction of an offer posted of the same date with the acceptance of the offer, though before the acceptance has been delivered to the offerer, will not prevent the completion of the contract. If at the date of the acceptance the offer is a subsisting offer, the *concursum* which then takes place completes the contract. *Thomson v. James*, 12th July 1855; 18 D. 1.

**Acceptance of a Bill of Exchange;** is the act whereby the drawee contracts the obligation to pay the bill. It is usually done by signing his name either opposite to the address, or across the face of the bill. The

word "accepts" is also sometimes prefixed to the signature of the acceptor; but this is unnecessary. In common parlance the accepted bill is called "an acceptance."

The theory of a bill of exchange is that the bill is an assignment to the payee of a debt due by the drawee to the drawer, and acceptance by the drawee imports that the acceptor is a debtor to the drawer, or at least that he has effects of the drawer in his hands. Where the drawee has accepted he is the original debtor in the bill, and the drawer is only liable in default of payment by the acceptor. A bill must be drawn absolutely, but it may be accepted conditionally; but the payee is not bound to receive a conditional or qualified acceptance. If, however, he does receive a conditional acceptance, he must conform to the terms of it; and if he does not receive it, but protests for non-acceptance, he cannot afterwards recover from the party who accepted conditionally. *Sprot v. Matthews*, 10th May 1786; 1 *T. R.*, 182. When a bill is once accepted, and the acceptance has been communicated to the holder, the acceptance cannot be recalled, even with the consent of the holder; but an acceptance may be cancelled by the drawee before it has been communicated to the holder. *Cox v. Troy*, 29th Jan. 1822; 5 *B. & Al.* 474. The acceptor of a bill, whether for accommodation or for value, can only be discharged with consent of the holder of the bill. *Fenton v. Pocock*, 16th Nov. 1813; 5 *Tauxl. R.* 190. The holder of a bill may discharge any of the parties to it; but there is this difference between the acceptor and the other parties, that the acceptor is first liable; and in order to be entitled to have recourse against him, it is not necessary to show notice given to him of non-payment by any other party to the bill. *Dingwall v. Dunster*, 15th Nov. 1779, 1 *Doug. R.* 247. When a bill is accepted payable at a particular place, and at that place only, a delay in presenting there the bill for payment will not discharge the acceptor, unless he prove that he has sustained damage by the delay. Where a party accepts a blank bill, he is held to be the acceptor for the full amount which the stamp will cover, and is subject to all the liabilities attaching to the character of an acceptor. Such an acceptance is held to confer a power or mandate upon the party receiving the stamp so signed to pledge the security of the subscriber in any form of bill or note he chooses, and to the full amount of the sum which the stamp will cover. Neither is such an acceptor entitled to any notice of the bill being filled up. *Russel v. Langstaffe*, 22d Nov. 1780, 2 *Douglas* 514; *Smith v. Minjoy*, 29th Jan. 1813, 1 *M. & S.* 87; *Fair v. Cran-*

*ston*, 11th July 1801, *M.* 1677; *Ogilvie v. Moss*, 28th June 1804, *M. App.*, Bill, No. 17; *Smith v. Taylor*, 27th Feb. 1824, 2 *S.* 627; *Lyon v. Butler*, 7th Dec. 1841, 4 *D.* 178. An acceptance by a factor "for behoof of" his constituent imports a personal liability on the part of the factor so accepting. *Webster v. M'Calman*, 3d June 1848, 10 *D.* 1133. Such an acceptance concerns only the acceptor and the person for whom he acts in the transaction, and to make his relief more easy after he has fulfilled his obligation to the party to whom he grants the acceptance. So far, however, as relates to the bill, the drawer is entitled to proceed against the party so accepting.

*Bell's Princ.* § 314; *Ersk. B.* iii. tit. 2, § 29; *Bank.* vol. i. p. 361, § 9, *et seq.*; *Bell's Com.* vol. i. p. 396, *et seq.*, 5th edit.; *Bell's Illustrations*, § 314, *et seq.*; *Brown's Synop.*, p. 259; *Thomson on Bills*, pp. 355, *et seq.*, 487, *et seq.*; *Tait on Evidence*, p. 474, 3d edit. See also *Bill of Exchange*.

**Acceptance for Honour;** is acceptance of a bill after it has been protested against the drawee for non-acceptance. Such an acceptance is said to be for the honour of the drawer or indorser, *i.e.*, to save his credit, and may be made either by the drawee himself, or by a third party. The acceptance for honour is to a certain extent conditional, as the acceptor is not bound to pay the bill, unless the holder retain it until maturity, without returning it to the drawer protested for non-acceptance. And as such an acceptor is entitled to have evidence of his interposition, which may entitle him to recover against the party for whose honour he has interposed, a formal protest may be required before the bill is paid by the acceptor for honour. He has likewise a claim not only against him for whose honour he interfered, but also against all the parties on the bill liable to him. *Bell's Princ.* § 322; *Bank.* vol. i. p. 361, § 11; *Bell's Com.* i. p. 401, 5th edit.; *Thomson on Bills*, p. 491, *et seq.*; *Jurid. Styles*, iii. pp. 589, 595, 2d edit. See *Bill of Exchange*.

An acceptance for honour is equivalent to saying to the holder of the bill, "Keep this bill, don't return it, and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me and you shall have the money." It is in the nature of a conditional acceptance, and implies that the bill will be paid by the acceptor for honour, if, on its arriving at maturity, it is not paid by the drawer. An acceptor for honour, however, will not be liable, unless the bill, when it becomes due, is duly presented for payment to the drawer. When a bill accepted for honour still remains

with the holder, a second resort to the drawee is proper, for effects often reach the drawer who has refused acceptance in the first instance, out of which the bill might be satisfied if presented to him again when the period of payment arrives. Whatever is requisite to enable a person, who accepts for the honour of another, to call upon that person to repay him, and to enable him to recover over against such person, is also necessary to enable another party to recover from such an acceptor for honour. *Hoare v. Cazenove*, 27th Nov. 1812, 16 *East* 391; *Williams v. Germaine*, 21st Nov. 1827, 7 *B. & C.* 468.

**Acceptilation**; is the extinction of a debt, by a declaration that the debt has been paid when it has not; or the acceptance of something merely imaginary in satisfaction of the debt. *Stair*, B. i. tit. 8, § 5; *Ersk.* B. iii. tit. 4, § 8; *Bank*, i. p. 490, § 20, *et seq.*

**Accessory or Accessory**. A person is said to be accessory to a crime, who aids the perpetrator with advice in the commission of it, or who assists in its execution. One who abets by previously promising protection to the criminal will be considered in law as an accessory. Our law does not, like that of England, recognize accession *after* the fact, where unconnected with any earlier knowledge of, or concern in, the deed. *Hume*, i. 282; *Alison's Princ.* 57-70. Both principal and accessory may be tried in one indictment, and the latter, though the principal has not been brought to trial. See *Accomplice*; *Art and Part*.

**Accession**; is a term used to signify the commencement of the King's reign.

**Accession, Deed of**; is a deed by the creditors of a bankrupt or insolvent debtor, by which they approve of a trust executed by their debtor for the general behoof, and bind themselves to concur in the fiduciary arrangements proposed for extricating his affairs. It is analogous to the English deed of covenants. Accession to a trust for behoof of creditors may be instructed without a formal deed, by facts and circumstances inferring accession, or not otherwise explainable. *Bell's Com.* vol. ii. p. 501, 5th edit.; *Jurid. Styles*, 2d edit., i. p. 123, ii. pp. 190, 254. See *Trust*.

A deed of accession is a mutual contract, by which no creditor who signs it is bound by it until all the other creditors have assented. This is commonly expressed as a special condition to the deed, but whether expressed or not, it is an implied and essential condition of the contract that all shall be bound or none. It has been held, however, that although the whole creditors have not concurred, it is not competent for one who has acceded to begin diligence in order to acquire a preference directly or indirectly, while the non-concurring

creditors are standing neutral. In *Watson v. Fede*, 5th Feb. 1724, *M.* 6397, the Court found that a *supersederes* of diligence had been signed by some of the creditors on the faith that all the creditors were to do the same, and that it was not binding on those who had signed, in respect a small number only, and not the whole, had signed it. They found also, however, that a creditor who had signed it could not be the first user of personal diligence against the debtor. Accession by a creditor binds his assignee to the debt. It will also bind himself in respect of a debt which he has purchased, although the cedent of the debt had not acceded. But where a creditor who has acceded acquires a debt fortuitously by succession on other unforeseen means, in relation to which there has been no accession, it is doubtful whether, in respect of such debt, the creditor so succeeding is bound by his former accession.

**Accession—Accessories**. Accession, as a mode of acquiring property, is either *natural* or *artificial*. By *natural* accession, the young of cattle belong to the owner of the mother, and the fruits and produce of the earth to the proprietor of the soil. On the same principle, the gradual addition acquired by grounds lying on the bank of a river (called *alluvio*) belongs to the proprietor of the land receiving this addition. *Artificial* accession, again, is that addition which is the result of human industry, otherwise called *industrial accession*; e.g., trees planted, or a house built on the property of another, which belong to the proprietor of the ground, and not to the planter or builder. The party who has thus built by mistake may have a claim against the owner of the ground for the value of the house, in so far as it is a melioration; but the builder is not entitled to retain possession until repaid the expense of building, and may be summarily removed. *Stair*, B. ii. tit. 1, § 34; *Bank*, vol. i. p. 506, § 10, *et seq.*; *Bell's Com.* vol. i. p. 752, *et seq.*, 5th edit.; *Ersk.* ii. t. 1, §§ 14, 15; *Beattie*, 27th May 1831, 9 *S.* and *D.* 639; *Bell's Princ.* § 1473. See *Heritable and Moveable. Industrial Accession. Contexture. Adjunction. Specification. Commission. Fixtures.*

**Accessorium sequitur principale**; a Roman law maxim, signifying that the accessory right follows the principal. In the law of Scotland, the principle of this maxim has been fully adopted; in so much that the maxim itself forms one of the titles in Lord Kames' *Dictionary of Decisions*, and (following him) in Morison's *Dictionary* and Brown's *Synopsis*. *Stair*, B. iii. tit. 1, § 17; *Mr More's Notes*, p. 103; *Ersk.* B. ii. tit. 1, § 30; *Bank*, i. p. 506, § 10; *Kames' Princ. of Equity* (1825), p. 156-7.

**Accessory Actions;** are those actions which are in some degree subservient to others, as those of *wakening* or of *transference*; by the former of which, a cause, after it had lain over without any interlocutor having been pronounced in it for the period of a year (by which, technically speaking, it is said to have *fallen asleep*), might have been revived, and proceeded in to a conclusion. By the latter, an action may, on the death of the defender, be transferred in *statu quo* against his heir. Under this class of actions are ranked Proving of the Tenor, by which the tenor of a lost deed is judicially declared, and the loss thereby supplied; and Actions of Transumpt, by which copies of principal deeds are certified. By the recent acts, 13 and 14 Vict., c. 36, and 16 and 17 Vict., c. 80, important provisions are made as to the wakening and transference of actions, the effect of which is to render actions of wakening no longer necessary. *Stair*, B. iv. tit. 31; *Ersk.* B. iv. tit. 1, §§ 18 and 52; *Bank*. ii. p. 622, *et seq.*; *McGlash. Sher. Court Prac.* pp. 54, 316. See *Wakening*; *Transference*.

**Accessory Obligations;** are obligations adjoined to antecedent or primary obligations. Obligations for the regular payment of interest, cautionary obligations, and bonds of corroboration, are examples of accessory obligations, and all necessarily refer to some prior or principal obligation. *Stair*, B. i. tit. 17; *Mr More's Notes*, ciii.; *Ersk.* B. iii. tit. 3, § 60; *Bank*. iii. p. 105. See *Cautionry*.

**Accolade;** a ceremony used in conferring knighthood, consisting of the King's putting his hands about the knight's neck. *Tomlins*, &c.

**Accommodation Bills;** are bills of exchange granted without value having been received by the acceptors, for the purpose of raising money by discount. Such acceptances are denominated wind or accommodation bills; and the party for whose accommodation they are granted, whether drawer, acceptor, or indorser, is, of course, bound to relieve all the other parties whose names are on the bills from the consequences of their obligation. On bankruptcy, various nice and intricate questions arise with regard to the nature of such bills. The general rule established seems to resolve into this, that the onerous holder is entitled to rank on the estates of all the parties on the bill to the effect of drawing full payment. No double ranking is allowed, the estate of the acceptor, though he receive no claim upon the estate of the party for whose accommodation the bill was drawn, being competent against the party who is the case of mutual accommo-

dation bills to the same amount, they are held to be good considerations for one another. 4th, The ordinary rules as to due negotiation do not apply to such bills. Hence, the drawer or indorser of an accommodation bill, if he has participated in the accommodation, cannot plead against the holder the want of notice of dishonour. Where, however, the accommodation is not for the drawer's behoof, but for the use of some of the other parties, the drawer has been held entitled to notice. See *Bell's Com.* i. 426, *et seq.*; *Princ.* § 346; *Ersk.* B. iii. tit. 2, § 33, and *Note by Mr Ivory*; *Bell's Illust.*, § 346.

Where a bill of exchange is given for money really due by the drawee to the drawer, or is drawn in the regular course of business, an indorsee, though he has not given to the indorser the full amount of the bill, may yet recover the whole; but where the bill is an accommodation one, and that known to the indorser, and he pays only part of the amount, he can only recover the amount he has actually paid for the bill. *Wiffen v. Roberts*, 1 *Espinasse*, 261.

**Accomplice;** a *socius criminis*, or associate with another, or with others, in the commission of a crime. An accomplice is an admissible witness against his associates in the crime, his credibility being a matter for the jury. By the mere act of calling an accomplice as a witness, the public prosecutor discharges all title to molest him for the future concerning the crime in question. In this way the supposed objection to his admissibility on the ground of interest to criminate his associate, is obviated. But a private prosecutor cannot tie up the hands of the public authorities by examining a *socius criminis*. In order that the pannel may not be deprived of the benefit of exculpatory witnesses by their being included in the same libel with himself, it is in the power of the Court, upon special cause shown, to disjoin the charges in the libel, in order that one of the accused may be adduced as a witness in behalf of the other. Formerly the proposed exculpatory witness was tried first, and was not admissible as evidence if he were convicted. Infamy being now no longer a ground of exclusion (15 Vict., c. 27, § 1), he is equally admissible, whether he be convicted or acquitted. Where, in the police court, several parties had been charged with an offence, and, on a motion made, their trials had been separated, and the party whose trial had been taken first had tendered the others as witnesses in his favour, and the magistrate had refused their evidence, on the ground that they were *socii criminis* in the offence libelled, convictions obtained against two of these parties were set aside, on the ground that the evidence so refused was ad-

missible, and ought to have been received. The Lord Justice-Clerk observed,—“Is there any authority for saying that, after a separation of the trials of different pannels, those whose trial is postponed cannot be received as witnesses for the other pannel?” *Bell v. Shaw*, 22d Jan. 1842, 1 *Brown*, 49. In a charge of assault against two pannels, after evidence for the Crown and for the pannels had been led, the counsel for the pannels proposed to examine one of them as a witness for the other, under § 3 of 16 Vict., c. 20. The Court held this to be incompetent, being of opinion that the proper course was to have moved for a separation of the trials, and that the statute did not make any alteration in this respect. *Hogan* (Glasgow Circuit), 28th Dec. 1853, 1 *Irvine*, 343. The testimony of *socii criminis* must, to a greater or less extent, be corroborated by unsuspected evidence. *Campbell or Brown* (Perth), 4th Oct. 1855, 2 *Irvine*, 232. See *Hume*, ii. 175, 367, 402; *Alison's Prac.* 241, 452; *Bell's Notes to Hume*, 182, 261; *Dickson's Law of Evidence*, 851; *Ersk. B. iv. tit. 4, § 10, et seq.*; *Bank. vol. i. p. 243, et seq.*; *Swint. Abridg. vocs Evidence*, § 6. See *Art and Part*; *Accessory*.

In England, the term accomplice is usually applied, in a limited sense, to the perpetrator of a felony, admitted, for the furtherance of justice, to give evidence against his associates. *Tomlins, vocs Accessory*.

**Account, Stated.** See *Stated Account*.

**Accounts.** Merchants' accounts suffer a triennial prescription by the act 1579, c. 83. This prescription begins to run from the date of the last article. The existence of the debt (including the subsistence as well as the constitution of it) may be proved by the oath of the debtor after the expiration of the three years. The debt may also be proved by a writing signed by the debtor. By the Bankrupt Statute, 54 Geo. III., c. 137, where the debt claimed rests upon an open account, the creditor is required to produce a certified copy of the account, signed by the party to whom it is due, along with an affidavit by the creditor. The provisions of the statute as to this are not very clear; but it seems now to be settled that a correct copy of the whole account on both sides, as it stands in the creditor's books, must be produced, certified as authentic, either by the creditor or his book-keeper. The oath of verity is a certifying of the account. *Bell's Com.* vol. ii. p. 343, 5th edit. The words of the act 2 and 3 Vict., c. 41, § 11, are, “That the creditor shall produce with his said oath such accounts and vouchers as shall be necessary to prove his debt.” *Ersk. B. iii. tit. 2, § 24*; tit. 7, §§ 17 and 25; *Bell's Princ.* 3d edit., §§ 629, 635, 586; *Bell's Illustrations*, § 629;

*Shaw's Digest, h. t.* and pp. 17, 641; *Tait on Evidence*, pp. 122, 454–7, 3d edit.; *Jurid. Styles*, vol. ii. pp. 23, 31, 279, 382, 422, 2d edit.; *S. D. xi.* pp. 323, 546; xii. pp. 365, 523, 680; *Dow's Appeal Cases*, iv. 125. See *Prescription. Sequestration*.

**Accountant of the Court of Session.** By the act “for the better protection of the property of pupils, absent persons, and persons under mental incapacity in Scotland,” (12 and 13 Vict., c. 51), it is made lawful for the Crown to appoint an officer, called the Accountant of the Court of Session, whose duty is to superintend generally the conduct of all judicial factors and tutors and curators coming under the provisions of the act, and to see that they duly observe the rules and regulations laid down therein for their guidance. The accountant audits the factors' accounts, and reports thereon. He must make an annual report to the Court of all judicial factoreries. He is also the custodian of all deposit-receipts and other vouchers for sums of money placed under the authority of the Court, and of all bonds of caution and judicial bonds granted under the same authority,—a duty which, previously to the act, had been discharged by the senior Principal Clerk of Session. The records in the Accountant's office are open for inspection on payment of the fees fixed by Act of Sederunt 1st Feb. 1850. See also the Act of Sederunt framed in pursuance of the above statute, 11th Dec. 1849.

**Accountant-General;** an officer in the English Court of Chancery appointed to receive all money lodged in Court, and to deposit it in bank, or draw it out by judicial order. *Tomlin's Dict.* See *Judicial Factor*.

**Accretion;** takes place when a right, originally imperfect or defective, is completed in the person of the holder by some posterior act on the part of him from whom the right is derived. The term is usually applied to the titles of heritable property, and may be best illustrated by an example. Thus, if one having a good personal right to lands, but not infeft, sells the lands, and grants the purchaser a precept of sasine on which infeftment is taken, such infeftment, as flowing a *non habente potestatem*, will vest the purchaser with no feudal right. But if the seller should afterwards perfect his own feudal right by infeftment, his posterior infeftment, *jure accretionis*, will validate the prior precept, and the sasine following thereon, in favour of the purchaser, and thus complete the purchaser's feudal right to the lands. The maxim which applies to such a case is *Jus superveniens auctori accrescit successori*; and the principle is said to be the principle of warrandice, express or implied,—the law doing



what the grantor of the right is otherwise bound to do.

Where a party uninfest grants conveyances to several parties, and he is himself thereafter infest, his infestment accresces to the other parties, in the order of their recorded infestments. *Paterson v. Eelly*, 10th Dec. 1742, *M.* 7775. Where a party uninfest a me unconfirmed grants infestments to two creditors, the posterior of whom obtains his infestment confirmed, and the prior creditor thereafter obtains his author and himself confirmed in the same deed, the posterior creditor will be preferred. *Campbell v. Henderson*, 5th July 1821, 1 S. 104. The case of *Keith v. Grant*, 14th Nov. 1792, *M.* 2933, rules the point that the infestment of an heir does not accresce to a right granted by his ancestor who died uninfest. In that case it was observed on the Bench, "In such a case the *jus superveniens* cannot accresce. If an author after giving infestment is himself vested in the feudal right, his title becomes complete both in form and substance, and this new acquisition of right is communicated to all his former deeds. But a sasine obtained a *non habente* is altogether inept, and cannot be cured by any supervening right in his heir. In personal rights the law holds an obligation to convey and a conveyance to be the same, and therefore every person liable in absolute warrandice is bound to grant the conveyance. But in heritage, although an heir whose ancestor conveyed, having only a personal right, is liable in warrandice, and is obliged to give an infestment, still that infestment cannot proceed on the precept granted by the ancestor, who never acquired any right which entitled him to grant that warrant." According to the same principle, the infestment of assumed trustees will not accresce to and validate infestments following upon precepts granted by the trustees who assumed them, but who themselves were never infest. In *Martin v. Wright*, 3d Feb. 1841, 3 D. 485, Lord FULLERTON observed,—"The question is just whether infestment taken by different persons after the death of all the original trustees can be held, on the principle of accretion, to validate the precept of *clare constat* granted by the trustees who died uninfest? I do not think it can. There is no identity of persons between those who granted the precept and those who afterwards vested themselves with a title to grant it. The case is different from a corporation, which is held to be one person. There it may be said that the subsequent infestments in favour of the corporation is sufficient to validate the acts of the body done before infestment, and that although the officers of the corporation who take infestment are different from those by

whom the act was done. But there is neither principle nor practice for applying it to the case of trustees. A trust for purposes does not create a separate constructive person like a corporation. The title of each trustee stands on the right made up in his own person, so that the infestment of any one trustee, or any number of trustees, is not the infestment of any other trustee afterwards assumed. The persons are essentially different, and I therefore see no room for applying the principles of accretion to the case." A conveyance granted by a party who has no right to the subject conveyed, but with consent of the true owner, is effectual. *Buchan v. Cockburn*, 14th July 1739, *M.* 6528. In that case Lord KILKERRAN observed,—"All agreed that a proprietor of land consenting to a disposition granted a *non domino*, implies a conveyance by the *dominus*." Where, however, the party consenting is not the *dominus*, but a creditor merely, his consent is held to import no more than a *non repugnantia*. This was decided in the same case of *Buchan v. Cockburn*, in which Lord ARNISTON observed,—"In the case of a *verus dominus*, or a party having or claiming the property of the subject, such a party consenting can intend nothing less than to convey that right; but a creditor *hypothecarius*, his meaning can be understood no more than a *non repugnantia*, for he cannot be thought to convey his debt without payment, and without conveying the debt he cannot convey the security he has on the lands." The position of a party consenter differs from that of a party disponent in this, that the consent of the former has reference only to the rights vested in him at the time of consenting, but does not extend to other rights which he may subsequently acquire. These subsequent rights he is entitled to avail himself of, notwithstanding his former consent. The rule of law, *Jus superveniens auctori accrescit successori* does not therefore apply to a consenter unless he has expressly bound himself in warrandice. *Erskine* observes,—"No warrandice can be fixed by implication against a consenter whose implied obligation can only be understood to bar him from objecting to the disposition upon any right then in his person. *Ersk.* B. ii. t. 7, § 4. In the case of *Forbes v. Innes*, 8th January 1668, reported by *Lord Stair*, the plea was sustained that a consent cannot exclude any supervenient right of the consenter, but only such rights as the consenter had at the time of the consent; and that although a right acquired by a party who disposes with absolute warrandice accresces to his successor, it is not so in the case of a consenter whose warrandice is not found to be obligatory farther than as to the rights in the consenter's person at the time of his

consent." Were it not for the weight of authority the other way, it might be doubted whether the consent of the *verus dominus* to a conveyance by a party having no right to the subject conveyed should make the conveyance effectual. It would seem to be more in accordance with feudal principle that the feu should be held ineffectual as a conveyance, but effectual as importing an obligation to convey against the party consenting. The point was again raised in the case of *Mounsey v. Maxwell*, 29th Nov. 1808 (*Hume's Decisions*, p. 237), when Lord President BLAIR observed,—“As to the point raised, the authority of Lord Stair must rule. Two things are requisite, the disposition act and the form. The two must concur; but where both exist it is not material in which of the parties the right truly is. He who has not the right, disposing with consent of the other who has the right, disposes effectually. So *Stair* says, and such is the law of Scotland.” In the case of a party who had no right conveying, and afterwards acquiring a right, it has been doubted whether the maxim *jus superveniens* would apply, and yet it may be deemed to be no greater stretch of strict feudal principle than the one just adverted to. It is not doubted that the grantor of the conveyance would be under an obligation to grant a new conveyance of the subject; but would the acquired right of the grantor accrete to the original grantor *ipso jure*? *Professor Bell*, in his *Principles*, observes,—“If the grantor of the precept have at the time no right to the subject, but acquire a right by a subsequent title, it may be doubted whether accretion will take place. The ground of this doubt is that there can be no proper conveyance where there is no right existing; that law may, *fictione*, supply solemnities, but not substantial right; and that in such cases there is nothing but an implied obligation to convey, which requires a different mode of completion.” *Mr Bell* adds in a note,—“In consultation with the late *Mr Jamieson*, we differed in opinion, that sound lawyer inclining to hold the maxim applicable.” *Bell's Principles*, § 882. In the case of *Glassford's Executors v. Scott*, 9th March 1850, *D. 12*, p. 893, a bond of annualrent was granted by an heir of entail next entitled to succeed to the estate, and infestment followed on the bond. The heir in possession thereafter conveyed his right to the estate to the grantor of the bond, and the Court held that the bond was validated by accretion. Lord FULLERTON observed,—“The question is, whether this is a proper case to which the doctrine of accretion can apply? I confess I have some difficulty. This is a bond granted with absolute warrandice, and there is no

doubt this was done before the grantor succeeded to the estate. But then the estate was afterwards conveyed to him, and he was duly infest in it. My impression is that his infestment accreted to the security, and that the bond must be sustained.” There is no authority for holding that the doctrine of accretion is applicable to onerous deeds only. It appears to be equally applicable to gratuitous deeds, for in such deeds there is an implied warrandice that the conveyance made shall not be prejudiced by any future act of the grantor. The completion of the grantor's title must therefore be held to accrete to the gratuitous conveyance of the title so completed, and cannot be used to the prejudice of that conveyance. This point was raised in the case of *M'Gibbon v. M'Gibbon*, 5th March 1802, *D. 14*, p. 605, where a mother, while possessing on apperancy, conveyed lands to her sons in fee, on which infestment was taken. The deed contained no power of revocation; but thereafter the grantor, having completed her title, executed another deed, in which she gave her husband the power of dividing the lands among the sons. A grandson brought a reduction of this deed and a subsequent deed, by which the husband had exercised the power conferred upon him by that deed. One of the pleas in defence was that the doctrine of accretion was founded on warrandice express or implied, and did not apply to the case of a gratuitous deed containing no obligation of warrandice. The pursuer contended that it made no difference to the operation of accretion whether the deed was gratuitous or not. Lord COWAN, Ordinary, considered the argument “untenable,” and the Court “adhered.” Lord Justice-Clerk HORN observed,—“At the date of the deed the grantor had a right of succession as heir apparent of investiture. After its date her title was completed, and she became completely invested. I cannot understand on what principle it can be said that accretion does not apply.” Where a trustee on a bankrupt estate completes his title through the bankrupt by completing the bankrupt's own title, the securities previously granted by the bankrupt will thereby be validated by accretion. It is therefore an important matter for the trustee so to complete his title as to leave the bankrupt out of the progress.

*Stair*, iii. t. 2, § 1; *Ersk.*, ii. t. 7, §§ 2, 3; *Bell's Com.* i. 698; *Bell's Prins.* § 881, and authorities there cited; *Mr More's Notes on Stair* p. cccxciii; *Bank.* i. pp. 588 and 390; ii. p. 194; *Shaw's Digest*, pp. 227 and 471.

**Accumulation of Interest.** See *Interest*.  
**Accumulate Sum;** is the sum for which decree of adjudication is pronounced, composed, in the general adjudication, of the

principal sum of the debt, interest, and penalty; and, in the special adjudication, a fifth part more of the principal sum is added, as a compensation to the creditor on account of his receiving land for his debt. There is no instance, however, of a special adjudication being carried into effect. *Ersk. B. iii. tit. 3, § 59; Bell's Com. vol. i. p. 651, et seq., 5th edit.; Bell's Princ. 3d edit., § 32; Bell's Illustrations, § 32; Brown's Synop. p. 98; Shaw's Digest, p. 257, § 43. See Adjudication.*

**Acknowledgment.** This term is frequently applied to a written admission or acknowledgment that a certain sum of money has been paid to the party granting the acknowledgment. Where the acknowledgment is meant as a mere voucher of payment, equivalent to a receipt, it will be effectual, subject only to a penalty under the Stamp Laws if it has not been written on a proper receipt-stamp. But where the acknowledgment is given as the voucher of a loan, care must be taken not to include in the acknowledgment a promise to pay, or to repay the money when required, or against any specified future time, as such an engagement converts the acknowledgment into what law holds equivalent to a promissory-note, which is not actionable unless written on a proper bill-stamp, the want of which cannot be supplied by getting the writing afterwards stamped. *Bell's Princ. § 307. See Bill of Exchange. Promissory-Note.*

In the case of *Allan v. Murray*, 13th June 1837, S. 15, 1130, a holograph acknowledgment in these terms—"Received from A. B. £186. (Signed) C. D."—was held to import the constitution of a debt, and an obligation to repay. *Ogilvie, M. 11,510; Davidson, M. 1511; Rose v. Fiddler*, 24th Nov. 1809, F. C.

A mere acknowledgment of debt does not constitute a promissory-note, and does not require any stamp; and unless the instrument contains an order or promise to pay a sum of money, it does not require a bill-stamp. 1 *Ross' L. C. C. 52. Jones v. Simpson*, 2 B. & C. 318; *Tomkins v. Ashley*, 6 B. & C. 541; *Pirie v. Smith*, 11 S. 473.

**Acquittal;** signifies a deliverance from a charge of guilt. Acquittal by the jury has no force until the Court has given judgment upon the verdict; but after such judgment the person acquitted cannot be again tried for the same offence. *Tomlins' Dict.*

**Acquittance;** a release or discharge in writing of a sum of money or debt. The word is rather an English than a Scotch law term. *Tomlins. See Discharge.*

**Acre;** the principal denomination of land-measure in Great Britain. The English standard acre, now the imperial acre of Britain, is a square raised from the basis of the chain of 66 feet, or 22 yards, or 1-80th of a

mile. Ten of these squares form the acre, which thus contains 4840 square yards. This is divided into *roods*, of which there are four in the acre, and into *poles* or *perches*, of which there are 40 in each rood. The Scotch acre is considerably larger than the imperial. It is raised from the chain of 24 ells, and until of late years it was the practice of land-surveyors to measure with a chain of 74 feet and 4-10ths of a foot in length, the ell having been erroneously estimated at 37 inches and 2-10ths of an inch, whereby the Scotch acre came to be about 6150 square yards,—i. e., a Scotch acre was equal to 5 quarters and a fraction imperial. By the act 5 Geo. IV., c. 74, the imperial acre is declared the standard throughout the United Kingdom of Great Britain and Ireland from and after 1st May 1825; afterwards, by 6 Geo. IV., c. 12, fixed for 1st January 1826. See *Encyc. Brit. h. t.*

**Acre-Dale, or Aiker-Daill;** a term sometimes met with in old deeds and writings, signifying lands in the neighbourhood of villages or towns let in small portions of an acre or so. *Wood's Hist. of Parish of Cramond, p. 98.*

**Act of Bankruptcy.** In the law of England, there are certain ostensible indications of insolvency on the part of a debtor, which are called *Acts of Bankruptcy*, and which are sufficient to bring a party otherwise subject to the bankrupt laws, within their operation. These acts of bankruptcy are, (1.) Departing the realm, or his dwelling-house, with intent to defraud his creditors. (2.) Beginning to keep his house privately, to avoid his creditors. (3.) Procuring or suffering himself, voluntarily and without just cause, to be arrested or outlawed. (4.) Willingly or fraudulently procuring his goods or money to be attached or sequestrated. (5.) Making a fraudulent conveyance of lands or goods, to disappoint his creditors of their debts. (6.) Lying in prison two months after arrest, or detention for debt. (7.) Obtaining privilege, other than the privilege of Parliament, against arrest. (8.) Escape from prison after arrest for £100 or more. (9.) Preferring judicially any petition or bill against any of his creditors, to enforce acceptance of less than their just debt, or to procure longer delay in payment than was stipulated for. (10.) Paying the petitioning creditor his debt will supersede that commission, and be ground for another; and for the forfeiture of the debt so paid, for behoof of the other creditors. (11.) Neglecting to pay a debt of £100, or more, within two months after service of legal process for such debt on a trader, having privilege of Parliament. Holding these several special acts as criterions of insolvency or fraud, sufficient to found an application for a commission of bankruptcy, the law of Eng-

land admits no other acts, by inference or analogy ; while, in determining whether an equivocal act is to be held as falling within the legal description of any of the acts above enumerated, the great test seems to be, whether or not the supposed act was done to defraud or delay creditors in the recovery of their just debts. The expression, *act of bankruptcy*, is unknown in Scotch legal phraseology ; but in the definition of notour bankruptcy, under the act 1696, c. 5, and of mercantile bankruptcy, under the sequestration statute, an enumeration of the indications of insolvency, analogous to the English acts of bankruptcy, will be found. *Tomlins, voce Bankrupt. See Bankrupt.*

**Act and Commission** ; is the judicial act, whereby, in the Court of Session, a commission is granted to a special commissioner for taking a proof, or examining havers, in a depending action. *See Evidence. Commission.*

**Act of Court in a Service** ; was a notarial instrument, stating the proceedings in the court of service, drawn up and signed by the clerk of court ; which afforded evidence of what passed in the court relative to the service. *See Service.* This instrument is no longer necessary.

**Act of God** ; in law language, signifies any inevitable accident occurring without the intervention of man ; such as from storms, lightning, tempests, &c. Losses arising from these and similar fatalities are not held to be such as one party, under any circumstances (independently of special contract), is bound to make good to another. Such losses, for example, are sufficient to liberate innkeepers and stablers from their obligation under the edict, *Nauta, caupones, stabularii.* *Bell's Com.* i. pp. 470, 559, *et seq.*, 5th edit.

**Act of Grace.** The act 1696, c. 32, for the alimment of poor prisoners incarcerated for non-payment of debt, is called the Act of Grace. The original object of this enactment was to relieve royal burghs of this expense ; but practically, it has mitigated the severity of the law of imprisonment for debt. By the statute 6 Geo. IV., c. 62, the older statute has been amended and improved ; and the following are now the leading provisions of the law on the subject : No keeper of a jail is entitled to receive a prisoner to be confined for civil debt, until the incarcerating creditor, or some one on his behalf, deposits in the jailor's hands ten shillings for alimment of the prisoner. Where alimment is afterwards awarded to the prisoner under the act 1696, c. 32, the jailor is bound to pay the alimment at the rate allowed, out of the deposit of ten shillings, from the date of the imprisonment until the money is exhausted. Where the prisoner is refused alimment, the ten shillings are to be returned to the depositor ; or where the prisoner does not apply for alimment for

thirty days after commitment, the ten shillings are also to be returned. So also, where alimment has been awarded, but the ten shillings are not exhausted at the debtor's liberation, the unexhausted balance must be returned. And finally, where, before the prisoner can avail himself of the act 1696, the creditor consents to his liberation without payment of any part of the debt, the ten shillings are to be returned to the depositor, under deduction of the prisoner's alimment during his confinement, at the lowest rate usually allowed by the magistrates of the particular burgh. Every prisoner petitioning for the benefit of the Act of Grace must, when desired, execute a disposition *omnium bonorum*, in favour of the incarcerating creditor, for behoof of the other creditors, and at the expense of the creditor demanding the disposition. If, after being duly required, in writing, to execute such disposition, the debtor refuses or delays, he is entitled to no alimment while so refusing. A prisoner who desires the benefit of the Act of Grace must apply by petition to the magistrates of the burgh, and must swear that he has no means of subsistence. He must also be actually in prison at the time. He cannot apply while at large, on a sick bill ; and his application, when made, must be intimated to the incarcerating creditor or creditors, by service of the petition. The term allowed to the creditor either to provide an alimment, or to consent to liberation, is ten days from the service of the notice ; and if within that time alimment be not lodged, the debtor may be liberated. He may be liberated on the tenth day ; and where the incarcerating creditor lodges a sum with the jailor, to be applied in payment of the alimment awarded, the debtor will be liberated if the creditor fail to lodge a further sum, before the sum in the hands of the jailor is actually exhausted. It was at one time thought, that where the debt in respect of which the debtor had been incarcerated was a debt arising *ex delicto*, he was not entitled to the benefit of the act. But this is a mistake. Whatever be the origin of the debt, if it be of the nature of a civil debt due to a private party, whether *ex contractu* or *ex delicto*, the debtor is entitled to the benefit of the act. On the other hand, where the debt is a fine imposed *in modum pœnæ*, for the public interest, the debtor cannot claim the benefit of the Act of Grace against the public prosecutor, on the plea of inability to pay the fine ; but must be alimmented from the public fund appropriated to the alimment of prisoners *ex delicto*. A prisoner incarcerated for not performing an act within his own power, or *ad factum præstandum*, is not entitled to the benefit of the act. The *quantum*

of alimēt awarded varies in different burghs ; but is in general very moderate ; and in fixing it, the magistrates act subject to the review of the Court of Session. Where the debtor has an alimēt from any source, no matter under what restrictions it may have been given, he must either surrender that alimēt to the incarcerating creditor, or forego the benefit of the act. A debtor who has obtained the benefit of the Act of Grace, and who has been liberated in consequence of the creditor's failure to lodge alimēt, may be afterwards re-incarcerated under the same diligence ; although this is a power which a creditor would not be permitted to use oppressively. According to Erskine, where the debtor fails to lodge alimēt, the magistrates, if they choose, may themselves alimēt the debtor, and so protract his imprisonment. But the decision on which this *dictum* rests, has been disapproved of on the Bench, *obiter*, in a recent case. *Bank.* iii. p. 20, § 8 ; *Brown's Synop.* pp. 537, 1231, 1757 ; *Shaw's Digest*, l. t. and p. 647 ; *S.D.* vol. xi. pp. 144, 372 ; xii. p. 28 ; xiv. 380 ; *Ersk.* iv. tit. 3, § 28, *Icory's Notes* ; *Bell's Com.* ii. 553, *et seq.* ; *Princ.* § 2406 ; 6 Geo. IV., c. 62 ; 7 and 8 Vict., c. 34, § 13. See *Cessio Bonorum*.

**Act of Parliament.** An Act of Parliament is a law passed by all the three branches of the Legislature ; the King (or Queen), the Lords Spiritual and Temporal, and the Commons, in Parliament assembled. This is the highest legal authority known in the constitution ; and a statute so enacted cannot be altered, repealed, or suspended, except by the same authority, or (in Scotland) by a long course of contrary usage or disuse ; for, by the law of Scotland, a statute may, by disuse, cease to be obligatory. The ancient acts of the Scotch Parliament were proclaimed in all the country towns, boroughs, and even in the baron courts. This mode of promulgation, however, was gradually dropped as the use of printing became common ; and, by the act 1591, c. 128, the publication at the market-cross of Edinburgh was declared to be sufficient. British statutes require no formal promulgation ; and, in order to fix the time from which they shall become binding, it was enacted by 33 Geo. III., c. 13, that every Act of Parliament to be passed after April 8, 1793, shall commence from the date of the indorsement by the clerk of Parliament, stating the day, month, and year when the act was passed and received the royal assent, unless the commencement shall in the act itself be otherwise provided for. By the Acts of Parliament Abbreviation Act, 13 Vict., c. 51, it is provided, that Acts of Parliament may be altered, amended, or repealed in the same session ; that all Acts shall be divided

into sections, without introductory words ; that in referring to statutes it shall be sufficient to cite the year of the reign, chapter, and section, without the title ; that repealed acts shall not be revived in virtue of a repeal of the repealing act ; that repealed provisions shall remain in force till the substituted provisions come into force ; and that acts shall be deemed public unless the contrary be expressly declared. Section 4 contains the interpretation of certain terms for future acts. See *Parliament. Desuetude. Assent, Royal Statute.*

**Act of Warding ;** is a warrant issued by the magistrates of royal burghs, authorising the imprisonment of a debtor. This warrant is contained either in a judgment pronounced by the magistrates, or in a decree of registration proceeding from the court of the magistrates, upon a clause of consent, or upon a registered protest of a bill. The privilege of granting such warrants is peculiar to the magistrates of royal burghs. It has been traced (erroneously it is believed) to the 2d stat. Robert I., c. 19, *Reg. Mag.* p. 361 ; and was till lately the only direct execution for payment of debt known in Scotland ; imprisonment under horning and caption being founded on a fiction of the law, by which the debtor is imprisoned as a rebel. In strictness, the imprisonment under an act of warding ought to proceed only after an unsuccessful search for the effects of the debtor ; and it is the practice of the town-officers in Edinburgh to certify that such a search has been made ; after which, the days of charge being elapsed, the debtor may be imprisoned. Such warrants can be issued only against inhabitants of the burgh subject to the jurisdiction of the magistrates, which all persons are after forty days' residence within the royalty. In Ross's Lectures, vol. i. p. 255, there are some interesting historical speculations connected with this subject. *Bell's Com.* ii. 538 ; *Stair*, B. iv. tit. 47, § 1 ; *Bank.* iii. p. 1, § 2 ; *Kames' Stat. Law Abridg. voce Personal Execution* ; *Brown's Synop.* p. 1236.

**Acts of Sederunt ;** are ordinances of the Court of Session, made originally under authority of the act 1540, c. 93, whereby the Judges are empowered to make such statutes as may be necessary for the ordering of processes, and the expediting of justice. The power thus conferred was occasionally exceeded ; and it became necessary, accordingly, to ratify several of the Acts of Sederunt in the Scotch Parliament. In so far, however, as Acts of Sederunt are confined to declarations of the purpose of the court to decide in a particular way on an occurrence of similar circumstances, they seem to amount to little more than authoritative announcements

of the intention of the court to adhere judicially to certain precedents. The Acts of Sederunt which partake most of the legislative character are the acts 24th June 1665, as to pro-tutors, 28th Feb. 1662, as to executors-creditors, and 14th Dec. 1756, as to the removing of tenants. But with these exceptions, the Acts of Sederunt of the Court of Session have been confined, for upwards of a century and a half, almost exclusively to the regulation of judicial procedure, and to matters therewith connected. In recent statutes, express power is given to the Court of Session to pass Acts of Sederunt for carrying the purpose of the Legislature into more complete effect; and it is usually provided that the Acts of Sederunt made in virtue of such powers shall be laid before Parliament within a limited time. The old quorum of nine judges is requisite in passing an Act of Sederunt; 48 Geo. III., c. 151, § 11. *Ersk. i. t. 1, § 40*; *Shand's Practice*, i. 45; *Stair*, B. i. tit. 1, § 16; *Bank. i. p. 28*.

**Acts of the General Assembly of the Church of Scotland.** The acts of the General Assembly, issued under their legislative powers, are binding on all the members and judicatories of the church. The form of their procedure, in these enactments, is regulated by an act of the church (1697,) termed the Barrier Act, which directs any proposal or overture for a new act, or for repealing an old one, to be laid by the member by whom it is proposed before the presbytery or synod to which he belongs, who, if they approve of it, will transmit it to the General Assembly as their own overture. This overture may either be dismissed or adopted by the General Assembly, and it may be adopted with such changes or modifications as they may think proper. The overture, being adopted by the General Assembly, is, by that body, transmitted to the several presbyteries of the church for their consideration, with an injunction to send up their opinion on the measure to the next General Assembly, who may pass it into a standing law, if it be the general opinion of the church that it ought to be enacted; but a majority of presbyteries must have approved of it. The delay which this form of proceeding necessarily occasions, is remedied by a power exercised by the General Assembly of converting the overture, (where the presbyteries have neglected to communicate their opinion on the point,) into an interim act, which is held to be binding until the meeting of the next Assembly, and may be continued until the act be finally approved of or rejected. No overture, however, can be converted into an interim act, which involves an essential alteration of the existing law or practice of the church; but this does not

apply to measures which may be necessary for carrying out more effectually subsisting regulations or forms. See *Act of Assembly anent passing Interim Acts*, 1848. See *Hill's View of Constitution of Church of Scotland*, p. 110; *Gillan's Acts of Assembly*, p. 185; *Peterkin's Compendium of the Laws of the Church of Scotland*; *Cook's Styles of Procedure in Church Courts*, p. 308. See *General Assembly*.

**Actilia**; armour, weapons, harnessing. See *Skene De Verborum Significatione*.

**Actio Directa et Contraria.** Contracts and obligations in the Roman law gave rise to two actions; the *actio directa*, for enforcing implement of the essential obligation; and the *actio contraria*, for enforcing the counter obligation. Thus, in the contract of *commodate*, the *actio directa* was competent to the lender against the borrower, to compel him to return the thing lent; and the *actio contraria* to the borrower, to enforce his counter claims arising out of the contract. So the *actio tutelæ directa* was competent to the minor on the expiration of the tutory, against the tutor, for compelling him to account and pay. The *actio contraria* to the tutor against the minor, for reimbursement of the expense necessarily disbursed in the pupil's affairs. And generally speaking, in all contracts, the leading and essential obligation produced the *actio directa*, the counter obligation the *actio contraria*. *Stair*, iv. tit. 3, § 35; *Ersk.* iii. tit. 1, § 24.

**Actio Quanti Minoris.** See *Quanti Minoris*.

**Actio Redhibitoria**; was an action in the Roman law (founded on the implied warranty of the contract of sale), by which when the purchaser discovered a latent fault in the commodity purchased, such as rendere it unfit for the purpose for which it was intended, he was entitled, within six months, to return the goods, and claim repetition of the price. This action seems to have been competent, wherever the defect was such, that, the buyer had been made acquainted with it, he would not have become a purchaser. By the law of Scotland, an action of this kind is admitted, where it is brought immediately that is, within a few days after the sale; for if it be longer delayed, the presumption is that the purchaser is satisfied. It would appear that the law of England differs from the Roman and Scotch law in this respect, and that by the English law, express warranty for the seller is necessary, in order to entitle the purchaser to any remedy. *Brown on Sale*, p. 287; *Stair*, B. i. tit. 9, § 10; *Ersk.* B. iii. tit. iii., § 10; *Kames' Princ. of Equity* (1825) p. 17.

**Action.** An action is the judicial process, whereby legal rights and obligations, whether personal or real, heritable or movable, are asserted and ascertained, and vindicated or made effectual by the competent

tribunals for determining the question at issue, and warranting the appropriate execution. Actions are either *civil* or *criminal*. *Civil actions* properly so called, are those which, whether founded on a civil right or obligation, or on a crime or delict, are prosecuted merely *ad civilem effectum*, for enforcement of the right or reparation of the private injury. *Criminal actions*, on the other hand, are actions in which the offender is prosecuted *ad vindictam publicam*; or for the punishment or penalty of his offence against the public. In the practice of the law of Scotland, although these two classes of actions occasionally present themselves in something of a mixed form, yet, generally speaking, the line of demarcation is sufficiently distinct for all practical purposes; as is explained under separate articles. In the Court of Session, civil actions are classified by institutional writers, as **ACTIONS OF THE FIRST INSTANCE**, including Petitory, Possessory, Declaratory, Rescissory, and Accessory actions, and Summary actions, such as petitions or petitions and complaints under particular statutes, or for contempts of court, or against members of the College of Justice for malversation or misconduct, or the like; and **ACTIONS OF THE SECOND INSTANCE**, such as Advocations, Suspensions, and Reductions of decrees. The nature of these several actions is explained under their respective heads. In Scotland, there is no classification of actions according to certain inflexible *formulas*. Such an arrangement, however captivating in theory, is not adapted to the exigencies of actual business, and to the blended and complex character which questions of civil right frequently assume. Hence, there is hardly any combination of circumstances, and no involution of conflicting claims either of right or of status, which may not be explicated in the Court of Session, by means of an action founded on the special circumstances of the particular case; and concluding for the proper legal remedy or redress. In the inferior courts this is not always attainable, their jurisdiction being limited, not only in territorial extent, but also with respect to the description of actions which may be competently brought before them. On the subject of civil actions, we comprehending not only the judicial processes, but the *executorial*, or *diligences*, as they are termed in the law of Scotland, whereby civil rights are made effectual, and enforced by legal execution, see *Stair*, B. iv. tit. 3; *Ant. B. iv. t. 23*; *Ersk. B. iv. tit. 1*; *Bell's Princ.*; *Shaw's Digest, voce Process*; *Thomson on Bills*, p. 590, *et seq.*; *M'Farlane's Jury Practice*, 23, 39, 110; *Jurid. Styles*; and consult the following articles in this Dictionary: *Process. Summons. Ordinary Action. Ad-*

*vocation. Suspension. Reduction. Declarator. Ranking and Sale. Multiplepoinding. Sequestration. Diligence. Adjudication. Inhibition. Arrestment. Poinding. Maills and Duties. Hypothec. Poinding of the Ground. Interdict. Adherence. Divorce. Confirmation. Service. Act of Warding. Horning. Caption. Act of Grace. Cessio Bonorum. Appeal. Crown Debt. Exchequer. Church Judicatories. Presbytery. Sheriff. Admiralty. Burgh. Dean of Guild. Jurisdiction. Small Debts. Justice of Peace. Decree. Decree of Registration. Criminal Prosecution. Justiciary Court. Damages. Delict; and other titles suggested by the preceding articles and enumeration.*

**Actor**; a Counsel or Advocate. The term is still used by the Clerks of the Court of Session, who, in prefixing the *partibus* or minute of appearance to interlocutors, designate the respective counsel for the parties *Actor* and *Alter*.

**Actor Sequitur Forum Rei**; a Roman law maxim, importing that the pursuer of an action must follow the *forum* of the defender; *i. e.*, if the defender is not amenable to the courts of Scotland, the pursuer must raise his action against him in the country to the laws of which he is subject. See *Abroad*.

**Actornatus**; according to Skene, is he who makes answer for another in judgment, specially for the defender; as *Prolocutor* is he who speaks for the pursuer. Also an attorney or procurator for another. See *Skene, De Verb. Sig.*

**Actus**; one of the Roman law rural servitudes of *passage* or *way*. The servitude *iter*, in that law, signifies the dominant proprietor's right to a foot and horse passage for himself, his family, and tenants, through the servient proprietor's lands; and the servitude *actus* superadds to the *servitus itineris* the right also of using the road for carriages drawn by men, and for driving cattle. *Ersk. ii. t. 9, § 12*; *Stair, B. xi. t. 7, § 10*; *Bank. i. 678, § 39*. See *Road. Iter. Via*.

**Adherence, Action of**. By the act 1573, c. 55, where either of the spouses deserts the other without a reasonable cause, and remains in his or her "malicious obstinacy" for four years, the injured party may raise an action of adherence before the judge ordinary. If the pursuer obtain decree of adherence, and the defender disobeys the sentence, letters of horning may be obtained under the signet, to enforce the decree. If this fail, the church is directed to admonish the defender to adhere, on pain of excommunication; and if these several steps prove unavailing, the injured party may raise an action of divorce on the ground of *desertion*. An action of adherence cannot be raised until after at least one year's desertion; and the summons ought to be special

as to the date and circumstances of the desertion, not only to show that it has continued for one year, but also, in contemplation of a divorce following thereon, to leave no doubt in reckoning the four years. When the action of adherence is at the instance of the wife, she may competently conclude in the same summons for aliment; and her husband's payment of the aliment decerned for during the three intervening years will not bar the divorce, if the desertion continue. The defender in an action of adherence must be subject, either actually, or *fictione juris*, to the jurisdiction of the Scotch courts; *A. B.*, 1st March 1845, 7 *D.* p. 556; *Gordon*, 19th June 1847, 9 *D.* 1293; although it seems to be considered no bar to the action that the husband has left Scotland, if his absence be for the obvious purpose of depriving his wife of this remedy. See *Desertion*. Where the wife is the defender, there can be no difficulty as to jurisdiction, since she, *fictione juris*, follows the domicile of her husband; and if he seeks redress in this form, he must have his real domicile in Scotland. The action of adherence ought to be intimated personally to the defender, if abroad; *Black*, 4th February 1842, 4 *D.* 615. In *Smith*, 11th February 1854, 16 *D.* 544, it was held that the action of divorce might competently proceed upon edictal citation merely, in respect the previous process of adherence had also proceeded upon edictal citation, the defender having never been heard of since his desertion, though inquiries had been made after him. In the adherence, evidence must be led both of the marriage, and that the desertion was wilful; *A. B.*, and *Black*, *ut supra*. If the decree does not mention the date of the desertion, evidence thereof must be led in the subsequent action of divorce; *Maxwell*, 29th Nov. 1851, 14 *D.* 126. The action of adherence, not being mentioned in 11 Geo. IV. and 1 Will. IV., c. 69, and 6 and 7 Will. IV., c. 41, could only be instituted in the Sheriff Court, as coming in place of the inferior commissary, unless the defender was abroad, when it might be instituted in the Court of Session; but by 13 and 14 Vict., c. 36, § 16, this and all other consistorial actions can competently be brought in the Court of Session only. The recent statute, admitting the parties to a cause as witnesses, makes actions of adherence one of the exceptions in which the parties still continue inadmissible. The procedure before the presbytery after decree of adherence is given in *Cook's Styles of Procedure before Church Courts*, p. 239. See also *Fraser, Pers. and Dom. Relations*, pp. 447, 677, 713; *Shand's Pr.* 435; *Ersk.* i. tit. 6, § 44; *Lothian's Consist. Prac.* 96, *et seq.*; *More's Notes to Stair*, p. xxvi.; *Bank.* i. p. 139;

*Shaw's Digest*, p. 567; vol. iii. p. 207; *Jurid. Styles*, vol. iii. See *Divorce*.

**Adjournal.** See *Books of Adjournal*.

**Adjournment.** To adjourn a court is, by a regular act, to stop the proceedings for the present, and delay them to a future time. The proceedings in a service, or even in a criminal trial, may be adjourned on cause shown. But in a criminal case, no adjournment can take place after the assize have been sworn, excepting where the extraordinary length of the trial renders it absolutely necessary, and the adjournment must be to a day certain. *Hume*, ii. 263, 414, 417; *Ersk. B.* iv. tit. 4, § 90, and note; *M'Farlane's Jur. Prac.* p. 245. See *Continuation of Diet. Discharge of Compearance*.

**Adjudication for Debt.** Adjudication is the modern real diligence for attaching land and other heritable estate in satisfaction of debt. It was substituted for the apprising which seems to have been originally a very summary proceeding, by which, where the debtor was not possessed of sufficient movable property, the Sheriff was authorised to give him notice to sell his lands within fifteen days, to pay the debt, and failing his doing so, to transfer the property absolutely, to the creditor in satisfaction of his debt. The act 1469, c. 37, as a modification of the hardships of the older law, gave the debtor a power of redemption within seven years, on his repaying to the purchaser the price, and the expense of completing his titles. Where no purchaser appeared, the Sheriff was directed by that statute to apprise the lands by thirteen "of the best and worthiest of the shire," and to make it over to the creditor to the extent of the debt; the superior being bound to receive the creditor or purchaser on payment of a year's rent, or to take the lands himself and pay the debt. Under this statute, apprising appears to have been conducted for some time with a due regard to the mutual interests of the parties; but the execution of the act, in the country having fallen into the hands of messengers-at-arms, abuses arose, which were attempted to be remedied by conducting the apprising in every case at Edinburgh. The expense however, with which this was attended, introduced the practice of allowing the creditor to enter into possession on a general redeemable title, and to draw the rents and profits during the whole term of redemption, without being under any obligation to account for the surplus over the interest of the debt. This practice gave facilities to the grossest abuses and to remedy some of the evils, the act 1621, c. 6, provided that the rents and profits, in so far as they exceeded the interest of the debt, should be imputed *pro tanto* to the pay



ment of the principal. The same statute enacted, that the legal reversion of seven years should not run against minors. The act 1661, c. 62, prorogated the legal reversion of appraisings from seven to ten years, and provided, that all appraisings, within year and day of the first effectual one, should rank *pari passu*; defining the first effectual apprising to be that on which the first feudal right has been completed by sasive, or by charge against the superior. The expense of the first effectual apprising is also declared by that statute to be common to all who shall take benefit by it.

By the act 1672, c. 19, the form of adjudication was introduced. That statute, after narrating the various abuses of the old system of appraisings, enacted, that, in place of apprising, a process should be raised in the Court of Session against the debtor, in which the Court should adjudge from him a part of his lands, or other estate in use to be appraised, corresponding to the debt, interest, and the expense of entry and infestment, with a fifth part more on account of the inconvenience to which the creditor is put by being obliged to take land instead of money. The value of the land so to be adjudged was to be ascertained by a proof of the rental, or profits, to be led by the debtor (if he choose) and the creditor before the Court. Upon the decree of adjudication thus obtained the creditor was entitled immediately to enter into possession; and as the land so set apart was considered as of the nature of a *surrogatum* for the debt, the creditor was under no obligation to account for the surplus, if there should be any, after paying the interest. The period of redemption under this form, which was called a *special adjudication*, was made five years after the date of the decree; and it was declared, that after the creditor had attained possession under the decree, he should have no farther execution against his debtor by arrestment, caption, or otherwise, except in the case of violation under the warrant. But as these statutory provisions proceeded on the supposition that the debtor was to produce a sufficient progress of titles, and to ratify the decree of adjudication, and cede summary and quiet possession to the creditor, it was farther enacted, that where the debtor did not comply with these requisites, it should be in the power of the creditor to adjudge, generally, all right vested in the debtor, in the same manner as he might have used apprising under the act 1661, c. 62, and under the reversion and with the powers competent to the creditor conferred by that act. This last was the *general adjudication*; and it concluded only for the principal sum, interest and penalty, but not for a fifth part more; *Act of Sederunt*,

26th Feb. 1684. In the case of a special adjudication, the creditor could not also resort to personal and other diligence against the debtor, but he was under no such restriction in the case of the general adjudication.

The action of adjudication introduced by the statute 1672, c. 19, could not proceed until the debt had been constituted either by a decree ascertaining its precise amount, or by a liquid ground of debt; and the summons of adjudication, after stating the manner in which the debt was constituted, narrated the statute 1672, and formerly concluded alternatively for a special or general adjudication. This alternative conclusion was formerly necessary, because, although there was hardly an instance of a special adjudication, yet it was only on the debtor's refusal to avail himself of the first alternative that the Court was authorised by the statute to pronounce a decree in the general adjudication. The decree in the action adjudges the lands, &c. to the creditor redeemably, and orders the superior to receive him as his vassal. In order to give the necessary publicity to such decrees, an abridged statement, called an *Abbate*, containing the names of the debtor and creditor, and an enumeration of the subjects adjudged, is signed by the extractor who signs the decree, and recorded within sixty days, in a register appointed for the purpose. See *Abbate*.

The subjects which may be adjudged, are heritable estate in its most extensive signification, including not only feudal rights, but all rights or interests affecting or connected with land, such as heritable bonds and real securities, or burdens or faculties of all kinds, as also annuities and all rights having a tract of future time, liferents, reversions, rights of tack where assignees are not excluded, heirship moveables, heritable offices of dignity or jurisdiction, personal rights to lands, personal bonds excluding executors, rights of patronage, stock of any chartered bank where the diligence of arrestment is excluded, the husband's right to the rents of his wife's estate, rights to reduce *ex capite lecti*, fair, harbour and ferry dues, entailed estates during the life of the heir, and the like. *Jurid. Styles*, iii. 329; *Shand*, ii. 662. As the adjudication is a diligence, the summons contains no conclusion for expenses of process; although, where decree is unduly opposed, it would seem that the Court may award expenses; decree for which, in such a case, ought to be taken in name of the agent disbursing; *Shand's Prac.* ii. 675. The debt on which the adjudication proceeds must be liquid, and legally vested in the pursuer's person, by direct obligation, or by assignation, or by confirmation; and cannot be constituted in the

process of adjudication itself, except in the case of adjudication *contra hæreditatem jacentem* (which see.) By the mere citation of the debtor the subject to be adjudged becomes litigious. When the summons came into Court, there was formerly a difference in the procedure between a first and any subsequent adjudication; for the debtor in a first adjudication might have appeared and taken a day to produce his titles, &c. with the view, if he chose, of concurring in a special adjudication, which could not be done in any subsequent adjudication. It is also provided by the act 54 Geo. III., c. 137, § 9, that the Lord Ordinary, before whom the first process of adjudication is called, shall ordain intimation thereof to be made in the Minute-book, and on the walls of the Parliament House, in order that other creditors, who are in a condition to adjudge, may be conjoined in the process; and for that purpose twenty sederunt days are allowed. At the expiration of the twenty days, those who can produce instructions of their debts, with summonses of adjudication, libelled and signeted, are conjoined in one and the same adjudication. This procedure is proper to the first adjudication only. In the action of constitution with a view to adjudication, where delay might exclude the creditor from the *pari passu* ranking, the Lord Ordinary will pronounce decree of constitution at once, reserving all objections *contra executionem*; and with the same view, the Court, on a special petition, will dispense with the *induciæ* and calling of the summons, and with the reading of the decree in the Minute-book. But this indulgence will only be granted to secure the *pari passu* ranking, within year and day of the first effectual adjudication. After the lapse of the year it becomes a race of diligence, as against the residue, and no such favour can be shown to any one creditor. As to the form of process, so far as effected by the Judicature Act, 6 Geo. IV., c. 120, the regulation is, that in processes of adjudication, it is in the power of the Court and of the Lord Ordinary to require the parties to proceed according to the forms applicable to ordinary actions, in so far as it shall appear fit or expedient to apply these; but in so far as compliance with these rules is not specially required, the forms in use before the passing of the statute remain in force; except only as to the review of interlocutors, which is regulated by the general rule of the Judicature Act, and relative Act of Sederunt; A. S. 11th July 1828, § 103. An ordinary adjudication is rarely opposed to the effect of rendering a record necessary. In a work such as the present, the minute practical details connected with this important step of real diligence

would be out of place; but they will be found fully digested in *Shand's Practice*, ii. 656, 5741; *Jurid. Styles*, iii. 324, *et seq.*; and *Bell's Styles*, vi. 393, *et seq.*

The adjudication is made effectual, so as to compete with other heritable rights, by charter of adjudication and sasine (see *Effectual Adjudication*); and in all questions with other adjudications it will be completed by presenting a Note in Exchequer, when the holding is of the Crown, or by executing a general charge of horning against superiors at the market-cross of Edinburgh and pier and shore of Leith, where the holding is of a subject, and recording an abstract of the charge in the register of abbreviates of adjudication; 54 Geo. III., c. 137, § 11. The adjudication, being rendered effectual, may become the foundation of a preference; but all adjudications led within year and day of the first effectual adjudication are, by the act 1661, c. 62, to be ranked *pari passu*. Adjudications, after the expiration of the year and day, are preferred upon the residue of the estate, according to the dates of recording the abbreviates; 1661, c. 31.

The right of the adjudger was redeemable in the special adjudication in five years, and in the general in ten, and in the adjudication *contra hæreditatem jacentem* in seven. The redemption may be effected under the general adjudication by the creditor's intromission with the rents and profits, but in the special adjudication the rent went for the interest; and the debtor, before he can redeem the subject adjudged, must pay the debt and a fifth part more. The adjudication may be made the ground of an action of maills and duties (see *Maills and Duties*), by which the adjudging creditor will attain possession of the rents; but in that case he must account by a rental, and he will be liable in strict diligence in the recovery of the rents. The adjudger's right is rendered irredeemable by a decree of declarator of expiry of the legal, which is obtained in an action raised after the expiration of the period of redemption, in which action the debtor is required to redeem the lands, or to be foreclosed; and in this action of declarator the debtor in the general adjudication is entitled to insist that the creditor shall account for the rents and profits he has drawn, so as to have the precise balance ascertained. If the debt was not paid off within the legal, the adjudger's right formerly became *ipso facto* irredeemable, however small the balance remaining unpaid may have been. It is now settled, however, that a declarator of expiry is necessary, although it would appear that some eminent lawyers have doubted how far the rule is a proper one. See *Bell's Com.* vol. i. p. 705, 5th edit. A char

ter of adjudication and infeftment, followed by forty years' possession, forms a good irredeemable title without a declarator of expiry of the legal. *Robertson v. The Duke of Athole*, 10th May 1815, *Dow's Reports*, vol. iii.

An adjudication for debt, until it becomes irredeemable, is merely a *pignus pratorium* or judicial security, and not a sale under reversion. The true nature of an adjudication for debt was considered in the case of *Cochrane v. Bogle*, 2d March 1849. The pursuer held an estate under an entail defective in regard to the prohibition against sales, but valid in regard to the prohibition against contracting debt. A personal creditor of the former heir had adjudged the estate, and also the power to sell the estate, which was alleged to be in the debtor. A charter of adjudication was obtained, and infeftment followed. The debtor immediately thereafter died, and the next heir brought a reduction of the adjudication, and the infeftment following upon it. The defender pleaded that an adjudication was a sale under reversion, and that therefore it was not struck at by the entail, which was defective in regard to sales. The Court reduced the adjudication, and the judgment was affirmed in the House of Lords. Lord MACKENZIE observed,—"The question remaining is, Is adjudication equivalent to a sale? I am clear that it is not. Whatever the old apprising may have been in theory, I am clear that a decree of general adjudication in modern law is no more than a *pignus pratorium*—a step of diligence which only creates a security for debt. It is not the act of the debtor, but a security taken by the act of the law. The debt remains unpaid. The security may be abandoned, and other remedies taken. The debtor is still the vassal." The expiry of the legal does not, *ipso facto*, vest a right of property in the adjudger, but must be declared; and where a decree of the expiry of the legal is obtained in absence, it is liable to be opened up on certain grounds. *Bell's Com.* i. 705.

By 10th and 11th Victoria, cap. 48, § 17, bills for summonses of adjudication are abolished. By the same act, § 18, it is declared to be no longer necessary to libel a conclusion for special adjudication, and that it shall be lawful to libel, conclude, and decern for, general adjudication without such alternative. In virtue of the same act, § 19, the Court, when pronouncing decree of adjudication, whether for debt or in implement of a decree of sale, may grant warrant for infefting the adjudger or purchaser, and his heirs and successors, in the lands contained in the decree. The lands are to be holden alternately by two several infeftments and manners of holding, the one of the party adjudged from, and

the other of the immediate superior. In virtue of such decree of adjudication, or decree of sale, the adjudger or purchaser is entitled to complete his title by obtaining a charter of adjudication or of sale from the superior. Where, however, the person adjudged from is entered with his superior, or in a situation to charge his superior to grant entry by confirmation, the adjudger or purchaser has the option of taking infeftment in virtue of the warrant contained in the decree. An infeftment so taken, along with the decree of adjudication or of sale, constitutes an effectual feudal investiture in the lands holding base of the party adjudged from and his heirs, until confirmation thereof shall have been granted by the superior, in the same manner and to the same effect as if the party adjudged from had granted a disposition of the lands to the adjudger or purchaser in terms of the decree of adjudication or of sale, with an obligation to infest *a me vel de me*, and a precept of sasine, and the adjudger or purchaser had been infest on such precept. The effect of the charter of confirmation of the sasine proceeding on the warrant in the decree is to make the lands hold immediately of the superior; but the right of the superior to the composition payable by an adjudger or purchaser under the existing law is reserved entire, and the adjudger or purchaser, by taking infeftment on the decree, becomes indebted in such composition to the superior, and is bound to pay it on the superior tendering a charter of confirmation, whether the charter shall be accepted or not, and the superior is entitled to recover payment of such composition. The sasine on such decree, when duly recorded, is of itself sufficient to make the adjudication effectual in all questions of bankruptcy or diligence. Where the charter or other deed by which the vassal's right is constituted contains a prohibition against subinfeudation or alternative holding, the decree and sasine, notwithstanding such prohibition, forms a valid feudal investiture in favour of the adjudger or purchaser, but without prejudice to the right of the superior to require the adjudger or purchaser to enter forthwith, and to deal with him as with a vassal unentered.

See on the subject of this article, *Stair*, B. iii. tit. 2, § 14, *et seq.*; and B. iv. tit. 51; *Mr More's Notes*, p. cxciv. *et seq.*; *Bank*. vol. ii. p. 217, *et seq.*; *Ersk.* B. ii. tit. 12; *Bell's Princ.* § 823, *et seq.*; § 2386; *Kames' Stat. Law Abridg.* h. t.; *Hunter's Landlord and Tenant*, pp. 434, 798, 804; *Brown's Synop. h. t.* pp. 1174, 2050, 2168, &c.; *Shaw's Digest*, h. t.; *Sandford on Entails*, pp. 38, 349, *et seq.*; *Shand's Practice*, ii. p. 656, *et seq.*; *Jurid. Styles*, vol. i. p. 463, 2d edit.; vol. ii. pp. 38, 96, 329, 2d edit.; vol. iii. p. 324, *et seq.*, 2d edit.; *Watson's Stat.*

*Law, h. t.*; *S. D.* xi. pp. 130, 292, 355, 711, 713, 896, 949; xii. pp. 266, 385, 609; xiii. 509, 1011; xiv. 1117, 1126; *Kames' Princ. of Equity* (1825), 244-5, 282, 296-7, 390-9. See *Legal*.

**Adjudication contra Hæreditatem Jacentem.** When the debtor's apparent heir renounces the succession, the creditor obtains a decree *cognitionis causa*. The heir, in respect of his renunciation, is assoilzied, but the *hæreditas jacens* of his predecessor is subjected to the creditor's diligence; and the decree is called a decree *cognitionis causa tantum*, because its purpose is to ascertain the amount of the debt, so that adjudication may proceed against the heritage of the deceased. In cases where it is expected that the heir is to renounce the succession, a conclusion for adjudication is introduced into the summons of constitution; and, when the heir renounces, decree of adjudication *cognitionis causa* is pronounced. If the heir should not renounce, the conclusion for adjudication goes for nothing. This adjudication carries right to the rents due prior to the date of the decree, and is redeemable within seven years by any co-adjudging creditor, either of the deceased debtor or of the heir who has renounced; but the heir himself can neither be restored against his renunciation nor redeem unless on the head of minority, although, if it be an object to the heir to redeem, it may be accomplished indirectly by a simulate bond to a confidential person, who will redeem as a creditor of the heir. The superior of the lands thus adjudged is under the same obligation to enter the adjudger as in the case of apprisings by 1669, c. 18. The adjudication *contra hæreditatem jacentem* was in use before 1672, c. 19; and hence, as the exclusion of inferior courts applicable to adjudications substituted by that statute for apprisings did not apply, the adjudication *contra hæreditatem jacentem* might have proceeded before the Sheriff court, provided that the subjects were within the sheriff's jurisdiction. No special or general special charge was necessary or competent after the heir's renunciation. This adjudication not being founded on the act 1672, the first alternative of that statute could not be concluded for, the adjudication *contra hæreditatem jacentem* being always a general adjudication.

By the act 10 and 11 Vict., cap. 48, it is no longer competent to use letters of general charge, or special charge, or general special charge. In an action of constitution of an ancestor's debt or obligation against an unentered heir, the citation on and execution of the summons is equivalent to a general charge, and infers the like certification with a general charge. In an action of adjudication

against an unentered heir following on such decree of constitution, or in an action of adjudication against an unentered heir, founded on his own debt or obligation, the citation on and execution of the summons of adjudication is equivalent to a special charge or general special charge, as the circumstances may require, and infers the like certification with a special charge or general special charge, as the case may be. Again, in an action of constitution and adjudication, combined in the same summons, against an unentered heir, the same decree may be pronounced which would have been competent had the summons been preceded by letters of general charge, and decree of constitution and adjudication may be pronounced in the same interlocutor, and extracted on the same extract. A combined action of constitution and adjudication was only, under the old law, competent in the case of an adjudication *contra hæreditatem jacentem* in case the heir should renounce; for if he renounced he fell to be assoilzied in the action of constitution, and decree was given, not against the heir, but *cognitionis causa tantum* and *contra hæreditatem jacentem* of his ancestor. Where the heir did not renounce, decree of constitution could alone be obtained, and the debtor was then obliged to drop the adjudication *contra hæreditatem jacentem*, and to proceed against the heir by a separate adjudication, preceded by a special or general special charge. The act 10 and 11 Vict., cap. 48, has made no change in this respect, and in a combined action of constitution and adjudication *contra hæreditatem jacentem*, if the heir does not renounce, the pursuer must drop the adjudication, and raise a separate adjudication against him. The principle of this is, that where the heir does not renounce he must be vested with his ancestor's estate, and the estate must then be adjudged from him. In order to vest the estate in the heir he required to be specially charged to enter heir to his ancestor by letters either of special or of general special charge, according to the nature of the right which was the subject of adjudication. These charges, therefore, preceded the adjudication. Where, however, the heir renounced, the ancestor's estate was not vested in him, and, accordingly, letters of special or of general special charge were unnecessary. By the act 10 and 11 Vict., cap. 48, the execution of the adjudication is equivalent to letters of special or of general special charge in the ordinary case, but it does not state that the execution of a combined action of constitution and adjudication shall have that effect. Where, therefore, the heir does not renounce, it is still necessary to drop the adjudication *contra hæreditatem jacentem*, and bring a separate adjudication

against the heir. Accordingly, in the case of *Brown v. Wood*, 28th January 1851, 13 D. 543, it was held that, in a combined action of constitution and adjudication against an unentered heir, no decree of adjudication could be pronounced, in respect that there was no renunciation by the defender to be heir. Lord MEDWYN observed,—“Such combined actions can only be used in the case where the heir has already recorded a renunciation, or the pursuer has ascertained that he will renounce. To combine the two shortens the process, and in such a state of matters with perfect safety to the heir who is not to enter. But if the heir does not renounce, whether he appear or not, the practice heretofore has been, and most correctly so, that the pursuer must proceed first by his summons of constitution, and then, after decree in it, call the heir in a separate process of adjudication, in so much, that if, under the impression that the heir was to renounce, he had combined the two actions together, he was obliged to take decree only in the constitution, and to stop short there, and then raise his adjudication, preceding it with a special or general special charge to be the foundation of the diligence against the lands, as now the heir's estate *vi statuti*.”

*Ersk.* ii. tit. 12, §§ 47, 53; *Stair*, B. iii. tit. 2, § 45; *Mr More's Notes*, p. cxcvii.; *Bank.* vol. ii. p. 220; *Shand's Practice*, ii. 689. See *Renunciation. Annus Deliberandi. Charge. Apparent Heir.*

**Adjudication on Debitum Fundi.** Where there is a real burden, but no personal obligation, or where the personal obligation is ineffectual, as in the case of an heritable bond by a married woman, or where the object is to make the interest on interest equally preferable with the principal sum, decree is, in the first place, taken in a process of poinding the ground. And the letters of poinding the ground having been executed, an adjudication narrating the ground of debt, decree of poinding the ground, and execution of the letters is raised. This adjudication can affect no lands but those in the security, whereas the adjudication, when there is a personal obligation, may affect the whole heritable property of the debtor. Adjudications on *debita fundi*, as being preferable in respect of a real right, are not affected by the *pari passu* ranking of the act 1661, c. 62, which applies only to adjudications for personal debts. *Bank.* vol. ii. p. 238. See *Bell's Styles*, vi. 445; *Shand's Practice*, ii. 687, 707. See also *Debitum Fundi. Poinding the Ground.*

**Adjudication in Security.** The adjudication in security is not founded on the above-cited statutes, but has been introduced and sanctioned by the Court from equitable con-

siderations. It is the form to be followed where the claim of debt is contingent, future, or uncertain in amount. To authorise such an adjudication, the debtor must be *vergens ad inopiam*, or other creditors must be adjudging. If it be a first adjudication, it must be intimated in common form (54 Geo. III. c. 137, § 9); and under 1661, c. 62, may compete *pari passu* with ordinary adjudications. The adjudication in security is completed like an adjudication for payment; but it has no legal, and may be redeemed at any time. It would seem that an ordinary adjudger may restrict his adjudication to a security; and with that view, in one case, the Lord Ordinary was held entitled to recall his interlocutor adjudging, and to adjudge *de novo* in security only; *Ker*, 5th Feb. 1830, 8 S. & D. 462. See *Bell's Com.* i. 714; *Ersk.* ii. tit. 12, § 42; *More's Stair*, note, p. cxcvii.; *Bell's Prin.* § 832, 2389; *Shand's Practice*, ii. 709; *Bell's Styles*, vi. 488; *Jurid. Styles*, iii. 403.

**Adjudication in Implement.** Where a party has granted a conveyance to heritable property without a procuratory of resignation or precept of sasine, for enabling the grantee to complete his feudal title; or where the grantee's right stands on a missive of sale, or other obligation to convey without procuratory or precept; and where the granter or his heir refuses, or is unable voluntarily to supply the defect, an action of adjudication in implement is competent. This action is directed against the granter, or the debtor in the obligation to convey, or his heir. The summons libels on the deed or writing containing or importing the obligation to convey, and the defender's refusal to implement it; and concludes that, in implement of the obligation, the subject ought to be adjudged from the defender, and declared to belong to the pursuer; who should be decerned and ordained to be infest in the lands, to be holden of the defender's superior; that the defender should clear the subject of incumbrances, burdens, &c., or make payment to the pursuer of a sum necessary for that purpose; that he should deliver to the pursuer the title-deeds of the subject; and, finally, that he should pay expenses of process. A decree in this action is a warrant to the superior to grant a charter of adjudication in implement, infestment on which completes the feudal right of the pursuer. In this adjudication there is no legal and no *pari passu* ranking, because the action being pursued for the purpose of completing the pursuer's right to a special subject, the subject necessarily must be carried irredeemably (if such be the nature of the right); and for the same reason the title so completed, if otherwise unobjectionable,

necessarily must be exclusive. But this form of action is competent only when there is an obligation to convey, express or implied; and the obligation must be duly constituted against the defender, as in the case of adjudication for debt. The adjudication in implement does not require to be intimated when called in the course of the rolls, since no other adjudication can be conjoined with it; but an abbreviate must be recorded. In competitions of adjudications in implement, the first infestment gives the preference, without regard to the date of the decree, or diligence thereon; and the statutory prohibition of adjudications, during the dependence of a process of ranking and sale, does not apply to adjudications in implement; 54 Geo. III. c. 137, § 10. In such cases judicial application is made to strike the subjects so adjudged out of the sale, or to except them from the warrant of sale. By the bankrupt statute, the Court of Session is required to adjudge the lands and other heritages belonging to the bankrupt to the trustee, absolutely and irredeemably, for sale, for behoof of the creditors; which adjudication being of the nature of an adjudication in implement, as well as for payment or security, is subject to no reversion; and the trustee is also required to record the act or order adjudging, within fifteen days, in the register of abbreviates of adjudication; 54 Geo. III. c. 137, § 29, 30.

Superiors are bound to enter adjudgers in implement, and where two parties adjudge in implement and neither of them is infest, the party first charging the superior will be preferred. *Sinclair v. Sinclair*, M. 56. An adjudication in implement is not subject to be ranked *pari passu*, or with other adjudications of any kind. *Campbell v. Macvicar*, M. 277. In the case of *M'Gregor v. Macdonald*, 9th March 1843, a competition arose between two adjudications in implement. Colonel Macdonald obtained his decree on 10th March 1829, and the trustees of General M'Gregor obtained their decree on 12th November 1829. These trustees were also superiors of the lands in competition. Colonel Macdonald charged them to grant him a charter of adjudication, and on their refusal he denounced them, and then passing them over he obtained a charter from the next superior in March 1830, on which he was infest. The trustees, on obtaining their decree, granted themselves a charter, and were infest upon it in January 1830. The Court preferred Colonel Macdonald. Lord Moncreiff observed: "The case is that the trustees knew that Colonel Macdonald held the first adjudication. They intentionally delayed to give him his charter, and as soon as their own adjudication was

ready, they granted a charter to themselves for the avowed purpose of defeating his right. No superior is entitled to deal with the rights of third parties demanding that which he is bound to grant, and therefore the trustees are not entitled to found on the priority of the infestment obtained by them by means of what must be regarded as a tortuous act in law." By the act 10 and 11 Vict., cap. 48, § 19, the Court, when pronouncing decree of adjudication in implement, may grant warrant for infesting the adjudger and his heirs and successors in the lands adjudged. See *Adjudication for Debt*. In *Hutchieson v. Cameron's Trustees*, 26th June 1830, it was held that neither the creditor who brought a ranking and sale, nor the common agent in the process, were entitled to compare in a process of adjudication in implement of missives of sale, and state grounds against decree being pronounced. In *Wood v. Scott*, 1st July 1830, a party holding a missive of sale, and who was in the course of leading an adjudication in implement, applied to the Court to have the property which formed the subject of the adjudication struck out of a ranking and sale, and the common agent prevented from proceeding with the sale. The Court granted the application, and excepted the subject to which the missive related from the ranking and sale. The holder of the missive of sale then effected the completion of a feudal title by decree of adjudication in implement, upon which he obtained a charter of adjudication from the superior, and having taken infestment he produced the charter and sasine in the process of ranking. The question then arose, what effect was to be given to the completed title in the competition between the adjudger and the common agent, as representing the general body of creditors. The Court found "That the adjudication in implement was not rendered incomplete under the provisions of the Bankrupt Act by the process of ranking and sale, and if duly deduced the subject must fall to be struck out of the sale." By the bankrupt statute 2 and 3 Vict., cap. 41, § 79, it is enacted that the whole heritable estates belonging to the bankrupt in Scotland shall, by virtue of the act and warrant of confirmation in favour of the trustee, be transferred to and vested in him for behoof of the creditors absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment, and in security of debt, subject to the legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the

sequestration, and as if a poiding of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and were not null and reducible.

See on the subject of this article, *Stair*, iv. tit. 51, § 9; *More's Notes*, cccv.; *Bank*. vol. ii. 233; *Ersk.* ii. tit. 12, § 50, *et seq.*; *Bell's Prin.* § 835; *Shaw's Digest*, 7, 564; *Jurid. Styles*, iii. 333, 421, *et seq.*; *Kames' Equity*, 286; *Shand's Practice*, ii. 721; *Maclaurin's Forms of Process*, 25. See *Abbréviate*.

**Adjudication on Trust-Bond.** The expedient of adjudging on a trust-bond, is a mode of making up titles to heritage, where an heir is apprehensive about incurring a representation of his predecessor; or when he wishes to challenge adverse deeds, which, if he incurred a formal representation of his predecessor, he might be bound to implement. According to Professor Bell, this expedient was invented by Sir Thomas Hope, and ever since his time the device has had the sanction of the Court and of the profession. The form is for the apparent heir to grant a bond to a confidential person, for a sum exceeding the value of the estate; the fiduciary nature of the transaction being explained by a back-bond, containing an obligation by the simulate creditor, to denude of the property when the adjudication is completed. The creditor in this bond then charges the heir to enter to his predecessor in common form; the heir renounces the succession, and adjudication, in favour of the fictitious creditor, follows in the usual way. The simulate creditor is then in a condition to set aside any deeds granted by the predecessor of the grantor of the bond, on all the grounds which a creditor or singular successor may plead, although the heir himself, had he entered, might have been barred from availing himself of these pleas; and if by this expedient the trustee succeeds in acquiring the property as nominal creditor of the apparent heir, he fulfils his back-bond, by conveying it, free of these adverse deeds or claims, to the heir, as disponee of the creditor. See on this subject, *Ersk.* iii. tit. 8, § 72; *Bell's Prin.* § 834, and *authorities there cited*; *Shand's Practice*, ii. 725.

An heir who grants a trust-bond on which his ancestor's estate is adjudged, and the adjudication assigned to him, cannot thereafter renounce to be heir. In the case of *Glendinning v. The Earl of Nithsdale*, 22d January, 1662, reported by Lord STAIR, the heir offered to renounce and to purge the adjudication, and to declare that it should not prejudice the pursuer, and that he should be accountable for the price of any lands he had sold, or any rents he had uplifted. The Court, "after long consideration and debate,"

sustained the offer, but "resolved to make and publish an Act of Sederunt against any such courses in time coming, and declared that it should be *gestio pro hærede* to intromit upon such simulate titles." An Act of Sederunt was accordingly passed February 28, 1662, entitled "Act against the Granting of Bonds of Appearance Heirs whereupon apprising or adjudication may follow in prejudice of the defunct's debts." This act declares that such apparent heirs "shall be liable as behaving themselves as heirs to their predecessors, by intromission with the rents of the estate so adjudged or appraised, nor shall it be lawful to them to renounce to be heirs after such intromission." The mode of entering to an ancestor's estate by means of an adjudication or a trust-bond, is recognised by the act 1695, c. 24, entitled "Act for obviating frauds of Appearance Heirs." An apparent heir may make up a title to his ancestor's estate by means of a trust-adjudication, although his right to be heir is disputed, and although the estate sought to be adjudged is held under the fetters of an entail. *Craigie v. Ker*, 19th Jan. 1808. In that case one of the competitors for the Roxburgh estates granted to trustees a bond for a million and a half, upon which they adjudged. The Court decreed in the adjudication. The President CAMPBELL'S manuscript note on the case is "Adjudication upon Trust-Bond. This mode of making up titles recognised by various statutes; act 1621, c. 27; act 1695, c. 24, &c. It confers a safe, active, or tentative title, but till followed by possession or by ascertaining the right, is not a passive title. It cannot be stopped by any competing parties, but must proceed *valeat quantum*, reserving all objections *contra executionem*." An adjudication on a trust-bond is also competent where a disponee of the ancestor is infest. In the case of *Beveridge v. Coutts*, 10th July 1793, an heir proposed to bring a reduction of a deed granted by his ancestor on death-bed, and on which deed the disponee had taken infestment. As a preparatory step to the reduction he granted a trust-bond, upon which the trustee brought an adjudication. The disponee under the death-bed deed appeared, and pleaded that the lands were not *in hæreditate jacente* of the ancestor, and that therefore the heir-at-law could not be served to him, nor could he bring an adjudication against the lands. The heir pleaded that any settlement which he might make in the meantime would be of no avail if he should die before completing his title by service or by the mode now attempted. The Court adjudged, and it was observed on the Bench:—"As the pursuer is entitled to serve heir to

his predecessor, the adjudication must be equally competent, and he ought to be at liberty to vest such a title in his person as may enable him to make a settlement."

**Adjudication on Trust-Disposition.** This, like the adjudication on a trust-bond, is another simulate device for completing a title to heritage. It is effected by the apparent heir granting a disposition of his predecessor's heritage, *ex facie* absolute, with a back-bond declaring a trust, or granting at once a trust-disposition of the subjects. The heir is then charged by the trust-dispensee to enter, and on his failure, a decree of adjudication in implement is taken against him, which forms the tentative title. But this mode of making up a title was held to be incompetent in the case of Dunlop, 4th July 1820, *F. C.*, affirmed on appeal 31st March 1824; 2 *Shaw's Appeals*, 115. This case is very ill reported in the Faculty Reports; but see the House of Lords' Reports. It will probably have the effect of discountenancing this expedient. In this case another party was in possession of the estate on an *ex facie* good personal title. See *Bank*. vol. ii. 354; see also *Shand's Practice*, ii. 729, and cases there cited.

**Adjudication, Declaratory.** A declaratory adjudication is a very useful form of action, appropriately classed with adjudications. Where, for example, the radical right under a trust, or under an heritable security, is in a part indicated by the deed, but not feudally vested, the Court, nearly a century ago, suggested the expedient of a declaratory adjudication. In the case in which the suggestion was made, the right of the trustee was in the first place declared to have been merely fiduciary: it was further declared that the radical right of property was in the party beneficially interested; and this was followed by a decree declaring the trust at an end, and ordaining the superior to grant charters with precepts, for infesting the party to whom the property had been adjudged. At the same time the Court declared that they would follow the like course in all time coming; and the precedent thus established has been accordingly followed since, and received as a rule of great practical utility in analogous cases. See Dalzell, 11th March 1756, *M.* 16,204; Drummond, 30th June 1758, *M.* 16,206; *Bell's Princ.* § 1995, and cases there cited.

**Adjunction;** is one of the modes of industrial accession borrowed from the Roman law. It takes place where the property of one man is added to that of another; as, for example, where a man builds on the ground of another. In such a case it is held that the proprietor of the grounds is entitled to the building; but, as the presumption is

that it was erected in the *bona fide* belief that the ground was the property of the builder, he is entitled in equity to be indemnified to the extent at least of the benefit which he has conferred. *Stair*, B. i. tit. 8, § 6; *Ersk.* B. ii. tit. 1, § 15. See *Accession*.

**Adjurnatus;** an obsolete French word, adopted in the older Scotch law, signifying summoned, or called to a certain day. See *Skene, De Verb. Sig.*

**Adjustment;** in the law of insurance, is the settling and ascertaining the exact amount of the indemnity to which, under the policy, the insured is entitled, after all proper allowances and deductions have been made; and fixing the proportions to be borne by the underwriters respectively. Before any adjustment is made, the underwriters require to be satisfied that a loss within the terms of the policy has occurred; and in the ordinary case the duty of making the requisite inquiries is devolved on the underwriter who has first subscribed the policy. In complicated cases of average loss the papers are usually submitted to a professional referee, to calculate and adjust the percentage rate of loss. After an adjustment has been once made and signed, it is not usual for the underwriters to require further proof, but at once to pay the loss. It is not, however, conclusive and binding on the underwriters; for where the extent of the loss is disputed, the adjustment operates merely as a transfer of the *onus probandi* from the insured to the underwriters. *Bell's Com.* i. 613, *et seq.*; *Princ.* § 503, *et seq.* See *Insurance*.

**Adminicle;** is a term used in the action of proving the tenor of a lost deed; and signifies any writing, draft, or scroll, tending to establish the existence or terms of the deed in question. *Stair*, B. iv. tit. 32, § 6; *Mr More's Notes*, p. cclxxvi.; *Ersk.* B. iv. tit. 1, § 55; *Bank.* ii. p. 642, § 3. See *Proving of Tenor*.

**Administrator-in-Law.** By the law of Scotland the father is what is called administrator-in-law for his children. As such, he is *ipso jure* their tutor while they are pupils, and their curator during their minority. The father's power extends over whatever estate may descend to his children, unless where that estate has been placed by the donor or grantor under the charge of special trustees or managers. This power in the father ceases by the child's discontinuing to reside with him, unless he continues to live at the father's expense; and, with regard to daughters, it ceases on their marriage, the husband being the legal curator of his wife. *Stair*, i. t. 5, § 12; *Bank.* vol. i. p. 153, § 2; *Bell's Princ.* § 2068; *Dow's Appeal Cases*, i. 107; ii. 204, 214.



**Administrator**; in English law, is the person to whom, in default of an executor nominate, the Ordinary commits the administration of the goods of a person dying intestate. The administrator is accountable for his intrusions when required. *Tomlinson, A. I.* See *Executor*.

**Admiral**. By the act 1681, c. 16, the act 1609, c. 15, was ratified, and the High Court of Admiralty declared to be a sovereign judicature in itself, and in its own nature to import summary jurisdiction. The act farther declared the High Admiral to be the King's Justice-General upon the seas, and in all ports, harbours, or creeks, and upon navigable rivers below the first bridges, or within flood-mark, and that he had the sole privilege and jurisdiction in all maritime and seafaring causes, foreign and domestic, whether civil or criminal, within the realm; and over all persons concerned in the same; and all other judges were prohibited from interfering with the decision of such causes in the first instance. The act also subjected the decrees and acts of all inferior courts of Admiralty to the review of the High Court of Admiralty; it gave power to the High Court of Admiralty to review its own decrees; prohibited advocations of its judgments; and prescribed the form in which they might be suspended. The Judge-Admiral required to have been an advocate, who, for three years immediately preceding his appointment, should have *bona fide* attended practice in the Court; 26 Geo. III., c. 47, § 5. See *next article*.

**Admiralty, Court of**. The jurisdiction and powers of the ancient Court of Admiralty in Scotland, were fixed by the statutes referred to in the preceding article. Its jurisdiction was both civil and criminal. In civil matters the Judge-Admiral was judge in the first instance in all maritime causes; as in questions on charter-parties, freights, salvages, wrecks, bottomries, policies of insurance, and all questions relating to the lading and unlading of ships, or to any act to be performed within the bounds of his jurisdiction; he had jurisdiction also in all actions for recovery of goods, or their value, when the goods had been sent by sea from one port to another. In criminal matters he had exclusive cognizance in the crimes of piracy and mutiny on ship-board; but in the case of murder, and in general in all cases where the crime did not offend against the laws of navigation, this jurisdiction was not exclusive, even although the crime had been committed on ship-board. The Admiralty jurisdiction in Scotland was ratified and confirmed by the statute 5 Anne, c. 7, § 19; regulated by the statute 1 and 2 Geo. IV., c.

39; and finally abolished by the statute 1 Will. IV., c. 69. By this last statute, § 21, the civil jurisdiction of the Admiralty Court was transferred to the Court of Session, except in cases not exceeding £25 in value, which are made competent in the first instance in an inferior court, in the manner directed, and with the exceptions specified, in the act 1672, c. 16; and all applications of a summary nature, connected with such causes, may now be made to the Lord Ordinary on the Bills. Maritime causes include all questions as to policies of insurance on ships, and on goods sent by sea, freights, salvages, wrecks, and bonds of bottomry; all contracts as to the lading and unlading of ships, and with seamen as to their wages or employment on ship-board; as to the delivery of goods sent by sea, or for recovery of their value; actions for payment of the repairs on ships, or for provisions furnished for the crew; claims of ships'-husbands for such repairs or furnishings; actions for the sale of ships; against brokers for delaying to effect insurances on ships, or goods therein; and sundry other actions of a seafaring nature, requiring knowledge of maritime laws and practice—some of which actions are now made specially appropriate for trial by jury. (See *Jury Trial*.) Formerly in maritime causes the defender was bound to find caution *de judicio sisti et judicatum solvi*; the pursuer was also bound, if required by the defender, to find caution for damages and expenses. But the statute 1 and 2 Vict., c. 119, § 22, provides, that in maritime causes or proceedings before the Sheriff Courts caution *judicatum solvi* or *de damnis et impensis* shall not be required from any party domiciled in Scotland, unless the judge shall require it on special grounds; and 13 and 14 Vic., c. 36, § 24, abolished the granting of bonds *de damnis et impensis* by the pursuer, and *de judicio sisti et judicatum solvi* by the defender, in maritime causes before the Court of Session. In maritime actions for sailors' wages, there is an exception to the common law rule as to the rights of unconnected parties to sue in the same summons, inasmuch as all the mariners of the vessel may sue in one action; and in such actions the master and owners are bound to produce the ship's articles. The criminal jurisdiction of the High Court of Admiralty is, by the same statute, merged in that of the Court of Justiciary and Sheriff-courts; 11 Geo. IV. and 1 Will. IV., c. 69, § 21, 22. A Circuit Court of Justiciary has jurisdiction to try a crime charged as committed on the seas within the jurisdiction of that circuit; *Bell's Supp. to Hume*, pp. 146, 147. By the Judicature Act, the jurisdiction in questions of prizes and captures, and in the condemna-

tion of vessels, at one time exercised by the High Court of Admiralty in Scotland, is entirely taken away, and vested exclusively in the High Court of Admiralty in England; (see 6 Geo. IV., c. 120, § 57.) The Court of Session summonses in admiralty or maritime causes are not different from ordinary summonses. Formerly, however, they were signed by a principal or depute clerk of Session, and did not pass the Signet. But by § 29 of 1 and 2 Vict., c. 118, it is declared that they may be raised and pass under the Signet, in like manner as other summonses before the Court of Session. Such actions are also exempted from the fee-fund of the Court of Session, and the other Court of Session exactions; and the agents conducting them are bound to charge according to the rate of charges in the High Court of Admiralty; 11 Geo. IV. and 1 Will. IV., c. 69, § 40; see also note at end of Schedule of Fees appended to 1 and 2 Vict., c. 118. In *Morrison*, 11th July 1837, 15 S. 1293, the question was raised, whether, under § 21 (see *supra*) and § 22 of 1 Will. IV., c. 69, a maritime debt under £25, contracted to a merchant in Leith by a party domiciled in England, could be sued for in the Court of Session upon an arrestment *juris fund. causâ*, or whether the action should not have been raised, in the first instance, before the Sheriff. The latter section of the statute enacts, that the Sheriffs shall, within their respective Sheriffdoms, hold and exercise original jurisdiction in all maritime causes and proceedings, civil and criminal, including such as may apply to persons residing furth of Scotland, of the same nature as that previously exercised by the High Court of Admiralty. To remove any doubts as to the meaning of this provision, it is enacted by 1 and 2 Vict., c. 119, § 21, that the act 1 Will. IV., c. 69, shall be construed and held to mean, that the powers and jurisdictions formerly competent to the High Court of Admiralty in Scotland, in all maritime causes civil and criminal, shall be competent to Sheriffs, provided the defender shall, upon any legal ground of jurisdiction, be amenable to the jurisdiction of the Sheriff before whom such cause may be tried; and provided also, that it shall not be competent to the Sheriff to try any crime committed on the seas, which it would not be competent for him to try if committed on land. See on the subject of this article, in so far as historically interesting, *Stair*, ii. tit. 2, § 5; and iv. tit. 1, § 37; *Ersk. i. tit. 3, § 33*; *Bank. vol. ii. p. 538, § 1, et seq.*; *Bell's Com. i. 497, et seq. 540, 596*; *Kames' Stat. Law, h. t.*, and *voce Jurisdiction*; *Swint. Abridg. h. t.*; *Brown's Synop. p. 1139*; *Shand's Prac. vol. i. p. 14, 413, et seq.*; *Macfarlane's Jury*

*Prac. p. 18*; *Smith's Maritime Prac. pp. 12, et seq.*; *Boyd's Admiralty Proceedings*; *Watson's Stat. Law, h. t.*; *Barclay's M'Glashan's Sheriff Court Prac. p. 60*. See also *Sett. Ship*.

**Admiralty Courts in England**; are courts having jurisdiction in maritime causes, whether civil or criminal. In England, the Court of Admiralty is held before the Lord High Admiral, or his deputy, who is called the Judge of the Court. When there was a Lord High Admiral, the Judge of the Admiralty usually held his place by patent from him; but, when the office is executed by commissioners, the Judge holds his place by direct commission from the Crown under the Great Seal. The Court of Admiralty is twofold: 1st, The *Instance Court*, which has civil jurisdiction generally in marine contracts, and other questions of maritime right, such as disputes amongst part-owners of vessels, and questions relating to salvage, collision of ships, and the like. In criminal matters, this court, partly by common law, and partly under several statutes, takes cognisance of piracy, and other offences on the sea, or on the coasts beyond the limits of any county; and concurrently with the common law courts, as to certain felonies committed in the main stream of great rivers below the bridges. 2dly, The *Prize Court*, which has exclusive jurisdiction in all matters, civil and criminal, relating to prize of war; i.e. all acquisitions made, whether at sea or on land, by a naval force.

The trial of offences committed within the Admiralty jurisdiction has been further regulated by 4 and 5 Will. IV., c. 36, and 7 and 8 Vict., c. 2. By the former statute the Judge of the Admiralty is made one of the Judges of the Central Criminal Court, and that court is authorized to try offences committed within the jurisdiction of the Admiralty; and by the latter any courts of assize, oyer and terminer, or gaol-delivery, may inquire of and determine such offences, without any special commission. The civil jurisdiction of the Admiralty Courts was greatly extended, and their practice improved, by the statute 3 and 4 Vict., c. 65, which effected almost an entire reconstruction of these courts. Additional regulations were made by 13 and 14 Vict., c. 26. An appeal lies in the last resort from the Admiralty Courts to the Judicial Committee of the Privy Council. See *Stephen's Commentaries*, iv. p. 20, 367; *Comyn's Dig., voce Admiralty*.

**Admission to a Church**; is an act of the presbytery of the bounds, admitting a minister to his church; or, as the law expresses it, collating him to his benefice. This act proceeds upon the presentation of the patron; or, should he delay to present beyond six months after a vacancy, the title to present belongs to the

presbytery, in virtue of the *ius devolutum* which they enjoy. See *Minister. Call.*

**Admissions.** In the practice of jury trial, the admissions in point of fact, made by the parties respectively, are subject to the following regulations: 1. The parties may, after the record has been completed, by mutual admissions put upon record and subscribed by counsel, render any trial of facts unnecessary, leaving the law for the court; 6 Geo. IV., c. 120, § 33. 2. The admissions prefixed to the issues are useful in narrowing and simplifying the questions for trial; but, although the Court expressed an opinion that this practice was expedient, they did not absolutely decide in the case in which the question was raised, that a party could be compelled to allow the facts admitted by him on the record to be set down as prefatory admissions to the issues; *Macfarlane's Jury Prac.* 71. In practice, however, prefixed admissions are never inserted except with consent of both parties; *Macfarlane's Notes on Issues*, p. 23. 3. When parties are disposed to make admissions in regard to matters of fact, or to admit the authenticity of writings, a note of the admissions is made in writing, signed by the counsel or agent, and lodged in process. Such admissions are certified by the clerk, and may be used and read in evidence at the trial, if otherwise competent. This is usually matter of arrangement before the trial; and, in practice, is very useful, by saving the expense and trouble of aducing witnesses to prove facts, as to which there can be no serious doubt; *A.S.* 16th Feb. 1841, § 22; *Macfarlane*, p. 86. And 4. The judicial admissions of a party, made in the closed record, may be put in, and founded on as conclusive evidence at the trial; although loose argumentative pleadings are in this respect viewed differently, and are not held admissible as conclusive evidence of fact. Where admissions have been retracted, or merely dropped out, in making up the record, they are not conclusive; but the fact of their having once been made is an element of proof in the case, to be taken into consideration along with the other facts; *Bathgate*, 7th March 1840, 2 D. 811; *Lowe*, 24th June 1843, 5 D. 1261. Equally conclusive with an express admission upon record is an implied admission, as where the averment of a fact falling within a party's knowledge has not been denied by him. *Macfarlane*, p. 213; *Stair*, B. iv. tit. 45, § 6; *Shaw's Digest*, p. 1064; vol. iii. p. 370; *Shand's Prac.* p. 288; *Dickson on Evidence*, p. 701; *M'Glashan's Sheriff Court Prac.* p. 227.

**Adoption.** By the Roman law, one who had no children of his own might adopt the child or children of another, whether related to him or not. The ceremony by which this

was accomplished was called *adoption*; and its legal effect was, that the adopted child, after having been emancipated, or taken from under the *patria potestas* of his natural father, was received under the *patria potestas* of the adopter. When the adopted person was already under the *patria potestas*, it was proper adoption. If he was *sui juris*, it was termed *arrogation*; but adoption, as a generic term, applies to both. The adopted son possessed the same right of succession to his adopter, which a child born in wedlock would have enjoyed. Adoption is not recognised in the law of Scotland, although, where one wishes to confer on another the patrimonial advantages of inheritance, he may attain his object by conveying his property, whether heritable or moveable, to the party favoured; and that, either *mortis causa*, or by a deed *inter vivos*, reserving his own liferent; and subject, of course, to the legal rights of the grantor's heirs-at-law, which are to a certain extent inalienable. *Stair*, iii. tit. 4, § 34; *Bank*. vol. i. p. 19, § 42. See also *Deathbed. Legitim. Patria Potestas. Emancipation.*

**Adpromissors, or Cautioners.** In the Roman law, the cautionary engagement was undertaken by a separate act from that by which the principal obligant was taken bound; he was therefore termed adpromissor. *Ersk. B.* iii. tit. 3, § 61; *Bell's Princ.* 3d edit. § 240.

**Ad Quod Damnum;** in English law, is a writ directed to the Sheriff, to inquire whether a grant intended to be made by the King will be to his damage or that of others. It ought to be issued before the King grants certain liberties, as a fair, market, &c. *Tomlins' Dict. h. t.*

**Adscripti, vel Adscriptitii Glebæ,** among the Romans; were a kind of slaves perpetually attached to, and transferred along with the land which they cultivated. Their situation was very similar to that of the workmen employed in collieries and salt-works in Scotland, before the passing of the stat. 15 Geo. III. c. 28. *Ivory's Ersk.* p. 208; *Stair*, i. 2, 11. See *Colliers and Salters.*

**Adultery;** is the sin of incontinence in a married person. The older law of Scotland made a distinction between simple and notour adultery; *notour* being where issue is procreated between the adulterers; or where they live openly together at bed and board; or where they give scandal to the church, and have been excommunicated—*simple*, being the act unaccompanied by any of those aggravations. By 1551, c. 20, notour adultery is punishable by escheat of moveables; and by 1563, c. 74, it is made a capital offence. Both of these statutes are now in desuetude, although the records of the Court of Justiciary show that capital punishment was, in former times,

frequently inflicted for this crime. The punishment of simple adultery was, in those times, arbitrary. Now, the offence is not prosecuted as a crime, but may be the ground of an action of divorce, and also of a civil action of damages, although that species of reparation for this injury seems to have been unknown in the law of Scotland, until a comparatively recent period. By 1600, c. 20, a marriage between a person divorced on the ground of adultery, and the person with whom the adultery is judicially declared to have been committed, is declared null and unlawful, and the issue of such marriage incapacitated to succeed to their parents. But this statute appears to be also now in desuetude, and, except in one instance, was never enforced. It has been maintained, however, that this statute is not in desuetude; *Fraser's Domestic Relations*, i. p. 84. See on the subject of this article, *Stair*, B. i. tit. 4, §§ 7 and 18; *More's Notes*, pp. xxvii. xxxix.; *Bank*. vol. i. p. 132, *et seq.*; *Ersk. B. i. tit. 6*, § 43; *Hume*, i. 449, *et seq.*; *Bell's Prin.* §§ 1526, 1531, 1621; *Watson's Statute Law*, h. t.; *Brown's Synop. h. t.* and p. 2132; *Shaw's Digest*, pp. 588, 1170, and vol. iii. p. 214; *Kames' Equity* (1825), 312. See *Divorce*.

**Advent**; a time embracing about four weeks preceding Christmas, or the nativity of our Saviour. It begins on the Sunday falling on St Andrew's day (30th November), or next to it. In former times, this was held as a season of great sanctity, and many secular duties were laid aside. It was also one of the periods during which, in England, the solemnization of marriage, except by special license, was prohibited. *Tomlin's, h. t.*

**Adventure**. See *Joint Adventure*.

**Advertisement**; generally applied to a notice published in the newspapers, or by handbills or placards. Advertisements may have important legal effects in many different ways; either as notifying the terms on which parties are willing to treat; or describing the subject of sale, location, &c.; or, as of the nature of offers to be completed by acceptance on the part of those who choose to avail themselves of the terms. Public notifications of this kind are also necessary under various statutes, as preliminary to the exercise of statutory rights, or as qualifications for statutory privileges or immunities; e. g. under road and bridge acts, the bankrupt statutes, and many others. In the case of public carriers, advertisements are distinctly of the nature of offers, which will bind the carrier to those who send goods, in terms of the advertisement. In like manner, an advertisement of a *general ship* for a particular voyage places the master on the footing of a public carrier, ready to receive goods for the port to which the vessel is advertised

to sail. Such an advertisement entitles a merchant to bring his goods to the vessel, and to insist on their being received, unless the ship be already full, or the entire freight engaged. In this case also, the advertisement, and the shipping of the goods in reference thereto, completes the contract of affreightment between the owners and the shippers. *Bell's Com.* i. p. 541, 5th edit. See *Charter Party. Carrier. Private Bill*.

**Ad Vitam aut Culpam**. An office is said to be held *ad vitam aut culpam*, when the tenure of the possessor is determinable only by his death or delinquency; or, in other words, which is held *quamdium se bene gesserit*. See 28 Geo. II., c. 7, on *Scotch Jurisdiction*.

**Advocate**; the patron of a cause, who assists his client with advice, and who pleads for him. In Scotland, the barristers practising before the Supreme Court are called Advocates; and the same description is taken by the procurators or solicitors before the inferior courts in Aberdeen. The Faculty or Society of Advocates in Edinburgh is coeval with the institution of the College of Justice (A.D. 1532); and the profession of an advocate was known much earlier, provision being made, in the stat. 1424, c. 45, for securing the assistance of advocates for the poor. At the institution of the College of Justice the number of advocates was limited to ten; but there is now no limit; the number on the rolls of the Faculty being about 425, although the number of practising lawyers does not exceed 120. Before being admitted a member of the Faculty, it is necessary to undergo certain probationary trials. With that view the applicant for admission presents a petition to the Court, stating his wish to become an advocate, and intimating his readiness to undergo a trial of his skill. This application is remitted by the Court to the Dean of the Faculty, who disposes thereof by remitting the applicant to the private examiners, being six members of Faculty, nominated by him to discharge that duty, to make trial of his fitness. The candidate, having produced evidence that he is 20 years of age, and that he has paid the usual fees, is taken on trial, and examined, in the first place, upon *general scholarship*. This examination is conducted by three or more persons of learning, as assessors to the examiners, who report upon the candidate's qualifications. The subjects of examination are—1. Latin; 2. Greek, or (in the intransit's option) any two of the following languages, viz., French, German, Italian, Spanish; 3. Ethical and Metaphysical Philosophy; 4. Logic, or (in the intransit's option) Mathematics.—A list of the books on which the examination is made, is published by the examiners. Every intransit, however, is, without examina-

tion, deemed duly qualified in general scholarship, if he produce evidence that he is a Master of Arts of any of the Scottish universities, or a Bachelor of Arts or of Civil Law of Oxford, or a Bachelor of Arts of Cambridge, Dublin, or Durham, or a Master of Arts of the University of London, or of the Queen's University of Ireland, or a Bachelor of Laws of the University of London, or that he has attained such degree of a foreign university, as, in the opinion of the Dean and his council, affords evidence of the same amount of scholarship as that afforded by the degree of Master of Arts of a Scottish university. If the intrant has been found qualified in general scholarship, it is competent for him, after the expiry of a year, to go in for his private examination on law. The examiners, however, cannot take him on trial if, during the year before such examination, he have been engaged (without the sanction of the Dean and his council) in any trade, business, or profession, either on his own account, or as assistant to, or in the employment of, another. It is also a necessary preliminary to this examination that the intrant produce evidence of—1. Attendance during at least one session at a class of Civil Law in a Scottish or other university; 2. Attendance in a different year, and during at least one session, at a class of Scots Law in a Scottish university; 3. Attendance during either of these two years, or during another year, at the class of Conveyancing in a Scottish university; or a second session's attendance at a class of Civil Law, or the class of Scots Law; 4. Attendance at any time on a course of lectures on Medical Jurisprudence. In conducting the law examination the examiners are assisted by one or more of the Law Professors of the University of Edinburgh. The examination is upon the Institutes of Justinian, with such commentary as has been appointed by the examiners for this purpose; and upon the title of the Pandects, *De diversis regulis juris antiqui*, also with a commentary. If the Civil Law trials are approved of, the intrant is forthwith examined in the Law of Scotland upon such books as have been previously fixed and announced by the examiners. The private examinations may take place in vacation. On receiving the certificates of the private examiners, the Dean assigns a title of the Pandects to the intrant for the subject of his thesis, which he is appointed to lodge on a particular day, the Saturday following that day being named for the diet of his public examination. The thesis, if approved of, receives the *Impugnatur* of two of the examiners, and is, thereafter, publicly defended by the intrant before the Faculty. If the defence be satisfactory, the question of the in-

trant's admission is decided by the Faculty, voting by ballot. The Dean then reports him qualified, and the Court admits him to the privileges, on his taking the usual oaths.

An advocate thus admitted is entitled to plead in every court in Scotland, civil, ecclesiastical, or criminal, superior or inferior, unless when debarred by special statute (as in the small-debt acts); and also before the House of Lords. Advocates are answerable for their official conduct to the Court of Session. Though a party may manage his own cause in the Court of Session, so far as oral pleading is concerned, yet every paper in process must be signed by an advocate, *A. S. 5th March 1789*. There is an exception, however, to this rule in the case of defences; *Davidson*, 29th June 1848, 10 *D.* 1457, and 11 *D.* 703. The mere appearance of an advocate in Court presumes a mandate, where the party is within Scotland. An advocate is entitled, without special mandate, to refer the matter in dispute to oath; to submit the case to a referee, 11 *S.* 548; to throw up the case at the trial, even against his client's wish; 9 *D.* 308. See also 12 *S.* 401; and *Cowan*, 4th March 1836, 14 *S.* 634, as to the presumption of mandate employed in the appearance of counsel. A party represented by counsel is liable for expenses, though he never authorized the suit; but he has relief against those who used his name without authority; *Thomson*, 25th May 1855, 17 *D.* 774.

The library of the Faculty of Advocates, founded in the year 1682 by Sir George Mackenzie, is the most valuable library in Scotland, consisting of about 160,000 volumes, besides manuscripts. It is one of the libraries entitled to a copy of every published book, 5 & 6 *Vict.*, c. 45, § 8. There is also a statutory widows' fund belonging to this body. The Supreme Judges in Scotland are now invariably selected from the Faculty, as well as the Sheriffs-Depute of the several counties. The fees of admission, stamp for commission, &c., amount to about £336. The Faculty of Advocates has been, from time immemorial, considered as an incorporation, although no charter of incorporation now exists. The Faculty of Advocates are also members of the College of Justice, and as such entitled to its privileges. See as to the probationary trials of advocates, *A. S. 28th Feb. 1750*, and the regulations of 9th *Dec.* 1854; see also *Ivory's Form of Process*, vol. i. p. 58, *et seq.*; *Beveridge's Form of Process*, vol. i. p. 38, *et seq.*; *Shand's Practice*, vol. i. p. 73, *et seq.*; *Stair*, B. i. tit. 12, § 12, and iv. 43, 9; *More's Notes*, p. cxxvi. ccccxv. and cccclxxiii; *Ersk.* B. iii. tit. 3, § 33, and note by *Ivory*, B. iv. tit. 2, § 25; *Bank.* vol. ii. p. 484, § 1, *et seq.*; *Kames' Stat. Law abridg. h. t.*; *Brown's*

*Synop. h. t. and pp. 576, 867, 947; Shaw's Digest, h. t.; Watson's Statute Law, h. t. See Honorarium. Mandate. College of Justice. Confidentiality.*

**Advocates' First Clerks.** The members of the Faculty of Advocates had formerly the privilege of nominating their first clerks to act as agents of Court. This privilege was abolished by A. S. 4th December 1850. See *Solicitors before the Supreme Court.*

**Advocate, Lord, or King's (Queen's) Advocate.** The Lord Advocate is the principal Crown lawyer in Scotland, and one of the great Officers of State of Scotland. Prior to the Union he sat in Parliament *ex officio*, without election. He is appointed by the Crown, and his duty is to act as public prosecutor, and to plead in all causes in which the Crown is interested, particularly in criminal cases. Originally it would seem that the Lord Advocate had no power to institute criminal proceedings, except at the instance of the injured party; but for the last three hundred years the Lord Advocate has been vested with a discretionary power in the prosecution for crimes, so far as regards the public interest. At the same time, when a private party has been injured, and when the Lord Advocate declines to prosecute, the private party, with the Lord Advocate's concurrence (which is essential and is granted as a matter of course), may prosecute, not only for reparation of the individual injury, but *ad vindictam publicam*. The Lord Advocate's powers are very extensive. He may issue warrants for arrestment and imprisonment in any part of Scotland; and he possesses other powers, which are purely discretionary, and not very well defined. In the law courts, he is entitled to plead within the bar, and, if so inclined, to plead with his hat on; although that is an exhibition now in desuetude. The Lord Advocate and the Solicitor-General are the only members of the Scotch bar who have seats within the bar, and the distinction of silk gowns; and both of these officers, in addition to their official duties, accept of ordinary bar practice. In the discharge of his duties as public prosecutor the Lord Advocate has the aid of the Solicitor-General, and of four junior barristers appointed by the Lord Advocate, and called Advocates-Depute. Since the Union the Lord Advocate has usually been returned to Parliament, generally by one of the Scotch constituencies; and in Parliament, as first law officer of the Crown for Scotland, he is presumed to be able to answer inquiries concerning Scotch matters, and expected to take the superintendance of the legislation for that portion of the kingdom. The Lord Advocate cannot be constrained to pursue. He is master of his instance also to this effect, that, after he has

brought his libel into Court, he may pass from, or restrict, the charge, or restrict the pains to an arbitrary punishment even after a verdict has been returned. He cannot, like a private prosecutor, be called upon to find caution for insisting in the prosecution, or to give the oath of calumny. In the case of a verdict of acquittal, costs cannot be awarded against him, as they may against a procurator fiscal who has been guilty of gross irregularity; see *Prontice v. Newbigging*, 19th June 1843, 1 *Broun*, 561. Prosecutions at the instance of the Lord Advocate do not fall by his death or removal from office. *Ersk. B. iv. tit. 4, § 2; Hume, i. 9, ii. 118; and Bell's Notes, 164, 134; Kames' Stat. Law, voce King's Advocate.* See *Concourse. Criminal Prosecution. Commitment for Trial. Bail.*

**Advocates-Depute** are four advocates appointed by the Lord Advocate to aid him in the discharge of his duties as public prosecutor. Their duty is to consider precognitions sent to them by the Crown agent; to determine whether there is sufficient matter for an indictment; and if so, to prepare the indictment or criminal letters. The advocates-depute attend and assist, generally as juniors, at trials before the High Court of Justiciary at Edinburgh; the Lord Advocate, or the Solicitor-General, leading. One of the depute advocates attends as sole public prosecutor at each of the circuits of the Court of Justiciary; and at these circuits the depute exercises all the discretionary powers of the Lord Advocate as to bringing on the trial, abandoning or restricting the libel, and so forth. It is generally understood that the senior depute advocate attends to the trials before the High Court, and that the other three attend at the Circuit Courts of Justiciary. There is an advocate-depute also for conducting prosecutions of importance before the Sheriff Courts; and, since two separate court-rooms have been authorized at the Glasgow Circuit (11 and 12 *Vict.*, c. 79), he has officiated as supernumerary-depute in one of these courts. The salary of each of the four depute advocates is about £500 per annum. This appointment is not incompatible with ordinary bar practice. See *Criminal Prosecution. Circuit. Advocate, Lord.*

**Advocation** is a form of process, the object of which is to remove a cause from an inferior to the Supreme Court, in order that a judgment pronounced in the inferior court may be reviewed, or that the future procedure in the cause may be conducted in the Court of Session. Before the statute of 1838, all advocations originated by presenting in the Bill-Chamber a bill of advocation, which, on being passed, became the warrant for letters of advocation. Now, advocations, with the

exception of those of final judgments and of petitions for service, still originate in the Bill-Chamber; but letters of advocation are abolished, and written notes of advocation, prepared in terms of 1 and 2 Vict., c. 86, and relative *A. S. 24th Dec. 1838*, have come in place of the former bills and letters.

*Advocation of final judgments.*—A “final judgment” is one whereby the whole merits of the cause are disposed of, although no decision or decerniture has been pronounced as to expenses; *A. S. 11th July 1827*, § 1; 16 and 17 Vict., c. 80, § 24. But a mere finding that damages are due, or laying the foundation for a final decree, or ascertaining certain principles without applying them, is not enough; *Cameron*, 29th June 1837; 15 S. 1220. If a judgment is extractable, it is competent to advocate; but the whole merits of the cause, as against all the parties called, must be exhausted, whatever be the grounds upon which the final judgment may have proceeded; and if the action has been conjoined with another which is not exhausted, the conjoined action must be either exhausted also, or disjoined, before advocation is competent. Moreover, it must appear *ex facie* of the interlocutor, that the conclusions of the summons have been exhausted, and that no conclusion has been left undisposed of; so, where there are several conclusions, and decree has been pronounced relative to some of them, there must be absolviter or other judgment pronounced as to the rest, before the advocation be presented. See *Shand's Prac.*, i. 453; *Barclay's Sher. Court Prac.*, 449. See also *Macfie*, 15th June 1850, 12 D. 1033, in which the judgment of a sheriff was held to be, as to one matter, final and capable of being advocated, and interlocutory as to another matter.

A party about to advocate must intimate his intention in writing to the clerk of the inferior court, and lodge, at the same time, a bond of caution for the expenses already incurred, and which may be incurred, in the Court of Session. Where a party is unable to find a sufficient cautioner, he may advocate on juratory caution. (See *Juratory Caution.*) Intimation must be made, and caution found, before extract; and fifteen days in the ordinary case, and thirty days in causes before the courts of Orkney and Shetland, are allowed, after final judgment, for presenting a note of advocation. Extract is incompetent after such intimation, until the lapse of these periods. Thereafter, extract may be given out, unless a sist, or a note of advocation, has been intimated, advocation being competent at any time before decree has actually been extracted, on caution being found in common form; *A. S. 10th July 1839*, §§ 114, 119. The

first section of 1 and 2 Vict., c. 86, enacts, that final judgments of inferior courts may be brought under review of the Court of Session by lodging a written note of advocation with one of the depute-clerks of session, or his assistant. The note must be signed by an agent in the Court of Session, and have prefixed the interlocutors complained of, and judge's notes, and it must set forth in a prayer the remedy craved. Forms of notes of advocation are subjoined to the *A. S. 24th Dec. 1838*, which also contains minute regulations for carrying out the enactments of the statute. The note is received and marked by the clerk, on caution being certified by the clerk of the inferior court to have been found. Certified notice of the receipt of the note being transmitted to the clerk of the inferior court puts a stop to all further proceedings in the original cause, and the process must be forthwith transmitted to the Court of Session. The regulations as to the transmission of the process from the inferior to the Supreme Courts are contained in *A. S. 17th January 1797*. When advocations are called, the inferior court process must be produced along with the note. The note of advocation and certified notice must be intimated to the opposite party, and within fifteen days after the date of such intimation it is competent to call, and thereafter to enrol, the cause; 1 and 2 Vict., c. 86, § 1; *A. S. 24th Dec. 1838*, § 11; *A. S. 10th July 1839*, §§ 127, 128.

As a general rule, advocation is competent unless it be debarred either by statute or by confirmed practice. It is not competent (1.) in actions for payment of ministers' stipend, or the rents of their benefices; 1695, c. 27; or (2.) in actions founded on the statutes against profanity and immorality; 1696, c. 31. (3.) By 16 and 17 Vict., c. 80, § 22, it is incompetent to advocate, or bring under review in any other manner of way, any cause not exceeding the value of £25. Formerly, this prohibition was directed against the advocation of actions for sums under £12 only. Where the sum originally concluded for is under £25, but the amount of that sum with the interest accruing during the litigation exceeds £25 at the date of the judgment sought to be advocated, advocation is competent; *Mitchell*, 10th March 1855, 17 D. 682. The expenses, however, decerned for in the inferior court do not enter into consideration in estimating the value of the cause, of which they do not, in any correct sense, form part of the subject-matter; *Hopkirk*, 21st Dec. 1855, 18 D. 300. If the libel in the inferior court concludes for more than £25, advocation is competent, though decree has been pronounced for a less sum. It is

also competent, where the value of the subject in dispute is uncertain, *e.g.*, where it is a moveable, or where a right or principle is involved. (4.) The judgment of an inferior court ordaining a tenant to remove cannot be advocated, suspension being the remedy; 6 Geo. IV., c. 120, § 44; although, where the tenant has been assized from the removing, advocacy is competent; *Beveridge on Bill-Chamber*, 57. The judgments and orders pronounced by sheriffs in summary removing, brought in terms of 1 and 2 Vict., c. 119, are also final, and not subject to appeal or advocacy. (5.) Advocacy is made incompetent in a variety of actions limited to particular courts by express statute, *e.g.*, the small debt acts, road acts, &c. (6.) Under the former poor-law, the mode of bringing the determinations of kirk-sessions under review of the Court of Session was by advocacy. But, by 8 and 9 Vict., c. 83, § 74, any poor person who receives a certificate from the board of supervision to the effect that he has just ground of complaint that his allowance is inadequate, is entitled to sue his parish or combination in the Court of Session *in forma pauperis*. (7.) Advocations of interlocutory judgments were, until lately, regulated by 50 Geo. III., c. 112, before which it had been competent to present bills of advocacy at any stage of an inferior court process. By that statute, bills of advocacy could not be competently presented against interlocutory judgments, except on the grounds, 1st, of incompetency, including defect of jurisdiction, personal objection to the judge, and privilege of party; 2d, of contingency; and, 3d, of legal objection with respect to the mode of proof, or with respect to some change of possession, or to an *interim* decree for partial payment, provided that, in the cases specified under the third head, leave was given by the inferior judge; §§ 36, 37. Bills or notes of advocacy under the first and second heads were passed without caution; in those under the third head caution was required. Advocations of interlocutory judgments are now regulated by 16 and 17 Vict., c. 80.

#### *Advocation of Interlocutory Judgments.*—

The last-mentioned statute enacts, in § 24, that it shall be incompetent to take to review any interlocutor, judgment, or decree of a sheriff, not being an interlocutor sisting process, or giving *interim* decree for payment of money, or disposing of the whole merits of the cause. The former statute, 50 Geo. III., c. 112, is repealed in so far as inconsistent with the latter enactment. This statute does not, however, strike at advocations under § 40 of the Judicature Act (see *infra*), or at those under 50 Geo. III., in which the object of the advocacy is, not the review of a

*judgment*, but the general removal of the cause, *e.g.*, on the ground of contingency; *Harrington*, 20th Jan. 1854, 16 D. 368. The same section of the statute (§ 24) provides, that, when any interlocutor is brought under review of the Court of Session, it is competent for that court also to review all the previous interlocutors pronounced in the cause.

An advocacy of an interlocutory judgment is brought by lodging in the Bill-Chamber a written note of advocacy, with an articulate statement of the reasons of advocacy, and a note of pleas in law, annexed. On caution being certified to have been found in the inferior court, the note is received and marked by the Bill-Chamber clerk, and forthwith laid before the Lord Ordinary on the Bills, who pronounces the requisite order. If answers are ordered, they must be in similar form to the reasons of advocacy. If the note is passed, the cause may, after the expiry of fifteen days from the passing of the note, be called and thereafter enrolled; *A. S. 24th Dec. 1838*, § 13. The interlocutor of the Lord Ordinary passing or refusing the note is final; 6 Geo. IV., c. 120, § 45. If the procedure, however, have been irregular, the interlocutor may be brought under review; *Walker*, 5th July 1832, 10 S. 766. The presentment of the note in the Bill-Chamber must be certified in manner prescribed in *A. S. 24th Dec. 1838*, § 1. When the note is passed *de plano*, or without answers, intimation of the interlocutor passing it must be made both to the clerk of the inferior court and to the opposite party or his agent, and a certificate thereof returned to the Bill-Chamber, before the cause is transmitted to the Court of Session; *ib.* § 2. The caution for expenses in advocations of interlocutory judgments was formerly found in the Bill-Chamber; but now, in all advocations, whether of final or interlocutory judgments, it must be found in the inferior court; *ibid.* When the cautioner has become bankrupt during the dependence of the process, new caution cannot, as a matter of right, be insisted for; *Brown*, 14th July 1849; 21 *Jurist*, 539.

*Advocation with a view to Jury trial.*—In all cases originating in an inferior court, where the claim exceeds £40, as soon as an interlocutor or order has been pronounced allowing a proof, (unless where it is to lie *in retentis*, or is a mere diligence for the recovery of writings), either party, who may conceive that the case ought to be tried by jury, may remove the process into the Court of Session by note of advocacy, which is passed at once without discussion and without caution. If the parties, however, proceed to proof in the inferior court, they are



held to have waived their right of appeal to the House of Lords against any judgment of the Court of Session finding or declaring the several facts established by the proof; 6 Geo. IV., c. 120, § 40. Where the proof is taken in the inferior court, the Court of Session must, in reviewing the decision, and whether affirming or reversing it, specify distinctly in their judgment the facts material to the cause which they mean to decide, such judgment, in so far as relates to the facts, having the effect of the special verdict of a jury conclusively fixing the facts so specified; *ib.*; and see 17 D. 63, 6 *Bell's Appeals*, 394. The Court, however, notwithstanding the proof has been taken in the inferior court, have the power to send the case to a jury, either for the determination of the whole cause or of certain facts which they may consider not to have been satisfactorily proved; or they may remit the case with instructions back to the court below.

The note of advocation of an interlocutory judgment ordering a proof, where the claim exceeds £40, is similar to that in the case of a final judgment, although no caution is required. It contains no statement, and refers simply to the section of the statute; *A. S.* 11th July 1828, § 6; see form in schedule 2 to *A. S.*, 24th Dec. 1838. But it must pass through the Bill-Chamber; *Corry*, 12th July, 1842, 4 D. 1514, the provision in § 10 of *A. S.*, 1838, ordering the procedure in this class of cases to be the same as in advocations of final judgments, not being sufficient to dispense with the statutory direction of the Judicature Act. If the claim is not simply pecuniary, so as to show that it is in value above £40, the party wishing to advocate must apply by petition (duly intimated to the opposite party) to the inferior judge for leave, and, if required by the judge, he must make a solemn judicial declaration that the claim is of the true value of £40 and upwards; and leave being granted and proved by a certificate to that effect from the clerk of Court, the note of advocation may be presented; *A. S.* 11th July 1828, § 5. After the date of the interlocutor allowing a proof, neither party can proceed to proof before the expiry of fifteen free days (thirty for Orkney and Shetland), in order to give time for an advocation; but, unless the passing of the note be intimated within said periods, the proof will proceed, and advocation become incompetent. Of consent it may be taken without any delay; *A. S.* 10th July 1839, § 126.

An order upon a party to undergo a judicial examination is not a proof within the meaning of the statute; *Turner*, 11th Feb. 1823, 4 S. 419. So also, an interlocutor

before answer, allowing a proof *scripto vel juramento*, has not been held sufficient to warrant an advocation under this section, the Court holding that the proof contemplated by the statute was a proof at large, or *prout de jure*; *Hamilton*, 10th June 1837, 15 S. 1105. On the other hand, where such an advocation has been competently brought, the Court have not held it imperative upon them to remit the case to a jury; *Sands*, 20th Jan. 1829, 7 S. 290; *Baird*, 9th June 1830, 8 S. 893. In the latter case, it was laid down from the Bench, that the Court might, if they saw cause, allow a proof without a jury, but that, unless they named the sheriff as a commissioner to lead the proof, they could not remit to him. Where, in a case before a Dean of Guild Court, a remit had been made to tradesmen, and was followed by their report and judicial examination, and subsequently a proof at large had been allowed, advocation under § 40 of the statute was held incompetent, on the ground that a party, after allowing a fraction of proof to be taken, is not entitled to come forward and insist for a jury trial; *Tulloch*, 10th March 1838, 16 S. 983. See *Macfarlane's Jury Practice*, pp. 20, 35.

By the Service of Heirs Act, 10 and 11 Vict., c. 47, § 17, it is made competent, in cases in which there are competing petitions conjoined, or in which any person has appeared to oppose a petition, for any of the parties, at any time before the proof is begun to be taken, to present a note of advocation, praying the Court to advocate the proceedings, in order that the case may be tried by jury. This note is to be proceeded with in like manner as notes of advocation under § 40 of the Judicature Act. If it appear proper that the case be tried by jury, the proceedings are to be in the usual form. A record may be ordered to be made up in the Court of Session, at least where there has been no closed record in the Sheriff Court; *Livingstone*, 25th Nov. 1853, 16 D. 104. Where a verdict has been found in favour of a petitioner, the Court must, at the same time with applying such verdict, remit to the Sheriff with instructions to pronounce decree of service.

*Advocation of Brieves and Petitions for Service of Heirs.*—All questions originating in brieves for services must be brought in the first instance before the inferior judge, to whom the brieve is directed. Where any difficulty occurred, or injustice had been done, in the course of the proceedings, it was, under the old practice, by an advocation of brieves to the macers that the remedy was sought. In the service of an heir, in certain cases, the Lord Ordinary on the Bills was in use also to

authorize commission to be granted to the macers in the first instance, and the briefs to be directed to them as sheriffs in that part. This was also sometimes done in briefs of cognition; *Beveridge on Bill-Chamber*, 59. By 1 & 2 Geo. IV., c. 38, the mace's jurisdiction was abolished; and such special commissions were subsequently granted, and briefs issued, to the Sheriff of Edinburgh. That act provided, that in all cases of competition of briefs, or where a party claimed right to oppose a service, either party might apply for and obtain advocacy of the briefs to the Court of Session, either from an inferior judge, or from the Sheriff of Edinburgh acting under special commission. The provisions of 50 Geo. III., c. 112 (see *supra*), have been held not to apply to these advocations, a brief being competently advocated before any procedure under it. By 1 & 2 Vict., c. 86, § 2, it was enacted, that, in competitions of briefs, as well as where a party claiming right to appear and oppose a service had made appearance, it should be lawful to any party to remove the cause to the Court of Session by written note of advocacy, to be laid before a Lord Ordinary named therein, who should advocate the brief, and be judge in the service. By 10 and 11 Vict., c. 47, the old mode of procedure in the service of heirs was entirely altered. That statute abolished the use of briefs in such cases, instituting in their stead the petition for service, directed either to a new officer, called the Sheriff of Chancery, or to the Sheriff of the county within which the deceased had his domicile, or the lands are situated. It enacts in § 18, that, where the Sheriff has refused to serve a petitioner, or dismissed his petition, or repelled the objection of an opposing party, it shall be lawful to bring the judgment under review by note of advocacy. It must be presented fifteen, or, in the case of Orkney and Shetland, thirty, days from the date of the judgment; and if the judgment was pronounced after opposition duly entered, or in competition, the note must be intimated to the opposite party, and a bond of caution lodged with the Sheriff Clerk; *ibid.* The procedure is the same as in advocations of final judgments. The Court may order additional evidence, or remit to the Sheriff to take it, or appoint the case to be tried by jury. When the petitioner succeeds in his advocacy, the Court is required to remit back to the Sheriff to pronounce a decree of service. Where no appearance has been made before the Sheriff, a decree of service can only be challenged by reduction; *ibid.* See *Jurid. Styles*, i. 298. See also *supra*, *Advocation with a view to Jury Trial, in fine*; *Shand's Prac.* 480; *Barclay's Sheriff Court Practice*,

461; *Ersk.* vii. tit. 8, § 60, *et seq.*; *More's Notes on Stair*, cccclxxvi.

All notes of advocations not specially provided for in 1 and 2 Vict., c. 86, must be presented in the Bill-Chamber, and have a statement of facts annexed. The procedure therein, after passing the note, is the same as in advocations of interlocutory judgments; § 6.

*As to the procedure in Advocations after calling and enrolment in the weekly printed roll.*—In advocacy of final judgments, where the record has been made up in the inferior court, and is not objected to, it is held to be in point of fact the record in the Court of Session, and as such, along with additional pleas in law, which it is competent for the parties to lodge, is declared to be closed. If it be alleged that the record has been improperly completed in the court below, this must be distinctly pleaded, and the Lord Ordinary may order a new record to be made up; see *A. S.* 11th July 1828, §§ 25, 49. After the record has been closed, the Lord Ordinary, if it appear that it has been improperly made up in the inferior court, may open it up, and order a new record, or remit to the inferior judge, with instructions to that effect; *ibid.*, § 52. In advocations other than those of final judgments, the reasons of advocacy and answers are ordered to be revised, if the advocator is not ready to close, or condescendence and answers may be ordered, and the cause thereafter proceeds as in ordinary actions, in terms of the provisions of the Court of Session Act, 1 and 2 Vict., c. 86, §§ 3, 4, 6; 13 and 14 Vict., c. 36, § 9. Such is the earlier and the general mode of procedure; but, by recent enactments, advocations may, after enrolment, take a different course:—(1.) In an advocacy where the record has been closed and proof led in the inferior court, the Lord Ordinary before whom it is enrolled may, at the first calling, if moved to that effect, report the case to the Inner House, 13 and 14 Vict., c. 36, § 32. An oath on reference is not "a proof" within the meaning of this section; *Siday*, 28th January 1851, 13 D. 543. If the case be not so removed, the advocacy must run its course before the Lord Ordinary, his decision being reviewable in the Inner House. The same statute gives in all advocations, except in the case of counter conjoined processes, or of competitions, or advocations of briefs, to the pursuer or petitioner in the inferior court the privilege of fixing the Lord Ordinary and Division of the Court to whom the process shall belong. This must be done not later than the twelfth day from the date of the intimation of the note, and notice of its receipt by a clerk of the Court

of Session, to the respondent, or not later than the twelfth day from the date of the passing of the note, § 33. (2.) The privilege conferred upon advocations after concluded proof has been extended to all advocations, so that either party may, at the first calling, move for the removal of the case to the Inner House by report, 16 and 17 Vict., c. 86, § 25, as explained in *Balfour*, 27th January 1854, 16 D. 413. (3.) Upon any advection being brought before a Lord Ordinary, the parties have it in their power to enter into a judicial contract, whereby they consent to his judgment being final, and not subject to review. But the express consent of both parties is necessary for this, otherwise the case proceeds in common form, 16 and 17 Vict., c. 86, § 25, as explained in *Balfour supra*.

Where the judgment of the inferior court is affirmed, the form of the ultimate interlocutor is to "remit simpliciter" to the inferior judge, with a finding and decerniture for expenses. Where the judgment is altered, an interlocutor is pronounced, advocating the cause, and altering or varying the judgment, as the justice of the case may require; or a remit may be made with instructions without advocating the cause. It is always competent to find the advocator entitled to the expenses incurred, not only in the Supreme, but also in the inferior court.

In advocations of interlocutors pronounced by sheriffs, it is competent to the inferior judge, on the application of either party, and having due regard to the eventual issue of the cause, to pronounce an order regulating the interim possession. This order is not subject to review, except by the Lord Ordinary or the Court, in the course of discussing the advection; 6 Geo. IV., c. 120, § 42; *A. S.* 11th July 1839, § 130.

In *Mutrie v. Lowe*, 23d May 1844, 6 D. 1045, the question was discussed, whether an advection brings up the whole cause to the effect of allowing a respondent, without any counter advection, to renew pleas which had been unsuccessful in the court below. In that case, a party who had gained his cause, but without expenses, presented, with the view of obtaining his expenses, a note of advection, having prefixed the whole interlocutors in the cause. No counter note of advection was presented by the unsuccessful party, who, however, in a reclaiming note against the judgment of the Lord Ordinary (which had advocated the cause), craved that the prayer of his original petition in the Sheriff Court should be granted. The opinions of the whole Judges were taken, and it was held that, to enable a respondent to obtain a review of pleas unsuccessfully maintained by him in the inferior court, a counter advoca-

tion at his instance was necessary. This rule, however, was held to apply only where a substantive review was brought, and not in the matter merely of expenses. Accordingly, after consulting all the Judges, it was decided in *Murdoch v. Brown*, 8th March 1832, 10 S. 445, that, though a sheriff had found no expenses due, and the party unsuccessful on the merits had brought an advection, but there was no counter advection as to expenses, it was nevertheless competent to award the expenses in the Sheriff Court in favour of the respondents. It is enacted by 16 and 17 Vict., c. 80, § 24, that when any interlocutor of an inferior judge is brought under review of the Court of Session, it is competent for that Court also to review all the previous interlocutors pronounced in the cause. See, on the subject of this article generally, *Shand's Practice*, i. 440; *Shand's Digest of Court of Session Act*; *Barclay's Sheriff Court Practice*, 447; *Stair*, B. iv. tit. i. § 31, *et seq.*, and tit. 37, § 5, *et seq.*; *More's Notes*, cccxciii.; *Erskine*, iv. 2, § 40, *et seq.*; *Bankton*, vol. ii. p. 671, *et seq.*; *Swinton's Abridgment*, h. t.; *Kames' Stat. h. t.*; *Watson's Statute Law*, h. t.; *Brown's Syn. h. t.*, and p. 454; *Beveridge on the Bill Chamber*, 53, *et seq.*; *Macfarlane's Jury Prac.*; *Jurid. Styles*. See also *Suspension. Calling of Advection. Reasons of Advection*.

**Advection and Interdict.** See *Interdict*.

**Advection of Brieves.** See *Advection*.

**Advection in Justiciary.** See *Bill of Advection in Justiciary*.

**Advocatio Ecclesiæ**; an old law term, signifying the right of patronage, or the title and right to present to a vacant church. *Skene*, h. t.

**Advowson**; an English law term, signifying the right of presentation to a church or benefice. *Tomlins*, h. t.

**Ædificatum solo cedit**; a Roman law maxim, usually applied to the case where one has built a house on the property of another; and importing that the building belongs to the proprietor of the ground on which it is built. See *Adjunction. Accession*.

**Affiance**; the plighting of troth between a man and a woman upon an agreement of marriage. *Tomlins*, h. t.

**Affidatio**; used in the *Regiam Majestatem* to signify mutual faith and obligation to fidelity, as between husband and wife, superior and vassal, and the like. *Skene*, h. t.

**Affidavit**; an oath in writing, or a declaration to the truth of which an oath is sworn before a person legally authorized to administer an oath. In England, affidavits are necessary in a variety of cases, in order to bring facts under the cognizance of courts of justice. Where evidence in England is to

be acted on by juries, it is given by oral testimony; where it is to inform a court or judge, it is usually reduced to the form of an affidavit. In point of form, an English affidavit, if in a depending suit, sets out with the names of the parties. The name and description of the party making the affidavit are then written at length, and he signs it at the foot; and the paper being shown to him, he is requested to swear to his name and handwriting, and that the contents of the paper are true. The affidavit closes with the *Jurat*, specifying the officer before whom, and where, and when, the affidavit was sworn. This is signed by the officer or magistrate. If the affidavit be sworn in open court, that circumstance is mentioned in the *jurat*, and no officer is named. In Scotland, voluntary affidavits are not, generally speaking, admissible as evidence, or at all countenanced, because they are emitted *ex parte*, and there is no opportunity for cross-examination; but to this rule there are exceptions; *e. g.*, the Bankrupt Statute requires claimants to lodge their claims with affidavits, or oaths of verity. Such affidavit, when not framed according to statute, may be rectified, but the amendment must have the sanction of an oath; *Gibson*, 17th Dec. 1853; 16 D. 233. So also, according to the form of process in jury trial, certain motions for delaying the trial, examining old or absent witnesses, and the like, can only be made on affidavit by the agent for the party as to the truth of the facts on which the application rests; *A. S.* 10th Feb. 1841, §§ 17, 25. In applications also under the Entail Amendment Act, 11 and 12 Vict., c. 36, § 6, a petitioner must lodge an affidavit as to the debts affecting the estate, technical objections to which affidavits are obviated by 16 and 17 Vict., c. 94, § 1. In like manner, at common law, an affidavit is required in applications for *meditatio fugæ* warrants. Many other instances might be given, such, for example, as the affidavits required from half-pay naval and military officers: as to all which it may be observed generally, that such affidavits are what are called matters of voluntary jurisdiction, and consequently the magistrate administering the oath may do so beyond the limits of his territorial jurisdiction. Nay, it has been held that a Scotch justice may take an affidavit under the Entail Amendment Act in England, or in any part of Her Majesty's dominions within the jurisdiction of the Great Seal; *Kerr*, 12th June 1852, 1 *Macqueen*, 736. The statute, 5 and 6 Will. IV., c. 62, was passed to check the unnecessary use of oaths and affidavits. Among other cases to which this act does not apply, are oaths or affidavits in judicial proceedings; and, by a subsequent

statute, 6 and 7 Will. IV., c. 43, it was further declared not to extend to ratifications by married women. By 6 and 7 Vict., c. 82, the Lord Chancellor of England is empowered to grant commissions for taking affidavits, affirmations, and declarations, in Scotland, and persons wilfully swearing falsely in any affidavit, &c., so taken, are liable in the penalties of perjury. See *Barclay's Justice of Peace, h. t.*; *Hume on Crimes*, p. 370; *Bell's Notes*, pp. 95, 97; *Dickson on Evidence*, p. 54; *Tomlins, h. t.*, &c. See *Bank. ii.* 650; *Bell's Com. ii.* 48, 336; *Shaw's Digest*; *Jurid. Styles*. See also *Oath of Verity. English Debt. Claim. Affirmation. Oaths. Ratification*.

**Affinity**; is the relationship arising from marriage between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband. Thus, the relations of the husband stand in the same degree of affinity to the wife in which they are related to the husband by consanguinity. But there is no affinity between the kinsmen themselves. Thus, the husband's brother and the wife's sister have no affinity. That species of connection has received the name of *affinitas affinitatis*, a term borrowed from the Roman law; and is not by our law an impediment to marriage in any circumstances, although it was so by the Roman law, when the parties were in the direct line. *Stair, B. i. tit. 9, § 15*; *Mr More's Notes*, p. xv. and cccxvii.; *Ersk. B. i. tit. 4, §§ 8 and 9*; *Bank. vol. i. pp. 118 and 133*; *vol. ii. p. 646*; *Bell's Princ. § 1527*; *Hutch. Justice of Peace, vol. ii. pp. 207, 266*; *Tait on Evidence, pp. 364, 374, 3d edit.*; *Ersk. Princ. 11th edit., p. 69*.

**Affirmanti Incumbit Probatio**; a Latin maxim, inferring that the negative of an assertion is presumed to be true, and that the *onus probandi* lies on the party making the averment. This abstract proposition, however, is necessarily controlled by the operation of various legal principles and presumptions. Hence, nothing is more common than for a party to rest his case on an averment which it is not legally incumbent on him to prove, but which, on the contrary, it lies on his antagonist to redargue. *Stair, B. iv. tit. 39, § 4*; *Dickson on Evidence, p. 3*. See *Presumptions*.

**Affirmation**. By the statutes 3 and 4 Will. IV., c. 49; 3 and 4 Will. IV., c. 82; and 1 and 2 Vict., c. 77, Quakers and Moravians, and persons who had been of either of these persuasions, as also persons belonging to the sect called Separatists, who, from conscientious scruples, refuse to take an oath in courts of justice, and on other occasions, are permitted, in lieu of an oath, both in civil and criminal cases, to make a solemn affirma-

tion according to a statutory formula. The formula is, "I do solemnly, sincerely, and truly declare and affirm;" and in the case of *Separatists*, the statutory affirmation farther bears to be made, "In the presence of Almighty God." These affirmations are declared to have the effect of an oath, "in all places, and for all purposes whatsoever, where an oath is or shall be required," either at common law or by statute. The penalty of affirming or declaring falsely is the same as in the case of perjury. There is also a statutory form of affirmation in lieu of the oath of abjuration. The privilege of substituting a solemn affirmation or declaration instead of an oath has, by 18 Vict., c. 25, been extended to the case of all persons called as witnesses in any court of civil judicature, or requiring or desiring to make an affidavit or deposition, who shall refuse or be unwilling, from alleged conscientious motives, to be sworn. The judge must, however, be satisfied of the sincerity of the refusal. The statute prescribes the formula of the affirmation, and a false affirmation is declared to infer the pains of perjury. *Dickson on Evidence*, p. 979; *Hume on Crimes*, i. p. 370; ii. p. 376; *Ersk. B. iv. tit. 2, § 28, and note*; *Bank. vol. ii. p. 659, § 15*; *Bell's Com. vol. ii. pp. 337, 389*; *Barclay's Justice of Peace*. For the cases in which affirmations are substituted for oaths or affidavits, see *Oaths. Ratification*. See also *Quaker*.

**Afreightment.** See *Charter-Party*.

**Age.** A person is said to be of lawful age when he or she attains majority, or the age of twenty-one years complete. The earlier period of life is described generally as minority, but is sub-divided into *pupilarity*, which extends in males to fourteen years, and in females to twelve years; and *puberty*, which extends from the termination of pupilarity until the attainment of majority. A minor who has attained puberty may make oath and give evidence as a witness. No one under the age of twenty-one years can vote at an election for member of Parliament, or be elected a member; but a man is of age on the day preceding his twenty-first birthday. *Chamber's Election Law, h. t.*; *Stair, B. i. tit. 5, § 2*, and *B. iv. tit. 43, § 7*; *Mr More's Notes*, p. ccccxi.; *Ersk. B. i. tit. 7, § 36*; *Bank. vol. i. pp. 45 and 113*; *vol. ii. p. 645*; *vol. iii. p. 47*; *Macfarlane's Jury Practice*, p. 226. See *Minor. Pupil. Tutor. Curatory. Factor. Evidence*.

**Agent.** An agent may be defined generally as one whom another puts in his place, and authorizes or delegates to transact business for him, and, within the limits of the particular business to which the agency or mandate extends, to bind his constituent. The rights and powers of mercantile agents will

be found explained *voce Factor*. See also *Mandate. Principal and Agent*.

**Agent and Client.** Under this title, in our dictionaries and digests, are classed a very comprehensive series of cases, embracing all those questions which have arisen as to the responsibilities, duties, and privileges of law agents in the conduct of the business of their clients. Generally speaking, a law agent is presumed to have competent professional knowledge, and will be responsible to his client for the consequences of professional ignorance or negligence in the conduct of the business entrusted to him. And, on the other hand, in addition to his claim against his client for payment of his account of expenses, a law agent has a preference, of the nature of hypothec, over the expenses of process, where awarded or likely to be awarded against the opposite party in the suit, of which right the agent cannot be deprived by any arrangement between the parties to the cause. The agent has also a preference by retention over the papers and title-deeds of his client, which have come lawfully into his custody, until satisfied for the account of his business, or professional account. A law agent is not liable for damages on account of an error committed by him, unless the error amount to gross ignorance or negligence, and the state of this law at the time that the error was committed will be an element in the consideration. In order to recover damages, it is not enough to show that something which the agent was employed to do has not had the effect which was expected from it. It is incumbent on the employer to show an act of gross ignorance, such as could not have been committed by any other ordinarily informed member of the profession. In *Purves v. Landell*, it was observed in the House of Lords, that it was of the very essence of an action against a professional person by his employer, that there should be gross ignorance; that the man who had undertaken to perform a duty of an attorney, or of a surgeon, or apothecary, as the case might be, should have undertaken to discharge a duty professionally for which he was ill qualified, or, if not ill qualified to discharge it, which he had so negligently disobeyed, as to damnify his employer, or deprive him of the benefit which he had a right to expect from employing him; *Landell v. Purves*, 4 D. 1300; *reversed*, 4 Bell, 46; *Cook v. Falconer's Representatives*, 6 D. 149. In *Thompson v. Davidson*, 12 D. 179, the agent of a trust, who was himself a trustee, sold a subject held by the trustees in security of a debt, in virtue of the powers contained in the bond and disposition in security in their favour. The articles of roup stipulated that the purchaser should find security for the

price within three weeks, failing which the exposer was entitled to bring the subject to a second sale. The subject was bought by the debtor himself, and the agent failed to demand security, or to expose the subjects a second time. Several years after the agent's death, and before the debt was paid, the debtor became bankrupt, and the subject having proved insufficient for payment of the debt, the agent's representative was found liable to make up the deficiency. On appeal, the judgment was affirmed, but in the House of Lords the judgment appears to have been rested on the circumstance of the agent being a trustee rather than on the ground of agency. *Lord St Leonards, C.*—"No man can be permitted to sell an estate as a trustee, and then leave it optional whether that sale shall or shall not be completed by payment of the purchase-money. He is bound, from the very necessity of the transaction, if he does not himself find the money, to pursue the matter until he has brought it to a satisfactory conclusion. The act of Mr Thompson, therefore, was an intromission which bound him to answer for his neglect; and I am clearly of opinion, that this was a manifest and gross breach of trust." 1 *Macqueen*, 236. See on the subject of this article generally, *Ersk. B. iii. tit. 3, § 33, § 37; B. iv. tit. 2, § 25, and Notes by Mr Ivory; Bank. vol. ii. pp. 491 and 602; Bell's Com. vol. i. p. 460; vol. ii. p. 325, 111, 5th edit.; Bell's Princ. §§ 1388, 1437; Bell's Illust. ib.; Kames' Stat. Law abridg. h. t.; Shaw's Digest, h. t.; Shand's Practice; Macfarlane's Jury Practice, pp. 55, 143, 166, 291; Tait on Evidence, pp. 180, 367, 384, 487; Dickson on Evidence; Hume, ii. 338. See also Hypothec. Retention. Clerk to the Signet. Solicitor.*

**Agent and Principal.** See *Principal and Agent*.

**Agistment;** in the law of England, is where other men's cattle are taken into any ground to pasture at so much *per week*. *Tomlins, h. t. See Grass-maill.*

**Agnate.** Agnates, in the law of Scotland, are those related through the father, as cognates are those related through the mother. *Stair, B. iii. t. 4, § 8; Ersk. B. i. t. 7, § 4; Ersk. Princ. 11th edit. 87; Bell's Princ. §§ 2078, 2118.*

**Agreement;** a mutual bargain or contract. In a legal sense, this term may be applied generally to all those contracts in which two or more parties mutually consent to perform any lawful act, or to implement towards each other such engagements as the law will enforce. See *Consent. Contract. Obligation.*

**Aid, Extent in.** See *Extent*.

**Alba Firma.** In the language of the feudal law, *alba firma* is money-rent, in contradistinction to rent in victual. In blanch char-

ters, where the duty consists of some trifling payment in acknowledgment of the right of superiority, it is usually expressed to be *nomine albae firmæ*, and it is also usual to add the words, *si petatur tantum*; by which, if the duty be not demanded within the year, the right to demand it is lost. *Ersk. B. ii. tit. 4, § 7.*

**Alderman;** an associate to the civil magistrates of an English city or town corporate. He ought to be resident in the place. The aldermen of London are exempt from serving in inferior offices, or on juries or assizes. *Alderman* was a degree of nobility amongst the Saxons: literally, it imports no more than a *senior* or *elder*. *Tomlins, h. t.*

**Ale;** anciently could not be imported and sold within a barony without the consent of the baron. *Ersk. B. ii. t. 6, § 8.*

**Alehouses;** are not allowed to be kept without a license obtained from justices of the peace, or other magistrates empowered to grant them; act 44 Geo. III., c. 55, § 5, &c.; 48 Geo. III., c. 143, &c. Persons engaged in collecting the ale-duties are not eligible as members of Parliament; *Chamber's Dict. h. t.* See also *Swint. Abridg. h. t.; Hunter's Landlord and Tenant, p. 757; Bell on Leases, vol. i. p. 342, 4th edit.; Hutchesson's Justice of Peace, vol. i. p. 364, ii. p. 330, iii. p. 301; Tait's Justice of Peace, h. t.; Blair's Justice of Peace, h. t.; 9 Geo. IV. c. 58.*

**Alias.** *Alias dictus.* Where a party, either in a civil or criminal process, is known by several names, he is, as it is technically expressed, described by an *alias dictus*; e. g. "John White, *alias* (otherwise called) *Huffy White*." *Tomlins, h. t.*

**Alibi;** elsewhere. In criminal prosecutions, this term is used to express the panel's defence of having been in a different place, at the time libelled, from that in which the crime was committed. Of course, when true, this defence is the best proof of innocence; but there are several reasons for regarding it with suspicion. 1. The *alibi* offers the readiest and most obvious opportunity for false evidence. 2. When the prosecutor's evidence is direct, there is a necessary discrepancy between it and that which is brought to establish the *alibi*. 3. Time is not very apparent, and is seldom regarded, except when the witness's attention has been called to it by some circumstance. Hence, the witness's having particularly noted it is in general not very probable. When, therefore, a witness speaks pointedly as to time, it is of importance to ascertain his reasons for having observed and remembered it so exactly. In cases where the prosecutor is allowed a certain degree of latitude in charging the place of the crime, if the panel offer a proof of *alibi*, the prosecutor must bring evidence of the precise place

where the act was committed, that the jury may know whether the proof of *alibi* meets the depositions on the other side; consequently, a broad or alternative charge has no effect in excluding an *alibi*, where such a proof is naturally applicable. The charge of time is, by uniform practice, extended to three months; but this must, in like manner, be precisely fixed, when an *alibi* is pleaded for part of the time. In regard to those crimes, the place of committing which is immaterial, a proof of *alibi* will be of no avail, as *e. g.* the act of fabricating the plates, or of throwing off the spurious notes in a case of forgery. The plea of *alibi* is a special defence, of which intimation must be given at latest on the day previous to that of the trial; and, in order to enable the public prosecutor to meet such a defence, it must be minute in its specification of the place where the panel alleges he actually was at the time libelled. *Hume*, ii. 206-224, 410-413; *Ersk. B. iv. tit. 4. § 71*; *Ersk. Princ.* 11th edit. 530; *Tait's Justice of Peace*; *Alison's Prac.* ii. 369, 624.

**Alien**; one born in a foreign country out of allegiance to the British Crown. By 4 Geo. II., c. 21, § 1, all children born out of the allegiance of the Crown of Great Britain, whose fathers are natural-born subjects of Britain at the time of the birth of such children, shall be held to be natural-born subjects, unless such fathers have been attainted of high treason, or are liable to the penalties of high treason or felony in case of their returning to Britain, or are in the actual service of any foreign prince or state at war with Great Britain. By the act 13 Geo. III., c. 21, § 1, the same privilege is extended to all persons born out of allegiance, whose fathers, in virtue of the former act, are to be deemed natural subjects, although their mothers are aliens. By the act 7 and 8 Vict., c. 66, § 16, to be afterwards more fully referred to, women married to natural-born subjects are to be deemed naturalized. To be considered a natural-born subject under the first of these statutes, a person must have been legitimate from his birth, and not legitimated *per subsequens matrimonium* merely; for, to be within the act, the child must be born to a British father, while a bastard is *filius nullius*; *Shedden v. Patrick*, 6 July 1854; 1 *Macqueen*, 535. The consideration of the whole Court was given to the construction of the statutes in regard to aliens, in *Dundas v. Dundas*, 15th Nov. 1839, 2 D. 31, where it was held, that a domiciled American, born in America after the declaration of independence, and whose father and grandfather, though British subjects, had adhered to the United States, was incapable, from alienage, of succeeding to a Scotch estate. The children of aliens, if born in Britain, are,

generally speaking, natural-born subjects. Aliens residing in any place surrendered to Great Britain may act as merchants, &c. on taking the oath of allegiance; 37 Geo. III., c. 63, § 5. This statute saves the rights of the East India Company. An alien enemy coming into this kingdom, and taken in war, shall suffer death by the martial law. No alien can be returned on any jury in a trial between subject and subject. Aliens are subject to the laws, and, in the greater crimes, are liable to the ordinary course of justice, although it seems doubtful whether they will be punished on local statutes.

The influx of foreigners to Great Britain in 1792 and 1793, caused by the French revolution, led to the passing of various acts of Parliament, known by the name of the Alien Acts, by which masters of ships arriving from foreign countries are required to give an account to the custom-house officers of the number and names of the foreigners on board. The present Peace Alien Act, as it is termed, which has superseded all the former enactments, is 6 Will. IV., c. 11 (1836). Under its provisions, masters of vessels arriving from abroad must, under a penalty, immediately declare what aliens are on board, or have landed from their vessels—except foreign mariners employed in the navigation (§ 2). Every alien must, under a penalty, immediately on his arrival, produce his passport to the chief officer of customs, and declare his name, description, &c. (§ 3). The officer must register this declaration, deliver a certificate to the alien, and within two days transmit a copy of the shipmaster's declaration and of the alien's certificate to one of the Secretaries of state in Great Britain, or to the secretary for Ireland, if the arrival was there (§§ 4, 5). When an alien departs from the realm, he delivers up his certificate, which must be forthwith transmitted by the officer of customs to a secretary of state (§ 6). The statute farther provides for the punishment of offences against its enactments before justices of the peace; and it exempts from its operation foreign ministers and their domestic servants, registered as such according to law—aliens resident three years in the realm, and obtaining a secretary of state's certificate to that effect—and aliens who are below fourteen years of age at the time of any act done or omitted to be done by them. The proof of not being an alien lies on the party alleged to be such.

The general rule has been that aliens (not enemies) may acquire right to moveables, except in the case of British ships. But an alien is not entitled either to acquire or to succeed to heritage in Scotland. These disabilities may be removed by an Act of Naturalization,

or by letters of denization, or by naturalization in virtue of a certificate of a secretary of state, in terms of the act 7 and 8 Vict., c. 66 (1844). Within the British colonies or possessions, aliens may, by 10 and 11 Vict., c. 83, be naturalized by act or ordinance of such colony or possession.

An act of naturalization is an act of parliament, conferring on the individual the privileges of a natural-born subject. No bill for naturalization can be received without a clause in it disabling the person so naturalized from obtaining thereby any immunity in trade in any foreign country, unless he shall have resided in Great Britain for seven years after the commencement of the session in which he is naturalized; 14 Geo. III., c. 84.

Letters of denization are letters-patent issued by the Crown, conferring on the person in whose favour they are granted the privileges of a British subject. A denizen is in a sort of middle state, between a natural-born subject and an alien. He may purchase and transmit lands, but cannot succeed to them. The issue of a denizen born out of the kingdom before denization cannot succeed to him. But all persons, natural-born subjects of this kingdom, may inherit as heirs to their ancestors, although their ancestors were aliens; 16 Geo. III., c. 52. No denizen can be a member of the privy council or of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c. from the Crown.

Naturalization by certificate was introduced by the act 7 and 8 Vict., c. 66, of which the following are the chief provisions:—Every person, wherever born of a mother being a natural-born British subject, can take any estate, real or personal, by devise, purchase, or succession (§ 3). Every alien (friend) may hold every species of personal property to the same effect as if he were a natural-born subject (§ 4). Such alien, residing in the United Kingdom, may hold lands and houses for the purpose of residence or business, for any term not exceeding twenty-one years, to the same effect and with the same rights as a natural-born subject, except the right of voting (§ 5). Every alien, residing in the United Kingdom, with intent to settle therein, upon obtaining the certificate, and taking the oath of allegiance, prescribed by the statute, is entitled to all the rights and capacities of a natural-born subject, except those of being a member of parliament or privy council, or those which may be specially excepted in his certificate (§ 6). An alien, when desirous of obtaining a certificate of naturalization, must present a memorial to that effect to one of the secretaries of state, who, after consideration, may issue the certificate, which must

be enrolled for preservation in chancery. Within sixty days of the date of the certificate, he must take the oath of allegiance, and obtain a second certificate to that effect (§§ 7, 8, 9).

Every foreign seaman, who, in time of war, serves two years on board a British ship, by virtue of the royal proclamation is, by statute 13 Geo. II., c. 3, *ipso facto* naturalized, under the like restrictions, however, as to grants of lands and offices, as in the case of denizens. And all foreign Protestants and Jews, upon residing seven years in any of the American colonies, without being absent above two months at a time, and all foreign Protestants serving two years in a military capacity there, or being three years employed in the whale fishery, without ever absents themselves from the Queen's dominions for more than one year, and none of them falling within certain incapacities, shall, on taking the oaths of allegiance and abjuration, be naturalized, except as to sitting in parliament or the privy council, and holding offices and grants under the Crown in Great Britain or Ireland. See 13 Geo. II., c. 7; 20 Geo. II., c. 44; 2 Geo. III., c. 25; 13 Geo. III., c. 25; 20 Geo. III., c. 20; 58 Geo. III., c. 97.

The act of the Scotch parliament, 17th July 1695, instituting the Bank of Scotland, provides, that all foreigners who shall become partners in the bank shall thereby be and become naturalized Scotsmen to all intents and purposes whatsoever; and, as all Scotchmen became British subjects at the Union in 1707, it was thought, for upwards of a century thereafter, that an alien who had purchased Bank of Scotland stock thereby became a naturalized British subject. This notion, however, and the practice following on it, was brought into question, and after a solemn trial, it was decided, first in the Court of Session, and afterwards in the House of Lords, that the privilege was limited to the original partners of that bank; *Macao v. Officers of State*, 14th Nov. 1820, *F. C.*; 1 *Shaw's App. Cases*, 138.

See upon the subject of this article, *Stephen's Com.* vol. ii. p. 396; *More's Notes to Stair*, p. x.; *Ersk.* iii. 10, 10, *Ivory's Edition*; *Bank.* vol. i. p. 80, § 37; *Bell's Com.* 5th ed., pp. 151, 306; *Bell's Princ.* §§ 43, 1644, 2130, *et seq.* *Swint. Abridg. v. Naturalization*; *Kames' Stat. Law Abridg. v. Foreigner*; *Hunter's Land. and Tenant*; *Brown on Sale*, pp. 173-4-8; *Brown's Syn.* p. 723; *Thomson on Bills*; *Shand's Prac.* p. 152; *Watt's Stat. Law, h. t.*; *Hume*, i. 535, *et seq.*, ii. 41, 54, *et seq.*; *Kames' Princ. of Equity* (1825), p. 3511. See also 12 *S.* p. 293.

**Alienation**; is the act of transferring pro-



erty; and, in the Scotch law, it signifies the transference of heritable property. The seller says, "I hereby sell, alienate, and dispose," as expressive of a complete onerous conveyance to the purchaser; or, when the deed is given gratuitously or without a price, the terms of conveyance are, *give, grant and dispone*. See *Mr More's Notes to Stair*, p. clxxv.; *Ersk. B. ii. tit. 3, § 13, et seq.*; *B. iii. tit. 8, § 29, and notes by Mr Ivory*; *Bank. vol. ii. p. 189*; *Bell's Com. vol. ii. p. 183, et seq., 5th edit.*; *Bell's Princ. § 1749, et seq., 3d edit.*; *Hunter's Landlord and Tenant*, pp. 67, 74, 79; *Brown on Sale*, p. 3; *Sandford on Entails*, pp. 35, *et seq.* 175, *et seq.*; *Jurid. Styles*, vol. i. *Bligh's App. Cases*, i. 450, 458; ii. 196; *Meuries' Lectures on Conveyancing*. See *Disposition*. For prohibitions against alienation, see *Entail*.

**Aliment**; maintenance, food and clothing. By the law of Scotland, persons who, by reason of nonage, or from other causes, are unable to support themselves, are entitled, in certain circumstances, and in respect of certain relationships, judicially to enforce a claim for aliment.

(1.) Parents are bound to aliment their lawful children until they are of an age and in a condition to aliment themselves. This obligation must be construed, so far, with reference to the rank and circumstances of the parties, although anything more than a bare subsistence and necessary wearing apparel is discretionary on the part of the parent, and cannot be enforced. The obligation ceases with forisfiliation; but it continues in all ranks until the child is physically able to earn a livelihood; and, in the upper ranks still longer, if the child be destitute, especially in the case of daughters. If a child, after forisfiliation, fall into indigence, the obligation revives; and, as the obligation is of the nature of a debt, it transmits against the representatives of the father. Failing the father, the mother is liable if she have the means; and failing father and mother, the grandfather is liable where the means of the father and mother are exhausted. The name of a profession is not enough to liberate the father: it must be such occupation in a profession, or otherwise, as enables the child to support himself or herself. The father will also be discharged, if the child be otherwise provided with the means of aliment, or of raising money requisite for that purpose. The obligation also includes the son's wife in the upper ranks, during her husband's life, and after his death also, it would seem, if she be the mother of an heir of entail. In two cases of comparatively recent date, the law on this subject has been fully considered, both in the

Court of Session and in the House of Lords. See *Maidment*, 25th May 1815, *F. C.*, and 6 *Dow*, 257; and *Maule*, 9th July 1823, *F. C.*, and 1 *Wilson & Shaw*, 266. See also *More's Stair*, p. 29, *et seq.*; *Bell's Princ. § 1630, et seq. and cases there cited*.

(2.) Parents, when in indigence, have a claim of aliment against their children for separate aliment, where the children are in circumstances to afford it. *Bell's Princ. § 1634, and authorities there cited*; *More's Stair*, p. 31.

(3.) The father of an illegitimate child is bound to aliment the child until it can support itself. Generally speaking, the obligation continues until the child attains the age of puberty; although, if from disease or any other cause, the bastard is unable to earn a livelihood, the obligation may last for life. *Bell's Princ. § 2062, and cases there cited*. See *Basturd*.

(4.) A husband is bound to aliment his wife in family with himself. But if, from ill usage on his part, or from any other cause, the spouses live apart, this obligation to aliment will be enforced. So also, during the dependence of an action of divorce or of adherence, the husband, whether he be pursuer or defender, must not only aliment his wife, but must also provide the means of defraying her expenses in the action. *Bell's Princ. § 1538, et seq., and cases there cited*.

(5.) It is laid down in our law books, that the liferenter of a landed estate is bound to aliment the far or heir when he has no other means of subsistence. This obligation seems to have originated in an extended construction of the statute 1491, c. 25, under which the superior in a ward estate was bound, while the estate was in ward, to aliment the heir. But in whatever way this rule may have originated, it is probable, after the decision of the House of Lords in *Maidment's* case, and the *dicta* in that of *Maule*, that, in the abstract, this doctrine would not now be enforced; since, in every case of fee and life-rent, it may be said, as was observed in the House of Lords in *Maidment's* case, that the far has a marketable commodity, on which he may raise money by sale or otherwise for his maintenance. And although it may be inexpedient to countenance that species of improvidence, yet there appear to be no considerations, either of equity or of expediency, sufficient to warrant a court of law in imposing on a liferenter the burden of supporting, it may be, a strange far. See *Bell's Princ. § 1065, and authorities there cited*; *More's Stair*, cccxx.

(6.) Under the Act of Grace (1696, c. 32), creditors who choose to detain their debtors in prison after a surrender of their property

and effects in terms of that statute, and of the statute 6 Geo. IV., c. 62, are bound to aliment them. See *Act of Grace*. As to the aliment of the poor, see *Poor*.

On the subject of this article generally, the following authorities may be consulted: *Ersk.* B. i. tit. 6, §§ 16, 19, 30, and *passim* in this title, with notes by Mr Ivory; *Bank.* vol. i. p. 126, et seq., 156, et seq.; vol. iii. p. 20; *Bell's Com.* vol. i. pp. 635, 643; vol. ii. p. 553, et seq., 596, 5th edit.; *Bell's Princ.* §§ 1064, 1538, 1545, 1620, 1634, 2062; *Kames' Stat. Law Abridg.* h. t.; *Brown's Synop.* h. t. and pp. 1696, 1770, 2556; *Shaw's Digest* h. t.; *Sandford on Entails*, p. 243; *Shand's Prac.* pp. 265, 461, et seq.; *Hutch. Justice of Peace*, vol. ii. pp. 233, 252, 259, 279; *Tait on Evidence*, p. 277, 455; *Dickson on Evidence*; *Dunlop's Parish Law*, p. 192, et seq., 217, 270, et seq.; *Watson's Stat. Law*, h. t.; *Jurid. Styles*, vols. ii. and iii.; *Ersk. Princ.*; *Hume*, ii. 58, 362; *Dow's Appeal Cases*, vi. 257.

**Alimentary Fund**; is a fund set apart by the destination of the giver, for an aliment to the receiver. A fund so vested at least to the extent of a moderate aliment, is not arrestable, or otherwise attachable by the direct diligence of creditors. But although the bestower of the fund has, in this manner, a right to fix its destination, no one can exempt his own funds from the diligence of his creditors, by setting apart the whole or any portion of them as an alimentary fund for himself. Pensions from the King are held to be alimentary, although they do not bear an express clause to that effect; and in the statutes authorizing the establishment of widows' funds it is usual to declare the widow's annuity to be alimentary. In one case, a party left to his nephew, a peer, a life rent annuity of £1500, declaring that it should be considered as purely alimentary, and not attachable by creditors. The creditors of the life renter having arrested the fund, it was held that the life rent provision was not exorbitant, reference being made to the rank and circumstances of the annuitant, and that, therefore, no part of the annuity was attachable by creditors for debts contracted before the annuity took effect, whether those debts were for aliment furnished to the annuitant or otherwise; but that the annuity was subject to arrestment for debts purely alimentary, contracted posterior to the annuity taking effect. It was further held that the furnishers of each year had a preference on the annuity of that year over the furnishers of preceding years; but that such purely alimentary creditors were preferable *inter se* according to the priority of the diligences used by them for attaching the annuity. *Earl of Buchan v. his Creditors*, 13 S.

1112. See *Ersk.* B. iii. tit. 6, § 7; *Bank.* vol. i. p. 159; *Bell's Com.* vol. i. p. 128, et seq., 5th edit.; *Bell's Princ.* § 2360; *Brown's Synop.* p. 1553; *Shaw's Digest*; *Mensies' Lectures*; S. D. xv. 151.

**Alimony**; seems to be used by Erskine as synonymous with *Aliment*; but in English legal phraseology the term is confined to the allowance which a married woman sues for, and is entitled to, on separation from her husband. *Tomlins, h. t.* See *Ersk.* i. 6, 56, and B. iv. t. 3, § 28. See *Aliment*.

**Alloy**, or **Alloy**; is a mixture of several metals with silver or gold. It is used to defray the expense of coinage, and render the gold or silver more fusible. The alloy in gold coin is silver and copper; in silver coin, copper alone. The standard of gold is 22 carats of fine gold, and 2 carats of alloy in the pound Troy; the standard for silver is 11 ounces 2 pennyweights, and 18 pennyweights alloy of copper. In the Mint, a pound of standard gold is coined into 44 guineas and a half; and a pound-weight of standard silver is coined into 62 shillings. *Tomlins, h. t.*

**Allegiance**; is the fidelity due by every natural-born subject to the Crown. It is also due by every person who has been naturalized; and a temporary allegiance is due, during the period of his residence, by every foreigner who resides in the kingdom, and has the protection of our laws. Since the period of the Revolution, allegiance has been enforced by an oath, termed the Oath of Allegiance; 1693, c. 6. The person taking it "sincerely promises and swears that he will be faithful and bear true allegiance to the Sovereign." This oath must be taken by all those bound to take the oath of abjuration. See *Abjuration*. *Ersk.* B. i. t. 2, § 33; *Bell's Princ.* 3d edit. § 2193; *Hutch. Justice of Peace*, i. 44; *Hume*, i. 526-7. See also *Oaths*. *Affirmation*. *Alien*.

**Alleenarly**; only, merely. This is a technical word of some importance in Scotch conveyancing. Thus, where lands are conveyed to a father "for his life rent use *alleenarly*," the effect of that form of expression will be to restrict the father's right to a mere life rent, or, at best, to a fiduciary fee, even in circumstances where, but for the word "*alleenarly*," the father would have been unlimited fiar. See *Conjunct Rights*.

**Allodial**; is used in contradistinction to feudal; in which sense all moveable property is allodial. But in a more limited sense, the term is applied, 1. To the property belonging to the Crown; 2. To the superiorities reserved by the Sovereign; and, 3. To churches, churchyards, manes, and glebes, the right of which does not flow from the Crown. To

these may be added the udal lands of Orkney, which are held by natural possession, provable by witnesses, without any title in writing. This form of holding remains to this day, in every case where the property has not been feudalised, by the vassal's accepting of a charter from the Crown. In practice, it is common to obtain a Crown charter of lands, formerly udal lands, by an adjudication in implement, proceeding on a trust-disposition, without procuratory or precept; though, according to principle, it might proceed at once on a resignation by the udal proprietor in the hands of the Crown. There is also a holding not properly feudal, peculiar to a small property called the four towns of Lochmaben, which is held by a tenure somewhat like the copyhold right of England. The proprietors are enrolled as kindly tenants in the rental-book of the proprietor of the estate, which constitutes their title. This title has been judicially recognised; see *M.* p. 15195. See on the subject of this article, *Stair*, B. ii. t. 3, § 4; *Mr More's Notes*, p. clvii.; *Ersk.* B. ii. t. 3, §§ 8 and 18; *Bank.* i. p. 84, 529; *Menzies' Conveyancing*.

**Allowance of an Apprising.** The allowance was a decree in confirmation of an apprising, written on the back of it by the clerk to the bills, stating the amount of the debt, the lands appraised, and the names of the appraiser, debtor, superior and messenger, and the dates of the executions, and authorizing letters of horning, &c., against the superior. On the change of form from the apprising to the adjudication, the allowance gave rise to the abbreviate. *Stair*, B. ii. tit. 3, § 22; and B. iii. tit. 2, § 24; *Ersk.* B. ii. tit. 12, § 26; *Bank.* vol. ii. pp. 217 and 222; *Ersk. Princ.* 11th edit. 268. See *Abbreviate. Adjudication.*

**Alluvio**; is that addition which a river, running between the grounds of different heritors, may insensibly make to one of the properties, and which accretes to the owner of the ground to which the addition is made. But if, in place of a gradual increase, the course of the river should be altered by a violent flood, or by any convulsion of nature, the ground which may thus be added to one of the properties does not belong to the owner of that property, but remains the property of that person to whom it originally belonged. *Stair*, B. ii. tit. 1, § 35; *Ersk.* B. ii. tit. 1, § 14; *Bank.* vol. i. p. 506; *Bell's Princ.* § 935; *Ersk. Princ.* 11th edit. 124. See *Accession. Avulsio.*

**Almoner**; the person appointed to distribute the king's alms. A clergyman is usually appointed to the office.

**Alms**; relief bestowed on the poor. A parliamentary voter, whether in England or Scotland, who has received alms or parochial

relief during the preceding twelve months, is disqualified to vote; and by the English and Scotch Reform Acts such a person is not entitled to be registered as a voter in any city, burgh, or town. The disqualification in Scotland is the receipt of parochial relief within twelve calendar months next previous to the last of July; 2 and 3 Will. IV., c. 65, § 11. See *Chambers' Dict. h. t.*

**Altarages.** Altarages were donations granted for the singing of masses for the souls of deceased friends, &c. at particular altars; and when, at the Reformation, these came to be suppressed, the founders were allowed to convert the endowments to the maintenance of bursars in any of the universities; 1567, c. 12; *Stair*, B. ii. tit. 8, § 35; *Ersk.* B. i. tit. 5, § 3; *Bank.* vol. i. p. 558.

**Alternatives.** If there be an alternative in the manner of performing an obligation, the debtor has the choice, on the maxim, *In alternativis electio est debitoris*; but Bankton says, that after commencing a suit for the performance, the creditor has the right to choose. A conventional penalty for non-performance is not an alternative. The party entitled to the option retains his right, until he has declared under which alternative he has been acting. Thus, it was decided, that a tenant who was granted a lease for nineteen years, or for two lives, and who had held the farm for fourteen years without declaring his election, might insist on choosing to have the lease for two lives. But acting upon one of the alternatives for a time fixes the choice, and bars a recurrence to the other. In an obligation to do one of two things for a certain period annually, it is doubtful whether the first choice fixes the alternative, or the debtor continues to have an annual option. It is thought, however, that a tenant or other party, bound to pay either a money or a grain rent, may avail himself of the choice each year. In alternative legacies the right of election seems to depend on the intention of the testator, as implied in the form of expression which he makes use of: thus, when he bequeathes one of two things to the legatee, the legatee would appear to have the option; when he enjoins his executors to pay one of two things, the choice seems to be left to them. *Stair*, B. i. tit. 17, § 20; *Mr More's Notes*, pp. cxxi. cccxliv.; *Bank.* vol. i. p. 474, §§ 80-83; iii. 89; *Brown's Synop. h. t.* and p. 1430; *Hume*, i. 501, ii. 169, 194-2-8, 203-223.

**Altius non Tollendi**; was a Roman law servitude, whereby the servient proprietor was restricted from raising a building within his own ground to a height prejudicial to the dominant tenement. There was also, it is said, in the Roman law a servitude *Altius tol-*

*lendi*, which, according to some commentators, imported a right in the dominant proprietor to raise his house higher than was permitted by the regulations for the height of buildings in Rome. But this is a very doubtful interpretation; and in Scotland, at least, would receive no countenance, as applicable to those towns (such as Edinburgh) where there is a statutory limitation in the height of the houses. It would rather appear, indeed, that, properly speaking, there was no servitude *altius tollendi*, and that the term merely signifies an immunity from the servitude *altius non tollendi*. *Ersk.* B. ii. tit. 9, § 10; *Bell's Princ.* § 1007, and authorities there cited; *Stair*, B. ii. tit. 7, § 9; *Mr More's Notes*, p. cxxxi.; *Brown's Syn.* p. 2256, 2362. See *Edinburgh*. See also *Light*.

**Amand**; is synonymous with a *fine* or *penalty*. In our older practice, a defender who proposed imprecation was required to consign a certain sum to be forfeited as an *amand*, in case it should turn out that he had proposed the plea *animo differendi litem*. Prior to the peremptory statutory regulations introduced by the Judicature Act, 6 Geo. IV., c. 120, it was usual for the Court, or for the Lords Ordinary, to pronounce orders for the lodging of pleadings or other papers in the course of a process, "under an *amand*" (as it was expressed) "of 40s.," or some such sum; although, as these *amands* were seldom enforced, the compulsitor was practically ineffective, and is now in desuetude. *Stair*, B. iv. tit. 40, §§ 12 and 39; tit. 1, § 63; *Bank*. i. p. 297.

**Ambassador**; a person sent by one sovereign power to another, vested with authority to transact state affairs, and to act as representative of his constituent. The persons of ambassadors are protected under the law of nations. An ambassador will lose his privilege if he commit an offence against the state to which he is sent; and for treason against the sovereign's life he may be condemned and executed; but, were he guilty of crimes of a less serious character, he would, in courtesy, be sent back to his sovereign, to be punished by him. By the civil law, the person of an ambassador cannot be arrested, or his moveables taken in satisfaction of debt. The law of nations regarding the privileges of ambassadors is part of the law of Great Britain; and, by express statute (7 Anne, c. 12), ambassadors and their domestic servants are exempted from arrest. A resident merchant in this country, who acts as consul to a foreign power, is not thereby exempted from arrest. *Stair*, B. i. tit. 1, § 11, and tit. 12, § 13; *Bank*. vol. i. pp. 35 and 521; *Swint. Abridg.* h. t.; *Hume*, i. 536. See *Tomlins' Law Dict.*; *Wharton's Lexicon*.

**Ambidexter**; one who plays on both sides. In English legal phraseology it signifies a juror who takes money for his verdict. *Tomlins*, h. t.

**Amenable** to a certain court, signifies to be subject to the jurisdiction of that court.

**Amendment of the Libel**; is an addition to, or alteration on, the averments or conclusions of the action, made by judicial authority after the summons has been signeted and brought into Court. The amendment must be made in a writing separate from the summons, and can only be lodged by permission of the judge, on a motion from the bar. After it has been allowed to be seen by the opposite party, an interlocutor is pronounced, admitting it as part of the summons, if no objections are made. But no such amendment can be competently made after the record is closed, except in the case of *res noviter veniens ad notitiam* (6 Geo. IV., c. 120, §§ 6, 10; *Hill*, 19th June 1855, 17 D. 958); although amendments have been allowed after the record was prepared, under a reservation of the defender's claim for expenses. So also, in a process of reduction, it is competent to the pursuer, before the record is made up, to state additional reasons of reduction in the form of an amendment of the libel, on his furnishing the defender with a copy of the amendment forty-eight hours before it is given in, and paying such expenses as the Lord Ordinary shall think reasonable; and the defender shall give in defences applicable to such amendment; *A. S.* 11th July 1828, § 51; *Miller*, 2d Feb. 1850, 12 D. 653. The alterations on, and additions to, a summons which may be made by amendment of the libel are very considerable; but any fundamental change on the nature or grounds of the action is not admissible in this form; and the specialties of each case must be considered in dealing with questions as to the competency of an amendment. New pursuers cannot be so sisted; nor can a party who has raised an action in his own individual name be allowed to libel in an amendment, that he sues in the character of executor; *Smith*, 5th July 1850, 12 D. 1185. Neither is it competent to amend the libel in cases where the defender has not appeared. In such a case the pursuer may put in a minute restricting the conclusions of the libel (which may be done at any stage of the process), but he cannot add to or alter these conclusions; the presumption being, that the defender having had due notice and certification of what will ensue if he make no appearance, is prepared for decree in terms of the libel, although it is impossible to assume, in his absence, that he would also have acquiesced in the summons as altered. The remedy in such cases

is by supplementary action. An amendment of the libel, where otherwise competent, cannot be made in the form of a minute; see *Blair*, 1st June 1848, 10 D. 1095.

Amendments of the libel are regarded with great jealousy in criminal proceedings before the Court of Session, as in cases of forgery and fraudulent bankruptcy; and it is also a general rule, that no amendment of a summary petition is competent after procedure has taken place therein. In *Hutton*, 1st March 1851, 13 D. 804, no fewer than three separate amendments of a libel were allowed, reserving all questions of expenses. In *Dallas v. Mass*, 14th June 1853, 15 D. 746, the Lord Justice-Clerk said,—“ We have consulted the whole Judges, and are prepared to lay down a general rule in regard to the question which arises in this case. That rule is, that in everything which is of the essence of the action, whether in the averment of what is an essential quality, or of what is a proper ground of action, the summons and condescendence must be perfect and complete *ab initio*, and that no change can be introduced into the revised condescendence which alters the summons or the annexed condescendence, which is a part of the summons, in such matters. Such change can only be made by an amendment of the summons on leave obtained. This rule we are prepared to enforce in regard to the pleadings in this Court as well as in the Sheriff Court. Such being the general rule which the Court is to enforce, then, we in this Division hold, that, in this case, want of probable cause was of the essence of the action, and, therefore, as the statement of it was omitted in the condescendence annexed to and forming part of the summons, it was not competent to insert it by way of revisal merely, but that it could only be added as an amendment on leave granted.” A pursuer of an action of damages for slander was, however, allowed, on payment of the expense of revisal, to state in his revised condescendence two new instances of alleged slander, uttered at different times and places, and before different parties, from those stated in the summons; *Hewatson*, 15 D. 519. At the adjustment of the record at chambers with a view to closing, the Lord Ordinary may allow or require such alterations and amendments to be made on the record as may seem proper; 13 and 14 *Vict.*, c. 36, § 2. Similar regulations as to amendments and restrictions of the libel are in observance in the inferior courts, though, under the short forms recently introduced by the Sheriff Court Act, there is less room for error, and leave to amend is more scrupulously granted than formerly. The Sheriff, when a case comes before him in appeal, may *ex proprio*

*motu* open up the record for the purpose of allowing an amendment; 16 and 17 *Vict.*, c. 80, § 16. See also *A. S.* (Sheriff Courts), 10th July 1839, §§ 11, 13, 41, 99. Notes of suspension may be amended to the effect of offering caution or consignment, by lodging a minute to that effect, in terms of *A. S.* 24th December 1838, § 4.

On the subject of this article, see *Shand's Prac.* 493, 628; *M'Glash. Sher. Court Prac.* 310; *M'Farl. Jury Prac.* 31; *Jurid. Digest*, vol. iii.; *Brown's Synop.* 1787; *Shaw's Digest*; xiv. S. 845; xv. S. 226. See also *Abandonment of Action. Supplementary Summons.*

**Amendment of the Libel** (in criminal prosecutions). It is a general rule, that the prosecutor cannot alter or amend the libel at the bar without the pannel's permission; but in some cases *retrenchments* upon it have been allowed without his consent, provided there remains thereafter a relevant charge against him. Retrenchment, however, is never allowed where its effect is the production of a substantial variation in the libel, and the consequent injustice of obliging the pannel to go to trial on a charge for which he was not prepared; *Speirs*, 25th March 1836; 1 *Swinton*, 171; *M'Gregor*, 28th April 1842; 1 *Brown*, 331. An instance of permissible retrenchment is afforded by the case of *M'Caffer* (Glasgow, Sept. 1823), where it was allowed, on the motion of the prosecutor, before the pannel pleaded to the indictment, that the words, “Parish of Gorbals and,” in the description of the place where the crime was committed, should be struck out. Where there are several charges, or several pannels, the prosecutor may depart from one or more of the charges against one or more of the pannels, and proceed with his proof as to the rest. In some cases, also, the prosecutor is allowed to restrict the charge to a lower crime, but of the same kind, as, for instance, to homicide instead of murder. The prosecutor is likewise entitled at the bar to restrict the pains of law. *Hume*, ii. 280; *Bell's Notes*, 180, 232; *Steele*, 195; *Alison's Princ.* 365.

**Amendment.** In parliamentary proceedings, an amendment is an alteration proposed in the draught of any bill, or in the terms of any motion. No member, except when the House is in committee, is allowed to speak more than once on the same question; but he may speak again on an amendment, which is considered to be a new question. When a motion for the adjournment of the House is made, it is in the words, “That the House do now adjourn;” and if it be carried, the House will adjourn to the next sitting day; unless, at a previous part of the evening, a resolution has been come to, that, at its rising, the House shall adjourn to some particular

day. It is not competent, therefore, on a motion for adjournment, to move an amendment, specifying any particular day to which the House shall adjourn. An amendment may be proposed on an amendment. The parliamentary rule as to putting motions and amendments to the vote differs from that usually observed at public meetings. In Parliament, the motion which has been first made and seconded is always put first from the chair; and hence, when an amendment has been proposed, instead of the question that it shall be adopted being directly put, a vote is taken on the question, "That the words proposed to be left out stand part of the question," and if this motion is carried, the main question, which is really the same thing, is next put, and of course agreed to. But if the question, "That the words stand part of the question," be negatived, the main question is put with the omission of these words; so that the amendment separately is never put at all. *Hatsell*, ii. 111, *et seq.*; *May's Practical Treatise on the Law, Privileges, &c., of Parliament*, p. 236.

**Amerciament, or Amercement**; is properly an English law term, where an offender is at the mercy of the King in regard to the quantum of a fine: when it is used at all, it means a fine imposed on an offender. *Tomlins*, *h. t.*; *Wharton's Law Lexicon*.

**Amerciamentum, or Forisfactum Curie**; used in the *Regiam Majestatem* to signify the unlaw, or fine for absence. *Skene*, *h. t.*

**Amicable Sentence**; is applied to a decree-arbitral. See *Arbitration*.

**Amicus curiæ**; a bystander who, not being interested in the cause, of his own knowledge, and *tanquam amicus*, makes a suggestion in point of fact or in point of law, for the information of the Court, or to correct a mistake. See *Tomlins*, *h. t.*

**Amnesty**; an act of pardon or of oblivion.

**Ancestor**; in Scots law, is one from whom a landed estate is derived, and who is represented by the person in possession. In this respect an ancestor differs from one to whom the estate has previously belonged, and from whom it has passed to the present proprietor by purchase, or what is called a singular title; such a person being termed the *author*. *Stair*, B. iv. tit. 35, § 16; *Mr More's Notes*, pp. cccxxxvi. and cclviii; *Ersk.* B. iii. tit. 8, § 101, *et seq.*; *Bell's Com.* vol. i. p. 727, *et seq.* 5th edit.; *Bell's Princ.* § 1931, *et seq.* 3d edit.

**Anchorage**; is a duty payable by a vessel on its entering a port.

**Animals**; *injury done by*. See *Damnum*.

**Ann, or Annat**; is the half-year's stipend payable for the vacant half-year after the death of a clergyman, to which his family or nearest of kin have right under the act 1672,

c. 13. Thus, if a clergyman die after Whitsunday, his executors have right to the first half of that year's stipend, and his widow and nearest of kin have right to the other half, as ann. If he survives Michaelmas, he has right to the whole of the year's stipend, and his nearest of kin draw the first of the next half-year's stipend, as the ann. The right to the ann is not vested in the clergyman, but in his next of kin, and therefore can neither be assigned by him even in a *mortis causa* deed, nor attached for his debts. The rule for dividing the ann between the widow and children does not seem to be very clearly fixed; but Erskine inclines to adopt the same rule of division which would be followed in regard to executry; that is, to give one-third to the widow and two-thirds to the children *per capita*. Where there are no children, one-half goes to the widow, and the other to the nearest of kin: where there are children, but no widow, it goes wholly to the children; and where there are neither children nor a widow, it goes to the nearest of kin. Confirmation is not required to vest a right to the ann in those by law entitled to it. By the act 50 Geo. III., c. 84, whereby provision is made for augmenting small stipends to L.150, it is enacted, that the executors or personal representatives of the minister whose stipend shall be augmented under this act, shall be entitled to one half-yearly moiety of the augmentation to be so granted, in name of ann, over and above the stipend due to the deceased minister in the same manner as in ordinary stipends, and the Barons of Exchequer are empowered to grant precepts for payment of this ann to those having right thereto, on their receipt, without confirmation or making up any other titles; 50 Geo. III., c. 84, § 16. See also 5 Geo. IV., c. 72. See on the subject of this article, *Ersk.* B. ii. tit. 10, §§ 67, 68; *Stair*, ii. tit. 8, § 34, and *Mr More's Notes*, cccxlv.; *Bank.* vol. ii. p. 77; *Kames' Stat. Law Abridg.* *h. t.*; *Brown's Synop.* *h. t.*; *Hutcheson's Justice of Peace*, vol. ii. p. 464; *Connell on Tithes*, ii. p. 453; *Watson's Statute Law*, *h. t.*: *Jurid. Styles*, vol. ii., p. 285, 3d edit.

**Annexation**; as used in the *Regiam Majestatem*, signifies "a fast-knitting and binding." *Skene*, *h. t.*

**Annexation**; is the act of uniting lands to the Crown, and declaring them unalienable. It also signifies the appropriating of Church lands to the Crown; and the union of lands lying at a distance from the parish church to which they belong, to the church of a parish to which they are more contiguous.

1. *Annexed Property of the Crown*.—The liberality of our sovereigns during the fifteenth century had reduced the Crown to great poverty, and it was the object of Parliament to

put an end to such alienations. But this determination was not long acted on; the ancient system having been resumed, under the specious pretence of improving the country, by giving out the property of the Crown in feu for payment of a rent. By the act 1455, c. 41, the annexed property of the Crown is described, and declared unalienable, unless the gift receive the approbation of parliament. But that enactment seems not to have checked the evil; and it was followed by other statutes, and particularly by the acts 1457, c. 71; 1540, c. 15 and 16; 1584, c. 6; 1597, c. 233 and 234; some of which, by sanctioning subinfeudation in Crown lands, had the effect of dissipating, or greatly depreciating, the value of the annexed property, in so much, that now, with the exception of the Castles of Edinburgh, Stirling, and Dumbar-ton, the palace of Holyroodhouse, and the feu-duties of the ancient domains feued out under the above statutes, little remains of the once extensive territories of the Crown. *Ersk.* ii. tit. 3, § 14.

2. *Annexation of Temporality of Benefices.*— This annexation was made by the act 1587, c. 29, on a narrative of the poverty of the Crown, and his Majesty's desire to support the royal dignity without taxing his subjects, and, for that purpose, what had formerly been given by the Crown to religious houses is resumed, the cause of the disposition (that is, the support of the Popish religion), now ceasing, as the act expresses it. On these grounds, the whole estates, profits, and emoluments, belonging to the church and to ecclesiastical persons of every description, are, from and after July 29, 1587, declared to be the annexed property of the Crown under certain exceptions, and reserving a power to his Majesty of subfeuing. *Ersk.* ii. tit. 10, § 19; *Stat.* 1587, c. 29; *Mackenzie's Observations*, p. 226. See *Teinds*.

3. *Annexation quoad sacra tantum*; is the annexation of lands lying at a distance from the church to which they belong, to another church to which they are more contiguous, in so far as relates to the pastoral charge. Such lands still continue part of the parish from which, *quoad sacra*, they are separated, and remain subject to parochial burdens in it, such as the expense of building or repairing the manse, supporting the poor, paying stipend and the like, although it has been decided (contrary to the *dictum* of Erskine), that lands annexed *quoad sacra tantum*, are liable in the expense of upholding the church of the parish to which they are so annexed. *Ersk.* B. ii. tit. 10, § 64, and *Ivory's Notes*; *Stair*, ii. tit. iii. § 35; *Bank.* vol. i. p. 538, and 559; vol. ii. pp. 13 and 16; *Bell's Princ.* § 673, 3d edit.; *Brown's Synop.* pp. 1179, 1181, 1496, 2317; *Hutch.*

*Justice of Peace*, vol. ii. pp. 409, 427; *Jurid. Styles*, vol. iii. 491, *et seq.* 2d edit. See *Disjunction*.

**ANNO DOMINI**; the computation of time from the incarnation of our Saviour. *Tomlins*, h. t.

**Annualrent**; interest of money. Before the Reformation, it was not lawful to lend money at interest, and, to evade this law, persons lending money received a yearly rent out of land. The profit of the money so lent was denominated annualrent, and thus the term annualrent came to be synonymous with interest. *Stair*, B. i. tit. 15, § 7; *Bank.* vol. i. p. 436; *Kames' Stat. Law Abridg.* h. t.; *Brown's Synop.* h. t.; *Watson's Statute Law*, h. t.; *Menzies' Conveyancing*. See *Interest*.

**Annualrent Right** was a deed, by which, in consideration of a certain price paid to him, a proprietor of lands granted a yearly rent out of his property, redeemable by him on repayment of the purchase-money. This was a device to evade the laws in force previous to the Reformation against the taking of interest. But, after the Reformation, when it was made lawful to take interest, a bond was given by the borrower to the lender, by which he gave an heritable security for the whole debt, principal and interest. Hence, when these two securities came into competition, the annualrent right, though preferable to the heritable bond, extended merely to the annualrent, while the surplus was carried by the heritable bond. This form of security is now in desuetude. *Stair*, B. ii. tit. 5; *Mr More's Notes*, p. ceix.; *Ersk.* B. ii. tit. 8, § 31, *et seq.*; tit. 2, § 5; *Bank.* vol. i. pp. 487, 648, *et seq.*; *Bell's Com.* vol. i. p. 671, 5th edit.; *Bell's Princ.* § 909, 3d edit.; *Hunter's Landlord and Tenant*; *Brown's Synop.* h. t.; *Menzies' Conveyancing*. See *Burdens*.

**Annual**; a word used in the older law of Scotland, to signify a yearly revenue or duty payable at certain terms, either legal or conventional. *Skene*, h. t.

**Annuity of Teinds**; was an allowance to the King by the Commission of Teinds, at 6 per cent., from the teind of erected benefices, ratified by the act 1633, c. 15. They were disposed by the Crown in security of a debt, but the drawing of them was put a stop to in 1674, and the right has since that time lain dormant. *Stair*, B. ii. tit. 8, § 13, and B. iv. tit. 24, § 3; *Ersk.* B. ii. tit. 10, § 39; *Bank.* vol. ii. p. 58; *Kames' Stat. Law Abridg.* h. t. See *Teinds*.

**Annunities, Public.** See *Public Funds*.

**Annuity Tax**; a local tax levied within the royalty of Edinburgh for the support of the eighteen endowed clergymen of the fifteen city churches. The annuity is an assessment of  $4\frac{1}{2}$  per cent. on the rents of houses and

shops within the royalty, which was first authorized about the year 1634. It originated in suggestions which had been made by James VI., and repeated by Charles I., to the magistrates of Edinburgh as to the best means of supporting the Established clergy of the city. Acting on these suggestions, the magistrates applied to the Scotch Parliament for authority to levy the assessment. Parliament remitted the matter to the Privy Council, with power to act as they saw just; and in March 1634 the Privy Council ordained the levy, and in January 1636 the King approved of it. When first imposed the aggregate sum to be levied was limited to a maximum; but afterwards a general assessment of 6 per cent. on the rental was authorized, by a statute passed 6th June 1661, which is now the leading authority for the assessment. The more recent statutes in which this assessment is recognised are 7 Geo. III., c. 27, 25 Geo. III., c. 28, 26 Geo. III., c. 113, and 49 Geo. III., c. 21, by which last statute the assessment is made applicable to the support not only of the ministers of the then existing churches, but of those of such churches as, in virtue of that statute, might be erected in the extended royalty. The other sources of emolument to the endowed clergy of Edinburgh are the interest of a sum of £2000 in lieu of the duty of a merk per ton and pack formerly levied upon goods brought into Leith and Edinburgh, and applied to the payment of the ministers of the city of Edinburgh, but which duty was abolished by 1 and 2 Vict., c. 55, § 16,—and, also, the interest of 5000 merks mortified by Lady Yester. The annuity-tax is by far the most important of these sources of income, and the produce of the whole yields the very moderate stipend of about £500 per annum to each minister. Members of the College of Justice are exempted from the annuity-tax. Montrose, it is believed, is the only other town in Scotland in which a similar provision is made for the support of the clergy. See *Paterson*, 11th March 1829, 7 S. 573. See on the subject of this article *First Report of Commissioners of Religious Instruction*, 1837.

**Annuities.** An annuity is the right to a yearly payment in money. When secured on land it becomes a conventional liferent, and a *debitum fundi*, differing from annualrent rights chiefly in this, that it has no relation to a capital sum or stock. Annuities are either settled as a permanent aliment on the annuitant for family purposes, or from favour; or they are constituted by bond of annuity, whereby the obligor engages to make to the obligee a certain yearly payment, in consideration of a price deemed adequate at the time. Such as are for a fixed term of years are called An-

*nuities Certain*; such as depend on the duration of human life are called *Annuities on Lives*. The creditor in an annuity may adjudge heritable property sufficient to answer his claim, and it has also been held that he may arrest a fund of lying money sufficient to cover his annuity. An annuitant, in bringing his action for recovery of his annuity, claims a capital sum sufficient to produce an annual interest equal to the annuity. If he succeed, the requisite sum is recovered and invested or secured, and the interest of it is paid to him until the expiration of the annuity, when the capital is restored to the debtor in the annuity; or the same object may be attained under an arrangement for the purchase of an annuity from an insurance company. In bankruptcy a dividend corresponding to this capital was in like manner taken, which capital, on the expiration of the annuity, became the property of the creditors. In ranking annuities and contingent debts, however, a more convenient custom has of late been introduced of putting a value upon them as at the period of division, taking into account the interest of money, the chances of life, and other circumstances; and the creditor is ranked for this value in full of his claim, and entitled to draw a corresponding dividend. There was often necessarily much doubt and difficulty in fixing this value; for a full exposition of which see *Bell's Cons.* vol. i. p. 339, 5th edit.

By the Bankruptcy Statute 19 and 20 Vict., c. 79, it is enacted, that no creditor, in respect of an annuity granted by the bankrupt, shall be entitled to vote and draw a dividend until such annuity shall be valued. The Sheriff, before the election of a trustee, and the trustee thereafter, is directed to put a value on the annuity, regard being had to the original price given for the annuity, deducting therefrom such diminution in the value of the annuity as shall have been caused by the lapse of time since the grant thereof to the date of the sequestration, and the creditor is entitled to vote and draw dividends in respect of such value and no more, but it is provided that the judgment of the Sheriff or trustee shall be subject to review; and any creditor who has claims on the estate may appeal or appear and be heard on any appeal.

*Redeemable Bonds of Annuity* are, generally speaking, mere expedients for securing the lender of a sum of money in high interest, and in repayment of the capital on the expiration of the life. They are contracts by which the borrower becomes bound to pay to the lender, while the selected life endures, an annuity of sufficient amount to cover not only a high interest, but also a premium of insurance upon the life selected. Caution is given, or lands



are conveyed, in security of the payment, and the borrower has it in his option to redeem the right on repayment of the sum advanced. Annuities, as having *tractum futuri temporis*, are heritable, and an obligation to pay them falls, like other similar burdens, upon the heir of the deceased. They do not vest *de die in diem*, but at the specified terms of payment, which are usually Whitsunday and Martinmas. Arrestment of an annuity before the term when it fell due has been sustained to carry the annuity, when the annuitant actually survived that term. Certain annuities, as that of a minister's widow or of the widow of a writer to the signet, are, under special statutes, not arrestable, the principle of such enactments being that these are truly alimentary annuities. On the subject of this article see *Bell's Com.* vol. i. p. 336, *et seq.*, 356, 360; *Mr More's Notes on Stair*, p. cxli.; *Ersk. B.* ii. tit. 9, § 43; *B.* iii. tit. 6, § 9; *Bell's Princ.* §§ 1484, 1498; *Swint. abridg. h. t.*; *Brown's Synop.* pp. 135, 1555; *Shand's Practice*; *Menzies' Conveyancing*, 204, 310; *Jurid. Styles*, vol. i., 4th edit.; vol. ii., 3d edit.; vol. iii., 2d edit.; 13 S. pp. 199, 1112.

**Annus deliberandi**; is the year allowed by law to the heir to deliberate whether he will enter and represent his ancestor. The entry of an heir infers serious responsibilities, and therefore the year is allowed for consideration. The *annus deliberandi* commences on the death of the ancestor, unless in the case of a posthumous heir, in which case the year runs from the heir's birth. But the period for deliberating will not be extended on account of the heir's ignorance of the ancestor's death, as, for example, where the ancestor has died abroad. A pointing of the ground, however, at the instance of the predecessor's widow for her jointure may proceed against the lands within the *annus deliberandi*, to which process the heir may be competently made a party; *M.* 6876. The heir may also be charged to enter; and no procedure can follow on the charge within the year. And he may be cited in an action, provided the diet of compareance falls beyond the year; for within the year he is not bound to answer in any action in which he must appear as heir. If the apparent heir die within the year, the next heir has his own entire year, from the death of the apparent heir. The privilege of deliberating is terminated not only by the lapse of the year, but by the apparent heir's intermediate service to his predecessor, or by his incurring a passive representation; and the *annus deliberandi* will not interrupt the progress of an action of ranking and sale which has been raised against the predecessor. See on the subject of this article, *Ersk. B.* iii. tit. 8, § 54; *Stair*, *B.* iii. tit. 5, § 32,

and tit. 5, § 1, and *B.* iv. tit. 8, § 6; *Bank.* vol. ii. p. 310; *Bell's Com.* vol. i. p. 710, 5th edit.; *Bell's Princ.* § 1685, *et seq.*, and *authorities there cited*, 714, 3d edit.; *Brown's Synop.* pp. 811, 1036, 1559, 1675; *Shaw's Digest*; *Sandford on Heritable Succession*, vol. ii. pp. 95, 193; *Shand's Prac.* pp. 206, *et seq.*, 688, *et seq.* See *Apparent Heir. Charges to Enter. Ranking and Sale. Beneficium Inventarii.*

**Answer**; the title of a written pleading given in to a court of justice by a party, either as a replication to the claim of the pursuer, or to a statement ordered by the judge, or in support of a judgment which has been brought under review by a representation or petition.

**Antenuptial Contracts of Marriage.** See *Contract of Marriage.*

**Antichresis.** In the Roman law, *pactum antichreseos* was an agreement, by which the creditor in a voluntary pledge had the use and profits of the thing pledged, in lieu of the interest of the debt. It might also be agreed that the surplus should go to the extinction of the debt. This *pactum* bore some analogy to our wadset. *Stair*, *B.* i. tit. 13, § 11; *Bank.* vol. i. p. 384. See *Wadset. Pledge.*

**Anticipation of Rent.** See *Lease. Grassum. Tailzie.*

**Apocha Trium Annorum.** In the Roman law, three annual receipts, and, in the law of Scotland, three consecutive receipts for termly payments, raise a presumption that all prior arrears are discharged, *Stair*, *B.* iv. tit. 40, § 35; *Mr More's Notes*, p. cxxiii.; *Ersk. B.* iii. tit. 4, § 10; *Menzies' Conveyancing.* See *Discharge.*

**Apparent Heir**; in common language, is applied to the eldest son, as the person to whom the succession will probably open. But, in Scotch legal phraseology, an apparent heir is the person to whom the succession *has actually opened*, but who has not completed his title to his predecessor's estate, or taken up the succession by service, or by infestment on a precept of *clare constat*. An apparent heir is entitled to the *annus deliberandi*, within which time he may consider the consequences of his entry, and resolve to take up or to renounce the succession. (See *Annus deliberandi*.) With that view, the apparent heir is entitled to pursue an action of *exhibition ad deliberandum*; that is, he may compel those who are possessed of his ancestor's title-deeds to produce them for his inspection and information. He may also defend the titles of his ancestor when challenged. He may draw and discharge the rents, or even pursue for them. His executor seems to be entitled to draw what may have fallen during the heir's apparenacy, and which remained undrawn at the time of his death. An apparent heir, however, cannot remove his predecessor's ten-

ants. To enable him to do so, he must have completed his title. But in the case where the tenant has taken his lease from the apparent heir himself, during his apparen- cy, the tenant cannot defend himself against a removing, by disputing the title of the person with whom he has thus contracted. An apparent heir may pursue a judicial ranking and sale of his ancestor's estate, whether it be bankrupt or not; 1695, c. 24. The expense of the action is paid from the estate, when there is no surplus after paying the creditors; but, when there is a surplus, the expense must be taken from it. An apparent heir is, in certain circumstances, entitled to an aliment from a liferenter in possession of the estate; see *Aliment*. He may also, in virtue of his apparen- cy, reduce deathbed deeds. The creditors of an apparent heir are postponed to those of his immediate ancestor, as to the defunct's heritable estate, provided the ancestor's creditors do diligence against the apparent heir, and the real estate belonging to the deceased, within three years after his death; 1661, c. 24. The same statute declares that no right or disposition affecting the heritage of the defunct, made by an apparent heir, even after his entry and infestment, shall be valid to the prejudice of the predecessor's creditors, unless such right or disposition be made and granted a full year after the defunct's death. By the act 1695, c. 24, the onerous acts of an apparent heir, three years in possession, are rendered effectual against the estate which he possessed under his right of apparen- cy; it being there- by declared, that an heir passing by his im- mediate ancestor, and entering to one more remote, or succeeding by adjudication on his own bond to one more remote, shall be liable for the debts and deeds of the interjected person (who has been three years in possession) to the value of the estate; but when the heir obtains possession without having completed his title, he is not held to represent the appa- rent heir. This is an omission in the statute. Titles of honour, leases held by his predecessor, and rights not feudal having a tract of future time, vest in the apparent heir *ipso jure*, and without service. See *Ersk. B. ii. tit. 12, § 61, and B. iii. tit. 8, §§ 54, 77; Bell's Com. i. 99, 664; Stair, B. iii. tit. 5, § 1, et seq., and § 50; B. iv. tit. 26, § 8; Mr More's Notes, cccxxx. cccxxxvi. cccclviii.; Bank. vol. ii. pp. 310, 322, et seq.; Bell's Princ. § 1677, et seq.; § 1929, et seq., and authorities there cited; Hunter's Landlord and Tenant; Sandford on Entails, 76, et seq., 96, et seq.; Bell on Purchaser's Title, p. 81, et seq., 2d edit.; Watson's Stat. Law, h. t.; Jurid. Styles, vol. ii. p. 101, 3d edit.; Menzies' Conveyancing. See *Annus deliberandi. Beneficium Inventarii.**

**Appeal to the House of Lords.** Appeals are competent from final judgments of the Court of Session, Court of Exchequer, and Commission of Teinds, but not from the Court of Justiciary, or from the verdict of a jury, or from the judgment of the Court of Ses- sion, reviewing a judgment of an inferior court proceeding upon a proof, in so far as it finds certain facts to be established by such proof; 6 *Geo. IV.*, c. 120, § 40. And when the Court of Session pronounces a judgment out of the ordinary course of its public juris- diction, as when the parties have by agree- ment substituted the Court for a jury, no appeal lies; *Dudgeon, &c.*, 1st Aug. 1854, 1 *Macqueen*, 714; *Craig*, 22d Feb. 1849, 6 *Bell*, 308. Appeals are also competent from interlocutory judgments of the Court of Session, if with the leave of the Division pronouncing such interlocutory judgment, or, in cases where there is a difference of opinion among the Judges, such leave, or difference of opinion, being certified by two of the counsel in the cause; 48 *Geo. III.*, c. 151, and *Standing Order of the House of Lords, 9th April 1812*. As to jury causes, the result of some rather perplexing statutory enactments seems to be, 1st, That the determination of questions of law or relevancy, previous to trial, is not open to appeal without the express leave of the Court, reserving the effect of the objection in any appeal to be finally taken; 6 *Geo. IV.*, c. 120, § 33. 2d, In all cases of general ver- dicts, the order of the Court, granting or re- fusing a new trial, is not subject to appeal; 59 *Geo. III.*, c. 35, § 16. 3d, But if a bill of exceptions have been tendered, or a motion made for setting aside the verdict, on the ground of misdirection by the judge at the trial in matter of law, or of the undue rejection or admission of evidence, the party against whom judgment is given may ap- peal; 59 *Geo. III.*, c. 35, § 17; 55 *Geo. III.*, c. 42, § 7. The appeal must be presented to the House of Lords within fourteen days after the interlocutor has been pronounced, and if Parliament be not sitting, within eight days after the commencement of the next session. The case of *Melrose & Co.*, 28th Feb. 1854, 1 *Macq.* 698, shows how imperative this regulation is, and that it supersedes, in so far as regards the particular appeals to which it re- fers, the 15th section of 48 *Geo. III.*, c. 151, which makes it competent, when a judgment or decree is appealed from, to either party to appeal from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, so far as it is necessary, may be brought under review of the House of Lords. It is competent too to appeal against a judgment pronounced upon a question as to the admissibility of evidence, reserved

at a jury trial for the opinion of the Court; *Matheson & Son*, 27th March 1849, 6 *Bell*, 374. 4th, Unless in the case of bills of exceptions, or of motions for new trial on the ground of misdirection, or of the undue admission or rejection of evidence, appeal against the judgment refusing a motion for a new trial on any other ground is not competent; *Macfarlane's Prac.* 258. 5th, Such appeals, when otherwise competent, have the privilege of a summary hearing; 55 *Geo. III.*, c. 42, § 7. 6th, The House of Lords cannot order a new trial, unless they allow the bill of exceptions; and, in all cases where they are of opinion that the law directed at the trial, or the determination to receive or reject evidence, was correct, they are to make an order that the exception be disallowed, and the verdict carried into effect by a judgment thereon for the party in whose favour it was found; 7 *Will. IV.*, c. 14. See also 1 *Will. IV.*, c. 69, incorporating the Jury Court with the Court of Session: and *Macfarlane's Prac.* pp. 63, 258, 279. An appeal is competent against a judgment applying a verdict, where it involves a question of law arising out of the verdict; *Morgan, &c.*, 26th July 1855, 2 *Macq.* 342; 55 *Geo. III.*, c. 42, § 9. An appeal to the House of Lords on the mere question of expenses is incompetent; *Staud's Prac.* 1029. It is also incompetent to appeal directly from an interlocutor of the Lord Ordinary unreviewed by the Court. 48 *Geo. III.*, c. 151.

A party intending to appeal must, by his agent in the Court of Session, give written notice to the agent of his adversary that a petition of appeal against the judgment will be presented on a stated day, or as soon thereafter as conveniently may be; "and the day on which such notice was given shall be indorsed by the agent or agents of the petitioner on the back of the said appeal;" *Standing Order*, 9th April 1812. The petition of appeal (see *Juridical Styles*, vol. iii. p. 877) narrates the grounds of action without entering into discussion of the merits, and the procedure in it down to the date of the last interlocutor appealed from; and in cases of advocacy of an inferior court process, the interlocutors of that court, if adverse, ought also to be included in the appeal. It prays that the judgments or parts of judgments adverse to the interests of the appellant may be reversed, varied, or altered. It must be signed by two counsel, who must also certify that, in their opinion, there are reasonable grounds of appeal; and it must be presented to the House of Lords within two years from the extracting of the decree, or at least within fourteen days after the first day of the session or meeting of Parliament next ensuing the

expiration of the said two years. When an appeal is taken against a judgment pronounced during the sitting of Parliament, the petition must be presented within twenty days after the date of the judgment, otherwise it cannot be received that session. Where, however, the party entitled to appeal is under age, or covert, *non compos mentis*, imprisoned, or out of Great Britain or Ireland, the period for appealing is extended to "two years after his full age, discovery, coming of sound mind, enlargement out of prison, or coming into Great Britain or Ireland, and fourteen days to be counted from and after the first days of the session or meeting of Parliament next ensuing the said two years, but not afterwards or otherwise; and it is further ordered, that in no case shall any person or persons be allowed a longer time, on account of mere absence, to lodge an appeal, than five years from the date of the last decree or interlocutor appealed against; 6 *Geo. IV.*, c. 120, § 25, and *Standing Order*, 24th March 1725, amended 22d June 1829. A petition for leave to appeal against an interlocutory judgment more than two years after its date is incompetent; 11 *D.* 1193.

When a petition of appeal is presented, an order of service is granted as a matter of course, and the respondent is ordered to put in his answer in four weeks. The order is served on the agent or counsel of the other party, by delivering him a copy, and showing him at the same time the original; and the service is proved by an affidavit, which may be written on the back of the order, sworn by the person who has served the warrant in presence of a judge or justice of peace. Within fourteen days from the presenting of the appeal, the appellant (with the exception of the Lord Advocate), or some responsible person for him, must enter into a recognisance to the extent of £400, to answer the expense which may be awarded to the respondent in case of an affirmation; and without this recognisance, the appeal falls. A *pro forma* answer is lodged by the respondent, and cases are prepared for both parties. That of the appellant must be lodged within four weeks after the time appointed for the respondent to put in his answers to the petition of appeal, under penalty of dismissal of the appeal. But the appellant may present a petition, within the prescribed time, craving a prorogation, which petition is referred to the Appeal Committee. The case of the respondent must be lodged within the same period; but non-compliance on the respondent's part only subjects him to the danger of having the cause set down for hearing *ex parte*, which he can remove by stating a satisfactory reason for his delay, and paying the expenses thereby occasioned to the appellant. It is ordered, that "the appellant

alone, in his printed case, shall lay before this House a printed copy of the record as authenticated by the Lord Ordinary, together with a supplement containing an account, without argument or statement of other facts, of the further steps which have been taken in the cause since the record was completed; and containing also copies of the interlocutors or parts of interlocutors complained of; and each party shall, in their cases, lay before the House a copy of the case presented by them respectively to the Court of Session, if any such case was presented there, with a short summary of any additional reasons upon which he means to insist; and if there shall have been no case presented to the Court of Session, then each party shall set forth in his case the reasons upon which he founds his argument, as shortly and succinctly as possible;” *Standing Order, 12th July 1811, amended by Ord. 22d June 1829, and 6 Geo. IV., c. 120, § 26.* The case must also contain a copy of such proofs taken in the Courts below as the parties intend respectively to rely on at the hearing, together with references to the documents; *Standing Orders, 24th Feb. and 8th Dec. 1813.*

The cases are exchanged by the agents in London, and counsel are heard at the bar when the cause is on the list of the day for hearing, it being the duty of the appellant within a certain time to move that the cause be set down for hearing, under penalty of dismissal of his appeal; *Standing Order, 29th March 1720, amended 5th April 1734.* Judgment is usually pronounced soon after the hearing, affirming or reversing the judgments appealed from, or remitting the cause to the Court of Session for reconsideration. The execution of the judgment is obtained by presenting an authentic copy of it, with a petition, to the Court of Session, praying that it may be applied; and the procedure after appeal is regulated by the forms of the Court of Session and of the statute.

A successful pursuer may apply by summary petition to the Court for interim execution, pending an appeal to the House of Lords; *48 Geo. III., c. 151, § 17.* This statute empowers the Court to regulate all matters relative to interim possession or execution, and payment of costs and expenses already incurred, according to their sound discretion, having a due regard to the interests of the parties, as they may be affected by the affirmance or reversal of the judgment. The applicant must find caution to refund in the event of a reversal. An order for interim payment does not found a right of action in England; *Patrick v. Shedden, 22 Law Journal, N. S. 283.* The respondent may also apply by petition to the House of Lords to have an appeal, of which he has received notice, dismissed as

incompetent and irregular. Parties are heard before the Appeal Committee, who report to the House their opinion, which is invariably adopted; or the question may be ordered to be argued at the bar of the House; and if the appeal be dismissed, a certificate to that effect is furnished to the respondent, and the interlocutor or decree appealed from is revived, to the same effect as if no appeal had been entered. Provision is made for appeals “dismissed for want of prosecution,” by *48 Geo. III., c. 151, § 20.* Where a respondent desires to present a cross-appeal, this must be done within a fortnight after his answer is given in to the original appeal. It is presented, and an order made as upon the appellant’s petition. Recognisance is not necessary, nor is an additional case from either party required.

An appeal to the House of Lords does not remove the process from the Court of Session as regards any point not necessarily dependent upon the interlocutor submitted to review; *13 and 14 Vict., c. 36, § 13.* The interlocutor of the Inner-House, pronounced on review of the interlocutor of the Lord Ordinary closing the record, is not appealable as an interlocutory judgment; *Ibid. § 5.* In processes of cessio, a petition of appeal must be lodged within ten days from the date of the judgment during the sitting of Parliament, if it sit for so many days, otherwise within six days after the next session shall have met; *6 and 7 Will. IV. c. 56, § 19.*

See on the subject of this article, *Smith’s Forms of Procedure in the House of Lords upon Appeals from Scotland*, which contains a concise view of the whole practice of the House upon appeals, the Standing Orders, and a table of fees. See also *Shaw’s Forms of Process*, pp. 433-442, where the statutes, Standing Orders, and decisions of the Court, are digested; and *Macqueen’s Practical Treatise on the Appellate Jurisdiction of the House of Lords and Privy Council.* See *Expenses.*

**Appeal to Circuit Court.** The Jurisdiction Act (20 Geo. II., c. 43) allows an appeal to be taken to the Circuit Court of Justiciary; *1st*, In criminal cases against the judgment of an inferior court, inferring neither death nor demerement; and, *2d*, In civil causes, where the sum in dispute does not exceed £12 sterling (extended to £25 sterling by *54 Geo. III., 67, § 5*). These appeals must be lodged with the clerk of the inferior court, within ten days after the judgment has been pronounced; and the adverse party, or his agent, and the inferior judge himself (where the appeal contains any conclusion against him), must be served with a copy of the appeal fifteen days at least before the sitting of the circuit court. No such appeal is competent

except against a final judgment of the inferior court; *i. e.*, a judgment by which the merits of the cause, as well as the expenses, are disposed of; but it is not necessary that expenses, where found due, be taxed and determined for; *Dundee Whale Fishing Company*, 13th Oct. 1848, *Shaw's Just. Rep.* 15. By the Acts of Sederunt regulating inferior courts, these appeals in civil causes may be taken and minuted in open Court, at the time of pronouncing the judgment; or they may be taken by lodging a written appeal in the hands of the clerk of Court, and serving a duplicate of it upon the opposite party or his procurator, personally, or at his dwelling-house, and in either case within ten days after the date of the sentence, and fifteen days at least before the sitting of the Circuit Court. Along with his appeal the appellant must lodge a bond of caution for answering and abiding by the judgment of the Circuit Court, and for costs, should they be awarded, the circuit judges being empowered to award the opposite party's expenses against the appellant. In point of form these appeals are variously framed; but in general they are short and articulate, containing a series of reasons of appeal, and a prayer for recal or alteration of the judgment. The circuit judges must proceed with such cases summarily; and their decision is final, and not subject to review of any kind. But in cases of difficulty, the case, where a criminal one, may be certified to the High Court of Justiciary; and where civil, to the Division of the Court of Session to which the judge who hears the appeal belongs; the judgment of the Court on the point so certified being also final. Where the sentence of the inferior court is recalled, and the case does not appear to the circuit judge to be matured, he may recal the judgment appealed from, and remit to the inferior court with instructions; and under such a remit, if the question of expenses be reserved, the inferior judge has power to decern for the expenses incurred in the Circuit Court: but in that case, as the sentence appealed from is recalled, the cautioner in the appeal will not be liable for the expenses. Here, as in advocations, it is to the conclusions of the summons or original petition in the cause that regard must be had in estimating the £25. If the sum concluded for (exclusive of the conclusion for expenses of process) exceed £25, or where no particular sum is concluded for, if the subject-matter of the action truly exceeds £25 in value, the appeal is incompetent. The act 20 Geo. II., c. 43, has been held not to warrant appeals from the sentences of justices of the peace to the Circuit Court; nor from the sentence of the water-bailie of Glasgow, nor, so far as

appears, from a judgment of the dean of guild; *per curiam*, in *Donaldson*, 21st Nov. 1828 7 S. 41. Neither is it competent to appeal a case of nuisance; or an action of removing or ejection. The entry of an appeal to the Circuit Court, which has not been insisted in, or which has been dismissed as incompetent, is no bar to an advocacy, where that mode of review is otherwise competent.

By 16 and 17 Vict., c. 80, § 22, it is declared not to be competent to remove from a sheriff court, or to bring under review of the Court of Session, or of the Circuit Court of Justiciary, or of any other court or tribunal whatever, by advocacy, appeal, suspension, or reduction, or in any other manner or way, any cause not exceeding the value of £25 sterling, or any interlocutor, judgment, or decree, pronounced in such cause by the sheriff. This prohibition excludes all appeals to the circuit from the sheriff, but not from magistrates of burghs; and it does not exclude appeals from the sheriff's judgment in the Small Debt Court, upon the limited ground of review stated in 1 Vict., c. 41; 2 *Irvine's Rep.* 156. See 20 *Geo. II.*, c. 43; 31 *Geo. II.*, c. 42; 54 *Geo. III.*, c. 67, § 3; *A. S.* 12th Nov. 1825; *A. S.* 10th July 1839; *Ersk. B.* i. tit. 3, § 28, and *Ivory's Notes*; *Hume*, ii. 516; *Bell's Notes*, 308; *Alison's Prac.* 32, 34; *Barclay's Notes on A. S.* p. 70; *M'Glashan's Sheriff Court Prac.* pp. 443, 447. See also *Advocation. Final Judgment. Circuit Court.*

**Appeal.** Appeals in Sheriff Courts are now regulated by 16 and 17 Vict., c. 80. It is competent to appeal to the Sheriff any interlocutor disposing in whole or in part of the merits of the cause. But by § 19, it is enacted that, until such an interlocutor has been pronounced, it shall not be competent to appeal against any interlocutor, not being one—(1.) Disposing of a dilatory defence; or (2.) Sisting process; or (3.) Allowing a proof; or against any interlocutor on the admissibility of evidence pronounced during the leading of a proof, except as provided for in §§ 17 and 18; but that it shall be competent, in every case in which an appeal against an interlocutor is taken, also to appeal against all or any of the interlocutors previously pronounced. By § 17, it is not competent, prior to the closing of the proof, to appeal to the Sheriff against any interlocutor on the admissibility of evidence pronounced during the leading of the proof; but it is competent to appeal on the proof being declared closed, or within seven days thereafter. § 18 provides that nothing in the act shall preclude any person pleading confidentiality, or objecting to produce writings on pleas of hypothec, or otherwise, from taking to review any judgment of the Sheriff-substitute or Sheriff disposing of such pleas;

but such judgment of the Sheriff-substitute is only reviewable by appeal taken at the time in open Court, and minuted. By § 16 it is enacted, that an appeal to the Sheriff must be entered within seven days from the date of the interlocutor. Within eight days thereafter, the appellant may either lodge a reclaiming petition, or intimate his desire to be heard orally, and the Sheriff disposes of the case on reclaiming petition, or reclaiming petition and answers, or on the oral debate. If there is no reclaiming petition, and no intimation from either party of a desire to be heard orally, the Sheriff may dispose of the case without farther argument. For the mode of review of decrees of the Sheriff-substitute granting *cessio*, see 6 and 7 Will. IV., c. 7. No appeal to the Sheriff is competent against judgments of the Sheriff-substitute in summary removings from premises let for less than a year under 1 and 2 Vict., c. 119, except when such actions have been remitted to the ordinary roll; A. S. 1839, § 149. See *M'Glashan's Sheriff Court Prac.* p. 301. See also *Reclaiming Petition. Cessio. Sequestration.*

**Appeal**; in the old criminal law of England, was a vindictive action at the suit of the party injured by some heinous offence, in which the appellant, instead of merely seeking pecuniary compensation, as in civil actions, demanded the punishment of the criminal. *Tomlins, h. t.*

**Appearance**; in legal phraseology, means the stating of a defence in a cause. Where a defender states a defence, he is said to have appeared; and, in consequence of that appearance, the judgment pronounced becomes a decree *in foro*, and cannot be opened up when allowed to become final, unless where new facts have come to the knowledge of the party. An exception to this rule is also admitted, where decree has been pronounced against a party in consequence of his inability through poverty to carry on his case. See *Balenden v. Duke of Argyle*, 6th July 1792; *M. p.* 7252; *Shand's Prac.* 284, 311, 314; *M'Glashan's Sheriff Court Prac.* 198, 305; 16 and 17 Vict., c. 80.

**Appellant**; is the party by whom an appeal is made: the other party in the proceedings in the House of Lords is termed the respondent.

**Appenage**; a child's part or portion, and properly the portion of the King's younger children in France. *Tomlins, h. t.*

**Appendant**; in English law, signifies a pertinent or accessory to another inheritance of greater value, as a seat in a church to a house, &c. *Tomlins' Dict.* See *Part and Pertinent.*

**Apportionment Act.** See *Heir and Executor.*

**Appraisalment**; see *Appretiation.*

**Appraisers**; are the persons appointed to value pointed goods. They must be licensed and sworn de *fideli administratione.* 54 Geo. III., c. 184.

**Apprehending of a Debtor**; is the act of arresting a debtor under a legal warrant, on account of his failure to pay the debt. This may be done in certain cases under an act of warding (see *Act of Warding*), but formerly the ordinary warrant for apprehending a debtor was a caption issued in the sovereign's name, and under the signet, charging messengers-at-arms to apprehend and imprison the debtor, and to call upon magistrates for assistance in doing so. Letters of caption are still competent; but under the Personal Diligence Act (1 and 2d Vict., c. 114), within year and day of the expiration of a charge to the debtor upon the extracts set forth in the act, the extract and execution of charge may be recorded in the Register of Hornings; and on presenting the extract, execution, and certificate of registration in the Bill-Chamber, with a minute endorsed in the terms of schedule 4 annexed to the act, the Clerk of the Bill-Chamber writes his "*fiat*" on the extract, which is now the usual warrant for imprisonment. A similar course is competent in Sheriff Courts in regard to the extracts of Sheriff Court decrees, or extracts from Sheriff Court books; and also with regard to the imprisonment of Crown debtors by 19 and 20 Vict., c. 56 (*Court of Exchequer Act*). All magistrates and sheriffs are bound, when required, to assist in executing a caption, under pain, on refusal, of being made responsible for the debt. The messenger-at-arms who is entrusted with the caption or warrant, and his cautioner, are liable to pay the debt, if the messenger delays to execute the warrant after having received instructions to do so; *Bell's Com.* vol. ii., p. 543, 5th edit. Imprisonment for debt being one of the proofs of notour bankruptcy under the act 1696, c. 5, and the law having recognised a species of *constructive imprisonment*, it is of importance to attend to the manner of apprehending the debtor. According to the most regular form, there are three successive steps in apprehension—1st, The display of the blazon; 2d, Showing the warrant; 3d, Touching the debtor with the wand of peace, after which he is held in law to be in custody; and should he thereafter escape and take refuge in the sanctuary, the messenger may follow and seize him there, and take him to prison. A sist on a bill of suspension, obtained by the debtor posterior to such apprehension, will not prevent his incarceration, a bill of suspension and liberation, where there are grounds for it, being then the remedy. Either the regular apprehend-

ing, or the actual incarceration, has been held sufficient to render the debtor notour bankrupt. The apprehension, however, requires to be in all respects formal. *Bell's Com.* ii. p. 169, 5th edit.; *Ersk. B. iv. t. 1, § 42, and Notes by Mr Ivory.* In the case, however, of *Scott*, 18th Jan. 1855, 17 D. 292, it was held that it is not essential to the validity of such a constructive imprisonment that the messenger-at-arms in executing the diligence make use of his wand of peace. By the Bankruptcy Act, 19 and 20 Vict., c. 79, it is now enacted, that, on and after 1st Nov. 1856, notour bankruptcy shall be constituted, *inter alia*, by insolvency concurring with a duly executed charge for payment, followed by imprisonment or formal and regular apprehension of the debtor, § 7. Peers and married women are secured against personal execution on civil debts—also pupils by special statute, 1696, c. 41. A warrant to imprison for civil debt cannot legally be executed on Sunday. 2 *Bell's Com.* 569, 5th edit. For an exception to this, see *Meditatione fugæ.* See also *Bankrupt. Imprisonment.*

**Apprentice.** An apprentice is one who engages by indenture to serve a master for a certain number of years, in order to be instructed in some profession, art, or manufacture, which the master becomes bound to teach him. The terms of such an engagement, as to its endurance, apprentice-fee, the recompense given to the apprentice, &c., must depend on the nature of the employment, and the particular agreement of the parties. Though a pupil (that is, a boy under fourteen, or a girl under twelve, years of age) may enter into an indenture, yet he must have the concurrence of a parent or tutor, who alone can be liable in the penalty for the non-performance of the engagements on the part of the apprentice. After pupilarity, when the minor has no curators, he may effectually enter into an indenture, the conditions of which will bind him. Where the apprentice deserts his service, the master is entitled to the apprentice-fee, without deduction. In England, it would appear, that, by a general law, an apprentice serves during seven years for a privilege which extends over all England; whereas in Scotland, an apprentice by his service acquires merely the privilege of his master's incorporation in the particular burgh where he has served, and in which his master carries on his business. At common law an apprentice cannot enlist, or enter the royal navy; and by 9 Geo. IV., c. 4, § 103, apprentices who enlist are liable to be punished not only as having obtained money under false pretences, but also with imprisonment and hard labour for two years, besides being liable to serve as soldiers when their apprenticeship expires, and seizable as de-

serters, if they do not then deliver themselves up to an officer authorized to receive recruits. *Tomlins, h. t.*; *Ersk. B. i. tit. 7, § 62*; *B. iii. tit. 3, § 16*; *Bank. vol. i. p. 58*; *Bell's Princ. § 2188, 3d edit.*; *Swint. Abridg. h. t.*; *Brown's Synop. h. t.* and pp. 1510, 2342; *Shaw's Digest*; *Shand's Prac. pp. 86, 96*; *Hutch. Justice of Peace, vol. iii. p. 315*; *Tait's Justice of Peace, h. t.*; *Blair's Justice of Peace, h. t.*; xi. *S. p. 180*; xiii. *S. 778*; *Hume, i. 174, 68, 75*; *Menzies' Conveyancing*; *Fraser's Pers. and Domestic Relations.* For the determination of complaints by masters against apprentices, and apprentices against masters, see *Workman.*

**Appretiation**; the valuing of pointed goods. See *Pointing.*

**Apprising.** See *Adjudication.*

**Approbate and Reprobate.** A person is said to approve and reprobate, where he takes the advantage of one part of a deed, but rejects the rest. A deed must be taken altogether, or rejected altogether. To this doctrine there is an apparent exception in the case of an heir founding upon a deathbed deed in so far as it revokes a prior deed which is to his prejudice, but reducing it in so far as he is also prejudiced by it. In such a case it is held that the ancestor having himself revoked the prior deed, it is in the same position as if it had been cancelled by him, or had never existed. The revocation is the act of the ancestor himself, and the prior deed being thus out of the way, the heir is entitled to reduce the deathbed deed as, 1 *L. C.* 617, being to his prejudice, although the prior deed was equally prejudicial to him. This apparent exception to the rule of approve and reprobate was established by the House of Lords in the case of *Crawford v. Coultis.*

In that case the heir pleaded that the doctrine of approve and reprobate could not apply, because he did not claim the estate under either of the deeds executed by his ancestor, but in virtue of his right as heir-at-law. The donee of the ancestor pleaded, on the other hand, that the revocation of the prior deed and the conveyance by the new deed were "*partes ejusdem negotii*," and could not be separated,—that the revocation was made for the sole purpose of giving effect to the new conveyance,—and that, if the latter was ineffectual, so also must the former be held to be. The Court decided in favour of the donee under the deathbed deed. The heir having appealed to the House of Lords, the case was remitted for the purpose of parties being reheard. In moving the remit Lord ROSSLYN, C., delivered an opinion adverse to the judgment, and observed:—"The respondent founded part of his argument upon

what is termed in Scots law the maxim of approbate and reprobate. Says Mr Coutts, 'If you approbate the revocation of the deed to Sir Hugh, contained in the posterior deed in my favour, then you cannot reprobate the other clauses of that deed.' But this is false reasoning. The Court cannot say to the heir-at-law—Under what deed do you claim? It is enough for him to say—God and nature have made me heir-at-law, show me by what deed my right is cut off. The title of an heir-at-law is always complete, insomuch that a conveyance or devise to such heir in fee is held null, and of no avail. The law of England in such a case says, the heir is in by *descent*, and not by *purchase*." On the case returning to the Court below parties were reheard, when the Court adhered to their former judgment; and the heir having again appealed, the judgment was reversed. Lord ELDON, C., observed:—"I think that this is not a case where the doctrine of approbate and reprobate will apply. The heir does not claim under the deathbed deed. He says, 'Your deed does not give you a title unless you can show me a deed executed in *liege poustie* existing at the death of the granter. If there be no such deed, the deed executed on deathbed is gone.'" See *L. C.* vol. i. p. 617. The doctrine established in the case of *Crawfurd v. Coutts* was applied in the subsequent case of *Batley v. Small*, Feb. 1, 1815, and again in *Mudie v. Moir*, March 1, 1824, 2 *S. Ap.* 9. In this last case the conveyance in the deathbed deed was in favour of the same party as in the prior but revoked deed, but making certain alterations on some of the other interests provided in that deed. The donee pleaded that the second deed being substantially the same with the prior one, the heir's right of challenge was excluded. The Lord Ordinary decided in favour of the heir, but the Second Division of the Court was equally divided in opinion, and one of the Lords Ordinary having been called in, he concurred in the judgment of the Lord Ordinary in the cause. On appeal this judgment was confirmed. Lord ELDON, C., observed:—"There is this peculiarity in the law of Scotland, that though a deed is bad as a deathbed deed, it may be good for one purpose, that is to say, that the heir-at-law can insist that it is a good deed, provided the effect of it be to revoke a former settlement, though in itself it would be bad. In this case it has been strongly contended that it ought not to operate as a revocation, although there are express words of revocation in it, because there had been a former deed, and that it was an affirmation of that former deed. Now, in truth, in respect of that, there is hardly a single interest which is given in the former deed, which is not somehow in its nature and

quality altered by this. It does therefore appear to me, that whatever might be the case—in respect of which I beg to be understood to give no opinion whatever—if the dispositions had been exactly the same,—I give no opinion whatever upon the principles which might or might not apply to such a case,—they do not apply to this case; and, therefore, how ever much I may regret the hardship of the case, it appears to me your Lordships can give no other judgment but that of affirmation of this judgment."

In *Anderson v. Fleming*, May 17, 1833, the deathbed deed was almost identical with the one executed in *liege poustie*. It, however, contained a revocation of all former deeds of settlement. Lord MACKENZIE, Ordinary, ordered cases to the Court on the question, "Whether the prior deed was to be considered as so effectually revoked by the clause of revocation in the deathbed deed as to entitle the pursuer, as the heir-at-law, to reduce the last deed as an independent deed to his prejudice, executed on deathbed?" The Court decided in favour of the heir-at-law. Lord Justice-Clerk BOYLE observed:—"I have paid every attention to the argument that there is a distinction between the principle in the case of *Moir* and *Mudie* and this, but I can see no ground for it whatever. It is settled law that the plea of approbate and reprobate does not apply, and the decisions in the cases of *Batley*, and of *Moir* and *Mudie*, though in the latter there was a variation in the deeds, go to the same principle, as stated by the Lord Ordinary, viz., That in all the cases the Court never entered into the view of the supposed intention of the testator. Then that being decided, all that is said on the other side is, that Lord Chancellor ELDON, according to his uniform practice of not deciding any cause not actually before him, refrained from giving an opinion as not necessary to the decision. And I have not seen any authority for departing in this case from the principle in the cases of *Batley*, and *Moir* and *Mudie*, that the revocation being absolute, effect must be given to it."

In the cases just cited, the prior deed was revoked by an express clause of revocation in the deathbed deed; but a different rule is applied where the revocation is not express, but implied merely from the execution of a subsequent deed. In such a case the right of the heir is not restored, and he is not entitled to reduce the subsequent deed on the head of deathbed. This rule was established in the case of *Rowan v. Alexander*, Nov. 12, 1775. The defence was, that as the first deed was not expressly revoked by the last, the first should still subsist, although



the second should be taken out of the way, a virtual revocation not being sufficient. The defence was sustained on the ground, that, since the deathbed deed contained no revocation of the former one, it could not subsist as a revocation after it was cut down on the head of deathbed. This judgment was disapproved of by Lord ROSSLYX, C., who, in the case of *Crawford v. Coultts*, observed:—"The Court of Session here made a distinction between an express revocation and an implied one, which I confess I do not feel. If a person makes a disposition of his estate and locks it up in his repositories, and at the distance of ten years makes another disposition of the same estate, I should be of opinion that the former deed was revoked, and that the posterior one must take effect." Lord ELDON, C., also disapproved of the judgment in *Rowan v. Alexander*; and in the subsequent stage of *Crawford v. Coultts*, observed:—"It was said in that case that there was no express revocation; but it is difficult to perceive what could be a more express revocation than giving the estate wholly to another. That case must now be held to stand upon the principle that the testator did not mean the former deed to be revoked, unless the second deed was found to be good; and expressing nothing as to a revocation of the former deed must be held to have meant in effect that both should stand to accomplish the purpose he wanted of giving the estate to the donee in the last deed. This would apply also to the case of the donee under the second deed being unwilling to take, or incapable of taking. But the same principle will not apply to a case of express revocation." In the same case his Lordship also intimated, that though he disapproved of the judgment in *Rowan v. Alexander*, he would hold the point determined by it to be the law, and observed:—"There is a manifest difference between what might have been fit and proper to be done when that case was recent, and what may be so at this day. No man can say that many titles may not rest on the principle of that case of *Rowan v. Alexander*." See *L. C.* vol. i. p. 635. Accordingly, the principle of that case was applied in the case of *Eastburgh v. Wauchope*, May 25, 1820, where the judgment of the Court in favour of the donee was affirmed in the House of Lords. In moving the affirmance, Lord ELDON, C., observed:—"As to the question of implied revocation, if we are to act on the maxim of *Stare decisis*, the judgment cannot be disturbed. The deed in *liege pousitie* reserves a power of revocation. By making another disposition under the authority of the power, it must be supposed that the donee intended to do something effectual, and it cannot be implied that, by the exercise of the

power, he meant to revoke it. *L. C.* vol. i. p. 665."

The doctrine of election in England is similar to that of approbate and reprobate in Scotland, but a difference occurs in the application of it in certain cases. Thus, where a deed is inoperative to carry real property, the heir is not put to his election unless there is an express condition attached to the bequest in his favour, to the effect that he shall convey the real property according to the wish of the testator. The ground for limiting the doctrine of election in such a case is, that the will, being improbate, is so completely void as to the real estate, that it cannot be read so as to raise the implied condition arising from the disposal of it, and that the deed is therefore to be dealt with as if it had contained no disposal of the real estate, and only a personal bequest in favour of the heir. This limitation of the doctrine was first applied by Lord HARDWICKE, in *Hearle v. Greenbank*, 3 *Atk.* 695. In that case an infant had made a disposition of her inheritance, which in law is null. Lord HARDWICKE decided that the heir was not obliged to elect, and observed:—"Where a man executes a will in the presence of two witnesses only, and devises his real estate from his heir-at-law, and the personal estate to the heir-at-law, this is a good will as to personal estate, yet, for want of being executed according to the Statute of Frauds, is bad as to the real estate; and I should, in that case, be of opinion that the devisee of the real estate could not compel the heir-at-law to make good the devise of the real estate before he could be entitled to his personal legacy, because there is no will of the real estate, for want of the proper forms and ceremonies required by the statute. In the present case there is no instrument which could pass the real estate." Where, however, there is an express condition annexed to a bequest to the heir-at-law, he cannot take the bequest without complying with the condition; and therefore if the condition is to the effect that the heir shall convey the real estate to the party named by the testator, he must execute such conveyance before being entitled to the bequest. This distinction was established in the case of *Boughton v. Boughton*, 2 *Vesey*, 12. In that case the will purported to give the real estate to the testator, but was not executed agreeable to the Statute of Frauds. It, however, expressly directed that if any who received benefit by the will should dispute any part of it, they should forfeit all claim under it. It was held that, there being an express condition in this case attached to the bequest to the heir, he was bound to elect. Lord HARDWICKE observed:—"In the case of *Hearle v. Greenbank*, my opinion was grounded upon

there being no instrument executed sufficient to pass land, and there were none of the cases in which it was determined that there should be such an election, but where there was a will concerning land, but that there was no ground for the Court to imply a condition to abide by a will of land when there was none; but that it would be dangerous to break in on the Statute of Frauds to make an estate pass by instrument not sufficient to pass real estate—not by the words of the testator, but by a condition implied by the construction of the Court. Therefore it could not be, nor was it, warranted by any proceeding; for it was only guessing at the intent of the testator, who might leave it for that very reason. But the question is, Whether this case did not differ from that from the express clause in the will? In the case of *Hearle v. Greenbank*, where the Court were to make such a construction by implication from the face of the instrument itself, the Court must see the will, and could not know or take notice of a will of real estate. But here, if there is such a condition annexed to a personal legacy, the Court must consider every part of that, whether it is a matter relating to real estate or not. You must read the whole will relating to the personal legacy, let it relate to what it will; which is a substantial difference, and will prevent going too far to break in upon the Statute of Frauds, and at the same time will allow natural justice, which requires, as far as may be, such a construction to be made, otherwise the intent of the statute may be overturned.”

The soundness of this distinction in the doctrine of election in England has been frequently doubted; but, being once established, it has been thought advisable that it should be retained. In *Carey v. Askew*, 1 Cox, Lord KENYON, Master of the Rolls, observed:—“As to the question of election, the cases which have been decided are certainly great authorities; but I must confess I should have had great difficulty in making the same distinction if they had come before me. They have said, You shall not look into a will unattested so as to raise the condition which would be implied from the devise, if it had appeared; but if you give a legacy on condition that the legatee shall give the lands, the heir must elect. However, I am bound, by the force of those authorities, to take no notice whatever of the unattested will, as far as it relates to the freehold estates, and therefore the plaintiff cannot be put to his election.” In *Brodie v. Barry*, 2 Ves. & Ben. 127, Sir WILLIAM GRANT observed:—“I do not understand why a will, though not executed so as to pass real estate, should not be read, for the purpose of discovering in it an implied

condition concerning real estate annexed to a gift of personal estate, as it is admitted it must when such condition is expressed to such gift. For if by sound construction such condition is rightly inferred, the effect seems to be the same as if it were expressed in words.”

The case of *Kerrs v. Wauchope*, affirmed in the House of Lords, 1 Bligh, 1, was the case of two heirs-portioners, who, having reduced a deathbed deed in so far as it affected the heritage of the testator, still claimed an interest under the deed. It was held that they could not approbate and reprobate the deathbed deed. Lord ELDOX, C., observed:—“It is equally settled in the law of Scotland and of England that no person can accept and reject the same instrument. If a testator gives his estate to A, and gives A’s estate to B, courts of equity hold it to be against conscience that he should take the estate bequeathed to him, and at the same time refuse to give effect to the implied conditions contained in the will of the testator. The Court therefore will not permit him to take that which cannot be his but by virtue of the disposition of the will, and at the same time to seize what by the same will is given, or intended to be given, to another; it being contrary to the established principles of equity that he should enjoy the benefit, while he rejects the conditions of the gift. As to the difficulty raised from the invalidity of the deed to carry land, from which it is inferred that that part of the deed is to be held *pro non scripto*, the distinctions are undoubtedly thin and unsubstantial, it having been held that, although a will be not duly executed according to the statute to affect land, yet if by the same will personality is given upon condition that the legatee shall convey land, in such case, inasmuch as the condition of personality cannot be read without reading at the same time the condition on which it is given; the giving of the condition is inseparable; and such was the feeling of Sir William Grant in *Barry’s case*.” The case of *Kerrs v. Wauchope*, however, was not the case of heritage conveyed by an informal or improbativ deed, but the case of a deathbed deed which is not null in law, but only reducible at the instance of the heir of the investiture to whose prejudice it is granted. Accordingly Lord ELDOX observed:—“There is besides a ground on which this case may be consistently determined, namely, that a deathbed deed is not null, but only voidable, and in many cases will regulate the succession, and the doctrine is directly applicable to prevent the Ladies Kerr from claiming under this deed while they have repudiated any part of the succession, and while they have made this election to reject.”

The importance of this difference between

the English doctrine of election and the Scots doctrine of approbate and reprobate arises, when the testator, whose will is under consideration of the courts in Scotland, has died domiciled in England. In such a case the will is construed according to the law of England, and it is left to English lawyers to say whether, by the English law, the heir would be put to his election or not. Accordingly, in the case of *Trotter v. Trotter*, Dec. 5, 1826, 5 S. 72, which was the case of the will of a party who had died domiciled in India, and which was ineffectual to convey heritable bonds in Scotland, the opinion of English counsel was taken, whether, according to the law of England, the heir would have been obliged to elect between the heritable bonds and his interest under the will. The opinion returned was in favour of the heir, and judgment was pronounced accordingly. Lord ALLOWAY dissented, and observed:—"I perfectly agree with the opinion of the English counsel consulted here, that the heir is entitled to take under the settlement, and also as heir-at-law, if it was not the intention of the testator to dispose of the heritable property by that settlement, and so far I think it right to follow the English law, which, however, agrees with our own. But when we come to ascertain what was the intention of the deceased, I conceive that we are entitled to throw out of view the technicalities of the English law, which seem in a great measure to depend on whether the property be freehold or copyhold, and whether there be two or three witnesses, and to judge of the intention for ourselves. The will here is a military testament made in a remote colony, and no technical language is used in it. I know it cannot carry the real estate, but the intention to do so is clear. All I ask is to construe the will according to the fair colloquial meaning of the language; and in this view the intention to settle his whole estate in Scotland, as well as elsewhere, is evident." On appeal, the judgment of the Court was affirmed. Lord ELDON, C., observed:—"The question is simply a question of construction—Does it appear upon the face of the will that it was the intention of the testator to dispose of these heritable bonds? Now, the rule of law in England, with respect to subjects of this kind, is well ascertained and well defined, and it is this—That you are not to proceed by probability or conjecture, but that there must be a clear and manifest expression of the intention on the face of the will to include that property which is not properly devised before the heir can be put to his election." The ground, however, on which it must be held that the intention to include the heritable bonds was not clearly expressed was just this, that they had not "been properly

devised" in respect that the will was inoperative to carry heritable property in Scotland. This is clear from the opinion of English counsel on which the judgment proceeded, and which is in these terms:—"Considering heritable bonds in Scotland as real estate to which the heir-at-law is entitled, unless they are conveyed away by his ancestor with due solemnities, we think the heir-at-law would be entitled in this case to claim them without being put to his election, if the question had occurred in a court of justice in England."

The case of *Dundas v. Dundas*, 7 S. 241, was the case of a party domiciled in Scotland conveying by his settlement real property in England, but which was ineffectual to do so, not being attested by three witnesses, according to the law of England. In this case, the Court decided without taking the opinion of English counsel, on the ground, that the testator being a domiciled Scotsman, his will fell to be construed according to the law of Scotland; and applying the doctrine of approbate and reprobate, they decided against the heir. Lord J. C. BOYLE observed:—"This is a Scotch deed, and we must determine as to the intention expressed in it, according to the principles of the law of Scotland alone; and it is clear that the intention of General Dundas was to pass all his estates, and he attempts to convey a landed estate in England, which he does ineffectually, but the intention is clear. Then the question comes to be, Is the heir entitled to take the English property in face of his father's intention expressed in the trust-deed, and also to claim a share of the other funds under that deed? I am decidedly of opinion that this would be to approbate and reprobate the same deed, and that he must therefore collate the English estate, or give up his claim for a share of the trust-funds." Lord PITMILLY observed:—"The case of *Trotter* is just the converse of this; and the same principle which led us to decide by the English law there leads here to a decision according to the Scotch law. Then, if it be a question of Scotch law, there cannot be the slightest doubt." In the House of Lords, it was contended for the heir-at-law, that, as the case related to real estate in England, it must be dealt with according to the law of England, and that according to that law, as the trust-deed was improbativ to the effect of transferring the estate in England, it could not be dealt with as probative to the effect of establishing that it was the intention of the testator to convey that estate to his trustees, but that the deed being improbativ as to the alleged act of transfer, it must be read as if that property had not been mentioned in it. In affirming the judgment of the Court below, Lord LYNDBURGH, C., ob-

served:—"If this decision should stand, it will not by any means tend to show that the Court of Session has a right to set aside in any manner the Statute of Frauds as to a will with respect to an English freehold estate. The decision does not infringe on the English law, it only operates on Scotch personalities and Scotch reality, over which the Scotch Courts have an undoubted right, and they say, 'We, according to your principle, take the whole of this deed together. We do not say the deed has any effect on landed estates any more than Lord Kenyon said in the case of *Carey v. Askew*, that the will would affect an English estate. We do not say that this would take, in an English Court, from the heir-at-law his landed estates; but we are called upon to construe, according to the principles of our law, the Scotch deed; and knowing it to be a Scotch deed, we say, by the principles of Scotch law, not that you shall not have your estate in England, but that you shall not have your Scotch share unless you bind yourself to fulfil what we call and construe to be the plain intent of the party.' It is taking up the matter upon the condition: the personal and real estate in Scotland the Court of Session can deal with, but not this English landed estate, except so far as the Court makes the vesting of the estate, real and personal estate, or the share of it, to depend upon the voluntary act of relinquishing the English right. Now, as I am not prepared to say that the Scotch Court has not that power, and as I am prepared to say that they can exercise that power without violating the English law upon the ground stated, I should incline humbly to advise your Lordships to affirm the judgment."

Where an heir repudiates his ancestor's settlement, and takes the heritage which was intended for another party, the question arises—What is to become of the portion of the succession intended for the heir but forfeited by him by his repudiation of the settlement? By the repudiation of the heir the scope of the settlement is deranged, and the intentions of the testator are frustrated. Does the portion of the succession forfeited by the heir lapse, and is it to be dealt with as if forming part of an intestate succession; or is it to be given to the party who is prejudiced by the heir's repudiation as a surrogation or compensation for what he has lost? Equity determines in favour of the latter view, on the principle, that to do so would be to follow out, as nearly as possible, the presumable intention of the testator. The objection to doing so is, that the Court would be making a will for the testator, and not giving effect to the will left by him. But effect cannot be given to the will left by the

testator, in consequence of the derangement of the settlement produced by the heir's repudiation of it. As, therefore, the state of matters is different from what was contemplated by the testator, the heir's repudiation not having been anticipated by him, it comes to be a question in equity, Whether the derangement produced by that repudiation ought not to be lessened by transferring to the party prejudiced by the repudiation the share forfeited by the heir repudiating. This course has been adopted in the law of England, and is called the doctrine of compensation—a doctrine engrafted on the primary one of election. In *Kerrs v. Wauchope*, 1 *Bligh*, 1, Lord ELDON observed:—"A question then arises, What is to become of the life-interest, which the appellants cannot take either as legatees or as next of kin? In our Courts we have engrafted on the primary doctrine of election the equity, as it may be termed, of compensation. Suppose a testator gives his estate to A, and directs that A's estate should be given to B. If the devisee will not comply with the provision of the will, another condition is implied as arising out of the will, that, inasmuch as the testator meant that his heir-at-law should not take his estate, which he gives to A in consideration of A giving his estate to B, if A refuse to comply with the will, B shall be compensated by taking the property, or the value of the property, which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him. The Court has not yet determined whether the respondents are or are not entitled to take a compensation until the death of the survivor of the appellants. The Court below having given no opinion, it is impossible we can give an opinion on that point. It is for their determination in the first instance. The cause must, in point of form, be remitted, with a view to have that question decided. It appears to me very easy of solution." The question, however, was not decided on the remit. The term "compensation" has not been adopted by the law of Scotland, but the equitable principle implied in that term exists, and is founded on the presumable intention of the testator in the unprovided-for event of his settlement being repudiated by his heir. Accordingly, in the case of *M'Innes v. Macallisters*, June 29, 1827, 5 S. 801, the liferent of a sum of money which had been bequeathed to the heir-at-law, but which was forfeited in consequence of his taking as heir an estate which had been left to another party, was transferred to that party as a partial compensation for what she had lost. The same principle was applied in the case of *Peat v. Peat*, Feb.

14, 1839, *D. i. 508*, where a widow having repudiated her husband's settlement, and thereby forfeited her interest under it, which consisted of the life-rent of a sum of money, it was held that the interest so forfeited did not accrue to the legatees to whom the principal sum had been bequeathed, but that it accrued to the residuary legatees, who were the parties whose interest under the settlement had been impaired by the reprobatory act of the widow. Lord GILLIES observed:—"There is no ground, either in law or equity, for holding that the parties to whom the principal of the sum affording those life-interests was provided by the settlement, are entitled to benefit by the widow's exercise of her right. The reprobatory act occasioned great loss to the residuary legatees. It occasioned no loss whatever to the special legatees; and I can see no ground for holding that it should in any way redound to their benefit. Their whole right under the settlement in the year 1800 was to obtain payment of it after the death of the widow. It is true that, since the testator's death, his widow has repudiated the settlement, and carried off a large portion of what was destined to the residuary legatees; but surely the fact that the widow has caused the residuary legatees to get less than the testator designed for them, is no reason why the special legatees, by a second and unnecessary deviation from his will, should get more than he ever intended for them."

In the case of *Breadalbane's Trustees v. Pringle*, Jan. 15, 1841, 3 *D. 357*, the testator had directed his trustees to pay over the free rents of his unentailed lands to his two daughters equally between them while both should be in life, and to the survivor, and to continue to do so as long as both or either of them should be alive. One of the daughters successfully claimed her legitim, contrary to the scope of the settlement of her father, and thereby forfeited her interest in the bequest. The other daughter then claimed the whole of the rents of the unentailed lands, on the ground that the settlement contained no direction regarding the half of the rents which her sister had forfeited. It was held, however, that her interest was not enlarged by the forfeiture of her sister's interest, but that the forfeiture operated during the lifetime of that sister in favour of the heirs of entail, who had been prejudiced by the legitim having been claimed. Lord MEDWYN observed:—"It is argued, that if the claim of the trustees was to be sustained, it would be making a will for the testator different from what he has made, and different perhaps from what he would have made if he had anticipated the event which has occurred.

But this argument will apply with equal force to the claim on the other side. During the lifetime of her sister, Lady Elizabeth Pringle was only to have the half of the rents, and it cannot possibly be discovered, from the tenor of these settlements, that if the Marquis had known that the Duchess of Buckingham would claim her legitim, and therefore interfere with the purpose of the trust, his meaning would have been to enlarge Lady Elizabeth's provision by one-half. On the contrary, as his object had been to leave his personal succession, free from any claim of legitim, for the benefit of the heirs of entail, when that object was in part defeated by this claim, it is natural to suppose that he would wish the forfeited interest in the unentailed rents to go into the general trust, to supply in part what had been taken out of it against his will. This principle of *surrogatum* was given effect to in the case of *Kerr v. Wauchope*, 3d May 1819, in the House of Lords; of *Macalister*, 29th June 1827; and of *Peat*, Feb. 14, 1839."

In the case of *Nisbet's Trustees v. Nisbet*, Dec. 5, 1851, 14 *D. 145*, a testator directed his heritable and moveable estate to be divided between the children of his two brothers and sister, and declared that, should either of his brothers or sister challenge the settlement, they should forfeit all right under it for themselves and their families. The eldest brother obtained a reduction of the settlement, in so far as it conveyed heritage, on the head of deathbed, and thereby forfeited his children's share of the succession. The next of kin of the testator then claimed the forfeited share, on the ground that the settlement contained no provision that the forfeited share should be divided among the other beneficiaries, and that, therefore, so far as regarded that share, the testator must be held to have died intestate. It was held, however, that the forfeited share did not fall to be divided between the next of kin, as being intestate succession, but fell to be paid to the beneficiaries under the trust-deed, to whose prejudice the reduction of the settlement, on the head of death-bed, had operated. Lord FULLERTON observed:—"I must hold that the forfeiture was presumably intended for the benefit of the remaining legatees, and most certainly not for the benefit of the next of kin, who have no interest whatever under the settlement; and I think this is the principle which we may extract from the different decisions referred to of *Kerr*, *Macalister*, *Peat*, and *Breadalbane*. None of them, perhaps, are in point; but all of them will be found to involve this principle, that the forfeiture or repudiation of a settlement by a party interested in it will not confer on any party a

benefit not contemplated by the settlement, at the expense of the parties whose interests have been diminished by the challenge of the settlement occasioning the forfeiture. I think this principle, perfectly sound and reasonable in itself, is quite sufficient to determine the present competition in favour of the remaining beneficiaries under the trust and against the next of kin."

See on the subject of this article, *Ersk. B. iii. tit. 3, § 49*; *Bell's Com. vol. i. p. 146, et seq. 5th edit.*; *Bell's Princ. § 1937, 3d edit.*; *Brown's Synop. h. t.*; *Shaw's Digest, h. t.*; *Sandford on Entails, p. 103*; *Sandford's Heritable Succession, vol. i. pp. 97, 112, 142*; *11 S. p. 139*; *Kames' Princ. of Equity (1825), 205. See Deathbed.*

**Approbatory Articles.** See *Articles Improbatory.*

**Appropriation**; signifies the annexing of an ecclesiastical benefice to the proper and perpetual use of some religious house, bishopric, college, or spiritual person, to enjoy for ever. *Tomlins' Dict.*; *Wharton's Lex. h. t.*

**Approved Bill**; in mercantile law and usage, is a bill to which no reasonable objection can be made. The person who sells goods for *approved bills* is not entitled arbitrarily to repudiate the bill offered: he must state a reasonable objection. *Brown on Sale, p. 41.*

**Approver.** In English law language, an *approver*, or *prover*, is one who confesses participation in a felony, and bears evidence against his accomplice or accomplices. A person who has once pleaded guilty of the crime cannot be an approver. A prisoner is seldom, and only in very special circumstances, convicted upon the uncorroborated evidence of an approver. *Tomlins, h. t. Wharton's Lexicon, h. t.*; *Taylor on Evidence, 778.* An approver is admitted to give evidence upon an implied promise of pardon, if he make a truthful confession. See *Accomplice.*

**Apud Acta.** This expression is applied to judicial notices or intimations given in open court, the parties, or their counsel or agents, being present. Thus, if an adjournment of a proof or other judicial proceeding is made by the court, or by a commissioner, and the parties and witnesses, being present, are convened to attend at a future day, this is called a citation *apud acta.* So, in a criminal process, the court may adjourn a trial to a future day specified in the deliverance, which being intimated *apud acta* to parties, witnesses, and assizers, is sufficient notice without further citation. *Hume, ii. 275. Bell's Notes, 230.*

**Appurtenances**; are things either corporeal or incorporeal, appertaining to another thing as principal, as hamlets to a chief

manor, &c. *Tomlins' Dict. See Pertinent; Part and Pertinent.*

**Aqueductus**; a known rural servitude, signifying the right to conduct water by conduits, canals, pipes, &c. in the servient tenement. This servitude may be acquired by immemorial possession; and as the owner of the dominant tenement has the benefit of the servitude, so he is bound to maintain the aqueducts, pipes, &c., in such a condition as to prevent their injuring the servient lands. The servient proprietor, on the other hand, is bound to allow reasonable access for repairs, cleansing, and the like. The dominant proprietor is not bound to repair the injury occasioned by restagnation from floods. *Ersk. ii. 9, 13*; *Bell's Princ. § 1012*; *Stair, B. ii. t. 7, § 12*; *Bank. i. 681.*

**Aqueshustus**; or watering of cattle, is another known rural servitude, under which the dominant proprietor has right to water his cattle at a stream, well, or pond, in the servient lands. It does not prevent the servient proprietor from making a similar use of the water for his own cattle, or from covering it over, provided he leave open a portion sufficiently extensive to admit of a reasonable exercise of the servitude, with free access. *Ersk. ii. 9, 13*; *Bell's Princ. § 1011*; *Bank. i. 681.*

**Arage**; (from *averia*.) an old law term still employed by conveyancers, signifying services due by a tenant to his landlord or superior, and performed by horses, or carriage by horses. *Skene, h. t.*

**Aratrum Terræ**; a ploughgate of land. It consists of eight oxgates of land, because, anciently, the plough was drawn by eight oxen. *Balfour's Practicks, p. 441.*

**Arbiter**; a person voluntarily chosen by parties to decide a difference between them.

**Arbitration**; this term is applied to the voluntary reference of a dispute to the determination of one or more persons appointed for that purpose by the parties; and to the decision or award following thereon. It is usually effected by means of what is called a *submission*, i.e. the contract of reference, and a *decree-arbitral*, i.e. the form in which the award is promulgated. Submissions are either general or special; the former including all disputes subsisting at the time, and the latter applying merely to one or more particular subjects, e.g. a previously depending process. The deed of submission commonly contains the following clauses, viz., 1<sup>st</sup>, The proper clause of submission, describing the nature of the reference and the name of the referee. 2<sup>d</sup>, A clause defining the arbiter's or oversman's powers, which, in the ordinary case, are declared to be of the most comprehensive character, including, in effect, all the

rights possessed by the ordinary tribunals which determine matters of the particular description submitted. 3d, A clause specifying the time within which the award or decree-arbitral is to be pronounced. 4th, A clause obliging the parties to implement the award under a specified penalty. To these clauses, in the ordinary case, there is annexed a provision, that the reference shall be binding on creditors or representatives, notwithstanding the death or bankruptcy of either party before its determination; and also a declaration, that in case the submission shall terminate without a final decree-arbitral having been pronounced, any proof which may have been taken shall be received as legal, in any after submission or process. The deed concludes with the usual consent to registration both of the submission and consequent decree, in order to their being the warrant of diligence. The first procedure under a submission is usually the acceptance of the submission by the arbiter, and the appointment of a clerk, by a minute indorsed on the deed of submission. The pleadings, when written, commence by a claim lodged by one of the parties, which is followed by answers, replies, &c., or by the making up of a record, when the arbiter deems that necessary; after which, the arbiter either determines the case *de plano*, or allows a proof, or orders further pleadings or procedure. When there are two arbiters, the deed of submission usually provides that they shall have power to name an umpire or oversman, in case they shall differ in opinion; or sometimes such an oversman is named in the deed; and when the arbiters differ, the reference, or devolution, as it is sometimes called, is made to the oversman, who, if he chooses, may order further debate before deciding. The decree-arbitral commences with a narrative of the nature of the submission, and of the consequent procedure; and, after stating that the pronouncer of the decree has ripely advised the whole matter, and has "God and a good conscience before his eyes," it gives forth the findings and decerniture. It concludes with an order on the parties to implement the decree, under the penalty specified in the submission, and mutually to discharge each other of the matter submitted, on that implement being effected. Lastly, It ordains the submission and decree to be recorded in terms of the clause of registration in the submission; and the extract of both forms a warrant to either party for diligence against the other. A decree-arbitral is tested and executed in the form of a regular deed. By act of regulations, 2d Nov. 1695, c. 25, decrees-arbitral are declared not to be reducible, except on the grounds of bribery, corruption, or

falsehood. It is necessarily implied, however, in their nature, that such decrees are also reducible when the arbiters exceed the powers with which the submission invests them, for by it their jurisdiction is defined; or where the proceedings of the arbiter are palpably irreconcilable with the principles of impartial justice; as, where he has not fully heard the parties, or where he has taken a proof, or any other important step in the submission, in absence of one of the parties. On this point there are some decisions, both in the Court of Session and in the House of Lords, which tend, at least, to a liberal construction of the specified grounds of reduction in the act of regulations. See the following cases: *Sharpe v. Bickerdyke*, 3 Dow, 102; *Johnstone v. Cheape*, 5 Dow, 247; *Heggie and Co.*, 1st Feb. 1825, 3 S. 488; *Earl of Dunmore*, 28th Jan. 1835, 13 S. 356; *Mitchell v. Cable*, 17th June 1848, 10 D. 1297; *Miller and Sons v. Millar*, 10th March 1855, 17 D. 689; and see also *Menzies' Conveyancing*, p. 396 *et seq.*

The preceding observations apply to formal submissions followed by regular decrees-arbitral; but effect will also be given to less formal agreements to refer, more particularly where matters are not entire, *ubi res non sunt integra*, as it is expressed; that is, where something has been done on the faith of the agreement. This is especially the case *in re rustica* and *inter rusticos*; or amongst merchants in the adjustment of mercantile disputes. But such references, and the awards following on them, found a right of action merely for implement against the party refusing implement, and cannot be, like a formal submission and decree-arbitral, the warrant of summary diligence. It would now seem, however (although there are *dicta* to the contrary), that such submissions and decrees-arbitral, unless in matters of the most trivial importance, must be proved *scripto*; *Ferrie*, 5th June 1824, 3 S. 113, and cases there cited; *Tait on Evidence*, 302; *Dickson on Evidence*, p. 309.

In articles of roup, missives or minutes of sale, contracts of copartnership, and other mutual deeds, it frequently happens, that in contemplation of future differences, provision is made for a submission or reference; and in all such cases, where the arbiter is not expressly named, but merely described as the person who may be the holder of a particular office for the time, the reference will not be effectual; *Buchanan v. Muirhead*, 25th June 1799, *Fac. Coll.*; *Bell's Com.* vol. ii. p. 648, 5th edit.; *Bell's Prin.* § 391, and authorities there cited; *Menzies' Conveyancing*, p. 387.

Although, however, the general rule is, that a reference is ineffectual where the

arbiters are not named, there is an exception to the rule where the reference is connected with a contract, and where a reference may be necessary to liquidate the contract. Thus, in the case of a contract of sale, it may be stipulated that the price should be referred to a person not named, but to be mutually chosen by the parties; in such a case there is no dispute between the parties, but something to be decided which is necessary to liquidate the contract of sale. In a contract of lease, also, where a party agrees to take the stocking at a valuation, a reference to a party unnamed will be sustained. When, therefore, a reference is necessary to liquidate an obligation come under by a party, it is good, though the referee is not named, for were it otherwise, the obligation itself would be at an end. In the case of *Smith v. Duff*, 28th Feb. 1843, 5 D. 749, a tenant was under an obligation to cede possession of the land let to him at any time before the expiry of the period for which it was let, on being allowed such compensation for the remainder of the term "as should be fixed by men to be mutually chosen for that purpose," and it was held that this was a valid obligation to refer, and that the tenant was not entitled to have the compensation fixed in any other way. See also *Munro v. Mackenzie*, 18th Dec. 1823, 5 S. 593, and *Dizon v. Campbell*, 25th June 1830, 8 S. 970. Where, however, a lease contains a general clause of reference of any disputes and differences which may arise as to the true intent and meaning of the lease, or as to any other matter arising out of or in connection with the lease, the general rule applies that the referees must be named, otherwise the reference is not obligatory. In the case of *Hendry's Trustees v. Newton*, 28th May 1851, 13 D. 1001, the reference was of that description, and was not sustained. Lord FULLERTON observed:—"The point that a general submission to arbiters not named cannot be sustained, seems to be definitely fixed. No doubt, in another description of cases, decisions have been pronounced which at first sight seem to be inconsistent, but it will be found that those decisions rest upon a distinction which, whether in itself well founded or not, is now definitely recognised. It is confessedly an exception from the general rule, and applied only in cases where the ascertainment of a point essential to the extrication of a special stipulation in the contract is made part of the stipulation itself; as, for instance, where parties bind themselves to pay and receive a sum to be fixed by men mutually chosen, or to accept their opinion as the criterion of the existence or non-existence of some contingency on which the obligation of the parties is by

the contract dependent. Such are the circumstances of the case relied on by the petitioners; and it is quite clear that the principle of this exception cannot apply to the present." Lord IVORY observed:—"The purpose of this submission is not to ascertain what the law stipulates, but arises out of matters which infer nonperformance or neglect of the lease. Questions as to the liquidation or extrication of the stipulations of the contract are the kind of matters which the authorities have dealt with as forming part of the contract; and if the question does not fall within that description, it cannot be brought under the exception to the rules which requires that the arbiters should be named. If this submission is not an essential part of the contract, it falls under the general rule, that there can be no good submission of this general nature to parties of whom there is not a direct *delectus*." According to the law of England, an arbiter has no power to award expenses, unless that power be expressly given him by the submission. In Scotland the contrary was determined in the case of *Robertson v. Brown*, 15 S. 199; on the authority of previous decisions in cases of judicial reference. The point was again determined in favour of the power, in the case of *Ferrier v. Allison*, 5 D. 456, and, on appeal, the judgment was affirmed; 5 *Bell*, 161. After a submission has expired, an arbiter cannot sign a decree-arbital, although he may have come to his decision before the expiry, and recorded it in an informal writing. *Runciman v. Craigie*, 24th May 1831, 9 S. 629; and *Lang v. Brown*, 23d Nov. 1852, 15 D. 38. Where two arbiters had agreed on certain points, and differed on others, and had devolved the submission upon the oversman *quoad* the points on which they differed, and the oversman had prorogated the submission, it was held by a majority of the whole Court, that the prorogation not merely prorogated the submission *quoad* the points referred to him, but also *quoad* the other points, so as to enable the arbiters to write out a decree-arbital upon these points after the period when, but for the oversman's prorogation, the submission would have expired; *Lang v. Brown*, 23d Nov. 1852, 15 D. 38. An arbiter who accepts the office, is not entitled capriciously to renounce it, but is bound to perform the duty he has undertaken faithfully and honestly, and he may be compelled to proceed and execute a decree-arbital; *Edinburgh & Glasgow Railway Company v. Miller*, 26th March 1853, 15 D. 603. See on the subject of this article, *Bell's Com.* vol. ii. p. 386, 5th edit.; *Stair*, B. iv. tit. 2, § 18; tit. 3, § 1, and *Mr More's Notes*, p. xlii. lv.; *Ersk.* B. i. tit. 2, § 2; B. iii. tit. 3, § 44; B. iv.



tit. 3, § 29, and notes by Mr Ivory; *Bank*. vol. i. p. 453, et seq.; vol. iii. pp. 56, 89; *Parker on Arbitration*, 2d edit.; *Bell's Princ.* 3d edit. § 391, 2350; *Kames' Stat. Law Abridg.* h. t.; *Hunter's Landlord and Tenant*, i. pp. 221, 372; ii. 526, 2d edit.; *Brown's Synop.* h. t. pp. 369, 1427, 1847, 1893, 2737; *Shaw's Digest*, h. t.; *Tail's Justice of Peace*, voce *Submission*; *Blair's Justice of Peace*, voce *Submission*; *Jurid. Styles*, vol. ii. p. 162, 3d edit.; 11 S. 170, 207, 345, 353, 659, 778, 942; 12 S. 205, 210, 311, 887; 13 S. 188, 289, 356, 361, 414, 641, 684; 14 S. 404, 447, 464, 470; 15 S. 463; *Ersk. Princ.* 11th edit. 502-4; *Kames' Princ. of Equity* (1825), 466; *Dow & Clarke*, ii. 121; *Shaw & Maclean*, i. 747; *Meazies' Lectures*, 381.

**Arbitrary Punishment**; is a punishment awarded according to the discretion of a judge. In no case can it be extended to a capital punishment: it must be restricted to fine, corporal punishment, or imprisonment. *Ersk. B. iv. tit. 4, § 15*. In cases punishable capitally, the public prosecutor may, at any time before moving for sentence, restrict his libel to an arbitrary punishment; but, if there be no such restriction, the judge is bound to pronounce the capital sentence. *Alison's Prac.* 88, 90, 97, 108; *Hume*, ii. 134; *Steele*, 196.

**Arbitrium Boni Viri**. A dispute left *ad arbitrium boni viri*, means one to be decided as a person in whose probity confidence may be placed would decide. The price of a thing is often fixed in this way. When parties in their contract have agreed to refer to persons, who afterwards die or leave the country, the amount of any sum to be paid, the Court of Session sometimes modifies the amount as a thing in *arbitrio boni viri*. *Brown's Synop. h. t.*; *Brown on Sale*, p. 149, note; *Kames' Princ. of Equity* (1825), 134, 154.

**Archbishops**; Primates of the church. During the establishment of Episcopacy in Scotland there were two Archbishops; the Archbishop of St Andrews, who was called the Primate of all Scotland; and the Archbishop of Glasgow, who was called the Primate of Scotland.

**Arches Court**. The Court of Arches in London is the chief and most ancient consistory court belonging to the Archbishop of Canterbury, for the disposal of spiritual causes. It is so called from the church in London, St Mary-le-Bone (*de Arcubus*), where it was formerly held. The judge of this court is called the Dean of the Arches. He possesses extraordinary jurisdiction in all ecclesiastical causes, except those belonging to the Prerogative Court; and he has also ordinary jurisdiction in appeals from all in-

ferior ecclesiastical courts within the province. An appeal lies from the Court of Arches to the Judicial Committee of the Privy Council. See *Tomlins, h. t.*; *Wharton's Lex. h. t.*; *Stephen's Blackstone*.

**Arles**. See *Earnest*.

**Armiger, Esquire**; the term of dignity below a knight, and above that of a gentleman. *Tomlins, h. t.*

**Armorial Bearings, or Arms**. Mackenzie defines arms to be "marks of hereditary honour, given or authorized by some supreme power, to gratify the bearer, or distinguish families,"—and historically, armorial bearings seem to have been originally the distinctive marks, badges, or devices, whereby warriors clad in armour were recognised in battle. The bearings so assumed or conferred as cognisances became permanent in families, and in process of time heraldic emblazonry was reduced to a system, by which the different branches of a family, and their relationships and intermarriages, were discoverable from their coats-armorial. This department has been long under the jurisdiction of the Lyon King of Arms, and besides having been the subject of several statutes, it has been illustrated by considerable antiquarian learning and research. Strictly speaking, the privilege of conferring armorial bearings belongs to the Crown; but practically, a coat-armorial may now be purchased at the Lyon Office; see *M'Donnell*, 20th Jan. 1826, 4 S. 371. In deeds of entail, stranger heirs called to the succession are frequently enjoined by the entailor to bear his name and arms; and in one case, where the maker of the entail had inserted such a clause without having had any coat-armorial matriculated, it was held incumbent on the heir of entail succeeding, and on the other heirs of entail, to follow out the entailor's appointment by obtaining from the Lyon Office arms of the proper description, descendible to the heirs of entail; *Moir*, 5th Feb. 1794, *Mor*. 15537. See the statutes 1587, c. 46, 1592, c. 127, 1672, c. 21. In the case of *Macdonnell v. Macdonald*, 2d Jan. 1826, 4 S. 371; it was held to be competent for the Court of Session to review the judgments of the Lord Lyon. Lord ROBERTSON observed:—"The power of granting ensigns-armorial is part of the royal prerogative, but everything belonging to that power has been given by sundry statutes to the Lord Lyon. His power to grant new armorial bearings is merely discretionary and ministerial, and with that this Court cannot interfere. But if the Lord Lyon should grant to one person arms which another is entitled to bear, and should refuse to give redress, there could be no doubt of the jurisdiction of this

Court to entertain an action at the instance of the party, to have his right declared, as this would involve a question of property, which a right to bear particular ensigns-armorial undoubtedly is." Lord PITMILLY observed:—"As to the abstract principle, it is clear that wherever there is a competition as to the right to armorial bearings an appeal lies to this Court by advocacy, and also by reduction, which is the proper remedy, when the arms are already granted; or even if the Lyon refuse arms to a party entitled, the Court has jurisdiction to give redress. The Lyon Court is, in fact, on the same footing with other inferior courts." The action was, however, dismissed, on the ground that the pursuer did not allege that the arms borne by the defender belonged to him. In the case of *Cuninghame v. Cuninghame*, 13th June 1849, 11 D. 1139; it was also held that the judgments of the Lord Lyon in matters of heraldry might be reviewed by the Court of Session, and the objection taken to the competency of an advocacy was repelled. In this case the question was raised, whether the heraldic honours of a family went to the heir-male or the heir of line, the heir-male bearing them with a mark of cadency; but it was not determined, as the rights of the competing heirs were held to be settled by a private act of Parliament. By various revenue statutes a tax is imposed on armorial bearings, whether borne on plate or on carriages. *Ersk. B. i. tit. 4, § 32, et seq.; Mackenzie's Heraldry Works*, vol. ii. p. 575, folio edit.; *Encyc. Brit. voce Heraldry*. See also *Tailzie. Lyon King of Arms. Lyon Court*.

**Arraign**; (*ad rationem ponere*) is an English law term, signifying to indict a prisoner, and call upon him at the bar for his defence. The term is unknown in the law of Scotland, except in trials for high treason, in which the forms of procedure and the law in both countries are the same. See *Tomlins' Law Dict.; Wharton's Lex. h. t.*

**Arrears**; money unpaid at the due time, such as rent, interest, the balance of an account, and the like. The most important practical rule of the law of Scotland with respect to arrears is, that all arrears of annual returns, and of funds themselves heritable, such as arrears of rent, the arrears of interest due on an heritable bond and covered by the real security; arrears of feu-duties, the balance or reversion of the price of subjects sold judicially, and the like, are all held to be moveable, and, in questions of succession, belong to the executor, and not to the heir in heritage. *Ersk. B. ii. tit. 2, § 7, and tit. 9, § 64; Bell's Princ. § 1479, and authorities there cited; Mr More's Notes to Stair, p.*

*exxxix; Bell's Com. vol. i. p. 131; vol. ii. p. 8, 5th edit.; Hunter's Landlord and Tenant; Bell on Leases, vol. i. pp. 403, 449; vol. ii. p. 32. See Hypothec. Heritable and Moveable. Executor. Confirmation.*

**Arrendare**; according to Skene, is a Spanish word used in old Scotch deeds, to signify a rent or yearly duty. *Skene, h. t.*

**Arrearagium**; a word used in the *Regiam Majestatem*, to signify arrears of rents, profits, and duties. *Skene, h. t.*

**Arrest**. As applied to personal diligence, this is properly an English law term; and means the apprehending or restraining a person in execution of the command of a court or by officers of justice. In Scotland, the word *apprehension* or *apprehending* is usually applied to this species of arrest; and the civil and criminal warrants for such apprehension are various. The following articles may be consulted:—*Caption. Act of Warding. Border Warrant. Meditatio Fuga. Apprehending a Debtor. Criminal Prosecution. Bail. Commitment.*

**Arrest of Judgment**; an English law term. To move an arrest of judgment is to show cause why judgment should be stayed, notwithstanding a verdict. Judgment may be arrested for good cause in criminal as well as in civil cases. *Tomlins, h. t.; Wharton's Lex. h. t.* In the practice of the Scottish Criminal Courts, it is competent, when the prosecutor moves for sentence, for the panel to propose reasons in arrest of judgment. But no objection to the libel or to the proof admitted can be received in arrest of judgment. *Alison's Prac. 651; Hume, ii. 463.*

**Arrest, Parliamentary freedom from**. See *Privilege of Parliament*.

**Arrestee**; the person in whose hands an arrestment is laid. If an arrestee disregards the arrestment and pays the money to the common debtor, he will be liable in damages and expenses. See *Breach of Arrestment*.

**Arrestment**; is the diligence, whereby the debtor in a moveable debt or obligation, is interpellated from making payment or delivery to his creditor, until the debt due to the arrester by the arrestee's creditor is paid or secured. The party in whose hands the arrestment is laid is called the *arrestee*; the user of the arrestment is called the *arrester*, and the arrester's debtor is called the *common debtor*, because, where (as usually happens) there are two or more competitors for the arrested fund or subject, he is debtor to all of them. The *nexus* thus imposed does not operate as a transfer of the debt or subject to the arrester (see *infra*). For that purpose an action of forthcoming is necessary, at the instance of the arrester, in which he calls the

arrestee and the common debtor; and if there be no competition, and no objection on the part of the common debtor, decree of furthercoming in the arrester's favour will be pronounced. (See *Furthercoming*.) If, on the other hand, several arrestments have been used by other creditors of the common debtor, then, instead of an action of furthercoming, the arrestee, or any of the creditors in his name, may bring all parties into the field by an action of multiplepoinding, in which the arrestee states the amount of the debt due by him to the common debtor, and his readiness to pay it but for the arrestments. He then concludes, that he shall be held liable in once and single payment only, and found entitled to the expenses of bringing the action into court; and decree to that effect having been pronounced, the arrestee, if he pleases, or if any party interested insist on it, consigns the money, or places the subject *in manus curiæ*; or the arrestee is allowed to retain the sum or the subject until the issue of the competition amongst the arresting creditors. He is thus discharged, either by consignment, or, where that has not been insisted for, by making payment or delivery to the party preferred by the decree of the Court. (See *Multiplepoinding*.) Though the general effect of arrestment is merely to create an inchoate attachment, arrestment used upon an extract decree under the Court of Exchequer, act 19 and 20 Vict., c. 56, § 30, operates "to transfer to the Crown, preferably to all other creditors of the crown-debtor, all right to and interest in the arrested fund competent to the crown-debtor;" and the arrestee is entitled to pay without awaiting the institution of a furthercoming.

As to the mode in which arrestment is laid on.—This may be done in virtue of special letters of arrestment passing the signet, or of the warrant to arrest contained in letters of horning, or of the warrant inserted in a signetted summons, or in an extract-decree under the provisions of 1 and 2 Vict., c. 114, §§ 1, 2, 17, &c.; and it must in these cases be executed by a messenger-at-arms. Arrestment may also be laid on in virtue of an inferior judge's precept of arrestment, or of warrant to arrest contained in a libelled summons in the Sheriff Court, or in an extract decree or act of a Sheriff, or extract decree of registration in the Sheriff Court Books; and it may then be executed by the officers of the inferior court; but such precepts or warrants cannot be executed against the arrestee beyond the territory of the inferior judge, though the common debtor should be resident within the jurisdiction. When the arrestee lives beyond the jurisdiction, the sole warrant was letters of arrestment in supplement, (see

*Supplement*.) until, by 1 and 2 Vict., c. 114, § 13, it was made competent when the arrestment is on a decree, if the debtor's moveables are within the territory of another sheriff than him from whose books the extract has been issued, to present the extract, with a minute indorsed thereon, in the Bill-Chamber, or in the court of the sheriff within whose jurisdiction the moveables are; and to obtain a *fiat* authorizing the arrestment in like manner as if the extract had been originally issued from the books of the Court of Session or concurring sheriff.

Arrestment may be used either after the arrester has constituted his debt against the common debtor, or during the dependence of an action for that purpose.

When the arrester's debt is already constituted, the warrant for arrestment will be either the letters of horning, or the inferior court precept; or special letters of arrestment, for which a warrant will be obtained at the Bill-Chamber on exhibiting a liquid ground of debt; or the warrant appended to the extract of a decree by the Court of Session, Teind Court, Court of Justiciary, Court of Exchequer, or Sheriff, upon which it is made lawful to arrest, in like manner, as if letters of arrestment on a liquid ground of debt, or letters of horning containing warrant to arrest, had been issued under the signet, or precept of arrestment granted by a sheriff; 1 and 2 Vict., c. 114; 19 and 20 Vict., c. 56. By these statutes provision is also made for arrestment at the instance of parties acquiring right to extracts containing warrant.

When the arrester's debt is not yet constituted, arrestment may be used on the dependence of an action for constituting the debt, as to which the rules are—1st, Where the action was raised in the Court of Session, the production of the libelled and signetted summons, although not executed, was formerly a sufficient warrant for special letters of arrestment on the dependence; and now, by 1 and 2 Vict., c. 114, § 17, there may be inserted in summonses concluding for the payment of money a warrant to arrest on the dependence, until caution be found to make the subjects arrested furthercoming. In virtue of this warrant, or of special letters of arrestment according to the former practice, it is competent to arrest before executing the warrant of citation. But the arrestment will be null unless the warrant of citation be executed within twenty days after the date of execution of the arrestment, and unless the summons be called within twenty days after the diet of compareance, or, where the expiry of the twenty days falls within the vacation, or previous to the first calling-day in the next session, upon the first calling-day next

thereafter. 2d, Such arrestment may be used at any time during the dependence of the action, the action being held as in dependence pending an appeal to the House of Lords; and as a corollary to this rule, an arrestment on the dependence does not fall *eo ipso* by a judgment of the Court of Session, assailing the defender from the conclusions of the action on the dependence of which the arrestment has been used, but will remain effectual in case the defender should take an appeal, and obtain a reversal in the House of Lords. 3d, The will of an inferior court summons may also contain a warrant to arrest on the dependence; 16 and 17 Vict., c. 80, § 1; and when no such warrant is contained in the summons, a precept of arrestment may be obtained on the dependence. Here, also, it is necessary that the summons be executed within twenty days after the date of the arrestment, and be called within twenty days after the diet of comparance; *A. S. 10th July 1839*, § 154. Where the arrestee lives beyond the jurisdiction of the sheriff, arrestment on the dependence may be used within another sheriffdom upon the sheriff-clerk thereof indorsing the warrant or precept of arrestment; 1 and 2 Vict., c. 114, § 19; *A. S. 10th July 1839*, § 155,—a provision which supersedes letters of arrestment on the dependence in supplement. Arrestment on the dependence covers not only principal and interest, but the expenses of process till its final issue, into whatever court it may be carried; but not the expenses of the furthcoming. Arrestment is competent upon the dependence of an action brought, not for the real purpose of being insisted in before the Court of Session, but avowedly in order to secure the benefit of the diligence during the dependence of a similar suit in Chancery: 4 *D.* 924, 1334.

The subjects which may be arrested are moveable and personal debts, not made real by sasine, including the arrears of interest on heritable or real debts. The debt or subject arrested must not be in the possession of the common debtor himself. It must be in the hands of a third party. As the subject arrested must not be in possession of the common debtor, neither must it be in that of his servant, or of any one who is a mere custodian for him. On the contrary, the arrestee must be properly and directly the debtor of the common debtor: so arrestment is ineffectual in the hands of one who is factor for the party who is indebted to the common debtor, and consequently accountable not to the common debtor himself, but to his debtor; *Campbell*, 12th Dec. 1752, *M.* 742; *Ersk. Inst.* iii. 6, 4; 2 *Bell's Com.* 74. Now, by the Mercantile Law Amendment Act (19 and 20 Vict., c.

60), while a seller of goods is deprived of his general right of retention against a purchaser from the original purchaser, it is (see § 3) made competent to him to arrest or point the goods in *his own hands* at any time prior to intimation being made to him of a sale to a subsequent purchaser; and such arrestment or pointing is declared to have the same effect as an arrestment or pointing by a third party. Some moveable subjects are, by statute, charter, or special destination, not arrestable; *e. g.* the original stock of the Royal Bank of Scotland; annuities to widows of ministers of the Church of Scotland, of writers to the signet, &c.; servants' wages, as being alimentary; the wages of labourers and manufacturers, in so far as necessary for their subsistence; 1 Vict., c. 41, § 7; *M'Glash. Sher. Court Prac.* 377; *Barclay's Dig.* p. 33, *et seq.*; 8 and 9 Vict., c. 39; pensions from the Crown; salaries of judges of the Court of Session; sums expressly declared to be alimentary, except for alimentary debts; and the like; and it is a general rule, that funds appropriated for a special purpose, which arrestment would defeat, cannot be attached by this diligence; *Mor.* pp. 744, 745. With these, and some other exceptions of the same class, all personal claims, and all claims resolvable into personal claims, are arrestable, even although payable from the proceeds of heritable property. Such are claims against trustees who are empowered to sell heritage, and to apply the price,—obligations by trustees to account for the price of heritage,—and so forth. A creditor, by producing the grounds of a personal or moveable debt in a process of ranking and sale, does not thereby render the debt heritable, or bar arrestment. Neither will a personal creditor's accession to a trust-deed, conveying heritage in payment of debts, have that effect. But, on the other hand, the shares of the price of heritage, payable under a ranking and sale to heritable creditors, are not arrestable; neither is the reversion of an heritable estate which has been sold judicially by creditors. So also a debt, secured by an assignation to a lease of an heritable subject, is not arrestable, although a debt due by heritable bond before infeftment is; 1661, c. 51. Debts by bill of exchange, and the *ipsa corpora* of bills, are not arrestable; and where a mercantile agent has sold goods, and taken bills for the price as agent, an arrestment in his hands, before he has received payment of the bills, will not attach either the bills or their proceeds, as a debt due by him to his constituent; *Johnston*, 12th May 1837, 15 *S.* 904, and *authorities there cited*. And, in general, nothing will be covered by arrestment, except an actual debt, or a sum or subject, for

which, as *debtor*, the arrestee is accountable to the common debtor; see *Hume*, 29th May 1852, 14 *D.* 821; although, on this subject, the judgments of the court have varied, and the distinctions drawn have been occasionally so subtle, that it is difficult either to classify the cases, or to deduce any abstract rule from them. Future debts, *i. e.*, debts not due until after the arrestment is used, are not attached; but this does not include debts, the obligation for which is already incurred, but the term of payment only not arrived. Arrears of rent and interest, and the current term's rent or interest, may be arrested; and it is now settled, that the whole term-day must elapse before the new term commences; and hence, that an arrestment used on the term-day to attach the ensuing term's rent is premature. But such arrestments of current rents are always to a certain extent contingent, since the efficacy of the arrestment depends on the common debtor being *in titulo* to exact them at the term of payment, his right being defeasible by adjudgers, or other singular successors acquiring right to the lands, and consequently to the rents, in the intermediate period. In like manner, where the subject, the rents of which have been arrested *curr nte termino*, has been a donation *inter virum et uxorem*, the arrestment may be defeated by a revocation of the gift by the husband or wife. The effect of arrestments depends upon the legal and not the conventional term of payment, though the arrester cannot require payment before the conventional term has arrived. The contents of a policy of assurance may be effectually arrested, at least if the debtor die before a new premium falls due; *Strachan*, 19th June 1855, 13 *S.* 954. Arrestment in the hands of a mercantile company will attach the interest of a partner in the funds of the company, although such funds should be entirely abroad, or should consist chiefly of heritable property; and arrestment in the hands of a partner will secure funds, *e. g.*, railway calls, owing by him to the company; *Hill*, 13th Nov. 1849, 12 *D.* 46. But arrestment used in the hands of the consignee of goods before they have come into his possession, will not attach the goods.

As to the parties in whose hands the arrestment must be used, the leading rule is, that it must be used in the hands of the debtor to the common debtor. Where the debtor is an incorporation or joint stock company, it will be validly used either in the hands of the treasurer or manager, or by being executed against the managers and directors by serving each with a copy, or by delivering a copy to them when met on the business of the incorporation. If the debtors

are trustees, the arrestment must be used in the hands of the trustees who, under the trust-deed, are empowered to act. As the creditor can arrest in the hands of a party indebted to his debtor, so upon the death of the last he may use the same diligence to attach funds owing to those who represent him in his liabilities; *Globe Insurance Co.*, 14th August 1850, 7 *Bell's App.* 296. By 19 and 20 *Vict.*, c. 56, § 36, it is made competent, notwithstanding the death of a party indebted to the Crown by bond or other obligation on which diligence may proceed, or under an extract decree for payment of any Crown debt, to proceed against his effects by arrestment, and also by poinding, in like manner as if he were alive, and without taking any proceedings whatsoever against his representatives. Where the debtor is abroad, and has no domicile at which the arrestment can be used, it may be executed against him edictally by delivery of the schedule at the office of the keeper of edictal citations; 1 and 2 *Vict.*, c. 114, § 18; *A. S.* 24th *Dec.* 1838. But he will not be thereby interpellated from making payment to his original creditor, unless it be proved that he, or those acting for him, were previously aware of the arrestment, 19 and 20 *Vict.*, c. 91, § 1; and, on the same principle, even where the arrestee is in this country, but makes payment to his creditor in circumstances in which he cannot be cognizant of the attachment of the funds in his hands, he will not be liable in second payment; *Laidlaw*, 26th October 1841, 2 *Rob. App.*, 490. An edictal arrestment of a debt, due by a foreigner who has no *forum* whatever in Scotland, has been held to be inept. Arrestment in the hands of the tutor of a pupil is effectual to attach a debt due by the pupil; but arrestment in the hands of a minor *pubes* is good, although not executed against his curators. Every arrestment was formerly regularly executed before two witnesses, who required to subscribe the execution, and be designed therein, under the sanction of nullity; 1681, c. 5; now, by 1 and 2 *Vict.*, c. 114, § 32, extracts, citations, deliverances, schedules, and executions may be either printed or in writing, or partly both, and, except in the case of poindings, more than one witness is not required for service or execution of them. See also 9 and 10 *Vict.*, c. 67. *Shand's Prac.* 233 and 255. The execution must be either personal, or by leaving a service copy at the arrestee's dwelling-house. If left at his shop or counting-house, (unless the arrestee be a mercantile company), it will be inept.

If the arrestee pay or deliver in the face of the arrestment, he will be liable for the value to the arrester, at least to the extent of

his debt; see *Breach of Arrestment*. But the arrestment creates no real right entitling the arrester to vindicate the subject from third parties acquiring in *bona fide*. Arrestment, where used nimiously or oppressively, may be recalled, or *loosed*, as it is expressed, or restricted, where a largesum than is reasonable has been attached. The Lord Ordinary before whom the cause is enrolled may, on petition, recal or restrict the arrestment, on caution being found by the common debtor, or without it. The Lord Ordinary on the Bills has the same powers in vacation; 1 and 2 *Vict.*, c. 114, § 20. It is also made competent for any Sheriff from whose books a warrant of arrestment has been issued, on petition, to recal or restrict the arrestment, on caution or without caution; § 21. See *Loosing of Arrestments*. The arrestment, where it has been used on the dependence of an action, falls by the death of the arrestee, whose heir may pay the common debtor, unless interpellated; but it subsists, to the effect of supporting an action of furthcoming, while the heir holds the subject; and may be renewed against the arrestee's heir, so as to give a preference to the arrester over an arrester in the hands of the heir. It also subsists after the death of the common debtor; and, on the death of the arrester, remains effectual to his heir. All arrestments formerly suffered a *quinquennial* prescription; i.e., if not pursued or insisted in within four years after being laid on, if used on liquid grounds of debt or decrees, and, where used on the dependence of an action, within five years after decree is obtained in the depending action; 1669, c. 9. By "pursued or insisted in," was meant, following up the arrestment by furthcoming, or by a process of multiplepointing, or other judicial claim for making the arrested fund available to the arrester. Now, by 1 and 2 *Vict.*, c. 114, § 22, the prescription of the act 1669, c. 9, is repealed in so far as regards the prescription of arrestments, which are thereafter to prescribe in three years instead of five. The three years run, in arrestments upon decrees and registered protests, from the date of the arrestments; in the arrestments upon the dependence, from the date of the final interlocutor in the action; and in arrestments upon a future or contingent debt, from the date when the debt becomes due, and the contingency is purified. Under the Sheriff Small Debt Act, arrestments fall in three months, unless renewed every three months. In competition, arrestments are preferable according to their dates: hence, in the execution, the hour at which the arrestment was used should be mentioned. If, however, there have been *mora*, the first furthcoming, though following upon a posterior arrestment, is preferred, as

being the first completed diligence. But all arrestments used within sixty days before, and four months after, the constitution of no-tour bankruptcy, for attaching the bankrupt's effects, are to be ranked *pari passu*; while arrestments used posterior to the four months cannot compete with prior arrestments, but may rank with each other on any reversion of the estate; 19 and 20 *Vict.*, c. 79, § 12. No arrestment of a bankrupt's effects, used on or after the sixtieth day prior to sequestration, is effectual, and the effects arrested must be made forthcoming to the trustee, the arrester, however, having a preference out of them for the expense *bona fide* incurred by him in his diligence; *ibid.* § 108. In competition with assignments, the date of the intimation of the assignation is the criterion of preference, not the date of the deed of assignation.

In the attachment of a ship in security or execution, arrestment, and not pointing, is the proper diligence. For such arrestment the ordinary warrant to arrest is sufficient; *Clark*, 17th June 1853, 15 *D.* 750. This is made by affixing a copy of the arrestment on the main-mast, or on the stern, if the ship has not left the stocks, and by chalking above it the Royal initials. When a vessel has been arrested, it is rendered available as a source of payment not by action of furthcoming, but of arrestment and sale; *Shand's Prac.* 417. See on the subject of this article, *Ersk.* B. iii. tit. 6, § 1, *et seq.*; *Stair*, B. iii. tit. 1, § 24, *et seq.*; *Morr's Notes*, p. cclxxxiii. *et seq.*; *Bank.* vol. ii. 196, *et seq.*; *Bell's Com.* i. 6; ii. 65, *et seq.*; iii. 11, *et seq.*; *Princ.* § 2272, *et seq.*, and authorities there cited; *Kames' Stat. Law*, h. t.; *Brown's Synop.* h. t.; and pp. 288, 304, 341, 439, *et seq.*; *Shand's Prac.*; *Tait's Justice of Peace*, h. t.; *Blair's Manual*, h. t.; *Jurid. Styles*; *Barclay's M'Glash. Sher. Court Prac.* 372; *Shaw's Dig.*; *Kames' Equity*, 282, 290, 391, 475; *Menzies' Conveyancing*, 302. See also *Furthcoming. Assignation. Multiplepointing.*

**Arrestment in Security.** In the preceding article it has been shown, that the creditor in an illiquid claim may obtain a security while that claim is under judicial discussion, by *arrestment on the dependence*. Another case of arrestment in security arises where a creditor has a liquid ground of debt, such as a bill or bond, but the term of payment is future. If his debtor be *vergens ad inopiam*, the creditor in such a document may obtain in the Bill-Chamber warrant for letters of arrestment, which secure the debt till caution be found that it be made forthcoming to him. See authorities cited *voce Arrestment*.

**Arrestment Jurisdictionis fundandæ causæ;** arrestment for the purpose of founding a jurisdiction. This arrestment is used for the

purpose of bringing a foreigner under the jurisdiction of the courts of Scotland. A person domiciled abroad, whether native or foreigner, is not amenable to the Scotch courts, or liable to legal diligence, real or personal, unless he either has property in Scotland, or comes personally into the country. Where his property is heritable, he is held to have a *forum*, and may be cited as forth of the kingdom. But where his property is merely moveable, an arrestment to found a jurisdiction is necessary. This arrestment is laid on, either in virtue of the warrant of an inferior court, or of letters of arrestment *jurisdictionis fundandæ causa*, passing the signet on a warrant obtained at the Bill-Chamber; and even when laid on by the warrant of an inferior court, such an arrestment will found a jurisdiction in the Supreme Court. This arrestment, however, is merely to the effect of founding a jurisdiction in ordinary patrimonial claims of debt, or the like, not in questions of *status*; and it will have no effect as a *securus*, in competition with ordinary arrestments. For that purpose, after the jurisdiction has been thus founded, the creditor must raise an action against his debtor, on the dependence of which he may then use an arrestment in common form; see *Menzies' Concealing*, p. 304. An arrestment *ad fundandam jurisdictionem* is also required to warrant the raising of a horning against a party domiciled abroad, who has moveable property in Scotland. But this kind of arrestment is not necessary, where the sum or goods belonging to the absent party are already the subject of an action of multiplepoinding, or after they have been already arrested, or where jurisdiction is founded on the principle of reconvention. *Ersk. B. i. tit. 2, § 19, Ivory's edit.; Bell's Com. ii. pp. 68, 168; Shand's Prac. i. 63, et seq.; Jurid. Styles, vol. iii.; Kames' Equity, 286; Brown's Synop. 224, 747. See Abroad. Reconvention. Foreigner. Edictal Citation.*

**Arrhs.** See *Earnest*.

**Arriage and Carriage;** were indefinite services formerly demandable from tenants; but by act 20 Geo. II., c. 50, § 21 and 22, all indefinite services are prohibited; and none can now be demanded, but such as are enumerated in the lease, or in writing apart. Mill-services continue on the former footing. *Ersk. B. ii. tit. 6, § 42; Stair, B. ii. tit. 4, § 7; Hunter's Landlord and Tenant, i. 365.*

**Arrogation;** in the Roman law, was the adoption of one who was *sui juris*, as contradistinguished from proper adoption, which took place where the adopted person was formally manumitted by his natural father, and taken under the *patria potestas* of his adopter. Arrogation was originally effected

by a species of legislative act, assented to in the *Comitia Curiata*, and, during the empire, by an imperial rescript. See *Adoption*.

**Arson;** an English law term, synonymous with wilful fire-raising. Arson is defined to be voluntarily and maliciously burning the house of another. This offence, by the common law of England, was a capital felony, and punishable with death, and extended, by 7 and 8 Geo. IV., c. 30, to the burning not only of dwelling-houses, churches, and erections for the purposes of trade, but also of coal mines, stacks of corn, &c. But, by 1 Vict., c. 89, the capital punishment is confined to the offence of voluntarily and maliciously setting fire to a dwelling-house, any person being therein; or to the setting fire to vessels with intent to commit murder. This statute does not extend to Scotland. Where the offence is not accompanied by these aggravations, it is punishable with transportation, penal servitude, or imprisonment; 16 and 17 Vict., c. 99; 9 and 10 Vict., c. 24, and c. 25. See *Wharton's Lex. h. t.; Boothby's Synop. of the Law relating to Indictable Offences*, p. 22. See also *Wilful Fire-raising*.

**Art and Part;** signifies the aiding or abetting in the perpetration of a crime. One may become art and part guilty of a crime:—  
1. By giving a warrant or mandate to commit the crime; 2. By giving counsel or advice to the criminal how to conduct himself in it; or, 3. By assisting in the execution of it. By statute 1592, c. 153, all criminal libels must contain a charge of art and part, even although the crime consisted in a simple and indivisible act, committed, and charged to have been committed, by one person; so that the panel may be convicted, although it should turn out that the act was not committed by him, but by another at his command. In this way also, provided the fundamental fact charged remains unaltered, the prosecutor is secure, although his proof should vary from the libel with respect to the manner in which the deed was done. In the charge of art and part, the prosecutor is not under the necessity of setting forth the mode of the panel's accession. It follows from the nature of this charge, that a verdict of guilty *art* and *part* is substantially the same as a simple verdict of guilty, and does not infer an inferior degree of guilt. See 9 Geo. IV., c. 29, § 9; *Hume*, ii. 225-9, 236-9, 441, 456; *Bell's Notes*; *Steele*, 193, 201, 211; *Alison's Prac.* 250; *Brown's Synop. h. t.* The charge of art and part is properly omitted in indictments for concealment of pregnancy, under the statute 49 Geo. III. c. 14; *Punton*, 2 *Swin-*

**Articles, Lords of;** were a committee of the Scotch Parliament, thus described by

Robertson: "As far back as our records enable us to trace the constitution of our Parliaments, we find a committee distinguished by the name of Lords of Articles. It was their business to prepare and to digest all matters which were to be laid before the Parliament. There was rarely any business introduced into Parliament but what had passed through the channel of this committee: every motion for a new law was first made there, and approved of or rejected by the members of it. What they approved was formed into a bill, and presented to Parliament; and it seems probable, that what they rejected could not be introduced into the House. This committee owed the extraordinary powers vested in it to the military genius of the ancient nobles: too impatient to submit to the drudgery of civil business, too impetuous to observe the forms, or to enter into the details necessary in conducting it, they were glad to lay that burden upon a small number, while they themselves had no other labour than simply to give or to refuse their assent to the bills which were presented to them. The Lords of Articles, then, not only directed all the proceedings of Parliament, but possessed a negative before debate. That committee was chosen and constituted in such a manner as to put this valuable privilege entirely in the King's hands. It is extremely probable that our kings once had the sole right of nominating the Lords of Articles. They came afterwards to be elected by the Parliament, and consisted of an equal number out of each estate, and most commonly of eight temporal and eight spiritual Lords, of eight representatives of boroughs, and of the eight great officers of the Crown." *Hist. of Scotland*, B. i. See also 1594, c. 218, and 1663, c. 1. At the Revolution of 1688, this system was thought inconsistent with the freedom of Parliament, and was declared a grievance by the Convention of Estates; 1689, c. 18. The Lords of the Articles were accordingly suppressed by the act 1690, c. 3. See *Ersk. B. i. tit. 3, § 5.*

**Articles of Roup**, are the conditions under which property is exposed to sale by auction. They refer generally to the nature of the right to be conferred; specify the titles by which the property is to be conveyed; regulate the manner of bidding; prescribe the rules by which offerers are to be preferred; and name a person to be judge of the roup, before whom the procedure takes place, and who is empowered to declare the purchaser. These articles are executed by the exposor on stamped paper; and when the day of sale arrives, they are read over in presence of the meeting, at the place and time appointed for

the sale. The subject being exposed to sale by an auctioneer, a minute of the offers is made, generally on the back of the articles, and signed by each offerer, and the highest offerer at the out-running of a sand-glass is declared to be the purchaser by the judge of the roup. Minutes of the procedure are made, and regularly signed and attested at the time of sale. These articles contain a clause of registration, by which the parties consent to a decree going out in terms of the conditions, under which they may be enforced by the diligence of the law. Besides the rules and conditions expressed in the written articles of roup, there are implied rules binding on both parties. Thus, the exposor must bring the subject fairly to sale, and not attempt to raise the price by the assistance of a white-bonnet or fictitious offerer; and on the other hand, there must be no combination amongst the offerers to suppress the natural ardour of competition amongst intending purchasers. *Ersk. B. iii. tit. 3, § 2, and note by Mr Ivory; Bell's Com. vol. ii. p. 274, 5th edit.; Hunter's Landlord and Tenant, i. 405, 407; ii. 328; Bell on Purchaser's Title, p. 165, et seq., 2d edit.; Shand's Prac. p. 896; Jurid. Styles. Menzies' Conveyancing, i. 838; Duff on Feudal Rights, 162.*

#### Articles Improbatory and Approbatory.

By the old form of process, where a deed or writing was objected to as false or forged, after the party founding on the document had abidden by it *sub periculo falsi*, pleadings, called *Articles Improbatory and Approbatory*, were ordered to be put in. According to the present practice, when the writing has been abidden by, the record is made up, "by ordering a condescendence of articles improbatory, and answers containing articles approbatory, which shall be revised and accompanied with notes of pleas in law. The revised condescendence and answers to be signed by the parties respectively, as well as by their counsel, except where, on cause shown, and in respect of the particular circumstances of the case, it may be deemed necessary, for the ends of justice, to dispense with the signature of the party, and without prejudice to the form of procedure heretofore observed in such cases; A. S. 11th July 1828, § 53. These articles improbatory and approbatory consist of articulate averments and answers, in the usual form in which condescendences and answers are prepared, setting forth the facts and circumstances relied on by the one party, as instructing the alleged forgery or falsehood, and by the other, as showing the writing to be genuine and fairly come by. See *Shand's Practice*, 645. See *Abiding by. Condescendence.*

**Articulate Adjudication.** The proper oc-



caſion for an articulate adjudication is where ſeveral ſeparate grounds of debt are veſted in a trustee, to purſue one adjudication for the whole. In that caſe the practice is to accumulate each debt ſeparately, ſo that, if a *pluris petitio* in any one of the debts ſhould occur, it may not prejudice the adjudication as to the remainder. This is called an articulate adjudication; and correctly there ought to be concluſions in the libel for accumulating the debts ſeparately, or the interlocutor muſt be ſo expreſſed as to have that effect. But there may be an articulate adjudication where there is only one ground of debt; e. g. a bond, with principal, interest, and penalties ſeparately ſtated, inſtead of being accumulated into one ſum. *Shand's Practice*, ii. 673; *Jurid. Styles*, iii. 401; *Bell's Com.* i. 737. See *Adjudication. Pluris Petitio*.

**Artiſts and Artiſers**; are held to profeſs expertneſs in the art which they practice, *spondere peritiam artis*, and are therefore liable for any damage which may occur through their want of ſkill, on the maxim, *imperitia culpæ annumeratur*. Under this rule all professional men are comprehended. See *Bell's Com.* vol. i. p. 459, for the rules with regard to this reſponſibility, the principle of which is, that the performer of the work is reſponſible for any deficiency in that degree of ſkill which the hirer or employer is naturally entitled to expect. The property of artiſts in their work is protected by various ſtatutes. *Ersk.* B. ii. tit. 1, § 16; *Bell's Com.* vol. i. pp. 123, 459, 5th edit.; *Bell's Princ.* § 154, 1361; *Bell's Illuſtr.* § 154; *Shaw's Digest*; *Watson's Stat. Law h. t.* See alſo *Literary Property. Lien. Location. Nautæ, cappones*.

**Artizan.** See *Master and Servant. Workmen. Combination*.

**Ascendants**; perſons in the degrees of kindred reckoned upwards. Ascendants, according to the former law of Scotland, ſucceeded after collateral deſcendants. Thus, failing deſcendants, that is, children and their children in ſucceſſion, and failing brothers and ſiſters and their deſcendants, the ſucceſſion went to aſcendants, that is, to the father in the firſt place, the mother, according to the former law, though an aſcendant in the ſame degree, never ſucceeding to her child. By the act 18 and 19 Vict., cap. 23, a change was introduced into the law of Scotland; and it was enacted, that, where a ſon dies in teſtate without leaving iſſue, and is ſurvived by his father, his father ſhall have right to one-half of his moveable eſtate in preference to the ſon's brothers and ſiſters, or their deſcendants who may have ſurvived him. Where, again, the father predeceases a ſon who dies

inteſtate without leaving iſſue, but who is ſurvived by his mother, his mother is entitled to one-third of his moveable eſtate, in preference to his brothers and ſiſters, or his other next of kin. Failing the father, the ſucceſſion goes to collaterals, that is, to the brothers or ſiſters of the father, and their deſcendants. Failing the collaterals of the father, the ſucceſſion goes to the grandfather and his collaterals; and ſo upwards as far as connexion can be traced; and when all trace of connexion is loſt, the ſucceſſion goes to the Crown as *ultimus hæres*. *Erſk.* B. i. t. 4, § 8; B. iii. t. 8, § 7, *et ſeq.*; *Erſk. Princ.* 11th edit. 485.

**Assay of Weights and Measures**; is the examination of weights and meaſures by the proper officers.

**Assassination**; is the murdering of a perſon either for hire, or by deliberate lying in wait. It might be inferred from ſome Scots ſtatutes that even the attempt to commit this crime is capital; but this is not the caſe. See *Hume*, vol. i. p. 180, 288; *Ersk.* B. iv. t. 4, § 45; *Swint. Abridg. voce Treason*, § 75.

**Assault**; is an attempt or offer with force and violence to do a corporal hurt to another. It does not neceſſarily imply an injury actually done; it is ſufficient if ſuch was intended, and a menacing geſture may amount to an aſſault; but no words, if unaccompanied with violence, will amount to aſſault. And no words, however insolent and contumelious, will juſtify an aſſault, though ſuch provocation will in general tend to mitigate the puniſhment. Any one, however, who is aſſailed with blows, is quite juſtified in defending himſelf in the ſame manner, and is not to blame if the aſſailant be injured in the ſtruggle. But after the aſſeſſor has been diſabled, or has ſubmitted, the party who has been originally aſſaulted may in his turn become the aſſailant by continuing his blows; in which caſe the firſt offender is entitled to demand puniſhment for the counter-aſſault committed on him. No provocation which did not take place recently before the aſſault will juſtify it; for when a conſiderable time has elapſed, the deed will be held to have reſulted from a ſpirit of revenge, and not from momentary paſſion. The aſſeſſor is liable both to a civil action for damages, and to a criminal proſecution. In caſes of aſſault, even of the moſt atrocious kind, the practice is to make a charge ſimply of aſſault, and to ſtate the ſerious parts of the offence as aggravations of the ſimple crime; by which means the riſk is avoided of the whole charge falling by a failure to prove the aggravations. The higheſt aggravation of aſſault is intent to murder, (*See Attempt at Murder*). But aſſault is a very aggravated crime, though there may have

been no intention to kill, if it has been to the effusion of blood, or the danger of life, or with loaded fire-arms or other lethal weapons. The intent to ravish is also a serious aggravation of assault, which will not be made out, however, by the mere using of indecent liberties, unless there has been an evident preparation for carnal connection. Intent to rob, which is also an aggravation of a serious nature, is proved by acts of violence, indicating a design to take the property; but such proof is admitted with caution, as, in the confusion of an assault, acts of this kind may take place with no intention to carry off the property. Assault is aggravated when committed in pursuance of an intent to compel a rise of wages, &c., or when committed on a magistrate, or any other officer of the law, in the discharge of his duty, or in revenge for the exercise of it,—on a parent,—on a wife,—or on any one in his own house. (See *Hamesucken*). Mutilation of the limbs may be charged either as the worst aggravation of assault, or as a separate offence. The punishment of assault is arbitrary, varying from imprisonment for a month, or even less, to transportation for life. In cases of great cruelty, scourging has frequently been added. See 6 *Geo. IV.*, c. 159; *Hume*, i. 327-336, 26; *Bell's Notes*, 89, 90; *Alison's Princ.* 175-179, 188; *Steele*, 104; *Ersk. B. iv. tit. 4*, § 37; *Bell's Princ.* 4th edit. § 2032; *Jurid. Styles*, 2d edit. iii. 87; *Dow's Appeal Cases*, ii. 66, 288.

**Assedation**; is an old law term, used indiscriminately to signify a lease or feu-right.

**Assembly, General.** See *General Assembly*.

**Assent, Royal.** When a bill has passed through all its stages in both Houses of Parliament it receives the royal assent, which is always given in the House of Lords; the Commons being summoned by the Black Rod. The Sovereign may either be present in person, or the assent may be signified by letters-patent under the great seal, signed by the Sovereign, and communicated by commissioners; who are usually three or four of the great Officers of State. The Sovereign's assent is announced by the clerk of Parliament in French. In recent times there is no instance of the royal assent being refused; although that occurred once or twice in the reign of William III. and once in the reign of Queen Anne, the bill not assented to by her having been the Scotch militia bill. In former times the refusal of the royal assent was not an unusual occurrence. By a legal fiction, all the laws passed in a session of Parliament are considered as properly only one statute, the separate acts being so many different chapters; and this fiction having led to doubts as to the proper commencement of

the act, it was ordered, by 33 *Geo. III.*, c. 13, that the clerk of Parliament should indorse on every bill the day on which it received the royal assent, and that from that day, if not otherwise provided in the act, its operation should commence. *Hatsell's Precedents*, p. 338, *et seq.*; *May's Treatise on Parliamentary Law*, p. 387, *et seq.*

**Assessors to a Judge**; are persons possessed of knowledge in the law, who are appointed to advise and direct the decisions of the judges in certain inferior courts. *Stair, B. iii. tit. 5*, § 25; *Bank. ii. 507*; *Hume, ii. 15, 29, 31*.

**Assets**; is an English law term, (now much used in Scotland), signifying, strictly speaking, goods or effects enough to discharge the burdens cast upon the heir or executor in satisfying the debts and legacies of the testator or ancestor; but applied more generally to the estate and effects of every description available for the payment of the debts of a bankrupt or insolvent. See *Wharton's Lex. h. t.*

**Assignment.** In legal phraseology, the term assignment is applied to a written deed of conveyance in favour of another, made by the creditor in any obligation, or the proprietor of any subject not properly feudal. The maker of the assignment is called the *cedent*; the receiver is called the *assignee*, or *cessioner*, or *cessionary*; and where the right or subject assigned is a debt or obligation, the obligant or debtor therein is called the *common debtor*. According to the usual style of the deed, assignee and his heirs and donators are made the lawful cessioners of the cedent "in and to" the sum or subject assigned, and in and to the deed by which the right is constituted, or the written evidences of the claim, if there be any. This form of expression arises from the circumstance of the deed having been anciently of the nature of a mandate or procuratory *in rem suam*. In modern practice, however, it has become common to use the words "assign, convey, and make over," which correspond more with the actual character and effect of the deed. The other clauses are, 1. A declaration of the nature of the assignee's powers. In the ordinary case, these powers, whether expressed or not, include, of course, all those possessed by the cedent. 2. A clause of warrandice. Generally speaking, where the right assigned is a debt, it is not to be presumed that the cedent is to warrant the solvency of the common debtor. The cedent has, in the usual case, no security that the claim will be made good, except the solvency or credit of the common debtor. Hence the implied warrandice of assignments is warrandice *from fact and deed*. Warrandice of a higher kind, however, may

be specially given. 3. A clause, mentioning what deeds are delivered to the assignee;—and, lastly, the usual registration and testing clauses. When the assignee conveys to a third party, the deed is called a *translation*; and when he reconveys to the cedent, it is called a *retrocession*.

In order to complete the transference to the assignee, the assignation must be intimated to the common debtor; and so essential is this, that in competition, an assignation first intimated will be preferred to one prior in date, but posterior in intimation. Regularly the intimation ought to be notarial, yet the law admits equipollents when the notice to the common debtor is equally strong; *e. g.* a charge on letters of horning at the assignee's instance against the common debtor, or a judicial demand by action or otherwise. The assignee's possession of the right, as, for example, by receiving payment of rents or interest from the common debtor, is another equivalent to intimation; or his being a party to the assignation; or his acknowledgment in writing on the back of the assignation, or by letter. So also a written promise by the common debtor to pay to the assignee as in right of the debt, or a draft accepted or presented and protested, in the case of a money debt, will be sufficient. But the common debtor's mere private knowledge of the assignation, unaccompanied by possession on the part of the assignee, in competition with more formal rights or intimations, is not held tantamount to intimation, although such knowledge may be a sufficient bar to the common debtor's paying to the cedent. When the common debtor is out of Scotland the intimation must be made edictally; the warrant for which is obtained at the Bill-Chamber, on production of the ground of debt and assignation. Formerly edictal intimation was made at the market-cross of Edinburgh, and pier and shore of Leith; but now the intimation is made at the Register House; 6 *Geo. IV.*, c. 120, §§ 51, 52; *A. S.* 24th Dec. 1838. See *Edictal Citation*.

Where a debt is due by several co-obligants, the transference of the debt will be completed, by intimation being made to any one of them. Mr Erskine observes:—"Where there are many obligants, whether joint debtors, or principals and cautioners, intimation made to any one is sufficient for completing the conveyance; but such intimation is not effectual for interpellating those to whom no intimation was made from making payment to the cedent; and therefore assignees ought in prudence to make intimation to all of them." A different rule, however, has been held to apply to the case of a partner of a firm assigning his interest in the firm to another.

In the case of *Russell v. Breadalbane*, 5 *W. & S.* 256, there were only two partners, and the one assigned to the other. Intimation in such a case was held to be unnecessary. Where, however, there are more persons than the cedent and the assignee, it has been held that the transference of the rights available against the other partners requires intimation to each of the copartners, or, what is held to be equivalent to it, intimation to the company in its social character, at its usual place of business, to one representing it. This rule was applied in the case of *Hill v. Lindsay*, 7th Feb. 1846, 6 *D.* 472, which was the case of a competition between the trustee on the sequestrated estate of the cedent partner, and an assignee partner, *de facto* the managing partner of the company. This circumstance, however, was held not to be equivalent to an intimation to the company. In the case of *Hill v. Lindsay*, Lord FULLERTON observed:—"There is no room for the application of the principle laid down by Mr Erskine, that in a joint obligation, the intimation to one of the *correi debendi* is a good intimation. The question here does not regard a joint obligation. The rights and correspondent obligations among the partners themselves are in their nature several. Each is bound to every one of the others by the force of the contract of copartnership; indeed it is that combination of all these several obligations which constitutes the copartnership. But it seems to follow from this, that, to complete the transference of the rights of one partner in the concern as against his copartners, there must be intimation to each of these copartners, as each of the several debtors in that combination of several obligations which is sought to be transferred. Holding this to be the sound view, the case of *Russell v. Breadalbane* is of no weight in the present case. There were but two partners, and the one assigned to the other. Intimation was unnecessary and incongruous. An intimation by the assignee to himself would have been absurd. Indeed it is obvious, that in such a case an assignation, *i. e.*, an active transference of right was unnecessary. A single renunciation by the one partner would have answered every purpose, as it would have left the remaining partner in the full possession of the whole rights of the company. But where there are more partners than the cedent and assignee, and where an active transference is necessary, the transference of the rights available against the other partners seems to require, as in other cases, intimation to all of those parties against whom the obligation was sought to be inferred. Then there was here no intimation to the company in its

social character at its usual place of business, or to any one representing it, which might perhaps be held to imply an intimation to each of the partners. There was nothing but the private knowledge of the two partners, who happened to stand in the situation of cedent and assignee." Lord JEFFREY dissented, and held "that there was a very strong analogy between the claim by a partner for a dividend out of the free stock of the company, and a debt due by the company, which is the case mentioned by Mr Erskine, and to which the decisions cited by him refer." The passage in Mr Erskine is as follows:—"In debts due by a corporation, or a trading company, it would be often extremely difficult, if not impracticable, to discover all its members, and the places of their residence, so that if there were a necessity to intimate to all of them, there could be no security in the purchasing of shares in any joint stock. Wherefore, in practice, the intimation of an assignment of a debt due by an hospital, made to no other but the treasurer, was admitted as a proper intimation, Jan. 1739, *Cred. of Letham* (*Dict.* p. 738); and an intimation to two clerks, who were also the managers of a trading company, a minute of which was regularly entered into their books, was adjudged to have the effect of fully divesting the cedent; *Tinw.* 19th Nov. 1755; *Watson of Muirhouse contra Murdoch, &c.* (*Dict.* p. 850)."

Certain assignments require no intimation, such are indorsations to bills of exchange—adjudication, which is a judicial assignment—and marriage (*quoad* the husband's rights), which is a legal assignment,—the assignment to all rights vested in the bankrupt in favour of the trustee under mercantile sequestration,—and in England, the assignment under a commission of bankruptcy. The class of subjects which are not assignable is very limited. Text writers enumerate merely different rights (*i. e.*, the rights themselves, not the profits of them), alimentary provisions and paraphernal goods; which last are said to be so peculiarly the wife's property, that if not specially assigned, they are not carried by a general assignment of the wife's moveable estate.

An assignment vests the assignee with the whole right which was in the cedent; and hence, where diligence has been raised by the cedent against the common debtor, the assignee, according to Erskine, may use the cedent's name in following it out. But without judicial authority the assignee is not entitled to execute in his own name diligence which has been raised in the name of the cedent. The requisite warrant for the change will be obtained at the Bill-Chamber, on pro-

duction of the assignment; and in every case this would seem preferable to following out the diligence in the name of the cedent after he is denuded. A special assignee will not be affected by latent claims of trust pleadable against the cedent, unless they have been duly notified to the party holding the right assigned. In the case of *Redfearn v. Somervail*, 22d Nov. 1805, a party held some stock, apparently in his own right, but truly in trust for another company, of which he was a partner. This party having borrowed money for his own use, assigned in security to the lender the stock in the company which he held in trust, and the assignment was intimated. On his bankruptcy, a competition arose between the company, for whom the bankrupt had held the share in trust, and the assignee. Lord CRAIG, Ordinary, found that the bankrupt was not only allowed to remain in the quiet and undisturbed possession of said stock, as absolute proprietor, for a considerable time after he made the purchase, but for several years after the company for whom he held the stock in trust was dissolved. His Lordship, therefore, and in respect that it was not alleged that Francis Redfearn, the special assignee, was in *mala fide* to accept the assignment under challenge, sustained his claim. Somervail, the party representing the company for whom the bankrupt held the stock in trust, reclaimed against the interlocutor of the Lord Ordinary, and the Court found that the allegation of the stock in question having stood in the person of David Stewart the bankrupt, in trust for David Stewart and Company, relevant to exclude the assignment granted by the bankrupt to Francis Redfearn. Against this judgment the assignee pleaded, that it was undoubted law that a posterior assignment first intimated was preferable to a prior one which had not been intimated, and that there was no difference between such a case, in which a party conveyed a right which he once had, but which he had previously given away, and the present case, where a party conveyed a right which apparently stood in his person, but which, by a latent trust-deed, was held by him for behoof of others; that in both cases the simple form of intimation would have prevented the wrong, and that in both the safety of commerce demanded that the same rule should be adopted. The Court, however, adhered to their judgment. The assignee, however, having appealed to the House of Lords, the judgment was reversed. Lord REDDERSDALE observed:—"Somervail, carrying his right to the utmost possible extent, could not be in a better position than an assignee without intimation; and Redfearn, whose assignment was intimated;

had clearly the preferable right. It was absurd, therefore, to say, that a person having the qualified right of a latent trust should be preferred to Redfearn, who had an intimated assignment." Lord ELDON observed:—"If latent equities were suffered to prevail against assignments, the effect would be that nothing could ever be assigned; for, as long as our Scotch neighbours retained any part of their characteristic shrewdness, they would never take an assignment, if they were aware that, by means of latent equities, such assignments might give them nothing. No case or authority of any kind has been found to support the position, that an intimated assignment might be defeated by a latent equity, which, as being latent, *ex necessitate*, could not be intimated."

A different rule, however, has been applied by the Court to the case of creditors who did not advance their money on the faith of a special assignment of a right held by a party, *ex facie* absolutely, but truly in trust for another. In the case of *Dingwall v. MacCombie*, June 6, 1822, 1 S. 463, a party who held certain shares in a company in trust for another transferred them in favour of the true owner within sixty days of his own bankruptcy. In a competition between the trustor and the creditors of the trustee, the former was preferred. Lord ALLOWAY, Ordinary, held that the creditors of the trustee could not stand in a better situation than he did; and the Court adhered. Lord GILLIES observed:—"It is true that, if the share belonged to Thomson (the trustee), he could not convey to Dingwall (the trustor) so near to his bankruptcy; but if he merely held it in trust, I think he could give an acknowledgment thereof at any time. There is a great difference where the question is with the creditors of the trustee and a *bona fide* purchaser. The creditors stand in the situation of the bankrupt, whereas a purchaser is entitled to rely on the holder being the true owner. The case of *Redfearn* being that of a purchaser is not applicable." In the case of *Gordon v. Cheyne*, Feb. 5, 1824, 2 S. 675, it was held, in conformity with the case of *Dingwall v. MacCombie*, that shares in a company held by a party *ex facie* absolutely, but truly in trust, were not attachable by the trustee for his creditors, but belonged to the trustor. Lord BALGREAT observed:—"If this were a question with an intimated assignment, there could be no difficulty; but the question is, whether the share did not remain *in bonis* of the trustor, and whether he is not entitled to vindicate it in a question with the trustee's creditors. Trusts in moveables have been always acknowledged by us as lawful, and indeed it is impossible to carry on com-

merce without them. A party may be unable to act for himself, or his property may be situated in a foreign country, where he is not naturalized, and where he must avail himself of a trust. It is well known that millions of the public funds belong to foreigners, and are held for their behoof by trustees. It is therefore a very alarming doctrine to maintain, that by the bankruptcy of the trustee all the funds belonging to third parties, and confided to his care, pass immediately to his creditors. The general rule of law is, *nemo plus potest transferre quam ipse habet*, and *assignatus utitur jure auctoris*; but there are exceptions, such as heritable rights, which are governed by what appears on the record; and moveable subjects, the title to dispose of which is affected by the state of possession. But in regard to *jura incorporalia* the general rule has always been considered as applicable. DIRLETON and our older writers even hold it to apply to the case of a purchaser; and Lord ELCHIES was the first to point out the inconvenience of the rule being so applied. I think that the House of Lords were mistaken as to the nature of the old decisions. We were so much influenced by them, that we decided *Redfearn's* case in conformity to them. But the House of Lords introduced, what I think is a reasonable distinction, and one for the benefit of society. There is, however, no such benefit in applying the exception to such a case as the present, but the reverse. Then look to the equity as affecting both parties. If a creditor wish for security, he should not rely on the mere reputation of his debtor,—he should inquire and obtain a security. If he does not so, he has himself to blame. But if I place my property under the care of a trustworthy person, and he become bankrupt next day, is there any equity in transferring my property to his creditors? No doubt the *prima facie* appearance of the property being in the bankrupt lays on me the burden of showing that he is merely a trustee; if I do so, I am entitled to have my property restored. But would it not be most inequitable to deprive me of that right, because, without any fault on the part of myself or my trustee, he has become bankrupt. If the creditors can show any *culpa* on my part, whereby a false credit is raised in favour of their debtor, as if I put property into his possession so as to increase his credit, my right to restitution may be barred; but it is incumbent on them to show this; and here they have not done so. I therefore can see no reason for applying the rule of *Redfearn's* case to the present one. I have also been influenced in my opinion by the views and decisions in England; and in regard to matters of this nature it is expe-

dient to approximate the two systems as nearly as possible. The English law appears indeed to be conclusive as to the distinction between purchasers and creditors, and the case of *Chion* is directly applicable." Lord PRESIDENT observed:—"The case is certainly not unattended with difficulty, and puzzles may be raised; but I concur in the opinion of the majority. We must look, in the first place, to Scotch principles and decisions. I think Redfearn's case an exception; and I am not inclined to extend it to the case of parties not dealing on the faith of the special subject. The general rule *nemo potest, &c.*, and *assignatus utitur*, is clear, and I bow to Redfearn's case, &c., as an equitable decision, although I think it contrary to our law. Down to the publication of Elchies' Notes, no such distinction was ever drawn. He saw the blemish, but states the law to be different; and the case of Redfearn introduced the exception. But there is no similarity between it and the present one. Redfearn did not trust to general credit, he stipulated for and obtained a special subject. In that case, either he or the truster was to be elected; and the latter, who put it in the power of the trustee to defraud, must suffer. In the present case, the shares were acquired by Sanders with Gordon's money for Gordon's behoof. They are taken in name of Sanders, and so entered in the books. But the trust is proved by the letter written *unico contextu* with the transaction. Gordon trusts to his general honesty; so do the creditors. They take the chance of what Sanders may have; they do not lend either money or sell their goods on the security of a special subject. What equity is there in their favour in a question with the *verus dominus*? I can see none. But I rest my opinion on the general rule of law; and I admit that I am happy that our law has, by Redfearn's case, been assimilated to that of England. But we see that in England the same decision has been pronounced as we propose to pronounce in this case. I do not think that the bankrupt act either applies, or was intended to apply, to a case of this kind."

Assignations of moveables *retenta possessione*, i.e., while the cedent himself retains possession, cannot prejudice his onerous creditors. Neither will an assignation of moveables, followed by symbolical delivery and an instrument of possession, but without an actual change of possession, be effectual to exclude creditors. See the cases *Borthwick v. Urquhart*, 7 S. 420; *Fraser v. Fresby*, 8 S. 982; *Robert v. Wallace*, 5 D. 4.

In the cases of leases, where assignation is otherwise lawful, difficulties connected with the nature of the subject have arisen. The

question then is, whether the right of the assignee to a lease can be completed by intimation without possession, as to which the following points appear to be settled:—1. Actual possession of the subject of the lease by the assignee certainly completes the assignation. 2. Where the principal tenant has sublet, and has then assigned, intimation to the subtenant will complete the assignation, to the effect of entitling the assignee to draw the subrent, to which the cedent would have been entitled. 3. When the object of the principal tenant is to convert his lease into a security for debt, the expedient resorted to has been to grant an assignation of the lease to the creditor, and to intimate that assignation to the landlord; and then for the assignee, as principal tenant, to grant a sublease to the cedent. In this way no change in the actual possession takes place, and there being no record of leases, the assignation remains, to a certain extent, latent, or at least a deed known, it may be, only to the landlord, the tenant and the assignee. The question as to the validity of such a security has been much agitated both in the Court of Session and in the House of Lords; and although it is said to be still an open question, yet, so far as it has been decided, the general rule is, that possession, natural or civil, is indispensable to the validity of the assignation; and consequently, in a question with the creditors of the cedent, the security is not to be relied on.

In the case of *Brock v. Cabbell*, 8 S. 647, the question was raised, whether an assignation of a lease by a tenant to a creditor, in security of a debt, and followed by intimation to the landlord, but without any actual change of possession, was sufficient to exclude the general body of creditors of the tenant. There was considerable difference of opinion on the Bench, the majority holding that possession was necessary to complete the transference. In the House of Lords the general point was not determined, and the judgment of affirmance proceeded on the special circumstances of the case. These, however, do not appear to have been such as to have warranted a waiving of the decision of the general point raised. Money had been advanced to the tenant by a bank, and the lease had been assigned to them in security of the advance, and intimation had been made to the landlord, and a sublease was taken by the tenant from the bank, his assignee to the principal lease. This last circumstance seemed to have been considered in the House of Lords as one which, instead of mending the matter, threw suspicion on the transaction. It is difficult to see how this should be the case, the bank having done all that it could think of to complete the security which it had re-

ceived. The general point, therefore, whether a lease can be effectually transferred without an actual change of possession, still remains undetermined. Consult on the subject, *Bell's Com.* i. 66, *et seq.*; *Ivory's Ersk.* B. ii. tit. 6, § 26, note 102; *Hunter on Landlord and Tenant*, i. 487, 495.

In connection with the subject of assignments, it may be stated as a general rule, that in every case, where a creditor receives payment from a cautioner, or from one who is not the proper debtor, he is bound *ex æquitate*, and for the relief of the cautioner, to grant an assignment to any separate security which the creditor may have held for his debt. To this rule, however, there is an exception, where such equitable assignment cannot be granted without prejudice to some separate right in the creditor; *e.g.*, a security over the same subject for a different debt. In that case, the cautioner paying the one debt, could not demand an assignment to the security, without also making payment of the other. A postponed heritable creditor is not entitled to demand from a prior creditor an assignment to his debt on his making payment of the debt, unless he can show that such assignment is necessary to enable him to recover payment of his own postponed debt. To enable him to make such a demand, some legitimate reason must be stated. The right to demand an assignment is an equitable one, and a case must be established to justify the interposition of the equitable power of the court in favour of the party making the demand. Although it would be a good reason that the assignment was necessary to enable the postponed heritable creditor to recover his debt, it would not be a legitimate reason that he wished to acquire or keep up a good investment; *Cunningham's Trustees v. Hutton*, Dec. 18, 1847, 10 *D.* 307. In this case the Court refused to interdict a primary heritable creditor from selling, although the postponed heritable creditor offered to pay the prior debt on obtaining an assignment to the prior security. The estate, however, was sufficient to pay the whole heritable debts, and a sale was thought expedient by the tutors of the heir of the debtor. See, on the subject of this article, *Ersk.* B. iii. tit. 5; *Stair*, B. iii. tit. 1; *Mr More's Notes*, cclxxxi.; *Bank.* vol. ii. 196; *Bell's Com.* ii. 16, *et seq.*; *Princ.* § 1459, *et seq.*; 1 *Dow*, 50; ii. 248; *Kames' Equity*, 38, 74, 156, 262, 504; *Menzies' Conveyancing*.

**Assignatus Utitur Jure Auctoris**; a law maxim, importing that the assignee comes into the right and place of the cedent. See *Mr More's Notes on Stair*, p. lxxi. See also *Assignment*.

**Assignee**; the person in whose favour an assignment is granted.

**Assignees.** The assignees under an English commission of bankruptcy are persons chosen by the creditors at a meeting called by previous advertisement. The bankrupt estate is vested in the assignees, who are intrusted with the care of recovering and distributing the proceeds amongst the creditors, according to the order fixed by the commissioners. See 6 *Geo. IV.*, c. 16; *Bell's Com.* ii. 303, *et seq.*

**Assignment**; an English law term, similar in import to the term *assignment* in the law of Scotland. An assignment is defined to be a deed or instrument of transfer, the operative words of which are, "assign, transfer, and set over;" and which passes both real and personal property. *Tomlins, h. t.*

It is generally supposed in Scotland that an assignment or assignment of a debt in England does not require intimation to complete the transfer. PROFESSOR BELL states, "an assignment made in England requires not the ceremony of intimation to complete the transfer of a debt due there." 2 *Bell's Com.* 18; *Bell's Principles*, 1466. Notice, however, is necessary. It was otherwise ruled by SIR THOMAS PLUMER, in the case of *Cooper v. Fynmore*, 1814, 3 *Russell*, 60, who held, that priority of time must prevail, and that mere neglect of notice was not sufficient to postpone a prior assignee, and that in order to deprive him of his priority, it was necessary that there should be such laches, as in a court of equity amounted to fraud. In the subsequent cases, however, of *Deazle v. Hall*, and *Loveridge v. Cooper*, 3, *Russell*, 1, the same Judge pronounced a different judgment, and observed:—"To give notice is a matter of no difficulty, and whenever persons treating for a *chose in action* do not give notice to the trustee or executor who is the legal holder of the fund, they do not perfect their title; they do not all that is necessary, in order to make the thing belong to them in preference to all other persons, and they become responsible in some respects for the easily foreseen consequences of their negligence. In *Ryall v. Rowley*, 1 *Vesey senr.*, 371, the Judges held "that, in the case of a *chose in action*, you must do everything towards having possession which the subject admits of; you must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is for many purposes tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who

leaves a personal chattel to which he has acquired a title in the actual possession and under the actual control of another person." A similar judgment was pronounced in *Loveridge v. Cooper*, decided of the same date with *Deazle v. Hall*, and both judgments were affirmed by Lord LYNDEBURST, who observed:—"Where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and vendee, but as to third parties, in order that they may not be deceived, by apparent possession and ownership remaining in a person who in fact is not the owner. This doctrine is not confined to chattels in possession, but extends to *choses in action*, bonds, &c. In *Ryall v. Rowley*, it is expressly applied to bonds, simple contract debts, and other *choses in action*, and Lord Chief Baron PARKER says, that on the assignment of a bond-debt the bond should be delivered, and notice given to the debtor; and he adds, that with respect to simple contract debts, for which no securities are holden, such as book-debts, for instance, notice of the assignment should be given to the debtor, in order to take away from the debtor the right of making payment to the assignor, and to take away from the assignor the power and disposition over the thing assigned. In cases like the present, the act of giving the trustee notice is, in a certain degree, taking possession of the fund. It is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice." In *Meux v. Bell*, 1841, 1 Hare, 73, the Vice-Chancellor WIGRAM observed:—"I believe that, prior to the decision in Mr Sturt's case in 1809, *Wright v. Lord Dorchester*, 3 *Russell*, 49, it had never been held that the mere omission of a person having an equitable interest in a fund, the legal property of which was in another, to give notice of that interest, would of itself give a puisne incumbrancer the priority; and I think it is apparent, upon the judgment in *Evans v. Bicknell*, 6 *Ves.* 190, that Lord ELDON at that time did not consider the mere omission to give notice, when the transaction was quite destitute of fraud, would have that effect. Sir THOMAS PLUMER, also, in 1814, in the case of *Cooper v. Fynmore*, 3 *Russell*, 60, expressed clearly the law of the Court to be, that the mere omission to give notice would not postpone a prior to a puisne incumbrance. I conceive it to be now clearly decided by the cases of *Deazle v. Hall*, *Loveridge v. Cooper*, and *Foster v. Cockerell*, *Myl. & K.* 297, and 9 *Bligh, N.S.* 332, that, if a *bona fide* incumbrancer upon a fund, the legal interest in which is in a trustee, gives notice of his incumbrance to the trustee, and neither the incumbrancer giving the no-

tice, nor the trustee at the time of such notice being given, has notice of any prior incumbrance affecting the fund, the incumbrancer giving such notice, as long as the circumstances of the case remain unaltered, will be entitled to priority over a prior incumbrancer upon the fund, who has omitted or neglected to give notice of his incumbrance, although the puisne incumbrancer may have advanced his money without making any previous inquiries of the trustee. In the absence of notice, the party claiming the prior incumbrance, has not perfected his title. In a case where there cannot be an actual transfer of the subject, he must do all that is in his power; and if he fails to do this, and another person takes an incumbrance and gives notice, the second person has acquired a perfect assignment, whilst the first equitable assignment is imperfect."

Notice given to one of several trustees will be sufficient to perfect the right of the party giving the notice; and it is immaterial that the notice was not given for the purpose of completing and giving validity to the assignment. In *Smith v. Smith*, 1833, 2 *C. R.* and *Cr.* and *M.* 231, Lord LYNDEBURST, in delivering the judgment of the Court, observed:—"We think that the purpose for which the notice was given, if a notice were in fact given, is altogether immaterial. If the trustee were made acquainted by the plaintiff with the fact of the assignment, there should be no necessity for giving him a second notice. It would have been a mere form, and altogether superfluous." In *Meux v. Bell*, the Vice-Chancellor WIGRAM observed:—"The next question is, whether the first incumbrancer, in order to perfect his security, must, where there are several trustees, give notice to all of them. If notice to all is not necessary, I am unable to discover upon what principle notice to one can be deemed insufficient. If the case of *Smith v. Smith* has determined that notice to one trustee is sufficient, I should not exercise a sound discretion if I were to create any doubt upon that point. Another question is on the nature of the notice. It was said in argument, that it did not appear that the notice was given for the purpose of affecting the trustee with notice of the settlement. If the trustee had said that the fact had come to his knowledge in one transaction, and he had forgotten it at the time of the other, there might be reason for the distinction which has been attempted to be made with regard to the manner in which the trustee gained his information. In such a case there might be a distinction between knowledge which is the result of express and pointed instruction, and notice which is derived from casual information. If the trustee has actual



knowledge, at the time the transaction takes place, I have always understood the principle of law to be, that what a man knows for one purpose, he knows for all; and you do not inquire whether he learnt it in one character or in another." 1 *Hare*, 73. The ground for this appears to be, that the second assignee would have been safe if he had made inquiry, for he would then have been informed of the prior assignment. Although notice to one of several holders of a fund is sufficient, this would not apply to the case of a company, consisting of numerous partners. In such a case, notice should be given to the company at its office. In the case of *Thompson v. Spiers*, 1845, 13 *Sim.* 469, the question was, whether actual notice of the assignment of a policy, effected with the Equitable Assurance Society, was necessary to take the policy out of the order and disposition of the assured. In *Duncan v. Chamberlayne*, 11 *Sim.* 123, it had been held that such notice was not necessary, on the ground that all the assured of the Equitable Society were partners. The Vice-Chancellor observed:—"The rule is, that notice to one partner is notice to the partnership; and as all the insurers in the Equitable Assurance Office are partners in the Society, the fact of the assignment of a policy by one of the assured must be taken to be a fact of which the Society had notice." In *Thompson v. Spiers*, 1845, 13 *Sim.*, 469, the case of *Duncan v. Chamberlayne* was overruled, on the ground that, in order to take a policy of insurance out of the order and disposition of the assignor, it is essential to the interests of mankind that something should be done of a decisive nature, which might effectually prevent the payment of the proceeds to any other person than the assignee. The Vice-Chancellor observed:—"The Equitable Assurance Company is a very numerous and wealthy body, and therefore it would be idle to say, that, because the assured happens to be a member of the company in a legal sense, any act which he does, with reference to his own particular policy, is to be taken to be a partnership act, so as to affect the whole body with notice of it. In consequence of the decision in *ex parte Hennessey* by the Lord Chancellor of Ireland, I had a conversation a few days ago with his Lordship upon the subject, and we agreed that courts of equity ought to lay down some rule which should not be founded on so unsubstantial a basis as the technical doctrine of implied or constructive notice, but which should make it morally impossible for the assignor to have dominion over the policy, without the assent of the assignee."

It has already been seen, that an assignment is complete, if the party holding the right assigned is in the knowledge of the

assignment, although such knowledge may not have been obtained by an express notification by the assignee. This constitutes a material point of difference between the laws of England and Scotland, in the matter of assignments; for, in Scotland, private knowledge of an assignment by the party holding the right assigned is not sufficient to perfect the assignment, and intimation on the part of the cedent is necessary for that purpose. The English rule appears to be founded on this, that all that is required, is knowledge of the assignment by the party holding the right assigned; and that, if a proposed second assignee, before taking the assignment, does not apply to the party holding the right assigned, to ascertain whether a prior assignment exists or not, he has no just ground of complaint if it should afterwards appear that such party was in the knowledge of a prior assignment. In such a case, it would appear that the general rule, "*assignatus utitur jure auctoris*," is allowed to take effect. Another point of difference between the laws of the two countries appears to be, that by the law of England the puisne incumbrancer must be in *bona fide*, and not in the knowledge of the prior incumbrancer. By the law of Scotland again, the assignation first intimated prevails, in the case of an incumbrance or security.

**Assisa**; has various significations in the older law of Scotland: thus, it signifies properly a sitting in session—and is taken also in the *Regiam Majestatem* for a constitution, ordinance, or law. It is likewise used to signify a measure of quantity,—a rent due to the king,—and finally, it signifies a jury, in which last acceptation it is still in use. *Skene*, h. t.

**Assize**; sometimes signifies the sittings of a court, sometimes its ordinances, and sometimes it signifies a jury; see *Skene*, *De Significatione Verborum*, under the word *Assisa*. A jury, or assize, in the Court of Justiciary, consists of fifteen men, formerly chosen by the Court, now balloted, from a greater number (not exceeding forty-five,) summoned by the Sheriff, and of whom a list must be served on the defender along with the copy of his indictment. This number used to be restricted to forty-five, but power was given, by 6 Geo. IV., c. 22, to the Lord-Justice Clerk, or any one of the Lords Commissioners of Justiciary, to direct a larger number to be summoned where required. This power has been exercised where there were several panels to be tried on one indictment; and to the High Court and Glasgow Circuits respectively sixty-five and one hundred are cited. *Ersk.* B. iv. tit. 4, § 92, and § 101; *Bank.* vol. ii. p. 661; *Kames' Stat. Law Abridg.* h. t.; *Hume*, i. 380, 384; ii. 138, *et seq.*, 154, *et*

seq., 279 to 318, 414 to 462; *Bell's Notes*, p. 257; 11 and 12 *Vict.*, c. 79.

**Associate in Crime.** See *Accomplice*.

**Assolzie;** is to free a party from the conclusions of an action, or to find a criminal not guilty.

**Assumpsit;** is the commonest form of action in the English courts for the recovery of damages occasioned by the breach of a simple contract. The name is derived from the plaintiff asserting that the defender undertook to perform or pay something to him; and hence, the action can only be sustained when there has been an express promise, or when equivalent circumstances have taken place. *Tomlins, h. t.*; *Wharton, h. t.*

**Assumption of Thirds.** This was a provision for the clergy by the act 1567, c. 10, which directed the whole tithes of all the Popish benefices, without exception, to be paid to the collectors for the ministers' stipend; and particular localities were assigned in every benefice to the extent of a third. This was called the Assumption of Thirds. This plan of providing for the clergy was rendered unproductive by the act 1606, c. 2, restoring bishops, who, though laid under an obligation to provide for their clergy out of the thirds, succeeded in evading the law. *Ersk. B. ii. tit. 10, § 17.*

**Assumption, Deed of;** is a deed executed by trustees under a trust-deed or deed of settlement, assuming a new trustee or trustees. An express power from the truster is necessary in order to entitle trustees to execute such a deed; the terms of which must, of course, depend upon the nature of the powers conferred by the trust-deed. See *Jurid. Styles*, vol. ii. p. 498, 3d edit.; *Duff on Deeds*; *Menzies on Conveyancing*.

**Assurance.** See *Insurance*.

**Assurance, Oath of.** See *Oaths*.

**Assythment;** is an indemnification due to the heirs of a person murdered by the person guilty of the crime. The assythment may be made the ground of an action, wherever a person pleads on a remission, since the doing so is an acknowledgment of the crime. It may also be the ground of an action, wherever the crime has been found by the decision of a court; *M'Harg v. Campbell*, Feb. 24, 1767, *M.* p. 12541. But, where the criminal has suffered the pains of law, no claim for assythment lies. If the criminal has fled, and been fugitated, the assythment may be obtained from the donatory of the escheat of the criminal. See *Hume*, vol. i. p. 279, and ii. p. 477; *Stair*, B. i. tit. 9, § 7; *More's Notes*, p. lvii.; *Ersk. B. iv. tit. 4, § 105*; *Bank. vol. i. p. 246, et seq.*; *Bell's Princ. § 2029, et seq.* 3d edit.; *Kames' Stat. Law Abridg. v. c. Reparation*; *Brown's Synop.*

p. 2131; *Jurid. Styles*, vol. ii. p. 408, 3d edit.

**Astriction;** is the obligation imposed by the servitude of thirlage, by which certain lands are astricted to a particular mill, and the possessors bound to grind their grain there. *Stair*, B. iv. tit. 15; *Ersk. B. ii. tit. 9, §§ 18, 32*; *Bell's Princ. § 1017*, 3d edit.; *Brown's Synop. p. 3.* See *Thirlage*.

**Atheism;** disbelief in the existence of God. Under the act 1661, c. 21, and 1695, c. 11, persons guilty of certain degrees of this offence were liable to capital punishment; but these statutes were repealed by the 53 Geo. III., c. 160, § 3, and the punishment is now arbitrary at common law. See *Hume*, vol. i. p. 568; *Ersk. B. iv. tit. 2, § 23, and note*; tit. 4, § 16; *Bank. vol. ii. p. 645*; *Kames' Stat. Law Abridg. h. t.*; *Hutch. Justice of Peace*, vol. ii. p. 335; *Alison's Prac. 437*. As to the effect of atheism in disqualifying witnesses, see *Brown*, 221; *Tait on Evidence, 347*; *Dickson on Evidence, 848, 907*.

**Attachiamentum;** from the French word *attacher*, used in the *Regiam Majestatem* to signify a charge or binding of a person, to the effect he may be compelled to appear to answer in judgment. It also signifies an attachment of goods and effects by arrestment or otherwise. *Skene, h. t.*

**Attachment;** in English law, is a judicial proceeding, answering to what in Scotland is termed arrestment, by means of which a creditor may obtain the security of the goods or other personal property of his debtor, in the hands of a third person, for the purpose, in the first instance, of enforcing the appearance of the debtor to answer to an action; and afterwards, upon his continued default, of obtaining the goods or property absolutely in satisfaction of the demand. *Attachment* is also used to signify a kind of criminal process, which courts of record are authorized summarily to issue upon a mere suggestion, or upon the personal knowledge of the judges, without indictment or information. It is properly granted in cases of contempt. *Tomlins, h. t.*

**Attainder;** is the corruption of blood consequent on a conviction for high treason. Its effect is to make the convicted person forfeit his honours and dignities, and become incapable of succeeding to any ancestor. The estate, which he is thus prevented from taking, falls to the immediate superior as escheat. It follows as a necessary consequence of the corruption of blood, that the heirs of the attainted person cannot inherit upon his death, nor can an heir succeed to an ancestor where the propinquity between the two is through the attainted person. *Ersk. B. ii. tit. 3, § 16*; *B. iv. tit. 4, § 24*; *Bank. vol. ii.*

p. 261, *et seq.*; *Swint. Abridg. voce Treason*, 96. See *Treason*.

**Attaynt**; convicted. *Skene, h. t.*

**Attempt at Murder.** At common law, an attempt at murder is held to have been committed when the panel has inflicted an injury of such a nature as shows him to have been quite reckless of the life of the sufferer; or when he has done all that he could to accomplish his purpose, although no injury may have ensued; as, *e.g.*, where the pistol misses fire, or the ball does not hit its object. An act of a more remote nature, by which the panel intended to destroy life, and which would have had that effect had it not been defeated, amounts to this crime. But mere preparations for murder, while the deed is still in the panel's option, are not legally cognisable. Any circumstances, which would have made the killing amount only to justifiable or culpable homicide, if the wounded man had died, will of course go to extenuate the attempt. Attempt at murder is punishable at common law with any pain short of death. By 10 Geo. IV., c. 38, attempt to murder, or to do severe bodily injury, is capital in the following cases:—1. Where loaded fire-arms are discharged, or attempted to be discharged, at any one. In this case, the intention to kill or injure does not need proof. 2. Stabbing or cutting with intent to murder or inflict injury. In this case the intent must be proved, and also that it has taken effect on the person aimed at. 3. Where poison is administered with intent to murder or inflict injury. Here, also, the intent must be proved, and the poison must have been actually swallowed, and not merely put in the way of the intended victim. 4. An attempt to suffocate, strangle, or drown, with intent to kill or inflict injury. Here the intent must be proved. 5. Where sulphuric acid or other corrosive substance is thrown at a person with intent to murder, disfigure, or injure, and where the person aimed at has been disfigured or seriously injured in consequence. The mere throwing of the acid, or its burning or destroying the dress, will not be sufficient. Here also the intent must be proved. Circumstances which would have lowered the crime from murder, had death followed, do not render the statute inapplicable, but merely modify the punishment. The prosecutor has the power of restricting the pains of law without departing from the statute. See *Rome, i. 26-30*; *Bell's Com. p. 66*; *Alison, 163*; *Steele's Powers and Duties of Juries, 98*. See *Murder*.

**Attector, in the Bill-Chamber**; is one who states the sufficiency of a cautioner offered in the Bill-Chamber. Where a cautioner is offered and objected to, and where the objec-

tion cannot be otherwise obviated to the satisfaction of the clerk of the bills, the additional caution of an attestor is interposed. The attestor not only certifies the sufficiency of the cautioner offered, but binds himself *subsidiarie* along with the cautioner; whereas, when a justice of the peace or other respectable person certifies that the proposed cautioner is habite and repute in good circumstances, such a certificate imports no more than that at the time the fact so certified is true, without inferring any personal responsibility beyond the knowledge and belief of the magistrate, or other person certifying. *A. S. 27th Dec. 1709*; *Stair, B. iv. tit. 52, § 10 and § 25*; *More's Notes, cxliii.*; *Ersk. B. iii. tit. 3, § 71*; *Bank. vol. i. 459*; *Bell's Com. i. 323*; *Kames' Stat. Law, voce Cautioner in Suspension*; *Jurid. Styles, ii. 90*; *Beveridge on Bill-Chamber, p. 33, and App. p. 44*; *Shand's Prac. 478*. See *Cautionary. Discussion. Bill-Chamber*.

**Attorney**; one appointed by another to act for him in his absence. There is not in Scotland, as in England, a class of practitioners of the law who take the name of attorneys. The office of attorney in Scotland is private, and conferred by letters of attorney, which regulate the extent of power conferred on the attorney. In the ceremony of giving sasine, the person who acted for, or represented the party who was to be infeft, and who, as his procurator, received symbolical delivery, was denominated the attorney, and was formerly appointed by special letters of attorney; but now possession of the warrant for infeftment is held to be sufficient evidence of his commission, though a fraudulent use of the warrant may annul the sasine. *Stair, B. ii. tit. 3, §§ 16 and 17*; *More's Notes, p. xi.*; *Bell's Com. vol. i. p. 478*; *vol. ii. p. 349, 5th edit.*; *Jurid. Styles, vol. ii. p. 303, et seq. 3d edit.* See *Infeftment*.

**Attorney's Certificate.** Under certain revenue statutes, every writer to the Signet, solicitor, agent, attorney, or procurator in the law courts in Scotland, is subject to a high license-duty on his admission; and, in order to authorize him to make, or at least to recover, his professional fees or charges for judicial business, he is also bound annually to take out, and to record, in a special record kept for the purpose, a stamped certificate or license. The license-duty at present payable by an agent, solicitor, or writer to the Signet, on his admission as a practitioner, is L.25. An agent in the Supreme Court, if admitted without indenture, pays (in addition to the above L.25) the sum of L.60. In the inferior courts, if admitted without an indenture, (in addition to the above L.25,) L.30. For a license to act as a notary-public, the stamp

is L.20; and the annual license of attorneys or agents resident in the city or shire of Edinburgh, who have been admitted for three years or upwards, is L.9. Where under three years, L.4, 10s. If resident elsewhere in Scotland, under three years, L.3: if of three or more years' standing, L.6 per annum. In Edinburgh (city and county) these annual certificates are entered in a record kept by an officer appointed by the Judges of the Court of Session, who marks on the back of the certificate the date of its being exhibited to him, and then redelivers it to the party; and this entry must be made by 31st December yearly, or before the agent begins to practise. These certificates, in Scotland, are issued from the Stamp Office annually between 31st October and 1st December: they bear date 1st November, and they expire annually on 31st October. The penalty of a failure to take out and record such annual certificate is, that the defaulter shall forfeit L.50, and "be incapable of maintaining or prosecuting any action, suit, or proceeding in any court of law or equity, for the recovery of any fee, reward, or disbursement, upon, account of, or with relation to, any business, matter, or thing performed, executed, directed, or conducted by him in any character or capacity requiring a certificate." The statutes regulating this matter are, 25 *Geo. III.*, c. 80; 37 *Geo. III.*, c. 90 (which, however, seems to be limited to England); 7 *Geo. IV.*, c. 44; 9 *Geo. IV.*, c. 49; and 16 and 17 *Vict.*, c. 63. The result of several decisions in the Court of Session rather appears to be, that the penal clause in the statutes is personal to the agent, operating as a bar against his suing his client for the recovery of judicial expenses incurred, as well as disbursements made, while he had not a license; or, where expenses have been found due to his client, barring the agent-disburser from taking decree in his own name against the opposite party; but that it presents no bar to a decree for expenses in name of the client who has employed the unlicensed agent; at least where the client, in ignorance of his agent's omission, has actually paid him, and has been found entitled to costs against the opposite party in the suit. The decisions on this point, however, have not been uniform; and at all events it seems to be clear, that the Court will not sanction any collusive arrangement between agent and client, whereby the object of the above statutes may be evaded, and the agent enabled to recover, in name of his client, what he would not have been entitled to sue for in his own name. See on this subject, *Barry v. Singer*, July 8, 1826, 4 S. 813; *Smyth v. Nisbet*, Feb. 20, 1827, 5 S. 388; *M'Gown v. Begg*, Jan. 24, 1828, 6 S. 420; *Darling v. Adamson*, Nov.

26, 1834, 13 S. 93; *Johnson v. M'Queen*, June 21, 1834, 12 S. 770, and March 11, 1835, 13 S. 682; *Ireland v. Wilson*, June 25, 1851, 13 D. 1226, where a distinction was refused to be taken between proper judicial expenses and expenses incurred in a judicial reference.

**Attorney-General.** In England and Ireland the Attorney-General is the first ministerial law-officer of the Crown, appointed by letters-patent. He is, in principle, attorney for the Sovereign, to whom he stands in the same relationship that any other attorney does to his employer. His official duty is to exhibit informations, and conduct prosecutions for such crimes and offences as tend to endanger the state; to advise the heads of the various departments of Government on legal questions; to conduct all suits and prosecutions connected with the recovery of the revenue of the Crown, for the protection of charitable endowments; and, in general, to appear in all courts in England or Ireland, when the interests of the Crown are in question. Many questions of precedence have arisen between the Attorney-General and other functionaries; but it was settled by royal warrant in 1811, that the Attorney and Solicitor-General take rank at the head of the English bar; and by the Lord Chancellor in 1834, that at the bar of the House of Lords, the Attorney-General has precedence of the Lord Advocate of Scotland. In some respects, the office of Attorney-General is analogous to that of Lord Advocate; but the powers of the Lord Advocate are greatly more extensive and uncontrolled. *Black. iii.* 27; *Tomlins, h. t.* See *Advocate, Lord.*

**Attorney-at-Law.** In the English Superior Courts of Common Law at Westminster, the profession of attorney-at-law is analogous to that of law-agent or solicitor in Scotland; and to that of *Solicitor* in the Courts of Chancery, and of *Proctor* in the Ecclesiastical Courts. In England, anciently, suitors could not appear in court by attorney, without the king's special warrant; but by stat. 13 Edward I., c. 10, parties were empowered to prosecute and defend by attorney; after which the attorneys were formed into a regular body of law-practitioners. They are now admitted to practise in the English courts, and enrolled according to certain statutory regulations. They must also take out a certificate at the Stamp Office annually; and in other respects their duties, responsibilities, and privileges, resemble those of law-agents in Scotland. See *Bacon's Abridg. voce Attorney*; *Tidd's Prac.* c. 3 and 14; *Memfield's Law of Attornies*; 1 *Chitt. Arch. v. Attornies*; and especially the *Attornies' and Solicitors' Act*, 6 and 7 *Vict.* c. 73. See *Attorney's Certificate.*

**Aubaine.** See *Droit d'Aubaine*.

**Auction or Roup;** a mode of selling various descriptions of property, by a competition of bidders or offerers, under certain conditions previously stipulated. These conditions set forth the terms of the contract between the exposer and the offerer or purchaser. See *More's Notes to Stair*, pp. lx. lxiv. *et seq.*, xci; *Ersk. B. iii. tit. 3, § 2, and note by Mr Ivory*; *Bell's Princ.* § 130, *et seq.*, 2425, 2430, 3d edit.; *Bell's Illust.* § 130; *Swint. Abridg. h. t.*; *Brown on Sale*, p. 578, *et seq.*; *Brown's Synop.* p. 2201; *Bateman on Auctions*; *Sequen's law of vendors and purchasers*. See also *Articles of Roup*.

**Auctioneer;** is the person who officiates at an auction. He puts up the articles to sale at a certain price; he calls the offers; and declares the purchaser by knocking down the article to him. An auctioneer must take out a license annually, for which a duty is paid to Government. 42 *Geo. III.*, c. 93, and other *Stamp Acts*.

**Auditor;** an officer or agent of the Crown, or of a private party, or of a corporation, who examines periodically the accounts of under officers, tenants, stewards, or bailiffs, and reports the state of their accounts to his principal. *Tomlins, h. t.*

**Auditor of the Court of Session;** an officer appointed by the Crown, to whom either of the Divisions, or any Lord Ordinary, remit to tax the costs of a suit in which expenses are found due. A special remit of the particular account to be taxed is necessary; and the auditor returns a report to the Judge or Court making the remit, who thereupon pronounces decree for the amount of the taxed account. If either party considers himself aggrieved by the report of the auditor, it is competent for him to state his objections to the Court or Judge, by whom they will be summarily and finally disposed of. This officer was appointed for the first time by the Court itself, by Act of Sederunt, 6th February 1806, and his fees were settled by Act of Parliament 50 *Geo. III.*, c. 112, § 48. And by 1 and 2 *Geo. IV.*, c. 38, § 32, the office is made permanent, and the nomination is vested in the Crown; the office to be held *ad vitam aut culpam*. Two auditors may be appointed, if necessary; one for each Division. The auditor cannot practise before the Court, either directly or indirectly, under pain of deprivation of office. If unable to discharge his duties from temporary indisposition or absence, the Court may appoint a fit person, though practising before the Court, to officiate in the interim. Prior to the passing of the stat. 59 *Geo. III.*, c. 35 (1816), costs in jury causes were taxed by the second and third jury clerks; but by that statute, § 33, the auditor

of the Court of Session is also appointed auditor of accounts in jury causes. The persons eligible to the office are writers to the Signet, who have practised as such for not less than three years, and members of the incorporation of solicitors before the Supreme Courts in Scotland; 1 and 2 *Geo. IV.*, c. 38, § 32. The auditor's salary is now fixed by 1 and 2 *Vict.*, c. 118, § 24. In the inferior courts, an officer, with the like powers, is usually appointed by the particular court. See on the subject of this article, *Shand's Prac.* i. 118; *Macfarlane's Jury Practice*, 8, 291; *Shaw's Digest*; 11 *S.* 62; 13 *S.* 964. See also *Expenses*.

**Augmentation, Process of;** is a process in the Teind Court, raised by the minister of a parish against the titular and heritors, for the purpose of obtaining an increase of his stipend. By stat. 48 *Geo. III.*, c. 138 (1808), it is enacted, that no stipend which has been modified before the passing of that act shall be augmented until fifteen years after the date of the last final decree of modification; and that all stipends augmented after the passing of that act shall not be again augmented for twenty years; nor at any future period is a stipend ever to be augmented until twenty years after the date of the last decree of modification. The same statute provides, that all augmentations shall in future be modified in grain or victual, unless when peculiar circumstances render it necessary to modify them in money; but although modified in grain, the stipend is to be paid in money, according to the fair prices of that year for which it is payable. It is also enacted (§ 17 of this statute), that in addition to the heritors, the minister pursuing a process of augmentation shall cite the moderator and clerk of the presbytery of the bounds. The summons of augmentation has two objects: *first*, The ascertainment or *modification*, as it is expressed, of a suitable stipend for the minister, regard being had to the state of the teinds of the parish, its extent, and other circumstances; and, *secondly*, The allocation or localing of the stipend, so modified, on the heritors. There is also a conclusion for a suitable sum for communion elements; and in his summons the minister must state, as accurately as he can, the number of the inhabitants, the extent of the parish, and the other circumstances on which he founds. The summons is signed by the teind clerk, and passes the Signet. The titular, or the tacksman of the teinds, heritors, or liferenters, or other intromitters with the teinds, and others having interest, are not cited personally, but by the precentor giving public notice from his desk, immediately before the congregation is dismissed from the forenoon service. This notice specifies the day in which the

summons will be called in court, being not less than six weeks after the date of the first notice, and the notice must be repeated three several Sundays; a certificate to that effect being transmitted to the pursuer's agent. Notice in writing must also be put up on the principal door of the church by a messenger-at-arms or by a constable, who also transmits to the pursuer's agent a certificate to that effect; and, finally, the pursuer must insert similar notices, three several days, in the Edinburgh Evening Courant, Caledonian Mercury, and Edinburgh Advertiser Newspapers. When it is necessary to call the Officers of State for the interest of the Crown, they are called on *inducia* of six weeks; and the moderator and clerk of presbytery are sufficiently cited by a letter from the pursuer himself, engrossed in the presbytery record, one month before the summons is called in court; *A. S. 12th Nov. 1825.*

As soon as the summons is signeted, the pursuer must lodge with the clerk of court a note of the amount of the present stipend, specifying how it is paid, and the amount of the communion elements. He must also give in a rental of the parish (usually called the *minister's rental*), distinguishing the rent of each heritor as exactly as he can; and when the summons is called, which is by calling list, as in the Court of Session, the case is enrolled in the ordinary action roll of the Teind Court (Inner-House), when all concerned will be allowed to see the summons and writings produced in the clerk's hands, for fourteen days. On the lapse of that period the case may be again enrolled, when a proof will be allowed of the rental of minors' lands, and the heritors who are major will be held as confessed on the minister's rental, unless one or more of them take a day to depone. One act and commission, at the expense of the heritors deponing, is in that case extracted for the whole, on which they or their factors may depone; and as to the rental of minors' lands, it may be proved by a certificate under the hand of any of the tutors or curators, without extracting an act and commission. When the day assigned for deponing and proving has elapsed, the cause may be again enrolled, to have the term for proving circumscribed, and a remit made to the junior Lord Ordinary to prepare a scheme of the rental, either according to the minister's rental, if there has been no proof, or according to the proof led, and the certificates of rental and decrees of valuation produced. And when the scheme of the *proven rental* (as it is technically called) is prepared, the cause may be again enrolled before the Teind Court, when the parties will be heard, *viva voce*, on the merits, and the augmentation granted or

refused. When a decree modifying a stipend has been pronounced, it is declared by the Act of Sederunt, 12th Nov. 1825, to be final, and not subject to review in the Teind Court by petition or otherwise, unless it has been pronounced in absence; in which case a note may be given in by the defenders, praying to be heard; and on payment of previous expenses the case may be reheard. But doubts have been lately raised whether an interlocutor of the Teind Court refusing an augmentation may not be submitted to review, by a reclaiming petition to the Teind Court. The doubt is founded on the enactment in the Judicature Act (1825), that the ministerial and discretionary jurisdiction of the Teind Court, expressly including the modification of stipends, "shall nowise be altered or affected by this act;" and although the Teind Court Act of Sederunt, 12th Nov. 1825, plainly contemplates an assimilation of the practice of that Court to the altered practice of the Court of Session, as to the finality of Inner-House interlocutors, the question mooted, and likely soon to be tried, is as to the power of the Court, under the words of the statute, to alter the older practice of the Teind Court by an Act of Sederunt; see 6 *Geo. IV.*, c. 120, § 54. When the decree of modification is pronounced, the Teind Court at the same time remits to the second junior Lord Ordinary to prepare a scheme of locality; *i.e.*, an allocation of the modified stipend on the several heritors or others liable therefor; *A. S. 12th Nov. 1825.* (See *Locality*). Whether the heritors oppose the augmentation or not, unless in very special circumstances, the minister's own expenses, at least, must be borne by himself; but the heritors are at the sole expense of the locality, the common agent being authorized to furnish the minister with an extract of the decree of locality, interim or final, at the common expense; *A. S. 5th July 1809.* As to the mode of applying for the benefit of the statutes 50 *Geo. III.*, c. 84, and 5 *Geo. IV.*, c. 52, for improving small stipends, and making allowances in lieu of manse and glebes, see *Small Stipend*; and see on the subject of the present article, *More's Notes on Stair*, pp. xciii. ccxxxvii.; *Ersk. B. i. tit. 5, § 21, et seq.*, and *B. ii. tit. 10, § 46; Ivory's Form of Process*, ii. 444, *et seq.*; *Beveridge*, ii. 729, *et seq.*; *Jurid. Styles*, iii. 485, *et seq.*; *Connell on Tithes*, ii. 89, *et seq.*; *Brown's Synop. p. 2313; Shaw's Digest.* See *Teinds. Teind Court. Stipend.*

**Author**; in Scots law, signifies the person from whom a proprietor has purchased or acquired property by singular titles, as contradistinguished from an ancestor, from whom the property has come by descent. *Ersk. B. ii. t. 7, § 1.* See *Ancestor.*

**Authorship.** See *Literary Property*.

**Auto de Fe; or Auto da Fe (Act of Faith);** was the public and solemn reading of extracts from the trials promoted by the Inquisition, and of the sentences, condemnatory or of acquittal, pronounced by the judge of that tribunal. The offenders, or their bones or effigies, were present at this ceremony. The civil and criminal authorities of the place were also present, into whose hands the offenders were delivered for punishment. See *Encyc. Brit., vocs Act of Faith*.

**Avail of Marriage;** was the sum formerly payable to the superior by the heir of a deceased ward vassal, on his becoming marriageable. Marriage was a casualty in wardholding, which entitled the ward superior to receive from the heir of his former vassal a certain sum as the value (avail) or tax due on his marriage. Anciently, this casualty affected minor heirs only, who, after puberty, refused to marry upon the superior's requisition; but afterwards the single avail became due, though the heir had been major at the death of his ancestor, and had died, neither married, nor required to marry, by the superior. The avail was not due where the heir was married before the ancestor's death, or where he died before puberty. The single avail was fixed by the Court of Session, in 1674, at three years' rent of the vassal's estate; but it was afterwards reduced to two years' rent. The double avail was due where the superior offered a wife to the heir, in every respect his equal, who publicly declared her readiness to marry him, but whom he refused to marry, and married another. At first, the double avail was estimated at two single avails; but it is probable that, had it been questioned, it would have been reduced to three years' free rent of the vassal's estate. In estimating the amount of the avail, not only the ward estate, but the whole other free estate of the vassal, was brought in *computo*, as it stood at the period when he became marriageable. The act 20 Geo. II., c. 50, abolishing wardholding, put an end to this exaction. See *Stair*, B. ii. tit. 4, § 47, and *More's Notes*, p. ccviii.; *Ersk.* B. ii. tit. 5, § 18, *et seq.*; *Bank.* i. 637, *et seq.*

**Average;** a term used in commerce and navigation to signify a contribution made by the owners of the ship, freight and goods on board, or the insurers of these, in proportion to their respective interests, towards any particular loss or expense sustained for the general safety of the ship and cargo. This is the original and proper meaning of average; and in this sense it is commonly called *general*, or *gross average*, as falling generally, or on the gross amount of ship, cargo, and freight; *Bell's Com.* vol. i. p. 583, 5th edit. This con-

tribution was established by the Rhodian law, and prevails in every commercial nation. Passengers on board, with the apparel, jewels, &c., of their persons, seamen's wages and provisions, suffer no part of the general average. Goods thrown overboard are estimated (in later times) at the price they would have brought at the port of delivery, freight, duties, &c. deducted. See *Contribution*.

**Particular Average,** is used to denote a loss for which no relief can be had by general contribution; e.g., the loss of an anchor, the accidental loss of any part of the ship or cargo washed from the deck, &c. *Bell's Com.* ib.

**Petty Averages,** are the accustomed duties of anchorage, pilotage, &c., which, when they occur in the usual course of the voyage, are not considered as a loss, but as part of the necessary expense; *Bell's Com.* ib. p. 567; but if incurred for any extraordinary purpose, or to avoid impending danger, they are regarded as a loss includible within gross average. *Ersk.* B. iii. t. 3, § 17; *Bell's Princ.* 3d edit. § 437, *et seq.*; *Illust.* ib. See *Collision of Ships*. And on the subject of this article generally, consult *Park on Insurance*, c. vii.; *Marshall*, B. i. c. 12, § 7; *Stevens on Average*; *Benecke on Indemnity*; *Abbot on Shipping*, part 3, c. 8.

**Average Bond;** is a deed which it is usual for the parties liable to a general average to execute, empowering an arbiter to ascertain the value of the property lost, and to fix the proportion of the loss which each proprietor shall bear. See *Jurid. Styles*, vol. ii. p. 554, 2d edit.; *Smith's Maritime Practice*, p. 144.

**Averia.** In the *Regiam Majestatem*, this word signifies the best animal, which, in law, was given by a husbandman to his master as an *herzeelde*.

**Averment;** in Scotch judicial proceedings, is a statement in point of fact, which the party making it is understood to be prepared to prove. The word seems to have a different meaning in English law. See *Tomlins' Law Dict.*

**Aversio.** Sale *per aversionem*, means sale by the bulk; as, all the wine in one's cellar. *Stair*, B. i. tit. 15, § 17; *Bank.* vol. i. p. 419.

**Avizandum.** To make avizandum with a process, or part of it, is to take it from the public court to the private consideration of the judge. When a Lord Ordinary in the Court of Session, either after hearing parties, or, of consent, without a debate, is called upon to pronounce his decision, and, in place of doing so *de plano* in open court, takes time to consider, he makes avizandum with the process and debate, if there has been one, and a formal interlocutor to that effect is in such cases written out. The process is then transmitted to him by the clerk; and, after

considering it, the Lord Ordinary issues his decision in the usual form. Prior to the changes introduced by 13 and 14 Vict., c. 36, when the parties had finally adjusted their averments and answers, and were prepared to close the record, the cause was enrolled before the Lord Ordinary, who made avizandum with it, with the view of seeing how far the averments of the parties met each other, and that the record was in a fit shape for being closed, a formal interlocutor making avizandum being also written by the clerk; and the Lord Ordinary having satisfied himself that the record was correctly framed, returned the case from avizandum, and ordered it to be enrolled, for the purpose of closing the record, as more particularly explained *voce Record*. This form of procedure is now entirely abolished, except in actions of multiple-pounding and other processes of competition, which are still regulated by the former rule; and the revised papers are now simply transmitted to the Lord Ordinary by the clerk, without any enrolment or formal interlocutor for the purpose. With incidental proceedings, such as reports ordered by himself for his own information, the Lord Ordinary usually makes avizandum. In consistorial actions also he makes avizandum with the summons, in order to consider and dispose of the relevancy of the averments before allowing proof. See *Record*; *Great Avizandum*; *Stair*, B. iv. t. 2, § 9; t. 20, § 20; t. 43, §

12; *Bank*. i. 675; *Shand's Prac.* 334, 338, 341, 360; *Shand's Dig. of Court of Session Act*; *Macfarlane's Jury Prac.* 34. For forms observed in Sheriff Courts, see *Barclay's Sheriff Court Prac.*

**Avulsio**; takes place where lands are, by an inundation or current, separated from the property to which they originally belonged, and added to the lands of another person; or where a river changes its course, and, in place of continuing to run between two properties, cuts off part of one, and joins it to the other. The property of the part thus separated continues in the original proprietor; in which respect the term *avulsio* may be contrasted with the term *alluvio*, by which an addition is insensibly made to a property by the gradual washing down of a river, and which addition becomes the property of the owner of the lands to which the addition is made. *Ersk.* B. ii. tit. 1, § 14; *Bank*. i. 506; *Bell's Princ.* 3d edit. § 936. See *Alluvio*.

**Avunculus**; the mother-brother, but sometimes taken for the father-brother. *Skene*, h. t.

**Award**; is properly an English law term, signifying the judgment or determination of an arbiter. It is sometimes used in Scotland, but improperly, to signify a decree-arbitral; for the award of an English arbiter, and the decree-arbitral of a Scotch arbiter, are not in all respects analogous. *Ersk.* B. iv. t. 3, § 21; *Bell's Com.* ii. 304, 326, 5th edit. See *Arbitration*.

## B

**Back-Bond**; is a deed attaching a qualification or condition to the terms of a conveyance or other instrument. This deed is used when particular circumstances render it necessary to express in a separate form the limitations or qualifications of a right. *Stair*, B. i. tit. 10, § 16; B. ii. tit. 10, § 6; B. iii. tit. 1, § 21; *Bank*. vol. ii. pp. 95, 196; *Bell's Com.* vol. i. p. 34, 672; vol. ii. pp. 211, 240, 5th edit.; *Brown's Synop.* p. 1527; *Jurid. Styles*, 3d edit. vol. ii. p. 101, *et seq.*; vol. iii. p. 682. See *Absolute Disposition*.

**Back-Tack**; was a tack connected with wadsets, whereby the actual possession of the wadset lands was continued, or returned, to the proprietor or reverser, on payment of a rent corresponding to the interest of the loan. Where the wadset was accompanied by such a back-tack, it was termed an *improper wadset*. *Stair*, B. ii. tit. 10, § 11; *Ersk.* B. ii. tit. 8, § 28; *Bank*. vol. ii. p. 128, *et seq.*; *Jurid. Styles*, 2d edit. vol. i. p. 641. See *Wadset*.

**Backing a Warrant**. Where a warrant for apprehending a person is granted in one jurisdiction, and comes to be executed in another, the judge ordinary of the bounds, or a justice of the peace, if otherwise competent, must concur in authorizing his officers to aid the person possessed of the original warrant in carrying it into execution. This authority is given by indorsing or backing the warrant, as it is termed, which is then executed by an officer of the jurisdiction where the indorsement was made. See *Hume*, ii. 78; *Alison's Prac.* 125. The remedy of indorsement of a warrant applies, where the offender has made his escape out of one part of the United Kingdom into another, or out of any other part of Her Majesty's dominions into the United Kingdom, and *vice versa*; 13 *Geo. III.*, c. 31; 45 *Geo. III.*, c. 92; 54 *Geo. III.*, c. 186; 6 and 7 *Vict.*, c. 34; but, in such cases, oath to the authenticity of the warrant must be made by the bearer before the magistrate to whom he applies. The



ruling statute on this point, 13 *Geo. III.*, c. 31, applies only where the object of the apprehension is to bring the offender to trial. Any officer may convey a prisoner to gaol, or before a magistrate, through any county adjoining to that over which such magistrate possesses jurisdiction, or to that where the gaol is situated, in the same way as if he were an officer of the county through which he may so pass, and as if the warrant had been granted or indorsed by a magistrate of such county; 11 *Geo. IV.*, and 1 *Will. IV.*, c. 37, § 6. Farther, it is provided by 1 and 2 *Vict.* c. 119, § 25, that a criminal warrant, granted by a *Sheriff* against one charged with committing a crime within his jurisdiction, is sufficient for his apprehension within another county, and without indorsation, if executed by a messenger-at-arms or an officer of the court where it was issued. The apprehension of French criminals found within the British dominions is regulated by 6 and 7 *Vict.*, c. 75. The act 6 and 7 *Vict.*, c. 76, provides for the mutual delivering up of parties found in this country or in the United States of America, and charged with having committed certain specified offences within the jurisdiction of the other power. See on the subject of this article, *M'Kay v. M'Adam*, June 16, 1854; 1 *Irvine*, 497, and cases there cited. See also *Bail*.

**Bagimont's Roll**; was the rent roll of benefices in Scotland made up by *Benemundus de Vicci*, vulgarly called Bagimont, who was employed, in the reign of Alexander III. (A.D. 1275), to collect the tenth of benefices. Skene's account of this roll is erroneous. See *Hailes' Annals*, vol. iii. p. 200; *Bank. ii.* 53; *Skene*, h. i.

**Bail**; is the security given for the appearance of a person accused of a crime. Persons committed, or about to be committed, for trial, are entitled, under the act 1701, c. 6, to be liberated on bail, provided the crime charged against them is not capital. And in extraordinary circumstances the Court of Justiciary may take bail even in capital cases; *Hume*, ii. 90, *et seq.* It is competent, too, for the Lord Advocate, in cases clearly capital, to consent to bail; but such bail may be fixed at any amount he pleases; *Alison's Prac.* 167. The stat. 9 *Geo. II.* c. 35, § 35, also authorizes bail to be taken for officers of the customs or excise, and those assisting them, when, in the execution of their duty, they have killed or wounded any one, and thereby exposed themselves to a capital charge. The same is the case where persons have been killed or wounded on board a vessel, which has refused to submit to seizure or examination by a vessel of the royal navy or revenue; 24 *Geo. III.*, sess. 2, c. 47, § 23; 47 *Geo. III.*,

s. 2, c. 66, § 36. By 5 and 6 *Will. IV.*, c. 73, no person committed for trial for an offence, the punishment of which is, by 2 and 3 *Will. IV.*, c. 123, commuted from death into transportation for life, is entitled to bail, the Court of Justiciary, however, having power to admit to bail. And by 7 *Will. IV.*, and 1 *Vict.*, c. 36, persons accused of high crimes and offences against the Post-Office laws cannot insist on bail; but bail, even in these cases, may be accepted, with consent of the public prosecutor, or at the discretion of the Lords of Justiciary or of the Sheriff; See *Bell's Notes on Hume*, 158. The application for liberation on bail ought to be made in writing, and may be addressed to the judge committer, or to the Commissioners of Justiciary, or other judge competent to try for the crime. The magistrate must, within twenty-four hours after the petition comes into his hands, determine whether the crime be bailable, and fix the amount of the bail, unless when it is necessary, on a charge for sedition, to correspond with the Lord Advocate, in order to ascertain whether he means to apply for extension of the amount of the bail; in which case, it is thought that time for correspondence will be allowed; *Andrew v. Murdoch*, June 20, 1806, *Hume*, ii. p. 93; but see *Alison's Prac.* 172. On the requisite bail being found, the magistrate is bound immediately to liberate the prisoner. A failure in any part of the magistrate's duty subjects him to an action for wrongful imprisonment; 1701, c. 6. It is the duty of the clerk, and not of the magistrate, to determine the sufficiency of the cautioner.

By 39 *Geo. III.*, c. 49, the *maximum* for bail is fixed for L.1200 sterling for a nobleman, L.600 for a landed gentleman, L.300 for any other gentleman, burgess, or householder, and L.60 for any inferior person; and, on a charge of sedition, any of the Lords of Justiciary, on an application from the Lord Advocate, may extend the bail to such sum as may be thought proper in the circumstances of the case. Some of the revenue statutes fix particular bail for offences against the revenue laws. See 24 *Geo. III.*, c. 47; 42 *Geo. III.*, c. 82; 15 *Geo. III.*, c. 121. The bail found is, that the person admitted to bail shall appear and answer to any libel for the offence charged, which shall be raised within six months after the date of the bail-bond; and if the trial is to proceed in an inferior court, and the party fail to appear, the bail-bond is declared forfeited, and warrant granted for apprehending him, inferior judges having no power to *outlaw* for non-appearance; *Hume*, ii. p. 69. As soon as the prisoner is remitted to an assize, the privilege of bail ceases; but he may still receive that indulgence there-

after, if the prosecutor, in special circumstances, consent, and under such penalty as the Court may fix beyond the statutory sum; *Hume*, ii. 94. Where persons are apprehended in Scotland on a warrant, indorsed in terms of the 13 Geo. III., c. 31, or 44 Geo. III., c. 92 (see *Backing a Warrant*), for crimes committed in other parts of the United Kingdom, and brought before the judge who indorses the warrant, he may, if the offence be bailable, take bail for the person accused, in the same manner as the judge who issued the warrant might have done. If the offence charged be not bailable, the judge who grants the original warrant must write on the face of it, "not bailable;" and, where these words are not written, the judge before whom the offender is brought, under the indorsed warrant, may admit him to bail; 45 *Geo. III.*, c. 29, §§ 1 and 2. See also *Ersk. B. iv. tit. 4, § 85, and note, § 31, and note; Bank. vol. i. p. 458; Bell's Com. vol. i. p. 380; vol. ii. 566; Bell's Princ. § 2035; Swint. Abridg. h. t.; Hutch. Justice of Peace, vol. i. p. 462, 2d edit.; Tait's Justice of Peace, h. t.; Blair's Justice of Peace, h. t.; Jurid. Styles, 3d edit. vol. ii. p. 93 and 614; Alison's Prac. 160, et seq.* Provision is made for the liberation of a peer upon bail, by 6 Geo. IV. c. 66.

**Bail in Civil Actions.** See *Caution*.

**Bailiary, Letter of;** is a commission, by which an heritable proprietor, entitled to grant such a commission, appoints a baron-bailie, with the usual powers to hold courts, appoint officers under him, &c. See *Jurid. Styles*, ii. p. 269, 3d edit.; *Ersk. B. ii. tit. 3, § 33, et seq.; Bell's Princ. § 764, 770; Brown's Synop. p. 1104.*

**Bailie;** a magistrate; also an officer appointed by a precept of sasine to give infestment in land.

1. **A Magistrate.**—The bailie of a burgh, whether a royal burgh or a burgh of barony, is a magistrate possessed of certain jurisdiction by common law as well as by statute. Thus, at common law, he is held to possess the same power within his territory as the sheriff in his county; and by special statute, 1644, c. 33, 1668, c. 6, the provost and bailies of royal burghs have power to value and sell ruinous houses to the highest offerer. Their criminal jurisdiction extends to petty riots; but none except the magistrates of the burghs of Edinburgh, Stirling, and Perth, have jurisdiction in bloodwits. The chief magistrate of the burgh is named in all commissions of the peace. By 3 and 4 Will. IV. c. 76, when any of the bailies go out at the annual retirement of a third of the councillors, their places are directed to be supplied from the councillors, on the third day after the election of the council, by a plurality of

voices in the council, the first attending magistrate having a casting vote in cases of equality. The newly-elected bailie is generally made lowest in rank. *Ersk. B. i. tit. 4, § 21.* See *Burgh, Royal*.

**The Bailie of the Abbey,** is appointed by the Duke of Hamilton as heritable keeper of the palace of Holyroodhouse, and has jurisdiction in all civil debts contracted within the precincts of the Sanctuary. *Bell's Com. ii. 573.*

2. **An officer appointed by precept of sasine to give infestment.**—Anciently any person might have been named as bailie to give infestment; but by 1606, c. 15, all sasines on precepts from Chancery in favour of heirs, upon retours, are ordered to be given by the sheriff as bailie; because, when an heir is to enter by retour to lands held of the Crown, he becomes debtor to the Crown; and it is the duty of the sheriff, as the King's bailie, to receive payment, or to take security for the casualties due on the heir's entry. In every other case, any person may be bailie; and the precept, although blank in the bailie's name, is a sufficient warrant for any person to perform the office. At the same time, were there reason to suspect fraud, the court would allow an investigation to ascertain the authority under which infestment had been given. The blank in the precept of sasine is not filled up after the office is exercised. *Ersk. ii. t. 3, § 33.* See *Precept of Sasine*.

**Bailiff;** in English law, is a keeper or superintendent. *Bailiffs of sheriffs* are officers appointed by the sheriff to execute all processes directed to him. *Bailiffs of manors* are stewards appointed by the lord to superintend the manor. *Tomlins' Dict., h. t.*

**Bailment;** an English law term, defined to be, "a delivery of goods for a particular purpose, upon a contract, express or implied, that the purpose shall be carried into effect, and that, when that is done, the goods shall be restored by the bailee, or person to whom they are delivered, to the owner or bailor, or according to its directions." *Tomlins' Dict., h. t. Wharton's Lex.; Story on Bailments.*

**Bairman;** a dyvour or bankrupt. *Skene, h. t.* See *Dyvour*.

**Bairns;** according to Erskine, "is a known term used to denote one's whole issue." In destinations of heritage to the heirs and bairns of a marriage, the estate is carried to the eldest son. On the other hand, when the word heirs is left out, and the destination is to "the bairns," or to "the bairns and children," all the children succeed equally. The term "heirs and bairns," or "bairns," in destinations of moveables, leaves the ordinary rule of law to take effect, whereby, in moveable succession, all the children succeed

equally. *Ersk. B. iii. tit. 8, § 48*; *Bell's Princ. 3d edit. § 1961*; *Sandford on Heritable Succession, i. 173, et seq. Mensies on Conveyancing. See Destination. Heirs and Bairs.*

**Bairs' Part of Gear**; or legitim; is the share of the father's free moveable property, to which, on the father's death, the children are entitled by law. See *Legitim*.

**Ballivus**; a bailiff, bailie, or judge. *Skene, h. t.*

**Baneret**; is a knight made in the field of battle. Banerets created by the King under the royal standard in battle take precedence of baronets. *Tomlins, h. t., and Skene, voce Baneretes.*

**Banishment**; the punishment of exile from Scotland, inflicted on persons convicted of certain crimes (comparatively few in number, and in a great degree obsolete), for which that punishment is provided by special statute; 11 *Geo. IV.* and 1 *Will. IV.*, c. 37; *Alison's Prac. 63, 669. See Transportation.*

**Bank**; in English common law, is usually taken for a seat or bench of judgment.

**Bank**; the place or office where a corporation or company of money-dealers carry on their business. The term also applies to the corporation itself; and in this sense banks are said to be either public or private. Public banks may be constituted by act of Parliament, or by charter from the King. The constitution of the company, its office-bearers, extent of capital, and the rights of the partners, must depend upon the powers conferred by the Crown or by Parliament, and on the bye-laws which the corporation may frame, or on the conditions of the original contract. In banks instituted by act of Parliament the partners are sometimes relieved from liability beyond the value of their respective shares; whereas the partners in other banks, like the partners in a private trading company, incur an unlimited responsibility for the debts of the bank. See *Joint Stock-Companies*. The older chartered banks in Scotland are,

1. *The Bank of Scotland*, erected by a private act of the Scotch Parliament (July 17, 1695), with a capital of L.1,200,000 Scots (L.100,000 sterling), increased by several British statutes (the last of which is 44 *Geo. III.*, c. 23) to L.1,500,000 sterling. The shares are declared assignable, the transfers being entered in a book subscribed by the assignor and assignee. They are also disposable by will entered in the book of transfers without confirmation; and they may be transmitted "by adjudication, or other legal conveyance, in favour of one person alienably, who, in like manner, shall succeed to be a partner in his predecessor's place; so that the

foresaid sums of subscription may neither be taken out of the stock, nor parcelled among more persons by legal diligence, in any sort to the diminishing or disturbing of the stock of the said company and good order thereof." On the bankruptcy or forfeiture of a shareholder, the governor and directors may order his share to be sold by public roup, after such intimations as are prescribed for the sale of bankrupt lands. The act does not say whether the stock is to be heritable or moveable.

2. *The Royal Bank of Scotland*, erected by charter, in pursuance of 5 *Geo. I.*, c. 20. The stock of this bank is declared moveable, descendible to executors, but not liable to arrestment or attachment. By a bye-law, no proprietor can transfer, but in presence of the Court of Directors, who may stop the transfer until he finds security for what he owes the bank.

3. *The British Linen Company* was erected into a body corporate, by charter, in 1746. The shares are declared of the nature of personal estate, and to be transferred by certain forms. The charter was confirmed and enlarged in 1806, by a charter from *Geo. III.* Nothing is said in the charter as to the mode of attaching the stock.

In addition to these there are now other banks in Scotland, on which certain privileges have been conferred by charter; such are, *The Commercial Bank of Scotland*, *The National Bank*, and some others; but those charters do not affect the responsibility of the partners of these establishments for the debts and obligations of the company. By 7 *Geo. IV.*, c. 67, it is enacted, that joint stock banking companies may sue and be sued in name of their manager or other principal officer, on condition of their giving in to the Stamp-Office annual returns, upon oath, of the name of the firm, of the names of the individual members, and of their manager; and of giving, in the course of the year, an account of any persons ceasing to be members or officers, and of those entering in their stead. As to other regulations affecting banks, see the statutes 3 and 4 *Will. IV.*, c. 83 (1833); 4 and 5 *Vict.*, c. 50 (1841), and 8 and 9 *Vict.*, c. 38, (1845); See *Joint-Stock Companies*.

**Bank Stock**; is the capital of a bank divided into shares, according to the original constitution of the company. These shares are held by the partners of the bank, and may be disposed of, and are transferred by an entry in the books of the bank, under such forms as may have been prescribed by the contract or charter of the particular bank, for the security of the bank and partners. *Ersk. B. ii. tit. 2, § 8*; *B. iii. tit. 9, § 4*; *Bell's Com. vol. i. p. 106*; vol. ii. p. 3, 5th

edit. : *Bell's Princ.* 3d edit. § 1344, *et seq.* ; *Bell's Illust.* § 1345 ; *Jurid. Styles*, 2d edit. vol. iii. p. 355.

**Bank of England.** This bank, which has been the subject of various statutes, is under the management of a governor and directors, possessed of certain qualifications prescribed in the charter. Its stock is lent to Government at 8 per cent. interest, and is redeemable on payment of the money borrowed. *Tomlins' Dict., h. t.* The most recent statute affecting the Bank of England is 7 and 8 *Vict.*, c. 32 (1844).

**Bank Notes ;** are notes issued by a bank for value received, and made payable to the bearer on demand, but bearing no interest. They supply the place of coin, either by authority of public law, in the case of the Bank of England, or by public consent, in the case of private or joint-stock banks. They are, properly speaking, *nomina debitorum*, or obligations which may be the ground of an action, rather than *corpora* of moveables, and will be so interpreted in a conveyance of moveables. *More's Notes on Stair*, p. xlix. ; *Ersk. B.* iii. tit. 5, § 6 ; tit. 6, § 20, *note* ; tit. 7, § 29, *note* by *Mr Ivory* ; *Bell's Princ.* § 1377, 3d edit. ; *Brown's Synop.* pp. 166, 101, 1236 ; *Thomson on Bills*, p. 218, 47, 621 ; *Jurid. Styles*, 2d edit. vol. iii. pp. 596, 744 ; *Hume*, i. 136, 151-2 ; ii. 376. The issue of bank notes in England is now regulated by the act 7 and 8 *Vict.*, c. 32 (1844) ; and the issue in Scotland by the act 8 and 9 *Vict.*, c. 38 (1845).

**Bank Credits ;** are credits peculiar to Scotch banking, by which, on proper security given to the bank, a person is permitted to draw to a certain amount agreed upon, and for which, with the interest that may fall due upon the sum drawn out, security is given. The account opened with the bank on this credit is carried on by occasional money transactions ; the person receiving the credit drawing out or lodging money as his occasions require. The balance is thus continually fluctuating ; the sum which the person is due to the bank one day being perhaps repaid the next day, and drawn out again on the day following. The fluctuating nature of this balance, as well as the provision of the act 1696, c. 5, that no heritable security shall be given for a future debt, formed an obstacle to heritable security being given to banks for cash credits. The only way formerly of managing such a transaction was for the person desirous of obtaining such a credit on heritable security, to procure friends whose personal security was sufficient, who might join with him in an obligation to the bank ; and to those friends he gave an heritable bond of relief. But even this was not held to remove the difficulty ; for although the bond

was given to relieve the cautioners of their obligation, yet it was thought that the fluctuating nature of the original debt affected even the cautionary engagement, and rendered it ineffectual ; see *Creditors of Burgh*, March 2, 1791, *M.* 1159. But this has been since provided for by a clause in the act 54 *Geo.* III. c. 137, § 14, which declares, "That it shall be lawful for any person or persons possessed of lands, or other heritable subjects, and desiring to pledge the same in security of any sums paid or balances arising, or which may arise upon cash-accounts or credits, or by way of relief to any person or persons who may become bound with him or them for the payment of such sums or balances, although posterior to the date of the infestment, to grant heritable securities accordingly upon their said lands, or other heritable estate, containing procuratory of resignation and precept of sasine, for infesting any bank or bankers, or other persons who shall agree to give them such cash-accounts or credits, or for infesting such persons as shall become cautioners for them, or jointly bound with them, in such cash-accounts or credits : Provided always, that the principal and interest which may become due upon the said cash-accounts or credits shall be limited to a certain definite sum, to be specified in the security, the said definite sum not exceeding the amount of the principal sum, and three years' interest thereon, at the rate of 5 per centum ; And it is hereby declared, that it shall and may be lawful to the person to whom any such cash-account or credit is granted to operate upon the same, by drawing out and paying in such sums, from time to time, as the parties shall settle between themselves ; and that the sasines or infestments taken upon the said heritable securities shall be equally valid and effectual, as if the whole sums advanced upon the said cash-account or credit had been paid prior to the date of the sasine or infestment taken thereon ; and that any such heritable security shall remain and subsist to the extent of the sum limited, or any lesser sum, until the cash-account or credit is finally closed, and the balance paid up and discharged, and the sasine or infestment renounced." On compliance with this regulation, an heritable security may be given for a cash-credit. *Bell's Princ.* § 299, *et seq.* ; *Illust.* ib. By the act 9 and 10 *Vict.*, c. 79, § 2 (1856), the act *Geo.* III., c. 137 is repealed, but by another act of the same session, c. 91, it is declared in the preamble, that it is expedient that certain provisions contained in that act relating to securities for debts in Scotland should be amended and re-enacted, and by § 7, the above provisions of the act 54 *Geo.* III. are re-enacted. In describing the

forms of the securities to be granted, the new statute makes use of the same words as are employed in the old one, regard not being had to the changes in the form of securities introduced by the act 8 and 9 Vict., c. 31 (1845). In consequence of this oversight a doubt has been raised as to whether a security for cash-credits in the new form would be valid. It is thought, however, that securities in the new form would be sustained.

**Bank Agent.** The national banks, as well as private bankers, generally employ persons to act as their agents for conducting their banking operations in provincial towns. The powers of these agents depend upon the rules and regulations of the particular bank for which they act; but, in the ordinary case, they are authorized to discount bills, &c., for behoof of the bank, either on their own responsibility, or at least under a responsibility for a certain proportion of the discounts. The power of granting cash-credits is generally reserved to the principal bank. Caution to a large amount is required for bank-agents; and on the failure of the agent, it seems to be held that the money found in the desks, drawers, or boxes, used for carrying on the business of the bank, is the specific property of the bank, and may be reclaimed by it; and this although the identical notes issued by the bank may have been replaced by others. A clause empowering the bank summarily to terminate the agency, and to seize and carry off the whole notes, cash, obligations and effects belonging to the bank, is usually inserted in the bond of caution taken by the bank from the agent. See *Bell's Com.* vol. i. p. 264, 362, 480, 5th edit.; *Princ.* §§ 231, 290, et seq.; *Illust. ib.*; *Jurid. Styles*, 2d edit. iii. 615.

**Bank Interest;** is the interest allowed by public and private banks on money deposited with them. It has varied of late years from 2 to 3 and  $\frac{3}{4}$ , and at present is 4 per cent. For money advanced, either by discounting bills or on cash-credits, banks usually charge 2 per cent. higher than the interest allowed by them.

**Banker;** is the partner or manager of a bank, who deals in discounting bills. Some of the rules of bankers concerning bill transactions may be here stated. A bill, regularly discounted, is held to be a bill purchased by a banker, and, on his failure, is the property of his creditors. Bills sent merely for negotiation are the property of the sender, if distinguishable; the banker, as to them, being merely an agent. Where bills are blank indorsed to a banker, on the understanding that the indorser is to be allowed to draw for a certain proportion of their amount, the bills belong to the indorser, under a lien for the advances. Long-dated bills, deposited in se-

curity of bills at a shorter date, discounted by a banker, are held to be impledged to the banker; and, on retiring the short-dated bills, the customer is entitled to receive the long-dated bills, notwithstanding the intervening bankruptcy of the banker. Bills blank indorsed to a banker, and deposited for a special purpose, may be discounted or paid away by the banker to whom they are so indorsed; and, on his failure, the indorser cannot reclaim the bills, but must rank as a mere personal creditor. A banker has a lien for the general balance of his account over all bills deposited with him, "unless they have been discounted, in which case they are taken out of the account between the parties." See *Bell's Com.* vol. i. p. 270, et seq.; vol. ii. p. 118, 5th edit.; *Ersk. B.* iii. tit. 4, § 21, note by Mr Ivory; *Bell's Princ.* § 32, 1450; *Bell's Illust. ib.*; *Thomson on Bills*, pp. 403, 477, et seq., 523, 806; *Jurid. Styles*, 3d edit. vol. ii.; *Hume*, i. 64.

**Banks for Savings.** See *Savings Banks. Tait's Justice of Peace*, h. t.; *Blair's do.*, h. t.

**Bankrupt.** A bankrupt is an insolvent person who has subjected himself to the operation of the bankrupt laws. Every person subject to the laws of Scotland may be rendered legally bankrupt. By the statute 1696, c. 5, a "notour bankrupt" is a "debtor who being under diligence by horning and caption at the instance of his creditor, shall be either imprisoned or retire to the Abbey, or any other privileged place; or flee or abscond for his personal safety; or defend his person by force; and who shall afterwards be found, by sentence of the Lords of Session, to be insolvent." The statute 54 Geo. III., c. 137, § 1, extended the description of bankruptcy to persons subject to the laws of Scotland who were absent from Scotland, or not liable to imprisonment, by reason of privilege or personal protection; and declared that a charge of horning executed against such a person, or an execution of arrestment of any of his effects, not loosed or discharged within fifteen days, or a pinding of any of his moveables, or a decree of adjudication of any part of his heritable estate, should, when joined with insolvency, be held a sufficient proof of legal bankruptcy, and equivalent to notour bankruptcy under the act 1696.

Under the act 1696, all voluntary dispositions, assignments or other deeds, granted directly or indirectly by the bankrupt, at or after the time of his bankruptcy, or within sixty days before it, in favour of a creditor, either in satisfaction or further security, to the prejudice of other creditors, are void and null. This act also declared, that in the application of the act, all dispositions, heritable bonds, or other heritable rights granted by

the bankrupt, on which infestment may follow, shall be reckoned to be of the date of the sasine lawfully taken thereon. It further declared, that all dispositions or other rights granted for relief, or in security of future debts, shall be of no force as to any debt contracted after the date of the sasine. The act concludes, by ordaining fraudulent bankrupts to be punished, by being held infamous, *infamia juris*, and by banishment, or such other punishment short of death, as the Court of Session shall see cause to inflict. (See *Fraudulent Bankrupt*.) The statute 54 Geo. III., c. 137, declared, that when a debtor had been rendered legally bankrupt in terms of the act 1696, all arrestments used for attaching the effects of the bankrupt within sixty days before, and four calendar months after the bankruptcy, should be ranked *pari passu*; and that all poidings used within the same period should give a preference to the poider; but every other creditor having liquid grounds of debt, or decree for payment, and summoning the poider, or judicially producing the same in any process or competition relative to the price of the poided goods, before the lapse of the four months, should be entitled to a proportional share of the price of the goods so poided, corresponding to his debt, deducting the expense of the poiding, which the poiding creditor shall retain. The same statute also enacted, that in all questions on the act 1696, and under this statute, the dispositions, heritable bonds, or other rights on which infestment may follow, instead of being reckoned of the date of the *sasines*, as provided by the act 1696, should be held of the date of the registration of the sasine; and that all dispositions, assignments, and venditions which do not require sasine, should be reckoned (in so far as these statutes were concerned) of the date of the intimation, delivery, or other act requisite for completing the right, without prejudice to the validity of these rights in all other respects. From the provision of the act 1696, regarding securities for future debts, heritable securities for cash accounts were excepted; 54 Geo. III., c. 137, § 14. With regard to judicial sales of the lands of a bankrupt, and alienations, on the approach of bankruptcy, to conjunct and confident persons, see the articles *Judicial Sale and Ranking*, and *Conjunct and Confident*.

The act 19 and 20 Vict., c. 79, 1856, is "An act to consolidate and amend the laws relating to Bankruptcy in Scotland," and repeals the acts 54 Geo. III., c. 137, 2 and 3 Vict., c. 41, and 16 and 17 Vict., c. 53, except as regards any act or deed done or granted prior to the new act coming into operation, which is declared to be 1st November 1856. The general provisions of the

statute will now be given, as it would occupy too much space to give the whole provisions in detail.

The date of a deed under the new act, or under the act 1696, c. 5, is the date of recording the sasine where sasine is requisite, and in other cases, the date of registration of the deed, or of delivery, or of intimation, or of such other proceeding as shall in the particular case be requisite for rendering the deed effectual.

Notour bankruptcy of an individual is constituted, *first*, by sequestration, or by the issuing of an adjudication of bankruptcy in England or in Ireland; or, *second*, By insolvency concurring either—(1.) With a duly executed charge for payment, followed, where imprisonment is competent, by imprisonment, or formal and regular apprehension of the debtor, or by his flight or absconding from diligence, or retreat to the sanctuary, or forcible defending of his person against diligence, or where imprisonment is incompetent or impossible by execution of arrestment of any of the debtor's effects not loosed or discharged for fifteen days, or by execution of poiding of any of his moveables, or by decree of adjudication of any part of his heritable estate for payment, or in security; or, (2.) Concurring with sale of any effects belonging to the debtor under a poiding, or under sequestration for rent, or with his retiring to the sanctuary for twenty-four hours, or with his making application for the benefit of *cessio bonorum*. In the case of a company it is constituted either in any of the foregoing ways, or by any of the partners being rendered notour bankrupt for a company debt. Notour bankruptcy is held to commence from the time when its several requisites concur; and when it has once been constituted, continues, in case of a sequestration, till the debtor obtain his discharge, and in other cases until insolvency cease, without prejudice to notour bankruptcy being constituted anew within such period.

Deeds made void by the act, and all alienations of property voidable by statute, or at common law, may be set aside either by way of action or exception, and may be so set aside by the trustee on a sequestered estate.

Arrestments and poidings used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, are ranked *pari passu*, provided the arrestments, if used on the dependence of an action, or on an illiquid debt, are followed up without undue delay. A creditor judicially producing in a process relative to a subject arrested or poided liquid grounds of debt, or decree of payment within the above period, is entitled to be ranked as if he had

executed an arrestment or a poiding. The first arresting or poiding creditor who recovers payment is accountable for the sum recovered to the subsequent creditors, who are entitled to be ranked *pari passu* with them. Arrestments used after the four months are ranked with each other on any reversion of the fund attached, according to law and practice, and do not compete with those used within the said periods.

In the case of a living debtor subject to the jurisdictions of the Supreme Courts of Scotland, sequestration may be awarded on such debtor's own petition, with the concurrence of a creditor whose debt amounts to not less than L.50, or of two creditors whose debts together amount to not less than L.70, or of three or more creditors whose debts together amount to not less than L.100, whether the debts are liquid or illiquid, provided they are not contingent. Sequestration may also be awarded in the case of a living debtor, on the petition of a creditor or creditors under the above qualifications, provided the debtor be a notour bankrupt, and have within a year before the presenting of the petition resided or had a dwelling-house or place of business in Scotland; or in the case of a company being notour bankrupt, if it have within such period carried on business within Scotland, and any partner have so resided or had a dwelling-house, or if the company have had a place of business in Scotland.

In the case of a deceased debtor, who at the date of his death was subject to the jurisdiction of the Supreme Courts of Scotland, sequestration may be awarded either on the petition of a mandatory to whom he had granted a mandate to apply for sequestration, or on the petition of a creditor or creditors qualified as above mentioned.

In the case of a living debtor, petitions for sequestration presented without his concurrence are competent only within four months of his notour bankruptcy. In the case of a deceased debtor, the petition at the instance of a creditor may be presented at any time after the debtor's death, but no sequestration will be awarded until the expiration of six months from the debtor's death, unless he was at the time of his death notour bankrupt, or unless his successors shall concur in the petition, or renounce the succession.

Where a petition for sequestration is presented, the Court, on special application by a creditor, or without such application if the Court think proper, may take immediate measures for the preservation of the estate, either by the appointment of a judicial factor or otherwise.

Sequestration may be awarded either by the Court of Session or by the Sheriff of any

county in which the debtor for the year preceding the date of the petition has resided or carried on business, provided that no sequestration has been awarded in another court, and remains undischarged. When sequestration has been awarded by two or more Sheriffs, the later sequestration must be remitted to the first in date.

A majority, being four-fifths in value of the creditors, may resolve that the estate of their debtor ought to be wound up under a deed of arrangement; and on such a resolution being come to, an application may be made to the Lord Ordinary or the Sheriff, within four days of the resolution, for a sist of the sequestration; and in the event of the application being granted, the Lord Ordinary or the Sheriff may make such an arrangement as they may think reasonable for the interim management of the estate.

Warrant of protection against arrest or imprisonment, until the meeting of the creditors for the election of a trustee, may be granted by the Lord Ordinary or the Sheriff, when awarding sequestration. Warrant also for liberating the debtor from prison may also be granted by the Lord Ordinary or the Sheriff by whom the sequestration is awarded, and such warrant of protection or liberation protects or liberates the debtor from arrest or imprisonment for debts contracted previous to the date of sequestration, but are of no effect against apprehension or imprisonment in *meditatione fugæ*, or *ad factum præstandum*, or for any criminal act.

The creditors of the sequestrated debtor can only vote and rank for the accumulated sum and interest, up to the date of sequestration, and when the claim of a debtor depends upon a contingency, he may apply to have a value put upon such debt. A claim upon an annuity must also be valued by the sheriff or trustee, and in making the valuation, regard is had to the original price given for the annuity, deducting therefrom such diminution of the value as shall be caused by the lapse of time, since the date of it being granted, up to the date of sequestration. After the date of sequestration, the creditor in an annuity is not entitled to sue any cautioner for it, except for the value fixed, and the arrears and interest thereon; and the cautioner, on making payment of such value, and arrears and interest, is discharged of all liability for the annuity, and he may claim in the sequestration for the sums repaid. If, however, he does not pay the sum so fixed, and arrears and interest, he continues bound for the annuity until such payment is made, under deduction of such dividend as the creditor may have received.

A co-obligant with the bankrupt in a debt is not freed from his liability, in respect of

any vote given, or dividend drawn by the creditor in the sequestration, or in respect of his assenting to the discharge of the bankrupt, or to any compensation. Such co-obligant, however, may at his own expense obtain from the creditor an assignment of the debt, on paying its amount, and may thereafter himself claim in the sequestration.

Where a creditor holds a security for his debt over any part of the bankrupt's estate, he must, before voting, make an oath, in which he shall put a specified value on the security, and deduct its value from the debt, and specify the balance, and he is entitled to vote in respect of the balance only, except in questions relating to the disposal and management of the estate over which his security extends, in which case he is entitled to vote in respect of the full amount of his debt. Where a creditor has an obligant bound to him along with the bankrupt, but who is liable in relief to the bankrupt, or holds any security from such an obligant, or any security from which the bankrupt has a right of relief, the creditor shall, before voting, make an oath in which he shall put a specified value on the obligation of such obligant, or on such security, to the extent to which the bankrupt is entitled to relief, and he shall deduct such value from his debt, and specify the balance, and he shall be entitled to vote in respect of such balance only.

A creditor on the estate of a company is not bound, for the purpose of voting on the company's estate, to deduct from his claim the value which he may be entitled to draw from the estates of the partners of the company. If, however, he claim on the estate of a partner, he must, before voting, put a specified value on his claim in the estate of the company, and also of his claim against the other partners thereof, in so far as they are liable to relieve such partner, and must deduct such value from his debt and specify the balance, and he is entitled to vote in respect of such balance only.

The trustee in the sequestration, with consent of the commissioners, may require a conveyance of a creditor's security on payment of the specified value, with an addition of 20 per cent. Mandatories for creditors may vote in absence of the creditors, but persons acquiring debts after sequestration are not entitled to vote in the election of the trustee or commissioners, but in all other respects may be ranked as creditors.

To entitle a creditor, who holds a security over any part of the bankrupt's estate, to be ranked in order to draw a dividend, he must on oath, put a specified value on the security, and deduct its value from the debt, and specify the balance; and on payment of the ba-

lance so specified, the trustee, with the consent of the commissioners, is entitled to a conveyance of the security, or full benefit of the security may be reserved to the creditor, and in either case he is ranked only for the balance of the debt, after deducting the value of the security. Where a creditor claims upon the estate of the partner of a company, in respect of a company debt, the trustee on such partner's estate must, before ranking the creditor, put a valuation of the estate of the company, and deduct from the claim of the creditor such estimated value, and rank him for the balance only.

The election, removal, and resignation of the trustee are regulated by §§ 67 to 74 inclusive, and the election and removal of the commissioners are regulated by §§ 75 and 76. The duties of the trustee and the commissioners are prescribed by §§ 79 to 86 inclusive. The protection and allowance to the bankrupt are regulated by §§ 77 and 78, and his examination by §§ 87 to 95 inclusive.

The act and warrant of confirmation in favour of the trustee, *ipso jure*, transfers to, and vests in him, or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, the whole moveable estate of the debtor, wherever situated, to the same effect, as if actual delivery or possession had been obtained, or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration, and were not null or reducible. It also vests in the trustee the whole heritable estate of the bankrupt, to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal revision, had been pronounced in favour of the trustee and recorded at the date of the sequestration, and as if poiding of the ground had been executed, subject always to such preferable securities as existed at the date of the sequestration, and were not null or reducible. The sequestration also vests in the trustee all real estate belonging to the bankrupt situated in England or Ireland, or any of the British dominions, provided, as regards all freehold, copyhold, and leasehold estate, the act and warrant of confirmation be registered in the chief court of bankruptcy, for the country in which the property is situated; and no purchaser of such estate for a valuable consideration is affected by the bankruptcy until the act and warrant shall have been so registered. Where also a conveyance of such estate would have required registration or enrolment, the act and warrant must also be so registered or enrolled; and, if not so registered or enrolled, a purchaser for valuable considera-



tion and without notice of the sequestration, is not affected by it.

Subsequent acquisitions by the bankrupt become the property of the creditors; and where any property has been improperly included in the sequestration, application may be made to have it struck out.

A sequestration is equivalent to a decree of adjudication for payment of the whole debts of the bankrupt, principal and interest, accumulated at the date of the sequestration; and when the date is within year and day of any effectual adjudication, the estate of the bankrupt will be disposed of under the sequestration, but the rights of any heritable creditor having a power of sale preferable to the power of the trustee, are not affected by this provision. A sequestration is also equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed pouding; and no arrestment or pouding executed on or after the sixtieth day prior to the sequestration is effectual; but an arrester or poudier within that period is entitled to the expense *bona fide* incurred by him in the execution of his diligence.

Prescription, under the law of Scotland, is interrupted, and the statute of limitation in England is barred, by a creditor presenting or concurring in a petition for sequestration, or lodging a claim under it, and that although the sequestration should be afterwards recalled.

In the case of a deceased debtor, where the sequestration is dated within *seven* months after his death, any preference or security for any prior debt acquired by legal diligence on or after the *sixtieth* day before his death, or subsequent to his death, and any preference or security acquired for a prior debt by any act or deed of the debtor which had not been lawfully completed for a period of more than *sixty* days before his death, and any confirmation as executor-creditor after the debtor's death, shall have no effect in competition with the trustee.

All payments made, and acts done, or deeds granted by the bankrupt, after the date of the sequestration, are null, except in the case of a *bona fide* purchaser of moveable effects who was ignorant of the sequestration, and in the case, also, of a debtor to the bankrupt making payment of his debts in *bona fide*, and in ignorance of the sequestration. The possessor also of a bill or promissory-note payable by the bankrupt, but who has recourse against other parties, or the possessor of a security for a debt due by the bankrupt, who shall receive payment of his debt in ignorance of the sequestration, and given up the bill or promissory-note, or security to the bankrupt, is not liable to repay

to the trustee the amount received, unless the trustee shall replace him in the situation in which he stood, or reimburse him for any loss or damage.

A creditor holding a security over the heritable estates of the bankrupt preferable to the right of the trustee, and having a power to sell, may sell in terms of his security, notwithstanding the sequestration, and the trustee may concur in the sale in order to fortify the title. Such creditor and the purchaser must account for any reversion of the price. If such creditor concur with the trustee in bringing the estate to sale, the trustee sells in his own name, and the conveyance is executed by him with consent of the creditor and the commissioners. The price is paid by the purchaser to the parties legally entitled to it; and in so far as not paid at the time of the delivery of the conveyance, it is consigned in the bank in which the money of the sequestrated estate is deposited, and such payment or consignment of the price frees and discharges the estate sold and the purchaser from the security of the consenting creditor, whether the debt in the security be satisfied or not, and from all securities postponed to the security of such creditor.

The payment of dividends is regulated by sections 121 to 136 inclusive, and the discharge of the bankrupt, with or without a composition, by the sections 137 to 149 inclusive.

All preferences, payments, and collusive agreements for discharge are void, and the bankrupt, if cognizant of the giving such preference, or making such payments, or entering into such agreements, forfeits all right to a discharge, and all benefits under the act, and a discharge, if granted, is annulled.

The discharge of the trustee is regulated by section 152 to 155 inclusive. A new officer, called "The Accountant in Bankruptcy," is appointed by section 156, and his duties are regulated by sections 157 to 163 inclusive.

In the case of a party dying without a settlement appointing trustees to manage his estate, any creditor to the amount of £100, or any person having an interest in his succession may apply by summary petition for the appointment of a judicial factor, and such factor may be appointed by the Court, subject to such conditions as to caution, and such other conditions as the Court may provide by act of sederunt. The proceedings of such factor are under the superintendence of the Accountant in Bankruptcy, who reports to the Court from time to time as he may deem expedient, and discharges the same duties with regard to him as he discharges with regard to a trustee under a sequestration. Where the deceased party has left a settlement in favour of trustees to manage his

estate, the trustees may, with or without the concurrence of the creditors of the deceased, or of persons interested in his succession, obtain an order on the Accountant to superintend the administration of the estate, in which case he will discharge the same duties as those above mentioned.

Any trustee to whom the pursuer of a *cessio* shall grant a conveyance of his estate and effects for behoof of his creditors, must act under the supervision and control of the Accountant in Bankruptcy, in the same manner as the trustee under a sequestration.

Where the estate of a bankrupt is not likely to yield free funds for division among the ordinary creditors, after payment of the preferable debts or expenses, beyond one hundred pounds, a majority in number and value of the creditors may resolve that the bankrupt shall only be entitled to apply for and obtain a decree of *cessio*, and shall have no right to a discharge in the sequestration, and the Lord Ordinary or the Sheriff shall thereafter determine whether such a resolution shall be confirmed or recalled; and if it be confirmed, the bankrupt is entitled to apply for a decree of *cessio* in the sequestration, without bringing a separate process.

The trustee in a sequestration may, with the consent of the commissioners, compound and transact, or refer to arbitration, any question which may arise in the course of sequestration regarding the estate, or any demand or claim made thereon; and the compromise, transaction, or decree-arbitral, is binding on the creditors and the bankrupt.

The Lord Ordinary or the Sheriff, on cause shown, may order that, for a period not exceeding three months from the date of the order, all letters addressed to the bankrupt shall be delivered by the Postmaster-general or the officer acting under him, to the Sheriff-clerk or trustee, to be opened in presence of the sheriff after written notice to the bankrupt to attend, if within Scotland, and such order may be renewed, on cause shown for a like period, as often as shall be necessary.

A member of Parliament, against whom a commission of bankruptcy has issued, and who is found bankrupt, during twelve calendar months from its issuing, is incapable of sitting or voting, unless the commission be superseded, and the full amount of debts paid. On certificate by the commissioners, at the expiration of the said twelve months, to the Speaker, the election is void; and after fourteen days' notice by the Speaker in the London Gazette, he issues his warrant for a new writ. This is confined to persons already elected. *Chambers on Elections, h. t.*

**Bankruptcy, Acts of.** See *Acts of Bankruptcy.*

**Bannock**; is a thick cake of oatmeal, and is a term for one of the duties in thirlage. It is a perquisite of the servant or assistant in the mill.

**Bannitus**; from *bannum*, a trumpet; banished for a crime or other cause; or being put, as it were, to the horn or *trumpet*, by three blasts, according to the old Scotch consuetude. *Skene, h. t.*

**Banrentes**; banerets; in old law language, a kind of estate, greater and more honourable than *barronea*. Barons were permitted to choose commissioners to the Scotch Parliament; but banrentes were summoned personally to Parliament. The term would seem also to signify the rent or yearly duty (*quasi banner-rent*) of one of the King's banner or standard-bearers. *Skene, h. t.*

**Banna**. Ban is a Saxon word, signifying proclamation or public notice; *Burns' Law Dict.* But banns, in Scotch law, is used to signify the proclamation in church, which, by the law of Scotland, is necessary to constitute a regular marriage. This proclamation is made in church, immediately before the commencement of divine service. It is done with an audible voice; and consists in calling the names and designations or additions of the parties who intend to intermarry; and inviting those who know of any sufficient objection, to state it before it be too late; *Ersk. B. i. tit. 6, § 10.* By the 10 Queen Anne, c. 7, it is enacted, "That no Episcopal minister residing in Scotland shall marry any person but those whose banns have been duly published three several Lord's days in the Episcopal congregation which the two parties frequent, and in the churches to which they belong as parishioners, by virtue of their residence." Marriages contracted without proclamation of banns are valid; but the parties, celebrator and witnesses of such marriages, are liable in certain penalties. The parties may be punished by fine and imprisonment, and the celebrator by perpetual banishment. *Ersk. ib. § 11, see Ivory's edit. note 143; Bell's Princ. § 1510, 4th edit.; Brown Syn. p. 876; Hutcheson's Justice of Peace, vol. i. p. 8; vol. ii. p. 221, 2d edit.; Tait's Justice of Peace, voce Marriage; Hume, i. 463; Alison's Prim. 543.* In practice, the strictness of the law, requiring proclamation of banns on three successive Sundays, has been departed from, and proclamation is permitted to be made on two, or even on one Sunday, upon payment of a higher fee. The certificate of due proclamation cannot be disproved.

**Baratry**; is the crime committed by a judge who is induced by a bribe to pronounce a judgment. *Baratriam committit qui propter pecuniam justitiam baratrat*, he commits baratry who barter justice for money. This prac-

tice seems in former times to have been very general in Scotland. See the act 1540, c. 104; *Ersk. B. iv. t. 4, § 30.*

**Baratry**; amongst ecclesiastical persons, was the offence of exporting money out of Scotland to purchase benefices at Rome, and was prohibited by several old acts of Parliament. See 1426, c. 84; 1567, c. 3; *Acta Parl. vol. iii. p. 14*; *Ersk. B. iv. tit. 4, § 30*; *Kames' Stat. Law abridg. h. t.*; *Hume, i. 587.*

**Baratry of mariners**; is gross fraud on the part of the master or mariners, tending to their own benefit, and to the prejudice of the owners of the ship. *Bell's Princ. § 479*; *Ilust. ib.*; *Shaw's Digest.*

**Bargain**; is a consensual contract or agreement, and is generally used to signify such contracts as may be completed without the intervention of writing, e.g. sales of moveables, locations, &c. By the stat. 1669, c. 9, such bargains, which are proveable by witnesses, prescribe in five years after the bargain. *In re mercatoria*, bargains of great importance may be proved by letters of correspondence, or even by less formal writings. *Bell's Com. i. 325*; *Tait on Evidence, 120*; *Dickson, 307.*

**Bargain and Sale**; in English law, is an instrument whereby the property of lands and tenements is, for valuable consideration, granted and transferred from one person to another. *Tomlins' Dict. h. t.*

**Baro**; a baron. *Skene, h. t.*

**Baron**; in its more ordinary acceptation, is the degree of nobility next to a viscount; but anciently, in Scotland, all those vassals who held their lands immediately of the Crown were termed barons. When titles of nobility were conferred on barons, they were called the *greater barons*; but both the greater and the lesser sat indiscriminately in the Scotch Parliament until 1427, when, by the act 102 of that year, the attendance of the lesser barons was dispensed with, on condition of their sending representatives from each county, to be called "*commissioners of the shire.*"

But although every person holding of the Crown came under one or other of the above denominations of greater or lesser barons, yet, to constitute a baron in the strict legal sense of the word, his lands must have been erected, or at least confirmed, by the King in *liberam baroniam*. And such a baron had a jurisdiction, both civil and criminal, which he might have exercised either in his own person, or by his bailie. This jurisdiction was, however, reduced by 20 Geo. II., c. 43, to the right of recovering from his vassals and tenants the feu-duties and rents of their land, and compelling them to perform the services to which they may be bound, and to the right of deciding in civil questions where the debt or damage did not exceed 40s. Be-

yond this the baron or his bailie's civil jurisdiction cannot be prorogated. The criminal jurisdiction of the baron is, by the same statute, limited to assaults, batteries, and smaller offences, which may be punished by a fine not exceeding 20s., &c. Where a fine is inflicted, it is to be recovered by pointing, or, in default of goods, by one month's imprisonment at farthest. But this jurisdiction is put under so many regulations and restrictions that it is now seldom if ever exercised. The act 20 Geo. II. farther provides, that no future charter of erection of a barony shall convey any higher jurisdiction than for recovering the rents of lands, multure, and mill services. An exception has, however, been made to this by the statute 35 Geo. III., c. 122, by which the Crown is authorized to erect free and independent burghs of barony in those parts of the sea-coast in which the fisheries are carried on. The magistrates in such burghs are to exercise the power of justices cumulatively with the justices of the county. *Ersk. B. i. tit. 4, § 25, et seq.*; *Stair, B. ii. tit. 3, §§ 2 and 62*; *Bank. vol. i. p. 55, 564, et seq.*; *Swint. Abridg. h. t.*; *Bell on Leases, vol. ii. p. 45, 326*; *Hunter on Landlord and Tenant, pp. 664, 667*; *Brown's Synop. pp. 1146, 2341.*

**Baron of Exchequer**; the Judges of the Scotch Court of Exchequer were termed Barons of Exchequer. See *Exchequer.*

**Baron and Feme**; the English law term for husband and wife. *Tomlins' Dict. h. t.*

**Baronet**; a dignity or degree of honour next after barons, having precedency of all knights excepting knights-banerets, created by the King under the royal standard. *Tomlins, h. t.*

**Barony**; is the territory over which the rights of barony extend: it also signifies the right itself. The right of barony can be conferred only by the Crown, and cannot be transmitted by the baron to be held base of himself. Where it is transmitted, it must be by a public holding, which enables the donee to renew the title from the Crown by resignation or confirmation, and so to come into the place of the disponent. The right of barony also incorporates the whole parts of which the barony consists, so that a conveyance of the barony, in general terms, carries every part and parcel of the barony, though not named, and every right connected with a barony, though these rights be not expressed. One effect of the right of barony was to unite the whole separate subjects of which the barony consists, so that one sasine, taken on any one part of the barony, carried the whole. And while a clause of union united only lands which are locally discontinuous, the union effected by a charter of barony united lands

though flowing from different superiors, or held by different tenures, as well as where the subjects are discontinuous in place. This privilege, however, is now rendered useless since the act 8 and 9 Vict., c. 35 (1845), which allows sasine to be given by merely recording the instrument, and does away with the necessity of giving infeftment on the lands themselves. By the act 1595, c. 93, it is provided, that the inhabitants of all barony lands shall be amenable to the courts within whose jurisdiction the lands are situated. *Stair*, B. ii. tit. 3, § 60; *Ersk.* B. ii. tit. 3, § 46; tit. 6, § 8, et seq.; *Bank.* vol. i. p. 564, et seq.; *Bell's Princ.* §§ 749, 849, 2191, 4th edit.; *Shaw's Digest*, h. t.; *Jurid. Styles*, 4th edit. vol. i. p. 355; *Menzies' Conveyancing*. See *Baron*.

**Barrenness.** See *Sterility*.

**Barrister, or Barraster;** in English law, a counsel learned in the law, admitted to plead at the bar, and there to take upon him the protection and defence of clients. The period of his probationary attendance at the inns of court ought to be five years. A counsel can maintain no action for his fees. Where Scotch and English counsel appear in the same cause, precedence is generally determined by their standing at their respective bars. *Chambers on Elections*, h. t.; *Tomlins' Dict. h. t.* See *Advocate*.

**Barratry, or Barrataria;** in the old Scotch law language, a kind of simony in acquiring right to benefices. *Skene*, h. t. See *Baratry*.

**Barter;** called, in the Roman law, *permutatio*, is a contract by which one thing is given in exchange for another. The distinction between barter and sale is, that, in the former, money, which is an essential of sale, is never one of the things exchanged. By the Roman law, if one of the things exchanged were evicted, the party so losing it had a right of recourse to the thing which he gave. But with us this right of recourse is confined to the contract of excambion, i. e., the exchange of heritable subjects, and has no place in the exchange of moveables. *Stair*, B. i. tit. 14, § 1; *Bank.* vol. i. p. 407. See *Excambion*.

**Base Rights.** Where a person disposes feudal property to be held under himself, instead of under his superior, the right which the disponent thus acquires is called a base right. In the original charter, the lands are disposed to the receiver, to be held by him of the grantor either in feu or in blench, there being no other species of holding in modern conveyancing. In the feu-holding, a feu-duty or annual payment in money or victual is given. In the blench-holding, an elusory duty, as a penny Scots money, or the like, is stipulated as an acknowledgment of superiority. Where lands are given out on either of these holdings, the charter describes

the subject, the disponent or vassal, the holding, and the nature of the warrandice undertaken by the grantor: it assigns the rents to the disponent, and contains a mandate to the grantor's bailie to give infeftment to the vassal. This is the base right, by which, in modern conveyancing, subinfeudation is effected. The grantor remains vassal to his own superior, and the subinfeudation makes no change on the titles he holds from his superior. Thus, suppose A. to hold of the Crown blench, and that he subfeus his lands to B., to be held in feu. A. is the vassal of the Crown, and B. is the sub-vassal in the lands. B., the subvassal, has thus two superiors; A., from whom he derives his right, who is his immediate superior, and the Crown, which is his mediate superior. The right in A. is termed the *dominium directum*, in reference to B.'s right over the property, and B.'s the *dominium utile*, or property. A.'s right is termed a public one; B.'s a base or subaltern right. These two rights stand on different sets of titles, entirely unconnected with each other. A.'s title stands on his own Crown charter and sasine; B.'s on his base right. The base right in favour of B. can never be confirmed by the Crown, to the effect of making B. hold of the Crown. This would be to deprive A. of his subvassalage, which no act of the Crown or of B. can accomplish. Formerly, when the casualty of recognition existed, by which the whole land, in consequence of the acts of the immediate superior (that is of A. in the case supposed), might have recognised, it was common for a subvassal to take a confirmation from his mediate superior; because such a confirmation, though it did not make the subvassal hold of his mediate superior, freed him from the consequences of this casualty. But now that wardholding is abolished, the necessity of this measure is at an end, and a confirmation of this kind is not sought for. The only confirmation in modern practice is the confirmation of a right given to a purchaser to be held of the seller's superior, as is elsewhere explained. The modern disposition to a purchaser, from considerations of expediency, gives the disponent the alternative either of a public or a base holding; and infeftment taken on the precept of sasine in such a disposition constitutes a complete base right, which may be afterwards rendered public by a charter of confirmation from the disponent's superior. *Stair*, B. ii. tit. 3, § 27, et seq., *App.* § 2; *More's Notes*, p. clxxi; *Ersk.* B. ii. tit. 7, § 8, et seq.; *Bell's Com.* vol. i. p. 68, 5th edit.; *Bell's Princ.* 4th edit. § 816; *Kames' Stat. Law Abridg.* h. t.; *Brown's Synop. vocs Base Infeftment*; *Menzies' Conveyancing*. See *Disposition*. *Charter*. *Public Right*.

**Basilica.** See *Roman Law*.

**Bastard;** a child born of a woman who was not married to the father at the time of conception, and who was never thereafter married to him. Bastards are termed illegitimate children, in contradistinction to legitimate or lawful children born in wedlock. But although the act 1600, c. 20, declares, that a marriage contracted after a divorce for adultery between the divorced person and the paramour is unlawful, and that the issue are incapable of succeeding to their parents, such children are not to be regarded as illegitimate or bastards. *Stair*, B. iii. tit. 3, § 42; *Ersk. B. i. tit. 6, § 51*. A bastard can have no heirs except of his own body, because succession is through the father only, and bastards have no lawful father. *Stair*, ib. § 44. On the failure of heirs of a bastard's body, the King succeeds as *ultimus hæres*. But although a bastard cannot succeed as heir or executor either to his father or mother, he may succeed by destination. He may also dispose of his own estate, heritable or moveable, by a deed *inter vivos*; and he may even settle his heritable estate on any person he pleases, by a destination which is not to take effect until after his death. But prior to the passing of the stat. 6 Will. IV., c. 22, if a bastard had no lawful children of his own body, he could neither dispose of his heritable or moveable estate on deathbed, nor make a testament to the prejudice of the Crown's right. Where he had lawful issue, however, he might make a testament either in their favour or in favour of a stranger; for the King, being excluded by the mere existence of such issue, has no interest to challenge any destination of the bastard's property which he may think proper to make. And now, by the statute referred to, bastards have the power of disposing of their moveables by testament, in like manner as other persons; 6 Will. IV., c. 22. The widow of a bastard, whether there be issue or not, enjoys her legal rights of terce and *jus relictæ*; and creditors are entitled to use the ordinary diligence for attaching the heritable or moveable estate of a bastard, both before and after his death. See *Stair*, B. iii. tit. 3, §§ 42, 44; *More's Notes*, pp. xv. xxxii.; *Ersk. B. iii. tit. 10, § 5, et seq.*; *Bank. vol. i. pp. 46, 119, 276*; *Bell's Princ. 3d edit. § 2059, et seq.*; *Kames' Stat. Law Abridg. h. t.*; *Brown's Synop. h. t. and p. 1172*; *Shaw's Digest*; *Hutch. Justice of Peace*, vol. ii. pp. 263-8, 2d edit.; *Tait's Justice of Peace, voce Children*; xii. s. p. 663, 183, 604; xiii. s. p. 235; xiv. s. pp. 815, 852, 47; *Kames' Princ. of Equity* (1825), 497; *Hume*, i. 447; ii. 122, 333. As to the legitimation of bastards, and its effects, see *Legitimation*; see also *Alien*.

**Bastard, Aliment of.** The aliment of illegitimate children is a joint burden upon both parents. The mother is entitled to the custody of the child, and the father is bound to contribute his proportion of the expense; and if neither the mother nor father can support the child, it must be supported by the parish in which the mother has a settlement. The period for which the mother is entitled to the custody of the child does not appear to be precisely fixed; and, by decisions of the Court, it has varied from seven to fourteen years; *Ersk. B. i. tit. 6, § 56*; *Mor. Dict. 442, et seq.* and p. 11080. Neither does it appear to be settled, whether or not, after the period of the mother's custody of the child ceases, the father is entitled to insist on taking the child from the mother. In the case of *Goadby* against *M'Candy*, 7th July 1815, *Fac. Coll.*, the mother was preferred to the custody of a child of thirteen years of age, in competition with the relations of the deceased father. As to the *quantum* of aliment awarded against the father, it has varied of late from L.4 to L.10 a-year, according to the rank of the parties. In general, the award against artisans is from L.4 to L.6 a-year, and where the father is of a higher rank of life, L.10 a-year is generally given. It is payable quarterly by advance, and is continued until the child can earn its bread. On the insolvency of the father of an illegitimate child, the mother's claim for aliment to the child gives her a *jus crediti*, which entitles her to rank for the aliment on the father's bankrupt estate; in which respect she has an advantage over the mother of a lawful child, who, having united her fortunes and those of her children with the father, must follow his fate, and, independently of special contract, has no *jus crediti* entitling her or her children to rank for their legal provisions in case of insolvency; *Bell's Com. vol. i. pp. 635, 643, 5th edit.* A debtor who has been imprisoned for the aliment of a bastard child has been held not entitled to the benefit of the *cessio*. *Ib.* vol. ii. p. 591. See *Bell's Princ. § 2062, et seq.*; *Dunlop's Parish Law*, 205; *Brown's Synop. p. 73, et seq.*; *Shaw's Digest*; *Hutch. Justice of Peace*, vol. i. p. 114.

**Bastardus**; (old French) bastard; a child unlawfully begotten "outwith the band of marriage," according to the old definition. The word is said by Skene to be barbarous. *Skene, h. t.*

**Bastardy, Gift of**; is a gift of the Crown of the heritable or moveable effects of a bastard who has died without having lawful issue, and without having disposed of his property in *liege poustie*. By this deed the Crown gives, grants, and disposes to the donatory, see the bastard's estate and effects, with power to in-

stitute an action of declarator of the bastardy, which is necessary to entitle the donatory to take the benefit of the gift. See *Jurid. Styles*, vol. i. p. 461 and 504, 2d edit.; *Hunter's Landlord and Tenant*, 178. See *Gift*.

**Bastardy, Declarator of**; is an action instituted in the Court of Session by the donatory in a gift of bastardy, for having it declared that the lands or effects which belonged to the deceased bastard belong to the donatory in virtue of the gift from the Crown. The defender called in this action is the person who, had the bastard been a lawful child, would have succeeded to him. If the bastard's heritable estate has been held immediately of the Crown, the property and superiority are consolidated, and it is unnecessary to bring an action of declarator of bastardy unless a donatory has been named. But where the bastard's lands are held of a subject, the Sovereign, who cannot be vassal to a subject, always names a donatory, who, in order to complete his title, must obtain a decree of declarator of bastardy. See *Stair*, B. iii. tit. 3, § 43, B. iv. t. 12, § 2; *Brown's Syn.* p. 357; *Jurid. Styles*, 2d edit. iii. 200; *Shand's Practice*, 421; *Dickson on Evidence*, 8, 190, 703. A declarator of bastardy seems also to be competent, during the life of a bastard, at the instance of any party who has a good title and interest to prove the bastardy.

**Baston, or Baton**; a staff or baton. This is the proper symbol of resignation, though a pen has, by immemorial custom, been made use of as the symbol in the act of resignation. *Ersk. B. ii. tit. 3, § 36*; *Rose*, ii. 216; *A. S.* 11th Feb. 1708.

**Battery Pendants Lite**; was a statutory offence consisting in assaulting an adversary in a law-suit, during the dependence of the suit. The two statutes (1584, c. 138, and 1594, c. 219.) upon which it was founded, and which declared the punishment of the crime to consist in the loss of the cause, are repealed by 7 Geo. IV., c. 19. For the history and application of these statutes, see *Ersk. B. iv. tit. 4, § 37*; *Bank*, vol. i. p. 288; *Kame's Stat. Law abridg. h. t.*; *Brown's Synop. h. t.* and p. 454; *Watson's Stat. Law, h. t.*; *Gordon*, 27th Feb. 1781, *Mor.* 1378, and other cases there cited.

**Beasts, Wild.** The right to wild beasts, or to fowls or fishes, is acquired by occupancy, unless they have been previously deprived of their natural liberty, as by inclosing deer in a park, fishes in a pond, or birds in an aviary; but when, by any accident, they have regained their natural liberty, and the former proprietor has given over his pursuit of them, the right to them may, as before, be acquired by occupancy. Domestic animals, although

they should stray, still remain the property of their original owner. *Ersk. B. ii. tit. 1, § 10*; *Stair*, B. ii. tit. 1, § 5, and 33; *Bank*, i. 505.

**Beating of Judges.** To beat, strike, or insult any judge sitting in judgment, or on account of his judicial conduct, was at one time a capital offence; 1593, c. 177; 1600, c. 4; and threats of violence used to a judge on account of his conduct in that capacity will subject the offender to an arbitrary judgment; *Hume*, vol. i. p. 406. Erskine includes under this crime all offences against the law or its execution, e. g. deforcement of messengers, breach of arrestment, battery pendants lite. *Ersk. B. iv. tit. 4, § 42*. *At-son's Princ.* p. 573. See *Deforcement, Breach of Arrestment, and Battery Pendants Lite*.

**Bees**; are not private property unless they are in a skep, or are working in the hollow of a tree, wall, or house. When they hive, they remain the property of their former owner, so long as he continues in pursuit of them; but thereafter they belong to the first occupant. *Ersk. B. ii. t. 1, § 10*; *Stair*, B. ii. t. 1, § 33; *Blair's Manual, h. t.*; *Hume*, i. 80.

**Before Answer.** In judicial proceedings this expression signifies, before deciding the main question raised. It frequently happens that the full bearing of written or of parole evidence is not apparent when permission to adduce the evidence is asked; or the relevancy of the proof offered may be questionable; or in accountings, the precise state of the balance may affect the legal questions raised; or in questions about farms, buildings, machinery or the like, it may aid the judge in deciding, if he has correct information as to the state of the subject-matter of the suit. In these, and similar cases, our courts, both supreme and inferior, are in use to pronounce interlocutors allowing proofs, or granting diligence for the recovery of writings, or ordering judicial reports from accountants or from persons of skill, "before answer," that is, reserving for after consideration the relevancy as well as the legal effect of the proof, productions, or reports, on the merits of the legal questions at issue. The words "before answer," are perhaps not absolutely indispensable in such cases; but they have the advantage of barring all dispute as to the purpose of the inquiry so authorized, and preventing the plea that the relevancy of the proof was determined before it was ordered by the court. See *Proof. Evidence. Commission. M'Farlane's Pr.* p. 52. *Dickson on Evid.*, pp. 966, 783.

**Beggars.** There are many severe statutes against beggars and vagabonds: thus, 1424, c. 42; 1525, c. 22; 1579, c. 74; 1592, c.

147; 1597, c. 268; and the whole acts and Privy Council proclamations against beggars and vagrants are renewed and ratified by the act 1698, c. 21. *Hume*, vol. i. p. 475, 477; *Ersk. B. i. tit. 7, § 61*; *B. iv. tit. 4, § 39*; *Swint. Abridg. voce Poor*; *Hutch. Justice of Peace*, vol. ii. p. 20, and *App. Nos. xxx. liv. 2d edit.*; *Dunlop's Parish Law*, pp. 214, 254; *Dunlop's Poor Law*, pp. 1-27; *Caird's Poor Law*, p. 37. See *Vagabonds*.

**Behaviour as Heir**; or *gestio pro hærede*; is a passive title, by which an apparent heir, by intromission with his ancestor's heritage, incurs a universal liability for his debts and obligations. This passive title was introduced into the law of Scotland as early as the institution of the College of Justice; for the purpose, it would appear, of checking the frauds to which creditors were exposed under the more ancient law, according to which the heir was liable to the extent of his actual intromissions only. The passive title of *gestio pro hærede* is incurred, 1. By the heir's imixing with the heritable subjects of the ancestor, letting tacks, &c. 2. By intromitting with heirship moveables, which, in questions of succession, are reckoned heritage. 3. By intermeddling with the title-deeds of the ancestor's heritable estate, in such a manner as to give rise to a reasonable presumption that he intends to represent him. 4. By the heir's making over to a third party any part of the ancestor's heritable estate, or by granting discharges to any of the ancestor's debtors. But the simple renunciation by the heir of all claim to the succession in favour of the heir-male or of provision, even for a valuable consideration, infers no passive title, because creditors are not hurt by such a renunciation. 5. The passive title of *gestio pro hærede* is incurred under the act 1695, c. 24, if the heir, without service or entry as heir, shall "either enter to possess his predecessor's estate or any part thereof, or shall purchase," either by himself or by means of another person for his behoof, any right to his predecessor's estate, or any legal diligence or other right affecting the estate, redeemable or irredeemable, except as highest bidder at a judicial sale. But in construing this clause of the statute, it has been hold, in opposition to the opinion of *Erskine*, that the mere purchase by the heir of a debt affecting the ancestor's estate will not subject the heir unless he *possesses* in virtue of the right so purchased; *Clelland v. Campbell*, 10th June 1796, *Mor. p. 9759*. In this case, however, although the point was fully discussed, it was not at the instance of creditors. It may be remarked in general, with regard to this passive title, that the question, whether or not it has been incurred, will depend a good deal upon cir-

cumstances; and as its consequences may be highly penal, it would seem that, where the intromission has been inconsiderable, and where there has been evidently no intention of defrauding creditors, the heir will be relieved from the effects of his intromission. The court has even authorized an actual service as heir, to be set aside, in order to free the heir from his passive title. *Ayton*, 7th July 1784, *Mor. p. 9732*. See also *Ersk. B. iii. tit. 8, § 82, et seq.*; *Stair, B. iii. tit. 6, § 1*; *More's Notes*, p. cccxxxvii; *Bank. vol. ii. p. 366, et seq.*; *Bell's Com. vol. i. pp. 660, 711*; *Bell's Princ. § 1919*.

**Bench**; in English law, has different significations; thus, *Free bench* signifies that estate in copyholds, which the wife, being espoused a virgin, has, after the decease of her husband, for her dower, according to the custom of the manor; *Tomlins' Dict. King's (Queen's) Bench*; a court in which the King was formerly accustomed to sit in person; and which, on that account, was moved with his household. This court consists of a lord chief-justice, and three other justices or judges, who are invested with a sovereign jurisdiction over all matters, whether of a criminal or public nature. The court is now divided into a crown side and plea side; the one determining criminal, and the other civil causes. *Tomlins' Dict.*

**Benchers**; in the inns of court, are the senior members of the society, who are invested with the government of the body to which they belong. *Enc. Brit.*

**Benefice**; a church living. Prior to the Reformation, benefices were of two kinds. They consisted either of lands or tēinds: the former were called the temporality, the latter the spirituality of benefices. In consequence of the Reformation, James VI. considered himself proprietor of all the church lands, and erected several abbacies and priories into temporal lordships. Those to whom he gave these grants were termed lords of erection, or titulars, as having a title to the erected benefices. Abbacies and priories, and even bishoprics, were erected into temporal lordships, the proprietors of which received the titles of lords of erection, titulars, or commendators; and the property which formerly belonged to the bishops and their chapters was, to a considerable extent, brought back into the hands of the Crown by the restoration of Episcopacy, and its subsequent abolition. The lords of erection, and other lay proprietors of church lands, exercised the same rights in drawing the tēind which had formerly been exercised by the clergy; when fortunately this state of matters was put an end to by the decrees-arbitral pronounced by Charles I. on the surrender of tithes.

*Stair*, B. ii. tit. 8, § 10, *et seq.*; *Ersk.* B. ii. tit. 10, § 4, *et seq.*; *Bank.* vol. ii. p. 1, *et seq.*; *Bell's Com.* vol. i. p. 127, 5th edit.; *Hutch. Justices of Peace*, vol. ii. p. 410, 2d edit.; *Ersk. Princ.* 11th edit. 244-9; *Hume*, i. 575. See *Teinds. Annexation.*

**Beneficium Cedendarum Actionum.** This was a right conferred by the Roman law, whereby a co-cautioner, who had paid the debt for the principal debtor, was entitled to compel the creditor to assign his right of action against the other co-cautioners, so as to enable the cautioner who had paid to operate his relief from those who were bound along with him. By the law of Scotland a co-cautioner, who has paid, has an action of relief, without the necessity of any such conveyance from the creditor. In the practice of Scotland, a catholic creditor, who has a security extending over several subjects, must, if he draws his payment from one subject only, convey his security to the other creditors on that subject, to the effect of enabling them to draw from the other subjects over which the security extends, so as in the end to make the catholic debt rank proportionally on all the subjects over which the security extends. *Ersk.* B. ii. tit. 12, § 66; B. iii. tit. 3, § 68; *Brown's Synop. h. t.*; *Menzies' Conveyancing.* See *Catholic Creditor.*

**Beneficium Inventarii**; was a privilege enjoyed by an apparent heir in heritage, who was doubtful whether the value of the inheritance would be adequate to the payment of his predecessor's debts. This privilege was conferred by the act 1695, c. 24, whereby an apparent heir within year and day after his predecessor's death, that is within the *annus deliberandi*, was permitted to enter to his predecessor *cum beneficium inventarii*, or upon inventory, according to the practice in moveable succession. The effect of entering in this way was, that the heir became liable for his predecessor's debts and deeds, to the value of the heritage given up in the inventory only, and no farther. The statute required the heir, within the *annus deliberandi*, to make up and exhibit upon oath a full and particular inventory of "all lands, houses, annual rents, or other heritable subjects," to which he "may or pretends to succeed:"—which inventory was regularly subscribed before witnesses, and given in to the Sheriff-clerk of the county where the heritage was situated; or, if the defunct had no lands or heritage requiring sasine, to the Sheriff-clerk of the county where the defunct died. The inventory thus given in was directed to be subscribed by the Sheriff and the clerk of the court, and recorded in the Sheriff-court books, from which extracts of the inventory were to be given. The inventory required to be given

in, recorded and extracted, within the year and day; and thereafter, within forty days after the expiration of the year and day, the extract of the inventory was again presented and recorded in the books of Council and Session, in a particular register kept for the purpose. Where any part of the defunct's heritable estate had been accidentally, and without fraud, omitted in the inventory, the omission might be supplied by what was called an *eik*, or addition to the inventory, which was made and subscribed, given in and recorded, in the same manner with the principal inventory; provided such *eik* was made within forty days after the heir came to the knowledge of the omission. By intromitting with the heritage without attending to the provisions of this statute, the heir incurred a universal responsibility for the debts of the defunct. (See *Behaviour as Heir.*) The statute did not require the heir to serve within the year. If the inventory was given in and recorded within the statutory period, the heir might serve at any time he pleased; and the only change produced in the form of the service was, that the heir was declared to be served *cum beneficium inventarii*. The inventory and service might be expedite by a factor appointed by the Court of Session to manage the heritable estate of the defunct, in the apparent heir's absence. Paton, petitioner, 24th July 1785, *Fac. Coll. Mor.* p. 4071; *Ersk.* B. iii. tit. 8, § 68; *Bank.* vol. ii. p. 311; *Bell's Com.* vol. i. p. 662, *et seq.*; *Bell's Princ.* § 1926; *Hunter's Landlord and Tenant*; *Stair*, B. iii. tit. 4, § 32; *Mor's Notes*, p. cccxxi. See as to the form of entry *cum beneficium inventarii*, *Jurid. Styles*, vol. i. p. 401, 3d edit. By the act 10 & 11 Vict., c. 47 (1847), decrees of special and general service infer only a limited passive representation of the deceased, and the heir sued is liable only to the extent or value of the land and heritages taken up.

**Beneficium Competentis.** By the Roman law, the grantor of a gratuitous obligation, who was reduced to indigence, before fulfilling his obligation, had *beneficium competentis*, or the privilege of retaining a sufficiency for his own subsistence. The law of Scotland confers this privilege on fathers and grandfathers against their children and grandchildren, even although the effect of it should be to reduce the children to indigence; but it does not extend it to the case of strangers, or to collateral relations, or even to the case of a brother against a sister; *Ersk.* B. iv. tit. 3, § 89. See also Hogg against Hogg, 30th Nov. 1749; *Kilk. Mor.* p. 1390; and Hardies against Hardie, 1st July 1813, *Fac. Coll.* According to Erskine (B. iv. tit. 3, § 27), a bankrupt who has obtained the benefit of a *cessio bonorum*, and who after-



wards acquires property, has *beneficium competentie*; but this doctrine is not sanctioned by any reported case; on the contrary, it has been held that a bankrupt, in such circumstances, has not *beneficium competentie*, and that all which he is entitled to reserve are his working tools and his wearing apparel. *Ersk. B. iv. tit. 3, § 89*; *Hardies, 1st July 1813, Fac. Coll.*; *More's Notes to Stair, p. cccclxxvii.*; *Brown's Synop. h. t.*; *Shand's Practice, p. 793*; *Hutch. Justice of Peace, vol. ii. p. 284*; *S. D. xiii. p. 664*; *Kames' Princ. of Equity (1825) 295*; *Bell's Com. ii. 594, 597, and cases there cited.*

**Beneficium Divisionis**; in the Roman law, was an equitable privilege, by which a co-cautioner, who was required to pay the debt, might insist that the creditor should make the demand on him only *pro rata*, or for his proportion along with the other solvent cautioners. By the law of Scotland, a co-cautioner enjoys this privilege when he is bound simply as cautioner, along with another, for the principal debtor. But where cautioners bind themselves "*conjunctly and severally*" with and for the principal debtor, the benefit of division is lost, and the creditor may select any of them he pleases, and recover the whole debt from him. *Stair, B. i. tit. 17, § 12*; *Ersk. B. iii. tit. 3, § 63*. See *Cautionary*.

**Beneficium Ordinis**; or the benefit of discussion. Both by the Roman law and formerly by the law of Scotland, a cautioner who was bound simply as such, might insist, before paying the debt, that the principal debtor should be discussed; that is, that the debt should not only be demanded from him, but that letters of horning for the debt should be executed against him, and the denunciation recorded; that his moveables should be attached by poinding, or arrestment and furthering; and his heritage by adjudication. *Stair, B. i. tit. 17, § 6*; *Ersk. B. iii. tit. 3, § 61*; *Bell's Com. i. 347*. By the act 19 and 20 Vict., c. 60 (1856), the benefit of discussion is abolished, and the creditor is now entitled to proceed directly against the cautioner, unless the cautioner has stipulated in the instrument of caution that the creditor shall be bound to discuss and do diligence against the principal debtor before proceeding against him. See *Cautionary*.

**Benefit of Clergy**; in the criminal law of England, was a privilege which a person convicted of a capital felony (not excluded from the benefit of clergy), might plead in arrest of judgment for the first offence. This privilege operated as a species of statutory pardon, and was originally confined to the clergy, or to persons in holy orders. It was afterwards extended to all persons who could

read; and at that time it was the practice, on the conviction of a felon whose crime was not denied the benefit of clergy, to present him with a book in which he was required to read, and on the proper officer pronouncing the words, "*legit ut clericus*," the convicted person was burnt on the hand and discharged. If he could not read, he suffered the statutory punishment for his crime. By 5 Anne, c. 6, the benefit of clergy was extended to all persons convicted of clergyable offences, whether they could read or not; and by the same statute, and several subsequent ones, instead of burning on the hand, a discretionary power was given to the judge to inflict a pecuniary fine or imprisonment. The benefit of clergy is now abolished by 7 and 8 Geo. IV., c. 28, § 6, and by the 4 and 5 Vict., c. 22, as to peers. In the more atrocious capital offences, it had previously been taken away by various statutes; and in the criminal code of England, there are many enactments creating felonies "without benefit of clergy." A very interesting historical account of the origin of this privilege will be found in *Blackstone, B. iv. c. 28*. See also *Tomlins' Dict.*; *Hutch. Justice of Peace, ii. 180*; *Burn's Justice of Peace, 29th edit. i. 681*; *Stephen's Com. 3d edit., iv. 485*.

**Benevolence**; in English law, was a species of forced loan or gratuity from the subjects to the King; one of the arbitrary modes of obtaining money, which, in violation of Magna Charta, were formerly resorted to by the kings of England. *Tomlins' Dict. h. t.*

**Berthensek**, or *Birdinsek*; according to the orthography of Skene, the same word with *Burdenseck*. *Skene, h. t.* See *Burdenseck*.

**Berwick-upon-Tweed**. This town, which was originally part of the kingdom of Scotland, was ceded to England by Edward Baliol; and its liberties and customs, as an English town, were afterwards confirmed by Edward IV. and James VI. Although, therefore, it has some local peculiarities derived from the ancient laws of Scotland, it is clearly a part of England, being represented by burgesses in the House of Commons, and bound by all acts of the British Parliament, whether expressly mentioned or not; see 20 Geo. II., c. 42. Indictments and other local matters in the town of Berwick may be tried by a jury from the county of Northumberland. *Blackstone, i. 98*.

**Bestiality**; carnal intercourse with the lower animals is a crime punishable by the Scotch law with death. The attempt to commit the crime may be punished arbitrarily. *Hume, vol. i. p. 469*; *Alison, i. 566*; *Swinton's Reports, vol. i. p. 5*; 2 *Brown, 464*.

**Betting**. See *Gaming*.

**Bigamy**; is the contracting of a second

marriage during the subsistence of a former one. By 1551, c. 19, this crime, whether committed by the man or the woman, is punishable with the pains of perjury: these are, confiscation of goods, imprisonment, and infamy. Bigamy is not committed, if the first marriage was unlawful through near relationship, or if it was dissolved by divorce (unless the divorce was obtained by the fraud of the accused, and is afterwards set aside), or if the accused believed, on reasonable grounds, that the first marriage was dissolved by death. The crime is committed, however exceptionable and vitious the second marriage may be, provided it has been regularly celebrated. The clergyman and second spouse are art and part if they were aware that the former marriage subsisted. The witnesses also are art and part, if they concealed the former marriage from the second spouse, or from the clergyman, who were ignorant of it. In proof of bigamy, the extract of proclamation of banns, and the marriage certificate of the clergyman, in regard to both marriages, ought to be produced. The clergyman, if alive, must swear to his certificate; and if he be dead, some one acquainted with his handwriting must prove it. If the extract of proclamation or certificate has been destroyed or lost, or if it never existed, the testimony of those present at the marriage will be held sufficient; and in case of their death, of those who heard by report that the parties were married, and lived openly as man and wife. The first wife's evidence is inadmissible against her husband; but the establishment of the first marriage, by annulling the second, removes the objection to the second wife's testimony; when both marriages and the existence of the first spouse are proved, the burden of proving his belief, on reasonable grounds, that the first marriage was dissolved, lies upon the panel. 9 *Geo. IV.* c. 31, § 22; *Hume*, i. 459, *et seq.*; *Burnett*, 433; *Alison*, i. 535; *Steele*, 177; *Shaw's Digest*, i. 336; iii. 111; *Tait's Justice of Peace*, h. t.; *Watson's Stat. Law*, h. t.; *Bell's Supp. to Hume*, p. 112.

**Bill**; in Scotch judicial proceedings, is the name given to the application or petition to the Court of Session, praying the court to authorize those signet letters, which require such a warrant to pass the King's signet. See *Bills of Signet Letters*, *Bill-Chamber*. Petitions to the Court of Session, or reclaiming petitions (when in use) against judgments of the court, or of the Lords Ordinary, and in general all applications or pleadings not ordered by the court, were formerly denominated *bills*; and the roll in which petitions and reclaiming notes are first set down to be moved in court is still called the roll of *single*

*bills*. See *Stair*, B. iv. tit. 2, § 12, and B. iv. tit. 40, *passim*. See *Reclaiming Note*.

**Bill of Exchange**. Bills of exchange form a class of documents of most extensive use in the mercantile dealings, not of this country only, but of all civilized nations. Mr Thomson, in his valuable *Treatise on the Law of Bills*, with equal correctness and perspicuity, thus describes the instrument: "A bill of exchange is a written request, addressed by a person who is called the drawer, to another person called the drawee, desiring him to pay a certain sum of money, either to the drawer himself, or to a third party called the payee, within a certain time after its date, or after it is presented for payment, or on demand. If the drawee signs the bill in token of his agreeing to this request, he is called the acceptor."

The following will serve as an example of the ordinary inland bill; but no prescribed form of words is necessary to constitute a bill.

L.100 sterling. *Edinburgh,*

Three months after date, pay to me (or to some third party, E. F.), or order, at your shop in Glasgow, the sum of One hundred pounds sterling, for value received.

(Signed) A. B. (the drawer.)

(Signed) C. D. (the acceptor.)

To C. D. Grocer, Glasgow.

This document admits of being passed, to the effect of assigning the debt from the drawer to a third party, and from him to others by indorsation, either before or after acceptance; and in practice, most bills of exchange are so transferred to bankers, who, by means of their correspondents and otherwise, possess facilities for negotiating them; and generally the banker advances the amount at the time the document is indorsed to him, discounting the interest up to the day of payment.

A foreign bill of exchange differs little, either in its form or qualities, from an inland bill. To provide against the risk of loss or detention in the course of transmission, it is usual to draw foreign bills in sets, and to transmit each bill by a different conveyance; by which means the due negotiation of the document is with greater certainty insured. In accordance with this practice, foreign bills, whether drawn in this country or by merchants abroad, are generally in such terms as these:—

L.100 sterling. *Rotterdam,*

At sixty days after sight of this our first of exchange (second and third of same tenor and date being unpaid) pay to our order (or

to C. D. or order), the sum of One hundred pounds sterling, for value as advised.

(Signed) A. B. & Co.  
(Signed) P. L. & Son.

To Messrs P. L. & Son, }  
Merchants, Edinburgh. }

Such a bill of exchange, or an indorsed bill, is thus, in effect, an assignment to the payee or indorsee, of a debt due by the drawee to the drawer. This form of assignment took its origin entirely from the practice of merchants, to whose transactions it is peculiarly adapted. Its utility and extensive application to commercial transactions, which, among merchants residing at a distance from each other, would have been greatly encumbered by an adherence to more formal writings, early recommended the bill of exchange to the attention of the law in every country in Europe.

In Scotland, peculiar privileges have been conferred upon bills both by statute and by the common law. By the statute 1681, c. 20, payment of foreign bills may be enforced summarily, without the necessity of an action for constituting the claim; and the same privilege was extended to inland bills, by the act 1696, c. 36. At common law also, bills, both in their constitution and mode of transmission, have acquired an exemption from the strict form of other legal documents. The subscription of a party is in general necessary to render a bill binding; but it is not necessary that the bill should be either holograph or tested in the manner required in other probative writings. When a party cannot write, subscription by a notary and two witnesses has been sustained; Dinwoodie, 28th June 1737, *M.* 1419. In certain cases, other substitutes even have been received in place of the full subscription. Thus, subscription by initials or by a mark has each been sustained as sufficient; Shepherd, 19th Nov. 1760, *M.* 589; Kennedy, 25th May 1816, *F. C.* The mode of transferring right to the bill and its contents is equally simple. This may be done by the payee, or any indorsee from him, merely putting his name on the back of the bill, without stating the name of the indorsee, which is called a blank indorsation. In this shape a bill may be passed from hand to hand, without further indorsation, and the blank may be afterward filled up with the name of any one into whose hands it may come. The indorsement, however, may also be made in a special form, by the indorser putting above his subscription words to this purpose, "Pay the contents to E. F." And the effect of these indorsations in either form will be, to render the indorser liable in recourse to the indorsee for the amount of the bill, in case it

be not paid by the acceptor. But it may happen that the indorser has no personal interest in the transaction, and though desirous of transmitting the bill to those who have right to it, or of assigning the debt to another, he may be unwilling to undertake any obligation of recourse, or guarantee for the sufficiency of the acceptor; and in that case he may indorse the bill with safety, to the effect of assigning the debt, by adding the words, "Pay the contents to E. F., without recourse on me, A. B."

Such is an outline of the privileges possessed by bills of exchange; and a short enumeration of some of the requisites essential to their constitution, and to their due negotiation, will convey all that can, with advantage, be embraced within the limits of this work. Bills must be written on paper duly stamped. The last statute regulating the stamp duties is 17 and 18 Viet., c. 83, 1854. A bill on unstamped paper, or on too low a stamp, is null; 31 *Geo. III.*, c. 25, § 19, and 55 *Geo. III.* c. 184, § 8; and the commissioners of stamp duties have no power to affix the proper stamp, after the instrument has been engrossed. But it is of no consequence although the bill should be written on an improper stamp, provided the stamp duty be of equal or of greater value than the proper stamp, and that the stamp is not specially appropriated to some other instrument, by having its name on the face of it; stat. § 10. Bills must be for a sum of money, and unconditional. Bills for delivery of grain, or the like, or for a sum of money payable contingently on a particular event, have been denied the privileges of bills (*Mor.* p. 1399 and p. 1412). It is no objection to a bill, that it stipulates interest from the term of payment, or from its date. But a stipulation for a penalty, in case of failure to pay, has been held sufficient to annul the bill, although it has been doubted whether these precedents would now be followed; see *Thomson on Bills*, pp. 19, 20. A legacy, or *mortis causa* donation in the form of a bill would not be effectual to the payee, but good in the hands of an onerous indorsee; see *Mor.* pp. 8107, 12, 341, 1444. Any essential vitiation in a bill infers nullity. For an example of an ingenious fraud by interpolation, where the *stamp* had not been written over, and as to the consequences of such a fraud, in questions with *bond fide* onerous holders, see *Graham*, 27th Jan. 1795, *Mor.* 1453; *Pagan*, 19th June 1793, *Mor.* 1660. The result seems to be, that where an acceptor has been so careless as to accept a bill with blanks, which can be filled up in such a manner as to render the fraud imperceptible, he will be liable to the *bond fide* onerous holder, although the acceptor may be himself

entirely innocent of the fraud. Bills payable at a distant term have been considered inconsistent with the nature of bills; and in one case, a bill payable at three years after date, was held not entitled to the privileges of a bill; but it has been doubted by high authority whether the same strictness would now be observed.

What is called the *negotiation of a bill*, consists in the regular and punctual prosecution of those steps, which, in case of dishonour by the acceptor, are essential to preserve the holder's claim of recourse against the drawer and indorsers. For this purpose, three things must be attended to: 1. Presentment for acceptance or payment; 2. Protest in case of dishonour; 3. Intimation to the drawer and indorsers.

1st, The duty of presentment for acceptance will depend upon the terms of the bill. If it be made payable at a certain term, it is sufficient to present it on the day of payment. Where, on the other hand, it is payable at a particular period after sight, it is requisite to the due negotiation, that it be presented within a reasonable time after the indorsation; the precise extent of which will depend upon the custom, the distance to which the bill must be transmitted, and all the circumstances of the case. The draft, however, may be left with the drawee for twenty-four hours, that he may make up his mind whether to accept or not. With regard to an accepted bill, if it be payable at a particular term, it must be presented (and if dishonoured, it must be protested or noted), on the day of payment, or within the three following days, which are called days of grace; Cruikshanks, 29th Jan. 1751, *Kilk.*; *Mor.* p. 1576; British Linen Company, 19th May 1807, not reported, but noted in *Bell's Com.* i. 410. See *Days of Grace*. A bill payable on demand must be presented within a reasonable period, and without any undue delay. The presentment must be made at the place of payment specified in the bill, or, if no place of payment be mentioned, to the acceptor personally, or at his dwelling-house, or at his place of business, if at his place of business, it must be presented during the hours of business.

2d, The only legal evidence of presentment is an instrument of protest under the hands of a notary-public, certifying that he presented the bill, and protested it for non-payment or non-acceptance. The instrument of protest must specify that the bill was presented by the notary before two witnesses, whose names must also be inserted, although it is not necessary that they sign the instrument. It seems doubtful, however, how far the presentment by the notary's clerk is not sufficient; *Stevenson*, 14th Nov. 1764, *Mor.*

p. 1518; *British Linen Company*, 19th May 1807, *supra*. See also *Bell's Com.* i. 408, & *seq.* With a view to summary diligence, the protest must be recorded, and a decree of registration interposed, within six months after the bill falls due, in case of non-payment; and within the same period after the date of the bill, in case of non-acceptance.

3d, If the bill be dishonoured, notice must be sent to the drawer and indorsers, intimating the protest, and claim of recourse arising to the holder. This ought to be done in writing; but a verbal intimation is sufficient, provided the evidence of it be clear; *Syme*, 25th June 1813. The delivery of the notice into the Post-Office, or into the hands of any regular carrier, is held in the English cases to be sufficient, although the receipt is denied; *Bell's Com.* i. 415. In regard to foreign bills, the statute 12 Geo. III., c. 74, declares, "that notification of dishonour is to be made within such time as is required by the usage and custom of merchants." Erskine's doctrine, that the notification must be made "within three posts at farthest," seems to rest on no authority, and it was disregarded by the Court in the case of *Carrick*, 23d May 1790, *Mor.* p. 1614. In that case, the Court seemed rather to sanction the rule established by the English decisions, which appears to amount to this, that the notice must be sent the next day, where the parties reside in the same place, and, if possible, by the next post, to those who reside at a distance.

It is necessary to notify the dishonour to the drawer or indorsers notwithstanding the known insolvency of the acceptor. But neither notification of dishonour, nor protest is necessary, where the drawer has no effects in the acceptor's hands; for in that case the drawer loses nothing by the want of intimation or protest; *Hill*, 5th June 1805; *Mor. App. voce Bill of Exchange*, No. 18. See *Accommodation Bills*.

The intimation with regard to inland bills was formerly regulated by the act 12 Geo. III., c. 72, § 41, made perpetual by 22 Geo. III., c. 81, and which declared that it should be sufficient to preserve recourse, if notice was given of the dishonour within fourteen days after the protest was taken. This statutory provision was certainly an objectionable one, as making a great distinction between the notice of dishonour of inland bills in England and in Scotland. As, however, bills drawn in Scotland upon England were held to be foreign bills, the operation of the statute was strictly confined to Scotland. The provision, however, has been repealed by the Mercantile Law Amendment Act of Scotland, 1856, so that notice of the dishonour of any bill or promissory-note must be given

in the same manner and within the same time as is required in the case of foreign bills. By the same act it is declared, that the true date of bills or notes, when issued without date, may be proved by parole evidence: but summary diligence is not competent on such bills or notes. The same act declares, that no acceptance of a bill shall be valid unless it is made in writing on the bill, and signed by the acceptor, or some person duly authorized by him. It farther declares, that all bills or notes drawn or made within the United Kingdom and the islands mentioned in the act, on any party within the United Kingdom or such islands, shall be held to be inland bills. Under the same act a notarial protest of an inland bill of exchange is not now necessary, except for the purpose of summary diligence. Where a bill or note is lost, stolen, or fraudulently obtained, the holder must now prove that he gave value for it. Where, also, a bill or note is indorsed after the period of payment, the indorsee is subject to all the objections or exceptions to which the bill or note was subject in the hands of the indorser.

See as to prescription of bills the title *Prescription*; as to discounting of bills, see *Banker*; and, in general, on the subject of this article, and as to the numerous questions which have occurred connected with bills of exchange, the following authorities may be consulted: *Thomson on Bills*, 2d edit.; *Bayley on Bills*; *Glen on Bills*; *Chitty on Bills*; *Bell's Com. i.* 386, *et seq.*; *Princ.* 4th edit. § 305, *et seq.*; *Illust. ibid.*; *Ersk. B. iii.* tit. 2, § 25; *Ivory's Notes*; *Stair, B. i.* tit. 11, § 7; *B. iv.* tit. 4, § 6; tit. 47, § 7; *Mr More's Notes*, p. 49, 119, 272, 401; *Bank.* vol. i. 358; *Kames' Stat. h. t.*; *Watson's Stat. h. t.*; *Brown's Synop. h. t.*; *Menzies's Conveyancing*; *Ross's Leading Cases*, vol. i.; *Jurid. Styles*, ii. 2, *et seq.* See *Promissory Note*.

**Bill-Chamber, Bonds in.** See *Caution. Allendor.*

**Bill-Chamber.** "The Bill-Chamber is a particular department of the Court of Session, chiefly for determining upon applications for warrants to expedite signet letters. The Royal Signet in Scotland is placed under the direction and control of the Judges of the Court of Session; and it is in the form of letters passing under it that all ordinary civil actions are instituted, or legal execution against either person or property authorized. Some of these letters, such as ordinary summonses, are allowed to pass the signet without any special warrant from the court; but a variety of signet letters require the authority of the Court of Session to be interposed in the shape of a deliverance or *fiat* on a bill or petition as their warrant. (See *Bills of Signet*

*Letters.*) These warrants are, in the ordinary case, granted of course; and signet letters are now so well regulated by the recognised forms and practice of the court, that the *fiat* authorizing them to pass the signet is sufficient if signed by the officiating clerk in the Bill-Chamber; 53 *Geo. III.*, c. 64, § 17. All bills praying for signet letters are presented at the Bill-Chamber; the clerks in which either themselves grant the necessary warrant in virtue of the act 53 *Geo. III.*, c. 64, or they transmit the bill to the judge officiating in the Bill-Chamber for his determination upon its merits, before whom pleadings, either oral or written, may take place, after which he pronounces a judgment, either refusing the bill, or passing it, or remitting the case to the inferior judge. The decision of the Lord Ordinary officiating in the Bill-Chamber, with some exceptions, may be brought under review of the Court; and the judgment of the Court thus sitting on Bill-Chamber cases may be brought before the House of Lords by appeal, in the same manner with their judgments in ordinary cases. It is almost exclusively in questions as to the passing or refusing of bills of suspension of diligence, or in certain cases of advocacy of the judgments of inferior courts, that these discussions in the Bill-Chamber take place; and hence the result of such a discussion, however protracted, can only be the refusal or the granting of a warrant for expediting letters of suspension or of advocacy. So that the introduction of a cause into the court is all that is attained by the party who succeeds in getting such a bill passed; and, in general, even this advantage is not gained, unless caution be found to fulfil to the opposite party the decree which may be ultimately pronounced in the cause thus introduced."

The above quotation is made from the last edition of this work, since which time important changes have taken place. There is not now the same occasion for signet letters, or, where signet letters are necessary, for warrants by bill for expediting them, as formerly existed. The necessity of signet letters as warrants for diligence against person or property, where they proceeded upon *decrees*, is superseded by the Personal Diligence Act, 1 and 2 *Vict.*, c. 114, which authorizes a warrant to be inserted in the extract decree, to charge the debtor or obligant to pay or perform within the days of charge, under pain of pouding and imprisonment, and to arrest and poind; and declares that diligence shall proceed upon such warrant in the same way as if it had been executed in virtue of signet letters. (See *Bills of Signet Letters.*) Again, it is no longer necessary that a summons before the Court of Session shall

proceed upon a bill; 13 and 14 Vict., c. 36, § 18. And, especially, a change has been made in the practice as to advocations and suspensions. Before 1838 these had originated by the presentment of a bill to the Lord Ordinary on the Bills, which bill of suspension or avocation, being passed, became the warrant of the letters of suspension or avocation. Still, all advocations and suspensions, with the exception of advocations of final judgments and of briefs, originate in the Bill-Chamber; but letters of avocation and of suspension are abolished, and written notes, prepared in terms of 1 and 2 Vict., c. 86, and the relative Act of Sederunt, 24 Dec. 1838, passed to regulate proceedings in the Bill-Chamber, have superseded both the former bills and letters. The articles upon *Avocation* and *Suspension* show the modern forms of procedure. See also *Caution*. *Horning*. *Arrestment*. *Poinding*. *Diligence*. *Letters*.

The Bill-Chamber is open at all times, both during the sittings of the Court and in vacation; the junior Judge of the Court of Session officiating permanently in the Bill-Chamber during the sittings of the Court; 53 Geo. III., c. 64, § 2. In vacation and recess the Bill-Chamber business is performed by the six Judges of the Court of Session who are not Justiciary Judges, with power to all the Judges of the Court of Session, in case of indisposition or absence of any one of the six Judges, to act for him; 2 and 3 Vict., c. 36. The rotation in which the Bill-Chamber Judges officiate during vacation is fixed by Act of Sederunt, 8th August 1839 (See *Shand's Practice*, p. 71). As to the duties of the Bill-Chamber clerks, see *Shand's Practice*, p. 109.

By the Bankruptcy Act, 1856, 19 and 20 Vict., c. 79, sequestration may be awarded either by the Lord Ordinary on the Bills, or by a Sheriff. In sequestrations awarded by the former, and remitted to the Sheriff, the process of sequestration is held to be in the Bill-Chamber of the Court of Session, and the clerks of the Bill-Chamber to be clerks to such sequestration; § 43. The fees of these Clerks are regulated by § 181; and extracts of deliverances and decrees in sequestrations in the Court of Session are prepared by them; see Act of Sederunt, 20th July 1842, which, though bearing reference to the prior statute, is still observed in the practice of the Bill-Chamber.

For a historical account of the origin of the Bill-Chamber, see *Beveridge on the Bill-Chamber*; *Juridical Styles*, vols. ii. iii.; *Ivory's Erskine*, iv. 3, § 5; *Shand's Practice*, p. 444.

**Bill of Rights.** The statute 1 Will. and Mary, stat. ii., c. 2, is so called from declar-

ing the rights of British subjects. *Tomlins*, h. t.

**Bill of Lading**; is an acknowledgment granted by the master of a ship to the shipper of goods, specifying the particular description of goods, and the quantity shipped. The bill of lading contains also an obligation on the master to deliver the goods so shipped at the port to which the vessel is bound, to a particular person named, or to his order, or to his assignees, on payment of the freight, &c. It is usual to sign three copies of the bill of lading, one for the buyer or consignee, another to go with the cargo, and a third for the seller or consigner, each bill containing a clause that, one being fulfilled, the rest shall be void. Bills of lading are invalid if not written on a proper stamp; *Bell's Com.* i. 543, *et seq.* The bill of lading is transferable by indorsation without intimation to the master; and the property of the goods specified in the bill is transferred to an onerous and *bona fide* indorsee unaffected by any claim of retention of the goods on the part of the original seller, or any right in him to stop them *in transitu*. The master is bound to deliver the goods to the holder of the bill, or to the person who has acquired right to it by indorsation; *Bell's Com.* i. 198. See the form of the bill of lading, *Jurid. Styles*, vol. ii. p. 572. See also *Bell's Princ.* 4th edit. § 414, *et seq.*; *Bell's Illust.* §§ 410, 415; *Brown on Sale*, p. 483; *Smith's Maritime Practice*, p. 30.

**Bill of Health, or Sick Bill**; is the name given to the application made under the Act of Sederunt, 14th June 1671, by an imprisoned debtor for liberation on account of bad health. The debtor's sickness "and extreme danger of life," had to be attested on oath under the hand of "a physician, surgeon, apothecary, or minister of the gospel in the place;" and, on such certificate being given, the magistrates were authorized to allow the debtor to reside during his sickness in some house within the town; they being always responsible in case he should escape, and bound that, on his recovery, he should return to prison. The practice in Edinburgh was for the debtor to present a petition to the magistrates, accompanied by the proper certificate; and if the magistrates were satisfied, they pronounced an interlocutor finding him entitled to leave the jail, on his lodging a bond with sufficient caution that he should return to prison on his convalescence. The question as to the nature of the security to be given for his return was necessarily one of circumstances; and it rather appears that the magistrates were not entitled to insist for unexceptionable caution, as that, in many cases, would have amounted to a total

denial of the privilege. The general rule was that the magistrates should have regard to the health of the debtor, and take such precautions as circumstances admitted; and, where satisfactory caution was not found, it would seem that they were bound to place a guard over the person of the debtor, so as to prevent his escape. A prisoner liberated on account of bad health was not freed from restraint: he was confined to a house within the town, unless his illness were such as absolutely to require air and exercise. See *Bell's Com.* ii. 548, *et seq.*; 14 *S.*, 124; *Dow's Appeal Cases*, vol. v. 37.

The remedy under the above Act of Sedentary was, till recently, confined solely to the case of Magistrates of Royal Burghs, who were formerly the keepers of the prisons. By the Prison Act, 2 and 3 *Vict.*, c. 42, all liability of Magistrates for the holding, maintaining, and managing of prisons, or the alimment or escape of prisoners, is declared to cease, § 108; and it is further enacted, by 7 and 8 *Vict.*, c. 34, § 11, that Sheriffs within their respective sheriffdoms shall have power, by summary application to the *County Prison Board*, accompanied by proper and satisfactory medical certificates, to authorize the removal of any civil or criminal prisoner afflicted with any contagious or infectious disease, or any disease which threatens immediate danger to life, and cannot be treated in prison, from any prison within the county to any hospital or other proper place within the same, or to any hospital near the same, for such period and under such precautions for the safe and proper custody of the prisoner, and of his re-imprisonment as they may direct.

**Bill of Health, of a Ship**; is a certificate of the health of the crew, required where the vessel has come from a suspected port. Under the obligation in the charter-party to furnish the ship "with everything needful and necessary for the voyage," the master will be bound to procure a bill of health, where that is necessary; and if, from a neglect to procure it when it might have been got, the vessel is prevented from delivering her cargo, the master or owners will be liable to make good to the freighter any loss thence arising. *Bell's Com.* vol. i. p. 553, 5th edit.

**Bill of Advocation.** See *Advocation*.

**Bill of Advocation to Court of Justiciary**; is an application to the Lords Commissioners of Justiciary, praying that the proceedings in an inferior criminal court may be advocated or brought under review of the Court of Justiciary. Instead, however, of expediting the letters of advocation, as in the Court of Session, the practice is to debate and finally to discuss the whole merits of the case

upon the bill. During the litigation on the bill of advocation, the personal presence of the parties is not required; but after the bill is passed, the presence of both parties is necessary, as in an original criminal process in the Court of Justiciary. One Judge may pass a bill of advocation, but two are necessary to refuse one. An interlocutor pronounced, at the first diet, in a criminal cause in the Sheriff Court, finding the libel relevant, cannot be advocated until the trial is concluded, though there may be, perhaps, such extreme cases as will induce the Court of Justiciary to stop an inferior Judge from proceeding with a cause pending before him; *Jameson*, 3d December 1855; 2 *Irvine*, 273; *Hume*, vol. ii. p. 511, 512; *Bell's Notes*, 306; *Alison's Prac.* p. 26.

**Bill of Suspension.** See *Suspension*.

**Bill of Suspension in Court of Justiciary.**

This (like the note of suspension in the Court of Session) is an application to the Lords of Justiciary, after the conclusion of a criminal trial in an inferior court, to stay execution of the sentence. The merits of the bill of suspension are judged of in the same manner with those of the bill of advocation; and in it also one Judge may pass the bill, but two Judges are required to refuse it. It is no good reason of suspension or of advocation that the verdict of a jury is not warranted by the evidence, the only ground on which a verdict can be brought under review in this form being that the inferior judge has admitted unlawful evidence, or has improperly circumscribed the proof; for these, and similar grounds of complaint do not affect the jury, but the Judge, who has not afforded the jury the legal materials for coming to a correct verdict. The Court of Justiciary, on the same principle, will judge of all objections which appear on the face of a verdict, or which arise from irregular proceedings on the part of the jury. It will not prevent the suspension of a sentence, that it has been already partly, or even wholly, executed; *Gillies*, 4th December 1839, 2 *Swinton*, 454; *Hume*, ii. 513; *Bell's Notes*, 506; *Alison's Prac.* 27.

**Bills of Signet Letters**; are the warrants necessary to authorize the keeper of the Royal Signet in Scotland to affix it to certain classes of the writs which pass that seal. Letters passing the signet were formerly much more in use than at present. In the case of diligences against the property or person, and in some other instances owing to the peculiar nature of the case, signet letters were required, which proceeded on an immediate warrant from the Court of Session, which warrant was interposed in the shape either of a decree, or of a deliverance or in-

terlocutor on a *bill*, *i.e.* a petition praying for the letters; and signet letters upon decrees were said to pass *per decretum Dominorum Concilii*. Now, by the Personal Diligence Act, 1 and 2 Vict., c. 114, it is rendered unnecessary to execute diligence upon decrees of the Court of Session, Teind-Court, or Court of Justiciary, or Sheriff-Courts, or upon decree of registration, by virtue of signet letters, it being enacted that the decree itself shall contain warrant to charge the obligant to pay or perform under pain of poiding and imprisonment, to arrest and poid, and to open shut and lockfast places. Upon such warrant it is declared that diligence shall proceed against property or person to the same effect as if executed by virtue of letters of horning, or of caption, or as if arrestments and poidings had been executed under the forms previously in use. By 19 and 20 Vict., c. 56, similar warrants may be inserted in the extracts of Exchequer decrees. When signet letters proceed upon a *bill*, they are said to pass *ex deliberatione Dominorum Concilii*. When bills were required in suspensions and advocations, and also in loosing arrestments when there was any pleading, the deliverance passing the bill was signed by the judge who passed it; but in all other cases the signature of the Bill-Chamber clerk officiating for the time is, by 53 Geo. III., c. 64, § 17, declared to be sufficient. In cases where evidence of the statements in the bill is required to be produced with it, the deliverance is expressed, "*Fiat ut petitur*, because the Lords have seen the precept" or other document produced in evidence; and the reason, as expressed in the *fiat* of the bill, must be repeated in the signet letters, of which it is the warrant. In cases where such evidence is not required; and where the bill is passed of course, a simple *fiat ut petitur* is sufficient. At whatever time the letters are signeted, they must always bear the date of the bill on which they proceed. Bills bear at the end the name of the writer to the signet; but do not require to be signed.

By the Act 1 and 2 Vict., c. 869, both bills and letters of advocation and of suspension are abolished, and superseded by written notes. See *Advocation; Suspension*. Bills of summonses are abolished by the Court of Session Act, 13 and 14 Vict., c. 36, § 18. See, upon the subject of this article, *Bill-Chamber. Arrestment. Loosing of Arrestment. Poiding. Caption. Horning. Diligence. Letters*.

In the Court of Justiciary, when the process against the accused person is raised by *Criminal Letters*, a bill is presented to the Lords Commissioners of Justiciary, setting forth at large the tenor of the intended

charge, and praying for criminal letters. Where the Lord Advocate is the sole prosecutor, this bill is signed by him, or by some one having his authority; and where the prosecution is at the instance of a private party, the Lord Advocate must subjoin his *concourse* at the bottom of the bill. One of the clerks of Court signs the deliverance on the bill, which is as effectual for passing it as if the deliverance had been subscribed, as formerly, by one of the Judges of Justiciary; 11 and 12 Vict., c. 79, § 3. This is the warrant for raising criminal letters, which pass the signet of the Court of Justiciary, and proceed in the sovereign's name in the usual form, fixing a diet for trial, and authorizing the citation of the party, witnesses, and jury. Where the prosecution is instituted by indictment at the Lord Advocate's instance, although no such warrant is necessary to authorize the indictment, yet an application to the Lords of Justiciary, in the form of a bill, was, till lately, required as the warrant for letters of diligence for citing the party indicted, witnesses, and jury. The statute 16 and 17 Vict., c. 79, § 2, dispenses now with such bill, and ordains that letters of diligence, in cases both before the High Court and Circuit Courts of Justiciary, shall be issued by the clerk of Court to the Lord Advocate on exhibition of the indictment on which such letters require to be raised, or a copy thereof signed by the Crown agent; and it is not necessary that such letters pass the Signet. See *Exculpation, Letters of*. See also *Hume*, ii. 153, 154; *Bell's Notes*, 169; *Alison's Practice*; *Dickson on Evidence*, 943.

**Bill of Exceptions.** See *Exceptions*.

**Bishops**; the higher dignitaries of the Church of Rome or of England. When the church government of Scotland was Episcopal, there were two archbishops, the Archbishop of St Andrews and the Archbishop of Glasgow; the former had the title of *Primate of all Scotland*, the latter that of *Primate of Scotland*. In Scotland, under 1540, c. 125, the nomination of bishops was in the sovereign, who sent to the chapter or clergy of the cathedral a *congé d'élire*, at the same time recommending a particular churchman, whom they were bound to choose. After being chosen by the chapter, he was called bishop-elect; and the king's patent under the Great Seal, confirming the election, established in him a right to the spirituality of the benefice. The king then granted a mandate for the consecration of the bishop, at which it was requisite that three bishops should officiate. The last step was that of doing homage, and swearing obedience to the king. These ceremonies being gone through, the bishop acquired full right to



the fruits of his benefice from the day of his election. *Stair*, B. ii. tit. 8, § 35; *Ersk.* B. i. tit. 5, § 3, *et seq.*; *Bank*, vol. i. pp. 53, 560; *Brown's Synop.* pp. 794, 2570; *Shaw's Digest*, p. 596.

**Black Act**; in English law, an Act (9 Geo. II., c. 21.) for the punishment of persons committing devastations in disguise. Repealed by 7 and 8 Geo. IV., c. 27.

**Black Acts**; are the Acts of the Parliaments of the five Jameses, with those of Mary's reign, and of James VI. down to 1586 or 1587. They were called the Black Acts, from the circumstance of their being printed in the Saxon character. *Ersk.* B. i. t. 1, § 37.

**Black Mail**; was a yearly payment for security and protection made to those bands of armed men who, about the middle of the 16th century, laid many parts of the country under contribution. The Legislature, in order to put a stop to this unlawful violence, enacted that, whoever, under pretence of securing his lands against "rievers," should pay to them a yearly contribution in money, should suffer death; 1567, c. 21; 1578, c. 102. It does not appear, however, that the punishment of death was ever inflicted, either on the payer or the taker of this exaction. *Hume*, vol. i. p. 476. See a singular example of a contract of black mail of so late a date as 1741; *Hume*, vol. ii., *App.* No. 9, p. 531. See also *Ersk.* B. iv. tit. 4, § 64; *Bank*, vol. i. p. 70; *Kames' Stat. Law Abridg.* h. t.

**Black Rod**. The gentleman usher of the black rod is chief gentleman usher to the Sovereign, and has his title from the rod which he carries as the badge of his office. His duty is to keep the Chapterhouse door, when a chapter of the Order of the Garter is sitting; and during the sitting of Parliament he attends on the House of Lords. To his custody all Peers called in question for any crime are first committed. His deputy is called the yeoman usher. See *Tomlins, h. t.*, and *May's Parliamentary Practice*.

**Blanch-Holding**; is one of the tenures of the law of Scotland. The duty payable to the superior in blanch-holding is in general trifling, as a penny Scots; or merely elusory, as a peppercorn, *si petatur tantum*. It may happen, however, that the duty is of greater value; and then the distinction received in practice is founded on the nature of the duty. Where it is of yearly growth, if it be not asked within the year, the right to exact it is understood to be lost; whereas, if it be not of yearly growth, it founds a claim at any time within the years of prescription. In Exchequer, the blanch-duty is always exacted; and where it is not converted into

money in the investiture, it is valued and ascertained. The casualties common to this and to feu-holding are non-entry, relief, disclaimation, purpresture, and liferent escheat. See these titles, and also *Feu-holding*. This manner of holding was anciently in use; and many estates were held both of the Crown and of the subjects-superior in blanch. On the abolition of ward-holding, by 20 Geo. II., c. 50, all the lands which held formerly of the Crown were converted into blanch-holding; and by the Act 25 Geo. II., c. 20, and the royal warrant under the Privy-Seal, January 1753, all lands held ward of the Prince were declared in future to be held blanch; whereby the extent of land held by this tenure was much increased. But the tenure is now seldom adopted in the constitution of what is termed an original right. See *Charter*. Besides the estates held blanch in one or another of those ways, there is an alternative blanch-holding inserted in every disposition of sale, so as to enable the purchaser to constitute a base right, holding of the seller, capable of carrying the property of the subject sold as it stood in the seller. Infestment on the precept of sasine, in a disposition containing the alternative holding, completes a feudal title in the person of the purchaser, who may afterwards complete his title with the superior, so as to come precisely into the seller's place. *Stair*, B. iii. tit. 3, § 33; *Ersk.* B. ii. tit. 4, § 7; *Bank*, vol. ii. p. 556, *et seq.*; *Bell's Princ.* §§ 682, 693, 4th edit.; *Swint. Abridg. vocs Tenures*; *Jurid. Styles*, 4th edit. vol. i. pp. 3, 25. See *Base Right* and *Public Right*.

**Blank Bonds**; were bonds, formerly known in practice, blank in the name of the creditor. They passed, like bills, by mere delivery, the bearer being at any time at liberty to fill up his name and pursue for payment. The ostensible reason, and perhaps the original one, for introducing these bonds into practice, was to save the expense of conveyances, and to facilitate the transmission of the right. Experience, however, having proved that they were capable of being easily converted to fraudulent purposes, the act 1696, c. 25, declared all deeds in which the creditor's name is left blank to be null. But the insertion of the creditor's name, posterior to the delivery of the deed by the grantor, must be proved in order to found the objection under the statute; Sinclair, 13th June 1746, *Mor.* p. 11559; Ruddiman, 30th July 1746, *Mor.* p. 11562. The statute excepts the notes of trading companies, and indorsations of bills of exchange. *Ersk.* B. ii. tit. 2, § 6; *Stair*, B. i. tit. 4, § 17; B. iii. tit. 1, § 5; *Bank*, vol. ii. p. 194; *Bell's Com.* vol. ii. p. 16, 5th edit.; *Bell's Princ.* § 1459; *Brown's*

*Synop. voce Blank Writ; Shaw's Digest; Thomson on Bills*, pp. 37, 68, 75.

**Blasphemy**; is the denying or vilifying of the Deity, by speech or writing. This is termed *divine lese majesty*, or treason against the Deity. A distinction is made between ascribing anything inconsistent with the divine attributes of God, and oaths and imprecations tending to throw contempt on religion. The former crime was, under the old law, punishable with death; the latter by an arbitrary punishment, proportioned to the circumstances of the offence. The acts 1661, c. 21, and 1695, c. 11, which provided capital punishment for offences of this description, were repealed by 53 Geo. III., c. 160. The punishment is now arbitrary at common law; and by 6 Geo. IV., c. 47, the publication of blasphemy, or of statements denying the existence or attributes of God, or the authority of the Holy Scriptures, is declared a cognisable offence, and punishable with fine and imprisonment. That statute also declares the criminal to be punishable on a second offence with banishment, a provision which is, however, repealed by 7 Will. IV., c. 5. As to offences against religion, see *Hume*, i. 568, *et seq.*; *Shaw's Digest*.

**Blazon of a messenger-at-arms**; the badge of his office displayed by a messenger in the act of apprehending a debtor. *Stair*, B. iv. tit. 47, § 14; *Bank*. ii. 503; *Bell's Com.* ii. 544; *Hume*, i. 389, 17 D. 292. See *Apprehending of a Debtor. Deforcement*.

**Bleaching**. The bleaching of linen cloth is the subject of various statutory regulations. See *Hutch. Justice of Peace*, vol. iii. p. 223. The bleacher has a lien upon the cloth in his hands for the price of bleaching, not only that particular parcel, but also former parcels, when there has been a regular course of dealing between him and his debtor. *Bell's Com.* ii. 109; *Bell's Prin.* § 1435, 4th edit.; *Bell's Illust.* ib.; *Brown's Synop.* p. 1253; *Hume*, i. 108.

**Blind Persons**. The deeds of blind persons require to be executed notarially, in the manner explained, *voce Testing Clause*.

**Blockade**. Neither neutrals nor any other vessels can trade with a port under blockade, without danger of capture. *Bell's Com.* vol. i. p. 305; *Bell's Princ.* 4th edit. § 43, and *authorities there cited*.

**Blood-Wits**; riots in which blood is spilt. The Sheriff of the county and Justices of the Peace have a cumulative jurisdiction in judging of these offences. *Ersk. B.* i. tit. 4, § 4; *Stair*, B. ii. t. 3, § 62; *Bank*, i. 567.

**Bloody-Hand**; in English law, one of the four circumstances taken as presumptive proof that the offender has killed deer in the King's forest. *Tomlins' Dict.* h. t.; and *Wharton's Lex. v. Backberinde*.

**Bludueit**; an unlaw or fine for wrong or injury, such as blood. A party infett in the ancient law with bludueit, was entitled to hold courts and recover fines for effusion of blood. *Skene*, h. t.

**Bona Fides**. A *bona fide* possessor is a person who possesses a subject upon a title which he honestly believes to be good. A *bona fide* possessor, from whom the subject has been evicted by a person having a better title, will be entitled to retain the fruits or profits which he has reaped or received during his *bona fide* possession. This is an equitable rule founded not only on the hardship of subjecting a person who has lived in the belief that the property was his own, to a claim for repetition of what he has drawn from it, but also on the negligence of the real proprietor, who has himself to blame for his delay to vindicate his property. A crop of corn belongs to the person by whom it has been *bona fide* sown; and where the *bona fides* continues, until after the legal terms of payment of rent, the rent, although still in the tenant's hands unuplifted, will belong to the *bona fide* possessor. Erskine (B. ii. tit. 1, § 26) is of opinion that interest of money erroneously paid to a person *bona fide* believing himself the creditor, is in the same situation with fruits and rents. In regard to the case of Oliphant against Smith, 30th Nov. 1790, *Mor.* p. 1721. Mr Ivory observes, "The judgment seems to have proceeded, not on any general denial of the doctrine in the text, but on a sort of *specialty*, viz., that the particular action before the Court—as being a *condictio indebiti* admitted no claim for annualrents, *bona fide percepta*."

*Bona fides* ends when the possessor becomes aware of the insufficiency of his title, whether by private knowledge or otherwise. But this is obviously a point which there must be considerable difficulty in fixing. When the defect of title is apparent at once, the execution of a summons for trying its validity will be held as a sufficient interruption of the *bona fides*. Where, however, the question of right is attended with difficulty, the interruption of the *bona fides* may not be held to have taken place until after *litis contestation*, or even until a final decree in the action has been pronounced. The question, indeed, is evidently one which must depend on the special circumstances of the particular case. The following Roman law maxims are applicable to this subject: *Bona fides non patitur ut idem bis exigatur. Bona fide possessor facit fructus consumptos suos*. Contracts and actions in the Roman law, termed *bonæ fidei*, in contradistinction to *stricti juris*, are those in which the interpretation is not confined to the express terms of the convention, but may

be extended according to equity and the presumed intention of the parties. *Ersk. B. ii. tit. 1, §§ 28 and 29; Stair, B. i. tit. 7, § 11; B. ii. tit. 1, § 23; tit. 12, § 5; Mr More's Notes, pp. xv. xlvi. lxx. cli.; Bell's Princ. § 561; Kames' Stat. Law abridg. h. t.; Bell on Leases, vol. i. p. 393; vol. ii. p. 127, 4th edit.; Hunter's Landlord and Tenant, pp. 732, 785; Brown's Synop. h. t.; Shaw's Digest, h. t.; Macfarlane's Jury Practice, p. 222; 12 S. pp. 22, 1; Kames' Princ. of Equity (1825), 94, 306, 349-50, 368, 372-3-8; Hume, i. 25, 72-3, 448, 453-8. See Mala Fides; see also Adjunction.*

**Bonagium, or Villenagium;** slavery or servitude. In the ancient law-language of Scotland, *bondi, nativi*, and *villani* are synonymous. *Skene, h. t.*

**Bona Patria;** in our older law, an assize of countrymen, or of good neighbours. *Skene, h. t.*

**Bond.** A bond is a written obligation to pay or perform; and is, of course, as various in its nature as the circumstances vary relatively to which it may be granted. The most important bonds, in Scotch practice, are those of an heritable kind; but these, as well as the varieties of the personal bond, will be explained under other titles (see *Heritable Bond. Disposition in Security. Bond of Corroboration, &c.*); and the present observations shall therefore be confined to the simple moveable bond for repayment of borrowed money. The style of this bond commences with an acknowledgment by the granter of the receipt of the money. The common and safe form in this part of the bond is to declare that the money has been "instantly" received. Sometimes the money is stated to have been received at a bygone period; but it is expedient, if possible, to avoid this form of expression, as it may expose the bond to reduction under the act 1696, c. 5, in so far as it is a security for a prior debt. The style then takes the borrower, his heirs, executors, and successors, bound to repay to the lender and his executors or assignees (and sometimes to *nominatim* substitutes) the sum lent at a definite period, generally at one of the terms of Candlemas, Whitsunday, Lammas, or Martinmas, with interest at such rate as may be agreed on, from the time of advance until repayment, and a fifth part more of the principal sum of penalty in case of failure. On this part of the deed, it may be observed, that as the granter may be succeeded by various descriptions of heirs, some of whom would, by law, be liable *subsidiarie* only, and in a certain order, it is not unusual to add to the terms "heirs, executors, and successors," the words, "renouncing the benefit of discussion," which have the effect of rendering all the borrower's successors liable, con-

jointly and severally, to the creditor, reserving, of course, to the person who pays, his relief against the heir primarily liable. Under the penalty in the bond, the creditor on the debtor's failure in punctual payment is not entitled to recover more than the actual expense incurred in making the bond effectual; and it is not usual in moveable, as is in heritable bonds, to annex any penalty to a failure in the termly payments of interest. The form of the bond concludes with a consent to registration, in order that letters of horning, on a charge of six days, may proceed against the debtor if he should fail to pay; and the deed is closed with the usual testing clause; see the form, *Jurid. Styles*, vol. ii. p. 21. Moveable bonds, like other deeds, may be granted by one or more obligants, who may bind themselves, either jointly and severally, or *pro-rata* only; or they may be granted by bodies politic; and, like every other liquid obligation, may be made the ground of the diligence of adjudication against the debtor's heritage. Moveable bonds are transferred by assignation. Since the date of the act 1661, c. 32, they descend in all cases to executors, and are taken up by confirmation. Prior to the passing of that act, when a bond bore interest, it was regarded as a *quasi feudum*, and held to be heritable in questions of succession. The statute, however, altered that rule, except only in so far as regards the rights of husband and wife, and the fisk; that is to say, the principal sums in moveable bonds, in questions as to the legal rights of husband and wife, do not form part of the goods in communion; and did not fall under the single escheat before the abolition of that casualty. It is always practicable, however, to confer an heritable character on the bond, though it have no relation to a particular heritable subject, by merely making it payable to heirs, secluding executors; in which case, it necessarily becomes heritable by its own terms, and not because any heritable subject is impledged for the repayment. See *Ersk. B. ii. tit. 2, § 9, et seq.; Bell's Princ. § 63, 910, 4th edit.; Bell's Illust. § 68; Jurid. Styles; Kames' Princ. of Equity (1825), 45, 281; Ross's Lectures, i. 1, et seq.*

**Bond of Caution;** is an obligation by one person as surety for another, either that he shall pay a certain sum, or perform a certain act. The terms of this bond must necessarily depend upon those of the principal obligation to which it is an accessory. In the ordinary case, the principal debtor and the cautioner are taken bound in the same deed; but it may happen that the obligation by the cautioner is undertaken in a separate deed. Separate bonds of caution are necessary in

various steps of judicial procedure,—as in processes of suspension, in which, in the ordinary case, before the letters are expedite, the suspender must lodge in the Bill-Chamber a bond of caution to the satisfaction of the opposite party, and of the clerk of the bills, containing an obligation on the cautioner to fulfil the decree to be pronounced in the cause, and to pay whatever damages or expenses may be awarded. (See *Suspension and Advocation*, also *Caution*.) Judicial caution is also required to be found in loosing arrestments, in law-burrows, by tutors and curators for the faithful discharge of their duty, and in many other instances which need not be enumerated here. *Bell's Com.* vol. i. p. 362, *et seq.*; vol. ii. pp. 69, 372, 5th edit.; *Bell on Leases*, vol. ii. pp. 312, 347, 355, 4th edit.; *Hunter's Landlord and Tenant*; *Jurid. Styles*; *Dow's Appeal Cases*, i. 247, 272; *Menzies' Conveyancing*. See *Cautionary*.

**Bond of Relief**; is a bond by the principal debtor, granted in favour of a cautioner, declaring the nature of the cautioner's obligation, and that it was undertaken solely for behoof of the grantor of the bond of relief,—who binds himself to relieve the cautioner from the consequences of his obligation. Sometimes heritable security is granted to the cautioner for his relief, or the friends of the principal debtor become bound along with him in the bond of relief. See examples of such bonds, *Jurid. Styles*; see also *Menzies' Conveyancing*.

**Bond for a Cash-Credit in a Bank.** Where heritable security is not granted to the bank, this is a simple personal bond by the person in whose favour the credit is granted, and his cautioners, who are in the ordinary case bound along with him as principal debtors to the bank. See an example of such a bond, *Jurid. Styles*. As to the manner of granting heritable security for such credits, see *Bank Credits*. See also *Menzies' Conveyancing*.

**Bond of Corroborator.** A bond of corroboration is an additional obligation granted by the debtor in a bond, by which he corroborates the original obligation. This deed may be used, 1. For the purpose of accumulating arrears of interest into a principal sum, and adding it to the original debt, so as to make the whole bear interest. 2. Where the debtor in a bond dies, his heir may grant a bond of corroboration of his ancestor's debt, which will save the expense of constituting the debt against the heir. 3. Where the creditor in a bond dies, the debtor may grant a bond of corroboration to his heir, which will save the expense of a confirmation, or of completing a title in the person of the heir. It may be thought that, in

those cases, the transaction would be simplified by cancelling or discharging the old bond and taking a new one; but it is to be observed, 1. That an inhibition which might strike at a new bond, of the date of the bond of corroboration, may have no effect against the original bond; and, 2. That a bond of corroboration may fall under the act 1696, c. 5, in case the grantor should become bankrupt within the sixty days; in which case, the original bond must be resorted to, or the debt must be constituted precisely as if no bond of corroboration had been granted. See examples of this deed, *Jurid. Styles*. See also *Ersk. B.* iii. tit. 3, § 60; *Bell's Com.* vol. i. pp. 531, 671; vol. ii. pp. 5, 212, 5th edit.; *Brown's Synop.* pp. 1064, 2569.

**Bond of Bottomry**; is a real security over a ship, granted by the owner or by the master, for payment of the money advanced for the outfit of the vessel, or for repairs. This form of security is of the nature of a contract of hazard, for the loan is repayable only in the event of the ship's safe arrival at the port of destination; and, in consideration of this risk, the lender exacts a certain rate of premium, greater or less, according to the risk. When bonds of bottomry are granted by the owner to raise money for the outfit of the vessel, they are preferable, according to the priority of their dates. But when they are granted by the master in foreign ports for repairs at different periods of the voyage, the last in date is entitled to priority in payment. It is proper to attend particularly to the description of the voyage, and to specify the ports at which the vessel is to touch, so as to avoid disputes as to the nature of the risk. See examples of this bond, *Jurid. Styles*. See also, *Ersk. B.* iii. tit. 3, § 17; *Bank.* vol. i. p. 399; *Bell's Com.* vol. i. p. 530, *et seq.* 5th edit.; *Bell's Princ.* § 452, *et seq.* 4th edit.; *Bell's Illust.*; *Kames' Stat. Law Abridg. voce Bottomtree*; *Shaw's Digest*; *Smith's Maritime Prac.* 129, 153; *Menzies' Conveyancing*.

**Bond of Respondentia**; is a bond precisely similar in its nature to a bond of bottomry, except that the security is given over the goods on board of the vessel instead of the vessel itself. See *Jurid. Styles*; *Bell's Com.* i. 535, 5th edit.; *Smith's Prac.* 135; *Menzies' Conveyancing*. See *Respondentia*.

**Bond of Presentation**; is an obligation granted for behoof of a person in custody on a legal warrant, in order to obtain his temporary liberation. The obligant in such a bond becomes bound to present the person so liberated, to the officer holding the warrant, at a particular day and place. A failure to produce the debtor in terms of this obligation will subject the grantor of the bond in

fulfilment of the obligation, for the non-performance of which the apprehension had taken place; e. g., to pay the debt where the debtor has been relieved from custody under a caption, or to produce the debtor at all diets of Court, where he has been freed from an arrest under a *meditatio fugæ* warrant. But, although independently of express stipulation, this is the legal consequence of undertaking such an obligation, it is usual, in formal bonds of presentation, to insert an express clause to that effect. It will afford the obligant in a bond of presentation no defence, for his failure to implement his obligation, to allege that the debtor, during his temporary liberation, has obtained a sist on a bill of suspension; or has retired to the Sanctuary; or has done any thing to evade the presentation, which he could legally have avoided doing, it being the very object of the bond to provide against acts of that description. On the other hand, it is equally clear that the obligant is freed by the intermediate death of the debtor, and that he is entitled to have implement postponed on account of the debtor's sickness, or any other inevitable accident. It appears also to be clear, that he is liberated, by the debtor's imprisonment, previously to the time of presentation, on another warrant, for by that means the object of the bond is accomplished, and the creditor cannot possibly allege detriment. There is an old case, indeed (*Potstead* against *Scott*, 7th July 1681, *Mor.* p. 1807), in which the contrary was found; but the *ratio* of that decision, as stated in the rubric, viz., "that the being imprisoned for another debt was considered to be the act of the debtor," is evidently unsound both in law and in reason; and the judgment seems to be disapproved of by later authorities. (*Bell's Com.* i. 385.) The most effectual form of the bond of presentation is a deed regularly tested and executed on a proper stamp, containing, besides the clause of presentation, a specific obligation on the granter to pay the debt in case of failure to present, and a clause of registration, on which the obligant may be immediately charged with burning, should he not duly implement the principal obligation. It is not uncommon in practice, however, to accept of a simple letter of presentation with a similar clause; but such a letter can afford a ground of action only, and is no warrant for summary diligence. The letter ought to be regularly tested; but an informality in this respect will seldom affect its validity; for if the debtor has been liberated on the faith of the letter, that will be held a sufficient *rei interventus*; and the objection that it is not regularly tested will not avail; *Dun-*

*more Coal Company* against *Young*, 1st Feb. 1811; *Fac. Coll.*; *Bell's Com.* i. 385; *Bell's Princ.* 4th edit. § 277; *Bell's Illust.* ib.; *Brown's Synop.* pp. 289, 341; *Shaw's Digest*; *Jurid. Styles*; *Menzies' Conveyancing*. By the Mercantile Law Amendment Act (1856), it is enacted that all guarantees or cautionary obligations shall be in writing, and subscribed by the person undertaking the guarantee or cautionary obligation.

**Bonding of Goods**; is the depositing of imported goods in the King's cellars, where they remain impledged for payment of the duties. The bonding system is regulated by the statute, 43 Geo. III., c. 132, under which the King's warehouse may be regarded as the warehouse also of the importer of the goods, where they lie at his risk and at his disposal, subject only to the King's pledge. It was at one time doubted in the Court of Session whether it was not necessary that the duties should be paid and the goods actually taken out of bond and delivered to the buyer, in order to complete the transfer. But it is now settled, that whether the duties are paid or not, an order of delivery, addressed to the keeper of the King's cellar, accompanied by notice to the keeper and a transfer in the cellar books, amounts to complete delivery. See *Bell's Com.* i. 186; *Shaw's Digest*.

**Bonorum, Cessio.** See *Cessio Bonorum*.

**Book Debts**; are debts by open account. The proof of debts of this description may sometimes be attended with difficulty. The evidence of furnishings made by merchants and retail dealers is generally parole; and the creditor's books, together with the evidence of the delivery by his clerks or porters, will, in the ordinary case, be held sufficient. If delivery cannot be proved, it would seem that circumstantial evidence of various kinds will be admitted on the part of the creditor; and it has been held that the books of a regular merchant afford a *semiplena probatio*, to the effect of allowing the claim to be supported by the evidence of a single witness and the oath of the merchant in supplement. *Bell's Com.* vol. i. p. 330; *Bell's Princ.* § 629; *Illust.* ib. For the steps to be taken by a party in Scotland, desirous to recover a debt due to him in England, see *English Debt. Claim*.

**Booking of a Prisoner for Debt.** When a debtor has been apprehended and removed to prison, the amount of the debt for which he is incarcerated, and the prisoner's name, are recorded in the jail books, which is termed *booking the prisoner*. This record was originally introduced by the magistrates, who were formerly keepers of the prisons, in order to inform themselves of the amount of their responsibility; and it is the jailer's, not

the creditor's, duty to see the proper entry made. It is the practice to enter the whole sum of debt; though formerly the creditor was safe in only entering a part of it, and arresting the debtor in prison for the remainder. Formerly, too, it was necessary to pay the jailer a fee proportionate to the sum booked; but by 2 and 3 Vict., c. 42, § 19, all jail fees, of every description, payable to the keeper or officers of prisons, are abolished. By the former practice, a debtor, after being once entered, could not be liberated without obtaining letters of relaxation and liberation from the King, after intimation to the creditor, and a charge to the magistrates to set him at liberty; but now, if the debtor pay the debt as it stands in the prison books, he is free. *Bell's Com.* ii. 554; *Ross's Lect.* i. 334, 343. See *Act of Grace*; *Breaking of Prison*.

**Books of Adjournal.** The records of the Court of Justiciary. In these books are engrossed the acts and regulations of the Court of Justiciary, and the relative procedure; and in other respects, the books of Adjournal are analogous to the books of Sederunt of the Court of Session. The power of the Court of Justiciary to pass acts of adjournal regulating the procedure of the court is conferred by 1672, c. 16. By 11 and 12 Vict., c. 79, § 7, record copies of proceedings, instead of being transcribed in the books of adjournal, may be inserted therein.

**Books of Sederunt.** The books in which the Acts of Sederunt of the Court of Session are recorded. Besides the Acts of Sederunt, these books contain the names of the judges present at each meeting of the court, the dates of the admission of the judges, clerks of session, and other officers of the court, advocates, &c. Formerly, indeed, most of the public papers of importance were recorded in these books; and even matters totally unconnected with the business of the court, such as eclipses and other remarkable events. See *M'Kenzie's Obs. on Stats.* p. 164. See *Acts of Sederunt*.

**Borgh**; in old law language, a cautioner, pledge, or surety, *Skene, h. t.*

**Border Warrant**; is a warrant issued by the Judge Ordinary, on the borders between Scotland and England, on the application of a creditor, for arresting the person or effects of a debtor residing on the English side of the border, and detaining him until he find caution *judicio sisti* (i.e. that he shall sist himself in judgment), in any action which may be brought for the debt within six months. The creditor applying for such a warrant must swear to the verity of the debt; and, as in *meditatio fugæ* warrants, to which these warrants are analogous, it is necessary to examine the debtor as to the *fuga*

before warrant to incarcerate is granted; so in border warrants it is proper to examine the debtor as to his domicile, &c., before issuing a warrant for incarceration. Very important information on the subject of border warrants will be found in *Landell*, 26th January 1838, 16 *S.*, 388; in which case the warrant was held to be illegal, and the procedure under it such as could not be sanctioned, even by the most inveterate usage. The alleged debtor afterwards brought action of damages against the party by whom the warrant was obtained, and the party (a Sheriff clerk) by whom it was granted, and obtained £500 damages against the former, and £300 against the latter; 3 *D.* 819; 7 *D.* 810. In the House of Lords, however, this action was afterwards held irrelevant, in respect that the summons did not expressly aver want of reasonable skill or gross negligence, or show facts necessarily raising such an inference; 4 *Bell, App.* 46. See *Barclay's M'Glash. Sher. Court Prac.* 405; *Ersk. B. i. tit. ii. § 21*; *Bell's Com.* vol. ii. p. 558, 5th edit. See also *Meditatio Fugæ*.

**Borough-English**; in English law, is a customary descent of lands or tenements, whereby in all places where this custom holds, lands and tenements descend to the youngest son; or if the owner of the land have no issue, to the younger brother. *Tomlins' Dict. h. t.*

**Borough Laws.** This name is given to a collection of ancient laws relative to burghs. These laws are not considered as obligatory, but are useful in tracing ancient manners and customs. *Ersk. B. i. tit. i. § 36.* See *Regiam Majestatem*.

**Borrowing**; is the act of receiving in loan. Contracts of loan are of two kinds, viz. mutuum and of commodate. The former of these comprehends the loan of such subjects as are consumed in the act of using them—such as corn, wine, money, &c.; the latter is that kind of loan in which the borrower is bound to restore the individual subject lent. See *Mutuum. Commodate*.

**Boze**; an old Saxon word, signifying compensation or satisfaction. *Skene, h. t.*

**Bothna**; according to *Skene*, is a park where cattle are fed and inclosed. *Skene, h. t.*

**Bottomry**; *Bond of.* See *Bond of Bottomry*.

**Bought and Sold Note**; in English law, where a note of sale is signed by a broker employed to sell a parcel of goods, the bargain is completed. *Bell's Princ.* § 89.

**Bounding Charter or Infestment**; a charter or infestment which describes the lands by their meaths or marches. Such a description confers right to all within the bounds, and, on the other hand, excludes what lies beyond. No prescription can confer right to that which is without the bound-

dary, as part and pertinent. In describing boundaries, the walls surrounding the subject will be held as conveyed, if the subject be conveyed with the walls by which it is surrounded. If it be described as bounded by certain walls, the walls will not be held as conveyed; and where it is intended that the wall is to be mutual, this must be expressed. *Stair*, B. ii. tit. 3, §§ 26 and 73; *Ersk.* B. ii. tit. 6, § 2, *et seq.*; *Bank.* i. 552; *Bell's Princ.* § 738; *Bell on Purchaser's Title*, 35; *Duff on Deeds*; *Menzies on Conveyancing*.

**Bovata Terræ**; an oxengate of land; sometimes erroneously written *davata terræ*. *Skene*, h. t.

**Box-Day**. In the Court of Session, box-days are two days appointed by the Judges, in each of the spring and autumn vacations, and one day in the Christmas recess, on one or other of which days papers ordered by the Court, or by the Lords Ordinary, towards the close of the preceding session, are usually appointed to be lodged. The first box-day is also the day on which interlocutors pronounced by any of the Lords Ordinary, within fewer than twenty-one days of the close of the session, become final, unless a reclaiming note be boxed, as it is termed, on the first box-day. See *Reclaiming Note*. In terms of 2 and 3 Vict., c. 36, § 13, and A. S. 8th August 1839, §§ 6, 7, summonses may be called at either of the box-days in the autumn vacation, the defences being returned at the second box-day, or at the meeting of the Court in November respectively; and by 13 and 14 Vict., c. 36, § 54, the Court is empowered to make regulations by Act of Sederunt for allowing summonses and notes of advocacy and suspension, &c., to be called at any box-day in vacation or recess, and making defences returnable at such box-days, or on the meeting of the Lords Ordinary, or of the Court after vacation or recess. The same statute, by § 8, allows the production in reductions to be satisfied on any of the box-days in vacation or recess; and by § 27, diligences may be reported on any of the box-days. In the inferior courts, also, it is enacted by 16 and 17 Vict., c. 80, § 45, that the Sheriff shall, before the termination of each session, appoint at least one court-day during each vacation for the despatch of all ordinary civil business, including the calling of new causes, and the receipt of condescendences, defences, and other papers, which, if the Court had not been in vacation, would have required to be previously lodged. See *Sheriff-Court*.

**Breach of Arrestment**; is the contempt of the law, committed by an arrestee who disregards the arrestment used in his hands, and

pays the sum, or delivers the goods arrested, to the common debtor. The person guilty of breach of arrestment was formerly liable to a prosecution both civil and criminal. The criminal action was competent either before the Court of Session or the Court of Justiciary; the punishment was arbitrary, with escheat of moveables, out of which the debt of the arrestee and damages were given. There is no example in modern times of such a prosecution. The civil action is for payment of the debt a second time by the arrestee, and for damages to the arrester, though even this rigour is not now countenanced; and at present the only consequence of breach of arrestment is, that the person guilty of it is liable in damages to the extent of the funds paid away, and the expenses; *Grant*, 27th Feb. 1792; *Mor.* p. 786. Where goods are arrested, and the arrestment loosed on caution, if the goods themselves cannot be restored, or their value cannot be clearly ascertained, the cautioner is held to be liable for the debt. *Stair*, B. i. tit. 9, § 29; B. iv. tit. 49, §§ 3, 7; *More's Notes*, p. cxc; *Ersk.* B. iii. tit. 6, § 14; B. iv. tit. 4, § 36; *Bank.* vol. i. p. 290; *Barclay's M'Glash. Sher. Court Prac.* 380; *Jurid. Styles*, 2d edit. vol. iii. p. 101; *Menzies' Conveyancing*, 307. See *Arrestment*.

**Breach of Trust**. The distinction between *theft* and *breach of trust*, is often exceedingly narrow; *Climie*, 21st May 1838, 2 *Swinton*, 118; but of late years the tendency of the Court has been to bring under the category of theft various offences, the *species facti* in which appears to have been held by our earlier constitutional writers to amount only to breach of trust. See *Hume*, i. 58, *et seq.*; *Alison's Princ.* 354; *Burnett*, 112; *Steele*, 114. Accordingly, in the case of *Brown*, 3d July 1839, 2 *Swinton*, 394, the principle was adopted and enforced, that where a person holding property is the mere hand for detaining or transmitting it, without any permanent mandate or right of administration, and is bound to give over such property *in forma specifica*, appropriation by that holder is theft; while, on the other hand, where the holder has a right of management, or a power to exchange, or to account for the property or an equivalent, the appropriation of the property or its proceeds falls under the *nomen juris* of breach of trust. In *Brown's* case, therefore, the appropriation by a watchmaker of a watch left with him to be cleaned or repaired, was held to be *theft*, Lord MEADOWBANK observing:—"When a party puts his watch into the hands of a watchmaker to be cleaned or repaired, he only parts with the *custody*,—the *possession* of the watch is the possession of the owner,—and the watchmaker, in appropriating it,

takes it out of the lawful possession of the owner, and so is guilty of theft." On the other hand, it is not theft, but breach of trust, where a pawnbroker appropriates articles pledged with him. In this case, the possession of the pawnbroker is not a limited and temporary custody; but the act of pledging gives him a title to the articles themselves, which by lapse of time becomes absolute, and enables him to sell and to give a valid right to all the world; *Crosgrove or Bradley*, 6th Feb. 1850; *Shaw's Just. Cases*, 301. Reference may be also made to the following cases:—*Field*, Jan. 22, 1838, 2 *Swinton*, 24, where a clerk, who had appropriated money delivered to be paid to a particular person, was held guilty of theft.—*Michie*, Jan. 28, 1839, 2 *Swint.*, 319, where it was held that a person who had received a bank-note to get change, and who appropriated the note, committed theft.—*Smith v. Wishart*, May 18, 1842, *Brown*, 342; where the appropriation by a bank-teller of money intrusted to him in that capacity, was unanimously held to be theft. Such a person has no power of administration, his duty being simply to pay and receive the money of the bank, in the bank's possession, and within their premises. He has no right to alter the form or condition of the money intrusted to him, and he is, in fact, trusted no farther than he has access to it. Again, in *Watt v. Home*, 8th Dec. 1851; *Shaw's Just. Rep.* 519, it was held, that where yarn is given to a workman, for the purpose of his weaving it into a web, he is guilty, not of breach of trust, but of theft, if he appropriate the yarn to his own use. In this case, the LORD JUSTICE-CLERK HOPE observed—"I have ever been of opinion that theft under trust was a known crime, and that the property being under trust constituted the offence an aggravated charge of theft, and the distinction was again pointed out between such a case and one of pledge. The weaver holds the yarn for a special purpose as his employer's servant, and has no separate possession of his own. The pledger, on the other hand, parts with a property in the goods, and the broker acquires, by force of special contract, *ius proprium* in them; so that not only cannot the pledger redemand them, but he may even steal them from the pawnbroker. See also, *Bell's Supp. to Hume*, pp. 8-17.

Breach of trust may be committed by a person in whom no trust is reposed, if he be art and part in the crime of one who is trusted. The punishment of breach of trust varies from imprisonment for a few months to penal servitude. See *Theft*.

**Breaking Bulk**; or making use of an article, debars a buyer from afterwards objecting to it, and returning it to the seller.

*Bell's Princ.* 3d edit, § 99, and authorities there cited; *Illust. ib.*

**Breaking Inclosures.** There are several statutes for the encouragement of planting and inclosing, which provide for the punishment of those who destroy planting or break inclosures, or who allow their cattle to do so. The penalties are pecuniary, with right to detain cattle found trespassing, until the fine is paid, along with the damage and expense. The chief statutes are 1661, c. 41, and 1685, c. 49. *Ersk. B. iv. tit. 4, § 39*; *Hume*, i. 82, 124. See *Planting and Inclosing*.

**Breaking of Prison**; is the crime of escaping out of prison. In order to constitute this crime, it is necessary that the person guilty of it shall have escaped out of a lawful prison, in which he was confined on a legal warrant, whether as a criminal, or as a person accused of a crime, or as a debtor. It makes no difference whether the offence has been committed by violence or by corrupting the jailor. The punishment is arbitrary, and must necessarily be regulated by the circumstances attending the commission of the crime; *Hume*, i. 401; *Bell's Notes*; *Alison's Prin.* 555. Where a debtor made his escape, the magistrates of the burgh were formerly liable for the debt, whether the insufficiency of the prison, or the carelessness of the jailor had led to the escape. But if the debtor escape in the night-time by the use of instruments, or by open force, or by any accident which could not be justly imputed to the magistrates or the jailor, Erskine holds that the magistrates were not liable, if they could prove that, immediately on the escape being discovered, they made all necessary search for the debtor; *Ersk. B. iv. tit. 3, § 14*. It follows that the magistrates were not liable if the escape had been effected by superior external force, but the *onus probandi* lay with the magistrates to prove such force, as well as their own vigilance, and their prompt pursuit of the debtor; *Bell's Com.* vol. ii. p. 551. By the act 2 and 3 Vict., c. 42, passed to improve prisons and prison discipline in Scotland, the magistrates are now relieved of all obligations respecting prisons and prisoners; and the funds authorized to be levied under the act, are declared not to be liable for the escape of prisoners, reserving action, however, against the jailor for any neglect on his part touching their custody. An attempt to break prison is a relevant point of dittay.

**Breve**; a word used in the old law language of Scotland, and also in the civil law, signifying a short compendious writ. *Breve testatum* is a writ or instrument subscribed by a notary public. See *Skene, h. t.* See *Briefves*.

**Breve de morte antecessoris**; the breve of mortancestry. It is from this ancient brieve that the modern law concerning the service



of heirs is derived. See a full account of the more ancient form, which in all essential particulars resembles and illustrates the prevailing practice, in *Skene, h. t.* See also *Service*.

**Breve de recto**; the brieve of right was anciently used before the Justice-General on the decision of the ground-right and property of lands, and the reduction of infeftments; transferred to the Lords of Council and Session as early as the period of the *Regiam Majestatem*. *Skene, h. t.*

**Breve de nova dissasina**; in the *Regiam Majestatem* this means the brieve or summons of ejection or spulzie. *Skene, h. t.*

**Breve de divisis faciendis**; the brieve of division. *Skene, h. t.*

**Breve Testatum**. The *breve testatum* was an acknowledgment in writing, which, by the ancient practice, was made out on the lands, at the time of giving possession to the vassal, and attested by the seals of the superior, and *paris curias*; afterwards the *breve testatum* was signed by the superior wherever he happened to be, and possession was given separately by the superior's baillie; *Ersk. B. ii. tit. 3, § 17*; *Bell's Princ. 4th edit. § 757*; *Bell on Purchaser's Title, p. 3, 2d edit.*; *Ross's Lect. ii. 121, et seq.*; *Menzies on Conveyancing*.

**Breves Pleadable**; are all such breves as are pursued and defended by an ordinary form of process before a competent judge, where there may be a pursuer and defender. *Skene, h. t.*

**Brevi Mann**; is an expression used to signify the performance of an act by a party on his own authority. Thus, for example, it was anciently the practice in Scotland for an heritable proprietor, on his own authority, to poind his tenant's moveables for payment of his rent, without applying to any other judge. The landlord, in like manner, exercised the power of *brevis manu* removal when his tenant refused to remove at the stipulated term. The practice of poinding or detaining cattle found trespassing seems to be a remainder of the *brevis manu* poinding. *Brevi manu* in the Roman law is usually applied to a kind of constructive delivery. A thing is said to be transferred by *brevis manu* tradition, when it has been previously in the buyer's possession on some other title, as pledge or loan. Some interesting historical details connected with this subject will be found in *Ross's Lectures, vol. i. p. 385*. See also *Kames' Stat. Law abridg. h. t.*; *Bell on Leases, vol. i. p. 367*; *ii. 28*; *Hunter's Landlord and Tenant, p. 719*; *Brown's Synop. h. t.*; *Shaw's Digest, h. t.*; *Ross's Lect. ii. 510*.

**Brewing**. Anciently the right of brewing was given by a license from the superior, and there was generally a clause in the charter *cum brueris*. But neither this clause nor a

license is now held to be necessary to entitle a feuar to brew for his own use. A person, however, with a right of barony may prevent a feuar or a stranger from importing and vending ale within the barony without his license. *Ersk. B. ii. tit. 6, § 8*; *Stair, B. ii. tit. 3, § 72*; *Bank. vol. i. p. 592*; *Brown's Synop. pp. 3, 371, 2356*.

**Bribery**; is the offering or taking of a reward, unduly to influence the conduct of the person receiving it in the exercise of his duty. This is an offence of peculiar atrocity, when it extends to the administration of justice. The punishment of the crime, when committed by a Judge of the Court of Session, is infamy, loss of office, confiscation of moveables, and an arbitrary punishment in the prison; 1579, c. 93. And there are many enactments directed against inferior judges who may be guilty of this offence. See *Hume, i. 407*; *Bank. vol. ii. p. 480*; *Bell's Princ. §§ 36, 37*; *Kames' Stat. Law abridg. h. t.*; *Macfarlane's Jury Practice, p. 156*; *Jurid. Styles, 2d edit. vol. iii. p. 235*; *Kames' Princ. of Equity (1825), 311*. As to bribery at parliamentary elections, see 17 and 18 Vict., c. 102; the "Corrupt Practices Prevention Act, 1854." See also *Election Law. Baratry*.

**Bribery Oath**; an oath formerly required from any parliamentary elector when attending to vote in the election of a member of Parliament. If required on the part of a candidate, the polling Sheriff will put the oath or affirmation of bribery to any registered voter before he poll; 3 Will. IV. c. 65, § 26. It was in these terms:—"I, A. B. do solemnly swear (or affirm if a Quaker), that I have not received or had, by myself, or any person for my use or benefit, any sum or sums of money, office, place, or employment, gift or reward, or any promise or security for any money, office, or gift, in order to give my vote at this election."

This oath is now abolished by the "Corrupt Practices Prevention Act, 1854," 17 and 18 Vict., c. 102, Schedule A. See *Reform Act. Affirmation*.

**Brieve**. A brieve is a writ issuing from Chancery, in the name of the king, addressed to a judge, ordering trial to be made by a jury of certain points stated in the brieve. These writs seem at one time to have been the foundation of almost all civil actions in Scotland (*Stair, B. iv. tit. 1, § 2*); but it is in the election of tutors to minors, the cognosing of lunatics or of idiots, and the ascertaining the widow's terce, and sometimes in dividing the property belonging to heirs-portioners, that brieves are now in use. The brieve of perambulation, which was in use long after the institution of the Court of Session, by which all questions relative to

marches were settled, is now supplied by a declaratory action; and the apprising of land, which proceeded before a jury, was converted into an action before the Court by the summons of adjudication. (See *Adjudication*.) The brieve of inquest, till lately in use in all cases of service of heirs, was abolished by 10 and 11 Vict., c. 47, and is now superseded by the petition of service. (See *Service*.) *Bank*. vol. ii. p. 554; *Bell's Com.* vol. i. p. 4, 5th edit.; *Bell's Princ.*; *Kames' Stat. Law Abridg. h. t.*; *Hutch. Justice of Peace*, vol. i. p. 165, 2d edit.; *Watson's Stat. Law, h. t.*; *Jurid. Styles*, 4th edit. vol. i. p. 278, *et seq.*; vol. iii. p. 1; *Kames' Princ. of Equity* (1825), 94.

*Brieve of Inquest.*—The principal object of this brieve was to require the Judge to whom it was directed to ascertain, by a jury, whether the person who applied for it was heir to a person deceased. It was executed edictally by the officer or the Judge to whom it was directed; and fifteen days elapsed between the date of executing, or proclaiming the brieve, and the service. The jury was not summoned: it might be taken without any previous intimation, and consisted, in modern practice, of fifteen persons. The inquest being set, in presence of the Judge, the claim of the heir was presented along with the brieve and executions. The heir also produced the necessary evidence of those heads of the brieve which he was called on to prove. Having proved or verified his claim, the inquest or jury served the claimant heir in the particular claimed and proved; and their sentence was attested by the Judge, and retoured by the clerk of the Court to Chancery, from which an extract, properly authenticated, was obtained, termed an extract-retour of the service. The brieve remained in every case the same, excepting in the description of the character of heir; but the points or heads of the brieve were differently answered in the general and in the special service. A petition of service is now substituted for the brieve of inquest, and the former procedure is repealed by 10 and 11 Vict., c. 47 (1847). See *Service*.

*Brieve of Tutory.*—The object of this brieve is to serve the nearest agnate tutor-at-law. It is issued from Chancery in the king's name, and is directed to any Judge. The heads of it are, 1. Who is the next male agnate of the full age of twenty-five years, and entitled to succeed to the pupil on his death? 2. Whether the agnate be attentive to his own affairs? 3. Whether he be next in succession to the pupil, in the event of his death? 4. Who is the next cognate? The first of these heads only is inquired into. After the brieve is taken out of Chancery, it is executed, upon fifteen days' warning, at the

market-cross of the head-borough of the Judge's jurisdiction to whom it is directed, against all and sundry. After the service is returned, a *letter of tutory* is expedie under the quarter seal in favour of the tutor, and is his title to act. *Stair*, B. iv. tit. 3, § 6; *Morr's Notes*, p. xlv.; *Ersk.* B. i. tit. 7, § 6; *Bell's Princ.* § 2079; *Jurid. Styles*, 4th edit. vol. i. p. 303. See *Tutor*.

*Brieves of Idiocy and Furiosity.*—The forms of these two brieves are very much alike. They are directed to the judge-ordinary of the bounds within which the person to be cognosed resides, or to the Sheriff of Edinburgh, constituted a commissioner for that purpose as Sheriff in that part; and the jury are directed to inquire—1. Into the state of the person. 2. Who is the next male agnate on whom the office of curatory may be conferred? In the brieve of idiocy, the direction is, to inquire Whether the person be of an unsound mind, furious, and naturally an idiot? In the brieve of furiosity it is, Whether he be of an unsound mind, prodigal, and furious? viz., who has neither time nor measure in his expenses, but squanders his estate by profusion; "*Qui neque tempus nec modum impensarum habet, sed bona dilacerando profundit.*" The verdict of the jury is returned to Chancery, and becomes the warrant for letters of curatory. *Stair*, B. iv. tit. 3, § 7; *Ersk.* B. i. tit. 7, § 49; *Bell's Princ.* § 2107; *Brown's Synop.* p. 949; *Jurid. Styles*, 4th edit. vol. i. p. 308, *et seq.*

*Brieve of Terce.*—The object of this brieve is to cognosce the widow to her terce. It is directed to the Sheriff of the county where the lands lie; and the jury are directed to inquire—1. Whether the claimant was the lawful wife of the deceased? and this is presumed, if she was habit and repute his wife. 2. Whether the husband died infert in the lands? which is proved by production of the husband's sasines. This is not a retourable brieve. The sentence of the jury serves the widow to her terce; and it is the duty of the Judge to "ken" her to it, by dividing the lands between her and the heir. *Stair*, B. iv. tit. 3, § 11; *Sandford on Heritable Succession*, vol. ii. p. 114; *Jurid. Styles*, 4th edit. vol. i. p. 325, *et seq.* See *Terce*.

*Brieve of Division amongst Heirs-Portioners.*—An heir-portioner who wishes to separate her share of the lands to which she succeeds, from that belonging to another heir-portioner, must apply to Chancery for a brieve, directed to the Sheriff of the county in which the lands lie. This brieve is proclaimed at the market-cross, and also served upon the parties concerned; and, at the diet appointed, the rights and allegations of the parties being settled, the Judge remits to an inquest of fifteen persons to measure the land and make a

division. The jury report to the Judge; and lots being cast for the different shares, the Judge decerns in the division, and ordains possession to follow in terms of it. An extract of the decree is held conclusive, and may be enforced by the authority of the Judge. This form is now but seldom resorted to, the parties, in general, settling the matter extrajudicially by arbitration, or otherwise by action *de communi dividundo*. *Jurid. Styles*, vol. i. p. 329; *Stair*, B. iv. t. 3, § 12; *Bell's Princ.* § 1081; *Shand's Prac.* 605; *Sandford on Heritable Succession*, vol. i. p. 21, *et seq.*

**Brieve**, *Advocation of*. See *Advocation of Brieves*; *Jurid. Styles*, i. 313, 4th edit.

**British Statutes**; are the statutes of the British Parliament. Formerly, all British statutes were held to be of the date of the first day of that session of Parliament in which they were made; but now, by 33 Geo. III., c. 13, it is enacted, that from and after April 8, 1793, the Clerk of Parliament shall endorse in English, on every act, the time when it receives the royal assent; which is declared to be the date of its commencement, unless another period of commencement be mentioned in the body of the act. *Ersk. B. i. t. 1*, § 37. See *Assent Royal. Act of Parliament*.

**Brocage**; is properly the hire or commission due to a broker for managing a transaction. Brocage contracts (as they are termed), by which a reward is stipulated for the promotion of a particular marriage, by means of influence to be exerted over one of the parties, are held to be *contra bonos mores*, and can afford no ground of action. *Bell's Com.* vol. i. p. 302; *Bank. i.* 114.

**Brocards**; law maxims, founded on inveterate custom, or borrowed from the Roman law, and accounted part of our common law; such is the maxim, *Jus superveniens auctori accrescit successoris*; and many others. *Bank. i.* 24. See *Maxims*.

**Broccarii**. In the ancient law language of Scotland, these are described as lockers, brokers, mediators, or intercessors in any transaction, paction, or contract, as in buying and selling, or in contracting marriage. In the civil law, they are called *Proxenetae*. *Stev. h. t.*

**Broker**. A broker is a person who negotiates sales of goods and other mercantile transactions, as agent for another, for which he exacts a certain fee or reward from the party for whom he acts. *Bell's Com.* vol. i. p. 599, *et seq.*; vol. ii. p. 120, *et seq.* 5th edit.; *Bell's Princ.* 2d edit. § 89, 1451; *Bell's Illust.* § 1451; *Swint. Abridg. h. t.*; *Brown's Synop.* p. 1251. See *Factor*.

**Bubble Act**. By the statute which went under this name, and which was passed in

1720, joint-stock companies were prohibited as prejudicial to the public; but there were difficulties attending the construction of the act, and it does not seem to have been observed. It was repealed in 1825. *Bell's Princ.* 3d edit. § 399; *Bell's Illust.* ib.; *Shaw's Digest*, p. 325, § 18. See *Joint-stock Companies*.

**Bull**; a brief or mandate by the Pope. By 13 Eliz. c. 2, the procuring, using, or publishing bulls is declared to be high treason; and by 7 Anne, c. 21, §§ 1-3, the English treason laws are extended to Scotland. *Ross's Lect.* ii. 102.

**Bullion**; uncoined silver or gold. See *Regulations of the Scots Parliament as to Bullion*. *Skene, h. t.*

**Burdens**. In a general acceptance the word burden may signify any restriction, limitation, or encumbrance affecting either person or property. In the present article, however, the term is to be considered as applicable solely to burdens in money, imposed either on the receiver of a right or on the subject of the right itself, in the deed by which the right is constituted. Burdens in this sense are said to be either *personal* or *real*. Where the grantee is taken bound by acceptance of the right to pay a certain sum either to the grantor or to a third party; but where there is no clause charging the subject conveyed with the sum, the burden is said to be *personal*; that is, it will be binding upon the receiver and his representatives, but will constitute no real incumbrance on the lands, or other subject conveyed, nor amount, indeed, to anything more than a mere personal obligation on the grantee. But where the right is expressly granted under the burden of a specific sum which is declared a burden on the lands themselves, or where the right is declared null if the sum be not paid, and where the amount of the sum and the name of the creditor in it can be discovered from the records by having entered the instrument of sasine, the burden is said to be real. Where the burden amounts to nothing more than a mere personal obligation on the receiver of the right, there can be little difficulty either as to the mode of constituting or of exercising it. But there are several points in regard to the constitution and effect of *real* burdens which deserve attention. In order to create a real burden, it is necessary, 1st, To declare the debt imposed, or to be imposed, to be a burden on the lands themselves. Where the burden is laid upon the *dispones* merely, and not upon the lands, even although the conveyance should bear expressly to be granted and accepted under that condition; or, although the condition should be appointed to be engrossed in the infestments, the debt will form no real burden. But where

the right is declared void in case the sum be not paid, it is held to be a real burden. 2d, The next essential is, that the debt be properly expressed as a burden on the lands, in the *dispositive clause* of the conveyance. This clause is the criterion for determining the character of the burden, and it is only in case of ambiguity in the dispositive clause, that other clauses, or particular expressions in the deed, will be admitted to explain the nature of the burden. 3d, In order to render the burden effectual against the creditors of the donee, it must be expressed and incorporated in the *sasine*, so as to enter the record. A general reference in the *sasine* to the burdens as appearing in the disposition, or other conveyance, was at one time held sufficient; but a contrary rule has been established by more recent decisions. While the donee remains uninfest, however, the burden, if properly expressed as a real burden, will be effectual against him and his creditors as a qualification of the personal right. Lastly, As no indefinite and unknown encumbrance can be created on land, it is necessary that, both in the disposition and in the *sasine*, the burden should be specific in its amount, and in the name of the creditor, in order that creditors contracting with the donee may know the extent of the burden, and whether or not it has been paid or extinguished. A clause charging the lands disposed with the donor's debts in general terms was formerly held sufficient to constitute the debts real burdens; but the contrary is now settled, although it need hardly be added, that such a clause lays the donee, who accepts the right so qualified, under a personal obligation to pay the donor's debts.

The terms in which a real burden may be imposed are various. Thus, the donor may expressly burden the lands conveyed with a sum payable to himself,—or he may create a burden in favour of a third party,—or he may reserve either to himself, or delegate to a third party, a power or faculty, as it is termed, to impose a real burden on the lands. (See *Faculty to burden*.) And with regard to reserved burdens generally, it may be observed that the real security which they afford depends on the donee's *sasine*. A distinction has been sometimes made between burdens reserved in favour of the donor, and those created by him in favour of a third party; and it has been said, that, in the former case, the donor's original infestment constitutes the security. But there seems to be no good ground for such a distinction. The right under the burden is not a right of property, but in security merely, depending for its existence on the existence of the debt. A general service has been held a sufficient

title in the heir of the donor to discharge such a burden; (Cuthbertson, 7th March 1806, *Fac. Coll., Mor. App. title Service and Confirmation*, No. 2); and the principle on which the security depends, applies equally to the case where the burden is reserved in favour of the donor and to that in which a third party is made the creditor. In neither case is it necessary to complete the transference of the real security, as in the case of an heritable bond by *sasine*. It seems also now to be understood in practice, that a simple assignation intimated to the holder of the burdened infestment is a proper transference of the burden to the assignee; and although such assignations are frequently recorded in the register of *sasines* and reversions, there does not appear to be any ground for preferring an assignation so recorded to a first assignation duly intimated, although not recorded. Whether the burden be reserved in favour of the donor, or of a third party, a general service transmits the burden to the heir of the creditor.

The creditor in a real burden may make his right effectual, 1st, By pointing of the ground (see *Pointing of the Ground*). 2d, By adjudication, without which the creditor has no means of entering into possession, and no title to pursue an action of *maills* and duties. *Stair*, B. ii. tit. 10, § 1. Although the burdened land have been sold to another, and although the purchaser be not personally liable for the debt, yet the creditor may adjudge the lands to the extent of the burden. With regard to the ranking of debts secured by real burdens, the rules are, 1st, That if the burden is properly laid on the lands, the creditor in it is preferable to the creditors of the donee, whether the donee be infest or not. 2d, Where the creditor in the burden is a third party, he is preferable to all posterior debts of the donor, from the date of the infestment in the donee's favour; and this although the donor may have given heritable securities to the posterior creditors; because no debt posterior to the disposition and infestment can compete with a debt made real by them. 3d, In a competition between the creditors of the donor, who creates the real burden, the preference of the creditor in the burden will depend on the date of the donee's *sasine*, seeing that the donor is not fully divested, until the infestment of the donee. 4th, In a competition between the creditor in the real burden, and the creditors of the donee, the preference of the creditor in the burden will be complete, whether infestment has followed on the disposition or not; the burden being a qualification of the right, whether it remains personal, or is made real by infest-

ment. 5th, In questions of preference amongst one another, on a shortcoming of funds, the creditors in real burdens will be preferable according to the date of the diligences which they have used to make the burdens effectual. The proper diligence to afford a title in such competition seems to be adjudication; and those burdens upon which adjudication has been used will be preferred to those which have not been adjudged for; *Creditors of Ross*, 30th June, 1714, *Mor.* p. 10243.

The creditor in a real burden may validly transfer it by assignation intimated to the debtor; and such an assignation of the personal claim of debt will carry with it the real burden as an accessory. In one case, the Court held that "the real burden or security not being followed by infestment, nor capable of it, could be validly transferred by disposition and assignation duly intimated and recorded in the register of sasines." But although the recording of the assignation in the register of sasines is mentioned in that particular case, it does not appear to have been held essential; and certainly this is not a deed which the act 1617, c. 16, requires to be recorded in the register of sasines; *Miller v. Brown*, 7th March 1820, *Ross's L. C.* vol. iii., p. 29. The proper diligence for attaching the right of the creditor in the real burden seems to be adjudication. And when the burden is paid off, the proper evidence of its extinction is a discharge and renunciation by the creditor in the burden, recorded in the register of sasines, &c. Personal burdens, which resolve into mere personal obligations on the donee, may be validly conveyed by an intimated assignation, and the creditor's right in them may be attached by arrestment. See on the subject of this article, *Stair*, B. ii. tit. 3, § 54, *et seq.* and tit. 10, § 1; *Ersk.* B. ii. tit. 3, § 49, *et seq.*; *Bank.* vol. i. p. 579; *Bell's Com.* i. 685, *et seq.*; *Bell's Princ.* § 892, 915, 1767, 3d edit.; *Shaw's Digest*; *Bell on Purchaser's Title*, p. 93, *et seq.* 2d edit.; *Jurid. Styles*; *Kames' Princ. of Equity* (1825), 281; *Ross's Lect.* ii. 353, 495; *Duff on Deeds*; *Mencies on Conveyancing*.

By the act 10 and 11 Vict., cap. 48, real burdens need not be inserted in full in conveyances if they have already been set forth at full length in a recorded instrument of sasine or resignation *ad remanentiam*, in which case they may be referred to in the terms, or as nearly as may be in the terms, set forth in Schedule C annexed to the act. A similar provision is made in regard to lands held in burgage tenure, by the act 10 and 11 Vict., cap. 49.

**Burdens, Public.** See *Public Burdens*.

**Burdenseck**; is the name given to the provision of our ancient law, by which it is said that a man was not punishable for the theft

of as much meat as he could carry on his back; provided the theft was committed to satisfy the cravings of hunger. There is some difference amongst authorities both as to the justice of this rule and the extent of its application; and it is not now recognised in the law of Scotland. *Hume*, vol. i. p. 55; *Kames' Stat. Law*, h. t.

**Burgage-Holding**; is that tenure by which the property in royal burghs is held under the Crown. It is originally constituted by a charter from the Crown in favour of the burgh; the effect of which is to make every proprietor of property situated within the burgh hold that property directly under the Crown as superior, for the *reddendo* (now merely nominal), of watching and warding; or, as it is commonly termed, "service of burgh, used and wont." The title of a donee to burgage property formerly proceeded on a resignation made by delivery of staff and baton (see Act of Sederunt, 11th February 1708), in the hands of the magistrates, in virtue of a procuratory granted by the vassal last infest, and followed by an immediate infestment given by the magistrates in favour of the donee, without the intervention of any precept or charter by progress. By the statute 10 and 11 Vict., cap. 49 (1847), it is now no longer necessary towards obtaining infestment in lands held in burgage upon a disposition or other deed of conveyance, or upon a decree of adjudication or decree of sale, that the party in right of the conveyance or decree, or his procurator should appear before the provost or one of the bailies of the burgh, in which the lands are situated, and resign into his hands, or into the hands of the Crown, and for the provost or bailie to give sasine to such party or his procurator. Neither is it necessary for the party or his procurator to proceed to the ground of the lands, or to the council-chamber of the burgh, or to use any symbol of resignation or sasine; it being now competent to resign and obtain infestment in the lands by presenting to the town-clerk of the burgh, being a notary public, the deed of conveyance or decree of adjudication, or of sale and other necessary warrants; and by the town-clerk giving sasine therein by subscribing and recording an instrument, expressed in the form given in the statute, or as nearly as may be in that form. Instruments of resignation or sasine expressed in such form may be recorded in the burgh register at any time during the life of the party in whose favour the instrument was expedite; and the date of presentment and entry set forth in the instrument is taken to be the date of the instrument; and in case of any error or defect in the instrument, it is competent to make, and

record of new, another instrument, as if no previous one had been made or recorded. The title of an heir in burgage subjects is completed sometimes by a precept of *clare constat* and infeftment, but much more frequently by a single act, called a cognition and sasine; the magistrate appearing on the ground, and taking a proof of the heir's propinquity, and afterwards giving him infeftment as heir, under the usual *salvo jure cujuslibet*. The service and entry of heirs *more burgii*, in burghs, in tenements holden in burgage, is not altered by the act 10 and 11 Vict., cap. 49 (1849). An adjudging creditor is infeft at once in burgage property on producing his decree of adjudication. When the title is merely personal (*i.e.*, an unexecuted procuratory of resignation), the disponee, heir, or adjudger, obtains right to it in the ordinary form used in similar cases, and infeftment is then given to him in the manner above explained. As these infeftments are of the nature of charters, and are the only evidence of the interposition of the superior, it is properly the duty of the town-clerk to expedite them; and this is enjoined by the act 1567, c. 27. And by 1661, c. 11, these sasines are ordained to be recorded within sixty days of their dates, in a particular register kept by the town-clerk for the burgh. The proper vassal in burgageholding being the whole community, which, in a legal sense, never dies, the casualties of non-entry, relief, &c., are not known in this holding. There is no widow's terce due from burgage subjects. The nature of the holding also properly excludes subinfeudations, although a base infeftment in an annual rent out of burgage property, given by a bailie of the burgh, as bailie in that part, and the town-clerk, as a common notary, has been held effectual; *Bennet*, 5th July 1711, *Mor.* p. 6895. The Crown, in granting the charter of the burgh, cannot prejudice the rights of other superiors, so that it sometimes happens that property situated within the limits of the burgh is not held by this tenure; nor does property acquired by the burgh, subsequently to the date of the charter, fall under this holding, except by a new erection. *Stair*, B. ii. tit. 3, § 38; *Ersk.* B. ii. tit. 3, § 38, *et seq.*; *Bank.* vol. i. p. 561; *Bell's Com.* vol. i. p. 680, 750, 5th edit.; *Bell's Princ.* 4th edit. § 685, 838; *Bell on Leases*, vol. i. p. 32, 4th edit.; *Hunter's Landlord and Tenant*, pp. 479, 480; *Brown's Synop.* pp. 373, 1039, 2363; *Shaw's Digest*, pp. 96, 591; *Sandford on Heritable Succession*, vol. ii. p. 110; *Bell on Purchaser's Title*, p. 131, *et seq.* 2d edit.; *Jurid. Styles*, 3d edit. vol. i. p. 553, *et seq.*; vol. iii. p. 906; *Ross's Lect.* ii. 504, 550.

**Burgess**; is a member of the corporation of a burgh, admitted either by the charter of erection, or by birth, as being the son of a burges, or by serving an apprenticeship to a burges, or by marrying the daughter of a burges, or by election by the magistrates of the burgh. The oath taken by a burges on admission is to the following effect: "I confess and allow, with my heart, the true religion presently professed within this realm, &c. I shall be leal and true to our sovereign lord (or lady) the King's (or Queen's) Majesty, and to the provost and bailies of the burgh; I shall obey the officers thereof, fortify, maintain, and defend them in the execution of their offices with my body and goods; and I shall not colour unfreemen's goods under colour of my own: In all taxations, watchings, and wardings to be laid on the burgh, I shall willingly bear my part thereof, as I am commanded by the magistrates: I shall not purchase nor use exemptions to be free thereof, renouncing the benefit of the same for ever: I shall do nothing hurtful to the liberties and commonweal of the burgh: I shall give the best counsel I can, and conceal the counsel shown to me: I shall not consent to dispoise the common goods of the burgh, but for a common cause and a common profit: I shall make concord where discord is, to the utmost of my power: In all lineations and neighbourhoods I shall give my leal and true judgment, bot prayer or reward." On making this oath, and paying the dues of admission, the burges receives an extract of the act of his admission under the hand of the town-clerk. The heir of a burges has a right to heirship moveables. *Ersk.* B. iii. tit. 8, § 17; B. i. tit. 4, § 20, *et seq.*, notes by Mr Ivory; *Bank.* vol. i. p. 56; *Shaw's Digest*, pp. 99, 617; *Ross's Lect.* ii. 550.

**Burgh Acres**; are acres, or small patches of land, lying in the neighbourhood of royal burghs; usually feued out to, and occupied by, burgeses, or persons resident within the burgh. The statute 1695, c. 23, concerning runridge lands, excepts burgh and incorporate acres from the provisions of the act. It has been held that this exception relates only to the case of royal burghs, and not to burghs of barony or others; *Douglas*, 22d Jan. 1777, *Brown's Sup.* v. 581; *Bell's Princ.* § 1099. See *Runridge*.

**Burgh, Royal**. A royal burgh is a corporate body erected by a charter from the Crown. The corporation consists of the magistrates and burgeses of the territory erected into the burgh. The magistrates are generally a provost and bailies, dean of guild treasurer, and common council. By stat. 1663, c. 6, the provost and bailies of royal

burghs have power to value and sell ruinous houses when the proprietors refuse to rebuild or repair them; and many enactments are to be found in the acts of the Scotch Parliaments, regulating the trade in royal burghs, and defining the privileges of the magistrates and burgesses; see *Kames' Stat. Law abridged, art. Burgh Royal*. The criminal jurisdiction of magistrates of royal burghs is now very much limited. They may judge in petty riots; and Edinburgh, Stirling, Perth, and some other royal burghs, have, by their grants, a cumulative jurisdiction along with the sheriff in blood-wits. The eldest magistrate of every royal burgh has, since the Union, been named in all the commissions of the peace. The magistrates have right, with consent of the majority of the burgesses, to impose certain small taxations or duties on the inhabitants, for the use of the burgh; and they have also the power of proportioning some of the taxes imposed by Parliament; *Ersk. B. i. tit. 4, § 22, Mr Ivory's edit., note 104*. A convention, composed of commissioners from each of the royal burghs, meets annually at Edinburgh, with power to make regulations for promoting the trade and commonweal of the burghs, and to inquire how their annual revenues have been applied. But the care of the revenues of royal burghs belongs properly to the Crown; and neither the convention, nor any private burgess, or number of burgesses, have any title to call the magistrates to account for their administration of the revenue of the burgh, or even, it would seem, to complain against special acts of mismanagement or peculation; *Ersk. ib. § 23, Ivory's edit., note 105*. There are sixty-six royal burghs in Scotland; and, by 2 and 3 Will. IV., c. 65, it is provided that twenty-three of the fifty-three representatives of Scotland in Parliament shall be returned by the royal burghs. For the provisions regulating these parliamentary elections, see *Reform Act*.

The right of appointing their successors formerly belonged to the old councils, in terms of the statute 1469, c. 5, by which it was also directed, that when the new council was chosen, the members of it, along with those of the old council, should choose all the office-bearers of the town, as aldermen, bailies, dean of guild, &c.; and that each craft should choose a person of the same craft to have a voice in the said election of office-bearers. This simple and uniform plan of election was not universally adopted; and from local influences, the setts of the burghs exhibited an almost endless variety in their details; agreeing, however, with scarcely an exception, in the principle of self-election. This diversity has now been put an end to, and the "close

system," as it has been called, abolished by 3 and 4 Will. IV., c. 76, by which the election of councillors is rendered popular, and given to male residents in the burgh or its vicinity, possessing certain qualifications mentioned in the act. The particular provisions of this act are the following: Every one is entitled to vote in the election of councillors who has resided for six calendar months next previous to the last day of June, within the royalty, or within seven miles of it, and who is, by 2 and 3 Will. IV., c. 65, qualified, in respect of the property or occupancy of premises within the burgh, to vote in the election of the member of Parliament. In such burghs as do not now send members to Parliament, property of the same value is required for the qualification, and claims for this privilege must be lodged with the town-clerk on or before the 21st July in a particular form given in schedule (A) appended to the act, which claims, and the objections to them, are disposed of in accordance with various regulations laid down in the act. The councillors are chosen from among the electors residing, or personally carrying on business within the royalty; and where there is a body of burgesses in the burgh, each councillor, before his induction, must be entered a burgess; but it is at present in contemplation to do away with this requisite. The number of councillors in each burgh is such as, by the sett existing at the passing of the act, constituted the common council, or, where this was variable, the smallest number constituting a full council. The electors of Edinburgh, Glasgow, Aberdeen, Dundee, Perth, Dunfermline, Dumfries, and Inverness, are divided into wards or districts. At the election (1833) immediately succeeding the passing of the act, each ward elected six councillors; but as every year the third part of the council goes out of office, in the order prescribed by the act, two councillors are now annually chosen by each ward, there being no bar, however, to the re-election of an outgoing councillor. The electors in burghs not contained in schedule (C) choose the whole council exactly as these wards do their proportion of it, and consequently elect each year a third part in place of that which has retired. Upon the third lawful day after the election succeeding the passing of the act, the councillors met and chose, by a plurality of voices, a provost, bailies, treasurer, and other office-bearers, as existing in the council by the sett or usage of the burgh; and vacancies occurring among such office-bearers, in consequence of the annual retirement of the third part of the council, are directed to be supplied from the councillors in like manner, as soon as the election of the new third

has taken place, the first attending magistrate having a casting vote in cases of equality. Vacancies taking place during the year by death or resignation are supplied, *ad interim*, by the remaining members of the council, and the persons so elected by the councillors retire at the succeeding election. The rights of the guildry, trades, &c., to elect their own dean of guild, &c., are still preserved; but they are now no longer recognised as official or constituent members of the council, their functions being performed by a member of the council, elected by the majority of the councillors. In Aberdeen, Dundee, and Perth, however, the dean of guild, and in Edinburgh and Glasgow, the convener of trades and the dean of guild, are *ex officio* members of council; and the electors in all the above-named burghs choose such a number of councillors as, together with the officers, makes up the proper number above specified. No magistrate or councillor can be town-clerk. The magistrates and council possess the same powers of administration and jurisdiction as was enjoyed by the magistrates and town-council before the passing of the act; and none of them is responsible for the debts of the burgh, or the acts of his predecessors, otherwise than as a citizen or burghess. The existing council in all burghs royal must every year make up, on or before the 15th of October, a state of their affairs, to be kept in the town-clerk's or treasurer's office.

In schedule (F) appended to the act, nine of the ancient royal burghs are enumerated, which, on account of the smallness of their population, are excepted from all the provisions of this act; and in which the election is conducted just as it was before the act was passed. These excepted burghs are Dornoch, New Galloway, Culross, Lochmaben, Bervie, Wester Anstruther, Kilrenny, Kinghorn, and Kintore. The election of magistrates and councillors for burghs which return or contribute to return members of Parliament, and are not royal burghs, is regulated by the act 3 and 4 Will. IV., c. 77 (1833), and 4 and 5 Will. IV., c. 86 (1834). The act 16 and 17 Vict., c. 26 (1853), provides for the supplying of vacancies in town-councils of burghs, consequent on null and irregular elections. The police of towns and populous places, and the paving, draining, cleaning, lighting, and improving the same, is regulated by 13 and 14 Vict., c. 33 (1850); and the act 16 and 17 Vict., c. 93 (1853), enables burghs to maintain and improve their harbours. The exclusive privilege of trading in burghs is abolished by the act 9 and 10 Vict., c. 17 (1846). On the subject of burgh royal generally, consult the following authorities:—*Stair*, B. iv. tit. 47. § 19; *Mr More's*

*Notes*, p. clxxi.; *Bank*. vol. ii. pp. 562, 577; *Bell's Princ.* § 2173, *et seq.* 4th edit.; *Swint. Abridg.* h. t.; *Kames' Stat. Law Abridg.* h. t.; *Hunter's Landlord and Tenant*; *Brown's Synop.* h. t.; and pp. 366, 392, 1104, 1154, 2360, 2665; *Shaw's Digest*, h. t.; *Watson's Stat. Law*, h. t.; *Jurid. Styles*; *Ross's Lect.* i. 90, 390, *et seq.*

#### Burgh of Barony and Burgh of Regality.

A burgh of barony, or a burgh of regality, is a corporation analogous to a royal burgh, consisting of the inhabitants of a determinate track of ground within the barony erected by the King, and subjected to the government of the magistrates. The right of electing magistrates is vested by the charter of erection sometimes in the baron or the lord of regality, the superior of the barony, and sometimes in the inhabitants themselves; and whatever jurisdiction belongs to the magistrates, the superior's jurisdiction is cumulative with it. The same rule holds in burghs of regality, both in regard to the manner of incorporating them, and as to the superior's cumulative jurisdiction. See *Ersk.*, B. i. tit. 4, § 30, *Mr Ivory's edit.* note 108.

**Burglary**; is an English law term, signifying the breaking and entering the *dwelling-house* of another in the *night-time* with the intention to commit theft or any other felony, whether the felony be completed or not. See *Tomlins' Law Dict.*; *Wharton's Lex.*; *Russell on Crimes*; *Hume*, i. 102. See *Housebreaking. Theft. Stouthrief.*

**Burlaw, Byrlaw.** Burlaw laws are made and determined by consent of neighbours, chosen by common consent in the byrlaw courts. Hence byrlaw-men or birley-men, a species of rustic judges for determining disputes in their neighbourhood. This seems to have been a very ancient institution. *Skene*, h. t.

**Bursary**; is the name given to an endowment or exhibition in a Scotch university, for the support of a student. *Ersk.* B. i. tit. 5, § 12; *Jurid. Styles*, 2d edit. vol. ii. pp. 290, 482.

**Burying-Place.** The right to a burying-place in a parish churchyard, is a right of a peculiar description, which, in the ordinary case, is attached as part and pertinent of the lands of the several heritors in the parish. But there is no proper right in the *solus* of the churchyard, vested in the heritor using it as a family burying-place, entitling him to exclude the management and control of the whole heritors of the parish, to whom the entire churchyard belongs, in the same sense in which the area of the parish-church belongs to them. This general rule, however, even in rural parishes, is liable to exceptions; and in burghs the same sort of property in a



burying-place, which is admitted as to church-seats, seems to be recognised; although the extent of the right of alienation does not appear to be distinctly ascertained. In Edinburgh, the right to special burying-places in the churchyards is recognised, and the right transferred by conveyances, which are recorded in the town-council or kirk-session records; and there can be no doubt, that where the magistrates of a town have acquired a piece of ground, whether adjacent to the churchyard or elsewhere, and have inclosed and laid it out as a burying-ground, the feu of a special allotment in this inclosure may be acquired, inherited, or transferred, as a burial-place, according to the ordinary rules of law, and always consistently with this special use of the subject. *Ersk. B. i. tit. 5, § 13; B. ii. tit. 2, § 8; Bell's Princ. 4th edit. § 836; Hutch. Justice of Peace, vol. ii. p. 375, 2d edit.; Dunlop's Parish Law, 26, 58, et seq.; and authorities there cited. See Churchyard.*

**Butchers.** By the present practice butchers are not summoned to act as jurymen in criminal trials; *Hume, vol. ii. p. 314.* By the act 1703, c. 7, butchers are prohibited from possessing, on lease or otherwise, either directly or indirectly, more than one acre for the purpose of grazing cattle, &c. The object of this act seems to have been to prevent monopolies; but there is no evidence of its ever having been enforced. *Bell on Leases, vol. i. p. 144, 4th edit.; Hunter's Landlord and Tenant, 179; Brown's Synop. h. t.; Shaw's Digest, h. t.*

**Buying of Pleas.** By the act 1594, c.

216, it is enacted, that it shall not be lawful for members of the College of Justice, or for any inferior judges, their deputies, clerks, or "advocates," directly or indirectly, by themselves, or others, for their behoof, to buy any lands, teinds, rowms or possessions, extended by judicial construction to all debateable rights, whether heritable or moveable, which are or have been in dependence and remain undecided. The penalty is loss of office, place, and privilege. The object appears to have been to prevent parties connected with the court from purchasing depending suits, and using their influence in the court in promoting their success: and hence it seems to be held that the purchaser of the plea must be a practitioner in the court before which it depends, otherwise he will not be affected by the statute. Although the act does not mention procurators before inferior courts, Mackenzie holds that the word "advocates" before these courts extends to procurators. *Mackenzie's Observ. on Stat. p. 289; Stair, B. i. tit. 10, § 8, and tit. 14, § 2, and tit. 17, § 14; Kames' Equity, 335, 8th edit.; Menzies' Conveyancing, p. 51. See Pactum de quota litis.*

**Bye-Laws.** Every corporation lawfully erected has power to make bye-laws or private statutes for the government of the corporation, which are binding on themselves, unless contrary to the laws of the land, or to the terms of their charter. In burghs, the town-council is now the only authority for making bye-laws. 5 and 6 Will. IV., c. 76, § 90; *Brown's Syn. p. 404; Wharton's Lex. h. t.*

## C

**Cadrow;** erroneously printed in the act 1434, c. 41, for *Cadzow* or *Hamilton*. *Skene, h. t.*

**Calendar.** The statute altering the calendar, and introducing what was called the *new style*, is 24 Geo. II., c. 23, which enacted, that from and after 31st December 1751, 1st January, and not 25th March, shall be reckoned the first day of the year; as also, that the day after 2d September 1752 should be reckoned 14th September. The statute provides for all the other changes connected with the alteration in the calendar. A calendar month consists of thirty or thirty-one days, except February, which has twenty-eight, and in leap-years twenty-nine days. See *Swint. Abridg. h. t.; Wharton's Lex. h. t.*

**Call, Ecclesiastical.** After a clergyman has received a presentation to a living, and

has preached his trial sermons, a day is fixed, within six weeks, for moderating in his call; notice being given from the pulpit at least ten free days before the day appointed, and not later than the second Sabbath after the meeting of presbytery. On that day, after sermon, the people are informed of the presentation which has been lodged, and are invited to subscribe a written call to the presentee to be their minister. The admission of ministers to benefices is now regulated by the act 6 and 7 Vict., c. 61 (1843). Upon a presentation to a benefice being laid before the presbytery of the bounds, they appoint the presentee to preach in the parish church, and thereafter they meet, and, after due notice, receive such reasons or objections against the presentation which do not infer matter of charge against him requiring to

be prosecuted according to the forms and discipline of the Church. The Reasons and Objections so received are determined judicially by the presbytery, or are referred by them to the superior judicatory of the Church for decision as they may see cause. In either case the presentee and all parties having interest are heard on the objections and reasons; and in cognoscing and determining on the same judicially, the presbytery or other judicatory must have regard only to such objections and reasons as are personal to the presentee in regard to his ministerial gifts and qualities, either in general or with respect to the particular parish to which he has been presented. They are entitled, however, to have regard to the whole circumstances and conditions of the parish, to the spiritual welfare and edification of the people, and to the character and number of the persons by whom the objections and reasons have been preferred. If the presbyters or other judicatory shall decide that the objections or reasons, or any of them, are well founded, and that, in respect thereof, the presentee is not a qualified and suitable person for the functions of the ministry in that particular parish, and ought not to be settled in the same, they pronounce a deliverance to that effect,—setting forth and specifying in the deliverance the special ground or grounds on which it is founded, and in respect of which they find the presentee not qualified for the charge. In this event the presbytery must intimate the deliverance to the patron, who is then entitled to issue another presentation within *six* months after the date of such deliverance, if no appeal is taken to a superior judicatory of the Church; but if such appeal is taken, then within *six* months after the date of the judgment of the superior judicatory, affirming the deliverance of the inferior judicatory, and dismissing the appeal. If the reasons or objections are not sustained by the presbytery, they proceed to the trial of the presentee, and admit him, if found qualified for the ministry of that parish. A presentee cannot be rejected upon the ground of any mere dissent or dislike expressed by any part of the congregation of the parish to which he is presented, and which dissent or dislike is not founded upon objections or reasons to be fully cognosced, judged of, and determined judicially by the presbytery or other judicatory of the Church. It is in the power of the presentee, patron, or objectors to appeal from any deliverance of a presbytery to the superior judicatories of the Church.

**Calling of a Summons.** After a summons has been executed, and the diet of appearance has arrived, the first step taken by the pursuer in order to bring the case into Court is

to call the summons. In the Court of Session this was formerly done by the clerks of Court reading over the names of the pursuer and defender from a *partibus* written on the margin of the summons. This duty was performed every Thursday and Saturday morning during the sitting of the Court, and on each of the nine last sederunt-days of the summer and winter sessions; and appearance was made for the defender, by the clerk of the counsel who was to act for him appearing at this *calling*, and stating the names of the defender's counsel and agent, which were marked upon the margin of the summons by the clerk of Court. The summons thus marked was then given by the pursuer's agent to the agent for the defender to prepare defences. At the expiration of six days it was necessary to return it, and the cause was then enrolled in the *Ordinary Action Roll*, and debated and disposed of according to the former practice. If no appearance was made for the defender at these callings, the cause was enrolled in the *Regulation Roll*; and if, when it came to be called before the Lord Ordinary in the course of that roll, the defender still failed to appear, decree in absence was pronounced.

By Act of Sederunt, 11th March, 1820, these callings before the Clerks of Court were abolished, and calling lists substituted, containing the names of the pursuer and defender, and of the pursuer's counsel and agent, as in the *partibus*; which lists were thereby appointed to remain exhibited on the walls of the Outer-House during the forenoon of the calling days, so as to admit of the defender's agent entering appearance for him at the clerk's office in the course of the evening. In addition to being thus exhibited on the walls, these lists are now printed for circulation among practitioners, so that full intimation is given to all concerned. When appearance is entered for a defender, it is done by his agent going to the Clerk's office in the evening of the calling day, or of the day following, and getting the name of the defender's counsel and agent marked on the *partibus*, and borrowing the summons and productions, in order to prepare defences. The calling day in time of session is Thursday, except during the last nine days of the winter session, and the last seven days of the summer session, when a calling list is daily exhibited; and if appearance be not entered for the defender, the summons is returned to the pursuer's agent, with a marking that the defender is absent; upon which the summons may be enrolled in the roll of undefended causes; and decree in absence will ensue. No defences can be received after this, except of consent, or by reclaiming note

to the Inner-House after decree in absence has been pronounced (See *Regulation Roll. Decree. Reopening.*) If appearance be entered, the defender (except in summonses of *cessio*) is allowed thirteen days to prepare his defences, counting from the calling day; and if these thirteen days expire during vacation or recess, the defences are not required until the box-day. There are many minute regulations about the *partibus*, and the productions to be made with the summonses; the fee-funding, without which it cannot be called; the printing of the Summonses in certain cases, and the like, as to which, see for the older practice, *Ivory's Form of Process*, i. 425, *et seq.*, and *A. S. 11th March 1820*; and for the present practice, 50 *Geo. III.*, c. 112, § 20; *A. S. 11th July 1828*, §§ 23, 24, 25, 26, 27, 29, 31, 32; *A. S. 8th July 1831*; 1 and 2 *Vict.*, c. 118; 13 and 14 *Vict.*, c. 36; *Shand's Prac.* 264, *et seq.*

In the inferior courts the calling was formerly made by the clerk reading the *partibus* in court, and marking appearance for the defender, where appearance was entered; failing which decree in absence was then pronounced. This procedure is now superseded by 16 and 17 *Vict.*, c. 80, which enacts in § 3, that where a defender in the Sheriff-court intends to state a defence, he must enter appearance by lodging with the sheriff-clerk, at latest on the day of compareance, a notice in the form printed in a schedule. On the first court-day thereafter, or on any other court-day to which the diet may be adjourned, not being later than eight days thereafter, the sheriff must hear the parties; and for this purpose the pursuer's procurator must enrol the cause for the first court-day after the day of compareance. Where no appearance has been entered, the Sheriff may, at any court held after the day of compareance, give decree in terms of the summonses, which decree is declared (§ 2) to be in all respects equivalent to a decree in absence obtained under the previously existing forms. See *Stair*, B. iv., tit. 2, § 2; tit. 38, § 2; *Hume*, ii. 263; *Jurid. Styles*, iii. 973; *M'Glashan's Sher. Court Prac.* 194. See also *Partibus. Protestation.*

A summons may be thus called on the day of compareance; and where the last day of the legal *inductæ* of any summons, suspension, or advocacion, is not a sederunt day, the day of compareance was fixed, by *A. S. 8th July 1831*, § 3, to be the first sederunt-day thereafter. Now, in terms of 2 and 3 *Vict.*, c. 36, and relative Act of Sederunt, 8th August 1839, summonses may be called at either of the box-days in the autumn vacation, the defences being returned at the second box-day, or on the meeting of the Court in No-

vember respectively; and the act 13 and 14 *Vict.*, c. 36, § 54, authorizes the Court to make regulations for allowing summonses and notes of suspension, advocacion, &c., to be called at any box-day in vacation or recess, and making defences returnable at such box-days, or on the meeting of the Lords Ordinary, or of the Court, after vacation or recess. (See *Box-day.*) In the case of a summons, the instance falls unless it is executed within year and day of its signeting, and called within year and day of the day of compareance; *A. S. 8th July 1831*. If by mistake a summons has been prematurely called, the proceedings which have followed such erroneous calling may be held *pro non scriptis*, and the summons may be called of new at the proper time. The calling being held as a judicial step, a summons once called, though not enrolled, if not taken out of court by protestation, may be awakened at any time within forty years; and it would also appear that the calling renders the subject in dispute litigious in those actions in which a mere citation has not that effect. *Shand's Prac.*, p. 276, and authorities there cited; 2 *Bell's Com.* 153. See *Litigiosity. Citation. Diet.*

#### Calling of a Suspension or Advocacion.

Previous to the statute of 1838, the calling of letters of, suspension or advocacion was in all respects analogous to the calling of a summons. But in suspensions, where the charger had made appearance in the Bill-Chamber, or where intimation of the bill or sist had been made to him by a notary or messenger-at-arms, and a certificate or execution returned; and in all advocacions where the respondent had made appearance in the Bill-Chamber, or where intimation of the presenting or passing of the bill had been made to the respondent or his agent in the inferior court, the suspender or advocator was entitled, at the expiry of ten days after the passing of the bill, to call and insist in the letters of advocacion or suspension without executing them; the charger or respondent being entitled, at the end of six days after the lapse of the period allowed for expediting the letters, to put up protestation in order to force on the discussion of the expedite letters, whether executed or not. All letters of suspension or advocacion not executed, or, where execution was unnecessary, not called, within year and day of the date of signeting, or though duly executed within that period, if not called within year and day of the day of compareance, fell asleep; but the instance did not fall as in the case of a summons; and it was competent, without a waking, to revive the proceedings in a bill of advocacion or suspension which had lain over, by a written note to the Lord Ordinary

on the Bills, duly intimated fifteen days at least before presenting such note. See *A. S. 8th July 1831; Stair, B. iv., tit. 52, 35, et seq.; Jurid. Styles*, 2d edit., vol. iii. pp. 980-4.

Since 31st December 1838, the calling of advocations and suspensions has been regulated by the act 1 and 2 Vict., c. 86, and relative Act of Sederunt, 24th Dec. 1838, superseding the use of bills and letters of suspension or avocation, and substituting a short note, presented, except in the case of advocations of final judgments, in the Bill-Chamber. The note of avocation of a final judgment must be lodged with one of the depute-clerks of the Court of Session, or his assistant. The lodging of the note must then be intimated to the opposite party by delivering a copy to him or his known agent; and within fifteen days after the date of the intimation it is competent to call, and thereafter to enrol, the cause in the weekly printed roll, when it proceeds in the same manner as expedite letters of avocation did formerly (§ 1). In advocations of interlocutory judgments the written note, which must in this case have articulate reasons of avocation annexed, is lodged in the Bill-Chamber, and forthwith laid before the Lord Ordinary on the Bills. If he pass it, the cause may, after the expiry of fifteen days from the passing, be called, and thereafter enrolled (§ 3). A decree *in foro* of an inferior court, and any diligence thereon, is now suspended by lodging in the Bill-Chamber a written note of suspension, the presentment of which being certified, operates as an interim sist of diligence. On the requisite caution being found, the note is forthwith passed. The note and interlocutor passing it must be served on the opposite party by a messenger; and after the expiry of fifteen days from the date of service it is competent to call, and thereafter to enrol, the cause (§ 4). In suspensions without caution, or on juratory caution, and of decrees of removing, an articulate statement of facts must be annexed to the note; and if the note is passed, the same procedure takes place as is provided in advocations of interlocutory judgments (§ 4). A decree in absence of the Court of Session is suspended by lodging in the Bill-Chamber a note, as above, which, upon consignation of the expenses decreed for, is passed. The note and interlocutor passing it must be served on the opposite party by a messenger; and fifteen days thereafter the cause may be called, and thereafter enrolled (§ 5). All suspensions and interdicts, and advocations or suspensions not specially provided for, are brought by lodging a note in the Bill-Chamber, as above, with an articulate statement of facts annexed. It is forthwith laid before

the Lord Ordinary, who pronounces upon it; and the note and order, or interlocutor upon it, must be served upon the opposite party by a messenger. If the note is passed, the same procedure takes place as in advocations of interlocutory judgment (§ 6). The respondent or charger, in all notes of avocation or suspension, may put up protestation after the expiry of fifteen days after the interlocutor passing the note shall have taken effect. *A. S. § 12. See Suspension. Avocation. Protestation. Wakening.*

**Calumny, Oath of.** The act 1429, c. 125, in order to prevent calumnious and unnecessary suits, ordains both parties, at the beginning of a cause, to swear, either by themselves or their counsel, that the facts set forth by them are true. This oath of calumny, as it is termed, was in practice never put, unless the adverse party required it; and, when made, it was held as an oath of credulity or opinion merely. The party putting it was not thereby understood to renounce all other probation; and the consequence of a party deponing against his allegations was to exclude him from insisting in them. A party was not bound to give oath upon each allegation separately, but only upon the whole generally and collectively. The practice of making counsel emit an oath of calumny became obsolete. The terms of the oath are prescribed in the Act of Sederunt, 13th Jan. 1692. Oaths of calumny have been little in use since the Act of Sederunt 1st Feb. 1715, by which it is provided (§ 6), that a party or his counsel may be called upon to confess or deny (but not on oath) any relevant matter of fact founded upon by him; and if he shall deny what shall afterwards be proved to have been known to him, he shall be found liable, without modification, to all the expenses to which his opponent shall have been put by such calumnious denial (see *Ersk. B. iv. tit. 2, § 16*); and such oaths have fallen still more into desuetude under the modern system of records and judicial examinations, and are now very rare in practice, at least in those cases in which a party may examine his opponent as a witness. See *Dickson on Evidence*, p. 776; and the case of *Paul v. Laings*, 7th March 1855, 17 D. 604, where there was a great deal of discussion, whether this oath (in causes not consistorial) still exists in the law of Scotland. An oath of calumny, however, in order to guard against collusion between spouses, is always put to the pursuer in actions of divorce, and of declarator of nullity of marriage on the ground of impotency. See opinions of the Court in the case of *Paul sup. cit.*; 11 *Geo. IV.*, and 1 *Will. IV.*, c. 69 § 36; *Dickson on Evidence*, p. 779. See also *Divorce*.

In the inferior courts the oath may be put, but only on consignment of a sum, not exceeding 40s. and not under 5s., to be fixed by the inferior judge, and, if he see cause, to be forfeited to the other party, in case the oath is passed from, or is negatived, over and above the party's travelling charges, and the expenses occasioned by the oath; *A. S. 12th Nov. 1825*; *A. S. 1839*, § 92. In the same Acts of Sederunt for regulating the inferior courts, there is an analogous provision, whereby the inferior judge is empowered, at any stage of the cause, to order the parties, or either of them (not on oath, however), to confess or deny such facts, or to answer such pertinent interrogations as the sheriff or commissioner shall put; and on failure, to be held as confessed, without prejudice to his being reponed on cause shown; *A. S. 12th Nov. 1825*; *A. S. 1839*, §§ 66, 67. See *Shand's Prac.* p. 385, 421, 433; *M'Glashan's Sher. Court Prac.* 326. A false oath of calumny will not subject the maker of it to a prosecution for the crime of perjury. *Stair*, B. iv. tit. 44, § 15, *et seq.*; *Mr Mor's Notes*, pp. cccxcv., ccccxvi.; *Ersk. Princ.* 12th edit. 481; *Brown's Synop.* pp. 63, 1924; *Shaw's Digest*; *Hume*, vol. i. p. 368.

**Campioness**; synonymous with *Champion*, and applied to the champion whom, in the days of single combat, a litigant brought to fight for him. *Skene, h. t.*

**Candidate**. In parliamentary election law, a candidate is a person offering himself, or put in nomination, for the suffrages of the electors. By the Scotch Reform Act, halls, rooms, booths, or other places hired, constructed or prepared for taking polls, are so, by contract with the candidates, or if they cannot agree, then at their joint expense; the expense at any one polling-place in a county not to exceed L.30, and in a burgh L.20. The candidates are farther bound to pay a guinea a-day to each poll clerk, and a fee not exceeding three guineas a-day to each polling sheriff. Where a poll has been demanded, the candidates are also bound to defray the necessary expense incurred by sheriffs, or sheriff-clerks, or town-clerks, in the transmission of precepts, intimations, poll-books, or other communications required by the act; the proposer to be liable, if the candidate has been proposed without his own consent; 2 and 3 *Will. IV.*, c. 65, § 40. On the requisition of any candidate, the booths, &c., at each polling-place may be divided (*Stat.* § 27); the candidate or elector requiring such division to pay the expenses therewith connected; 5 and 6 *Will. IV.*, c. 78. See *Reform Acts*. See also *Bribery Act*, 17 and 18 *Vict.*, c. 102.

**Candlemas-Day**. The feast of the purification (February 2).

**Cane**. See *Kain*.

**Canon-Law**. This law consists of the *decretum*, a collection made after the middle of the 12th century, drawn from the opinions of the Fathers and Popes, and from church councils, in imitation of the Roman Pandects,—of the *decretalia* collected from the Epistles of the Popes. *Stair*, B. i. tit. 14; *Ross's Lect.* i. 9.

**Canum, Canna**; used in old charters to signify the duty paid, chiefly in kirk-lands, in kind, as wheat, bear, oats, &c. *Skene, h. t.* See *Kain*.

**Capias**; in English law, a term applied to certain writs, from the occurrence of the word (*capias*) in the ancient Latin forms. *Capias ad respondendum*, is a judicial writ, by which all actions not relating to land or real property are commenced against any one not in custody whom it is intended to arrest or hold to bail. *Capias ad satisfaciendum*, usually called a *ca sa*, is a writ of execution to imprison the person of the defendant, after judgment has been pronounced against him, until he make satisfaction to his creditor. *Capias utlagatum*, is a writ against a person outlawed. *Tomlin's Dict. h. t.*; *Ross's Lect.* i. 244, *et seq.*

**Capita, succession per**; in contradistinction to *succession per stirpes*, is when each individual succeeds in his own right, and the right of representation is excluded. See *Succession Stirpes*.

**Capital Punishment**. The following recent statutes have been enacted, restricting the punishment of death:—4 and 5 *Will. IV.*, c. 67; 5 and 6 *Will. IV.*, c. 81; 7 *Will. IV.* and 1 *Vict.*, c. 84 and 91. By these acts capital punishment is abolished throughout the kingdom, in cases of returning from transportation, letter stealing, sacrilege, and forgery; and in England and Ireland in cases of riot, rescue of murderers, seduction of soldiers or sailors, the administering of unlawful oaths, breaking of prison, slave-trade, and smuggling. See these several articles.

**Capitis Diminutio**; in the Roman law, signifies a loss or change of *status*. It was of three kinds, answering to the three kinds of *status* which might be lost. *Minima* was a simple change in the individual's situation in reference to family, as from being *sui juris* to *alieni*, or from *alieni juris* to *sui*. *Media* was a loss of civil rights, while that of liberty was retained. *Maxima* was a loss of both civil rights and liberty.

**Captain or Master of a Ship**. See *Shipmaster*.

**Caption**. A caption is a warrant for the apprehension of the person of a debtor or obligant, on account of the non-payment of a debt, or the non-performance of an obligation. With the exception of the act of warding (see *Act of Warding*), which can be exe-

cuted within burgh only, the caption was, strictly speaking, till lately, the only civil warrant recognised in law for the above purpose. The fiction on which the apprehension under a caption proceeds is, that the debtor in the obligation having refused obedience to the Sovereign's letters, charging him to pay or perform, is imprisoned as a rebel. A caption is a writ which passes the signet, and which is prepared by a writer to the signet. It proceeds in the Sovereign's name, and is addressed, like all other signet letters, to messengers-at-arms, as sheriffs in that part, commanding them to charge sheriffs, magistrates, and messengers, within three days after the charge, to apprehend the person against whom the caption is directed, and to imprison him until he fulfil the charge in the letters of horning which he has disobeyed. In practice, however, the charge to sheriffs, &c., is never given, unless (which will seldom happen) they refuse to assist the messenger in the execution of his duty; and, by long-established custom, the messenger, on receiving possession of the caption, may, and does, apprehend and incarcerate the person against whom it is directed *de plano*, and without the necessity of adopting the form which its style apparently requires. In apprehending the debtor, the messenger is entitled, of course, when he may need it, to demand the assistance of the civil authorities; and, under the terms of the caption, he has unlimited power to open shut and lockfast places in search of the person of the debtor. A caption must proceed on proper evidence of the failure to pay or implement; and this evidence consists in the exhibition at the Bill-Chamber of letters of horning against the debtor, executed, denounced, and recorded (see *Horning, Denunciation*), along with a bill praying for letters of caption. The Bill-Chamber clerk, on being satisfied with the evidence produced to him, grants a deliverance on the bill, which is the warrant to the keeper of the signet to impress the signet on the caption.

The caption, though still competent, has been practically superseded by the forms contained in the Personal Diligence Act, 1 and 2 Vict., c. 114, which makes it competent to insert in extract decrees of the Court of Session, Justiciary, and of the Teind-Court, and also in decrees of registration, a warrant to charge the debtor or obligant to pay the debt, or perform the obligation, within the days of charge, under pain of poinding and imprisonment; and to arrest and poind, and for that purpose to open shut and lockfast places (§ 1). Within year and day after the charge has expired, the execution is recorded in the general register of hornings,

such registration being declared to have the same effect as denunciation in virtue of letters of horning, and recording of these letters along with the execution of charge and denunciation (§ 5). The keeper of the register thereupon gives a certificate of registration of the execution; and thereafter a warrant of imprisonment can be obtained by presenting in the Bill-Chamber, along with the extract, execution, and certificate, a minute (indorsed on the extract) in terms of the schedule subjoined to the act. This is signed by a writer to the signet, and craves warrant to apprehend and imprison, and, if necessary for the purpose of such apprehension, to open shut and lockfast places; and warrant also to magistrates and keepers of prisons to receive and detain the debtor or obligant. Upon the extract the Bill-Chamber clerk writes his *fat*, dating and subscribing it; and then such extract and deliverance can be used for the same purpose, and impose the same obligations upon magistrates and keepers of prisons, as if letters of caption had been issued under the signet (§ 6). The same act extends to sheriffs the power of imprisonment for civil debt; the sheriff-clerk, in the case of imprisonment following upon the decree of a sheriff, being, by § 11, empowered to issue warrant therefor in similar terms to that granted in the Bill-Chamber, which warrant is also declared to have the same effect as letters of caption issued under the signet. By § 33 of the Court of Exchequer Act, 19 and 20 Vict., c. 56, it is competent for the sheriff to cause extracts of decrees for debts due to the Crown, and execution of charge thereon, to be presented to the sheriff-clerk of the county where the charge was given, and the sheriff-clerk is to record the execution in the register of hornings, such registration being declared to have the same effect as the registration of any expired charge given in terms of 1 and 2 Vict., c. 114. The sheriff-clerk then indorses a certificate of registration; and it is thereafter competent for the sheriff to issue his warrant of imprisonment, which must be in terms of a schedule annexed to the act (§ 34). No minute is necessary, such as is required by the Personal Diligence Act. See, on the subject of this article, *Stair*, B. iv. tit. 47, § 13; *Mr More's Notes*, p. ccccxxx; *Ersk. B. iv. tit. 3, § 12, et seq.*; *Ersk. Princ.* 12th edit. 105, 496-7, 501; *Bell's Com.* vol. ii. pp. 51, 169, 543, 5th edit.; *Bell's Princ.* art. 2398; *Jurid. Styles*, 2d edit. vol. iii. pp. 573, 740, *et seq.*, 989; *Shaw's Digest. Ross's Lect.* i. 312, *et seq.*; *Menzies's Lect.* i. p. 288, *et seq.*; *Thom v. Black*, 10th Dec. 1828, 7 S. 158; 16 and 17 Vict., c. 79, § 3. See also *Apprehending of a Debtor. Booking of a Prisoner. Imprisonment. Horning.*

**Caption Process.** A process caption is a summary warrant of incarceration, granted on the application of the clerk of court, for the purpose of forcing back a process which has been unduly and contumaciously retained by the party whose receipt stands for it in the court books. In the Court of Session these warrants, which may be executed by macers or messengers-at-arms, are issued by the Lord Ordinary on the Bills, on the application of the clerk to the process. They are directed against the agent and his clerk whose receipt stands for the process, and authorize their incarceration and detention until it is returned. The application is usually made at the request of the opposite party, who, at the time must be entitled to force back the process from his antagonist; and as this compulsitor is understood to rest on a presumed contempt of court, so it would seem that it is not the appropriate remedy where the process has been actually lost, or where, from some other inevitable accident, it cannot be returned. In such cases, the remedy is an action of damages at the instance of the party prejudiced against the party by whose fault or negligence the process has gone amissing. Where an attempt is made to enforce a process caption under such circumstances, relief may be applied for by note of suspension. In the inferior courts process captions are issued by the inferior judge, on the application of the clerk of court. In many inferior courts, however, an order of court, making it imperative on a procurator to return the process under an award, has in most cases superseded recourse to a caption; *Barclay's Sher. Court Prac.* p. 331; *Barclay's Justice of Peace, h. t.* See also *A.S. 11th July 1828*, §§ 34, 104; *A.S. 10th July 1839*, § 159; *Pagan v. Horsburgh*, 1835, 13 S. 471.

**Captive.** All actions against a prisoner taken by the enemy stop till his return; but execution by horning may proceed against him. A ransomed hostage is entitled to the wages during his captivity which he would have been receiving on board ship; and even a sailor who receives no wages is entitled to a sum as *solatium*. The owners of the ship are bound in every case to procure the immediate release of a hostage, and indemnify him for his losses. *Brown's Syn. h. t.*

**Capture.** The jurisdiction in all matters relative to prize and capture in war, and the condemnation of ships, is now exclusively vested in the High Court of Admiralty of England. The principles of capture were, that two powers at war had a right to make prizes of the ships, goods, and effects of each other upon the high seas. The goods of an enemy on board the ship of a friend might be taken. The goods of a friend on board the

ship of an enemy ought to be restored. Contraband goods going to the enemy, though the property of a friend, might be taken. *Stair*, B. ii. t. 2. In *Mr Morre's Notes*, p. ciii., will be found cited a number of authorities upon this point, and a view of the principles of reprisals, extracted from the *Report* of Sir George Lee.

On the 28th of March 1854 war was declared against Russia, and the *London Gazette* of that date contained a declaration stating that it was impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches, and that she must maintain the right of a belligerent to prevent neutrals from breaking any effectual blockade which might be established with an adequate force against the enemy's forts, harbours, and coasts, but that Her Majesty would waive the right of seizing enemy's property laden on board a neutral vessel unless it be contraband of war. The declaration further stated, that it was not Her Majesty's intention to claim the confiscation of neutral property not being contraband of war found on board enemy's ships, and that being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organized forces of the country, it was not Her Majesty's present intention to issue letters of marque for the commissioning of privateers. The right of seizing enemy's property on board a neutral vessel had always before been uniformly maintained by England. The Treaty for the re-establishment of Peace was signed on March 30, 1856. After the Treaty was signed, additional conferences were held at Paris by the plenipotentiaries of the different countries, and at the meeting of April 14, 1856, they adopted the following declaration:—"1. Privateering is and remains abolished. 2. A neutral flag covers an enemy's goods, with the exception of contraband of war. 3. Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag. 4. Blockades, in order to be binding, must be effectual,—that is to say, maintained by force sufficient to prevent effectually access to the coast of the enemy." This declaration was adopted on the consideration "that maritime law in time of war had long been the subject of deplorable disputes, and that the uncertainty of the law, and of the duties in such a matter, gave rise to differences of opinion between neutrals and belligerents which might occasion serious difficulties and even conflicts."

**Carrier;** a person who holds himself out to the public as willing to undertake for hire the conveyance of goods from one place to

another. The Roman edict, *Nautæ, caupo-nes, stabularii*, which imposed a liability on shipmasters, innkeepers, and stablers, for goods intrusted to them, may be considered as part of the common law of Scotland; and the principle of the edict has been extended to the case of carriers by land as well as by water. No distinction will be made on account of the description of vehicle employed; and the owners, whether of waggons, carts, mail-coaches, or stage-coaches, will be liable to make good any losses happening to the goods while in their custody, and until they are delivered agreeably to their address; the rule, founded on considerations of public policy, being, that a person who holds himself out as willing to perform, for hire, this sort of service, thereby incurs an universal responsibility. Such persons are liable to the fullest extent for their servants and others employed by them. The carrier's engagement, however, is not understood to bind him to deliver the goods beyond the place to which he plies, unless he undertakes to do so; and, at common law, he is not responsible for losses arising from the act of God, or of the King's enemies. See *Stair*, B. i. tit. 9, 5; *Mr More's Notes*, p. lviii; *Ersk.* B. iii. tit. 1, § 29; and *Bell's Com.* i. p. 203, 445, 461, *et seq.*; *Bell's Princ.* 4th edit. arts. 158, *et seq.* 235, 369; *Bligh's Appeal Cases*, i. 580; *Brown on Sale*, pp. 367, 467, 493, 542; *Brown's Synop.* pp. 1411, 1521; *Shaw's Digest*; *Jurid. Styles*, 2d. edit. vol. iii. p. 82; *Hume*, i. 57, 65; 15 *S.* 693. See also *Public Carriages*.

The act 11 Geo. IV., and 1 Will. IV., cap. 68 (1830), was passed for the more effectual protection of mail-contractors, stage-coach proprietors, and other common carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which had not been declared to them by the owners. By this act common carriers are not liable for the loss of gold and silver coin, or gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, bank-notes, &c., &c., above the value of L. 10, unless their nature and value is declared when delivered, and an increased charge accepted by the owner. See act for its various provisions. The act 17 and 18 Vict., c. 31 (1854), provides for the better regulation of the traffic on railways and canals. By this act a railway or canal company is declared to be liable for neglect or default in the carriage of goods, notwithstanding any notice, condition, or declaration made by the company to the contrary, or anywise limiting their liability. A company, however, is not to be liable for loss of or injury to a horse

beyond L. 50, or for any neat cattle beyond L. 15 per head, or for any sheep or pigs beyond L. 2 per head, unless the value is declared, and extra payment made. The proof of the value of the animals, articles, or goods lost or injured, lies on the person claiming compensation. No special contract between a company and other party is binding unless the same be signed by such party, or the person delivering the articles for carriage.

**Carrucata**; a ploughgate, as much land as may be ploughed and laboured within year and day by one plough, synonymous with a hide of land. *Skene, h. t.*

**Carta, extensa, or extenta**; a charter containing a disposition of lands with certain moithes and marches, otherwise called a bounding charter. *Skene, h. t.*

**Cases.** In the Court of Session a case is a written argument on the merits of a cause. According to the judicature act, the case must commence with a copy of the closed record; and each ground of law, or plea stated in the record, must be separately argued in the case; 6 *Geo. IV.*, c. 120, § 22; but this regulation has not been strictly observed in practice. Cases could formerly be ordered either by the Lord Ordinary, or by the Inner-House; and in practice they usually were ordered in all causes of intricacy or difficulty. Now it is no longer competent to a Lord Ordinary to direct cases, or minutes of debate, or other written argument, to be prepared by the parties, whether for the use of himself or of the Inner-House; but he may, at any time after hearing parties on a closed record, take such cause on report to the Inner-House without cases or minutes of debate; 13 and 14 *Vict.*, c. 36, § 14. The interlocutor making the order for cases appoints the mutual cases to be lodged, interchanged, revised, and re-lodged within a certain limited time. The cause must be argued in the case strictly as it appears in the closed record; and if facts not set forth in the record are founded on in the argument, the case will be ordered to be withdrawn, and a proper one lodged. The cases are printed and boxed to the Court in the usual way. See 6 *Geo. IV.*, c. 120, §§ 16, 22; *A. S.* 11th July 1828, §§ 62, 63, 64, 107, 65; *Skand's Prac.* pp. 339, *et seq.*, and 960. See *Record. Reclaiming Note. Default. Appeal.*

**Cash-Account.** See *Bank Credit*.

**Castles.** See *Fortalices*.

**Casualties of Superiority.** The casualties of superiority are certain emoluments arising to the superior, which, as they depend on uncertain events, are termed *casualties*. The casualties proper to ward-holding, while it subsisted, were *Ward, Recognition, and Marriage* (see these titles, also *Ward-holding*). The casual-



ties common to all holdings are *Non-entry*, *Relief*, *Disclamation*, *Purpresture*, and *Liferent excheat*. (See these titles.) The superior is secured in his duties and casualties by his own charter and sasine. They form a *debitum fundi* preferable to the vassal's creditors, and may be made effectual by pointing of the ground. They form also a personal claim against the vassal. This preference is not confined to arrears or current feu-duties, but extends to non-entry and relief duties, and to the composition for singular successors. *Stair*, B. ii. tit. 4, § 1, *et seq.*; *Ersk. Princ.* 12th edit. 157, 270; *Bell's Com.* i. 23, 26; ii. p. 27; *Bell's Princ.* 4th edit., arts. 703, *et seq.*, 729, 862; *Sandford on Entails*, p. 359; *Sandford on Heritable Succession*, vol. ii. p. 188; *Brown's Synop.* pp. 955, 1538; *Ross's Lect.* ii. 255, 302, 377; *Mensies' Lectures*.

**Casual Homicide**; takes place when death is accidentally occasioned by a person lawfully employed, meaning harm to no one, and using all ordinary and reasonable caution. *Hume*, i. 191; *Alison*, 144; *Steele*, 70. See *Homicide*.

**Casus Amissionis**. In an action for proving the tenor of a deed or other writing which has been lost, it is necessary to condescend upon the particular accident by which the document was lost or destroyed, or at least to give some satisfactory explanation of the manner in which the loss has happened. In technical language this accident is termed the *casus amissionis*. The general rules as to the necessity of libelling and proving the *casus amissionis* are the following:—When the writ is such, that, upon payment or satisfaction, the debtor is usually content with its re-delivery, *e. g.*, a bill or promissory note, a special *casus amissionis* must be clearly established. But where, on the other hand, the writ is not of a mere temporary nature, but intended for preservation, as a right to lands, or where it is usual to take a separate discharge of an obligation, the Court will sustain a more general statement of the *casus amissionis*; see *Walker v. Block*, 1852, 14 D. 362; *Dickson on Evidence*, p. 653; *Stair*, B. iv. tit. 32, § 4, *et seq.*; *Mr More's Notes*, p. cclxxxvi.; *Bankton*, iv. 29; *Shand's Practice*, p. 832. See *Tenor, Action for proving of*.

**Catala**; when used in the old law-books of Scotland, this word is synonymous with the English law term *chattel*, and is applied to all moveable goods and gear. *Skene*, h. t.

**Catchpole**. In England, sheriff's officers are so called. *Tomlins' Dict.* h. t.

**Cathedral**. The church where the bishop had his see was styled the cathedral.

**Catholicas**. See *Roman Catholic*.

**Catholic Creditor**. A catholic or universal creditor is a creditor whose debt is secured

over several subjects, or over the whole subjects belonging to his debtor; as, for example, one who has heritable securities over two or more estates for the same debt. Such a creditor is bound to claim his debt according to certain equitable rules, and is not entitled to exercise his right so as to injure unnecessarily the claims of secondary creditors. Thus, if, as he may, he draw his whole debt from one of the subjects, he must assign his security to the secondary creditors on the subject from which he has drawn payment, to the effect of enabling them to draw a proportional part of the debt from the other subjects over which the catholic security extended. But where a catholic creditor, secured over two estates, on each of which there is a secondary security, has *bona fide* purchased, or otherwise acquired, right to one of these secondary securities, it is held (although the soundness of the opinion has been doubted) that the catholic creditor, in these circumstances, is not bound to assign to the prejudice of the secondary security he has thus acquired, but that he may draw payment from one of the subjects over which the catholic security extends, so as to leave the other free to the operation of the secondary security over the other to which he has acquired right. It has also been held that a catholic creditor, before the bankruptcy of his debtor, may renounce his security over one of the subjects, reserving his claim for the whole debt against the other, although it should happen that the subject to which he has so restricted his security is burdened with a secondary security, the creditor in which, of course, suffers by the restriction; *Eddie and Laird, &c.*, 29th June 1793, *Fac. Coll.*, *Mor.* p. 3403. Where the subjects over which the catholic security extends belong to two different persons, one of whom is principal and the other cautioner, the catholic creditor, who has drawn payment from the subject of the principal debtor, cannot be required to assign so as to enable a secondary creditor on the principal's estate to claim upon that of the cautioner; and if the catholic creditor has drawn his debts from the cautioner's estate, the cautioner is entitled to an assignment, so as to enable him to operate full relief from the estate of the principal debtor. See *Ersk. B. ii. tit. 12, § 66*; *Bell's Com.* ii. 523, *et seq.*; *Kames' Princ. of Equity*, vol. i. p. 124, *et seq.*; *Ibid.* (1825), 80-2; *Brown's Synop. h. t.*; *Shaw's Digest*.

In the case of *Littlejohn v. Bluck*, 13th Dec. 1855; 18 D. 207, part of the sequestrated estate of a bankrupt consisted of some heritable property and three ships. One creditor had a primary security over both the heritage and the ships. Another creditor had a secondary security over the heritage only;

and the question raised was, whether the secondary creditor was entitled to insist that the catholic creditor should make good his debt, in the first instance, out of the price of the ships, and should not except under deduction of what may thus be realized, attempt to make good any portion of his debt out of the heritage, so as to leave the latter, in so far as not, required for payment of the catholic creditor, available for the claims of the secondary creditor. The Court decided in favour of the claim of the secondary creditor, and farther held that the attachment effected by the sequestration in favour of the trustee did not disturb the respective relations and rights, legal and equitable, of the catholic and secondary creditors, but that these remained as they stood at the date of the sequestration, and that the trustee took the bankrupt estate *tantum et tale* as it stood in the bankrupt himself at the date of the sequestration. LORD JUSTICE-GENERAL observed, "In the ordinary case of a Catholic creditor, i.e., a creditor holding security over two subjects, and another creditor holding a postponed security over one of them, there can be no doubt that the catholic creditor is entitled to operate payment out of the two subjects as he best can for his own interest; but he is not entitled, arbitrarily or nimiously, to proceed in such a manner as to injure the secondary creditor without benefiting himself, as, for instance, capriciously to take his payment entirely out of the subjects over which there is a second security, and thereby to exhaust that subject to the detriment of the second creditor, leaving the other subject of his own security unaffected or unexhausted. The second creditor will be protected against a proceeding so contrary to equity, and the primary creditor will be compelled either to take his payment out of that one of the subjects in which no other creditor holds a special interest, or to assign his right to the second creditor from whom he has wrested the only subject of his security. But other interests may come into play so as to affect materially the right of this secondary creditor to control the primary creditor. These other interests may be brought into existence by the voluntary act of the common debtor. He may grant to a third creditor a second security over that one of the subjects which is not already conveyed directly to the second creditor; and if he does so, the security so given to that third creditor acting in *bond fide* will be valid. There will then be three creditors interested in the two subjects, the rule in such a case is, that the catholic creditor must use his right fairly as between the two secondary creditors, and not use it so as to benefit unfairly one of them to the

prejudice of the other. His debt must be paid proportionally out of the two subjects. Priority of date is of no consequence as between the two secondary creditors. The effect, then, of another secondary creditor being brought into the field is to diminish, or it may be to destroy, in great measure, the value of the control which the earliest secondary creditor at one time had over the proceedings of the catholic creditor. The equity which supported him when there was no other interest in the way is no longer free to act to the same extent in his favour. The granting to a third creditor a second security over that one of the subjects which was conveyed and directed to the second creditor is a voluntary act of the common debtor, by which the position of the secondary creditor may be materially affected. Whether the same result would be brought about by the hostile act of another creditor adjudging the subjects for debt, has not, I believe, been decided; but I see strong grounds for contending that the same results might follow in that case. In the present case, nothing voluntary was done by the common debtor to affect the right of the secondary creditor, nor did any third creditor, by diligence, attach the ships so as to acquire for himself a security over them. But the bankruptcy occurred; and the question comes to be, Whether the statutory right and interest which the trustee so acquired in the ships is such as to interfere with the right which, but for that statutory interest, would have unquestionably belonged to the secondary security over the land. In other words, has the bankrupt statute placed the trustee, as regards the matter in question, in the same favourable position that would have been occupied by the holder of a second security over the ships. In this question I have given all the consideration I could, and I have come to the conclusion that the trustee does not occupy that position with reference to the subjects of the securities in question. The general object of the statute was to preserve, as far as possible, all rights and interests in the position in which they stood the moment before bankruptcy, and to give them the same effect to which they were then entitled. To effectuate that object the statute ousted the bankrupt, and transferred the estate to a trustee. It put a stop to all races to diligence then in process; but it abstained from disturbing any securities or preferences honestly obtained and lawfully completed. According to the nature of such securities or preferences, it expressly saved them. I think it follows from this, that the same event which in this case disabled and ousted the bankrupt, and called into existence the trustee, gave stability and permanency to

the antecedent securities and interests affecting the land and the ships, with all the rights and qualities belonging to these securities as they then stood. I do not see in the statute anything which gives to the trustee the character of the holder of a second security over the ships, or which gives to him the character of the holder of a security at all. He is a statutory transferee for a particular purpose. His title is universal, and he takes the estate, subject to all qualities and conditions, as at the moment of bankruptcy. The saving words at the end of the 78th section appear important: 'subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible.' The trustee in the present case took the estate of the bankrupt subject to the debts and securities, with all their qualities, as they stood at the date of the sequestration. The demand of the secondary creditor is nothing more than that effect shall be given to this quality of his security in the distribution of the estate."

**Cathorius, Cathorius**; a word used in ancient legal phraseology, the precise import of which seems to be unknown. A fine of one *cathorius* was equivalent in value to nine cows. *Skene, h. t.*

**Calpes, Calpes, and Carriet**; a word used in old acts of Parliament to signify a gift, such as a horse or any other article, given to a powerful neighbour or chief, in return for his protection. It seems to have been something of the nature of *black mail*. *Skene, h. t.*

**Causa Scientiæ**. Where a witness testifies to a fact which is the result of reason exercised upon particular circumstances, his reasons for drawing that conclusion are of importance for the purpose of ascertaining whether his conclusion was correct. This is particularly true with regard to all questions of skill and science. *Starkie on Evidence; Dickson on Evidence.*

**Cautionary**; is that obligation by which a party becomes surety for another; or, according to Stair's definition, it is "the promise or contract of one, not for himself, but for another." A probative writing is essential to the constitution of a cautionary obligation. Where, however, *rei interveniunt* has followed on an improbativ document, and matters are no longer entire, the improbativ document will be held sufficient to constitute the obligation; *Brown v. Campbell*, 28th Nov. 1794, M. 17058, and *Sinclair v. Sinclair*, 3d Feb. 1795; *Bell*, 140. See also, *Ross's L. C.*, vol. iii. p. 20, and the case of *Church of England Life Assurance Co. v. Hodges*, 12th Feb. 1857, 19 D. 414. Formerly it was the law, that, although a cautionary obligation must be constituted by a probative document, that

rule suffered an exception when the cautionary obligation was undertaken at the same time with a principal obligation, which obligation was itself one that could be established by witnesses. In such a case it was held that the cautionary obligation might be proved by witnesses also. See *Carruthers v. Bell*, 13th Nov. 1812, and *Rhynd v. Mackenzie*, 20th Feb. 1616. Also *Ross's, L. C. v. 3*, p. 20. The law in this respect, however, has been altered by the Mercantile Law Amendment Act for Scotland, 19 and 20 Vict., c. 60, 1856, which enacts, that all cautionary obligations shall be in writing, and subscribed by the person undertaking them, or by some person duly authorized by him.

A simple cautioner, or *adpromissor*, as he was termed in the Roman law, is one who binds himself as cautioner with the principal, for the greater security of the creditor. Such a cautioner was formerly entitled to the benefit of discussion; that is, he was entitled to insist that the principal debtor be discussed, by the execution of diligence both against his person and property, before the cautioner was called upon to satisfy the debt or obligation (see *Beneficium Ordinis*). This, however, has been altered by the Mercantile Law Amendment Act, which declares that it shall not be necessary for the creditor, to whom a cautionary obligation has been granted, to discuss or do diligence against the principal debtor before calling on the cautioner for payment of the debt to which the cautionary obligation refers, but that it shall be competent for him to proceed against the principal debtor and the cautioner, or against either of them, and to use all action or diligence against both or either of them, which may be competent. There is nothing, however, to prevent a cautioner from stipulating in the document constituting his cautionary obligation, that the creditor shall be bound, before proceeding against him, to discuss and do diligence against the principal debtor; and a provision to this effect is contained in the statute. There is another description of cautioner, who was termed in the Roman law *expromissor*. Such a cautioner comes under a distinct and separate obligation, in which he is himself the principal, having, however, claim of relief, as mandatory or negotiator for another. A cautioner of this description had not the benefit of discussion. Cautioners are frequently taken bound, conjunctly and severally, or as full debtors, with the principal, in which case both parties are liable *in solidum*. Where there is more than one cautioner, bound simply as such, and not jointly, each of them is liable, in the first instance, only for his own share, if the subject of the obligation be divisible, unless,

from the insolvency of the other cautioners, the creditor cannot recover from them. See *Beneficium Divisionis*.

It follows, from the nature of the obligation, that a cautioner who has paid the debt has an action *ex mandato* against the principal for relief; and for this purpose he is entitled to demand an assignation from the creditor, not only of the debt and whole diligence, but also of any other securities held by the creditor; and should this claim of relief be cut off by any proceeding on the part of the creditor, the cautioner is thereby liberated from his obligation. The cautioner's claim is for relief from the principal obligation, with the interest and expenses paid by him; but under this claim he is not entitled to include the expense of diligence against himself, because he ought to have paid without diligence. The cautioner is entitled to sue the principal debtor for relief from the cautionary obligation, even before payment: 1st, Where the debtor is taken bound to deliver the cautionary obligation, cancelled at the same term at which he is bound to pay the creditor, and where the term of payment is past, because in that case the cautioner is as fully entitled to insist for implement of the obligation as the creditor himself is. 2d, Where the principal debtor is *vergens ad inopiam*, the cautioner may attach his funds for his relief, before either payment or distress. 3d, If the cautionary obligation be conditional, and may be long pendent, the cautioner will be allowed to adjudge in security, although there have been no previous distress, under the qualification that no execution shall follow on the decree until distress. Where an additional cautioner is interposed, and becomes bound in a separate deed, as in a bond of corroboration, it has been questioned whether the new cautioner has a total relief against the original cautioners, or a proportional relief only. The rule seems to be, that if the new cautioner have become bound on behalf of the former cautioners, he will be entitled to claim a total relief from them. If he is interposed solely on account of the principal debtor, he will be entitled to a proportional relief only, precisely as if he had become bound along with the original cautioners. *Smiton v. Millar*, 15th Nov. 1792, *Fac. Coll.*, *Mor. p.* 2138. See 3 *Ross, L. C.* 28.

Extrajudicial cautioners have the benefit of a limitation or prescription of their obligation. This was introduced by the act 1695, c. 5, which provides that no person binding and engaging for, and with another, conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sums longer than seven years after

the date of the bond; but that, from and after the said seven years, the said cautioner shall be *eo ipso* free of his caution; and that, whoever is bound for another, either as express cautioner, or as principal, or as co-principal, shall be understood to be a cautioner, and to have the benefit of this act, provided that he have either clause of relief in the bond, or a bond of relief apart intimated personally to the creditor at his receiving of the bond, without prejudice to the true principals being bound in the whole contents of the bond or contract; as also of the said cautioners being still bound conform to the terms of the bond, within the said seven years, as before the making of this act: As also, providing that what legal diligence by inhibition, horning, arrestment, adjudication, or any other way, shall be done within the said seven years, by creditors against their cautioners, for what fell due in that time, shall stand good, and have course and effect after the expiring of the seven years, as if this act had not been made. The limitation introduced by this statute does not extend.—1st, To a letter of credit or of guarantee in a mercantile transaction, when it is not accompanied with any obligation of relief by the principal debtor; 2d, To an obligation for an annual payment; 3d, To an obligation *ad factum præstandum*; 4th, To a cautioner in a bond of relief; 5th, To a cautioner in a bond of corroboration; 6th, To the case where the term of payment of the debt is beyond the seven years from the date of the bond; 7th, To a cautioner in a contract of marriage, or for the discharge of an office; 8th, To an engagement, by letter or otherwise, to pay, or see paid, a sum already lent; 9th, To the case of a bill of exchange wherein one signs as cautioner; or, *lastly*, To judicial cautionary.

Where the cautioner has a separate bond of relief, in order to secure the benefit of the act, it must be intimated either notarially or judicially to the creditor; mere private knowledge is not sufficient. The cautioner's obligation will be extended beyond the seven years, provided; 1st, That the bond has been renewed, or a corroboration granted by the cautioner, or negotiations carried on for paying the debt, so as to bar the cautioner, *personali exceptione*, from founding on the act; 2d, That the creditor shall have raised diligence against the cautioner, or shall have obtained decree against him within the seven years; for it would seem that mere citation in an action is not sufficient in this, as it is in prescriptions. It is also to be observed, that the diligence or decree within the seven years does not operate in the septennial limitation like an interruption of prescription in the ordinary case. The effect of

the limitation is effectually to liberate the cautioner from all responsibility beyond the seven years; and the diligence or decree against the cautioner can extend only to the sum in the bond, and the interest falling due within the seven years; *Bell's Com.* i. 356. A cautioner who has by mistake paid the debt after the expiration of the seven years, will be entitled to demand repetition from the creditor. *Carrick v. Carse*, 5th Aug. 1778, *Mor.* p. 2931.

With regard to the discharge of extrajudicial cautionary obligations, it may be observed generally, that a discharge of the principal is a discharge of the cautioner, for the cautioner has become bound, relying on his relief from the principal. A discharge of a co-cautioner was formerly a discharge to the remaining cautioners to the extent of the share which the discharged co-cautioner would have borne. This, however, has been altered by the Mercantile Law Amendment Act, 1856, which enacts that a discharge by the creditor of one co-cautioner shall operate as a discharge to all the cautioners. See *Church of England Assurance Company*, 1857, 19 D. 1079. The renunciation by the creditor of any security held by him over the principal debtor's estate will also discharge the cautioner. Even the discharge of the debtor from prison by the creditor will have this effect; as will the acceptance of an extrajudicial composition on the debtor's estate by the creditor individually, without the consent of the cautioner. So also, if the creditor give the principal debtor time, without the cautioner's consent, the cautioner will be free. But mere delay or forbearance to enforce payment does not amount to "giving time." The creditor must farther have bound himself to delay beyond the term of payment stipulated in the obligation in security of which the cautioner interposed. The arrangement must be such, for example, that, if the cautioner were to pay the debt and take an assignation, he would be barred from proceeding against the principal debtor by the creditor's agreement to give time. This, or any other agreement whereby the creditor ties up his own hands and the hands of the cautioner *quoad* the principal debtor, without the cautioner's consent, is "giving time" in the legal acceptation of that expression; *Bell's Princ.* § 262, and *authorities there cited*. In like manner, it will discharge the cautioner, if the creditor, without consulting him, ranks on the debtor's bankrupt estate, or consents to the acceptance of a composition under the bankruptcy statute, so as to enable the principal debtor to get his discharge; although this general doctrine is somewhat affected by the decision, *Whitelaw, &c. v. Steins*, 20th May

1814, *Fac. Coll.* But see *Bell's Com.* vol. i. p. 359. To take a statutory composition, however, where the creditor was not a concurring creditor, will not liberate the cautioner; *Bell's Com.* ib. See 19 and 20 *Vict.*, c. 60, § 9.

Mere negligence on the part of the creditor, unless it has been gross, will not free the cautioner: Thus, the creditor is under no obligation to execute diligence when the term of payment arrives, although, if he has completed diligence, he cannot himself discharge it, without forfeiting his claim against the cautioner. Unless fraud or collusion between the creditor and the principal debtor can be proved, it will not avail the cautioner to plead that, by due diligence, the debt might have been recovered from the principal; for the cautioner in such circumstances has in his own power the remedy of inhibition, adjudication, or arrestment, in security. The loss of recourse, in the case of undue negotiation of a bill of exchange, seems to be an exception to this general rule (see *Bill of Exchange*), and some cases of cautionary for the due execution of an office may afford another exception. See *Bell's Com.* vol. i. p. 360, 5th edit. See also on the subject of cautionary, *Stair*, B. i. tit. 17, § 3, *et seq.*; *More's Notes*, p. civ. cxiii. *et seq.*; *Ersk.* B. iii. tit. 3, § 61, *et seq.*; *Bell's Com.* *ibid.* p. 347; *Hunter's Landlord and Tenant*, i. p. 360, ii. p. 150; *Ersk. Princ.* 12th edit. 330-1; *Shaw's Digest*, tit. *Cautioner*; *Brown's Synop.* h. t.; *Bell's Princ.* § 246, *et seq.* 4th edit.; *Illust.* i. 106; *Kames' Princ. of Equity* (1825), 74-7, 106; *Ross's Lect.* ii. 499, 549; i. 77, *et seq.*, 162, 221, 354; *Menzies' Lect.* 208, *et seq.*

*Cautionary for the faithful Performance of an Office.*—The cautionary obligations of this description are various; but it is unnecessary to enumerate them particularly. The most important are:—1. *Cautionary obligations for the intrusions of a bank-agent.*—The responsibility which the cautioner in such a case undertakes is very serious; and on the failure of the agent, difficult questions of equity may arise, as to the degree of vigilance which the bank ought to have exercised in the periodical accountings with the agent. In all such questions much must necessarily depend on the terms of the particular bond; but cases of neglect may easily be figured which would bar all claim against the cautioner. The bonds given on these occasions refer to past as well as future losses; and any improper concealment by the bank at the time of arranging the caution might also have the effect of liberating the cautioner. It may be observed here, that a clause, frequently inserted in these bonds, providing that no suspension shall pass except on consignment, will not receive effect, as being a  *pactum illi-*

*cautum*; *Bell's Com.* vol. i. p. 364. 2. *Cautioners for a messenger-at-arms.*—In this case the cautioners are taken bound to make good “the damage, interest, and expenses which the lieges shall sustain through the negligent, fraudulent, or informal execution of the messenger.” See *Darling's Messenger-at-arms.* Under this obligation it is held, 1. That the cautioners are liable only for what the messenger does in his character of messenger, and not for his actings as agent, a capacity in which messengers are frequently employed: 2. That the messenger, as such, has no discretionary power: 3. That the cautioners are liable not merely to the employer of the messenger, but to those against whom he has committed any fault: 4. That, in estimating the damage arising from the messenger's neglect, the law holds the damage to be the amount of the debt; nor will any proof be allowed of the desperate circumstances of the debtor, in order to show that due execution of the diligence would not have secured payment; *Bell's Com.* ib. 3. *Cautioner for a notary.*—The responsibility here is similar to that in the case of the messenger. It is not necessary to make out a case of fraud; for the cautioner will be liable for the consequences of neglect, or error, even though it should arise from want of skill. *Bell's Com.* ib. p. 366, *et seq.*

It may be observed in general, with regard to cautioners for the due performance of an office, 1. That, having once engaged for the officer's fidelity, they are not entitled to withdraw suddenly, although they may do so after a reasonable notice; and, 2. That, on the death of the cautioner, the obligation will subsist against his representative, until he shall, by a similar withdrawal, terminate the obligation. *Bell's Com.* ib. p. 366. See also *Wyllie v. Black's Trustees*, 13th Dec. 1853, 16 D. 180.

*Judicial Cautionary.*—There are several descriptions of cautionary required in judicial procedure.

1. *In a Suspension or Advocation.*—In advocations, caution is required for the expenses incurred in the inferior court, and also for such expenses as may be incurred in the Court of Session; *A. S.* 11th July 1828, § 2; and the bond of caution is prepared by the clerk in the inferior court. In suspensions, caution is found in the Bill-Chamber; and the cautioner, by the form of his bond, becomes liable, jointly with the principal, for the sums, with interest and expenses of process, which may be decreed for against the suspender upon discussing the note. But although such are the express terms of the bond, it is provided by *A. S.* 14th June 1799, that, in case of a suspender or advocator failing to expedite the

letters, or in case of the respondent obtaining protestation, the cautioner is to be liable, as well as the principal, for the expenses. And by the Judicature Act, 6 Geo. IV., c. 120, § 47, a still farther extension of the cautioner's liability has been effected. It is thereby enacted, that “cautioners in a bill of suspension shall be liable to fulfil the obligation in their bond, although the letters of suspension shall not be expedite before the day of citation mentioned in the deliverance, and also in case of the charger's obtaining and duly extracting protestation for not enrolling, calling, and insisting.” The obligation on the cautioner is not affected by the death of either the charger or the suspender, during the dependence of the process; *A. S.* 29th Jan. 1650. An attester is liable only *subsidiarie*, and is consequently entitled not only to insist that both the principal and cautioner shall be discussed before himself, but he may also claim a total relief against both of them. It has been held, that a person who has signed a bond of caution of this nature, which has been returned from the Bill-Chamber to get an attester, may withdraw his obligation at any time before the attested bond has been accepted of by the opposite party, and received by the Bill-Chamber clerk; *Stewart v. Mitchell*, 1786; *Mor.* p. 2157. After the bond has been lodged in the Bill-Chamber, and answers put in for the charger, however, although no express acceptance has been signified, the cautioner is not entitled to resile; *Crawford v. Lynde*, 26th May 1819, *Fac. Coll.* Neither could the charger, after the cautioner had been accepted, and the letters expedite, require a new cautioner in the event of the insolvency of the cautioner already received; but this was altered as regards suspensions of *liquid* obligations by *A. S.* 11th July 1828, § 18, which made it competent for the Court, in such an event, to order new caution to be found. The cautioner in a suspension is not liberated by the circumstance of the decree under suspension being converted into a libel. *A. S.* 27th Dec. 1709; *Ersk.* B. iii. tit. 3, § 71; *Bell's Com.* 5th edit. vol. i. p. 385; *Hume*, i. 144; *Ross's Lectures*, i. p. 365, *et seq.*; *Shand's Prac.* p. 476; *Beveridge on Bill-Chamber*; *Barclay's M'Glash. Sher. Court Prac.*; *Juridical Styles*; *Dickson on Evidence*, p. 323, *et seq.* For authorities on caution in suspensions, see the authorities under the general word *Caution*. See also *Advocation. Attestor. Suspension.*

2. *Caution in Loosing Arrestment.*—The obligation extends no farther than to the sums arrested. The cautioner was never held to be entitled to the benefit of discussion; *Ross's Lect.* i. p. 458; *A. S.* 11th July 1826; *Shand's*

*Prac.* p. 573; *Juridical Styles*, ii. p. 90. See *Arrestment*.

3. *Caution judicio sisti* lays the cautioner under an obligation to produce the party for whom he becomes bound at all diets of court, when required. In case of failure to do so, the bond is forfeited, and the cautioner incurs the penalty, which is generally the debt sued for, without the benefit of discussion. A cautioner *judicio sisti* may at any time liberate himself by producing the party in court, and protesting to be free from farther liability. In like manner, when the pursuer extracts the decree without calling upon the cautioner to produce the party, the obligation is at an end. *Ersk. B. i. tit. 2, §§ 19 and 21*; *B. iii. tit. 3, § 73, notes by Ivory*; *Bell's Com. i. p. 380, 5th edit.*; *Bell's Princ. 4th edit. § 274*; *Shand's Prac. pp. 415, 504*; *Hutch. Justice of Peace, i. p. 419*; *Jurid. Styles, 3d edit. p. 92*; *Tait's Justice of Peace, voce Bail*; *Ersk. Princ. 12th edit. p. 18*. See also *Meditatio fugæ*; *Cessio*.

*Caution judicio sisti* in maritime causes is abolished by 13 and 14 Vict., c. 36, § 24.

4. *Caution judicatum solvi*.—This species of cautionary was required only in maritime suits, such as were formerly pursued before the Court of Admiralty. The cautioner became liable for the solvency of the party during the dependence of the process, and for payment of the debt *subsidiarie*, and had, of course, the benefit of discussion. *Caution judicatum solvi* in the Court of Session was abolished by 13 and 14 Vict., c. 36, § 24; and as regards the Sheriff Courts, it cannot be required from any party domiciled in Scotland, unless on special grounds to be stated by the judge; 1 and 2 Vict., c. 119, § 22. *Ersk. B. i. tit. 2, § 19 and 21*; *B. iii. tit. 3, § 73*; *Bell's Com. i. 384*; *Bell's Princ. 4th edit. § 275*; *Shand's Prac. p. 415, 314*; *Hutch. Justice of Peace, i. p. 419*; *Jurid. Styles, 3d edit. ii. p. 94*; *Ersk. Princ. 12th edit. p. 340, Barclay's Sher. Court Prac. p. 61*. See *Admiralty*.

5. *Cautio usufructuaria*; is that caution which liferenters may be required to give for the preservation of the liferented subjects against waste or injury. The act 1491, c. 25, authorizes such caution to be insisted for at the suit of any party interested; and on refusal, the act 1535, c. 15, imposes the penalty of exclusion from the profits of the subject until security be given. *Ersk. B. ii. tit. 9, § 59*.

6. *Juratory caution*; is a description of security sometimes received in advocations and suspensions, where the party is unable to procure other caution. It consists of an inventory of his effects given up upon oath, and assigned in security to the opposite party.

See *A. S. 14th June, 1799*; *A. S. 11th July 1828, §§ 2 and 3*; *A. S. 10th July 1839, § 121*; and 13 and 14 Vict., c. 36, § 34. See also *Juratory Caution*.

7. *Cautioner in bail*.—This cautionary is applicable to criminal cases, and resembles the caution *judicio sisti*. The cautioner becomes bound, under a specific penalty, to produce the person of the accused, "to answer to any libel that shall be offered against him for the crime or offence with which he is charged, at any time within the space of six months." The six months will be computed from the date of the bail-bond; and unless there is an express obligation to produce the person of the accused "at all diets of court," the cautioner will be discharged of his obligation, by producing him on the first diet; and if the trial is then delayed, bail must be applied for of new. *Hume, vol. ii. p. 94*; *Alison's Prac. 174*; *Jurid. Styles, ii. p. 93*. Upon failure to implement the obligation, the cautioner's bond will be declared forfeited, and the penalty will be recovered by the Exchequer. See *Bail*.

8. *Caution in law-burrows*.—The caution here is, that the complainer shall not be molested in his person or property by the party complained of, under a certain penalty, which, on contravention, will be levied from the cautioner. One-half of the penalty goes to the complainer, the other to the public; 1581, c. 117. See *Jurid. Styles, ii. pp. 91, 92*. See also *Law-burrows*.

**Caveat**; is an intimation made to the proper officer to prevent the taking of any step (the presenting of a signature for instance) without intimation to the party interested, so as to enable him to appear and object to it.

**Cellar, King's**. See *Bonding Acts, and King's Cellar*.

**Cepum animalium**; used in the *leges burgorum*; the fat of animals. *Skene, h. t.*

**Certificate**; a declaration of a fact by an officer or other person acting in a public character. A certificate of baptism is signed by the session-clerk. A certificate of bad health by a physician or surgeon must bear to be on soul and conscience. In the Bill-chamber proceedings, an attestation by the clerk that no caution has been received is termed a certificate. In cases of homicide, and other crimes against the person, medical certificates produced respecting the nature of the injuries must be verified on oath by the medical persons who granted them. *Stair, B. iv. tit. 42, 15, and tit. 43, 1, et. seq.*; *Burnett, 486*; *Dickson on Evidence, pp. 959, 965*.

**Certificate**; in English law, a writing made in any court, to give notice to another court of anything done therein, usually by

way of transcript. *Tomlins' Dict. h. t.; Wharton's Lex. h. t.*

**Certificate.** See *Attorney's Certificate.*

**Certificate of Registry of a Ship;** is a copy of what is entered in the register of the ship in the books of the Custom-house. It is granted by the collector, comptroller, or principal officer of the customs at the port of registry of the ship, and delivered to the captain as a voucher of the character and privileges of the vessel as a British ship; *Bell's Com.* vol. i. p. 158, 5th edit. See the form of this certificate, schedule D, 17 and 18 Vict., c. 104, 1854, being the act to amend and consolidate the acts relating to merchant shipping. See also the Merchant Shipping Repeal Act, 1854, 17 and 18 Vict., c. 120. Also the act 18 and 19 Vict., c. 91, 1855. Also, *Abbott's Law of Merchant Ships*, 10th edition, 1856.

**Certification;** in judicial procedure, signifies properly the *assurance* given to a party of the course to be followed in case he disobeys the will of the summons or other writ, or the order of the Court. Erskine defines it to be "the penalty to be inflicted on the defender if he shall neither comply with the will of the summons, nor show a reason why he is not bound in law to comply with it;" B. iv. tit. 1, § 7. Certification is either expressed or implied. In the ordinary summons, the defender is ordered to appear in court against a certain day, "with certification as effeurs." This certification was at one time so severe, that reiterated contumacy on the part of the defender was punished with confiscation of his property (1449, c. 29); but now, the certification in the summons amounts to nothing more than an absolute assurance to the defender, that if he fails to appear in the usual manner, the judge will deern in his absence. The certification in the general charge is, that in default of the heir's entry, the creditor shall have the same action against the heir as if he had entered. In the special charge, the certification is, that action shall be had not only against the heir, but also against the lands belonging to the deceased; *Ersk. B. ii. tit. 12, § 12.* The most important certification in our law, however, is that in the process of reduction-improbation. In that action two terms are allowed to the defender for the production of the writ sought to be reduced, and, after the expiration of these terms, ten days longer are allowed; but should the writ not then be produced, decree of certification may be pronounced by the judge, the effect of which is to hold the writ as forged and fabricated; and such a decree, once pronounced, can hardly be recalled, even although it has been pronounced in absence. *Stair, B. iv. tit. 3, § 31; More's Notes, p. cclxxvi; Ersk. B.*

iv. tit. 1, § 21; *Bell's Com.* 5th edit. vol. ii. p. 277, *et. seq.*; *Jurid. Styles*, vol. iii. p. 846. In the simple reduction, the certification is merely, that the deed called for shall be held as void until produced. *Ersk. ib. § 24; Ersk. Princ.* 12th edit. pp. 459, 489; *Shand's Prac.* 632, 641, *et. passim.*

**Certiorari;** is an English writ, analogous to our letters of advocation. It is issued out of the common law jurisdiction of the Court of Chancery in civil cases, and the Crown side of the Court of Queen's Bench in criminal cases, and is directed in the Queen's name to the judges or officers of inferior courts, commanding them to *certify*, or to return the records of a cause depending before them, to the end that the party may have more sure and speedy justice before the Queen, or such judges as she shall assign to try the cause. *Tomlins' Dict.; Wharton's Lex. h. t.; 2 Hale, p. 210; 4 Black. Com. p. 320.*

**Cess.** See *Land-Tax.*

**Cessio Bonorum.** The process of *cessio bonorum* may be termed an equitable relief from the severity of the law of imprisonment for debt. This process was formerly sued out exclusively in the Court of Session, in the form of a summons at the instance of the imprisoned and insolvent debtor, in which the whole of the creditors were called as defenders. When the process came into Court, the pursuer was bound to exhibit a condescendence, containing a full statement of his affairs; and to satisfy the Court that his inability to pay his debts had arisen from innocent misfortunes. This process is still competent before the Court of Session; and any one of the creditors is entitled to appear and object to the statement; and the pursuer will not be allowed the benefit of the process, until he has given a satisfactory explanation of the state of his affairs; the *onus probandi*, however, of all objections, lies with the creditor. When the objections have been obviated, the Court pronounce an interlocutor, finding the debtor entitled to the benefit of *cessio*; and upon his lodging in the hands of the clerk of Court a disposition *omnium bonorum* in favour of his creditors, and making oath that the condescendence contains a full and true state of his affairs, and that he has made no conveyance of any part of his property, either before or since his imprisonment, to the prejudice of his creditors, decree of *cessio* will be pronounced; the effect of which is to liberate the debtor from imprisonment, and to protect him from re-incarceration for any debts due, prior to the decree, to the creditors who have been called in the action. The decree also generally contained a dispensation to the pursuer from the necessity of wearing the dyvour's habit. See *Dyvour.*



By 6 and 7 Will. IV., c. 56, the jurisdiction in cases of *cessio* is extended to sheriffs. The principal provisions of that statute are,—

1. Any debtor in prison, or who has been in prison, and is afterwards liberated, or against whom a warrant of imprisonment has been issued, may present to the Sheriff of the county in which he lives a petition, stating his inability to pay his debts, and willingness to surrender his estates, and praying for decree of *cessio* and *interim* protection; the petition to contain a list of his creditors, and to be accompanied by the warrant, or a certificate of imprisonment.
2. The debtor then, on a warrant from the Sheriff, publishes a notice in the *Edinburgh Gazette*, requiring the creditors to appear in court within thirty days, and sends letters with the same notice to each of the creditors, or, at his option, cites them in terms of law. He then lodges a state of his affairs, subscribed by himself, and all books, papers, &c., relating to his affairs, with the Sheriff-clerk. The jurisdiction of the Sheriff extends to foreign creditors; *Kennedy*, March 10, 1838.
3. On the day appointed for compareance, the Sheriff may examine the debtor upon oath; after which, the Sheriff, if necessary, shall allow parties a proof, and make a note of the creditors' objections, and either grant decree, or refuse it *in hoc statu*; or grant it, subject to a declaration, that it shall not be extractable or available as a protection to the debtor for such time as shall appear proper, or make such other orders as to him appear just; and where he shall grant decree under such limitations, or refuse decree *in hoc statu*, he shall state the grounds of his decision, and his note of the objections shall form part of the process.
4. If such decree be pronounced by the Sheriff-substitute, any one aggrieved may lodge a reclaiming petition within six days; and if the complainer intimate in the petition his desire that, if the Sheriff-substitute be disposed to refuse it, the petition may be laid before the Sheriff, it shall be transmitted to the Sheriff.
5. Any person, after disposal of such petition, or without presenting one, may, within ten days, or in Orkney within twenty days, after the last judgment complained of, lodge with any of the clerks of Session a reclaiming note, a copy of which shall be delivered within the said period to the respondent, or his known agent; and a copy, certified by the said clerk of Session, shall be a sufficient warrant to the Sheriff-clerk to transmit to the said clerk of Session the proceedings in process.
6. If the Court of Session be sitting, the Court shall, after enrolment of the reclaiming note, pronounce judgment, or remit to the Sheriff with instructions, or to the Lord Ordinary on the Bills during vacation or the Christmas recess. If the Court be not

sitting, the Lord Ordinary on the Bills may act as judge during vacation or Christmas recess, subject to review; but if the proceedings have not been brought to a termination before the Lord Ordinary at the commencement of the ensuing Session, the cause shall be re-transmitted and enrolled before the Inner-House, which may give judgment therein, as if it had been enrolled, or had continued without interruption, before the Inner-House.

7. In cases originating in the Court of Session, the procedure remains as before; but the Court are, in addition, empowered to remit to the Sheriff to examine as above (3.), and report to the Inner-House, who grant decree, or refuse *hoc statu*, or grant with limitation.
8. If the Court of Session be not sitting when the report is made, the Lord Ordinary on the Bills may hear parties *viva voce*, and pronounce judgment; or if the Court be sitting, but the proceedings cannot be terminated before vacation or Christmas recess, the Inner-House may remit to the Lord Ordinary. And if the proceedings be not terminated before the Lord Ordinary at the commencement of the ensuing session, the Inner-House takes them up.
9. The Lord Ordinary shall possess, for the purposes of the act, the same powers during vacation and recess as the Inner-House during session; but any person aggrieved by his judgment may lodge a reclaiming note to the Inner-House within ten days.
10. The Inner-House, the Lord Ordinary, or the Sheriff, may grant *interim* protection or liberation, provided that, before the issuing of the warrant, the debtor lodge a bond with a sufficient cautioner, binding themselves under a penalty, to be divided among the creditors, that he shall attend all diets when required; and the effect of such warrant of liberation or protection shall not be suspended by the mere lodging of a reclaiming note; but the Inner-House or Sheriff (as the case may be) may, on its being lodged, and parties heard, recal the warrant of liberation or protection; and the Inner-House, Lord Ordinary, or Sheriff, may grant warrant to bring the debtor before them for examination, and carry him back to prison. The debtor cannot apply for *interim* protection or liberation sooner than the day of compareance; *Shand's Prac.* p. 803.
11. The decree shall operate as an assignation of the debtor's moveables for behoof of the creditors, in favour of any trustee mentioned in the decree; but it shall be in their option to require a disposition *omnium bonorum*.
12. When decree is refused *in hoc statu*, the debtor may at any time thereafter apply for decree, without the necessity of raising a new summons or presenting a new petition.
13. The dyvour's habit is abolished, and the act 1696, c. 5, in reference to it, is

repealed. 14. The debtor must prove his insolvency, and take oath before the Sheriff as before the Court of Session. 15. Any person may lodge a petition of appeal to the House of Lords against the judgment of the Inner-House within ten days, if Parliament be sitting; but if not sitting, or not sitting long enough, within six days after it next meets. 16. No fee-fund or government duties are exigible in any of the proceedings. 17. Court of Session agents may practise in the Sheriff-courts.

This act of 6 and 7 Will. IV., together with two explanatory Acts of Sederunt,—that of 24th December 1833, applying to the process of *cessio* in the Court of Session, and that of 6th June 1839, applying to *cessios* in Sheriff-courts,—now regulates the law upon the subject. By § 3 of the recent Bankrupt Act, 19 and 20 Vict., c. 79, insolvency, concurring with an application for *cessio*, renders a debtor notour bankrupt; and by § 167, the trustee, for behoof of the creditors of the pursuer of a *cessio*, is placed under the supervision of the Accountant in Bankruptcy.

The effect of a decree of *cessio* being not to discharge the debtor, but merely to relieve him from the operation of personal diligence, it affords no protection against the attachment by his former creditors of any property which he may subsequently acquire, either by his own industry or otherwise. The creditors, however, before proceeding with diligence against the new acquisitions of the debtor, are bound to realize the property conveyed by the disposition *omnium bonorum*, and to apply it, as far as it will go, in extinction of their debts; *Bell's Com.* vol. ii. p. 589, 5th edit. In surrendering to his creditors either new acquisitions or the property formerly belonging to him, the debtor is not entitled to retain anything but his working tools, properly so called (see *Beneficium Competentiæ*); and where the debtor has a fixed salary or fixed wages, it is settled that he must give up all that exceeds a proper aliment: Thus clergymen have been held bound to give up part of their stipend, and officers in the army a proportion of their half-pay; *Bell's Com.* *ibid.* p. 594. See also *Bell's Com. on the recent Sequestration Statutes*, pp. 25, 104; *Stair*, B. iv. tit. 52, 17, *et seq.*; *More's Notes*, p. cccclxxxiv; *Ersk. B.* iii. tit. 3, § 26, *et seq.*; *Shand's Practice*, p. 795, *et seq.*; *Jurid. Styles*, 3d edit. vol. ii. p. 251, vol. iii. p. 305; *Watson's Stat. Law, voce Bankrupt*; *Shaw's Digest. h. t.*; *Brown's Synop.*; *Bell's Princ.* 4th edit. arts. 5232, *et seq.*; *Kames' Princ. of Equity* (1825), 296; *Burton on Bankruptcy*, p. 633, *et seq.*; *Barclay's M'Glash. Sheriff Court Prac.* 426, *et seq.*; 1 *Hume*, 371; *Baird on Cessio*.

**Cestui Que Trust**; in the law of England,

is the party beneficially interested under a trust; or, according to the English law definition, "is he in trust for whom or to whose use or benefit another man is infeoffed or seised of lands or tenements." The *cestui que trust*, if in possession, votes in parliamentary elections. *Tomlins, h. t.*; *Chambers, h. t.*; *Whar-ton, h. t.*; *Lewin on Trusts*; *Hill on Trusts*.

**Chalder**, a chalder of victual consists of 16 bolls.

**Chalking of Door**; a mode of warning tenants in burgal tenements to remove. In Edinburgh this is performed by a town-officer, acting *ex officio*, and at the request of the landlord, but without any express judicial warrant. It is not clear that the officer need notify to the tenant the purpose of his visit: although the safe course is to do so. The chalking consists of marking the principal door of the tenement with chalk forty days before Whitsunday; and a certificate, or *execution of chalking*, being returned, subscribed by the officer and two witnesses, becomes the warrant for a summary removing before the burgh court, under which decree of removal will be pronounced, immediately on the arrival of the removing term; and if the tenant do not then remove, he may be ejected on the expiration of a charge of six days. *Bell on Leases*, vol. ii. p. 118, 4th edit.; *Hunter's Landlord and Tenant*, ii. 85; *Ross's Lect.* ii. 551. See *Removing*,

**Challenge**; an invitation or defiance to fight a duel, whether given verbally or in writing. By 1696, c. 35, the person, whether principal or second, or other interposed person, concerned in giving a challenge, was punishable with banishment and escheat of moveables, although no fighting ensued. This statute was repealed by 59 Geo. III., c. 70; but both the sender and acceptor of a challenge, or one who posts a person as a coward for not fighting, are still guilty of an indictable offence. The challenge must be serious and formal, and not mere intemperate expressions or words of defiance, which, though importing a design to fight, are not followed up by more deliberate proceedings. *Hume*, i. 438, 442; *Bell's Notes*, p. 111; *Hutch. Justice of Peace*, vol. i. p. 386; *Alison's Princ.* p. 580; *Burn's Justice by Chitty*, p. 586. See *Duelling*.

**Challenge of Jurors**. To challenge a juror, is to object to his acting as a juryman. The English Treason Laws, which were extended to Scotland by 7 Anne, c. 21, allow a person tried for that crime *thirty-five* peremptory challenges, *i. e.*, challenges without cause assigned. In other criminal cases the panel had not, until lately, by the law of Scotland, any right of *peremptory* challenge; but he is served with a list of the whole forty-five persons from which the jury is to be se-

lected, and has thus an opportunity of learning all reasonable objections which may be stated against any of them, and, on cause shown, he may object without limit. The lawful grounds of objection are,—1. That the proposed juryman is infamous *infamia juris*, or an outlaw; 2. That he has hostile feelings towards the panel, or that he has expressed such feelings; 3. That he is insane, or deaf, or dumb, or a minor; 4. Where the prosecution is at the instance of a private party, it is a good objection that the juryman is near of kin to the prosecutor, or that he is dependent upon him in such a manner as to create an undue bias; *Hume*, i. 5, 545; ii. p. 309. And now, by the statute 6 Geo. IV., c. 22, the prosecutor and panel have, each of them, five peremptory challenges without reason assigned; *Alison's Prac.* p. 383; but in both criminal and civil trials only two in the special list can be peremptorily challenged. See *Jury*. By the act establishing the jury court in civil causes in Scotland (55 Geo. III., c. 42, § 21), peremptory challenges to the number of four to each party are allowed; and challenges, on cause shown, are of course unlimited. The act 59 Geo. III., c. 35, by which the jury court is made permanent, makes no alteration in regard to the right of challenge. See *Jury Trial*.

**Chamberlain.** The chamberlain of Scotland was an officer of high dignity and of supreme jurisdiction. He had the inspection of all royal burghs, and power to inquire into the conduct of the magistrates, and to apply the burgh revenues to their proper use. He decided disputes betwixt burghs and burghs, and held circuits for the exercise of his jurisdiction. He judged also in matters of public police within burghs, a power now exercised by the Dean of Guild. The office of chamberlain of Scotland has been long since abolished. *Stair*, B. iv. tit. 1, § 4; *Ersk.* B. i. tit. 3, § 38.

The *Lord Great Chamberlain of England* is an officer of considerable importance. He is governor of the Palace of Westminster; and, upon all solemn occasions, such as the coronation of the King, the keys of Westminster Hall are delivered to him. He has the care of providing all things in the House of Lords during the sitting of Parliament. The Gentleman Usher of the Black Rod, Yeoman Usher, &c., are under his authority. The office is hereditary. *Tomlins' Dict.*; *Wharton's Lex.*

The *Lord Chamberlain of the Household* has the superintendence and government of all affairs belonging to the King's chamber (except the bed-chamber), and also of the wardrobe; of artificers in the King's service, King's messengers, comedians, &c. The serjeants-at-arms are also under his inspection, and the King's chaplains, physicians, apothecaries,

surgeons, &c. He has a vice-chamberlain under him; and both are Privy Counsellors. *Tomlins' Dict.*; *Wharton's Lex.*

**Champarty, or Champerty;** in English law, a bargain with the plaintiff or defendant in any suit, to have part of the land, debt, or other things sued for, if the party that undertakes it prevails therein; whereupon the *champertor* is to carry on the party's suit at his own expense. It is strictly forbidden by several English statutes, being a species of maintenance, and punished in the same manner. *Tomlins' Dict. h. t.*; *Wharton's Lex. h. t.*; *Story's Com.* ii. 289; *Story on Contracts*, § 208. See *Maintenance. Buying of Pleas.*

**Champert;** in old law language, a gift taken by a great man or by a judge for delaying a just, or expediting a wrongous action. In England it is used where the judge himself, either directly or indirectly, maintains the plea. *Skene, h. t.*

**Chancellor of a Jury;** is the preses or foreman of the jury, who announces the verdict when it is a verbal one, and who delivers it in, and, along with the clerk, subscribes it in name of the jury, when it is in writing; *Hume*, vol. ii. p. 426; *Alison's Prac.* 639. By the Jury Court act, 55 Geo. III., c. 42, § 33, it is provided that the chancellor of the jury in civil causes shall be elected by a majority of the jury after they are sworn, and, in case of an equality of votes, the juror first sworn shall have a double vote. See *Verdict*.

**Chancellor, Lord.** The office of Lord Chancellor of England is the highest under the Crown. The Lord Chancellor is appointed to the office by the mere delivery of the King's great seal into his custody. He is a Privy-Councillor *ex officio*, and Speaker of the House of Lords by prescription. He has the appointment of all justices of the peace throughout the kingdom. In England he is the guardian of all infants, idiots, and lunatics, and has the general superintendence of all charitable institutions. In his judicial capacity he exercises the very extensive jurisdiction of the Court of Chancery. He not only keeps the King's great seal, but all patents, commissions, warrants, &c., from the King are perused and examined by him before being signed. The highest branch of his jurisdiction is that of cancelling the King's letters-patent when granted contrary to law. The Lord Chancellor is superior in point of precedency to every temporal Lord. *Tomlin's Law Dict.*; *Wharton's Lex. h. t.*

The office of Lord Chancellor in Scotland was abolished at the Union in 1707. The Chancellor of Scotland was formerly an officer of very great importance. He presided in the Scots Parliament, and in all courts of judicature (1661, c. 1), and had the principal

direction of the Chancery. He had the custody of the great seal, and was chief counsellor to the King (*Balf. Practicks*, p. 15); and took precedence of all others *ratione officii*. On the abolition of the office, a keeper of the great seal for Scotland was appointed; in affixing the seal, however, to the writs passing under it, he acts merely ministerially. See *Great Seal*.

**Chancery or Chancery.** The Chancery in Scotland is an office managed by the Director of Chancery and his deputies, in which are recorded all charters, patents of dignities, gifts of offices, remissions, legitimations, presentations, commissions, briefs, retours, precepts thereon, and all other writs appointed to pass the great or the quarter seals. The Director of Chancery is keeper of the quarter seal, or testimonial of the great seal as it is also termed; and in this office all writs passing under the quarter seal are written. All writs passing through Chancery are recorded before they are given out to be sealed. It is from Chancery that all briefs are issued, and to it all retourable briefs are returned to be recorded. *Stair*, B. iv. tit. 1, § 2; tit. 3, § 1; tit. 48, § 39; *Brown's Synop. h. t.* See *Briefs. Seals*.

**Chancery**; in England, the highest court of judicature next to the Parliament. Its jurisdiction is of two kinds, *ordinary* and *extraordinary*, in the former of which the Lord Chancellor, Lord Keeper, &c., is bound, in his proceedings and judgments, to observe the order and method of the common law; the latter is that which the court exercises in cases of *equity*. *Tomlins' Dict. h. t.*; *Wharton's Lex, h. t.*

**Chapels and Altarages.** Before the abolition of Popery, it was usual for pious persons to found and endow chapels, which were served by a chaplain; or altarages, which were small endowments for the maintenance of a priest to perform divine service at an altar, on behalf of the soul of the founder, or some of his deceased friends. *Ersk. B. i. tit. 5, § 3.* See *Altarage*.

**Chapter.** In times of Popery and Episcopacy the chapter was the bishop's council, consisting of an archdeacon, dean, and canons or prebendaries, who were generally ministers within the diocese. By the advice of this council, the bishop managed both his spiritual affairs and the temporal affairs of the diocese. See *Stair*, B. ii. tit. 8, § 15; *Ersk. B. ii. tit. 10, § 5.*

**Character of Panel.** Evidence of the prisoner's general bad character cannot be brought to support a specific charge. The charge of habit and repute in theft is of course excepted. In certain cases of homicide, proof of a vindictive temper, and of a

series of cruelties practised towards the individual killed, is competent; but such cruelties must be set forth in the libel. Proof of character is allowed on the part of the panel, both as evidence in his favour, and in mitigation of punishment, as, for instance, in homicide on sudden quarrel, that he is of a mild temper, and that the deceased was the reverse. Such evidence of character must be given on oath, unless when offered in mitigation of punishment, in which case a written certificate is admitted, *valeat quantum*, where the case has not gone before the jury; *Dickson on Evidence*, p. 965. Where the character of the injured person is impeached by a panel, the prosecutor may bring evidence to support it. In cases of rape, the woman's general loose manners, and even particular acts of criminality, may be proved; but the prosecutor must have notice of this line of defence, unless he has attempted to set up her previous character. *Hume*, ii. 413; *Alison's Prin.* 215; *Alison's Prac.* 629; *Dickson on Evidence*, 21. In charges of rape also, the prosecutor may anticipate the ordinary defence, that the connection was voluntary, by proving the woman's good character, though not impugned on record; *M'William*, 1846; *Arkley's Rep.* p. 209.

**Character of Parties.** In an action of damages for defamation, it is competent to the pursuer to adduce evidence in support of his general character, as upon that the amount of his damages in some degree depends. When a pursuer leads evidence in support of his character, the defender is entitled to attack it and lead counter evidence, but not to impugn a general character in favour of which evidence has been led, by questions as to particular acts. Upon the question, whether the defender is entitled to attack the general conduct of the pursuer, although evidence has not been led in support of it, there are several conflicting decisions cited by Mr Macfarlane; *Jury Prac.* 217. In the most recent of these, evidence was admitted that the pursuer was of a violent and quarrelsome disposition, there being a statement to that effect in the record; and the principle seems now to be recognised, that general evidence against the pursuer's character will be rejected, unless the defender has attacked it on record, or taken an issue in justification; *Dickson on Evidence*, p. 18. It is incompetent in civil cases to lead evidence as to the defender's general character, either *pro* or *contra*. See *Macfarlane's Jury Prac.* 216-8, and *authorities there cited*; *Dickson, ut supra*.

**Character to Servant.** There is no legal obligation upon a master to give his servant a character; but if he give a false one, he is liable to the servant in damages. *Bell's Princ.*

4th edit. p. 53, and authorities there cited; *Il-lust.* p. 149.

*Chardones, vel Cardones*; cards with which wool is carded and wrought. *Skene, h. t.*

**Charge.** In the technical language of Scotch law, a charge is the command of the Sovereign's letters to perform some act. The term is also applied to the messenger's copy for service, requiring the person to obey the order of the letters; as a charge on letters of horning, or a charge against a superior.

*Charge to enter Heir.—General Charge.*—This formerly was a writ issued in the sovereign's name, and passing the Signet, ordering the heir within forty days to enter heir to his predecessor, under certification that, if he failed, the creditor should have action against him, in the same manner as if he had entered. The general charge was intended merely as the foundation of proceedings against the heir; and although such a charge might have been given during the currency of the *annus deliberandi*, yet no summons could be raised for constituting the debt, until after the expiration of the year, unless, during the course of it, the heir had intromitted with the effects of the deceased, and so incurred a passive title. When the action had been raised on the expiration of the general charge, the heir, if he chose, might appear and renounce the succession; in which case decree *cognitionis causæ* might be obtained at the instance of the creditor. This decree was termed a decree of cognition, because its chief object was to ascertain the amount of the debt; but such a decree, proceeding on a renunciation by the heir, could not affect either his person or separate property. Where no appearance was made for the heir, decree was pronounced against him as lawfully charged to enter heir, which had the effect of constituting him debtor personally, and gave the creditor action against him and his estate, as well as against the estate of the ancestor. *Ersk. B. ii. tit. 12, § 12, et seq.; Bell's Com. 5th edit. vol. i. p. 709; Brown's Synop. h. t.; Shaw's Digest; Jurid. Styles, 2d edit. vol. iii. p. 328; Sandford on Heritable Succession, vol. ii. p. 9, 11, 67; Ross's Lect. i. 498; Menzies' Lectures.*

The debt being thus constituted, it still remained, that the heritable rights which belonged to the ancestor should be vested in the heir, or made liable to the diligence of the creditor; and for this purpose the heir required to receive either a *special* or a *general special charge*.

The *Special Charge* was a writ also issued in the Sovereign's name, and passing the Signet. It narrated the general charge and procedure for constituting the debt, and that the heir would not enter himself heir in special to the heritage in which his ancestor died infest, so

as to enable the creditor to adjudge that property; and it ordained the heir, within forty days, to enter himself heir in special to his ancestor, under certification that, if he failed, the creditor should have action of adjudication against him and the lands, precisely as if he had so entered. The execution of this charge was by 1540, c. 160, made equivalent, *fictione juris*, to the heir's actual entry; and on the expiration of the forty days, an adjudication at the instance of the creditor effectually carried the subjects to which the heir was charged to enter. *Ersk. B. ii. tit. 12, § 13; Bell's Com. ibid. pp. 712 and 740; Jurid. Styles, 2d edit. vol. iii. pp. 375, 415, 763.*

*The General Special Charge.*—The only difference between this charge and the special charge was, that it was applicable to those heritable subjects to which the ancestor had personal rights, not completed by sasine; and the heir was charged to make up his titles to the unexecuted procuratories or precept, &c. under certification that, if he failed, the creditor should have the same action against the heir and the heritage, that he would have had if he had been retoured heir in general to his ancestor. *Ersk. ib.* By the statute 54 Geo. III., c. 137, § 8, it was enacted, that, after one charge, whether general or special, had been given on *inducæ* of forty days, every subsequent charge might be on *inducæ* of twenty days only; and by the same section of the act, these *inducæ* were declared to be applicable whether the heir was within Scotland or not. *Jurid. Styles, 2d edit. vol. iii. p. 371.*

Where the heir himself, and not the ancestor, was the debtor, there was no occasion for a general charge. All that the creditor had in view in such a case was, that his debtor should complete his titles to the property to which he had succeeded, so that it might be attached for his debt; and, for this purpose, it was necessary to raise letters either of special or of general special charge, according to the state of the titles to the subjects of the succession; and, on the expiration of this charge, whether the heir entered or not, the subjects were effectually attached by adjudication at the creditor's instance. 1621, c. 27; *Ersk. B. ii. tit. 12, § 14.* But, even in this case, the heir was not obliged to answer the charge until the expiration of the *annus deliberandi*; and the creditor could not go on with his proceedings during the year, unless the heir chose either to obey the charge, or to assume possession of the estate, or grant conveyances of it. It has been doubted whether the heir, when he was himself the original debtor, was at liberty to renounce the succession which had opened to him, and which might have enabled him to discharge his debts; and it was once held that such a re-

nunciation was competent; *Carse*, 23d March 1627, *Mor. Supplement*, p. 40; but the correctness of that decision has been questioned; *Bell's Com.* vol. i. p. 709, 5th edit.

The act 1540, c. 106, authorized charges to enter to be given only where the heir was of perfect age; but, by immemorial usage, it was the practice to charge minors. It has been already observed, that the charge might be given during the currency of the *annus deliberandi*; and in those cases where the general charge was meant to be the foundation of an ordinary summons, the action was sustained if the summons on which it proceeded was not executed until a year after the ancestor's death, although the forty days of the charge were not elapsed at the date of the execution. But where a special charge had been given with a view to an adjudication, the summons of adjudication, according to the construction put on the statute, could not be raised until the expiration of the *annus deliberandi*, and of "the forty days next ensuing that year, within which the heir is charged to enter." *Stair*, B. iii. tit. 4, § 32; tit. 5, § 22, *et seq.*; B. iv. tit. 51, § 10; *Ersk.* B. ii. tit. 12, § 15; *Bell's Com.* 5th edit. vol. i. p. 743; *Bell's Princ.* 4th edit. art. 1855, *et seq.*; *Menzies' Lectures.* See *Adjudication*.

By the act 10 and 11 Vict., c. 48, § 16, general, special, and general special charges are abolished. The execution of a summons of constitution of an ancestor's debt against an unentered heir is made equivalent to a general charge. The execution of a summons of adjudication following on the decree obtained in such action of constitution is made equivalent to a special charge, or general special charge, as the case may require. The same effect is given to the execution of a summons of adjudication against an unentered heir, founded on his own debts. See on this subject the article *Adjudication contra Hereditatem Jacentem*.

**Charge on Letters of Horning.** The will of letters of horning commands messengers-at-arms, as sheriffs in that part, to order the debtor to pay the debt within a certain number of days; and this the messenger does by leaving for the debtor what is termed a copy of charge; by which, in virtue of the letters of horning, he commands and charges the debtor to make payment of the debt, specifying the sum, and describing the voucher of debt as in the narrative of the letters of horning, and that within the days and under the pains expressed in the letters. This must be signed by the messenger (1592, c. 141). The date must be in writing (1693, c. 12), and the names and designations of the witnesses inserted. The form of giving this charge is regulated by the act 1540, c. 75;

and the cases provided for are,—1. Where the charge is delivered personally, and then the form is simple. 2. Where the debtor is not found, and the charge is left with the servant. In this case, it must be left at the principal dwelling-place, and with the servant within the dwelling-place; and this fact must be stated in the execution. 3. The other case provided for by the act is where the party cannot be found, and access cannot be got. In that case, the messenger must knock six audible knocks on the door, and then affix a copy of charge on the most patent door of the house. The execution returned by the messenger is a certificate of his having gone through the form of delivering the charge; which execution must be signed by him and by the witnesses, whose names and designations must also be inserted. 1681, c. 5. When the debtor is furth of the kingdom, this charge may be given edictally, provided the letters contain a proper warrant for such charge. See *Citation*.

Since the Personal Diligence Act, 1 and 2 Vict. c. 114, the use of letters of horning as the warrant of a charge is almost superseded. That act provides, § 1, that extracts of decrees of the Court of Session, Teind Court, and Court of Justiciary, and of decrees proceeding on registered deeds, &c., may contain a warrant to charge the debtor or obligant to pay or perform; in virtue of which extract the charge may be given; and an execution must be returned in terms of an annexed schedule, § 83. A similar warrant to charge may be inserted in extracts of Sheriff Court decrees, § 9. Extract decrees in Exchequer causes also may, by 19 and 20 Vict., c. 56, contain warrant to charge. See 6 *Geo. IV.*, c. 128, § 31; *Bell's Com.* 5th edit. vol. ii. p. 200 and 543; *Shaw's Digest*; *Ross's Lect.* i. 114, 237, 292, 478, 534; *Hunter's Landlord and Tenant*; *Darling's Messenger-at-arms*; *Menzies' Lectures on Conveyancing*, p. 282. See *Horning, Edictal Citation*.

**Charge against Superiors.** These charges may be used by heirs, by adjudgers, or by purchasers.

*Charge by an Heir.*—The charge may be used against a superior, or against the heir of a superior. 1. *Against the superior.* By the 20 *Geo. II.*, c. 50, the heir, on production of his special retour, may obtain a warrant for letters of charge, to charge the superior to enter him on fifteen days' notice, which he is bound to do on receiving the non-entry and relief duties, and exhibition of the ancient titles; and this charge may be enforced by personal diligence against the superior; *Ersk.* B. iii. tit. 8, § 79. 2. *Against the heir of the superior.* When the superior is dead, and the heir unentered, the superior's heir must, in terms of the act 1474, c. 58, be

charged by the heir of the vassal to infest himself within forty days, under certification that, should he fail, he shall lose the tenant for his lifetime; which has been explained to mean the casualties arising from the delinquency of the vassal, and besides be liable in damages; and should the heir fail to enter, the vassal may proceed to charge the intermediate superiors, until he comes to the Crown, from whom he will receive a title. *Ersk. ib.* § 80.

*Charge by an adjudger.*—Where an adjudger wishes to render his debt real, and capable of competing with other real rights, he must obtain infestment; and, with this view, where the superior refuses to enter him, he must raise letters of horning (the warrant of which is contained in the decree of adjudication), and upon these charge the superior to enter him within twenty-one days. This was introduced by the act 1647, c. 43; and although that act was rescinded, the practice has continued; and the superior is bound to give an entry on payment of a year's rent of the subject. Should the superior neglect the charge, the next highest superior may be charged to give an entry to the adjudging creditor, and so on up to the Crown, from which a charter will be obtained, which will vest a feudal right in the adjudging creditor. *Ersk. B. ii. tit. 12, § 25.* As to the mode of rendering an adjudication the first effectual one, see *Effectual Adjudication.* See also *Adjudication.*

*Charge by a purchaser.*—By the act 20 Geo. II., c. 50, § 12, every purchaser possessed of a disposition with a procuratory of resignation, may demand an entry from the superior, on payment of the entry-money stipulated in the original charter, or of a year's rent. On the superior's refusal, the purchaser may apply to the Lord Ordinary on the Bills, praying a warrant for letters of horning to charge the superior to receive him; and upon production in the Bill-Chamber of the disposition or other conveyance, containing procuratory of resignation in favour of the purchaser, warrant will be granted for letters of horning, on fifteen days' *inducia*, to charge the superior to enter the purchaser. Should the superior be himself unentered, the purchaser may proceed and charge him in the manner above explained.

This formerly was the only way in which a superior could be compelled to give an entry; for although the purchaser might be entered by confirmation, that entry was the voluntary act of the superior, and admitted of no charge at the instance of the pursuer. *Stair, B. iv. tit. 3. § 30; Bell's Com. 5th edit. vol. i. p. 718; Bell's Princ. 4th edit. art. 823; Ross's Lect. ii. 301; Menzies' Lectures.*

By the act 10 and 11 Vict., c. 48, § 6, a

superior may be compelled to grant a charter of confirmation in the same way and form as he might have been compelled to grant a charter of resignation. See *Confirmation.*

**Charity;** receipt of charity or parochial relief disqualifies to vote for a member of Parliament. See *Alms.*

**Charter.** A charter is the written evidence of a grant of heritable property, made under the condition that the grantee shall annually pay a sum of money, or perform certain services to the granter; and by our law it must be in the form of a written deed. The granter of a charter is termed the superior,—the grantee the vassal,—the vassal is said to hold the subject of the superior,—and the annual sum or service stipulated is termed the duty. Charters are called *blench* or *feu*, from the nature of the stipulated prestation,—*a me* or *de me*, from the kind of holding,—and original, or by progress, from being first or renewed grants of the same subjects. See *Menzies' Lectures; Duff's Feudal Conveyancing.*

*Blench and Feu Charters.*—In former times, the duty which superiors almost always required from their vassals was military service, and the vassal was then said to hold ward. This holding, however, was abolished by the act 20 Geo. III. c. 50; and since that act took effect, the only duties which it is lawful to insert in charters are *blench* and *feu* duties. A *blench-duty* is a mere nominal payment; as a penny Scots, or a red rose, *si petatur tantum*. A *feu-duty* is a consideration of some value. Charters containing these different duties are termed, according to their nature, *blench* or *feu* charters. Original *blench-charters* are not very common in modern practice. From the nature of the duty stipulated in them, superiors can derive no advantage from granting such rights, but, on the contrary, subject themselves to considerable inconvenience and expense, in so far as it is necessary for them to complete titles to the superiority in favour of themselves or their heirs, to enable them to renew the *blench* right after the death of the original vassal. *Jurid. Styles, 3d edit. vol. i. pp. 10, et seq.; 24, et seq.; 4th edit., p. 16, et seq.; 41, et seq.*

*Charters a me and de me.*—All charters were originally written in Latin, and one of the clauses began with the words, "*Tenendas predictas terras de me,*" to show that the grantee was to hold the lands of the granter, or to consider him as his superior. A charter having a clause in these terms was called a charter *de me*. It often occurred, however, that vassals disposed their lands to a third party, to be held, not of themselves as superiors, but of their superiors; and, for this purpose, they granted charters conveying the

lands, to be held *a me de superiore meo*; and these were termed charters *a me*. As, however, the vassal had no authority to grant such charters, it was necessary to get them ratified by the superior, in order to render them valid. A charter *de me*, then, is a grant of lands to be held of the grantor; a charter *a me*, is one to be held of the grantor's superior. *Ersk. Princ.* 12th edit. 143.

*Original Charters, and Charters by Progress.*—An original charter is one by which the first grant of the subject is made: a charter by progress is one renewing the grant in favour of the heir or singular successor of the first or succeeding vassals.

I. *Original Charter.*—According to its modern form, the original charter contains the following clauses:—1. The narrative, which contains the name and designation of the grantor or superior, and the inductive cause or consideration, onerous or gratuitous, which may have induced the superior to grant the right; and, where the consideration is pecuniary, the narrative also contains a receipt and discharge for the sum paid. 2. The dispositive clause, in which the superior declares that he has granted and disposed, and thereby grants and disposes, the lands to the vassal: it specifies the heirs who are to succeed to them: it contains a minute description of the lands, stating the county, parish, &c., in which they are situated; and when the superior means to reserve any right in the subjects to himself or others, or to make the grant under any peculiar conditions, such reservations or conditions are inserted here. 3. The *tenendas*, stating that the grantee is to hold the lands of the grantor as superior. 4. The *reddendo*, which expresses the duty in money or services to be paid by the vassal to the superior, with the sum which an heir, and sometimes a singular successor, is to pay for a renewal of the grant, termed relief and entry-money. 5. The clause of registration, which is only for preservation, and in the books of Council and Session. 6. The precept of sasine, which, now, is a mandate to any notary, to give symbolical delivery to the vassal of the subjects conveyed. And, 7. The testing clause. Besides these clauses, it is usual to insert a clause of absolute warrandice, which warrandice, however, is implied; and an assignation to the rents, which is only useful before infeftment is taken on the precept. Original charters are now seldom granted by the Crown. As most of the lands in the kingdom have already been inserted in charters from the Sovereign, the charters which the Crown is now called on to grant are chiefly renewals of former rights. Nevertheless, when property has fallen to the Crown as *ultimus hæres*, by forfeiture or other-

wise, there is no other mode by which the donatary to whom such property may be gifted, can complete his right, except by obtaining an original charter from the Crown. But even such a charter is assimilated in its form more to a charter by progress than to an original grant, as it contains the clause termed a *Quæquidem*, stating to whom the property last belonged, and how it reverted to the Crown, and was gifted to the new grantee. *Ersk. Princ.* 12th edit. pp. 143-47; *Jurid. Styles*, 4th edit. vol. i. pp. 1-71.

II. *Charters by Progress.*—After an original charter has once been granted, and the vassal infeft on it, no person claiming either as his heir or singular successor can obtain a complete title to the subjects as they stood in his person, without a renewal of the grant from the superior. The requisites to enable the claimant to demand such a renewal from the superior differ, according as he is an heir or a singular successor.

1. *Precept to an Heir.*—When a vassal has died infeft in lands, his heir, in order to establish his right to them, must expedite a special service; a proceeding by which it is ascertained judicially, that the ancestor was the last feudal proprietor of the lands when he died, and that the heir is now entitled to them. On the production of the retour of such a service the superior is bound to issue a warrant for infefting the heir, which, however, is not in practice called a charter, but a precept upon a retour. In its form, this precept merely relates the retour, and grants warrant for infeftment; and it contains, of course, the usual registration and testing clauses. It is issued for the purpose of infefting the heir only. It is not, therefore, granted to his heirs or assignees; and he is not entitled to convey it, so as to enable another person to infeft himself by virtue of it.

When a subject is superior of the lands, and when he refuses to give an entry, the vassal may, by exhibiting his retour to the Court of Session, obtain a warrant for letters of horning, to charge the superior to grant the precept within fifteen days, on payment of the non-entry and relief duties. It is not usual, however, for subject-superiors to require the heir to expedite a special service; for, if they be satisfied, from other sources, of the heir's right, they may legally grant warrant for his infeftment without any other authority. The precepts issued in cases of this kind, are termed precepts of *Clare constat*. See *Clare constat*. Also *Entry*.

When the ancestor has died uninfest, having a right to a disposition of the lands containing a procuratory of resignation and precept of sasine, or to a decree of adjudication



or of sale, his heir, by expeding a general service, may place himself in precisely the same situation, and enjoy the same right as his predecessor; and therefore, like him, he may obtain from the superior a charter, as a singular successor, in the manner about to be explained.

2. *Charters to Singular Successors.*—These are of various kinds.

*Charter of Resignation.*—When a person has purchased lands from a vassal, to be held of his superior, and when he wishes to be placed in precisely the same situation in which his author stood, by becoming immediate vassal of the superior, this can only be accomplished with the superior's consent. To obtain this consent, certain forms are necessary. One of these forms, and that most consistent with feudal principles, is for the original vassal to grant a procuratory of resignation in favour of the purchaser, which is a mandate to a procurator to appear before the superior, and there, for the vassal, to resign the lands into the superior's hands, for the purpose of his granting them again to the purchaser. The resignation is made symbolically, by the procurator delivering a staff and baton to the superior. When the superior is thus re-invested with the property, he makes a new grant of it to the disponee; and, in evidence of this grant, he executes a charter in his favour. This charter, as being preceded by a resignation of the subjects, is called a charter of resignation. It differs from an original charter, in having a clause called, from its first word, a *Quæquidem*, inserted immediately after the dispositive clause. The object of the *Quæquidem* is to specify that the subjects belonged formerly to the granter of the procuratory of resignation, and were, by virtue of that procuratory, resigned for new infeftment in favour of the grantee, as having right, either as the disponee named in the procuratory, or as the heir or singular successor of that disponee. It also differs from an original charter, in having a clause saving and reserving the rights of all parties, so that the superior incurs no new warrandice, not incumbent on him already by the original grant. At one time, no superior could be compelled, against his inclination, to receive, as vassal in the lands, any person who was not the heir expressed in the original grant; but by the act 20 Geo. II., c. 50, superiors are bound to enter all singular successors who have got from the vassal dispositions containing procuratories of resignation,—they receiving the fees or casualties to which law entitles them on a vassal's entry, viz., a year's rent of the lands, and, if they refuse, such disponees are entitled to apply for letters of horning to charge the superiors to receive them. Super-

riors are also bound to give the new grant under all the conditions specified in the procuratory of resignation, in so far as they do not alter or impair their own rights. *Jurid. Styles*, 4th edit. vol. i. pp. 344, 406; *Ross's Lect.* ii. 285. See *Entry*.

*Charter of Confirmation.*—Besides the mode just explained, there is another by which a disponee may be received as vassal in the lands, in place of the disposer. In its modern form, the disposition includes the clauses of a charter *a me*; and when the disponee has taken infeftment on the precept it contains, the superior may declare that infeftment to be equivalent to sasine on a precept granted by himself. This is accomplished by means of a charter of confirmation, so called because it ratifies and confirms the otherwise invalid title of the grantee. The clauses of this charter are all similar to those of an original grant, except the dispositive, which in this case narrates and confirms the title-deeds in favour of the disponee; and, as the infeftment has already been taken, it contains no precept of sasine. Formerly superiors could not be compelled to grant charters of this description, but this was altered by the act 10 and 11 Vict., c. 48, § 6. See *Confirmation*; *Jurid. Styles*, vol. i. p. 521; *Ross's Lect.* ii. 294. See *Entry*.

*Charters of Adjudication and of Sale.*—The mode of entering adjudgers and purchasers at judicial sales differs from that of entering a disponee who has right to a procuratory of resignation, only in so far as it is not necessary to resign the lands into the superior's hands, to entitle him to grant the charter in their favour. The charter of adjudication, therefore, or of sale, is almost precisely similar to that of resignation, only the *Quæquidem* omits the mention of the resignation, and recites merely the decree and other deeds, by which the lands are transferred to the new vassal. Superiors were compelled to enter appraisers, on payment of a year's rent, by the statute 1469, c. 37; and this rule was extended to adjudgers by 1672, c. 19, and to purchasers at judicial sales by 1681, c. 17, joined with 1690, c. 20. *Bell's Com.* 5th edit. vol. i. p. 705, *et seq.* See *Adjudication*.

*Charter of Novodamus.*—It sometimes happened that an heir or singular successor applies for a charter, when he cannot exhibit a sufficient legal title to require the superior to grant one, though, at the same time, from immemorial possession of the lands, or other circumstances, there can be no doubt of his right. In such cases, superiors are in the practice of giving new grants of the subjects, under the reservation, however, of their own rights, and the rights of all others, as accords of law. As such charters are not granted upon the resignation of a vassal, or in obe-

dience to a decree, they proceed *a non habente potestatem*, and therefore they are ineffectual till prescription has followed on them. *Jurid. Styles*, vol. i. p. 520; *Ersk. Princ.* 12th edit. 151.

III. *Mode of Expediting Crown Charters.*—To authorize the issuing of a Crown charter in favour of a singular successor, certain previous warrants were formerly necessary. The first and most important of these was the signature. This was a writ prepared by a writer to the Signet, containing all the clauses of the charter which it was wished to expedite. It was presented to the Baron of Exchequer, who held a commission from the Crown for this purpose, and was revised by him, to ascertain if it was correct. When the charter was a charter of resignation, the lands were resigned in the hands of the Crown, which was done by one of the officers of the Court of Exchequer, as attorney under the procuratory of resignation, delivering a baton to the Baron; and instruments were taken by a notary upon the act of resignation. The signature was then signed by the Baron; and the cachet, which is a stamp containing a *fac-simile* of the royal sign-manual, was adhibited. When the charter was one of *novodamus*, or if it created a barony or the like, the signature was superscribed by the Sovereign. At one time the signature was the warrant of a precept under the Signet, directed to the Keeper of the Privy Seal. The precept under the Signet was prepared by the writers to the Signet, and framed in Latin: it was directed to the Keeper of the Privy Seal, and became the warrant of a new precept, under that seal, to the Keeper of the Great Seal, authorizing a charter in the terms of the warrant. These warrants were recorded at the respective offices, and retained by the officer giving out the new warrant. Thus, the signature, which was the warrant of the precept, was retained at the Signet; the precept was retained by the Keeper of the Privy Seal; and the Privy Seal precept was retained by the Keeper of the Great Seal, by whom the charter was sealed, and given out to the Crown vassal. But these forms were curtailed, and the precept under the Signet became the warrant of the charter. The Great Seal completed the charter, and rendered it equivalent to a formally subscribed private deed. In giving infestment on the Crown charter, the precept might have been executed by any one as bailie, and any notary might have acted as notary. *Stair*, B. ii. tit. 3, § 14, *et seq.*; *More's Notes*, p. clxvii.; *Ross's Lect.* ii. 117, *et seq.*; *Jurid. Styles*, 2d edit. vol. i. p. 9, *et seq.*; *Bell's Princ.* 4th edit. art. 757, *et seq.*; *Brown's Synop.* p. 2158.

By the act 10 and 11 Vict., c. 51, signa-

tures and precepts to Chancery are abolished, and Crown charters are now obtained at any time by lodging in the office of the Presenter of Signatures a draft of the proposed charter, together with a note praying for a charter in terms of the draft. Along with the note and draft there must also be lodged the last Crown charter, or Prince's charter, or retour or decree of service, and precept from Chancery, of the lands, and all the title-deeds of the lands subsequent thereto, together with evidence of the valued rent when necessary, and an inventory and brief of the titles. The draft charter is then revised by the Presenter of Signatures. Mistakes in former titles may be rectified in the new charter, the rectifications being first reported to the Judge in Exchequer by the Presenter of Signatures, and approved of by him. The amount of composition, or other duties payable to the Crown, is marked on the draft, and certified by the signatures of the Auditor of Exchequer and of the Presenter of Signatures. If no objections are made to the draft as revised by the Presenter of Signatures, a docquet is put upon it, signed by him, and also by the agent applying for the charter. The draft is then officially transmitted by the Presenter of Signatures to the office of the Director of Chancery, and is the warrant for the immediate preparation of a charter in Chancery, in terms of the draft. If the party applying for a charter is dissatisfied with the draft as revised, he may lodge a note of objections to it or against the amount of duties and composition marked on it. Such note of objections is laid before the Judge in Exchequer, and disposed of by him. A similar mode of procedure is adopted when the Presenter of Signatures refuses to revise a draft charter for want of a sufficient production of titles. The charter, when engrossed, has affixed to it the seal appointed by the Treaty of Union to be kept and used in Scotland in place of the Great Seal thereof formerly in use, or the Seal of the Prince if the charter be of lands holden of the Prince, and a separate seal be then in use for such charters, and is recorded in Chancery. The ceremony of resignation is now abolished, resignation being held to be made in terms of the procuratory of resignation, by the ingiving of the note applying for a charter of resignation, and to be of the date of such ingiving; and the charter sets forth that resignation was made of the date of applying for it, and also deduces the titles according to the law applicable to such charters. Where a charter of *novodamus*, or a charter containing any new or original grant, is applied for, the party applying must first obtain the consent of the Commissioners of Her Majesty's Woods and Forests, or any two of them, and

written evidence of such consent must be produced along with the note applying for such charter in the office of the Presenter of Signatures. Such charter, too, after being revised and engrossed, but before being sealed, must be lodged with the Queen's and Lord Treasurer's Remembrancer, and transmitted by him for the sign-manual of the Sovereign, and the signatures of the Lord High Treasurer, or of the Commissioners of the Treasury, or any three of them. If the charter be of lands holden of the Prince and Steward of Scotland, and his Royal Highness be then of full age, it must be transmitted for the consent and approbation of the Prince, signified under his sign-manual. On this being done, the proper seal is attached to the charter. In competition of diligence, and in all other cases, the lodging of a draft charter and note is held equivalent to the former practice of presenting a signature in Exchequer, and the recording a copy of the note and an abstract of the draft charter in the Register of Abbreviates of Adjudications is equivalent to the former practice of recording an abstract of the signature in such register. All Crown charters are now expressed in the English language, and may be in the form given in schedule C annexed to the act 11 and 12 Vict., c. 51. Conditions of entail may be referred to as set forth in the recorded deed of entail, or in any recorded instrument of sasine forming part of the progress of title-deeds under the entail, the reference being made, or as nearly as may be, in the terms directed in the schedule C annexed to the said act. In the same manner, real burdens may also be referred to as already set forth in any recorded instrument of sasine forming part of the progress of titles of the lands.

IV. *Mode of Expediting Crown Precepts.*—Under the former practice, when the Crown was superior of the lands, the heir of the party last infest obtained a precept from Chancery, as a matter of course, on producing his special service. The precept was directed to the sheriff of the county in which the lands were situated, who acted as bailie for the Crown, and gave infestment accordingly; and by a special clause in the precept, he was directed to take security for the casualties payable on such an occasion. As these casualties were calculated to a particular term, the precept became null in consequence of a declaration inserted to that effect, if the infestment was not expedite before the term of Whitsunday or Martinmas immediately posterior to its date, and if infestment was not so expedite, a new precept required to be obtained. The sheriff-clerk had the exclusive privilege of acting as notary in expediting infestments, or such precepts.

Under the act 10 and 11 Vict., c. 51, a precept from Chancery is obtained by an heir specially served, by his lodging the retour or decree of his special service, and a draft of the proposed precept in the form, or as nearly so as the case will admit, of the schedule B annexed to the said act, together with a note praying for a precept in terms of the draft, and lodging also the last charter or retour or decree of service, and the titles of the lands subsequent thereto. In revising the draft precept the same procedure is adopted as in revising Crown charters, and when revised, it is officially transmitted to the office of the Director of Chancery, and is the warrant for the preparation in Chancery of a precept in terms of the revised draft. The precept is then engrossed and recorded in Chancery, and delivered to the heir on payment of the usual fees and charges, and also on paying the amount of duties payable to the Crown or Prince. A precept may also be granted to an heir holding only a general service, on his lodging along with the last charter an extract retour or decree of general service, duly expedite and recorded, instructing his propinquity to the party who died last vest and seised in the subjects, or the character of heir otherwise vested in him, and establishing his right to succeed to the lands. The precept granted on production of such extract retour or decree of general service is expressed in the form, or as nearly so as the case will admit, of the schedule B annexed to the said act. Contrary to the former practice, it is now competent to obtain a Crown charter of confirmation, combined with a precept for infesting the heir to the party last seised in the lands.

**Charter Party**; is a mutual contract between the owners of a ship and the freighter, by which the freighter hires the vessel, either to perform a particular voyage, or for a certain specified time, at a stipulated hire or freight. Where the vessel is hired by time, the commencement and termination of the time must be accurately stated; and where hired by the voyage, the voyage must be properly described, and provision made for deviations or accidental interruptions. The charter party also specifies the freight, and whether it is to be paid by the voyage, or by the day, week, or month; and contains various other regulations and provisions arising out of the nature of the contract; and it generally contains a clause of registration, which may be the ground of summary execution without a previous action. Writing is not absolutely necessary to prove this contract. It may be proved by the oath of the owners; but before either informal missives or any other writings can be founded on in Court to

prove the contract, such writing must be stamped. The stamp for a regular charter party, or for any memorandum or other writing equivalent to it, is, by 5 and 6 Vict., c 79, § 21, five shillings. The owners are bound, by the nature of this contract, that the vessel shall be seaworthy, or fit for the stipulated purpose, and that the master and seamen shall be skilful; that the ship shall be at the destined port on the day appointed, and shall sail at the stipulated time; and that the goods shall be delivered according to the bill of lading, and in good condition, unless prevented by the act of God or the Queen's enemies. The freighter, on the other hand, is bound to furnish the cargo and pay the freight in terms of the bargain, and, in case of delay occasioned through his fault, to indemnify the owners for the lost time. These conditions, which may be termed the *naturalia* of the contract, may, of course, be modified or varied by express stipulation. Difficult questions may also arise as to the owner's right to demand freight *pro rata itineris*; but these and all other questions depending upon the construction of the special contract, or arising out of accidents in the course of the voyage, must depend so much on the circumstances under which they occur, that they can hardly be comprehended under any general rule. See the form of this contract, and a specification of the particulars deserving of attention in framing it, *Jurid. Styles*, vol. ii. p. 564; vol. iii. p. 629, 2d edit. See also *Bell's Com.* vol. i. p. 538, *et seq.* 5th edit.; *Bell's Princ.* 4th edit. arts. 407, *et seq.*, 420, *et seq.*; *Smith's Maritime Practice*, 138; *Abbott's Law of Merchant Ships*, 10th edition, 1856.

**Chartered Companies.** See *Joint Stock Companies*.

**Chase.** In the older law of England, a chase was a large extent of ground, open, and privileged for wild beasts and wild fowl. It differed from a park in not being inclosed, and also in this, that a man might have a chase in another man's ground. *Tomlins' Dict. h. t.*

**Chattels;** is an English law term, signifying all goods moveable or immoveable, except such as are in nature of freehold, or parcel of it. *Tomlins' Dict.*; *Bell's Com.* vol. i. p. 249, 5th edit.; *Ross's Lect.* i. 40.

**Chaud Melle,** or *riza*; is a term in our ancient law, applied to homicide committed on a sudden, and in heat of blood. Skene defines it, a hot, sudden "tulzie" or debate, contradistinguished from forethought felony. *Skene, h. t.* The person guilty of this offence had the benefit of sanctuary, from which, however, he might have been taken for trial; but if he proved *chaud melle*, he was returned safe in life and limb. The privilege of sanctuary to criminals was abolished at the Re-

formation; but the act 1649 (re-enacted by 1664, c. 22,) seems to be held in practice to include the case of homicide in *chaud melle*. The object of that statute is to fix the different degrees of casual homicide, and to remove doubts in future. The cases specified are—homicide committed in lawful defence, or upon thieves or robbers breaking houses during the night, or homicide committed in the time of masterful depredation, or in pursuit of denounced rebels for capital crimes, in none of which cases is a capital punishment to be inflicted. But as homicide in *chaud melle* is not specified, it has been doubted whether the benefit of the statute ought to be extended to that offence. Our practice, however, has been favourable to such an extension; and this construction of the statute has the sanction of the highest authority in the criminal law of Scotland. See *Hume*, vol. i. p. 240, *et seq.*; *Alison's Princ.* 92. See also *Homicide*.

**Checker;** the Exchequer. See *Skene, voce Scaccarium*.

**Chevissance;** in English law, an agreement or composition; in ancient statutes, an unlawful contract. *Tomlins' Dict. h. t.*

**Chief Baron;** formerly the President of the Scotch Court of Exchequer, but the duties of that Court are now transferred to the Court of Session by the Acts 19 and 20 Vict., c. 56, which declares that Court to be also the Court of Exchequer in Scotland. See *Exchequer*.

**Child-Murder.** The trial for child-murder differs from that of other cases of murder in nothing, except that stronger evidence of intentional violence is required; since, in unassisted births, the mother is sometimes unconsciously the cause of her child's death. The exposure and desertion of infant children may amount to murder, culpable homicide, or misdemeanour merely, according to the circumstances attending the commission of the offence. *Hume*, i. 299; *Alison's Princ.* 158; *Steel*, 102; *Watson's Stat. Law, h. t.* For the provisions of the statute regarding *Concealment of Pregnancy*, see that article.

**Child-Stealing, or Plagium;** is a crime punishable by our law with death. *Hume*, vol. i. p. 82, *et seq.*; *Alison's Princ.* 620. On restriction of the pains of law, a panel convicted of *plagium* was sentenced to 7 years' transportation; 2 *Broun's Rep.* 288; while another panel found guilty of the same offence, aggravated by previous conviction of theft, was sentenced to 18 months imprisonment; *Irvine's Rep.* 234.

**Children;** are either lawful or unlawful. *Lawful children* are those children who are either procreated in marriage, or afterwards legitimated by the intermarriage of the parents. The legal presumption is, that all

children born of a woman who, at the time of conception, was lawfully married, are legitimate; nor can this presumption be defeated, except by direct evidence that the husband could not possibly be the father of the child. Thus, if it can be proved that the husband is impotent, or that he was absent from his wife at the time of conception, the presumption of legitimacy ceases. It seems to be fixed in our practice, that the period of absence necessary to elide the legal presumption must have commenced at least ten months before, and that it must have continued until within six lunar months of the birth of the child. The legal presumption, *Pater est quem nuptiæ demonstrant* is now held to be overcome by such clear evidence as will satisfy the Court that *de facto* the husband is not the father of his wife's child, although neither impotency nor the utter impossibility of access be established. See the case of *MacKay v. Mackay*, Feb. 24, 1855, 17 D. 494. It must always, however, be difficult to establish the illegitimacy of a child born in wedlock, without evidence either of the husband's impotency, or of impossibility of access between the spouses; but neither of these circumstances appears to be indispensable elements of the evidence. This also appears to be the law now recognised in the Courts in England. Children legitimated by the subsequent intermarriage of their parents enjoy all the rights of lawful children; and, of course, an eldest son thus legitimated will succeed as heir to his father's heritage, to the exclusion of a son procreated in wedlock. But if the parents are domiciled, and intermarry in a country where legitimation *per subsequens matrimonium* is not recognised, such marriage will not render their children, born before their marriage, legitimate, to the effect of entitling them to succeed as lawful children in Scotland. *Sheddan*, 1st July 1803, *Fac. Coll., Mor. App. voce Foreign*, No. 6; affirmed on appeal, 2d March 1808. See *Ersk. B. i. tit. 6, § 49, et seq.*; *Stair*, B. i. tit. 5, &c.; *More's Notes*, p. xxxi. cxxix. cxvii.; *Bell's Com.* vol. i. p. 632, *et seq.*, 5th edit.; *Bell's Princ.* 4th edit. arts. 1624, *et seq.*, 1961, *et seq.*; *Fraser on Personal Relations*; *Shaw's Digest*, tit. *Parent and Child*; *Hume*, ii. 435; *Kames' Princ. of Equity* (1825), 71. See *Bastard. Legitimacy. Legitimation.*

**Children of a Marriage.** In marriage settlements it is very common to destine lands, or to give provisions, to the children of a marriage, or to the bairns of a marriage, or to the heirs and bairns of a marriage. For the construction of the different terms, see *Heirs and Bairns. Bairns of a Marriage. Destination.*

**Chiltern Hundreds.** The Steward of the

*Chiltern Hundreds* was formerly an officer to protect the inhabitants of a part of Buckinghamshire from banditti. The duties have long since ceased; but the office is nominally retained, and any member of the House of Commons, wishing to resign his seat, attains his object indirectly, by applying for the stewardship of the Chiltern Hundreds, which is granted as a matter of course; and being a place of honour and of nominal profit under the Crown, his acceptance of it vacates his seat. The place is in the gift of the Chancellor of Exchequer. This practice in vacating seats began in 1750. *Chambers' Election Law*, h. t.

**Chimney-Sweepers.** From motives of humanity, chimney-sweepers have been made the subject of various statutes, the latest of which is 3 and 4 Vict., c. 85, 1840. Any one who shall compel, or knowingly allow, any child or young person under the age of twenty-one years to ascend or descend a chimney, or enter a flue, for the purpose of sweeping, cleaning, or coving the same, or for extinguishing fire therein, is liable to a penalty of not more than L.10 or less than L.5. No child under sixteen years of age can be apprenticed to any person using the trade or business of a chimney-sweeper, and every indenture to the contrary is null and void. The construction of chimneys is also regulated by the same act.

**Chirographum apud debitorem repertum præsumitur solutum.** The written voucher of debt being found in the possession of the debtor affords a presumption that payment has been made by him. This, however, is not a *presumptio juris et de jure*, and may therefore be elided by an express proof that the voucher did not come into the hands of the debtor by the consent of the creditor. *Stair*, B. i. tit. 18, § 3; B. iv. tit. 32, § 3. *More's Notes*, p. cxxv.; *Ersk. B. iii. tit. 4, § 5*; *Bell's Princ.* 4th edit. art. 566; *Bell's Illust.* art. 566.

**Chose in Action;** in the English law, is a thing to which a man has only a bare right, or *jus ad rem*, as distinguished from *jus in re*, without any occupation or enjoyment. A thing sold, but undelivered, is the vendee's property, but only a chose in action. *Bell's Com.* i. 105, 5th edit.; *Bell's Princ.* 4th edit. § 1338; *Tomlins' Dict. h. t.*; *Wharton's Lex. h. t.*; *Brown on Sale*, p. c. 6; *Ross's Lect. i.* 39, 177; 1 *Hume*, 79. .

**Christian Name.** In election law, the insertion of a wrong Christian name has various effects, according to circumstances. In the return, an error in the Christian name of a member of Parliament has been corrected without petition, upon motion. *Chambers' Election Law*, h. t.

**Christmas Day**; is a *dies non* in English election law, but not in Scotland. *Chambers' Election Law, h. t.*

**Christmas Recess**; a vacation at Christmas, formerly of three weeks' duration, during which the Court of Session is adjourned. By the Court of Session Act, 20 and 21 Vict., c. 56, 1857, this adjournment cannot now be for longer than fourteen days; § 9. The Court rises on the Saturday before Christmas. There is one box-day appointed in this recess, and three or four days of it are usually devoted to the trial of jury causes. A. S. 21st Dec. 1661; A. S. 11th July 1828, 8th July 1831; 2 Geo. III. c. 27; 13 and 24 Vict. c. 36, §§ 8, 27, 54; *Shand's Prac.* pp. 122, 250, 285, 945; *Beveridge's Form of Process*, p. 37. See also *Box-Day. Reclaiming Note.*

**Church of Scotland.** The Roman Catholic religion was abolished in Scotland by the Act 1560, ratified by the Act 1567, c. 2. After the Reformation, the form of church government inclined to Episcopacy or to Presbytery, as the influence of the one party or the other predominated; until, at last, by the Treaty of Union in 1707, Presbytery was finally established as the form of church government in Scotland. Immediately after the Reformation, the government of the church was given to parochial presbyters, under the control of officers termed superintendents. In 1572, the titles of Bishops and Archbishops were given to the clergymen who were then, or should thereafter, be ordained ministers of the cathedral churches. They had also the privilege of sitting in Parliament; but by 1592, c. 116, Presbyterian church government was established in kirk-sessions, presbyteries, provincial synods, and general assemblies. Episcopacy was restored by 1606, c. 2, and gave place to Presbytery in 1638. Episcopacy was a second time restored in 1662; and in 1689 was again succeeded by Presbytery, which, from that time, has continued to be the established religion of Scotland. Presbytery being thus established, those Presbyterian ministers who had been expelled from their churches in 1661 were, by the act 1690, c. 2, ordered to be replaced; and the church government is declared, by 1690, c. 5, to be in their hands, and in the hands of the ministers and elders chosen by them, or whom they may thereafter choose: a general assembly is appointed, with directions to settle all the disorders of the late times, and a confession of faith is recognised. This act is confirmed as the foundation of the Treaty of Union betwixt the two kingdoms by the Act 1707, c. 6, and the confession of faith and form of church government, as established in Scotland by law, are declared to be a fundamental and essential condition of

the Treaty of Union; *Ersk. B. i. tit. 5, § 5, et seq.* Many severe laws were formerly enacted for enforcing conformity to the established form of church government. See *Cook's Church Law Styles*. See also *Nonconformity*.

**Church Lands.** See *Benefices*.

**Church Patronage.** See *Patronage*.

**Church.** Churches, and other things destined to sacred purposes, are held to be *extra commercium*, and cannot be applied to uses of private property; yet, from expediency, it frequently happens that the situation of churches is changed, church bells and communion cups are disposed of, and new ones purchased in their place; and the parishioners also acquire a quasi property in the seats or area, for the special purpose of attending divine service. In a judicial division of the area of a church amongst the heritors, they are preferred, both with regard to priority and extent of choice, according to the amount of their valued rents. The burden of upholding parish churches and the walls of the churchyard is, by long usage, imposed on the heritors of the parish; and where the parish is partly within burgh, and partly in the country, the expense must be borne by heritors and proprietors of houses, in proportion to their real rent; *Ersk. B. ii. tit. 1, § 8, and tit. 10, § 63*. But although this is a burden which attaches to the lands, it is not properly a *debitum fundi*. Singular successors in the lands, and creditors, are not liable for arrears, but only for that part of the expense applicable to the years of their possession.

The transportation of churches from one part of a parish to another is regulated by statute, 1707, c. 9. Parliamentary churches are regulated by 4 Geo. IV., c. 79, and 5 Geo. IV., c. 90. *Bell's Com.* vol. i. p. 701, 5th edit.; *Bell's Princ.* 4th edit. art. 1164; *Jurid. Styles*, 2d edit. vol. iii. p. 929; *Dunlop's Parochial Law*, p. 1, *et seq.*; *Sup. to Connell on Parishes*; *Shaw's Digest, h. t.* See *Manse. Glebe*.

**Church, by voluntary contribution.** By 4 and 5 Will., c. 41, it is enacted, that ministers to churches in Scotland, built by voluntary contribution, and erected into parochial churches, shall be appointed according to the mode prescribed by the church courts, and that no one having right to the patronage of the parish within which such church is erected shall have claim to the patronage of the newly-established church. But the patron of a parish, building and endowing a church therein, shall retain every right to which he would have been legally entitled before the passing of the act; and so, in the case of churches built by the patron and heritors, unless an objection shall be transmitted in writing to the moderator of the presbytery, signed by heri-

tors who have contributed one-fourth of the sum laid out in building and endowment, in which case the said church shall be within the provisions of the act. None of the expenses of the new churches shall fall upon the teinds. One-fifth of the sittings shall be at rents fixed by the church courts.

By section 8 of the act 7 and 8 Vict., c. 44, entitled "An act to facilitate the disjoining or dividing of extensive or populous parishes, and the erecting of new parishes," it is provided that churches built or acquired at the expense of private persons may be erected by the court, on the application of such persons, into a parish church in connection with the Church of Scotland, without any concurrence of heritors; districts may be marked out, designated, and attached thereto *quoad sacra*, and such district disjoined *quoad sacra* from the parish or parishes to which it may have belonged, and erected into a parish *quoad sacra* in connection with the Church of Scotland; the minister and elders whereof are to have the *status*, and all the powers, rights, and privileges of parish ministers and elders, provided that the titles to the church shall be so taken and conceived that the church shall be inalienably secured as the church of the new *quoad sacra* parish in connection with the Church of Scotland, and that due provision shall be made for the maintenance of the fabric of the church, and the security of a competent stipend to the minister in all time coming. The 9th section provides for a portion of the sittings in such churches, not exceeding one-tenth, being set apart as free seats; and for another portion, not exceeding one-fifth, being let at a rent to be fixed by the presbytery; and for the remaining portion being also let under certain conditions. The same section also regulates the expenditure and application of the pew rents.

**Church Officers.** In Scotland there are no church officers, properly so called, except the beadle and the precentor. The appointment of the beadle in burghs belongs to the magistrates, and in landward parishes, it would seem, to the heritors; unless where it is otherwise provided in the decree of erection of a new parish; or unless there has been long contrary practice. The beadle usually holds the appointment of sexton and of bellman; but where the offices are disjoined, the same rule as to their appointment will apply. It does not seem to be clear, however, that, in so far as the beadle acts as session officer, his appointment is not in the kirk-session. The precentor, where it is not otherwise provided by the decree erecting the parish, is in the ordinary case appointed by the kirk-session. He is removable at pleasure. *Dunlop's Patrimonial Law*, p. 53, *et seq.* See *Elders*.

**Church Judicatories.** The judicatories of the church are kirk-sessions, presbyteries, provincial synods, and general assemblies. The constitution of these shall be explained in their order: 1. *Kirk-Session*, composed of the minister of the parish and ruling elders. 2. *Presbyteries*, which include a certain number of parishes, varying in number, according to local situation and other circumstances, there being thirty parishes in some presbyteries and no more than four in others. The presbytery is composed of a minister and ruling elder from each parish within its bounds. With regard to Professors of Divinity within the bounds of a Presbytery the practice has varied exceedingly. It would appear that they are not necessarily members of presbytery; but the matter is at present being investigated by a committee of General Assembly. The number of presbyteries in Scotland is at present eighty-four. The inequality in the number of parishes of which presbyteries are composed produces this anomaly, that in those cases in which matters are decided in the General Assembly by a majority of presbyteries, a presbytery consisting of three or four parishes has equal power and weight with one which is composed of twenty or thirty parishes. There is a moderator of the presbytery chosen twice a-year, a clerk of the presbytery, and an officer to execute its orders. 3. *Provincial Synods*. These are composed of three or more presbyteries: the number of provincial synods is at present sixteen. Every minister within the bounds of the synod is a member of court; and the same elder who last represented the kirk-session in the presbytery is the representative of the kirk-session in the provincial synod. A communication is established amongst the different provincial synods, by sending one minister and one elder, who are entitled to sit, to deliberate, and to vote with the original members of the synod. The synod has a moderator, clerk, and officers of its own choosing. 4. *General Assembly*. This is the supreme ecclesiastical court, consisting of representatives from the presbyteries, royal burghs, and universities in Scotland, and from the churches in the East Indies connected with the Church of Scotland. The representation is regulated by the 5th act of Assembly 1694, which provides, "That all presbyteries consisting of twelve parishes, or under that number, shall send in two ministers and one ruling elder: That all presbyteries consisting of eighteen parishes, or under that number, but above twelve, shall send in three ministers and one ruling elder: That all presbyteries consisting of twenty-four parishes, or under that number, but above eighteen, shall send four ministers and two ruling elders; and

that presbyteries consisting of above twenty-four parishes shall send five ministers and two ruling elders: That collegiate kirks, where there are two or more ministers, are, so far as concerns the design of this act, understood to be as many distinct parishes; and no persons are to be admitted as members of assemblies but such as are either ministers or ruling elders." And by a subsequent act (Assembly 1712, c. 6), it is provided, that when the presbytery exceeds thirty ministerial charges, it shall send six ministers and three ruling elders. The sixty-six royal burghs of Scotland are represented in the General Assembly by ruling elders; Edinburgh sending two, and every other burgh one. Each of the five universities in Scotland is represented by one of its members.

The General Assembly of the Church of Scotland meets by the joint authority of the Church and of the Crown, the meeting being appointed both by the moderator and of the Sovereign's commissioner. See *Commissioner*. The act 1592, establishing Presbyterian government, declares "it lawful to the kirk and ministers, every year at the least, and oftener, *pro re nata*, as occasion and necessity shall require, to hold and keep general assemblies." And the act 1690, by which Presbyterian government was restored at the Revolution, allows the general meeting and representation of the ministers and elders, according to the custom and practice of Presbyterian government throughout the whole kingdom. In pursuance of these acts, the General Assembly meets annually in the month of May, and continues to sit for ten days. The Assembly has a moderator, chosen by itself, who presides in its deliberations; a procurator or advocate; principal and depute clerks, agent, printer, and other officers. The annual meeting of the General Assembly is honoured with a representative of the Sovereign, in the person of a Lord High Commissioner. When the Assembly is dissolved, it is done first by the moderator, who appoints the time for holding the next General Assembly, and then by the Lord High Commissioner, who, in the Sovereign's name, dissolves the present, and appoints another Assembly to be held on the same day named by the moderator; thus uniting the civil and ecclesiastical powers of the state, which indeed seem to be indispensably necessary to the constitution of a regular Assembly. *Ersk. B. i. tit. 5, § 6.*

It has been questioned whether the Commission of the General Assembly is not also a judicatory of the Church, established and recognised by the laws and constitution of the realm; but the point, although fully argued upon one occasion, has not been decided. See the case of *Middleton v. Anderson*, 4 D. 957.

The jurisdiction of the Church includes certain civil as well as ecclesiastical powers. The civil powers consist in the right which presbyteries have of pronouncing decisions with regard to manes and glebes, and the qualifications of schoolmasters (see *Schools*). The ecclesiastical powers of the Church of Scotland are legislative, judicial, and executive.

The *legislative power* has been explained under the article *Acts of the General Assembly*. It is sufficient here to mention, that the General Assembly has no power to pass acts affecting or encroaching upon the civil rights or patrimonial interests of the subjects, and altering the law of the land, and that the Court of Session has jurisdiction to afford protection and redress against any such incompetent Act of Assembly. *Earl of Kinnoull v. Presbytery of Auchterarder*, 16 S. 661, aff. 3d May 1839; *M'L. and Rob. App.* 220; and subsequent cases mentioned in *Shaw's Digest, hoc. tit.*

The *judicial power* of the Church consists in the infliction or removal of those censures which belong to a spiritual society; and in regard to the clergy, a judgment of deposition will have the effect of depriving the individual of the emoluments of his office as minister of the parish. But a difference takes place in the origin of the procedure, where it is directed against a layman, from what takes place when it is directed against a clergyman. The procedure against a layman of the established church must commence in the kirk-session of his own parish; and the judgment of the kirk-session may be brought under review of the presbytery, while that of the presbytery may be again brought before the synod, and from that the case may still be carried to the General Assembly. The procedure against a clergyman cannot commence in the kirk-session, because the clergyman is the moderator of that court; and the other members being inferior, he cannot be tried there. It is therefore before his superiors, the presbytery, that the procedure against a clergyman must commence; and the judgment of the presbytery may be reviewed by the synod, that of the synod by the General Assembly. It is by this gradual progress, from judicatory to judicatory, that the injustice of inferior courts may be rectified by the more unbiassed and enlarged views of the supreme ecclesiastical court of the country. This system of review differs from that in civil causes, from the situation of the judges; who have all an interest equally with the parties, to have the doctrines and principles of church discipline and order preserved entire. Although, therefore, in civil causes, the power of appeal rests in the parties, yet, in ecclesiastical causes, the members of the



different courts have an interest that entitles them, as well as the parties, to carry the decision of their own court to the review of a superior one. Thus, a point may be brought before a superior court, 1. *By reference*: and then, in place of deciding, the inferior court refers to the superior court, and may sit and vote in that superior court; a circumstance which is an objection to this form of procedure, since the joining of so many members may give a bias to the decision of the superior court. 2. *By appeal*: where the party is entitled to bring the whole proceedings of the inferior court under review of the superior court; and in defending the judgment, the members of the inferior court are entitled, and in some degree bound, to defend the judgment which they have pronounced. 3. *By complaint*: where a decision appears to the members of a court to be wrong, the minority may enter their grounds of dissent in the minutes; and they may also, if they see cause, complain to the superior court, which will bring all the members of the inferior court, as well as the parties, to the bar of the superior court, which may decide on the cause in the same manner as if the cause had come before them by appeal of the parties. In the lawful exercise of their judicial powers, the sentences of church courts, in matters purely ecclesiastical, are not subject to the review of any civil court. But the Court of Session, at least in cases of flagrant wrong, and gross excess or abuse of powers, has jurisdiction to afford redress against an illegal sentence of a church court. *Cruickshank v. Gordon*, 5 D. 909.

The executive power of the church is exercised in a great measure by the presbyteries, though the supreme executive power remains with the General Assembly. The most important occasions of exercising this power are the settlements of vacant parishes, in which the General Assembly gives directions to the presbytery within which the parish lies as to the manner in which they are to proceed; or, when any reluctance appears on the part of the presbytery, the whole course of procedure is prescribed by the General Assembly; and the presbytery act in a ministerial capacity, and must implicitly obey the instructions they receive. See *Hill's Theological Institutions*; *Hill's Prac.* 86.

As to the powers of the church judicatories, and the jurisdiction of the Court of Session, and to entertain complaints and actions relative to the legality of their decrees, reference may be made to the following important cases:—*Murray v. Donaldson*, 13 Sh. 128 (*Deposition of schoolmaster by presbytery, and review of presbytery's judgment by superior ecclesiastical courts*); *Earl of Kinnoull v. Presbytery of Auchterarder*, 16 Sh. 661; *M'L. and Rob.*, 220; *Clark v.*

*Stirling*, 1 D. 955; *Mackintosh v. Rose*, 2 D. 253; *Presbytery of Strathbogie*, 2 D. 258, 585, 1047, 4 D. 1298; *Edwards v. Cruickshank*, 3 D. 283; *Earl of Kinnoull v. Ferguson*, 3 D. 778; affirmed 11th July 1842; *Middleton v. Anderson*, 4 D. 957; *Cunningham v. Presbytery of Irvine*, 5 D. 427; *Campbell v. Presbytery of Kintyre*, 5 D. 657; *Earl of Kinnoull v. Ferguson*, 5 D. 1010; *Cruickshank v. Gordon*, 5 D. 909; *Sturrock v. Greig*, 11 D. 1220; *Lockhart v. Presbytery of Deer*, 13 D. 1296.

As to admission of ministers, see 6 and 7 *Vict.*, c. 61. See also *Call*.

**Church Rates**; in England, a taxation or assessment laid on the parishioners to defray the expense of upholding and repairing the fabric of the church. The rate is usually imposed by the parishioners, convened by the church-wardens; and the vote of a majority of such meeting binds the whole parishioners. See *Tomlins, voce Church-Warden*; *Wharton's Lex. h. t.*; 4 and 5 *Vict.*, c. 36; *Steph. Com.* 91. In Scotland, the burden of supporting the fabric of the church is laid on the heritors of the parish. See *Church. Heritor*.

**Church-Road**. It frequently happens that there are in the country bye-ways or paths, sometimes mere footpaths, and sometimes foot and horse roads, used chiefly, if not solely, by the parishioners in going to the parish church. These are called church-roads; and although statute-labour and turnpike-road trustees have power to shut up useless roads, or to substitute others for them, they are not empowered to shut up any horse or foot road to kirk or mill. *Blair's Justice's Manual*, 122, and authorities there cited. See *Road. Highways*.

**Church-Wardens**; in England, are ecclesiastical officers, chosen by the parishioners and minister jointly, sometimes by the minister alone, sometimes by the parishioners assembled in vestry, as custom directs, to protect the edifice of the church; to superintend the ceremonies of public worship; to promote the observance of religious duties; to form and execute parochial regulations; and to become, as occasion may require, the legal representatives of the body of the parish; they are generally two in number. *Tomlin's Dict. h. t.*; *Wharton's Lex. h. t.*; 3 *Steph. Com.* 89.

**Churchyard**. The parish churchyard is, generally speaking, subject to the same regulations with the area of the church; and in landward parishes belongs to the heritors, for the special purpose of interring the dead of their families, and those resident on their properties. In England, a churchyard has been described as "a consecrated place entitled to public protection, and in which nothing should be done but under the direction of public authority" (*per Sir W. Scott, Haggard's Reports*, i. 19). In Scotland, a churchyard is

not recognised as a consecrated place ; but it is a place which considerations of public decency require to be protected against outrage ; and which the heritors will be entitled to protect against any attempt at exclusive appropriation by parties using it as the place of interment of their family or friends. See *Dunlop's Parochial Law*, p. 58, *et seq.* ; *Erskine*, i. § 13. See also *Burying-place. Gravestone.*

**Cinque-Ports.** Those havens which lie towards France, and have therefore been thought to require peculiar vigilance. They have an especial governor, called *Lord Warden of the Cinque Ports*, and various privileges granted them, as a peculiar jurisdiction, their warden having not only the authority of an admiral amongst them, but sending out writs in his own name. This jurisdiction was preserved by the Municipal Corporation Act, 5 and 6 Will. IV., c. 76. They are Dover, Sandwich, Romney, Hastings, and Hythe; to which are now added Winchelsea and Rye. The constable of Dover Castle is Lord Warden. *Tomlins' Dict. h. t.* ; *Wharton's Lex. h. t.*

**Circuit Court of Justiciary.** The act 1672, c. 16, divides the kingdom into three districts, and appoints circuits to be made by the Justiciary Judges. This regulation is affected by different statutes, as 20 Geo. II., c. 43 ; 23 Geo. III., c. 45 ; 30 Geo. III., c. 17. The circuit courts of the southern district are directed to be held at Jedburgh, Dumfries, and Ayr ; the western at Stirling, Inverary, and Glasgow ; and the northern at Perth, Aberdeen, and Inverness. The court must remain at each place not less than three days ; and no business begun at any of the places must be left unfinished. There are two circuits in the year ; one in spring, which must be held between the 12th of March and the 12th of May, and another in harvest ; and under a recent statute there is an additional circuit court held at Glasgow, for criminal cases only, during the Christmas recess of the Court of Session ; 9 Geo. IV., c. 29 ; 11 Geo. IV. and 1 Will. IV., c. 37. By 11 and 12 Vict., c. 79, § 8, the judges on circuit in Glasgow are authorized to sit separately in different courts. One judge may proceed to business in absence of his colleague ; and, when necessary, the circuit court may certify a case commenced before it to the whole Court of Justiciary for consideration ; but there is no right of appeal from the circuit. See *Hume*, vol. ii. p. 19, *et seq.* ; *Bell's Notes.*

With regard to presentments and information, in order for trial before the circuit courts, it is enacted, by 8 Anne, c. 16, that the sheriffs, magistrates of burghs, justices of the peace, and other inferior judges, shall hold courts at their usual places of sitting, on the 22d February and 22d July yearly, to receive

information of matters criminal to be tried at the ensuing circuit, and to transmit written abstracts of the accusations offered before them, and the evidence by which they are supported, to the Lord Justice-Clerk and his deputies, forty days at least before the sittings of the respective circuit courts, so that indictments may be raised in due time. In practice, however, this duty has devolved on the Sheriff, who is bound to make immediate inquiry into the circumstances of every crime committed within the sheriffdom, as soon as his fiscal, or the injured party, shall lay a complaint before him ; so that in general the offender is in custody or under bail, and the precognition duly transmitted to the Lord Advocate, before the days mentioned in the statute ; *Hume*, vol. ii. p. 23. As to the jurisdiction of the circuit court in certain appeals, civil and criminal, see *Appeal. Ersk. Princ.* 13th edit. 32-3 ; *Brown's Synop.* p. 1155 ; *Shaw's Digest.*

Issues in civil jury causes may also be tried before one or more of the Justiciary Judges on circuit, or by any other judge of the Court of Session, at any circuit town ; twenty-one days' notice of such sittings being given by intimation on the walls of the Outer Parliament House, and in the lobby of the Court of Exchequer, and also on the door of the courthouse of the circuit town, and the door of the Sheriff's court in the other county towns of the circuit. 55 Geo. III., c. 42, § 15 ; A. S. 9th Dec. 1615, § 7 ; 59 Geo. III., c. 35, § 22 ; 1 Will. IV., c. 69, § 11. See *Jury Trial.*

**Circuit Courts.** Circuit courts are established in Scotland, for the trial of small debt causes by the sheriffs, by 1 Vict., c. 41, 1847. See *M'Laurin's Digest*, and *Notes of Small Debt Act.* See also, *Small Debts.*

**Circumduction of the Term ;** is the sentence of a judge declaring the time elapsed for leading a proof ; after which the party is precluded from adducing farther evidence. When the time limited for leading and reporting a proof or a diligence for the recovery of writings has expired, the opposite party may move for circumduction ; and the term will be circumduced, unless upon cause shown, when a prorogation may be granted. Circumduction will be opened up upon payment of a greater or less sum of expenses, wherever that course is fair and reasonable in the circumstances, *Dickson on Evidence*, 1017. Before judgment can be pronounced on the proof, the term must either be circumduced, or the parties must judicially declare their proof concluded. A judgment on a mere circumduction, not followed by any judgment on the merits of the cause or proof, is not a *res judicata*, but a mere judgment by default, against which a party may be reponed.

In the Sheriff courts, upon the expiration of the term for proving, circumduction is granted, unless sufficient cause for not proceeding be shown to the Sheriff, who may renew the diet, on payment of expenses or not, as he may think proper. If circumduction be granted, the party will not be reponed, except on cause shown to excuse his former failure, and on payment of an indemnification to the other party. When a proof has been reported, and an interlocutor pronounced, no further proof will be allowed, except on very weighty reasons shown, and on payment of expenses. If such further proof is applied for, the facts and the witnesses must be condensed on in the petition for farther proof; *A. S. 10th July 1839*, §§ 81, 82, 83. Where the proof is by oath of party, and he fails to appear, and no satisfactory reason be assigned, the term is circumduced, and he is held as confessed, and decerned against accordingly. He may be reponed, however, against a holding as confessed, in indemnifying the other party for his expenses. § 79. See *Stair*, iv. 46, § 6; *Ersk. B. iv. tit. 2, § 32*; *Maclaurin's Form of Process*, 32; *M'Glashan's Sher. Court Prac.*, p. 287; *Shand's Prac.* 360. See *Proof. Reporting*.

**Circumstantial Evidence**; is evidence deduced from the existence of a fact, or of a group of facts, bearing immediately upon, and inferring the existence of, the principal fact which is sought to be proved. This evidence, on a superficial view, is often thought inferior to direct evidence; and there can be no doubt that it is a matter of considerable difficulty to draw the conclusion which the evidence warrants. But when that conclusion is correctly drawn, and every other hypothesis by which the facts may be accounted for is excluded, or shown to be exceedingly improbable, the conviction produced upon the mind is, and justly ought to be, as strong as if the same fact were proved by the most direct testimony. And it enjoys this decided advantage over direct evidence, that there is less chance of witnesses combining to establish a falsehood, and less chance of their escaping detection. In criminal cases the utmost caution ought to be employed in weighing circumstantial evidence; and until every other supposition, besides the pannel's guilt, which might have been attended with the same circumstances, has been shown to be *morally impossible, i. e.*, so certainly false, that, upon the conviction of its falsehood, any one would hazard his own most important interests, a verdict of guilty is not warranted. But it is no reason to acquit a prisoner, that his innocence is not *absolutely impossible*, since no evidence, however direct and complete, will establish that. When the probability of the

prisoner's guilt bears to his innocence a finite ratio, however great, conviction is not warranted, since the principle of sacrificing one innocent person, for the sake of punishing ninety-nine guilty persons, has always been repudiated. "When the proofs of a crime are dependent on each other, that is, when the evidence of each witness, taken separately, proves nothing, or when all the proofs are dependent upon one, the number of proofs neither increases nor diminishes the probability of the fact; but when the proofs are independent on each other, the probability of the fact increases in proportion to the number of proofs" (*Beccaria*, c. 14). Circumstantial proof of a civil contract is little favoured, as the party can, and therefore ought, to provide direct evidence. But in civil questions arising from delict, it is freely admissible; as in such cases it is not usually in the party's power to provide direct evidence. *Ersk. B. iv. t. 2, § 34*; *Starkie on Evidence*; *Taylor on Evidence*; *Greenleaf on Evidence*; *Dickson on Evidence*; *Willes on Circumstantial Evidence*; *Alison*, 78; *Hume*, ii. 383; *Burnett*, 524; *Tait*, 439; *Steele*, 52-63; *Shaw's Digest*, *Hutch. Justice of Peace*, i. 271; *Taylor on Evidence*. See *Evidence*.

**Circumvention**; deceit or fraud. All bargains, in which an intention to take undue advantage by either of the parties is apparent, may be set aside on the ground of dole or extortion, without proving any special circumstance of fraud or circumvention. But it is not enough that the deed challenged be merely hurtful and irrational; for, unless it be evidently oppressive, it is not reducible without an actual proof of dole, even although the granter of it be of a facile temper, if he be not absolutely an idiot. If, however, there be lesion in the deed and facility in the granter, the most slender circumstances of fraud or circumvention will be sufficient to set it aside. *Stair. B. i. tit. 9, § p. 9*; *More's Notes*, lix.; *Ersk. B. iv. tit. 1, § 27*; *Ersk. Princ.* 12th edit. 455; *Bell's Com.* vol. i. p. 141, 5th edit.

**Citation**; is the act of calling upon a party to appear in Court to answer to an action; or to give evidence; or to do some other judicial act. It is done by an officer of Court, or by a messenger-at-arms, under a proper warrant. Citations in the Court of Session are given by messengers-at-arms under authority of summonses passing the Signet, or under warrants given by the Court on petitions and complaints; and in inferior courts the citations are generally given by the officers of court, on warrants issuing from their respective courts. In the ordinary case, the citation must be given, and an execution returned, agreeably to the rules laid down for regulating charges. See *Charge on Letters of Horning. Execution*.

The copies of citation delivered to the party must bear at length, and not in figures, the day and date of the delivery thereof, as also the names and designation of the witness; 1693, c. 12; *A. S. 8th July 1831*, schedule V.; 9 and 10 Vict., c. 67. They must be signed by the messenger. In general full copies of summonses, down to the bill, require to be served on the defender; but there are certain summonses which may be executed by short copies. See *Shand's Prac.* p. 231; *M'Glashan's Sheriff Court Prac.* p. 180, both of which authorities are very full on the subject of citation and execution. Wherever a special form of citation is provided for by statute, it must be closely followed, and any deviation therefrom is, as a general rule, and especially in cases of a criminal or penal character, fatal.

Parties may also be cited edictally; that is, by a citation, formerly published at the market-cross of Edinburgh, and the pier and shore of Leith; but now, under 6 Geo. IV., c. 120, § 51, and *A. S. 24th December 1838*, by copies left at the office of the keeper of Edictal Citations; and lists of such citations are printed and published. See *Edictal Citation*. This form of citation is competent and necessary where the party cited, although amenable to the courts of this country, is resident out of Scotland; and it is enacted by 6 Geo. IV., c. 120, § 53, that a person, not having a dwelling-house in Scotland occupied by his servants and family, who has been absent from his usual residence forty days without leaving notice where he is to be found, is to be held as absent from Scotland, and cited edictally. A foreigner, having a landed estate in Scotland may be cited in this manner in any action relating to such estate; but the Court of Session, as being the *commune forum* of all who reside abroad, is the only court to which he can be competently cited. A native Scotchman, having no property in Scotland, cannot be cited edictally *ratione originis*; *Pedie v. Grant*, as reversed in House of Lords, 1 *W. and S.* 716. See *Stair*, B. iv. tit. 3, § 27, tit. 38, § 2; *Ersk. B. i.* tit. 2, § 18 and 19, *Ivory's edit. note* 28; *Kames' Stat. Law abridg. App. note* 7; *Kames' Princ. of Equity (1825)*, 284-6; *Brown's Syn. h. t.*; *Shaw's Digest. h. t.*; *Hume*, ii. 50, 84, 242, *et seq.*; *Ross's Lect. i.* 237, 292; *Dickson on Evidence*, p. 609, *et seq.* See also *Jurisdiction. Foreigner. Forum. Inducia.* Edictal citation is necessary in several other instances: Thus, when a minor is called as a defender, his tutors and curators were formerly cited, not by name, but edictally at the market-cross of the head burgh of the county where the minor resided; *Ersk. B. iv.* tit. 1, § 8; and in the case of choosing curators, there was a similar edictal citation of all having

interest, 1555, c. 35; *Jurid. Styles*, 2d edit. vol. iii. pp. 5, 970. Now, by 13 and 14 Vict., c. 36, § 22, the forms of edictal citation, charge, publication, citation, and service at the market-cross of Edinburgh, and pier and shore of Leith, in processes of ranking and sale, and all other processes; and also the edictal citation of the minor's next of kin at the market-cross of the head burgh, and the similar edictal citation of the minor's tutors and curators, are abolished; and in lieu thereof such edictal citations, &c., are performed by the delivery of a copy thereof at the office of the keeper of Edictal Citations.

Where a party is not found personally, but is cited at his principal dwelling-place in terms of 1540, c. 75 (see *Charge on Letters of Horning*), care must be taken that it is truly the party's dwelling-place. Citation at an inn, or of a merchant at his counting-house, is inept. When a party has both a town and a country house, the one at which he is residing at the time ought to be preferred, though the execution of citation or charge at the other seems to have been sustained. A mercantile company is properly cited at its place of business; but whenever it is necessary to cite the individual partners, this must be done personally, or at their respective dwelling-places, or edictally, as the case may require. An incorporation may be cited when its office-bearers are met together, by delivery of a copy of citation to the preses, or by citing each of the representatives personally at his dwelling-place, or edictally in common form. See *Menzies on Conveyancing*, p. 285; *Shand's Prac.* 239.

In the inferior courts, the authority for citing defenders who are within the territory of the judge, is the warrant contained in the note of the summons, according to the schedule annexed to 16 and 17 Vict., c. 80. But it may be necessary to cite parties not to be found within the judge's territory, but amenable to his jurisdiction *ratione rei sita*, or on some other ground. This may be done either by obtaining letters of supplement (see *Supplement*) from the Court of Session, or by using the Sheriff's own warrant or precept after it has been first indorsed by the Sheriff-clerk of the sheriffdom wherein the parties to be cited reside. The same holds in the citation of witnesses and havers; 1 and 2 Vict., c. 119, § 24; *A. S. 10th July 1839*, § 16. Short forms of citations and execution in civil causes in the Sheriff-courts are provided for by 16 and 17 Vict., c. 80.

*Citation on a reference to Oath of Party.*—Where a party is cited upon a reference of the matter in dispute to his oath, under certification that, if he do not appear and depone, he shall be held as confessed, he must

be cited either personally by a messenger, or *apud acta*; that is, the day of appearance must have been notified to him in Court by the Judge. But if the party be furth of Scotland, or have no fixed or known residence, an edictal citation will be sufficient. *Ersk. B. iv. tit. 2. § 17.*

*Citation in Criminal Cases.*—In criminal cases it is not sufficient that the party appear voluntarily. He *must* be brought into Court in regular form, and can plead any omission of form, the want of which cannot be obviated of consent. Citation in criminal cases is regulated by Sir William Rae's Act, 9 Geo. IV., c. 29. There must be served on the panel a full and correct copy of the libel, with the list of witnesses and the assize, to which there formerly was subjoined a short copy of citation, subscribed by the messenger. Instead thereof, the copy of the libel must have marked on it a notice (intimating the day of compearance), subscribed by the officer and a witness, in the form contained in schedule A. It is not necessary for the officer to subscribe any other part of the copy of the libel. The citation must proceed on a regular warrant issuing from the court before which the panel is to be tried, but the party executing the service need not have such warrant in his possession. Criminal writs and warrants may be executed either by a macer or a messenger-at-arms, or by any sheriff-officer of the county within which the service is to be made; 11 and 12 Vict., c. 79, § 6. Where the panel can be found personally, the citation must be delivered to him. Failing his personal apprehension, the copy must be left at his dwelling-place with his wife or servants; or, if access cannot be obtained, the officer must affix a copy to the principal door of the house; 1555, c. 33. In all cases where the panel is not cited personally, an edictal citation is also required by the act 1555, *i. e.*, by open proclamation at the market-cross of the head burgh of the shire where the pannel dwells, and by affixing the necessary copies there. If no domicile can be found for the party, he may be cited edictally at the head burgh of the shire where he last chiefly resorted, by special authority from the court. If he be abroad, he must be cited by open proclamation at the market-cross of Edinburgh, and pier and shore of Leith. An execution is of course returned by the officer. See *Hume*, ii. p. 242, *et seq.*; *Bell's Notes*, p. 222, *et seq.*; *Alison's Prac.* 312, *et seq.* See also *Criminal Prosecution*.

*Citation for interrupting prescription.*—The currency of either the positive or the negative prescription may be interrupted by a citation in a process. Thus, the positive prescription may be interrupted by a citation in

a process at the instance of the party in right of the property, against the party in possession, for recovery of possession; or the negative prescription may be interrupted by a citation in a process at the creditor's instance against the debtor for payment of the debt. By 1669, c. 10, all citations for interrupting prescription are directed to be executed by messengers-at-arms against the defenders personally, or at their dwelling-places, and at the parish church, during, or immediately after, divine service; or if the defenders be furth of Scotland, then, at the market-cross of Edinburgh, and pier and shore of Leith, upon sixty days: but in practice this rule is disregarded. The same statute enacts, that all citations used for interrupting prescription, whether in real or personal rights, shall be renewed every seven years, otherwise to prescribe, unless the parties be minors; in which case the act is not to extend to them during the years of their minority. As this statute is limited to *citations*, if it should happen that the citation is followed by the appearance of the parties in court, or any other judicial step, it is no longer to be accounted a bare citation, but becomes a depending action, which will subsist for forty years without being renewed, unless it be an action limited by statute to a shorter period; *e.g.*, an action on arrestment, which prescribes in five years. For the security of purchasers and other singular successors, the act 1696, c. 19, ordains that all summonses used for interrupting the prescription of real rights shall pass upon a bill under the signet, and specify all the grounds on which they proceed; and that the summons and execution shall be registered within sixty days, in a particular register to be kept at Edinburgh for the purpose; otherwise that they shall be of no effect in interrupting prescription against singular successors. See *Ersk. B. iv. tit. 7, § 38, et seq.*; *Bell's Princ.*, § 615, *et seq.* 2007. See *Prescription*.

*Citation*; in English law, a summons to appear, applied particularly to process in the spiritual courts. *Tomlins' Dict. h. t.*

*Civil Law*; from *Civitas*, is, properly speaking, the law of a state. In this sense it is synonymous with positive or municipal law. But the term civil law is generally applied to the Roman law. The Roman law consists of the Pandects, and an abridgment thereof called the Institute; and of the Code, containing the constitutions of the Emperors, from Adrian to Justinian; and the Novels, consisting of the later constitutions of the Emperors. This law, which was the law at one time of all Europe, has materially influenced the jurisprudence of this, as well as of every other European state. But, besides

this general influence on what may be termed the common or traditionary law of those countries, the Roman law is directly received as legal authority in all of them, to a certain extent at least. In this country, the establishment of the Court of Session, and the bias towards the civil law which the judges of that Court (who were principally ecclesiastics) had received, produced a very remarkable effect on the municipal law of Scotland. From that time our ancient common law gave place to the civil law, except in those cases where the principles of feudality were opposed to it. But, gradually, the statutory law, the feudal law, the mercantile law, and the principles recognised and established by the decisions of the Court of Session, have formed a system of wise and equitable rules, which leave to the civil or Roman law nothing more of its former influence than what naturally and necessarily arises from the equity of its principles, and the force of the reasoning on which its decisions are established. *Stair*, B. i. tit. i. §§ 12 and 16; *Gibbon's Rome*, cap. 44; *Buller's Horæ Subsecivæ*; *Halifax's Analysis*; *Taylor's Elements of Civil Law*; *Irving's Introduction*; *Cumt's Manual*; 1 *Black. Com.* 392; 1 *Stephen's Com.* 8, 11, 15; *Colquhoun's Summary*; *Bowyer's Commentaries*; *Sanders on the Institutes*. See *Roman Law*.

**Civil List.** This term is derived from the distinction which was, at the Restoration, made between the military and extraordinary expenses of government, and those incurred in the maintenance of the ordinary establishments of the country; the revenues appropriated to the latter being called the hereditary or *civil list* revenues. The term came afterwards to be much restricted; and by 1 Will. IV., c. 25, the civil list charges were confined to expenses proper for the maintenance of the Sovereign's household. See *Tomlins, vocæ King*, § 5; *Wharton's Lex. h. t.*

At the commencement of the present reign a Civil List was settled upon Her Majesty for life, to the amount of £385,000 *per annum*, of which £60,000 is assigned for the privy purse. In return for this grant, it was provided that the hereditary revenue should be carried to the Consolidated Fund.

By the Civil List Act, 1 and 2 Vict., c. 2, Her Majesty is empowered to grant pensions to the amount of £1200 *per annum*, chargeable on the Civil List revenues, and intended for the remuneration of those who have just claims on the royal beneficence, or by their services or discoveries have earned the gratitude of their country. 2 *Stephens' Com.* 591.

**Claim.** To claim is used synonymously with to demand what is due. Where a proprietor insists for what belongs to him against the person withholding it, he is said to make

a claim. But the term has also a technical meaning in Scotch law, as applicable to the claim in a service, the claim of enrolment, or the claim by a creditor on a bankrupt estate.

**Claim in a service;** was the petition addressed by the heir to the inquest, in which he stated his relationship to the deceased, and prayed to be served heir to him, either in general or in special, or of provision, as the case might happen. In the general service, the claim stated simply that the heir was nearest and lawful heir in general to the deceased. In the special service, the claim enumerated the lands in which the ancestor died infest, with the particular tenure by which they were held, the new and old extent, &c., and stated the claimant to be heir to the deceased in these lands, and prayed the jury to find so. The claim in the service of an heir of provision specified the particular deed containing the destination under which the claimant prayed to be served heir. See forms of these claims, *Stair*, B. iii. tit. 5, § 32; *Bell's Princ.* 4th edit. art. 780; *Jurid. Styles*, 2d edit. vol. i. p. 337, *et seq.* The service of heirs is now regulated by 10 and 11 Vict., c. 47, 1847. See also *Service of an Heir*.

**Claim of enrolment as a freeholder;** was the application made to the freeholders of a county, under the old election law, by a person who wished to be put upon the roll. This claim was addressed to the freeholders assembled at the meeting at which the claim was made. It stated the names of the lands, the titles thereto, and their dates, with the old extent or valuation on which the claimant desired to be enrolled, and required the freeholders to admit him, as being duly qualified. Before a freeholder could present such a claim, he must have been year and day infest; and the only meetings at which enrolments could be made were the Michaelmas head-court, and the meeting for election of a member of Parliament. In order to entitle the claimant to be enrolled at the Michaelmas head-court, his claim must have been lodged with the sheriff-clerk at least two calendar months before the meeting. But at the meeting for election, the production of the claim and titles mentioned in it, on the very day of the meeting, was sufficient. *Wight on Elections*, B. iii. c. 1, and *App. of Cases*, p. 13; *Jurid. Styles*, 2d edit. p. 153. See *Election Laws*. For the mode of making claims for registration under the Reform Act, see *Reform Act*.

**Claim on a bankrupt estate.** A creditor claiming to be ranked on a sequestrated estate must describe distinctly the ground of his debt, and accompany his claim with an oath of verity, which shall specify every security which the claimant holds for the debt,

whether over the estate of the bankrupt or otherwise; and where he holds no other person than the bankrupt bound, and no security, the oath must contain a deposition to that effect. See 19 and 20 Vict., c. 79, 1856. See also *Bankrupt*. See *Bell's Com.* vol. ii. p. 355 and 413, *et seq.* 5th edit.

**Claim, under an English commission of bankruptcy.** In order to enable a Scotch creditor to prove under a *fiat* issued against an English trader, he must forward to his agent in England an affidavit, setting forth fully the nature of his debt, accompanied by the securities, if any, held by the creditor, and a copy of the account, if any, between the parties. See *Archbold's Law and Practice of Bankruptcy*. See *English Debt*.

**Clan Acts;** a name applied to certain statutes passed in the reign of George I. providing for the bestowal of forfeited estates. See *Semi. Abridg. voce Forfeited Estates*; and for decisions upon the point, see *Brown's Syn.* pp. 732, 2357.

**Clan-Macduff;** the law of clan Macduff was a barbarous privilege, anciently enjoyed by any homicide who could claim kindred, as near as in the ninth degree, to the blood of Macduff, Earl of Fife. If such a person came to Macduff's cross, at the line of march between Fife and Strathern, above Newburgh, and near Lindores, and gave nine kye and a colpindach (a young cow), he was free of the slaughter committed by him. *Skene, h. t.*

**Clandestine Marriage;** is a marriage contracted without the due observance of the ceremonies which the law has prescribed, viz., the regular proclamation of banns, and the nuptial benediction pronounced by a clergyman properly qualified. By the law of Scotland, clandestine marriages are as valid and effectual as regular marriages; but the parties, celebrator and witnesses, are liable to certain penalties. By 1661, c. 34, the parties are liable to imprisonment for three months, and to certain fines according to their rank. The act 1672, c. 9, also provides a forfeiture of the legal rights of *jus mariti* and *jus relictae*; but this act falls under the general repealing statute, 1690, c. 27. See *Carruthers v. Johnston*, 11th Dec. 1705, *Dict.* 2252; *Brown's Synop.* 367. The witnesses to such irregular marriages are liable, by 1698, c. 6, to a fine of L.100 Scots each. The celebrator, by 1661, c. 34, is punishable with banishment from Scotland, under pain of death in case of his return; and by 1698, c. 6, which ratifies the former act, he is liable "to such pecuniary or corporal pain as the Lords of the Privy Council shall think fit to inflict." But this discretionary power has never been exercised by the Court of Justiciary. The celebrator formerly incurred the penalties of the statutes,

if he was not a regularly ordained clergyman of the Church of Scotland, or an episcopalian clergyman admitted to orders by an English or Irish bishop, or if he had omitted to produce and record his orders, or to take the oaths to Government, as required by 10 Anne, c. 7, and 19 Geo. II., c. 34. So also a Roman Catholic priest was liable to the penalties if he celebrated a marriage. But by 4 and 5 Will. IV., c. 28, it is enacted, that after the passing of that act. (25th July 1834), it shall be lawful for all persons in Scotland, after due proclamation of banns, to be married by Roman Catholic priests, or ministers not of the established church, and also for such priests or ministers to celebrate marriages, without being subject to any punishment, pains, or penalty whatever, anything in the above-mentioned acts of Parliament, or in any other act or acts of Parliament, notwithstanding. The penalties, however, are still incurred by the celebrator, if banns have not been duly proclaimed; but a magistrate, before whom the parties appear to declare themselves married persons, so as to complete the civil contract, is not accounted a celebrator in the sense of the statutes, unless he takes upon him to pronounce the nuptial benediction; the statutes having in view merely the religious part of the ceremony. The penalties are recovered before justices of the peace on complaint by the fiscal; and the parties appearing and conferring are fined; and the conviction is received as evidence of the marriage. In prosecutions before the civil judge for the recovery of penalties, the procurator for the church is made joint prosecutor along with the Lord Advocate. By 7 Anne, c. 6, the right of action is limited to two months after the transgression; but it is doubtful whether this limitation relates to anything but the pecuniary fines, and at any rate, it is for the benefit of the clergy of the episcopal communion only. See *Bell's Princ.*, 4th edit., art. 1514; *Fraser on Personal Relations*. *Kames' Stat. Law abridg. h. t.*; *Hume*, i. 463, *et seq.*; *Alison's Prin.* 543; *Cases of Dickson*, 1844, 2 *Brown's Rep.* 278; and *Thorburn*, 2 *Brown*. See also *Marriage. Banns*.

**Clare Constat, Precept of;** is a deed executed by a subject-superior, for the purpose of completing the title of his vassal's heir to the lands held by the deceased vassal, under the granter of the precept. The deed was formerly addressed to the superior's bailies in that part, whose names were left blank, so that the office of bailie might be exercised by any one, but is now addressed to any notary public. It then sets forth, that, from documents shown to him, the superior is satisfied that his late vassal died infeft in the lands, which are described, and that the

heir in whose favour the precept is granted is the nearest and lawful heir of the deceased. The holding and *reddendo* are then mentioned, and the deed concludes with a precept of sasine, directing sasine to be given to the heir. Where the investiture of the lands contains a destination in favour of heirs, different from heirs-general, the precept ought to be granted to the heir in his proper character; for although a reference to the particular investiture, with a general description of the heir as nearest and lawful heir to the ancestor in the lands described, may be construed to mean the precise character of heir called by the destination, yet it is better to avoid a question of construction, by describing the heir with the same accuracy which would be required in a service. The precept of *clare constat* may proceed on any evidence, whether judicial or not, which satisfies the superior that the person claiming the entry is heir of the last vassal. Where, however, extrajudicial evidence to the satisfaction of the superior cannot be obtained, a service of the heir in the proper character must be produced before the superior can be required to grant the precept. Where the title is at all doubtful, it is for the advantage of the heir to have a service; for although a precept of *clare constat* and infestment form a good title of prescription, yet the title thus completed may be challenged at any time within the period of the long prescription of forty years; whereas a special service cannot be challenged after the lapse of twenty years, and a precept of *clare constat*, when proceeding on a service, has the benefit of this shorter prescription. The superior's title to grant a precept of *clare constat* is limited by the terms of the investiture. He can renew the right in the person of the heir called to the succession by the investiture, or, where there is no special destination, he may give an entry in this form to the heir-at-law; but he cannot give it to a general donee, nor even to the heir of investiture in liferent, and to his son in fee. In order to authorize any such variation, the heir must first complete his own title; after which, if the destination does not prevent him, he may transmit the property in any line he thinks proper. It follows, from the nature of the precept of *clare constat*, that the heir cannot assign the unexecuted precept of sasine contained in it, so as to be the warrant of infestment in favour of any other person than himself. Precepts of *clare constat* are also excepted from the act 1693, c. 35, so that they became void by the death of the granters or receivers. This, however, has been altered by the act 10 and 11 Vict., c. 48, 1847, which enacts that precepts of *clare constat* shall remain in full force during

the life of the granter. See *Precept of Sasine*. The heir, by taking infestment on the precept of *clare constat*, becomes liable *passive* for his ancestor's debts, and at the same time he acquires an active title as to the subject contained in the precept, in questions with the superior; but it gives no active title as to any other subjects belonging to the deceased. Erskine seems to think that, upon principle, this mode of entry by private consent ought to have conferred no active title whatsoever. An entry by precept of *clare constat* can be given only where the last proprietor stood publicly infest; but where the infestment of the ancestor was base, a charter of confirmation and precept of *clare constat* may be combined in the same deed, the superior, in the first place, confirming the ancestor's base infestment, and closing the deed by a precept of *clare constat* for infesting his heir. *Stair*, B. ii. tit. iii. § 14; B. iii. tit. 5, § 26; *More's Notes*, pp. clx. and ccvi.; *Ersk.* B. iii. tit. 8, § 71; *Bell's Com.* vol. i. p. 697, 5th edit.; *Bell's Princ.* 4th edit. § 777, *et seq.*, 1818, *et seq.*, 1916; *Ross's Lect.* ii. 533; *Jurid. Styles*, 2d edit. vol. i. p. 532, *et seq.* *Brown's Synop.* pp. 968, 1041, 2158, 2242; *Sandford on Heritable Succession*, vol. i. p. 270; vol. ii. p. 2. See *Confirmation*.

**Claremethen.** The law of claremethen was an ancient regulation concerning the warrantice of stolen cattle or goods, as to which see *Skene, h. t.*

**Clarificatio;** the clearance given by the verdict of an assize. *Clarificatio debiti* was synonymous, apparently, with the constitution of the debt by legal evidence. The word is used in the *Regiam Majestatem*. *Skene, h. t.*

**Clause of a Deed;** is one of the subdivisions of a deed. The ordinary clauses inserted in deeds are expressed according to certain technical forms which have been sanctioned by practice, and the legal import and effect of many of which have been settled by adjudged cases; so that it is at all times unsafe to vary the usual form of expression of such clauses. *Ball on Leases*, vol. i. p. 276, 4th edit.; *Hunter's Landlord and Tenant*, p. 289, *et seq.*; *Brown's Synop.* h. t.; *Ross's Lect.* ii. 141; *Shaw's Digest*, h. t.; *S. D.* vol. xi. pp. 220, 255, 362; xii. 426; xiv. 458. See *Dispositive Clause*. *Testing Clause*.

**Clause of Registration.** See *Registration*.

**Clause of Union.** See *Union*.

**Clause of Warrantice.** See *Warrantice*.

**Clause of Pro-Emption;** is a clause sometimes inserted in a feu-right, stipulating, that if the vassal shall be inclined to sell the lands he shall give the superior the first offer, or that the superior shall have the lands at a certain price fixed in the clause. It is settled that a clause of this kind is not struck at by



the act 20 Geo. II., c. 50, by which clauses *de non alienando* are prohibited; but Erskine holds that, without a clause of irritancy, the clause of pre-emption will be unavailing against singular successors. This, however, does not seem to be well-founded. See *Ersk. B. ii. tit. 5, § 28*, and *Bell's Com. vol. i. p. 26, 5th edit.* It is quite clear, however, that a clause of pre-emption can have no operation against singular successors, unless it appear in the sasine. *Bell's Com. ib.; Bell's Princ. 3d edit. § 864.*

**Clause de non Alienando.** This was a clause formerly in use to be inserted in feurights, by which the vassal was taken bound not to alienate the feu without the superior's consent. But by the statute 20 Geo. II., c. 50, § 10, all such clauses, restraining the power of alienation, are prohibited and declared of no force, even although inserted in deeds before the date of the statute; the Court of Session being empowered to modify an additional feu-duty to those superiors who suffer by the retrospective operation of the statute. And by Act of Sederunt, 10th March 1756, the indemnification is fixed at a feu-duty equal to a fourth of one *per cent.* of the valued rent of the lands, where the lands are valued, and where the lands are not valued, a sixth part of one *per cent.* of the real rent; *Ersk. B. ii. tit. 5, § 28.* It is settled that a clause of pre-emption does not fall under the statute. *Stair, B. ii. tit. 3, § 58; More's Notes, p. clxxxiii.; Bell's Com. vol. i. p. 26, 5th edit.; Bell's Princ. 3d edit. § 1720.* See *Clause of Pre-emption.*

**Clause of Devolution.** A clause of devolution may be defined generally to be a clause devolving some office, obligation, or duty, on a party in a certain event, *e. g.*, on the failure of another to perform. It is unnecessary to specify the various deeds in which such a clause may occur. By much the most important instance of it, however, in our practice, is to be found in the articles of roup in a judicial sale, and in other articles of roup, in which a clause is inserted, binding the highest offerer to find caution for the price within thirty days, and, on his failure to do so, devolving the purchase on the next highest offerer, under a similar obligation, and so on downwards; intimation of the devolution being made within ten days of the offerer's failure to find caution, and the offerer so failing being bound to make good the difference between his offer and the offer taken. This clause, which has been introduced solely for the benefit of the expositors, is attended with evident hardship to the bidders at a sale; for even the second highest may be kept in a state of suspense for forty days after the sale, and the remaining bidders for a much longer

time. In construing the clause, it seems to be understood, 1st, That on the failure of the highest offerer to find caution, it is optional to the expositors either to re-expose the lands or to claim against the second offerer, although the soundness of this construction has been doubted. 2d, That where the expositors, on the highest offerer's failure to find caution, have made their election to abide by the sale, without re-exposing, and have made a demand upon the second offerer, the second offerer has full right to the purchase, and cannot be deprived of it by any subsequent attempt on the part of the highest offerer to implement his bargain. 3d, It is now settled that the exposor's claim against the highest offerer for the difference between the amount of the first and second offer is not of the nature of a penalty, but properly a debt arising *ex contractu.* *Bell's Com. vol. ii. p. 274, 5th edit.*

**Clause of Return;** is a clause by which the grantor of a right makes a particular destination of it, and provides that, in a certain event, it shall return to himself. A clause of this kind, where not protected by prohibitory, or by irritant and resolute clauses, has been held to be of the nature of a simple substitution, which may be defeated by the gratuitous act of the grantee or any of the substitutes. A distinction, however, has been attempted to be drawn between a substitution and a clause of return, in a gratuitous deed in favour of a stranger, the former of which, it is said, vests the right absolutely in the donee, subject to his power of disposal, whereas a clause of return creates a *conditional right*, which is not defeasible, at least by any gratuitous act, on the part of the donee or substitutes. This distinction, however, does not seem to be well-founded. See, however, the case of *Mackay v. Campbell's Trustees*, 13 S. 246. See also *Ersk. B. iii. tit. 8, § 45; Duke of Hamilton v. Douglas*, 9th Dec. 1762; *Mor. p. 4253*, and *Mor. Dict. title Fiar absolute, limited; Bell's Princ. art. 1705, 4th edit.; See also Substitution. Prohibitions.*

**Clauses Irritant and Resolute.** These two clauses were devised for limiting the right of an absolute proprietor, and making effectual the conditions imposed on him, which otherwise would have inferred no more than a personal obligation, ineffectual against creditors or singular successors. By the irritant clause, the deeds done by the proprietor, contrary to the conditions of the right, are declared to be void and null; and, by the resolute clause, the right of the person contravening is resolved and extinguished. It was the union of the two clauses which accomplished what neither of them singly could attain; and by which, in practice, the conditions of

an heritable right, whether an entail or other conveyance, were rendered real and effectual against the singular successors and creditors of the disponee, as well as against himself and his heirs. *Stair*, B. i. tit. 13, § 14, *et seq.*; B. ii. tit. 10, § 6, *et seq.*; B. iv. tit. 5, § 7, and tit. 18; *More's Notes*, p. lxxx, *et seq.*; *Ersk.* B. iii. tit. 8, § 25; *Bell's Com.* vol. i. p. 46, 4th edit.; *Bell's Princ.* 4th edit., art. 720. See *Irritancy*. Entail. *Conditions in Grants*.

**Clay.** The landlord or his assignee, and not the tenant, has a right to the use of pipe-clay. *Bell on Leases*, i. 345, 4th edit.

**Clep and Call**; a certain formula anciently used in petitions and libels, especially in criminal matters. *Skene*, h. t.

**Clergy.** Before the Reformation, the clergy of Scotland were divided into regular and secular. The regular clergy had no charge of any congregation, but were bound to close residence in their monasteries: they were called regular, because they were bound to obey certain rules: These were the monks, under the direction of the abbots or priors; which order of clergy was abolished at the Reformation. The secular clergy were those who discharged the pastoral office over a certain district, as the bishops, presbyters, and deacons. But the introduction of presbyterian church government has reduced this order to presbyters alone. *Ersk.* B. i. tit. 5, § 3, *et seq.*; *Ersk. Princ.* 12th edit. 50. For the form of admission of a clergyman of the Church of Scotland, see *Minister*. For an account of their provision, see *Teinds*.

**Clergy.** No person ordained a priest or deacon, or a member of the Church of Scotland, is capable of being elected member of Parliament; 41 *Geo. III.*, c. 63. Roman Catholic clergy are also excluded by 10 *Geo. IV.*, c. 7, § 9. See *May's Parliamentary Practice*, p. 34; *Chambers' Election Law*, h. t.

**Clergy, Benefit of.** See *Benefit of Clergy*.

**Clerical Error.** A clerical error is an error accidentally committed in the transcription of a deed or other written instrument; and where such an error is obviously accidental, not in *substantialibus* of the instrument, it will not be fatal to its validity or efficacy. In judicial proceedings in the Court of Session, *e. g.*, in interlocutors of Court, the general rule is, that after an interlocutor has been signed it cannot be varied or altered except by the Inner-House on a reclaiming-note, when it is the interlocutor of a Lord Ordinary, or by appeal to the House of Lords, where the judgment has been pronounced in the Inner-House. But where a clerical error has been committed, even although the interlocutor has been signed, the Court will authorize the error to be corrected. The principle seems to be, that the erroneous in-

terlocutor does not express and embody the true intent and meaning of the Court. Such corrections, however, cannot be made on a motion from the bar, but must be prayed for by incidental petition. *Kerr*, 17th Dec. 1835, 14 *S. & D.* 180.

**Clerk of Session**; is the title given to the clerks of the Court of Session. There were formerly six principal clerks, six depute-clerks, and six assistant-clerks or closet-keepers, as they were sometimes called. But by the statute abolishing the Jury Court as a separate establishment, and uniting jury trial in civil causes with the ordinary jurisdiction of the Court of Session, the number of the principal clerks is reduced to four, who, in addition to their former duties, perform the duties connected with trials by jury and Bill-Chamber proceedings in the Inner-House. 11 *Geo. IV.*, and 1 *Will. IV.*, c. 69, § 13; 1 and 2 *Vict.*, c. 118, §§ 5, 6, 7; 13 and 14 *Vict.*, c. 36, § 37. By the first of these acts, the appointment of the depute and assistant clerks of Session is vested in the Crown; and in case of the necessary absence of any principal clerk, his duties may be discharged by any of the remaining principal clerks, or by any person appointed by his Division of the Court from among the assistant clerks in the Inner-House, or the depute-clerks in the Outer-House; 1 and 2 *Vict.*, c. 18, § 8. The appointment of the principal clerks was always in the Crown; and by act of regulations, 1695, to qualify them for the office, they must be either advocates or writers to the signet of three years' standing. Their appointment, however, disqualifies them from practising as advocates or agents before the Court of Session; 1 and 2 *Geo. IV.*, c. 38, § 9. Their duty is to attend the Judges in the Inner-House, and, under their direction, to write out the judgments or interlocutors, or other orders pronounced by the Court, to keep the books of Sederunt, and to receive bonds of caution ordered by the Inner-House, not in the Bill-Chamber. Two of the principal clerks attend each division of the Court. The depute-clerks are five in number, one, with his assistant, being attached to the bar of each of the Lords Ordinary. They officiate in the Outer-House before the Lords Ordinary, whose judgments or interlocutors they write out; 1 and 2 *Vict.*, c. 118, § 12. Each principal clerk and each depute-clerk has a distinct apartment, or closet as it is called, in the Register Office, in which he keeps the processes to which he is clerk. The duty of taking charge of the Outer-House processes, of transmitting them to the judges to be considered, and of attending at the closets of the depute-clerks to lend out the processes, is discharged by the assistant-clerks or closet-

keepers, who also attend in the Outer-House while the Court is sitting. The principal clerks have also assistants, who officiate at their apartments in the Register Office, and take charge of the processes depending before the Inner-House; and, by the act 50 Geo. III., c. 112, § 13, the duty of preparing the extracts of the decrees of the Court was entrusted to the assistants of the principal clerks; but that part of the 50 Geo. III. is repealed, and all such extracts are now prepared by the extractor of Court (1 and 2 Geo. IV., c. 38, § 17; 1 and 2 Vict., c. 118, §§ 19, 20), who is placed under the superintendence of the junior principal clerk of Session for the time being. (See *Extractor*). The principal clerks and depute-clerks of Session are entitled to no fees, but have fixed salaries, the former L.1000 *per annum* each, and the latter L.400; 50 Geo. III., c. 112; 1 and 2 Vict., c. 118. The emoluments of the assistants were formerly derived from fees which they exacted for lending out and receiving back processes, &c.; now each assistant-clerk has a salary of L.350 *per annum*. 1 and 2 Vict., c. 118, §§ 10, 13, 30. See *Shand's Prac.*, p. 102.

**Clerk of the Bills.** By 1 and 2 Vict., c. 118, § 14, the charge of the Bill-Chamber department of the Court of Session was entrusted to two Clerks of the Bills, under the principal clerks of Session, and appointed by the Crown. Their duty was to receive and to present to the Lord Ordinary all notes of advocacy and suspension, and all bills which required to be laid before him; 1 and 2 Vict., c. 118, § 14; and receive bonds of caution, when such are required in the Bill-Chamber. By Act of Sederunt, 18th Feb. 1686, the Clerks of the Bills are made liable for the damage arising either from the accepting of an insufficient cautioner, or for refusing a sufficient one; but by the Act of Sederunt 14th June 1799, this act is repealed, and it is declared that, in time coming, the Clerks of the Bills shall be responsible for the due performance of their duty in "receiving or rejecting cautioners, according to the rules of common law and justice, applicable to the cases that may hereafter occur." Formerly, the Clerks of the Bills had also to present to the Lord Ordinary all bills for summonses or diligences, &c.; but, by 53 Geo. III., c. 64, § 17, the *fiat* of the Clerk of the Bills officiating for the time is declared to be a sufficient warrant for passing such bills. See *Bill-Chamber*. They write the *fiat* for personal execution under 1 and 2 Vict., c. 114. See also Act of Sederunt regulating Bill-Chamber proceedings, 14th December 1838, *Beveridge on the Bill-Chamber*; *Shand's Prac.* p. 109.

By 20 and 21 Vict., c. 18, the office of one of the Clerks of the Bills is abolished; and it is provided that there shall be in future only one Clerk of the Bills, who shall be responsible for the reputed solvency of cautioners, and for consigned money, and shall discharge in person all the duties attached to the office. § 2. There are an Assistant-clerk of the Bills, and two ordinary clerks, also authorized (§ 2) to be appointed, the former being empowered to subscribe and authenticate writs and documents in the necessary absence of the principal clerk. All these clerks are paid wholly by salary; and the fees charged and collected in the Bill-Chamber Office are accounted for to the Treasury; §§ 3, 4. The clerks in the Bill-Chamber are clerks in sequestrations (19 and 20 Vict., c. 79, § 43), and prepare extracts of decrees in sequestration cases; A. S., 20th July 1842.

**Clerk to the Court of Teinds.** There was formerly one principal clerk in the Teind Court appointed by the Crown. His duty was to attend the Court, and write out, under its direction, the whole acts, orders, and decrees. There were also a depute Teind-clerk and extractor for that Court.

By 1 and 2 Vict., c. 118, § 26, the office of principal Teind-clerk is abolished, and it is declared, that the business formerly performed by the Teind-clerks shall in future be discharged by the first and second Depute-clerks of Teinds, the former being styled Clerk of Teinds, and having a salary of L.300 *per annum*, and the latter being styled Depute-clerk of Teinds, with a salary of L.250. Power is reserved to the Crown to appoint a person to be keeper of the records in the Teind-office, whose chief duty is to arrange and index the records and processes. The Depute-clerk of Teinds is to continue to discharge the duty of extracting acts and decrees pronounced by the Commissioners of Teinds. § 27. See *Teind Court*.

**Clerk of Justiciary;** is the clerk of the Court of Justiciary. There are a principal and two assistant clerks, whose duty it is to attend the sittings of the Justiciary Court in Edinburgh, to keep the books of Adjournal, and to write out the interlocutors and sentences of the Court. They have also an apartment in the Register Office, where they transact the business connected with the Justiciary and Circuit Courts. Besides the principal and assistant clerks of Justiciary, there are three circuit-clerks, one of whom attends the judges on each of the circuits as clerk of court. The clerks of Justiciary and the circuit-clerks were formerly appointed by the Lord Justice-Clerk, but are now appointed by the Crown.

**Clerk of the Peace;** is the clerk to the

justices of the peace for the county. His duty is to attend the Justice of Peace Court, and to keep the books of record, &c. He must not practise in the court of which he is clerk; *A. S. 6th March 1783*. A principal clerk can only be removed or suspended by the Court of Session; the clerks of the peace in Scotland are appointed by the Secretary of State (1685, c. 16; 1686, c. 20; 1690, c. 28); and the principal clerk of the county appoints the depute and district clerks. *Tait's Just. of Peace, h. t.*; *Blair's Just. of Peace, h. t.*; *Barclay's Digest, h. t.* By 7 Will. IV., and 1 Vict., c. 83, clerks of the peace and others are compelled to take the custody of documents directed to be deposited with them under the standing orders of either Houses of Parliament. *May's Parl. Prac.*, 599. In England, the *Custos Rotulorum* of the county has the appointment of the clerk of the peace, who may execute his office by deputy, to be approved of by the *Custos Rotulorum*, and to hold the office during good behaviour. *Tomlins' Dict., h. t.*; *Wharton's Lex. h. t.*

**Clerk of the Pipe.** The office of Recorder of the Great Roll, or Clerk of the Pipe, was an office in the Scotch Court of Exchequer, established by 6 Anne, c. 26; but as, by 2 and 3 Will. IV., c. 103 and 112, a great part of the duties of the office was transferred to offices in England, it was, by 4 Will. IV., c. 16, abolished, and its powers and authorities transferred to the Lord Treasurer's Remembrancer of the Exchequer of Scotland. *Tomlins' Dict., h. t.*

**Clerk of the Crown**; an officer in Chancery, whose function it is constantly to attend the Lord Chancellor. Under warrant of the Lord Chancellor (in case of a new Parliament), or of the Speaker on casual vacancies, he makes out writs for the election of Members of Parliament. All returns are made to the Clerk of the Crown, which he cannot alter, except by order of the House, under a penalty of £500, *toties quoties*. The returns are entered in a book kept by him, accessible to all, on payment of a reasonable fee. True copies and the book are evidence. *Tomlins' Dict., h. t.*; *Chambers' Election Law, h. t.*; *May's Parliamentary Prac.*

**Clerk of the Parliament Rolls**; an officer who records all things done in the High Court of Parliament, and engrosses them in parchment rolls. *Tomlins' Dict., h. t.*

**Clerks of Jury Causes.** The duties of clerks of Jury Causes are now performed by the clerks of Session; 13 and 14 Vict., c. 32, § 37. See *Issues. Jury Trial.*

**Clerks of Court.** It would exceed the proper limits of this work to enumerate the different clerks of inferior courts. Every court has necessarily a clerk, whose duty it is to

write out the judgments, and extract the decrees of the court. In like manner, each royal burgh has a clerk chosen by the magistrates, whose duty it is to keep a record of their proceedings, and to act as notary in giving sasine in burghage property. See *Sheriff-Clerk.*

**Clerks to the Signet.** The clerks or writers to the Signet are said to have been anciently clerks in the office of the Secretary of State, by whom writs passing the King's Signet were prepared. These writs were summonses ordering attendance on the King's court, or charging the party to obtemper the decree pronounced against him, or authorizing execution against his person or estate. When the College of Justice was established, the writers to the Signet were in the exercise of nearly the same duties in which they are engaged at the present day; and they are recognised as members of that college; 1537, c. 59. The duty of the clerks, or writers to the Signet, now is, to prepare the warrants of charters of land flowing from the Crown; to sign all summonses for citing parties to appear in the Court of Session; and almost all diligences of the law for affecting the person or estate of a debtor, or for compelling implementation of the decrees of the Supreme Court. The writers to the Signet have further the privilege of acting as agents or attorneys in conducting causes before the Court of Session. Writers to the Signet, after ten years' practice, and certain probationary examinations on civil law, may be appointed Judges of the Court of Session. They are also eligible to several other important offices connected with the Court of Session. The Society is now under the Keeper of the Signet, who usually acts by a deputy-keeper; and the affairs of the body are conducted by this deputy and certain commissioners named by the keeper, from the members, with power to them to make by-laws for the admission of members, and the regulation of their conduct. By the existing rules, a person applying to be admitted to enter into indenture as an apprentice must be at least sixteen years of age, and must produce certificates of his having attended two full winter courses at one or other of the universities; one of these certificates being from a professor of humanity; and it being understood that these two courses are exclusive of medical, divinity, or law classes. The apprenticeship is for five years; and immediately on expiration of the indenture, the apprentice (having attained the age of twenty-one years complete) may apply to be admitted to trial, with a view to become a member. Every candidate for admission must have attended four courses of the law classes, viz. one of civil law, one of Scotch law, and one

of conveyancing, with a second course of any one of these. And when admitted on trial, the candidate is first examined by three private examiners on his knowledge of Scotch law; and three months afterwards is examined by the public examiners in the hall of the society, and in presence of the commissioners, as to his knowledge of conveyancing. The apprentice-fee to the master is L.200. The payment by the apprentice to the widows' fund, L.50, 1s. 6d.; to the general fund of the society, L.81. 2s. 6d.; the total of indenture fees being L.331, 4s. At passing, the fees are, for the commission, L.25; passing fees, L.51, 6s.; perquisites to officers, L.3, 5s. 6d. Total expense of entering as a member of this body, L.410, 15s. 6d. *Minute of Society, 9th March 1825; Shand's Prac. 83, et seq. See College of Justice.*

**Close Time.** See *Fishing.*

**Closing Poll.** See *Poll.*

**Closing Record.** See *Record.*

**Coaches, Public.** See *Public Carriages.*

**Coal-Mine.** A coal mine is legally a part of the lands within which it is situated, and passes with a conveyance of the lands. It may nevertheless form a separate estate. Thus, a proprietor may sell or feu the surface, reserving the coals and minerals, or dispose of them, reserving the lands; and the two thus separated become distinct feudal estates. *Ersk. B. ii. tit. 6, § 5.* When a superior feus lands under a reservation of a right to coals, it is usual for him to come under an obligation to pay the vassal surface damage for the injury which may be done to the lands by working the coal-mines, an obligation which, in case of a sale of the coals by the superior, will attach to the purchaser of the coal, in virtue of the principle by which every obligation affecting an heritable subject is transferred from the former to the present proprietor. A liferenter, whose right extends merely to the fruits, *salva rei substantia*, has no title to coal-mines without a special grant, even although they are open, and in course of being worked; nor will he be entitled to the rents of coal-mines unless the grantor of the liferent shows that it was plainly his intention to include these rents in the liferent. *Stair, B. ii. tit. 3, § 74; tit. 9, § 43; More's Notes, pp. cc. and cclxxi.; Bell's Com. vol. i. p. 62, 5th edit.; Bell on Leases, vol. ii. pp. 43, 120, 261, 4th edit.; Bell's Princ. 4th edit. arts. 1043, 1051, 1069, 740; Hutch. Justice of Peace, vol. iii. p. 241. 2d edit.; Hunter's Landlord and Tenant; Ross's Lect. ii. 173. See Liferenter.*

**Cocket;** a seal belonging to the Custom-house; or rather a scroll of parchment sealed and delivered from the Custom-house to merchants, as a voucher that their goods are cus-

tomed. The word also signifies the custom-house or office where goods to be transported were first entered and paid custom, and had a cocket or certificate of discharge. *Tomlins' Dict.; Fleta, l. 2. c. g.*

**Code;** a collection of the laws and constitutions of the Roman emperors made by order of Justinian. The code is the second volume of the *Corpus Juris Civilis*, and contains twelve books. Before the time of Justinian similar collections had been made, such as the *Gregorian* and *Hermogenian*, which are collections of the imperial constitutions from Hadrian to Diocletian and Maximinus; and the *Theodosian*, from Constantine the Great to Theodosius the Younger. There are several modern systematic collections of laws called codes, the most celebrated of which is the Code Napoleon. See *Roman Law. Civil Law.*

**Codicil;** is a writing by which the grantor bequeathes legacies out of his moveable estate, and which does not contain the nomination of an executor, or clauses which refer to anything but moveables, or which take effect till the grantor's death. The same form of authentication is required in a codicil as in any other formal deed. Codicils are usually executed in reference to a previous testament. See *Testament.* The same name is frequently given to those writings which alter the terms of settlements *mortis causa* of any description, whether they be in the form of testament or not. *Stair, B. iii. tit. 8, § 16 and 23; Bell's Princ. 4th edit. art. 1870; Jurid. Styles, 3d edit. vol. ii. p. 434.*

**Cofferer;** a principal officer of the king's household, who has a special charge and oversight of other officers of the household, to all of whom he pays their wages. *Tomlins' Dict. h. t.*

**Cognate.** A cognate is a relation connected by the mother's side; and as there is no succession through the mother, a cognate cannot succeed as heir to the father's property. But where there is room for a tutor-at-law, who is chosen from the relations on the father's side, or agnates, as they are called, the custody of the child is given to the mother, or, failing her, to the nearest cognate. In the Roman law, a cognate is a relation through a female, and an agnate a relation through a male. *Stair, B. iii. tit. 4, § 8 and 34; Ersk. B. i. tit. 7, § 4; Ersk. Princ. 12th edit. 87, 386; Bell's Princ. 4th edit. art. 2079.*

**Cognition.** This term was anciently applied to an action for ascertaining disputed marches. The Court of Session was in use to remit the matter in dispute to the Sheriff, to be tried by a jury; but this form is now in disuse, and in place of a remit to the Sheriff, the present practice is to have the proof taken by commission, and reported to

the Court of Session, who decide upon it. *Stair*, B. i. tit. 9, § 28; B. ii. tit. 3, § 73; *Ersk.* B. iv. tit. 1, § 48. As to the cognition, or cognoscing, of idiots and insane persons, see *Breve. Idiot. Furiosity. Curatory.*

**Cognition and Sale**; is the name given to a process before the Court of Session, at the instance of a pupil and his tutors, for obtaining a warrant to sell the whole or a part of the pupil's estate. In this action, the next heirs and creditors are called as parties; the summons must contain a statement of the nature and amount of the pupil's heritable estate; and, either in the summons or in the course of the action, a full state of the pupil's affairs must be exhibited, so as to enable the Court to judge of the necessity of the sale. When the action comes into Court, a proof of the value of the property is led, and a memorial and abstract prepared, as in the case of a judicial ranking and sale; upon advising which, the Court authorizes a sale either of the whole or of a part of the property, as it may think proper, by public roup, and at an upset price, not under the value proved in the course of the process. When this warrant is obtained, the tutors may proceed to sell extrajudicially, at such time and place as they think best. In this process, of course, there is no ranking of the creditors. It may also be observed, that a summary application to the Court for warrant to sell is not competent; *Ersk.* B. i. tit. 7, § 17, *note*. In granting such warrants, the Court of Session acts as a court of equity; but it will not interpose unless in a case of great necessity, and where the estate is so burdened as to afford no reasonable prospect of beneficial management for the pupil without a sale. The Court at one time was in use to exercise a discretionary power in authorizing such sales, as appeared evidently advantageous to the pupil; but more recently, a different rule has been followed, and now the Court will not interpose on any views of expediency, however clear; *Finlayson*, 22d Dec. 1810, *Fac. Coll.* It was once the practice, in the case of sales by minors *puberes*, for the purchaser to insist on an action of cognition and sale at the instance of the minor and his curators, as a protection against a reduction on the head of minority and lesion; but the Court lately, "on the ground that a minor and his curators could sell without judicial authority, and that no decree of the Court could prevent a reduction by the minor, refused to interpose their authority as unnecessary;" *Wallace*, 8th March 1817, *Fac. Coll.* See *Ersk.* B. i. tit. 7, § 17; *Bell's Com.* vol. ii. p. 257, 5th edit.; *Bell's Princ.* 4th edit. art. 2084; *Shand's Prac.* p. 757, 940, *et seq.*; *Jurid. Styles*, 2 edit. vol. iii. p. 437; *Menzies' Lect.* p. 31. See *Judicial Factor.*

**Cognition and Sasine**; is a form of entering an heir in burgage property. Where the ancestor died infest, one of the bailies of the burgh, at the request of the heir, examines two or more witnesses as to his propinquity; upon whose evidence the bailie cognosces, and declares him heir to the ancestor, and infests him by hasp and staple, the symbols used in burgh tenements. The ceremony is performed by the heir's taking hold of the hasp and staple of the door, and entering the house and bolting the door; and, on his coming out, he takes instruments in the hands of the town-clerk, who always acts as notary on the occasion. An instrument of cognition and sasine is then extended, stating the *res gesta*, and closed by the notary's doquet. The instrument of sasine, by 1681, c. 11, must be recorded within sixty days of its date, in a particular register kept by the town-clerk. Where the heir, before infestment, makes over the subject to another, the cognition of the heir's propinquity, and the purchaser's infestment, may be inserted in the same instrument; and where the ancestor's right was merely personal, the cognition of the heir, the resignation by the ancestor's author, and the new infestment in favour of the heir, may all be inserted in the instrument of cognition and sasine, which is then called *resignation, cognition, and sasine*; *Jurid. Styles*, 3d edit. vol. i. p. 693; 4th edit. 571. The form just explained seems to be the regular method of completing an entry by cognition and sasine. By the practice of the city of Edinburgh, however, no witnesses are examined as to the heir's propinquity; but on the simple application of the party, and production of the last sasine, an instrument is returned, stating the cognition and infestment of the heir under the usual *salvo jure cujuslibet*. The same form of entry may be used by the heir of the creditor in an heritable bond over burgage subjects. The title of the heir in a burgage tenement may also be completed by precept of *clare constat* and infestment, or by special service and infestment; but the cognition and sasine is the simpler and more usual form. See *Bell's Princ.* 4th edit. art. 845; *Jurid. Styles*, vol. i.; *Menzies' Lect.* See also *Burgage Holding*. The act 10 and 11 Vict., c. 47, 1847, enacts, by § 26, that the service and entry of heirs *more burgi* in burghs, in tenements holden in burgage, shall not be affected by the act. By section 5 of c. 49, the forms of sasines in lands holden in burgage are assimilated to those used in relation to lands holden by the other tenures, in the case of infestments upon a disposition or other deed of conveyance, or upon a decree of adjudication or of sale, but no change is introduced in regard to sasines upon the entry of heirs.

**Cognitionis Causa.** Where the creditor of a deceased heritable proprietor pursues the heir, with a view to constitute the debt against him, and attach the defunct's heritage, and the heir appears and renounces, the Court will pronounce a decree for the amount of the debt, which is called a decree *cognitionis causa*. And in virtue of this decree ascertaining the debt, the creditor may proceed to adjudge the heritage of his deceased debtor. See *Adjudication*. So also in the case of moveable succession, the creditor of a deceased person whose debt is not constituted, may charge the defunct's nearest of kin to confirm executor to him within twenty days after the charge; which charge shall be a passive title against the person charged, unless he renounce; and then the creditor may proceed to have his debt constituted, and the *hereditas jacens* of moveables declared liable by a decree *cognitionis causa*; upon obtaining which, he may be confirmed executor-creditor. 1695, c. 41; *Stair*, B. iv. tit. 19; *More's Notes*, p. cclxxx.; *Ersk. Princ.* 12th edit. 276; *Bell's Com.* ii. 85; *Shand's Prac.* p. 690. See *Executor-creditor*.

**Cognovit Actionem;** in English law, is where a defendant acknowledges or confesses the plaintiff's cause against him to be just and true; and, before or after issue, suffers judgment to be entered against him without trial. *Tomlins' Dict. h. t.*; *Wharton's Lec. h. t.*

**Cohabitation.** The living together at bed and board; that is, living as husband and wife, and being reputed as such, will constitute a marriage. See *Marriage*.

**Coif;** in England, the badge of a sergeant-at-law, who is called sergeant of the coif, from the lawn coif which he wears under his cap when he is created. *Tomlins' Dict. h. t.*

**Coin;** is the current money of the realm. The coining of money is part of the king's prerogative; and he may, by proclamation, make any foreign coin lawful British money at his pleasure. The current coin of Great Britain is composed of gold, or silver, or copper. The denomination, or value of the coin, is also fixed by the king's proclamation. *Bell's Princ.* 4th edit. art. 1334, *et seq.*; *Thomson on Bills*, p. 414, *et seq.*; *Shaw's Digest*; *Tait's Justice of Peace, h. t.*; *Swint. Abridg. voce Money*; *Ross' Lect.* ii. 235; *Tomlins' Dict.*; *Wharton's Lec. h. t.* See *Coining*.

By 16 and 17 Vict., c. 102, it is enacted, that any person defacing the current coin by stamping words thereon, or bending the same, shall be guilty of an offence punishable by fine or imprisonment, or both; and that a tender of coin so defaced shall not be a legal tender; and the party tendering such defaced coin shall be liable, on summary conviction, in a penalty not exceeding 40s.; but

the prosecution for such penalty must be with consent of the Lord Advocate.

**Coining.** By our earlier practice, all offences against the current coin of the realm, *e.g.*, counterfeiting, vending, disguising, or importing it, seem to have been considered treasonable, and were punished capitally, whether the coin was gold, silver, or brass. By the treason laws of England, counterfeiting the king's money, or bringing false money into the kingdom, counterfeiting foreign gold or silver coin current in the kingdom by consent of the Crown, or wasting, clipping, or otherwise impairing or falsifying, the current coin, or possessing instruments proper for coinage, or conveying them out of the Mint, or marking, colouring, or gilding any coin or base metal, to resemble the current coin, &c., is treason; and the English treason laws having been extended to Scotland at the Union, offences of this kind must now be tried according to the forms prescribed in trials for treason; *Hume*, vol. i. p. 532. But there are several offences against the coin not treasonable by the law of England, which of course remain on the same footing in this country as before the Union, and may be prosecuted under the Scottish statutes. 1. The coining of counterfeit brass or copper money is not treason by the law of England; and although it was an offence punishable capitally by our old law, the punishment by the present practice seems to be arbitrary. To constitute this crime, it is not necessary to utter, or attempt to utter, the base coin, if the piece be formed so as to resemble the coin, and be likely to pass as such. The crime, however, is not committed if the piece or medal struck have some private and peculiar device, such as must distinguish it from the current coin, and show that it was not intended for deception. 2. The knowingly uttering of false British coin, counterfeited within the realm, is not treason; and, by our practice, the punishment is arbitrary, provided the person guilty of the offence has had no concern in the fabrication; for, in that case, or if he share the profit of the adventure with the coiner, he is art and part in the crime of coining. 3. The uttering of false British coin, counterfeited in a foreign country, and imported, is not treasonable, except on the part of him who imports it, with intent to utter it. The punishment of this offence is also arbitrary. 4. The same holds with regard to the uttering of imported false foreign coin, current in this country by proclamation. 5. Coining within Britain, or lightening there, foreign money, not current by act of Parliament, but by consent of parties merely, is a misdemeanour, punishable arbitrarily. See *Hume*, vol. i. p. 561, *et seq.*

By 2 Will. IV., c. 34, by which the former enactments relative to coining and uttering are repealed, and their provisions amended and consolidated, it is enacted—(1.) That if any one shall falsely fabricate a coin, in imitation of any of the king's current gold or silver coin, or shall gild silver, or colour any counterfeit gold or silver coin, or any piece of metal whatever of a fit size and figure to be coined, and with intent that the same shall be coined into counterfeit gold or silver coin, or shall alter silver coin, with intent to make it pass for gold coin; or copper coin, to make it pass for gold or silver coin; he shall be punishable with transportation for life, or for a term not less than seven years, or with imprisonment for a term not exceeding four years; and the offence of making or fabricating shall be held complete, although the coin so made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected; §§ 3, 4. (2.) If any one shall impair, diminish, or lighten current gold or silver coin, with intent to make it pass for current coin, he shall be punishable with transportation for a term not exceeding fourteen, nor less than seven years, or with imprisonment for a term not exceeding three years; § 5. (3.) If any person shall buy, sell, receive, pay, or put off, or shall offer to do so, any counterfeit gold or silver coin, for a lower value than its denomination, or if any person shall import into the United Kingdom any counterfeit gold or silver coin, knowing it to be counterfeit, he shall be punishable with transportation for life, or for a term not less than seven years, or imprisonment for not more than four years; § 6. (4.) The uttering of base coin is punishable with imprisonment for not more than one year; and the possessing at the time of the said uttering, or the uttering within ten days thereof, other counterfeit coin or coins, is punishable with imprisonment for two years; second convictions to make the culprit liable to transportation for life, or not less than seven years, or imprisonment for not more than four years; § 7. (5.) If any person shall have in his possession three or more pieces of counterfeit gold or silver coin, knowing the same to be counterfeit, and with intent to utter the same, he shall be punishable, for the first offence, with imprisonment for a term not exceeding three years; and for the second with transportation for life, or not less than seven years, or with imprisonment for a term not exceeding four years; § 8. (6.) Making, mending, buying, selling, or possessing, without lawful authority, any instruments used in fabricating current coin, with the knowledge that such instrument or

instruments is to be used, or has been used in counterfeiting current gold or silver coin, shall be punishable with transportation for life, or not less than seven years, or imprisonment for not more than four years; § 10. (7.) Conveying instruments or engines for coining out of any of his Majesty's Mints, without lawful authority, is punishable with transportation for life, or for not less than seven years, or imprisonment for not more than four years; § 11. (8.) Counterfeiting copper coin, making, mending, buying, selling, or possessing instruments for counterfeiting it, or buying, selling, or putting off counterfeit copper coin for a lower value than its denomination, is punishable with transportation for not more than seven years, or imprisonment for not more than two years; and uttering copper coin, knowing it to be counterfeit, or possessing three or more pieces of such coin, knowing it to be counterfeit, and with intent to utter it, is punishable with imprisonment for not more than one year; § 12. Current coin altered, so as to pass for current coin of a higher denomination, is held to be "counterfeit coin," within the meaning of the act. The fact of the coin being counterfeit may be competently proved without the evidence of scientific witnesses. All that is necessary, is that the jury be satisfied by personal inspection, coupled with the evidence of credible witnesses, that the coin is bad; 2 *Broun's Rep.* 291. A party may still be indicted at common law as well as on this statute. Where a coin, intended to represent and pass as the current coin, bears the royal effigy and arms, it is not necessary that they be in every respect identical with those upon good coin; but where there is so little resemblance as not to deceive a person of ordinary comprehension, the offence is fraud, and not uttering counterfeit coin. See *Steele*, p. 151; *Alison's Princ.* p. 451; *Bell's Notes to Hume*, p. 130, *et seq.*

The act 6 and 7 Will. IV., c. 69, passed to fix the standard qualities of gold and silver plate in Scotland, and to provide for the assaying and marking thereof, imposes the punishment of transportation for life, or for any term not less than seven years, or imprisonment for any term not exceeding four, nor less than two, years, for offences with reference to the stamping or marking of gold or silver plate. See also the following statutes, 7 Will. IV., and 1 Vict., c. 9, as to the punishment of imprisonment being accompanied with hard labour or solitary confinement; 5 and 6 Vict., c. 47, as to the stamping of foreign plate admitted into this realm; and 56 Geo. III., c. 68, and 12 and 13 Vict., c. 41, which regulate the coinage of silver.



**Collateral Security** ; is an additional and separate security for the due performance of an obligation. Such securities, of course, can never be made available to any greater extent than that of securing implement of the principal obligation ; but in ranking on the bankrupt estates of principal and collateral obligants, the rule is, that while the whole debt remains unpaid, the creditor is entitled to rank for the whole upon the estate of each obligant, whether principal or collateral, whose obligation extends to the whole, to the effect of drawing full payment of the debt. *Bell's Com.* vol. ii. p. 523, 5th edit. ; *Jurid. Styles*, vol. i.

**Collateral Succession** ; is the succession of the brothers and sisters of the deceased. In heritable succession, the brother-german next youngest to the deceased succeeds ; or where the deceased is himself the youngest brother of three or more, his immediate elder, and not the eldest, brother-german, succeeds ; and so on through all the brothers in the order of their seniority. Failing brothers-german, the sisters-german succeed equally as heirs-portioners, though there should be brothers-consanguinean ; and failing them, brothers-consanguinean (that is, brothers by the same father) succeed, according to the same rules with brothers-german ; and failing brothers-consanguinean, sisters-consanguinean succeed as heirs-portioners. Brothers and sisters uterine (that is, by the same mother, but by different fathers,) formerly had no right to succeed by the law of Scotland in any case. *Stair*, B. iii. tit. 4, § 6, *et seq.* ; *Ersk.* B. iii. tit. 8, § 8 ; *Ersk. Princ.* 12th edit. 385 ; *Bell's Princ.* art. 1661, *et seq.* See *Succession. Conquest*.

In moveable succession there was formerly no representation allowed. But by the act 18 Vict., cap. 23 (1855), the issue of a predeceasing next of kin come in the place of their parent in the succession to an intestate, and take the share to which the parent would have been entitled. It is provided, however, that no representation shall be admitted among collaterals of the brothers' and sisters' descendants. It is also provided, that the surviving next of kin of the intestate claiming the office of executor, shall have exclusive right to the office in preference to the children or other descendants of any predeceasing next of kin. If, however, no next of kin shall compete for the office, then such children or descendants are entitled to confirm. By the same act it is enacted, that, where an intestate dies without leaving issue, whose father and mother have both predeceased him, and shall not leave any brother or sister-german or consanguinean, nor any descendant of such brother or sister, but shall leave brothers

and sisters uterine, or any descendant of such brother or sister, such brothers and sisters, or such descendants, in place of their predeceasing parent, shall have right to one-half of his moveable estate.

**Collation** ; is a provision of the law of Scotland, by which the heritable and moveable succession of a deceased person may, in certain circumstances, be accumulated into one mass, and distributed in equal shares amongst his next of kin. Collation may take place either between the heir in heritage and the executors, or amongst the younger children.

1. *Collation between the heir and executor.*—Where the estate of the deceased consists partly of heritage and partly of moveables, the heir in heritage has no share of the moveable estate, if there be others as near in degree to the deceased as himself. But although this be the provision of the law where the heir chooses to accept the heritage, yet, if he considers it for his interest, he has the privilege of claiming a share of the moveables as one of the next of kin, provided he collates the heritage with the executors, who are bound to collate the executry with him ; so that the whole estate, heritable and moveable of the deceased may be thrown into one mass, and distributed by equal portions amongst all the next of kin. The same rule holds in collateral succession : Thus, a brother who succeeds as heir, may collate with his younger brothers and sisters, and claim an equal share of the whole succession. Erskine seems to hold that the heir is entitled to this privilege, even although he be not one of the next of kin (*Ersk.* B. iii. tit. 9, § 3) ; but the contrary has been found by an unanimous decision of the Court. *McCaw*, 28th Nov. 1787, *Fac. Coll., Mor.* p. 2383. It is only the heir of line, or the heir *ab intestato*, who can be required to collate, in order to have a share of the moveable succession. The eldest heir-portioner who succeeds to an heritable estate by an entail, or by her father's destination, is entitled, on her father's death, to a share of the moveables without collating ; *Ricart*, 19th Nov. 1720, *Mor.* p. 2378 ; for, although the decision, *Balfour v. Scott*, 15th Nov. 1787, *Fac. Coll., Mor.* p. 2379, is of a contrary tendency, it does not seem reconcilable to principle, and has been disapproved of. See report of Lord Meadowbank's speech in the case of *Little Gilmour*, 13th Dec. 1809, *Fac. Coll.* It is settled that an heir of entail who is one of the next of kin, and not heir *alioqui successurus*, is entitled to a share of the moveables without collating the entailed estate, although he has succeeded to it through the deceased : *Rae Crawford v. Stewart, &c.* 3d Dec. 1794, *Fac. Coll., Mor.* p. 2384. But an heir of entail *alioqui successurus* is not on-

titled to receive a share of the moveable estate without collating the rents of the entailed estate; *Little Gilmour*, 13th Dec. 1809, *Fac. Coll.*; see also *Anstruther v. Anstruther*, 16th August 1836; 2 *S. & M.*, *House of Lords*, 369; also 1 *S. & M.* 463. Where lands have been purchased and taken to a father in life-rent, and to his heir *alioqui successurus* in fee, with a power of disposal in the father, the heir must collate before he can claim any share of his father's moveable succession; *Baillie*, 23d Feb. 1809, *Fac. Coll.*; and it would also appear, that where a father has, during his own lifetime, put forward his heritage to his eldest son *præceptione hæreditatis*, the son, on his father's death, cannot claim a share of the moveables without collating the heritage so put forward; *Bank. B.* iii. tit. 8, § 28. It has likewise been held, that an heir cannot claim a share of his father's moveables from the executors without collating the heritage to which he has succeeded as heir to his father, although that heritage lies in a foreign country; *Robertson*, 18th Feb. 1817, *Fac. Coll.* Where a father has possessed heritage on apparençy, without completing any feudal title, and his son has made up his titles by serving to the person last infeft, the son can claim a share of his father's moveable succession without collating the heritage possessed by his father on apparençy. See the case of *Spalding v. Spalding*, Nov. 18, 1821, *Hume's Decisions*, p. 119. See also on the subject of collation, *Fisher's Trustees v. Fisher*, Nov. 19, 1844, 7 *D.* 129.

2. *Collation amongst younger children.*—The object of this collation is to preserve equality in the distribution of the *legitim*, and it is confined exclusively to the children entitled to *legitim*. Under this provision of the law, every child claiming *legitim*, who has already got a provision from the father, is bound to collate that provision with the other children, and impute it in part of the *legitim*. Every provision given by the father falls under this collation; e.g., tocher, provisions granted to the child on his or her marriage, bonds of provision, and all sums advanced for behoof of the child, except the expense of education, or inconsiderable presents made by the father. But this collation is not required where it appears to have been the grantor's intention that the child should have the provision as a *præcipuum* over and above the share of the *legitim*. Neither is a child bound to collate a bond of provision granted to him by the father on death-bed, in so far as such provision does not exceed the dead's part; for, although a father cannot diminish the *legitim* by a death-bed deed, yet he may dispose of the dead's part *in articulo mortis*, even to a stranger, and much

more to his own child. *Ersk. B.* iii. tit. 9, § 25. Where an heritable estate is provided to a younger child, he is not bound to collate it, for such provision does not diminish the fund from which *legitim* is taken. This kind of collation cannot affect the rights of third parties: Thus the widow cannot be required to collate legacies or donations made to her by the husband so as to increase the *legitim*, nor, on the other hand, are the children obliged to collate their provisions with the widow, in order to increase her *jus relicta*. *Stair, B.* iii. tit. 8, §§ 26 and 46; *More's Notes*, pp. clxxviii. and cclxxiii.; *Ersk. B.* iii. tit. 9, §§ 24 and 25; *Ersk. Princ.* 12th edit. 431; *Bank. B.* iii. tit. 8, § 16, *et seq.*; *Bell's Com.* vol. i. p. 100, *et seq.* 5th edit.; *Bell's Princ.* 4th edit. art. 1910, *et seq.*; *Sandford on Heritable Succession*, vol. i. p. 43, *et seq.* See also *Legitim* and *Jus Relictæ*.

**Collatio Bonorum**; in the Roman law, was somewhat different from collation in our law. Any one of the *sui hæredes* who wished to participate in the succession, was obliged to collate or bring into the common stock, to be divided among the several heirs, or imputed as part of his own share, whatever he had received by gift out of the estate, during the defunct's lifetime.

*Collatio bonorum*, in English law, is where a portion, or money advanced by the father to a son or daughter, is brought into *hotch-pot*, in order to have an equal distributory share of his personal estate at his death. *Tomlins' Dict. h. t.*

**Collation of Benefices.** Collation was a form of introducing a parochial minister to his church, during the times of Episcopacy. It was done by writing under the hand of the bishop, approving of the person presented, and conferring on him the vacant benefice, and requiring the inferior clergy to induct him to the church. For the form of admitting a parochial minister, see *Minister, Ersk. Princ.* 54, 12th edit.

**Collections in Churches.** By proclamation, 29th August 1693, it is ordained that one-half of the sums collected at parish churches, and of the dues received by the kirk-session, shall be paid over into the general fund for the support of the poor. The other half has generally been applied for the temporary relief of sudden distress. Collections at dissenting meeting-houses are entirely at the disposal of the congregation.

By the Poor-Law Act, 8 and 9 Vict., c. 83, § 54, in all parishes in which it has been agreed that an assessment should be levied for the relief of the poor, the whole ordinary church collections are declared to belong to, and to be at the disposal of, the kirk-session of each parish, but to be applied, however, to no

other purposes than those to which they were before the date of the act in whole or in part legally applicable. See *Dunlop's Parochial Law*, p. 82.

**College of Justice.** The term college, which, in general, is applied to a society of learned men associated for scientific purposes, has been applied to the Supreme Civil Court, composed of the Lords of Council and Session, and of the members and officers of court. This court receives the title of College of Justice in the act 1537, c. 36, and the judges of it that of Senators, 1540, c. 93. The judges consisted originally of seven churchmen and seven laymen, with a president, the Abbot of Cambuskenneth being the first president; and, from the act 1579, c. 93, it appears that, at the institution of the court, the president must have been a clergyman. By the Treaty of Union, art. 19, no person can be appointed a judge of this court who has not served as an advocate or principal clerk of session for five years, or as a writer to the Signet for ten; and in the case of a writer to the Signet, he must undergo the ordinary trials on the Roman law, and be found qualified two years before he can be named. The judge must be at the least twenty-five years of age. The admission is made by the judges, in virtue of a letter directed to them by the Sovereign, requiring them to try the qualifications of the nominee, and to admit him. The form of trial is laid down by an Act of Sederunt, July 31, 1674. It consists in the presentee, or Lord Probationer as he is called, hearing, and reporting, and delivering an opinion on, certain of the causes depending in court. And although this injunction to make trial of his qualifications seems to imply a power of rejecting him, yet the court are deprived of the power of rejecting the presentee, by the act 10 Geo. I., c. 19. It was anciently the practice to name extraordinary Lords, whose number was increased to no fewer than seven or eight. But James VI., by a letter recorded in the books of Sederunt, March 28, 1617, promised to restrict himself to the nomination of only three or four, in terms of the act 1537; and it is not till the 10 Geo. I., c. 19, that the power of naming these extraordinary Lords was renounced. The proper number of judges, until the stat. 1 Will. IV., c. 69, was fifteen, and is now thirteen; *Ersk. B. i. tit. 3, § 12, et seq.* See *Session*. In addition to the judges, the College of Justice, by Act of Sederunt, 23d Feb. 1687, includes the advocates, clerks of session, clerks of the bills, writers to the signet, deputies of the clerks of session who serve in the Outer-House, their substitutes, one in each clerk's office, the depute-clerks of the bills,

the clerks of Exchequer, the directors of Chancery, their depute and two clerks, the writer to the privy seal and his depute, the clerks to the general registers of sasines and hornings, the macers of the Court of Session, the keeper of the minute-book, the keeper of the rolls of the Inner and Outer House, one clerk to each of the judges, one clerk to each advocate, the extractors in the Register Office, and the keeper of the Advocates' Library. The barons and members of the Scotch Court of Exchequer were members of the College of Justice by 6 Anne, c. 26, § 11; the Lords Commissioners and officers of the Jury Court by 59 Geo. III., c. 35, § 36; and the keeper of the judicial records of the Court of Session, the assistants to the principal clerks of session, the auditor of the Court of Session, and the collector of the fee fund, are, by 1 and 2 Geo. IV., *ex officio* members of the College of Justice. The privileges of the College of Justice, according to several acts of the Scotch Parliament, consisted in a general immunity from taxation. No such general immunity, however, is now claimed; and the privileges now consist of an exemption from watching and warding; from payment of the annuity for ministers' stipends; from all the city imposts on goods carried to or from the city; and, lastly, from the civil jurisdiction of the magistrates. The privilege of suing in the Court of Session was abolished by the Court of Session Act, 13 and 14 Vict., c. 36, § 17, 1850; and the privilege of exemption from the jurisdiction of the Sheriff Court was abolished by the Sheriff Court Act, 16 and 17 Vict., cap. 80, § 48, 1853. In so far as the privileges of the College of Justice entitle the members to exemption from police assessments for watching, cleaning, and lighting the city of Edinburgh, they have been renounced by the members; and, by the police statute, the assessment is levied from them in the same manner as from the rest of the inhabitants. *Stair*, B. ii. tit. 3, § 3; B. iv. tit. 1, § 21; *Ersk. Princ.* 12th edit. 27, 29 33; *Bell's Princ.* 4th edit. art. 2212; *Shaw's Digest, h. t.*; *Brown's Synop.*; *Ross' Lect. i.* 361, 423, 542.

**Collegiate Church;** was a church founded by a person of property, at his private expense, in which certain canons or prebendaries officiated under a head *præpositus* or provost. *Ersk. B. i. tit. 5, § 3.*

**Colliers and Salters.** The workmen at coal-pits and salt-works in Scotland were formerly in a state of servitude, similar to that of the *adscripti* of the Romans, and the ancient *nativi*, or bondmen of this country. Colliers and salters were bound by the law itself, independent of paction, merely by enter-

ing to a coal-work or salt-work, to perpetual service there; and in case of sale or alienation of the ground on which such works were situated, the right to the service of these workmen passed to the purchaser as *fundo annexum*, without any express grant. But by the statute 15 Geo. III., c. 28, it was declared, that after the 1st July 1775, they should be no otherwise bound than as other workmen, and the benefit of the act 1701 was extended to them. The object of this statute, however, having been in a great measure defeated, partly by the nature of its provisions, and partly by transactions between the workmen and their masters, by which their bondage was continued, it was provided by the act 39 Geo. III., c. 56, that all the colliers in Scotland who were bound colliers at the time of the act 15 Geo. III., should be free from their servitude; and all action is denied to coalmasters for money advanced to colliers prior to, or during their service, with a view to their engagement at the works, except only sums advanced during their service for the support of their families in case of sickness, for which advances the coalmaster may retain from their weekly wages one-twelfth of the sums so advanced, till the principal and interest be repaid; and the master has action for the balance in case the term of service end before the advance is repaid. Persons seducing, or attempting to seduce colliers from Great Britain, are to be punished in the same manner as persons seducing manufacturers. In questions under the act no coalmaster or lessee of coals can act as a justice. *Ersk. B. i. tit. 7, § 61; Ersk. Princ. 12th edit. 114; Jurid. Styles, 3d edit. vol. ii. p. 160; Watson's Stat. Law, h. t.; Hunter's Landlord and Tenant; Blair's Justice of Peace, h. t.; Tail's Justice of Peace, h. t.; Fraser's Personal Relations.*

**Collision of Ships;** is the collision of one vessel against another, whereby the ship or cargo suffers damage. The question, whether the collision has been caused by accident, or by design, or through negligence, must necessarily depend upon the circumstances under which it happens; but where it is clear that a fault has been committed, it is settled that the owners of the vessel in fault must answer for the damage resulting from it, at least to the value of the ship. Where the loss or damage arises from pure accident, or the act of God, as it is termed, the rule is, that the loss falls where it lights. Where there may have been a fault, but it is impossible to say to whom the blame attaches, the case seems to be considered as one of average loss, or contribution, in which both ships are to be taken into account, so as to divide the loss equally; although there is some difference amongst

authorities as to whether the ships are to contribute equally, or in proportion to their respective values. But however that question may be determined, it rather appears to be fixed that the contribution is confined exclusively to the ships, and that no share either of the benefit or of the loss arising from the contribution falls upon the cargo. In questions between the owners of the ship and the owners of the cargo, if the damage has arisen from the fault of the master or mariners, the shippers are entitled to claim indemnification from the master and owners. On the other hand, if the loss be accidental, it is a mere peril of the sea, which forms an exception in the charter party, and must fall where it lights. In like manner, if the injury to the cargo has arisen from an inscrutable accident, which, as between the ships, gives rise to a claim for contribution, it is settled, in so far as the cargo is concerned, that this also is a mere peril of the sea within the exception of the charter party. See, on this subject, *Bell's Com. vol. i. p. 579, et seq., fifth edit.*

**Collistridium;** the "jougs" or collar round the neck, with which a delinquent is bound to the pillory or stocks. *Skene, h. t.*

**Collusion;** is a deceitful or fraudulent agreement between two or more persons to defraud a third party of his right. When proved, it has the effect, at common law, of voiding any transaction in which it occurs. Arrangements between bankrupts and their creditors, on the eve of bankruptcy, present the most frequent instances of collusion; and as the proof in such cases is necessarily difficult, our bankrupt statutes have created certain legal presumptions of collusion. Such are the provisions of the act 1621, c. 18, as to alienations to conjunct and confident persons, and of the act 1696, c. 5, regarding securities granted within sixty days of bankruptcy, by which presumptions of collusion and fraud are established. Independently, however, of those statutes, wherever collusion can be proved, or where the transaction is of such a nature as to imply fraud or collusion, it is reducible at common law: such are conveyances *omnium bonorum* to the prejudice of creditors, or such conveyances as necessarily render the debtor insolvent; payment by anticipation to a favoured creditor on the approach of bankruptcy; securities given on the approach of bankruptcy, accompanied with concealment or false appearances; arrangements for granting preferences by circuitous transactions or otherwise; these, and all similar transactions in which there is either direct evidence of collusion, or conclusive real evidence in the nature of the transaction itself, are reducible at common law, although they should not fall within the

letter of any of the bankrupt statutes. See *Stair*, B. i. tit. 9, § 12, *et seq.*; *Ersk.* B. iii. tit. 1, § 16; and B. iv. tit. 1, § 27, *et seq.*; *Bank.* B. i. tit. 10, § 72; *Bell's Com.* vol. ii. p. 243, *et seq.* 5th edit.; *Bell's Princ.* 4th edit. art. 1316; *Bell's Illust.* art. 1316. See also *Circumvention. Fraud.*

**Colpindach**; a young beast or cow of the age of one or two years, now called a quey. According to Skene it is an Irish word, and properly signifies a foot-follower. *Skene, h. t. Columbaria.* See *Pigeon-House.*

**Combat.** Single combat was anciently admitted as a legal mode of proof, both in criminal and civil actions; and this kind of evidence appears to have been received as far down as the reign of Robert III. in questions regarding capital crimes. *Ersk.* B. iv. tit. 2, § 2; *Ross's Lect.* ii. 136. See *Duelling.*

**Combination.** A combination amongst workmen to raise their wages, when attended with tumultuary assemblages or violence, is a crime at common law; and by 39 and 40 Geo. III., c. 106, justices of peace were vested with power to punish summarily, by fine and imprisonment, combinations, whether on the part of workmen against their masters, or of masters against their workmen. It was always doubtful, however, whether that statute extended to Scotland; and at any rate, by 6 Geo. IV., c. 129, the previously existing statutes relative to combinations were repealed; and amongst other provisions, it is thereby declared, that a peaceable meeting, for the sole purpose of determining the wages to be given or asked, shall not subject those attending it to the punishments awarded by this act; but that violence, threats, intimidation, molestation, or the like, exercised towards workmen or others, to make them join an association, or to prevent them from hiring themselves out, is punishable with imprisonment for not more than three months, with or without hard labour. See *Hume*, i. 493, *et seq.*; *Alison's Princ.* p. 188; *More's Notes to Stair*, p. lxx.; *Bell's Princ.* 4th edit. art. 193; *Brown's Synop.*; *Hutch. Justice of Peace*, vol. ii. p. 279, 2d edit.; *Tait's Justice of Peace*, h. t.; *Blair's Justice of Peace*, h. t.; *Watson's Stat. Law*, h. t.; *James's Princ. of Equity* (1825), 336; *Barclay's Digest*, h. t.

**Comedian**; an actor or actress. The salary of a comedian is held to be alimentary, and cannot be attached, except in so far as it exceeds what is necessary for subsistence; although the debtor may be incarcerated for the debt, and thus forced to bargain with his creditors; *Bell's Com.*, vol. i. p. 131, 5th edit. It is not hamesucken to assault a comedian in a play-house; *Hume*, vol. i. p. 313. A copy of every new play, or addition to an old play, must be sent to the Lord Chamberlain seven

days before it is acted, by whom it may be prohibited; 6 and 7 *Vict.*, c. 68, § 12. The same statute repeals the Act 10 Geo. II., c. 28, under which players had been exposed to be treated as rogues and vagabonds.

**Comes**; or Earl, was an ancient officer with territorial jurisdiction; *Ersk.* B. i. tit. 4, § 1.

**Comitas**; as used in international law, signifies the courtesy of nations, by which effect is given in one country to the laws and institutions of another, in questions arising between the natives of both. In consequence of the intimate connections and relations of small states with each other on the Continent, such questions are there frequent; and many treaties have been written on the *Confictus Legum*, and the *Comitas*, by which they are reconciled. See *Foreign.*

**Commendator.** During Popery the Commendator was the person by whom the fruits of a benefice were levied during a vacancy. He was properly a steward or trustee; but the Pope, who was entitled to grant the higher benefices in *commendam*, abused the power, and gave them to commendators for their lives. This abuse led to a prohibition of all commendams, excepting those granted by bishops for a term not exceeding six months. 1466, c. 3; *Ersk.* B. i. tit. 5, § 4.

**Commissaries.** The commissaries or officials were anciently the delegates of the clergy, for judging in those questions which fell within the ecclesiastical jurisdiction. By the acts 1560 and 1567, c. 2, all jurisdiction depending on Papal authority was abolished. But the Commissary Court of Edinburgh, consisting of four commissaries, was erected by Queen Mary, under a grant dated Feb. 8, 1563. The Commissary Court of Edinburgh had a double jurisdiction; one *diocesan*, which it exercised over the special territory contained in the grant, viz., the counties of Edinburgh, Haddington, Linlithgow, Peebles, and a part of Stirlingshire (although, in practice, this jurisdiction was confined to the three Lothians); another *universal*, by which it confirmed the testaments of all who died in foreign countries, or who died in Scotland without a fixed domicile, and reviewed the decrees of inferior commissaries. There was but one commissary in each diocese until the erection of the Commissary Court of Edinburgh, after which inferior commissaries were established, under a commission from James VI., in most of the principal towns in Scotland. The Commissary Court of Edinburgh is now abolished (see *infra*); but, while it existed, it had, as regarded inferior commissaries, a privative jurisdiction in declarators of marriages, actions of adherence or divorce, executions of testaments, and declarators of bastardy during the bastard's life; and a cumulative jurisdiction in

actions of aliment against husbands, and of slander and defamation,—actions for sealing up repositories,—actions for verbal injuries arising from hasty words,—the authenticating of tutorial and curatorial inventories,—and civil actions in absence to the extent of £40 Scots, and to a greater amount, if the jurisdiction was prorogated by consent of parties. The judgments of the Commissary Court of Edinburgh were subject to the review of the Court of Session. By 49 Geo. III., c. 42, § 2, the registration of probative writs, and of protests on bills, was taken from the commissaries. The number of inferior commissariots was formerly twenty-three; but by 4 Geo. IV., c. 97, they were all abolished, and their jurisdiction vested in the sheriffs. The following are the principal provisions of that act: Compositions in respect of confirmation and fees, termed consignation fees and sentence money, are abolished. 2. Abridged extracts of decrees and testaments-testamentar are substituted for full extracts, unless a party shall require a full extract. 3. The inferior commissariots are abolished, and every sheriffdom and stewardry is declared to constitute a commissariot, except Edinburgh, Haddington, and Linlithgow, which continue the commissariot of Edinburgh. (See *infra*.) 4. The small-debt jurisdiction of the commissaries of Edinburgh is abolished, and it is provided that no inferior commissary, as established by the act, shall exercise jurisdiction in such actions, or in any cases to which the sheriffs' jurisdiction was then competent. 5. The inferior commissaries cease to hold office, and the sheriffs or stewards-depute become commissaries, each over the commissariot comprehending his respective county or stewardry. 6. The proceedings of sheriffs or stewards, as commissaries, are reviewable by the Court of Session only. 7. Sheriff-substitutes may be appointed commissary-deputes.

By the act 1 Will. IV., c. 69, the provisions of 4 Geo. IV., c. 97, that the sheriffdoms of Edinburgh, Haddington, and Linlithgow shall be the commissariot of Edinburgh, are repealed; and it is declared that each of these shall constitute a separate commissariot, under the provisions of the said act. The Commissary Court of Edinburgh is declared to possess the same jurisdiction in the sheriffdom of Edinburgh as the sheriffs, being commissaries, in other sheriffdoms of Scotland, and any more extensive jurisdiction was declared to cease, except such as regards the confirmation of testaments of persons dying furth of Scotland, having personal property in Scotland. 2. Actions of aliment are competent before any sheriff-court of Scotland. 3. All actions of declarator of marriage, of nullity of marriage, legitimacy and

bastardy, and all actions of divorce and of separation *a mensa et thoro*, are competent only before the Court of Session. To these are now added actions of adherence, and all other consistorial actions, though not specially mentioned in the act of 1 Will. IV.; 13 and 14 Vict., c. 36, § 16; and see *A. v. B.* 1848, 11 D. 101. 4. In actions of divorce, the Lord Ordinary is required to administer the usual oath of calumny to the pursuer, and no judgment can be pronounced in the pursuer's favour till the grounds of action have been substantiated. 5. Such cases are not appropriated to trial by jury; but either Division, or a Lord Ordinary, after advising with his Division, may direct any such cause, or issues of fact connected therewith, to be tried by jury; and the same oath shall be administered to witnesses in consistorial causes as in the other courts of justice. 6. The incorporated solicitors of Edinburgh may conduct before the Court of Session, such causes as were formerly carried on before the Commissary Court. 7. Summonses in maritime and consistorial causes, instituted in the Court of Session, do not require concurrence or to pass the Signet, but must be signed by a clerk of Session. But by 1 and 2 Vict., c. 118, § 29, it is enacted that summonses in Admiralty causes may be raised and pass the Signet, like other summonses before the Court of Session; and, by 13 and 14 Vict., c. 36, § 15, it is declared that all summonses in consistorial or other causes may be signed either by a clerk of Session, or by a writer to the Signet, whose signature shall be equivalent to that of a clerk of Session. See 14 S. p. 187, 7 D. 1063. See also 16 and 17 Vict., c. 80, § 21. 8. Directions are given for agency fees, &c., which are not to exceed what they were in the Commissary Court, nor is any thing to be exigible on account of fee-fund.

By 6 and 7 Will. IV., c. 41, the Commissary Court of Edinburgh was abolished, and the duties of the commissaries transferred to the sheriff, who now confirms to the succession of parties dying furth of Scotland. The provisions of the act 4 Geo. IV., c. 97, apply to the sheriffdom of Edinburgh, and to the clerks and officers of the said Commissary Court, in the same way as such provisions apply to the other sheriffdoms of Scotland. Certain of the sheriffs are named in a commission for taking proofs in consistorial causes;—and all agents qualified to practise before the Court of Session are authorized to practise in the Sheriff-court of Edinburgh, in proceedings transferred to the sheriff as coming in place of the commissaries. *Stair*, B. iv. tit. 1, § 36; *Bell's Com.* vol. ii. p. 80, 5th edit.; *Bell's Princ.* 4th edit. art. 1888;

*Jurid. Styles*, 2d edit. vol. iii. pp. 289, 673; See *Boyd's Judicial Proceedings*; *Shand's Prac.* pp. 14, 420; *Lothian on Consistorial Actions*; *Fraser on the Domestic Relations*; *Barclay's M'Glash. Sher. Court Prac.* 56. See also *Commission*.

**Commission.** See *Mandate. Principal and Agent*.

**Commission in the Army.** The acceptance of a commission in the army by a member of Parliament, not then holding one, vacates his seat, and that although he had formerly held a commission which he resigned. But acceptance of a new commission in the army or navy by a member already holding one (*e.g.* on promotion), does not disqualify from being elected, sitting, or voting. The acceptance of a commission in the militia by one not previously in the service does not disqualify. *Chambers' Election Law, h. t.*; *May's Parl. Prac.* 458.

**Commission of Oyer and Terminer.** See *Oyer and Terminer. Treason*.

**Commission of the Peace.** See *Justices of Peace*.

**Commission for Taking Proof.** In the Court of Session, as well as in inferior courts, parole proof may be taken under a commission granted by the court. The commissioner is delegated by the court to take the oaths, and to report to the court the depositions of the witnesses; and the judicial warrant, whereby the power is conferred on the commissioner, is called a commission. The commission is invariably accompanied by a *diligence*, which is in like manner a judicial warrant, under which the witnesses are cited, and may be compelled to attend the commissioner for examination. Formerly letters of diligence were taken out, commanding the witnesses to attend, which were signed by the extractor; but it is now provided by 13 and 14 Vict., c. 36, § 25, that a copy of the interlocutor granting the diligence, certified by the clerk, shall have the same effect as the extract, according to the former practice. The circumstances under which such commissions may be granted, as well as the duties of the commissioner in taking down the depositions of the witnesses, are explained *voce Evidence*. In the commissions granted by the Court of Session or Lords Ordinary, for taking proofs, the commissioner must be a member of the Faculty of Advocates, resident in Edinburgh, and attending the court, and of more than five years' standing at the bar, or a sheriff, or steward-depute, or substitute, or any other inferior magistrate, or the clerk, or assistant-clerk of any court; *A. S. 11th March 1800*. The parties, or their agents, are not allowed to name their own commissioner; although in practice it frequently happens

that the court adopts the suggestion of the parties, where they are agreed as to the particular commissioner to be named. When the witnesses to be examined reside furth of Scotland, the commission may be granted to any competent person, in the discretion of the court. Commissions may also be granted for the recovery of writings; the commissioner in that case being any competent person named by the court, or by the Lord Ordinary. See *Haver*. To prevent the danger of loss of evidence, when witnesses are above 70 years of age, or suffering under severe indisposition, or are intending to go abroad, and to remain there for a considerable period, such witnesses may be examined by commission, upon application to the Court or the Lord Ordinary during session, or to the Lord Ordinary on the Bills during vacation. The examinations are sealed up by the commissioner, and lie *in retentis*, subject to the orders of the Court. The regulations as to this are contained in *A. S.*, 11th July 1828, § 117; and they apply to all causes in the Court of Session, whether the proof is ultimately taken on commission, or before a jury, provided issues have not been ordered. If issues have been ordered, the examination must take place on adjusted interrogatories, and according to the regulations of the Act of Sederunt, 16th Feb. 1841, §§ 17, 21. By 13 and 14 Vict., c. 36, § 49, either division of the Court may allow proof on commission in any of the causes appropriated by 6 Geo. IV., c. 120, § 28, to jury trial, where the action is not one for libel or nuisance, or properly and in substance an action of damages. In consistorial causes, it is enacted by 6 and 7 Will. IV., c. 41, that when it is necessary to take proofs in such causes, the proofs shall be taken by certain of the sheriffs of Scotland named in a commission to be issued for the purpose; under which statute, six sheriffs resident in Edinburgh have been named, by one or other of whom the depositions of the witnesses in consistorial causes must be taken and reported to the Court of Session or Lord Ordinary. See article *Commissaries*. When, however, the witnesses in consistorial causes are furth of the kingdom, they may be examined before any Commissioner appointed by the Lord Ordinary or the Court; 13 and 14 Vict., c. 36, § 26. The Court has a discretionary power to send a consistorial cause, or any issue of fact connected therewith, to a jury. 1 Will. IV., c. 69, § 41.

Formerly, the depositions of witnesses in civil causes in the sheriff-courts (except small debt cases) were taken in writing before the sheriff or his substitute, to be proofs on commission; and remits to a commissioner were discouraged unless the sheriff could not per-

sonally perform the duty. *A. S.*, 10th July 1839, § 68; *A. S.*, 10th March 1849 (as to *prorogations and proofs in sheriff courts*), II. § 2; *A. S.*, 23d June 1852; 26th Jan. 1853. This matter is now regulated by 16 and 17 Vict., c. 80, § 10, which enacts that the sheriff shall, with his own hand, take a note of the evidence, setting forth the witnesses examined, and the testimony of each, not by question and answer, but in the form of a narrative, and the documents adduced, and any evidence, whether oral or written, allowed to be received. The note of the evidence of each witness must be read over to him by the sheriff, and signed by the witness before his dismissal. The notes of evidence ought also to be signed by the sheriff himself, and to have the *partibus* marked thereon. If the sheriff is unavoidably prevented from taking the note of evidence in his own handwriting, he may dictate it. But, where any witness or haver is resident beyond the jurisdiction of the Court, or, by reason of age, infirmity, or sickness, is unable to attend the diet of proof, the sheriff is empowered to grant commission to any competent person to take and report in writing the evidence of such witness or haver. He may also remit to persons of skill, and other persons, to report on any matter of fact; and, where such remit is made by consent of both parties, the report is final and conclusive. Section 11 provides, that a certified copy of the sheriff's interlocutor, fixing the diet of proof, shall be a sufficient warrant for citing witnesses and havers; which warrant may be made operative in any other county by being indorsed by the sheriff-clerk of that county. A form of citation and execution is appended to the act. Where the aid of a commissioner is still required, he must be either the clerk of Court or his depute, or a practitioner before any court of at least three years' standing, or a justice of peace, or any other magistrate. The commissioner ought to follow the rules prescribed by the Court of Session for the guidance of commissioners acting under its authority; *A. S.*, 11th March 1800. *A. S.*, 22d June 1809. The agents of the parties are personally liable for the commissioner's fees; 6 D. 95.

The act 6 and 7 Vict., c. 82, makes it compulsory on witnesses and havers in England and Ireland to attend before a commissioner appointed by any of the courts of law in Scotland; and it contains reciprocal provisions as to commissions issued from the courts of law and equity in England and Ireland, to be executed in Scotland. See *Shand's Prac.* 348, et seq.; *Macfarlane's Jury Prac.* 87, et seq.; *M'Glashan's Sheriff-Court Prac.* 233, et seq.; *Dickson on Evidence*; *Jurid. Styles*, 2d edit.

vol. iii. p. 784. See also *Evidence. Act and Commission. Diligence. Jury Trial. Witness. Foreign.*

**Commission of Trustee.** A trustee, under the bankrupt statute, is remunerated for his trouble by a commission upon the amount of the sums recovered. This commission is ascertained by the commissioners, who, previously to each dividend, audit the accounts, and strike the allowance to the trustee, by a minute under the hands in the book of sederunt. The commission usually allowed is 5 per cent., although a much higher commission is sometimes sanctioned by the creditors. It is competent to the bankrupt, creditors, or trustee to bring the amount allowed under review of the Lord Ordinary or the sheriff; but the opinion of the creditors should in all cases be expressed in the first place. The emoluments of a trustee under a private trust-deed, or of judicial factors, are frequently arranged on a similar principle. 19 and 20 Vict., c. 79, § 141; *Bell's Com.* i. 380. See *Trustee. Judicial Factor.*

**Commissioner.** The Lord High Commissioner to the General Assembly of the Church of Scotland represents the Sovereign in that Assembly. The Church of Scotland claims the right of meeting in a General Assembly, as well as in inferior courts, by its own appointment; but it also recognises the right of the Sovereign to call synods, and to be present at them. According to Erskine, the royal sanction seems to be necessary to the meeting of the Assembly, and the commissioner asserts the right of dissolving it. But during the last century and a-half no conflict in the exercise of those rights has occurred. In the years 1638 and 1692, however, the commissioner having dissolved the Assembly against their wish, and without fixing a day for the meeting of another, the Assembly continued its sittings, and appointed the day when the next Assembly should be held. In the years 1746 and 1760, when, by accident, the King's commissioner had not arrived, the Assembly met on the day appointed, and elected a moderator, but did not proceed to business until the commissioner arrived. In 1798 the commission was sent down, and laid on the table on the first session of the Assembly; but the commissioner did not make his appearance until the fourth session. When, from temporary indisposition, or any other cause, the commissioner is unable to attend, the business of the Assembly proceeds without him; the former practice of resolving into a committee of the whole house, on these occasions, being now considered unnecessary. *Ersk. B. i. tit. 5, § 6*; *Hill's Prac.* 87; *Cook's Prac.* See *Church Judicatories.*

**Commissioner of Customs.** See *Customs.*



**Commissioner of Excise.** See *Excise*.

**Commissioners ; private factors.** A commissioner or factor is a person who holds a power from his constituent to manage his affairs, either generally or in a particular department, with full authority to act as he himself might do if present. Extensive land estates are generally placed under the management of a commissioner or commissioners. See *Factor*.

**Commissioners of Justiciary.** The Justiciary Court consists of the Lord Justice-General, the Lord Justice-Clerk, and five Judges of the Court of Session; who are commissioned by the Crown in place of the assessors formerly given to the Justice-General. In this court the Lord Justice-General is present, or, in his absence, the Lord Justice-Clerk ; 1 *Will. IV.*, c. 69, §§ 18 and 19. See *Circuit. Justiciary*.

**Commissioners of Supply.** The Commissioners of Supply are named in the acts imposing the land-tax, and are authorized to act within their respective counties. They had, till lately, in order to qualify them to act, to be possessed of L.100 Scots of yearly valued rent, in property, superiority, or life-rent. Every person acting without that qualification, though named in the act as a commissioner, incurred a penalty of L.20 sterling, and his vote was not reckoned in any division of the commissioners. The exceptions in regard to qualifications were two ; one in favour of the eldest sons, or apparent heirs, of those possessed of a legal qualification, under the old election law, to vote in the election of a member of Parliament ; the other of the bailies and magistrates of royal burghs. See *infra*. Before proceeding to act, the commissioners are required, under a penalty of L.20 sterling, to take the oath of allegiance and abjuration, and to subscribe the assurance appointed to be taken by persons holding offices and public trust in Scotland. They are entitled to name a convener, who acts as preses of the meeting. See 17 and 18 *Vict.*, c. 91, § 14. They are also entitled to appoint a clerk, with a reasonable salary. Their chief duty is to assess the land-tax and to apportion the valuation according to the provisions of the Valuation of Lands Act, 17 and 18 *Vict.*, c. 91.

By this act a new qualification is introduced for commissioners of supply, and any person acting without that qualification is declared to be liable to the penalties presently attached by law to such acting. The qualification, it is enacted by § 19, shall be the being named as an *ex officio* commissioner of supply in any act of supply, or the being proprietor or husband of any proprietor infest in life-rent, or in fee not burdened with a life-rent, in lands and heritages within the county,

of the yearly rent or value, in terms of the act, of at least L.100, or the being the eldest son and heir-apparent of a proprietor infest in fee, not burdened with a life-rent, in lands and heritages within the county of the yearly rent or value, in terms of the act, of L.400 ; and the factor of any proprietor infest, either in life-rent or fee, unburdened as aforesaid, in lands and heritages within the county of the yearly rent or value of L.800, shall be qualified to act as a commissioner in the absence of such proprietor. It is provided that, with reference to the qualification of commissioners of supply, the yearly rent or value of houses and other buildings, not being farm-houses or offices, or other agricultural buildings, is to be estimated at only one-half of their actual yearly rent or value in terms of the act. Persons who, at the date of the passing of this act (10th August 1854), were in actual possession of the former qualification, are, so long as they continue to possess it, to be deemed to be in possession of the requisite qualification for a commissioner. By "the Commissioners of Supply Act, 1856," 19 and 20 *Vict.*, c. 93, all persons, being males and of full age, and possessed of the above qualification, otherwise than by nomination *ex officio*, for acting as commissioners, are declared, without being named in any act of supply, to be commissioners of supply while so qualified, and as such to be qualified, and have power to vote and act as freely, and to the like effect, as if they had been so named. Any one desirous of being put on the list of commissioners must give in a claim in writing before the 10th December in each year. Within seven days thereafter any objections to said claim must be lodged with the clerk of supply, and the lodging thereof, must be intimated forthwith by him to the party objected to. Ten free days' notice of the time and place of disposing of claims and objections must be given by the clerk in meeting (*ibid.* § 3). The commissioners, at their annual meeting on 30th April, will then appoint a committee of their number, three being a quorum, to meet and dispose of the claims and objections. They must be disposed of before 20th December in each year (§ 4). In accordance with their determination, the clerk must make up a list of the commissioners on or before 31st December in each year, and authenticate it by his subscription, and retain it in his custody. This list is, till the completion and authentication of the next list, conclusive as to the right of acting and voting as commissioners, except as regards such sheriffs and magistrates of burghs and towns as may, in any subsisting act of supply, be constituted *ex officio* commissioners, without being required to possess any property qualification,

who and whose successors in office are entitled to act and vote as commissioners *virtute officii*, without being inserted in the list (§ 5). There is an appeal from the determination of the commissioners on claims and objections to the Lord Ordinary on the Bills within ten days after the determination is pronounced. The Lord Ordinary's judgment is not subject to any review.

The commissioners of supply of every county, and the magistrates of every burgh, must cause a valuation-roll to be annually made up, showing the yearly rent or value of the whole lands and heritages in the county or burgh, specifying the nature thereof, and the names of the proprietors and tenants, or occupiers; 17 and 18 *Vict.*, c. 91, § 1. For making up this roll they are entitled to appoint an assessor or assessors, whose duty it is to ascertain and assess the yearly rent or value of the lands, &c., and to make up the roll before the 15th day of August in each year (§§ 3, 4). The mode of estimating the yearly rent or value, according to which it is the object of the act that all public assessments leviable according to the real rent shall be assessed, is fixed by § 8. For the purpose of making up the list of commissioners, the last completed valuation-roll of the county is *prima facie* evidence that every person entered therein as a proprietor of any lands, &c., is the proprietor thereof; and is conclusive evidence that the lands, &c., are of the yearly value set forth in the roll; 19 and 20 *Vict.*, c. 93, § 2. The commissioners must, on or before the 15th, and not earlier than the 10th September, annually hold a court for hearing appeals against the valuations made by their assessors; 17 and 18 *Vict.*, c. 91, § 8. The procedure at such courts is regulated by § 10. Three commissioners of supply, and two magistrates of a burgh, are to form a quorum of such commissioners and magistrates, the preses having a casting vote where the votes are equal (§ 14). The election of a preses is regulated by § 15. See *Valuation of Lands*. See also 5 and 6 *Will. IV.*, c. 64, § 10; *Wight on Elections*, pp. 184, 194, and *App.* 28; *More's Notes on Stair*, p. cclxxi.; *Hutch. Justice of Peace*, B. v. c. 4; *Dunlop's Parochial Law*.

**Commissioners of Teinds.** See *Teind Court*.

**Commissioners of the Jury Court.** See *Jury Trial*.

**Commissioners on a Sequestrated Estate.** By the Bankrupt Act, 19 and 20 *Vict.*, c. 79, § 75, 1856, it is enacted that at the meeting for election of a trustee, the creditors present, or their mandatories, shall, after the election of the trustee, elect three commissioners (if there be so many creditors who have claimed), who shall be either creditors or mandatories of creditors, and the like proceedings are declared

to take place in regard to their election as are provided in regard to the election of a trustee, except that they shall not be bound to find security. No person is eligible as a commissioner who is disqualified to be a trustee. A majority of the creditors, assembled at any meeting duly called for the purpose, may remove a commissioner, and may elect another in his place in the manner directed by the act. It is the duty of the commissioners to superintend the proceedings of the trustee, concur with him in submissions and transactions, give their advice and assistance relative to the management of the estate, and decide as to paying or postponing payment of a dividend. They may also assemble at any time to ascertain the situation of the bankrupt estate, and any one of them may make such report as he may think proper to a general meeting of the creditors.

Commissioners are disqualified, in the same manner as the trustee, from purchasing any part of the estate or effects of the bankrupt; *M'Kellar*, 8th March 1817, *Fac. Coll.*, and are entitled to no salary, commission, or allowance of any kind from the bankrupt estate. See *Bell's Com.* vol. ii. p. 383, *et seq.* 5th edit.

**Commissorium Pactum.** See *Pactum Commissorium*.

**Commitment for Trial.** After the declaration of an accused person, and the recognition have been taken, if there be reasonable grounds against him, the magistrate grants warrant to commit him to prison, to abide the result of his trial for the crime charged against him. This warrant, by 1701, c. 6, must be in writing, and duly signed. It must specify distinctly the particular offence charged; and it must proceed on a signed information. This information is generally in the form of a petition or complaint at the instance of the procurator-fiscal, by whom it is signed, although it would seem that a less formal application is a sufficient compliance with the statute; such, for example, as an affidavit or signed declaration, or even a letter by the party concerned, or having cause of knowledge, provided it properly describe the fact, and be duly referred to in the warrant of commitment. But, in whatever shape the information is, it must contain a direct charge of facts, not a vague statement of suspicions. The officer executing the warrant, before imprisonment, must serve the accused party personally with a copy of the warrant. The ordinary practice is, to subjoin the warrant to the information, and to serve the prisoner with a full copy of both. Commitment for trial, on a warrant defective in the statutory requisites, exposes the granter, the officer executing it, and the keeper of the prison, to the pains of wrongful imprison-

ment; 1701, c. 6. See *Wrongous Imprisonment*. There is an exception in the statute in favour of inferior magistrates, justices of the peace, &c., empowering them to take security for good behaviour, and to keep the peace, as they were in use to do before the passing of the act 1701; and also to commit for trial for indignities done to themselves, or to imprison vagabonds, &c.; or for riots, batteries, pickeries, &c.; the persons so committed, however, having the benefit of the statute, in so far as concerns bail and the expediting of the trial. It is also provided by the statute, that the Privy Council, or any five of them, in case of imminent or actual invasion, rebellion, or insurrection, may commit, upon suspicion or accession thereto, without being liable to the penalties of the statute; the person so committed having his relief for trial or liberation under this act; stat. 1701, c. 6. See *Hume*, vol. ii. p. 84, *et seq.*; *Alison's Prac.* 151; *Tait's Justice of Peace*, h. t.; *Blair's Justice of Peace*, h. t. See also *Arrestment. Bail. Criminal Prosecution.*

**Committee**; are those to whom the consideration or management of any matter is referred by some court or assembly to whom it belongs. The powers of a committee must, of course, depend upon the particular authority given to them by their constituents. In the House of Commons there are certain standing committees appointed by each new Parliament, viz., the *Committee of Privileges, of Religion, of Grievances, and of Trade*. The House is also in use, when it thinks proper, to appoint *Select Committees*, as they are termed, for particular purposes. Both the House of Lords and the House of Commons may resolve themselves into a committee of the whole House, which is, in fact, the House itself presided over by a chairman, instead of by the speaker. *Tomlin's Dict.*; *May's Parl. Prac.* p. 299.

One of the most important committees of the House of Commons is that for deciding upon disputed elections. The election and proceedings of this committee are regulated by 11 and 12 Vict., c. 98, "to amend the law for the trial of election petitions." See *Cox's Law and Prac. of Registration and Elections*, p. 290; *Clerk's Election Laws*; *May's Parl. Prac.*

**Commixtion**; is a species of specification, including under it *commixtio* properly so called, which is the mingling of solids; and *confusio*, which is the mixing of liquids. It may be proper to distinguish between that commixtion which produces a new subject, and that which mingles without altering the nature of the subjects, as in the case of two parcels of grain, or the mixing of two quantities of wine. 1. Where, from the com-

mixture of two or more substances of different kinds a new substance is produced, which does not admit of the materials being restored to their original state, the person by whom the new property has been made becomes the sole proprietor, and he must consequently be liable to the owners of the materials, for their value. 2. Where it is a mixture of the same substances, and no new one is formed, the original right of property remains; and whether the mixture has happened through accident, or has been made by design, the right of property in the materials will render the subject a common property, divisible amongst the parties according to the value of their respective shares. *Stair*, B. ii. tit. 1, § 37; *Ersk.* B. ii. tit. 1, § 17; *Bell's Princ.* 4th edit. art. 1298.

**Commodate**; is a species of loan, gratuitous on the part of the lender, by which the borrower is obliged to restore the same individual subject which was lent, in the same condition in which he received it. *Stair*, B. i. tit. 11, § 8, *et seq.*; *More's Notes*, p. lxxxi.; *Ersk.* B. iii. tit. 1, *et seq.*; *Bell's Com.* vol. i. p. 225, 5th edit.; *Bell's Princ.* 4th edit. art. 195, *et seq.* See *Loan. Mutuum. Borrowing.*

**Common Error.** See *Communis Error.*

**Common Law.** The term common law is used by many of the writers on the law of Scotland, and in some of the acts of the Scotch Parliament, to signify the Roman law; but in its proper acceptation, it means our consuetudinary law, whether founded on the Roman law, the feudal customs, or the ancient unwritten law of the country from whatever other source derived. *Ersk.* B. i. tit. 1, § 28; *Kames' Princ. of Equity* (1825).

**Common Pasturage.** See *Pasturage.*

**Common Agent**; is an agent or solicitor before the Court of Session, employed to conduct a cause in which several parties have a common interest. The two most important occasions for this appointment are in the process of ranking and sale, and in the process of augmentation and locality. But a common agent is also sometimes appointed in a process of multiplepointing. In the process of ranking and sale, immediately after the first term assigned for lodging claims, the process is enrolled, and an interlocutor pronounced by the Lord Ordinary, appointing the creditors to meet to choose a common agent, to carry on the process. This interlocutor is intimated in the minute-book, and in the Edinburgh Gazette, fourteen days before the meeting. At the meeting for election no one can vote unless his grounds of debt, with an oath of verity by the creditor, if in Britain, or an oath of credulity by his agent or attorney, if the creditor be out

of Britain, have been lodged with the clerk of process, at least twenty-four hours previous to the meeting. The majority in value elect. A regular mandate should be produced to entitle any one to vote for an absent creditor. No one can be elected who is a creditor, or conjunct and confident with the common debtor; and after his election, the common agent cannot act directly or indirectly as the private agent of any particular creditor or class of creditors, or of the common debtor, in any matter relative to the ranking, or the division of the price; nor can he purchase the property he brings to sale; *York Buildings Co., Mor.* p. 1336. The clerk to the process draws up a minute of the election; and the case being enrolled, and the election reported, the Lord Ordinary approves of the appointment, and administers the oath *de fidei* to the common agent. If the election be disputed, the agent approved of by the Lord Ordinary acts until the point is decided; and the competition is decided by the Lord Ordinary, whose decision, however, may be reviewed by the Inner House, on a reclaiming note by either of the candidates. The successful candidate receives his whole expenses from his opponent, or at least is not entitled to charge any part of the expense against the common fund. The common agent must keep a minute-book of his proceedings and official correspondence open to the inspection of all concerned, and is answerable to the court for his conduct, by summary complaint. It is his duty to take effectual steps for ascertaining the subjects belonging to the common debtor, and the encumbrances affecting them; and immediately on his appointment he ought carefully to examine the whole proceedings, to see that the proof of the rental, &c., are correct, and to hear the value of the lands and lots deponed to before the Lord Ordinary. *A. S. 17th Jan. 1756, 11th July 1794; Shand's Practice*, pp. 881-938. See *Ranking and Sale*.

In the process of augmentation and locality, after the augmentation has been granted, and the case enrolled before the junior Lord Ordinary, in order to proceed with the locality, he pronounces an interlocutor, ordering the heritors or their agents to meet, to name a person to be suggested to him as common agent for conducting the locality. A notice of this interlocutor is inserted in certain of the Edinburgh newspapers; and the name of the person chosen is then reported to, and approved of by, the Lord Ordinary; *A. S. 9th July 1809*. No one who is agent for the minister, titular, or for any heritor in the parish, can be common agent; *A. S. 12th Nov. 1825, § 13*. It is the duty of this common agent to prepare a state of the teinds,

according to the rules elsewhere explained. See *Teinds. Locality*.

Where a common agent is elected in the process of multipointing, the same general rules as to his appointment are observed; *A. S. 11th July 1828, § 48; Shand's Prac. 596; Bell's Com. vol. ii. p. 266, 5th edit.* See *Multipointing*.

**Common Pleas.** The Court of Common Pleas is one of the three Superior Courts of Common Law at Westminster. The Court consists of a chief justice and four *puisne* judges. Its jurisdiction is general over England, in all civil causes at common law between subject and subject. By the act 3 and 4 Gul. IV., c. 27, § 36, 1833; all real and mixed actions are abolished except for *Dower Quare Impedit* and *Ejectment*, and in the two first, the Court of Common Pleas continues to have exclusive jurisdiction, but it has no cognisance of pleas of the Crown. The judges of the Common Pleas and of Queen's Bench constitute the Court of Error in error from the Exchequer. The judges of the Court of Queen's Bench and barons of Exchequer, constitute the Court of Error in error from the Court of Common Pleas; and the judges of the Common Pleas and the barons of Exchequer constitute the Court of Error in error from the Queen's Bench.

**Common Prayer;** the liturgy or prayers used in the English church. It is the particular duty of clergymen, every Sunday, &c., to use the public form of prayer prescribed by the book of common prayer; and if any incumbent be resident upon his living, and keep a curate, he is obliged, by the act of uniformity, once every month at least, to read the common prayers of the church in his parish church, in his own person, under a penalty. The book of common prayer must be provided in every parish, and the common prayer must be read before every lecture, the whole appointed for the day, with all the circumstances and ceremonies, &c.

**Common Debtor.** Where the effects of a debtor have been arrested, and there are several creditors claiming a share of them, the debtor, as being debtor to all the claimants, is distinguished by the name of the *common debtor* in the proceedings which take place in the competition. *Ersk. B. iii. tit. 4, § 2.* See *Arrestment*.

**Common Good.** This term, in its widest acceptation, includes all the property of a corporation, over which the magistrates have a power of administration, solely for behoof of the corporation. By 3 Geo. IV., c. 91, § 5, it is enacted, that all leases for more than one year, of the heritable property or common good, shall, after certain notices, be let by public roup or auction, under the sanction of

nullity. Common lands feued by the magistrates to a private purchaser hold not of the Crown in burgage, but of the burgh in feu-farm. Neither are lands purchased by a burgh *tanquam quislibet*, out of their common stock, to be accounted burghal tenements. *Ersk. B. ii. tit. 4, § 9; Brown's Syn. 398; Hunter's Landlord and Tenant. See Burgh Royal Community.*

**Common Property**; is property, whether heritable or moveable, belonging to two or more proprietors *pro indiviso*. The common proprietors are mutually bound to communicate the profit, or to share the loss arising from their common property, according to their respective shares in it; and the consent of all the common proprietors is requisite in the management or disposal of the subject. Each joint owner may sell his *pro indiviso* right, the purchaser coming into his place; and the right may be in like manner adjudged by the creditors of the common proprietors, or any of them. As to the management, the maxim, *In re communi melior est conditio prohibentis*, applies; and hence, one coproprietor may prevent the others from removing tenants, unless better rents or better security is offered. He may also prevent any extraordinary use of the subject; *e.g.*, a lease of the privilege of shooting over the property. Or he may prevent operations on the common subject, whereby its condition is to be altered; *e.g.*, striking out a door in a common stair or passage. But necessary operations in rebuilding, repairing, &c., cannot be stopped by the opposition of any of the joint owners; and in general, the court seems disinclined to countenance wanton and emulous opposition. Where anything is built or planted on the common subject, it accretes to the common right. Where the parties cannot agree, either the will of the majority rules, or matters remain *in statu quo*. The expense of erecting or repairing a common wall between conterminous proprietors must be borne in proportion to the value of the share which each has in the subject; and in urban subjects, a division-wall has been held to be common property, although built at the expense of one of the parties. Where the common property is heritable, and the proprietors wish a division, this may be done either extrajudicially, or on a brieve of division directed to the Sheriff. See *Brieves. Hirs Portioners*. Where the subject is not divisible, *e.g.*, a brewhouse, or other indivisible heritable subject, any one of the common proprietors seems to be entitled to require the others, either to purchase his share at a certain price, or to sell him their shares at the same rate, or to concur with him in exposing the subject to sale by public roup. Moveable subjects, again, held in common,

may be divided, when divisible, in an action before the Judge Ordinary; or, when indivisible, as in the case of a ship, a majority of the joint owners may sell by public roup; or any one of them may oblige the others to take his share at a fixed price, or to sell him theirs at the same rate, by means of an action of *sett*. *Stair, B. i. tit. 16, § 4, and tit. 7, § 15; Ersk. B. iii. tit. 3, § 56; Bank. B. i. tit. 8, § 40; Milligan, 8th Feb. 1782, M. 2486, Hailes, 897; Bell's Princ. 289, and cases there cited. See Sett.*

**Common Interest**; as contradistinguished from common property, is applied to that right arising from mutual interest in a subject which, although not amounting to common property, vests the parties interested with certain rights which they may legally vindicate. The most familiar example of a right or interest of this class is afforded by those large tenements or buildings in Edinburgh, and other towns in Scotland, called *lands*; consisting of several storeys or floors, each of which is the separate property of an individual proprietor; and although there is no common property amongst the several owners of those floors, yet all the proprietors in the *land* have a common interest in the preservation of the walls and roof of the entire tenement. This common interest differs from *servitude*, in as far as each proprietor is bound to maintain his own portion of the walls. It differs from *property*, in so far as no one having merely a common interest, is entitled to break or to touch the wall or space which belongs to the upper or under proprietor. He can merely prevent injury, and insist on support. And it differs from *common property*, in so far as each of the several proprietors may make what alteration he pleases in *suo proprio*, provided he does not endanger the common interest, or expose those who hold it to reasonable alarm. The extraordinary alterations and transformations which have taken place in the older part of the New Town of Edinburgh, in the process of converting dwelling-houses into shops, have contributed to settle the law on this subject; and a series of instructive cases are cited below. As to the burden of supporting the roof of the tenement, it is generally made matter of special stipulation; but failing that, this burden lies on the proprietor of the garret-floor. In Edinburgh, and in other royal burghs, in every case of projected alterations on tenements within burgh, application for a warrant must be made to the Dean-of-Guild Court; those interested being called as parties. *Ersk. ii. t. 9, § 11; Bell's Princ. § 292, and cases cited; Sir J. Marjoribanks, 12th Nov. 1816, F. C.; Pirnie, 5th June 1819, F. C.; Gray, 13th June*

1825; *M'Kean*, 12th Nov. 1823; *Dennis-toun*, 10th March 1824; *Christie*, 4th June 1825; *Stewart*, 3d Feb. 1829. See *Dean of Guild. Jedge and Warrant. Edinburgh.*

**Commons, House of.** The House of Commons under the reform acts, consists in all of 658 members, viz., 159 for counties in England and Wales, 64 for counties in Ireland, and 30 for counties in Scotland, 333 for English, 39 for Irish, and 23 for Scotch burghs, with 4 for the English universities, and 2 for the university of Dublin; *Chambers voce House of Commons.* Vacancies occur by the general dissolution of Parliament by act of law which takes place at the end of seven years from the return of the writ whereby it was summoned, or at the end of six months after the sovereign's death; or by act of the sovereign in exercise of the prerogative. They also occur by the secession or disqualification of a particular member. After a general dissolution, the Crown has theoretically three years before a new Parliament need be summoned; but the practical necessity for summoning it is immediate. A warrant goes accordingly from the Queen in Council to the Lord Chancellor to issue writs. In cases of particular vacancies, if during session, a motion is made in the House, and the Speaker makes his warrant for the issuing of a new writ; if during recess, the Speaker receives notice of the vacancy, certified by two members, he forthwith causes notice to be inserted in the *Gazette*, and fourteen days afterwards issues a new writ. See *Election-Law. Reform Act. Parliament. Member of Parliament.*

**Commonty.** A common or commonty is a piece of ground belonging in property to one or more persons, and in general burdened with sundry inferior rights of servitude, such as pasturage, feal and divot, and the like, in which last respect a commonty differs from common property held *pro indiviso*. There being no regular method at common law of ascertaining the rights of parties in a commonty, and dividing it among them, the act 1695, c. 38, makes all commonties, except those belonging to the king and to royal burghs, divisible at the instance of any having interest, by an action in the Court of Session. The Court is empowered by this statute to discuss the relevancy, and to determine on the rights and interests of the parties to grant commission for perambulating and taking all necessary proof, and to divide the common amongst the parties concerned. It is also declared, that the interest of the heritors having right to the common shall be estimated according to the valuation of their respective lands and properties, and that the portion of the common adjacent to the property of each heritor be adjudged to him;

with power to the Court also to divide the mosses in the common, or, in case they cannot be conveniently divided, that they shall remain common, with free ish and entry, whether divided or not. Where there is only one proprietor burdened with rights of servitude competent to other heritors, it has been settled, after considerable fluctuation of opinion, that this is not a commonty within the meaning of the statute. But if there be two co-proprietors, the statutory division may be made; and the device of a conveyance by the sole proprietor, of a small portion of the lands proposed to be divided, to an adjoining proprietor, made even *pendente processu*, has been held sufficient to warrant the Court in proceeding with the division. A right of servitude over the common is not a sufficient title to pursue an action of division; *Bell's Princ.*, § 1093. In *Gordon v. Grant*, 12th, Nov. 1850, 13 D. 1, relating to the division of the commonty of Benachie, it was held that a party who had not a right of common property in a part of the lands was not entitled to insist on a division of that part of the lands in respect of a right of servitude which he claimed over it, and that his claim of servitude could only be made effectual under a separate action of declarator of servitude. The same party was also found not entitled to object to the claim of another party to have the same lands found to be his exclusive property, there being no other party claiming them as common property.

It is not at all times easy to ascertain whether the right be a right of common property, or a right of servitude merely. If the proprietor's title-deeds convey his lands to him, "with parts, pendicles, and pertinents," or with "mosses, commonties, parts, pendicles, and pertinents," with "the commonty," or the like expression, the right is a right of property in the common. If, on the other hand, the expression be, "with parts, pertinents, and common pasturage," or "with pasturage of cattle and privilege of commonty," a servitude merely is held to have been conveyed, although, in both cases, the possession may have been identical. And an infetment "with parts and pertinents," followed by prescriptive possession of the adjoining common, will amount to a right of common property; although, where the charter is a bounding charter, the clause "with pertinents," will found no more than a right of servitude. See *Bounding Charter*. Where the expressions are more ambiguous, they will be construed or explained by usage. The statute expressly exempts from division commonties the property of the Crown or of royal burghs; and it has been decided that, if the property be vested in the Crown, although

the benefit is conferred by grant, or a subject, such a common cannot be divided. *Shand's Prac.* ii. 520, and authorities there cited.

In the action of division, all parties having interests, whether of common property or servitude, must be called; but tenants need not be cited. The summons is executed, called, and enrolled, in the usual manner. It is framed in terms of the Court of Session Act, 13 and 14 Vict., c. 36, § 1; and the annexed condescendence must set forth, in reference to a plan or sketch to be produced along with it, the descriptions of the boundaries of the common, according to natural or other objects, or the names of hills, mosses, and other localities occurring along or near the line of the boundaries. The condescendence must set forth the nature and extent of the right and interest the pursuer claims in the common, his titles, and the claim he proposes to advance, which claim may be subject to any alteration which the evidence and the pleas of parties may render necessary; *A. S. 18th June 1852*, §§ 1, 2. The parties who intend to appear must lodge defences, stating the extent of the right and interest they mean to advance in the process; the extent and boundaries of the common, if they do not admit those stated by the pursuer; the lands, if any, within the pursuer's boundaries which they claim as private property, and as not forming part of the common; their titles and claim; *Ib.* § 4. After these papers are lodged the Lord Ordinary shall consider them, both in reference to the requirements of the Court of Session Act, and also in order to consider whether any questions of law should be determined before proof, or to what points the proof should, in the first instance, be directed; and whether it should be by commission or before a jury, and whether there are any separate and distinct points which should be so tried before the general boundaries are remitted to proof, and between what parties; *Ib.* § 5. When a proof by commission is determined upon, the Lord Ordinary grants commission to perambulate the common, to ascertain its boundaries, and the possession of the several heritors, to get the ground measured and a plan made, and to divide the common among the parties interested. See *Beveridge's Forms of Process*, 565. Diligence is at the same time granted against witnesses and havers; and the proof is in general ordered to be reported to the Court, or sometimes to the Lord Ordinary. The statutory rule of division is the valued rent of the properties to which the right to the common belongs; and where, as in Shetland, there is no valuation, the division is regulated by the number of merks belonging to each proprietor, according to which the taxes are paid; *Bruce*,

11th Dec. 1823, 2 S. 573. The other rules are—1st, To allocate to the parties the shares most adjacent to their own property, looking to the quality as well as the quantity; especially where the adjacent heritor has improved the border of the common nearest his lands. In that case, however, the land is allocated to the heritor at its improved value, the presumption being, that he has been reimbursed for the expense of the improvement by the possession,—a presumption which doubtless would yield to the fact in cases where it was otherwise. 2d, To preserve the servitudes over the undivided portions, or to commute them if those in right of the servitudes will consent, and to give them a portion of land in lieu. 3d, To allocate to the proprietor of a barony his share, according to the state of his possession. But where the proprietor of a barony, to which a common was attached, had feued out the whole barony, and given the feuars rights of servitude over the common, it was decided that he was still to be held as possessing by means of his feuars, and that he was entitled, accordingly, to have a share of the common set apart for him, corresponding to the aggregate valuation of the feuars, and subject to their servitudes; *Duke of Buccleuch*, 16th June 1812, *Fac. Coll.* 4th, To continue as common such mosses as are indivisible, with free ish and entry to the moss, whether divided or not. In the case of mosses the rule is not the valued rent, but the extent of the respective lands lying along the edge of the moss. In making the division, the common is first subdivided amongst the joint proprietors, as above. Then each proprietor divides his share with those whose servitudes are derived from him or his authors; although this seems to be an arrangement which can only be made of consent of parties; and in questions between the common proprietors and those having rights of servitude, the division is regulated not by the valued rent, but by the number of cattle the parties in right of the servitudes have been in use to pasture on the common, or according to the value of their interests in the common, whatever they may be; *Mailand*, 11th August 1772, *Mor.* 2485. Formerly the proprietor, in such cases, got a *procurium* of a fourth, over and above his share in the division; but no such rule is now acted on: all that the proprietor gets is the residue, after deducting the value of the servitudes. The proprietor has also a right to the coals and minerals, the parties in right of servitudes having right merely to the surface. When the proof is concluded and reported, circumduction will be pronounced, and great avizandum made. A prepared state was then framed by the Inner-House clerk, and a memorial and ab-

abstract, as in the process of ranking and sale; but prepared states have fallen into disuse. Instead of the memorial and abstract, when all parties acquiesce in the division, a short printed petition is boxed, praying the Court to approve of the proceedings, and to pronounce decree; and if there be no objections, decree of division will be pronounced by the Inner-House in terms of the report of the commissioner. If there be objections, they will either be disposed of at once, or a remit will be made by the Inner-House to the Lord Ordinary to prepare the cause, and decide on the objections in the usual way, and subject of course to the review of the Court. The expense of the division is paid proportionally to the benefit each heritor has derived from the division, as proved by the value of the portion allocated to him. Tenants, however, are not liable in any part of the expense, nor even for the interest of the expense so disbursed by their landlords. This action is not competent in an inferior court. See *Ersk. B. iii. tit. 3, § 56, et seq.*; *Bell's Princ. § 1092, et seq.*; *Kames' Stat. Law, h. t.*; *Jurid. Styles, iii. 149*; *Shand's Prac. p. 845, et seq.*

**Communi Dividundo Actio**; in the Roman law, was an action for the division of what was possessed in common by more than one; *Stair, B. i. tit. 8, § 15*. The principles of the Roman law on this subject are adopted in the law of Scotland; and where subjects possessed by *pro indiviso* proprietors are in their nature indivisible, an action of division and sale is competent at the instance of one of the proprietors; *Brock v. Hamilton, 19 D. 701, in note*.

**Communion-Elements**. The Teind Court, in modifying a stipend to a minister, make an allowance for communion-elements, payable out of the tiends of the parish; but do not consider themselves to be at liberty to encroach on the stock where the tiends are exhausted. *Ersk. B. ii. tit. 10, § 50*; *Dunlop's Parochial Law. See Augmentation*.

**Communion of Goods**. See *Goods in communion*.

**Communis Error**. Where, through oversight or negligence, an erroneous practice has prevailed, and has become inveterate, and especially where parties in their transactions have relied on the prevailing practice as correct; or where there is danger of disturbing judicial procedure in past cases; the Court of Session is in use, instead of correcting the error by a decision in a particular case, to overrule the objection when so stated, but to pass an Act of Sederunt, enjoining the observance of the correct practice in future; and certifying all concerned that they will hereafter decide accordingly. Such are the Acts of Sederunt, 26th Feb. 1684, 17th July

1741, and 17th Jan. 1756; in some of which cases the erroneous practice had been directly in the face of statutory enactments. See also the more recent cases of *Beattie, 22d May 1830, 8 S. 84*, where the *communis error* was in the will of a summons; and of *Russel, 7th July 1837*, where the error was in the ordinary form of the prayer of bills of suspension. See *Acts of Sederunt. Suspension*.

**Community or Corporation**. A corporation is composed of a number of persons erected by proper authority into a body politic, with certain rights and privileges. Cities, burghs, hospitals, scientific or professional associations, and the like, may be thus incorporated. Corporations cannot be legally constituted except by patent or by act of Parliament. Voluntary associations have no *persona standi in judicio*. But by special statute it is made lawful to establish societies for raising funds for the mutual relief and maintenance of the members or their families in old age, widowhood, sickness, or other contingency. The regulations of such societies are directed to be exhibited to the quarter-sessions of the justices of the peace, by whom they are to be confirmed; 10 *Geo. IV., c. 56*; 2 *Will. IV., c. 37*. See *Friendly Societies*. The stat. 7, *Geo. IV., c. 67*, authorizes joint-stock banks to sue and be sued, in name of their manager or principal officer, on certain conditions prescribed in the statute. See *Bank*. A corporation is held in law to be one person, and being in general established for a perpetuity, the legal person never dies; for although the individuals composing it die out, yet those who come in their places, either by succession or by election, or by the nomination of the founder, according as the charter is conceived, preserve the corporation entire. In general, by the charter of erection, a corporation may sue or be sued in its corporate name; and it may hold heritable property, and contract debt, which will be effectual against the property and funds of the corporation. A superior, however, is not bound to give an entry to a corporation, as to an ordinary purchaser, on payment of a year's rent; *Hill, 17th Jan. 1815, Fac. Coll.* See *Composition*. Communities have also, in the ordinary case, authority under their charter to elect magistrates, directors, or other office-bearers, to represent the whole community, and to bind it in the matters which the charter of incorporation allows to be entrusted to their management. Independent of an express clause in the charter, there are certain *naturalia* of a corporation which are implied in its erection. Thus, the corporation may acquire moveable property, and be sued for the price of it; it may have a common seal; may assemble to deliberate on its



affairs; and has a power to make bye-laws for the administration of the affairs of the community, provided such bye-laws are not inconsistent with the laws of the realm. Communities are dissolved,—1. By the expiration of the time to which their constitution limits them; 2. By act of Parliament; 3. By forfeiture, when they abuse their powers; in which last case, although the members necessarily suffer in their political capacity, yet no prosecution lies against such of the individual members as have had no accession to the crime. After a community is dissolved, the individuals are not, in the general case, bound even *subsidiarie* for sums borrowed by the incorporation. The estate of the corporate body, as being the fund on the faith of which the creditor contracted, is the only one to which he can look for repayment. Public trading companies, incorporated by a royal grant or by an act of Parliament, are also proper corporations, which endure in continual succession during the time appointed by their charter. But private copartnerships do not fall under this description; and being intended merely for the private interests of the copartners, they may be constituted without the authority of the King or Parliament. *Stair*, B. ii. tit. 3, § 23, *et seq.*; *More's Notes*, pp. clxxvi. *et seq.*, cccii.; *Ersk.* B. i. tit. 7, § 64; *Bank*. B. i. p. tit. 2, § 18, *et seq.*; *Bell's Com* p. 240, 6th edition; *Brown's Synop. h. t.*, and pp. 170, 597, 403; *Shaw's Digest*, tit. *Burgh*; *Jurid. Styles*, 2d edit., vol. i. pp. 39, 107; vol. iii. pp. 20, 712, 971; *Hume*, ii. 260; *Ross's Lect.* i. 83; *Swint. Abridg. voce Corporations*; *Bell's Princ.* 4th edit., art. 2167, *et seq.* See *Joint-Stock Companies. Society. Bank.* See also *Burgh Royal.*

**Company.** See *Society. Firm of a Company.*

**Company, Public.** See *Public Companies.*

**Comparatio Literarum.** The comparison of handwritings. This is one of the means of proving the truth or falsehood of an allegation of forgery: and where genuine subscriptions or writings are brought to prove that a subscription or writing is truly not of the handwriting of the person whose it is said to be, much weight is given to this species of evidence. But when the *comparatio literarum* is resorted to, to prove that a particular writing has been written by the accused, it is considered as a much more doubtful species of evidence. *Ersk.* B. iv. tit. 4, § 71; *Macfarlane's Jury Prac.* p. 225; *Menzie's Conveyancing*; *Tait on Evidence*, 142, 2d edit.; *Dickson on Evidence.* See also *Hume*, vol. i. p. 160; vol. ii. p. 381.

**Compearance.** This term is applied to the appearance made for a defender in an action. In the Court of Session, if a party appears by counsel, and propones defences,

such appearance will have the effect of rendering the decree pronounced in the action what is termed a decree *in foro*: and the question in dispute between the parties, when decided by a final judgment in which appearance has been made for both parties, is termed a *res judicata*. *Stair*, B. iv. tit. 38, § 5, and tit. 40, § 8; *Jurid. Styles*, vol. iii. p. 973; 1672, c. 16; *Shand's Prac.* 311. If no defences have been lodged, though appearance have been entered, and the process taken out to see, and counsel have appeared for the defender at the first enrolment, and got the case continued, decree pronounced thereafter, in respect of no defences, is nevertheless a decree in absence; 19 D. p. 474. Compearance in civil causes in the Sheriff-courts is made by notice lodged with the clerk in terms of 16 and 17 Vict., c. 80, § 3. See *Decree. Res Judicata. Absence.*

**Compearer.** A party not called as a defender in an action, but who conceives that he has an interest to oppose the action, may compear and claim leave to sist himself. If his claim is sustained, an interlocutor allowing him to sist himself is pronounced, and is designated as *Compearer*.

**Compensation**; is a provision of the law of Scotland, by which, where two parties are mutually debtors and creditors, their debts, if equal, extinguish each other; and, if unequal, leave only the balance due. Compensation, except by way of action, was unknown in the law of Scotland until 1592, c. 141, which provides that compensation, *de liquido ad liquidum*, may be pleaded by way of exception or defence *before* decree, but not by way of suspension or reduction *after* decree. Although compensation does not operate *ipso jure*, but must be pleaded, yet, where it is pleaded and sustained, the mutual debts are held to have been extinguished as at the time of concurrence; and, from that time downwards, the currency of interest on either side is stopped. In order to found compensation, it is necessary,—1. That each party be debtor and creditor in his own right: hence a tutor cannot compensate a debt, properly due to himself, with a sum for which he is creditor *tutorio nomine*. An executor confirmed, however, is held in this respect to be the same person with the deceased; and therefore, where he owes a debt *proprio nomine*, he may plead compensation upon a debt due to the deceased; and, on the other hand, a debt due to one who afterwards becomes executor to a person deceased, may be compensated with a debt due by the defunct to the executor's debtor. 2. The parties must be debtors and creditors to each other at the same time: hence, if, before the concurrence, one of them has regularly assigned his debt

to a third party, compensation cannot be pleaded against the assignee, on any debt afterwards arising between the original parties, although, where the concurrence has taken place before the assignment, the debtor may effectually plead compensation against the assignee, upon the debt due by the cedent; *Ersk. B. iii. tit. 4, § 14*. 3. The debts to be compensated must be of the same species and quality: hence, a sum of money cannot be compensated with a quantity of corn: because, until the price is fixed at which the corn is to be converted into money, the two debts are incommensurable; yet, in this case, some short time would probably be allowed for ascertaining the conversions, in order to make such a debt a proper subject of compensation; *Ersk. ibid. § 15*. It would also appear, that where a person is indebted to a bankrupt estate in a specific sum, and has, at the same time, an unascertained claim for damages against the bankrupt for failure to deliver goods, there is room for a plea of compensation on the part of the debtor; *Bell's Com. vol. ii. p. 128, 5th edit.* It is proper to observe, however, that the cases referred to by Professor Bell are, as he himself admits, scarcely to be quoted as authorities establishing this point. 4. A debt already due, and payable, cannot be compensated with a conditional debt, or one, the term of payment of which has not arrived; *Ersk. ibid.* But this holds only where the parties are solvent; for if one of them is bankrupt, the other may plead compensation on a debt which may become due at a future time; *Bell's Com. ibid.* 5. In strictness, compensation ought not to be admitted where the mutual debts are not clearly ascertained, either by the writ or oath of the adverse party, or by the decree of a judge. But, by invariable practice, if a debtor in a liquid sum pleads compensation upon a debt due to him by his creditor, but not actually constituted, the rule, "*quod statim liquidari potest pro jam liquido habetur,*" is applied, and sentence delayed *ex æquitate*, until the ground of compensation be made effectual. This rule has been applied not only where the counter-claim was offered to be instantly proved by writ or oath, but even where the constitution of the debt required a proof by witnesses (*Ersk. ib. § 16*); and although a debtor might not, in the ordinary case, be allowed to avoid the payment of what is liquid and payable, during a long litigation on an illiquid counter-claim, yet there is an exception even to this rule in balancing accounts on bankruptcy; for a solvent debtor will not be compelled to pay the liquid debt, and rank for his own illiquid claim, but may plead compensation; *Bell's Com. ib. p. 128.* 6. From

the exuberant trust implied in deposit, compensation is not pleadable by the depositary against the depositor. Nor can it be pleaded against the holder of a note payable to the bearer by the debtor, upon a debt due to the debtor by any former possessor of the note—a doctrine extended to indorsed bills of exchange, which the acceptor cannot compensate against the holder, by debts due to the acceptor by any of the indorsers; *Ersk. ib. § 17*. Neither is compensation admitted upon a debt extinguished by the long prescription at the time compensation is pleaded, even although at the time of concurrence the prescription had not run; *Carmichael, July 1719, Mor. p. 2677*. This rule holds also with respect to the shorter prescriptions, where the debtor is dead. But where the debtor is alive, the debt seems not to be in a worse condition than an illiquid debt, which may be instantly liquidated by reference to oath; *Bell's Com. ib. p. 128*. 7. Where the concurrence is made by the debtor acquiring right to a debt due by his creditor, compensation is not admitted, either where the acquirer is presumed to have had a bad intention, or where the compensation, if sustained, would void the diligence of third parties. Thus, a factor who is sued by his constituent for intromissions cannot plead compensation upon a debt due by the constituent, to which the factor has acquired right, after receiving the rents sued for. Nor can the debtor of a deceased person who, after his creditor's death, has acquired right to a debt due by the deceased, plead compensation on such debt in a question with the creditors of the defunct; *Ersk. ib. § 18*. Nor, indeed, can compensation be pleaded in any case on a debt which has been acquired *mala fide* to gain any undue advantage; *Bell's Com. ib. p. 130*. 8. Compensation may be pleaded not only by the principal debtor, but by any one having an interest, as by a cautioner, or by a competing creditor who has an interest to enlarge the fund for division, by extinguishing the debt of one of the claimants; *Bell's Com. ib. p. 131*. By the act 1592, c. 141, if compensation has not been pleaded by way of exception in the course of an action, it cannot be pleaded after decree, either by way of suspension or reduction. But if it has been pleaded, and unjustly repelled, it may be again insisted on, either in a suspension or a reduction, where these forms of process are not otherwise incompetent. Decrees in absence, whether of inferior judges or of the Court of Session, are held to be decrees in the sense of the statute; although Erskine seems to think that, as the act of regulations 1672, c. 16, provides, that all defences competent in law may be pleaded against a decree in absence,

in the same manner as if there had been no decree; so the defence of compensation ought in no case to be excluded by such a decree; *Ersk. ib.* § 19. But where the decree in absence has followed upon a summons against one of many debtors included in the same summons, this has been held a sufficient specialty to allow compensation to be pleaded in a suspension; *Corbet*, 20th March 1707, *Mor.* p. 2642; *A. v. B.*, 25th Feb. 1747, *Mor.* p. 2648. So also where the decrees have been set aside on some legal nullity, or the charge has been turned into a libel, compensation is still pleadable; *Wright*, 25th July 1676, *Mor.* p. 2640. Neither do baron decrees, nor summary decrees on a clause of registration, exclude compensation; *Bank. B. i. tit. 24, § 6, par 27*. But it has been found that, after a decree of furthcoming, compensation cannot be pleaded by way of suspension by an arrestee against the arrester on a debt due to the arrestee by the common debtor, although the decree of furthcoming was pronounced in absence of the arrestee; *Cunninghame, Stevenson, and Company*, 17th Jan. 1809, *Fac. Coll.* This decision, however, seems to have proceeded chiefly on the ground, that the decree of furthcoming operated as a transfer of the debt to the arrester, who was entitled to trust to his arrestment and furthcoming. When a pursuer is creditor to a defender by a separate debt not included in the libel, he may elide the defender's plea of compensation by pleading recompensation on the separate debt. The rules applicable to recompensation and to compensation are the same; and when recompensation is pleaded, the matter generally resolves into an action of count and reckoning; *Ersk. ib.*

Where the creditor of a company sues for a company's debt, compensation may be pleaded on a private debt due by the creditor to one of the partners of the company, and this may be done whether the company is solvent or insolvent, in existence or dissolved. The reason for compensation being allowed in such a case is, that the rights of payment and compensation are commensurate, and that, as every partner of a company is liable in the payment of the debts of a company, a debt due by a partner may be pleaded against one due by the company. The leading case on this subject is *Bogle's Creditors v. Ballantyne*, 8th July 1793, *M.* 2581. In that case it was observed by a majority of the Court, that in determining the question, there was no occasion to inquire whether the company was solvent or insolvent, dissolved or not dissolved, for that in all these situations the same rule would hold; that when a creditor pursued a company for payment, he could not prevent any one partner from standing forward and

discharging the debt, although out of his own private funds; that, on the other hand, a creditor had it in his power to demand payment *in solidum* from any individual partner without discussing the company; and that, as every partner, therefore, might not only make an ultroneous offer, but might even be compelled to pay, so he also was entitled to plead compensation, it being a general rule that the obligation to pay always implied a right to compensate. It is to be observed, however, that compensation on a private debt due to a partner can only be pleaded against a company's debt with consent of the company; but if the company do not object, it is *ius tertii* of the creditor to do so. See also the cases, *Scott v. Hall & Bissett*, 13th June 1809; *Russell v. M'Nab*, 26th May 1824, 3 *S.* 63, *N. E.*, 41; *Salmon v. Padon*, 17th Dec. 1824, 3 *S.* 406, *N. E.* 285. See also *Thomson v. Stevenson*, 10th March 1855, 17 *D.* 739. In this last case it was observed, "When a pursuer brings an action against a company where the partners are liable *in solidum* to the creditor for all the sums sued for, each is a debtor individually for the whole sum. The creditor has every partner liable to him *in solidum* for the whole amount. If any individual partner has a debt owing to himself individually, he is entitled to plead compensation, and the company is entitled, with his consent, that it shall be so applied. Assignment is not necessary, but consent of the individual is necessary; and he must concur in the application of his individual debt. But with his concurrence the company is entitled to say, 'Our partner, who is individually liable, chooses to pay off our debt in this manner, and we apply his debt in that way: that is the principle upon which the former decisions proceed.'"

The doctrine above laid down, being that established by the case of *Bogle v. Ballantyne*, is strongly controverted by Professor Bell in his Commentaries, vol. 2, p. 664. In the fourth edition of his *Principles of the Law of Scotland* he states the doctrine in a very qualified manner. "It may be doubted," he observes, "whether a company called upon to pay a debt to one who is creditor of a partner may not arrange with that partner to enable them to satisfy the debt, by assigning his debt to the company, so as to make a concurrence." He adds, however, "such arrangement cannot be made after bankruptcy." It is thought, however, that no assignment by the partner to a company of a debt due to him by the company's creditor is necessary; and that the true principle is, that the partner, with the company's consent, may stand forward and compensate the debt due by the company by a debt due to himself, on the ground that he

himself, as an individual, is personally liable in payment of the company debt.

Professor More, too, in his notes on Lord Stair's Institutions, objects to the doctrine above laid down, and observes, "Where a company happens to be solvent and able to pay its debts from its own proper funds, can any of the individual partners who has a debt owing to him by a creditor of the company, step forward, and, by setting off such debt against the claim of the company's creditor, obtain a preference over all the other creditors of his debtor? It is extremely difficult to hold this doctrine, which, in truth, resolves into this—that the partner of a company is entitled to set off a debt due to him against a claim of which he personally and individually has no right to demand payment. The mere circumstance of being a partner of the company would, according to this doctrine, operate as an assignment in his favour of the claims which any of his private debtors may have against the company." In the first portion of the passage here cited, the doctrine in question is clearly stated. There is some confusion, however, in the statement as to what the doctrine resolves itself into, when it is stated "that it resolves into this, that a partner of a company is entitled to set off a debt due to him against a claim of which he has no right to demand payment." No party, however, can have a right to demand payment of a claim against which he pleads compensation. Although, however, he has no right to demand payment of such a claim, he is under an obligation to make payment of it; and this is the principle on which the doctrine in question is based. Neither can it be said that, according to that doctrine, "the mere circumstance of a person being the partner of a company would operate as an assignment in his favour of the claims which any of his private debtors might have against the company." This would be to entitle the partner of a company to compensate a debt due by him to the company with debts due to the company by parties indebted to him. This, however, is by no means the doctrine in question, which is this—that the circumstance of the creditor of a company being a debtor of a partner of a company operates as an assignment in favour of the company of the debt due by its creditor to the partner.

Although, however, a company may plead compensation against a company's debt on a debt due to one of its partners by the company's creditor, the converse does not hold, that a company's debtor can compensate a company's debt by a private debt due to him by a partner of the company. See the cases *Morrison v. Hunter*, Dec. 5, 1822, 2 S. 68, *N. E.* 26; *Kerr v. Scott*, July 3, 1823, 2 S.

447, *N. E.*, 400; *Thom v. North British Bank*, Nov. 23 1850, 13 D. 134. Professor More thinks that the same principle should regulate both cases. He observes, "It is quite fixed that the debtor of a company when sued for a debt owing by him, cannot set off or compensate any claim which he may have against one of the partners as an individual; and how the converse of this can be supported upon principle is not so clear." The two cases, however, are very different. Where a company pleads compensation on a debt due to a partner, the partner in right of the debt is himself personally liable for the company's debt; and, being so liable, the company's creditor might, if he pleased, proceed at once against the partner and not against the company. Where, again, a company's debtor pleads compensation against a company's debt on a private debt due to him by a partner of the company, compensation is incompetent, because there is no *concursum debiti et crediti*, on the simple ground, that although each partner of a company is personally liable for a company's debt, a company is not liable for the debts of any of its partners.

Two other cases still require to be considered. Although a company's debtor cannot compensate a company's debt with a debt due by a partner, a company's creditor may compensate a debt due to a partner with a company's debt; and this, on the same principle that a company may compensate a company's debt with a debt due to a partner, the principle in both cases being, that a partner is individually liable for the company's debt. In the case now supposed, of a company's creditor compensating a debt due to a partner with a company's debt, it is clear that the company's creditor might sue the partner who is his creditor for the company's debt. It therefore follows, that the debt due by the company may compensate the debt due to the partner. The case of *Hotchkiss v. Royal Bank of Scotland*, Feb. 28, 1797, *M.* 2673, and affirmed in the House of Lords, 28th Nov. 1787, 3 *Paton's App.*, p. 618, may be cited in support of this proposition. In that case the plea sustained was one of retention and not of compensation. But the grounds on which these two pleas are competent to be pleaded are the same. In that case the Royal Bank of Scotland was sued by the trustee for the creditors of a shareholder of the bank for the transference of bank stock belonging to the bankrupt. The bankrupt was a partner of a company which was indebted to the bank, and the bank claimed retention of the stock in satisfaction of the debt due by the company of which the bankrupt was a partner. The plea was sustained both here and in the House of Lords.

Where, again, a company's debtor sues a partner, the partner cannot plead compensation on the debt due by his creditor to the company; and on this principle, that although a partner is personally liable for all the company's debts, he is not, as an individual, in right of the debts due to the company. There is therefore no *concursum debiti et crediti*. The company, it is true, may assign the company's debt to the partner, who may then plead compensation upon it, but he cannot do so without a transference of the debt in his favour; and such transference could only be effectual for the purpose of enabling the partner to plead compensation if made before the bankruptcy of his creditor. There is no case, it is thought, giving rise to the point last considered, but it appears to be easily resolvable on principle.

There are thus *four* cases in which the plea of compensation may arise with reference to company debts, and debts due to or by partners. The *first* case is, where a company's creditor sues a company, and is met with the plea of compensation on a debt due by him to a partner. The *second* case is, where a company's debtor is sued by a company, and meets the claim by pleading compensation on a debt due to him by a partner. The *third* case is, where a partner sues a company's creditor for a private debt, and is met by the latter pleading compensation on a debt due to him by the company. The *fourth* case is, where a company's debtor sues a partner for a private debt, and is met by the latter pleading compensation on a debt due by the former to the company. The result of the foregoing inquiry shows that compensation is competent in the *first* and *third* of these cases, and that it is not competent in the *second* and *fourth*. See, on the subject of Compensation, *Stair*, B. i. tit. 18, § 6, *et seq.*; *More's Notes*, cxxviii.; *Ersk.* B. iii. tit. 4, § 11; *Bank*. B. i. tit. 24, § 4; *Bell's Com.* vol. ii. p. 124, 664, 5th edit.; *Bell's Princ.* § 572, *et seq.*; *Thomson on Bills*, pp. 334-38, 834-54; *Kames' Princ. of Equity* (1825), 7, 258. See also *Retention*.

**Compensatio Injuriarum.** The plea of *compensatio injuriarum* is most frequently met with as a defence against actions of damages for slander or defamation. This plea, however, is not properly a bar to the action, but of the nature of a set-off or counter-claim, which extinguishes or modifies the pursuer's claim. The mutual injuries thus to be set off against each other must be, generally speaking, injuries of the same kind. Thus, a claim of damages for defamation could not be successfully met by an outstanding counter-claim of damages for a former assault; the defender's remedy there being obviously a separate action of damages. On the other hand, a

claim of damages for a libel in a newspaper, or in judicial pleadings, may be met and extinguished by a counter-claim for cotemporaneous defamation of the same character, conveyed through the same or a similar medium. A good deal of judicial discussion has occurred on the question, whether or not a counter-action at the instance of the defender is necessary, in order effectually to raise this plea; and it is not, perhaps, very easy to reconcile the authorities and judicial *dicta* on this point. It has been said, that the plea "is allowed without any separate action, where the injuries are of the same kind" (*per* Lord Gillies, in *Gilchrist v. Dempster*, *infra*); but more recently, the leaning of judicial authority has been in favour of a separate action. This much, however, seems certain, that without a separate action, a defender, in his defences, and at the trial, may found on concomitant injuries of the same kind inflicted on him by the pursuer, and this not only as part of the *res gestæ*, but as justifying the injury complained of, and extinguishing the claim of damages on that account. Recompensation, however, cannot be proved, since that plea, if well founded, ought to have formed part of the pursuer's direct claim. And in one case, where the defence of *compensatio injuriarum* had been sustained, and one shilling only of damages given, the Court refused to give the pursuer his costs, holding that the jury must be presumed to have balanced accounts between the parties, and found them equally wrong. *Gilchrist v. Dempster*, 10th Sept. 1823, 3 *Murray*, 368; and *Borthwick's Law of Libel*, App. 433. See also *Godard*, 4th Nov. 1816, 1 *Murray*, 156; *Edwards*, 23d Dec. 1823, and 6th Feb. and 24th June 1824, 3 *Murray*, 369, *et seq.*; *Borthwick on Libel*, 279, *et seq.*, and *authorities there cited*; *Shaw's Digest*, *Macfarlane's Practice*, pp. 223, 288. As to *compensatio injuriarum*, considered as a defence against an action of divorce on the head of adultery, see *Recrimination*.

**Competent and Omitted.** Those pleas which might have been maintained in the course of a suit, but which have not been stated, are said technically to be *competent and omitted*. By the stat. 1672, c. 16, § 19, it is enacted, "that decrees *in foro contradictorio* before the Lords of Session be not again suspended upon reasons competent to have been proponed, or which were repelled in the former decret." But a final decree *in foro* of the Court of Session may be suspended or reduced when it labours under essential nullities; e.g., where it is *ultra petita*, or disconform to its warrants, or where there is an *error calculi*, &c. And, in the opinion of our greatest law authorities, the Court of Session may also reduce their own decrees upon the emerging of any new

fact, or written voucher, not formerly pleaded upon, provided it appears that such fact or document was not known to the party before decree, and wilfully omitted, in order to protract the litigation; *Stair*, B. iv. tit. 1, § 44, 50, *et seq.*; *Ersk.* B. iv. tit. 3, § 3. The rule as to pleas competent and omitted is not effectual against a minor, although, if the plea has been proposed for the minor, and repelled, he cannot open up the decree; preliminary objections to the form of action and citation must be taken *in limine*, otherwise they cannot be heard afterwards. After a record has been once closed, new facts will be allowed to be brought forward before decree, provided they have occurred since the closing, or, if they existed before, provided they had only just reached the knowledge of the party, *res noviter venientes ad notitiam*.

The plea of competent and omitted has no place against a pursuer. If he sue on the same *media concludendi*, he will be met with the plea of *res judicata*. If the *media concludendi* are different, the plea of competent is inadmissible. See *Stair*, iv. 40, 16; *Bankton*, i. 10, 217. See also *Macdonald v. Macdonald*, 26th May 1840, 2 D. 889, 1 *Bell's Appeals*, 819. See on the subject of the article *Stair*, iv. 1, 44, 50, *et seq.*; also *Stair*, *ut supra*, § 44; *Ersk. Princ.* 12th edit. 491; *Bank*, B. i. tit. 36, § 16, *et seq.*; *Bell's Com.* vol. ii. p. 279, 5th edit.; *Bell's Princ.* 4th edit. 2346; *Shand's Prac.* 314, 652.

**Competition.** A competition, generally speaking, takes place wherever two or more persons are claimants for the same right, or on the same fund; but, in the technical language of the Scotch law, the term is most frequently applied to those contests which arise on bankruptcy between creditors, claiming in virtue of their respective securities or diligences. In all competitions of real rights or of real diligences, the preference depends in general upon priority of registration; and, in personal rights, the general rule is, that priority of diligence, not of obligation, determines the preference. But these general rules have been considerably modified by the various bankrupt statutes, one object of which has been to equalize diligences used, or securities granted, within a certain period of bankruptcy. The rules according to which the preference of rights and diligences is determined will be explained in the separate articles in which those rights and diligences are treated of. The chief processes of competition—that is, those processes in which the competing rights or claims are usually determined—are the processes of multiplepounding, ranking and sale, and mercantile sequestration under the bankrupt statute. *Ersk. Princ.* 12th edit.; *Bell's Princ.* 4th edit. art. 2262, *et seq.*; *Kames'*

*Princ. of Equity* (1825). See *Sasine*. *Adjudication*. *Inhibition*. *Assignment*. *Arrestment*. *Preference*. *Poinding*. *Bankrupt*. *Multiplepounding*.

**Competition of Brieves.** See *Service of an Heir*.

**Complaint.** See *Petition and Complaint*.

**Complaint, Summary.** See *Summary Applications*.

**Completing an Adjudication.** An adjudication may be completed for different purposes. It may be completed in order to enable it to compete with other heritable rights, in which case it must be completed by charter of adjudication and sasine; or it may be completed, to the effect of rendering it the first effectual adjudication, under the statute 19 and 20 Vic. c. 91, § 6, 1816. See *Effectual Adjudication*.

**Composition by a Bankrupt.** The creditors of an insolvent person are said to accept of a composition when they agree to give him a discharge in full, on his paying them a part, instead of the whole, of the debt he owes them. Extrajudicial agreements of this kind may be entered into, either with a single creditor, or with the whole creditors. In the former case, the agreement will be valid, whatever may be the consideration agreed upon between the creditor and the debtor. Where the agreement is entered into with the whole creditors, it is a mutual contract proceeding on two implied conditions; the one that all the creditors are dealt with equally; the other, that all shall concur, and that no one shall be bound, unless all are bound. The proper evidence of an agreement of this kind is a regular deed on stamped paper, although less formal evidence, particularly where followed by payments, or *rei interventus*, may bind the parties. It would seem, indeed, that such contracts are within the privileges conceded to writings *in re mercatoria*, and do not require to be either holograph or tested; *Bell's Com.* vol. ii. pp. 466, 504, 5th edit.; *Tait on Evidence*, 120; *Dickson on Evidence*. In extrajudicial arrangements for settling by composition, no creditor can be required to accept the composition offered unless he pleases.

By the bankrupt statute, 19 & 20 Vict., c. 79, § 137, an offer of composition may be made by a bankrupt or his friends, or, in case of his decease, by his successors, and in case of a company by one or more of the partners thereof, on the whole of his debts, with security for payment of the same, at the meeting for the election of a trustee. If a majority of the creditors in number, and nine-tenths in value, present at the meeting, shall resolve that the offer and security should be entertained for consideration, a meeting must be called by the trustee, to be held after the ex-

amination of the bankrupt, to consider the offer; and if the same majority of the creditors present shall resolve to accept the offer, a bond of caution must be lodged with the trustee, and a report of the resolution, along with the bond, is transmitted to the Bill-Chamber clerk, or Sheriff-clerk, in order that the approval of the Lord Ordinary or Sheriff may be obtained, and if approved of by him after hearing opposing creditors, a deliverance to that effect is pronounced by him. An offer of composition may also be made at the meeting held after the examination of the bankrupt, or any subsequent meeting. On a deliverance approving of the composition being pronounced, and on the bankrupt making a declaration, or, if required by the trustee or any creditor, an oath before the Lord Ordinary or Sheriff, that he has made a full and fair surrender of his estate, and has not granted or promised any preference or security, or made or promised any payment, or entered into any secret or collusive agreement or transaction to obtain the concurrence of any creditor to this offer and security, the Lord Ordinary or Sheriff pronounces a deliverance discharging the bankrupt of all debts and obligations for which he was liable at the date of his sequestration. All preferences, payments, and collusive agreements for concurring in a discharge are void, and a colluding creditor who has obtained any preference or payment is liable in the loss of double the value or amount of the preference or payment obtained, and also in the loss of the amount of the debt due to him by the bankrupt; these amounts to be divided among the other creditors of the bankrupt.

If the bankrupt and his cautioners fail to pay the composition, the auctioners will be entitled to rank upon the bankrupt for the whole original debt, and on the cautioners, for the amount of the composition. But the sequestration will not be held to revive on such failure; although, in competition with new creditors, the old creditors will be entitled to rank for their whole debt, deducting only what they have received from the bankrupt or his cautioners, as if it had been a mere payment to account. It would appear, however, that, in the event of a second bankruptcy, where payment of the composition to the creditors under the first has been delayed only for a short time, the cautioners or the new creditors may tender the stipulated composition, and so exclude the first set of creditors from farther competition. *Bell's Com.* vol. ii. p. 472, *et seq.* 5th edit. See in general, on the subject of Compositions, *Bell's Com.* *ibid.* p. 454, *et seq.*; *Bell's Princ.* 4th edit., art. 2439; *Thomson on Bills*, p. 575-80.

**Composition to a Superior**; is the name given to the entry-money paid to the superior

by a singular successor. The amount of this composition is sometimes fixed, or taxed, as it is termed, in the original charter; but where that is not the case, the superior is legally entitled to demand a year's rent of the subject. The superior's right to this exaction is founded on the acts 1469, c. 37, 1669, c. 18, and 1681, c. 17, by which superiors are bound to enter appraisers, adjudgers, and purchasers at judicial sales, on payment of a year's rent. There was formerly no direct mode of compelling a superior to enter a voluntary purchaser; but as this might always have been accomplished indirectly, under those statutes, by means of adjudication on a trust-bond or bill, the practice prevailed of entering purchasers by private consent, for the same composition which was legally exigible from adjudgers; and the stat. 20 Geo. II., c. 50, by providing, that heirs or purchasers may force an entry from the superior on payment to him of such fees or casualties "as he is by law entitled to receive upon the entry of such heir or purchaser," is held to have placed purchasers and adjudgers in the same situation with respect to entry-money. By the present practice, in settling the composition for a singular successor, the following rules seem to be fixed:—1. In the case of a land estate, the superior is entitled to a year's rent, as the lands are let to tenants, under deduction of feu-duties, public burdens, and annual burdens imposed with the superior's consent. 2. In the case of houses built in a village on ground feued, the same rule applies, with the additional deduction of a reasonable sum for repairs of houses, or other perishable subjects; *Aitchison*, 14th Feb. 1775, *Fac. Coll.*, *Mor.* p. 15,060; *Hailes*, ii. 612. 3. Where the vassal has granted a sub-feu, at a fair feu-duty, and not for an elusory payment, or with the view merely of defeating the superior's right, it is now settled that the purchaser or adjudger of the vassal's right is entitled to an entry on payment of one year's sub-feu-duty. This last point was very deliberately decided in a late case between the superior and a vassal who had sub-feued ground on which part of the New Town of Edinburgh is built. The superior demanded a full year's rent of the houses built by the sub-feuars; but the Court held that the vassal's singular successors were entitled to an entry on paying one year's sub-feu duty, that being a year's rent of the subject to which the singular successors were to acquire right; *Cockburn Ross v. Heriot's Hospital*, 6th June 1815, *Fac. Coll.*; affirmed on appeal. See *Ross*, *L. C.* vol. ii. p. 193. In strict law, the composition by an adjudger is due to the full extent, without regard to the amount of the debt on which the diligence is led; but, *ex æquitate*, it is

frequently modified below its true value; *Baird*, 18th July 1633, *Mor.* p. 15,054; and where the adjudger is excluded by a liferenter, he is not bound to pay the composition while the liferent subsists. If the right adjudged be a bare superiority, it was decided long ago that a year's feu-duty is all to which the superior is entitled as composition, because the feu-duty is the only rent to which the adjudger acquires right by his diligence; *Monkton*, 15th Feb. 1634, *Mor.* p. 15,020. Where several adjudgers charge the superior to enter them, he is not entitled to more than one year's rent for the whole, for all of their rights make but one right to the land adjudged. In lands holden by the Crown, the composition payable by an adjudger is regulated, not according to the rent of the lands, but by a percentage on the amount of the principal sum adjudged for; *Ersk.* B. ii. tit. 12, § 24. Where the subject adjudged is an annualrent holden base of the debtor, he is bound to receive the adjudger *gratis*. In like manner, magistrates of royal burghs, being merely the Crown's officers, are bound to enter adjudgers, and even voluntary purchasers, without exacting any composition; *Bank.* B. ii. tit. 4, § 32. It was once found, that where a corporation had adjudged, the superior was bound either to enter the corporation as his vassal, on payment of the usual composition of a year's rent, or to pay the value of the lands adjudged; *Church and Bridge work of Aberdeen*, 11th Dec. 1712, *Mor.* p. 15,034; *University of Glasgow*, 24th July 1713, *Mor.* p. 9296 and 15,075. But the decision in the last of these cases was reversed on appeal; and it has been lately held that the superior is not bound to receive a corporation as his vassal; *Hill*, 17th Jan. 1815, *Fac. Coll.* In the last case, the Court did not dictate any particular arrangement for the parties, and doubts were expressed by the highest authority on the bench, as to whether the Court had the power to compel the superior to receive a corporation on any terms. The expedients suggested by some of the judges were, either the entry of a trustee for behoof of the corporation, on payment of the usual composition, or an entry of the corporation itself, with a provision for a duplication of the feu-duty every twenty-five years. The superior is bound to enter an heir of entail, who is likewise heir of the former investiture, for a mere *duplicando* of the feu-duty; and he is also bound to enter the institute, when not heir of line, on payment of the usual composition due by a singular successor; but it is not held to be settled whether, when the heirs of entail are not also the heirs of the former investiture, the superior is entitled to a year's rent. In two cases in which superiors insisted on having a clause inserted,

declaring their right to a composition of a year's rent whenever the heir of entail was not also heir of line to the last vassal, the Court held that the superior is not entitled to insert such a clause, but that he may insert a reservation of his right to make the claim when the separation takes place. *M'Kenzie*, 4th July 1777, *Mor.* p. 15,053, and *App. Superior and Vassal*, No. 2; *Duke of Argyll*, 19th Nov. 1795, *Mor.* p. 15,068.

Where the institute or any heir of entail has once paid a composition to the superior, no second composition can be demanded from a subsequent heir of entail, on the ground either that he is not the heir of line of the last vassal, or that he is not the heir of the former investiture. The principle of this is, that on payment of a single composition, a superior is bound to grant a charter in favour of whatever persons the party paying the composition may please to name, and to embody in the charter, if required, the fetters of a strict entail; and the whole persons named in the charter, although strangers in blood to the party paying the composition, or to each other, are entitled, as the heirs of the investiture, to obtain an entry on payment of the casualty of relief. See the cases of *Mackenzie v. Duke of Argyll*, as above; also *Lockhart v. Denham*, 10th July 1760, *M.* 15,047; and *Stirling v. Ewart*, 14th Feb. 1842, 4 D. 684; and affirmed in the House of Lords, 4th Sep. 1844. See also *Ross, L. C.*, vol. ii. p. 329, *et seq.*

Where the institute of an entail is also the heir of the last investiture, but the entail comprehends various substitutes who do not possess that character, the institute, it is thought, is entitled to be entered as an heir, on payment merely of the casualty of relief; but it is also thought that the superior is entitled to the insertion of a clause in the charter feudalizing the entail, reserving his right to claim payment of a composition from a party claiming an entry who is not the heir of the former investiture; but on such composition being once paid by such party, no subsequent composition, it is thought, would be due. This appears to be the result of the combined cases of *Mackenzie v. Mackenzie*, and *Stirling v. Ewart*. See on the subject of this article, *Stair*, B. ii. tit. 3, § 41, and B. ii. tit. 4, § 32; *Ersk.* B. ii. tit. 4, § 11, and B. ii. tit. 12, § 24; *Bank.* B. ii. tit. 4, § 11, and B. iii. tit. 10, § 15; *Bell's Com.* vol. i. p. 23; *Bell's Princ.* art. 715, *et seq.* See *Entry of Heirs*.

**Compound Interest;** is never allowed on the sum in the original obligation or agreement; but it is common, by posterior contracts, to accumulate interest, and make it a principal bearing interest: and interest due in terms of the act 1621, c. 20, if decreet and



horing follow thereupon, will bear interest. Annualrent paid by a cautioner bears interest against the principal debtor, since, *quoad* him, it is a disbursement, and truly a principal sum. In some cases of peculiar hardship, though not coming under these rules, compound interest has been allowed; and, by 48 Geo. III., c. 151, § 19, the House of Lords is empowered, upon hearing appeals from Scotland, to adjudge the payment of compound interest upon the sums found due, if the said House shall, in its sound discretion think meet so to do. *Stair*, B. i. t. 15, § 8; *More's Notes*, p. lxxix. See the cases, *Jolly v. McNeill*, 28th May 1829, 7 S. 656; *McNeill v. McNeill*, 26th May 1826, 4 S. 455; in the *House of Lords*, 22d Dec. 1830; 4 W. & S. 455.

Where payment of a debt is improperly withheld, and the creditor is obliged to have recourse to an action to enforce payment, interest on the arrears of interest appears to be due from the date of the citation in the action. The principle of this is, that at the date of the action the pursuer claims two sums—the amount of the principal sum, and also the amount of the arrears of interest due on that sum. The debtor, by refusing payment of the two sums claimed, when cited in the summons to do so, renders himself liable for interest on both the sums. See on this subject the case of *Napier v. Gordon*, 1st Dec. 1829, 8 S. 149, and 21st Jan. 1830; 8 S. 357, and in the House of Lords, 3d Oct. 1831; 4 W. & S. 745. See also the case of *Maclean v. Campbell*, 15th Feb. 1856, 18 D. 609. See *Interest. Accumulate Sum.*

**Compounding Felony**, or *Theft-bote*; in English law, is where a party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. It is a misdemeanour punished with fine and imprisonment. *Tomlin's Dict. h. t.* See *Theft-bote*.

**Comprising**, or **Apprising**; was the ancient form of diligence used for attaching land for debt. See *Adjudication. Diligence. Apprising.*

**Compromise**; in English law, is understood to be a mutual promise of parties to submit matters in dispute to arbitration. In Scotland, the terms *submit* or *refer* are generally used; and a power to compromise is understood to be a power to adjust and settle a difference. Doubtful claims connected with a sequestrated estate may be compromised by the trustee and a majority of the commissioners. *More's Notes on Stair*, p. 1; *Bell's Com.* vol. ii. p. 415, 5th edit. See *Commissioners. Arbitration.*

**Compulsion**. Acts done or rights granted on compulsion, or under the influence of force

and fear, such as would shake a man of ordinary firmness and resolution, are reducible; *Ersk. B. iv. tit. 1, § 26.* See *Force and Fear*. In like manner, crimes perpetrated under constraint, where *vis major* and imminent personal danger are distinctly proved; as, for example, where a person has been found in arms against government during a rebellion,—or acting with a mob, or with pirates,—or even engaged in some minor outrage,—where the continued influence of superior force can be proved, it will be a sufficient defence against the criminal charge. *Bell's Princ.* § 12; *Illust. ib.*; *Hume*, vol. i. p. 50.

**Compurgator**; one who bears testimony to the credibility of another. Of old, a man's credit, in courts of law, depended on the opinion which his neighbours had of his veracity; and a party swearing was accompanied with a certain number of his neighbours to attest his credibility. *Tomlins, h. t.*

**Computation of Time**. The question whether or not a particular period of time has legally expired, may have very important effects on the rights of parties; and it is therefore of importance to attend to the rules by which time is computed. The following points seem to be fixed: 1. Where time is computed by years, as in the prescriptions, the years will be reckoned from the nominal day in one year to the same nominal day in the following year. Thus, if a debt be payable on the 15th May 1800, the 15th May 1840 will be the last day of the long prescription, and an interruption on that day will be effectual. Where a right is made to depend upon the expiration of a single year, a day is generally added *in majorem evidentiam*; hence the expression "*year and day*;" and the running of any part of the additional day completes the period. In this case, the brocard, *Dies inceptus pro completo habetur*, is applicable. Thus, a marriage contracted on the 1st January 1800 will be held to have subsisted year and day, to the effect of giving the husband right to the tocher, if the wife should die on the morning of the 2d January 1801; *Waddel*, 25th Feb. 1680, *Mor.* p. 3465. In reckoning the year and day for the *pari passu* ranking of adjudications, if the first adjudication were dated 1st February 1800, an adjudication dated 2d February 1801 would have the benefit of the *pari passu* ranking; *Bangour*, 26th Jan. 1681, *Mor.* 3467. 2. In computing by days, the days are reckoned from midnight to midnight. Thus, where an imprisoned debtor applies for liberation under the act of grace, the ten days will not be held to have expired until twelve o'clock, P.M., of the tenth day; *Blair*, 11th Nov. 1704, *Mor.* p. 3468; *Hood, Henderson, & Company*, 14th Dec. 1813, *Fac. Coll.* Where the granter of a

deed challenged under the law of deathbed lived for fifty-nine days and three hours, computed *de momento in momentum*, after executing the deed, the Court held the deed to be reducible, on the ground that the law requires the granter to have lived for sixty days, without counting the day on which the deed was executed; *Ogilvie*, 10th, Dec. 1793, *Fac. Coll.*, *Mor.* p. 3336. This decision was affirmed on appeal, and in the note of the judgment of the House of Lords, the House is said to have held, that if, exclusive of the day of executing the deed, the granter had lived until the morning of the sixtieth day after, the maxim, *Dies inceptus pro completo habetur*, would have applied; and, accordingly, it has been so decided; *Mitchell*, 3d Feb. 1801, *Fac. Coll. Mor. App. voce Deathbed*, No. 4. On the same principle, the sixty days before bankruptcy, under the act 1696, § 5, and the sequestration statutes, are reckoned backwards, exclusive of the day of the bankruptcy, the first of the sixty days commencing from the midnight preceding the bankruptcy, and being held as concluded the moment the sixtieth day begins; *Blaikie*, 21st Jan. 1809, *Fac. Coll.*; *Anderson*, 2d March 1813, *Fac. Coll.* In citations, and in computing the *inducitæ* of diligence, it is also settled that the action cannot be called, or a horning denounced, until after the midnight of the last day of the citation or charge. In computing the sixty days within which an instrument of sasine had to be recorded, the day of taking the infetment, as being the *terminus a quo*, was not counted, and registration at any time on the sixtieth day after that was effectual. *Bell's Com.* ii. 178; *More's Notes to Stair*, pp. cclvii. and cccxv.; *Hunter's Landlord and Tenant*, *Maekenzie's Obs. on Stat.* p. 353.

**Concealing Crimes.** The protection of a criminal after the commission of a crime, by concealing him from justice, knowing his guilt, is a distinct offence, which may be punished arbitrarily; *Hume*, 274, 281. Where, however, the protection is given in consequence of an agreement entered into before the commission of the crime, such concealment will be found a charge against the concealer of art and part in the principal crime; *Ersk. B. 4*, tit. 4, § 13; *Alison's Princ.* 231. See *Accessory. Accomplice. Art and Part.*

**Concealment of Pregnancy.** By the act 1690, c. 21, concealment of pregnancy authorized conviction for the murder of the child, if it was amissing or found dead. But by 49 Geo. III., c. 14, it is enacted, that if a woman "shall conceal her being with child during the whole period of her pregnancy, and shall not call for or make use of help or assistance

in the birth; and if the child shall be found dead or be amissing, she shall be imprisoned for a period not exceeding two years." By the latter statute, the concealment is not held to be a presumption of the murder, but to be itself a crime. The concealment must continue down to the death of the child; for the mother's keeping and acknowledging the child, for however short a time, will render the statute inapplicable. Premature labour, shown to be the cause of the child's death, is a sufficient defence; but the burden of proving it lies upon the panel. This is the only crime in which, from the nature of the major proposition, there can be no accession; and the minor consequently need not contain the charge of art and part; 11 *Swinton's Rep.* 572. Disclosure to the putative father is a sufficient defence; *Gall*, 1856, 2 *Irvine*, 367. The punishment usually awarded is from three to six, and, in aggravated cases, from nine to eighteen months' imprisonment. *Hume*, i. 291, *et seq.*; *Bell's Notes*, p. 80; *Alison's Princ.* 153; *Burnett*, 572; *Steele*, 100. See *Child-Murder.*

**Concluded Causes.** A cause is said to be a concluded cause where a proof has been allowed, and the term for proving has elapsed; *Shand's Prac.* 964. In the older practice of the Court of Session, the cause was then called before a Lord Ordinary on the Acts; the proof was declared to be concluded, and a state of the process was prepared by the assistant to the Inner-House clerk, under the authority of the Lord Ordinary on concluded causes. This state was printed and distributed amongst the judges for decision in the Inner-House; *Ersk. B. iv. tit. 2*, § 32. This form, with some rare exceptions, is practically superseded by the introduction of jury trial in civil causes. The prepared state is still sometimes made up in actions of proving the tenor. *Shand's Prac.* 840; *Stair*, B. iv. tit. 35, § 5, and tit. 46, § 8, *et seq.*; 2 *Ivory's Forms*, 1127. See *Jury Trial.*

**Concourse of Actions.** By the Roman law, different actions were competent on the same ground of right; but by the law of Scotland there is no civil action in which the pursuer has this privilege; for although, in some actions partly of a penal nature, the pursuer may insist either for the actual damage, or for violent profits, yet, if he once make his election, and claim simple restitution only, he cannot afterwards sue for violent profits. But our law admits a concourse of actions, in the special case of facts which may be prosecuted either civilly or criminally; for a prosecution to satisfy public justice is entirely different, both in its nature and object, from a mere prosecution *ad civilem effectum*; and even although in the criminal prose-

ention, the accused may have been acquitted, yet it is still competent for the private party to institute a civil action against him, founding on the same facts, which, in a civil process, where a debt or damages only are sought, may be referred to the defender's oath; a mode of proof inadmissible in a criminal prosecution. *Stair*, B. iv. tit. 48, § 9; *Ersk.* B. iv. tit. 1. § 64.

**Concourse of the Lord Advocate.** Although a private party who has a proper interest may institute a criminal prosecution at his own instance, concluding for the ordinary pains of law against the accused person; yet, by ancient and invariable style, such prosecution at the instance of a private party must be raised with concurrence of the Lord Advocate. This concurrence is necessary to every libel in the Court of Justiciary, whether the full pains of law, or pecuniary reparation only, be concluded for; and also in criminal proceedings before the Court of Session (*Shand's Prac.* 196); and, even in the ordinary civil action of reduction-improbation, which, *fictione juris*, is laid upon criminal grounds, but which is pursued *ad civilem effectum* only, the Lord Advocate's concurrence is necessary; *Shand's Prac.* 639. It would rather appear that, although the Lord Advocate may no doubt exercise his discretion in refusing his concurrence, where the proposed prosecution is manifestly absurd or illegal, or at the instance of a party whose title to prosecute is evidently defective, yet, in the ordinary case, he is not entitled to exercise any such discretion, but must give his concurrence when required, and that, even if he were formally to recal it in Court, the prosecution might still proceed at the private instance. In mutual libels at the instance of the private parties founded on the same facts, the Lord Advocate must give his concurrence to the action of each party. *Hume*, vol. ii. pp. 119, 126. See *Criminal Prosecution*.

**Concourse of Procurator-Fiscal.** See *Procurator-Fiscal*.

**Concursus Debiti et Crediti.** See *Compensation*.

**Concussion.** See *Force and Fear*.

**Condescendence** is the name given to a judicial pleading. Before the recent Court of Session Act, where the parties did not agree to hold the summons and defences as setting forth fully the facts and pleas upon which they respectively founded, or, when the Lord Ordinary thought fit, he ordered the pursuer to give in a condescendence, and the defender answers thereto, which papers altogether superseded the summons and defences. The condescendence was drawn by counsel, and set forth in substantive propositions, and under distinct heads or articles, all facts and circumstances pertinent to the cause of action,

which the party alleged and offered to prove. In the answers the defender met the averments in the condescendence by admissions or denials; and if he meant to rely on a series of counter-averments, he subjoined them to his answers also, in an articulate form, under the title of "*Defender's Statement of Facts*." Annexed to each paper were the pleas in law maintained by the parties. The papers were then revised, and the record closed. See 6 *Geo. IV.*, c. 120, §§ 8, 9, 12; *A. S.* 11th July 1828. Now, under 13 & 14 *Vict.* c. 36, and *A. S.* 31st October 1850, the summons only sets forth the name and designation of the pursuer and defender, and the conclusions of the action. The statement of the grounds of action is set forth in an articulate condescendence, having a note of pleas in law subjoined, which is annexed to the summons and constitutes a part of it. The defences must be in the form of articulate answers to the condescendence, with a statement of the defender's allegations in fact, if necessary, and a note of pleas in law appended. The summons is signed by a writer to the Signet, the defences by counsel. If the pursuer do not choose to close the record upon summons and defences, the pursuer then revises his condescendence, and the defender his defences. The record is thereafter adjusted before the Lord Ordinary in chambers, and closed. See *Summons. Defences. Record. Prorogation*. By § 10 of the said statute, the records are to continue to be made up in the old form in processes of competition, such as rankings and sales, and multiplepointings, and other causes to which the new regulations are not applicable. Strictly speaking, the parties ought, along with their papers, to lodge in process all writings in their custody, or within their power, on which they found. Such writings are, however, admissible productions at any time before closing the record; *A. S.* 11th July 1828. Where a party has not the papers essential to enable him to aver correctly, he may get a diligence for their recovery. See *Diligence*. Where, again, the mutual averments and answers can be safely made without the written evidence, it may be recovered *in modum probationis*, after the record is closed. But, generally speaking, where documents exist, or are supposed to exist, which may be decisive of the cause without the intervention of a jury, or the aid of parole evidence, it seems to be desirable (although in this respect the judicial practice has by no means been uniform), to afford the parties every facility for the recovery of the documentary evidence, prior to the completion of the pleadings and the closing of the record. In processes of suspension, and in certain advocations, the pleading, called *Reasons of Suspen-*

sion or of *Advocation*, is substantially a condescendence; and the provisions of the recent statute as to making up the record, apply, so far as may be, to processes of suspension and *advocation*. See *Advocation of Suspension*. In the Sheriff-courts, where the record is not closed upon the short minute introduced by 16 and 17 Vict., c. 80, § 3, the record is made up under that statute, by articulate condescendence and defences, in a manner similar to that pursued in the Court of Session. *Barclay's M'Glash. Sher. Court Prac.* p. 203, *et seq.* See on the subject of this article, 6 *Geo. IV.*, c. 120, §§ 8, 9, 12; *Shand's Prac.*; *Barclay's Dig. h. t.*; *A. S. 11th July 1823*, §§ 105, 55, 49. See also, *Pleas in Law. Record. Commonly.*

**Condescendence and Claim.** In a process of multiplepoinding, the claimants on the fund *in medio* must state their respective claims in the form of condescendences, with the conclusions, deduced in the shape of notes of pleas in law. The usual form is, first to aver the facts articulately, as in an ordinary condescendence; then to make the claim thence resulting, and to conclude with pleas in law. Where a competition ensues, the several condescendences and claims are ordered to be revised; and each claimant, in revising his own condescendence, must submit answers to the condescendence and claim of every other competitor. The injunction of the Act of Sederunt is, that the competition shall thereafter proceed as nearly as may be like an ordinary action; but practically, the records thus made up are complicated and awkward. *A. S. 11th July 1823*, § 48. See *Condescendence. Multiplepoinding. Ranking and Sale. Record.*

**Condictio Indebiti**; was an action in the Roman law for repetition of money paid to a person, under the belief that there was a debt due to him, when there was in reality no debt due. By the law of Scotland, action is also given for recalling a payment made through mistake or ignorance. Writers on the civil law, founding on the maxim, "*Ignorantia juris neminem excusat*," have made it a question whether a sum paid through a mistake in law is recoverable by this action. The Court of Session, on the ground that this was an equitable relief, formerly held that a mistake, whether in law or in fact, was a sufficient reason for recalling a payment; *Carrick*, 5th August 1778, *Mor.* p. 2931; *Bank. B. i. tit. 8*, § 23, *et seq.* From this rule there were the following exceptions: 1. Payment made under a natural obligation, though the law would not have enforced it, cannot be recalled. 2. If the person by whom the payment was made knew at the time that no debt was due; for in that case the person must have been presumed to have given the money in a pre-

sent; *Ersk. B. iii. tit. 3*, § 54. A payment made in consequence of a compromise, and in order to put an end to a law-suit, cannot be recalled, though it may afterwards turn out that the claim so compromised was unfounded; *Oliver*, 16th May 1798, *not reported, but noted*; *Ersk. ib.* A creditor who had obtained a preference in a ranking to which he was not entitled was found liable to repetition, although he had got no more than payment of his debt. *Keith*, 14th Nov. 1792, *Mor.* p. 2933; *Stair, B. i. tit. 7*, § 9; *More's Notes*, p. xlix.; *Bell's Princ.* 4th edit. art. 531; *Bell's Illust. art. 534*; *Kames' Princ. of Equity* (1825), 200.

In the case of *Wilson v. Sinclair*, 7th Dec. 1830, 4 *W. & S.* 398, however, it was laid down in the House of Lords, that when a person pays money under a mistake, he has no right to recover the money so paid, unless it was paid under a mistake in point of fact; and that if he pays by mistake in point of law, he has no right to recover it. It was further laid down, in the same case, by the House of Lords, that in the case of a payment by mistake in point of fact, the party can only recover if the mistake was unavoidable, and no fault of the party making the payment; but that if he had himself to blame, being ignorant of the fact which rendered the payment unnecessary, but having the means of knowledge of the fact within his power, and did not use those means, no action to recover would lie. The law on this point was again laid down to the same effect in the House of Lords in the case of *Dixon v. Monkland Canal Company*, 17th Sept. 1831, 5 *W. & S.* 445. In neither the case of *Wilson* nor of *Dixon* was it necessary to decide the point of law adverted to in these cases. In the former of the two cases the point was not pleaded, and the judgment was rested on the ground that the party claiming repetition had in his possession the document which contained the error founded on. In the latter case of *Dixon*, the decision was not necessary for the judgment, which was an affirmance of the judgment of the Court of Session refusing the claim of repetition, and proceeding on the special circumstances of the case. See on the subject the case of *Dickson v. Halbert*, 19th Feb. 1854, 16 *D.* 586.

**Condictio causa data, causa non secuta**; was a Roman law action, by which things given with the view to a certain event might be reclaimed if that event did not take place. The example of this commonly given, is that of presents made in contemplation of a marriage which did not take place. But if the expected event had been prevented by a cause not imputable to the receiver, no action

lay, unless he unduly delayed, when he might have performed. *Stair*, B. i. tit. 7, § 7; *Ersk. B. ii. tit. 1, § 10*; *Kames' Princ. of Equity* (1825), 131.

**Condition si sine Liberis Decesserit.** By the Roman law, if one made a donation of all, or the greater part of his estate, when he had no children, and came afterwards to have children, the gift became void, upon the presumption that, if the donor had anticipated having children of his own, he would not have made it. There is no example of this implied condition in our law, where the donation was *inter vivos*, and perfected by delivery; but, in testamentary settlements, or donations *mortis causa*, the doctrine is recognised with us, if the testator leaves a child, of whose existence *in utero* he is not presumed to have known. But if the children have been actually born during the testator's life, and if, notwithstanding, he allows the settlement to remain for a reasonable time unrevoked, it would rather seem that it cannot be set aside, especially if it was not of the whole, or the greater part of his estate, and provided it does not prejudice the child's legal or conventional provisions. The principle on which this doctrine rests has been applied in heritable as well as moveable succession, and has been extended to the case where a testator makes a provision for, or a destination in favour of, his child or children, whom failing, on a stranger. In such a case, where the immediate children of the testator have predeceased him, but leaving children, the grandchildren will exclude the stranger substitute. But as this rule of construction rests on a legal presumption, that presumption may be elided by contrary evidence, or by opposite presumptions, founded on the circumstances of the particular case. The general rule, however, is well settled. See *Ersk. B. 3, tit. 8, § 46*; *Bank, B. i. tit. 9, § 5*; *Bell's Princ. § 1776, et seq.*; and particularly *Mowbray v. Scougall*, 9th July 1834, 12 S. 910, *affirmed on appeal*; 2 S. & M'Lean, 305.

The application of the condition *si sine liberis* is not confined to the case of the children and grandchildren of the maker of the settlement, but it has been extended to the children of legatees to whom the testator is an uncle, or other near collateral relative. In the case of *Walker v. Walker*, 7th Dec. 1744, M. 10,328, also 14,858, the subject of the bequest was the whole effects of the testator, which were estimated in the deed at a particular sum. The mother of the testator was the institute in the bequest, and his brothers and sisters were substituted to heir *nominatim*. The sisters predeceased the institute; but it was held that their children, although not expressly called, had right to their

parents' shares. In the case of *Mackenzie v. Holte*, 2d February 1781, M. 660, &c., the bequest was in favour of the children of three persons named, these children being substituted to the institute in the bequest. Some of the children predeceased the institute. It was held that the issue of such children had right to their parents' shares, but that the nearest of kin of those who had predeceased the institute without issue had no right. It does not appear from the report of the case what was the degree of relationship, if any, which existed between the substitute legatees and the testator. In the case of *Wallace v. Wallace*, 28th Jan. 1807, M. App. Clause No. 6, the children in whose favour the condition *si sine liberis* was applied, were the grand-nephews of the testator, whose parents had predeceased the liferenter of the bequest. In the case of *Christie v. Paterson*, 5th July 1822, 1 S. 543, N. E. 498, the children who were favoured were second cousins of the testator. *Lord Gillies* in that case observed, "that he could not admit that there was any distinction in principle between the parties being first and second cousins, or more distant collaterals." In the case of *Dixon v. Brown*, 10th June 1836, 14 S. 938; *House of Lords*, 2 *Robinson* 1, a father left the residue of his succession, consisting both of heritable and moveable estate, to his eldest son *nominatim*, who had a family at the date of the settlement, but without mention of the son's heirs. It was held that the possession did not lapse by the son predeceasing his father by one day, but that it transmitted to his children. Where a tenement was directed to be liferented, and, on the death of the liferenter, to be sold, and the price divided among the heirs of the testator then living, it was held that the term heirs was not equivalent to children, and that, therefore, the *conditio si sine liberis* was inapplicable; *Black v. Valentine*, 17th Feb. 1844, 6 D. 689. See *Menzies's Lectures*.

**Conditions in Feudal Grants.** Where particular conditions or stipulations are inserted in feudal grants, with the view either of more effectually securing, or of modifying in some respect the rights of parties, it is an important inquiry, whether such stipulations are to be considered as mere personal obligations, binding upon the parties and their heirs, or as real qualifications or conditions of the grant, effectual against singular successors. It seems to be settled, that an obligation on the part of the vassal to take infeftment on the charter within a certain time, or not to dispoise before he has himself entered, or not to disappoint the superior of an entry by subfeuing, or any similar obligation, although it may serve as the ground of diligence, or of an action against the vassal or his representative,

will have no effect against singular successors. But if the stipulation be declared a condition of the grant, it has been thought that it will not only qualify the vassal's right so long as the right remains personal, but that, if the condition be inserted in the instrument of sasine, and so appears in the record, it will operate as a real qualification, effectual against purchasers and creditors, as being, on strict feudal principle, a condition, without compliance with which the superior is not bound to give an entry. *Bell's Com.* vol. i. p. 26, 5th edit.

The stipulations must be neither illegal nor *contra bonos mores*. Hence, it has been questioned, whether any legal obligation can be created by a stipulation, sometimes inserted in feudal grants, by which it is provided, that the superior's law-agent shall pass the infeftments on the various transmissions of the right. Such a condition has been in general reprobated as a discreditable attempt to infringe the ordinary rules of professional practice. In the case of *Campbell v. Dunn*, 28th May 1825, 2 S. 341, N. E. 299, where such a condition was inserted under the sanction of nullity, the court, although not without considerable difference of opinion, held the condition lawful. The judgment was appealed, when the case was remitted to obtain the opinion of the whole court; 1 W. & S. 690. The case was afterwards compromised; but not before the opinions of the consulted judges were returned, which are given in 6 S. 679. Of the consulted judges, *Lords Justice-Clerk Boyle, Pitmilley, Meadowbank, Medwyn, Glenlee, and Newton*, returned opinion in favour of the superior's claim; and *Lords Alloway, Cringletie, Mackenzie, and Eldin*, returned a contrary opinion, on the ground that the condition was vexatious, and one in which the superior had no interest, and that it was capable of answering no purpose but that of creating an office in favour of his agent, to the direct and manifest annoyance and prejudice of the feuders. See also 3 *Ross, L. C.* 291. Where a superior inserts such a clause, and insists on its being implemented, he is responsible to his vassal for the negligence or ignorance of the agent, whose services he is thus compelled to take. *Bell's Princ.* § 861, *et seq.*; *Ross's Lect.* ii. 304, 362; *Shaw's Digest*; *Menzies's Lectures*.

Where the burden or condition is not contrary to law, it is not essential that any *voce signata*, or technical form of words, should be employed. There is no need of a declaration that the obligation is real, that it is *debitum fundi*, that it shall be inserted in all the future infeftments, or that it shall attach to singular successors. Neither is it necessary that the obligation should be fenced with an irritant clause. On strict feudal principles, a con-

dition in a feudal grant is effectual as a condition of the grant, without a compliance with which the superior is not bound to give an entry to the heir or disponee of his vassal. See the case of *Tailors of Aberdeen v. Coutis*, 20th Dec. 1834, 13 S. 226; *House of Lords, remitted* 23d May 1837, 2 S. & M. L. 609; *affirmed* August 3, 1840, 1 Rob. 296. See also 3 *Ross, L. C.* 269. See also, on the subject of this article, *Burdens. Clause of Pre-emption. Clause de non Alienando*.

**Conditional Obligation.** A conditional obligation is an obligation depending on the existence of a condition. Such an obligation has no force until the condition exist, or be purified, as it is termed, because it is in that event only that the party declares his intention to be bound; hence the condition of an uncertain event suspends not only the execution of the obligation but the obligation itself. An obligation of this kind is held to be but "an obligation in hope till the condition be existent;" *Stair*, B. i. tit. 3, § 7; but the grantor is so far bound that he cannot revoke the hope he has given. Creditors may attach conditional debts; and if the obligation does not depend on the life of the particular individual, it is transmitted to heirs, in case the creditor should die before the existence of the condition. All obligations depending on uncertain events are properly conditional; thus, an obligation depending on the arrival of a day which may possibly never arrive is conditional; hence a provision payable to a child on his arrival at a particular age falls if the child die before reaching that age; and the same rule is also extended to legacies, although a contrary doctrine at one time prevailed; *Ersk.* B. iii. tit. i. § 6 and 7, *and note*. Conditions adjoined to obligations are divided into *possible* and *impossible*; the former are such as may naturally and legally happen; the latter such as either naturally or legally cannot come to pass, for what is contrary to the law, or *contra bonos mores*, is held to be legally impossible. Possible conditions are distinguished into *potential* or *potestative*, *i. e.*, such as are within the power of the party burdened with them; and *casual*, being such as depend upon an uncertain event over which the party has no control. Contracts are null if illegal or impossible conditions are annexed, it being presumed that the parties are not serious. But such conditions adjoined to legacies are simply held *pro non scriptis*, and the legacy remains pure; for *nemo præsuntur ludere in extremis*, and the testator is presumed to have seriously intended to give the legacy. The same rule holds in bonds of provision by parents to children in implement of the natural obligation; illegal or irrational conditions annexed to them being held *pro non*

*adjectis*; *Bank. B. 1, tit. 4, § 17*. It was formerly held that this rule was also applicable to unfavourable conditions, such, for example, as a condition that the grantee should not intermarry with a particular person, or without the consent of certain individuals; but the rule at present established seems to be different; for although these and such like conditions are not strictly enforced, if unreasonably insisted on, yet they are to a certain extent held to be effectual. Thus, if consent to a suitable marriage is unreasonably withheld by the parties whose consent is made a condition, the provision will be effectual even although the marriage is contracted without the consent, and this whether the provision comes from a father or from a stranger; *Ersk. B. iii. tit. 3. § 85*. And, in general, all potestative conditions will be held as fulfilled if the grantee has done his utmost to fulfil them: thus, if the condition be that the grantee shall intermarry with a particular person named, the condition will be purified by the grantee's paying his addresses to that person, although he is rejected; provided he has not unduly delayed doing so, or made his addresses in such a manner as to insure their being rejected; *Ersk. ibid.* Conditions depending merely on accident must be purified before the obligation can be enforced; but if the arrival of the condition has been prevented by the act of the debtor, or of any other person unduly interested in preventing its arrival, it will be held as purified, on the principle that no man can profit by his own wrong; *Ersk. ibid.* Although an uncertainty annexed to an obligation renders it conditional, it is to be observed, that an uncertain day is not merely a day the arrival of which is uncertain, but the very existence of which is uncertain. Thus, the day on which a person shall arrive at a particular age may never exist, but the day of his death must certainly arrive: the former, therefore, is an uncertain day, which creates a condition; the latter creates no condition; and an obligation to take effect on the day of a person's death is not in law a conditional obligation, although its operation is suspended until that event arrives. This distinction ought to be kept in view in applying the maxim, "*Dies incertus pro conditione habetur.*" *Stair. B. i. tit. 3, § 7, et seq.*; *Ersk. B. iii. tit. 1, § 6*; *Ersk. Princ. 12th edit. 288, 339*; *Bank. B. i. tit. 4, § 19*; *Bell's Com. vol. i. p. 236, 5th edit.*; *Bell's Princ. 4th edit. art. 49, et seq., 93, et seq.*; *Bell's Illust. art. 93*; *Brown on Sale, pp. 32, 42, et seq.*; *Kames' Princ. of Equity (1825), 149*; *Hunter's Landlord and Tenant; Thomson on Bills, pp. 10, et seq., 375, et seq.*

**Conditional Legacy.** The doctrine explained in the preceding article applies to the

case of a conditional legacy. *Bell's Princ. 4th edit. art. 1881*; *Menzies's Lect. See Legacy.*

**Conditional Institute.** Under destinations of heritage, those who are entitled to take up the succession as the immediate disponees of the granter, are called *institutes*, in contradistinction to the substitutes, who succeed as heirs to such persons. Frequently, however, the institution of a particular person is, by the terms of the deed, made contingent upon certain events. Thus, a person may be instituted conditionally, upon the failure of others prior to the period when the destination will take effect. In such a case the survivance of such person, when the succession opens, vacates the right of the institutes. If the institute does not survive the opening of the succession, the property will descend to the substitutes. *Bell's Princ. 4th edit. art. 1745, et seq.*; *Sandford on Heritable Succession, vol. i. p. 397*; *Sandford on Entails, p. 14, et seq.* See *Tailzie*.

Cases of conditional institution in land rights seldom occur in practice. A conveyance to a party, in the event of the granter leaving no heirs of his body, is a proper case of conditional institution; for, if the granter leaves heirs of his body, the conveyance falls. If also the conveyance contains substitutions, these also will fall, because the conveyance being to the conditional institute, if that fail the substitution must fail also. If, however, the conveyance be to a party failing heirs of the granter's body, it is not so clear that in such a case the conveyance would fall in the event of the granter leaving heirs of his body. In such a case there is room for holding that the granter intended the conveyance to take effect after the heirs of his body had failed, although they may have existed at his death. A conveyance by the granter to the heirs of his body, whom failing, to another party, differs very little in its conception from a conveyance to a party, failing heirs of the granter's body; and it might be contended that, in both cases, the conveyance was to take effect, and not to fall if heirs of the granter's body existed at the granter's death. The case of *Stevenson v. Barr*, 24th June 1784, *M. 14862*, however, appears to be opposed to this view. In that case a husband, by his contract of marriage, disposed a tenement to the children of the marriage, and, failing children of the marriage, to his spouse, and the precept of sasine was in favour of the wife and her heirs and assignees. A child of the marriage existed, and survived its father, and on its death a competition arose between its mother and its uncle, who claimed the tenement as the heir of the child. The mother pleaded that the declaration of the fee in favour of the child-

dren of the marriage could have no other effect, when followed with the expression "failing them," than if it had been succeeded by that of "whom failing." On the part of the uncle it was pleaded that, by the child surviving its father, it became vested in the fee, and that, therefore, its mother could not succeed but as a substitute; but that the terms of the deed, and especially those of the precept of *sasine*, implied a conditional institution only, for that the mother's infestment under her husband's precept could be of no avail after the fee had devolved upon another. A majority of the court, chiefly influenced by this fact of the precept having been granted directly in favour of the wife, considered her as a conditional institute, and accordingly altered the interlocutor of the Lord Ordinary, who had found that the children of the marriage having failed by the death of the only child of the marriage, the mother was entitled to the fee of the subject, it being specially provided for her, failing children of the marriage. Apart from the circumstance that the precept was granted directly in favour of the mother, it could scarcely be doubted that she was a substitute to her children, because the conveyance was in favour of the children, and, failing them, to their mother. The case, therefore, is not an authority for the proposition that a conveyance to a party, failing heirs of the body of the granter, falls by the granter being survived by such heirs.

In practice a substitute is termed and treated as a conditional institute, where the institute predeceases the granter of the deed, and such substitute is therefore entitled to take infestment directly on the precept in the conveyance, without any service either to the granter of the deed or to the institute. A service to the granter would be inept, because the deed of conveyance vests nothing in him. A service to the institute would also be inept, because, by his predeceasing the granter of the deed, nothing either vested in him. If, therefore, the substitute satisfies the notary that the institute and prior institutes are dead, an infestment in his favour would be valid. Such appears to be the sound view of the matter; but much difference of opinion has existed on this subject both at the bar and on the bench. By some it has been thought that, in all cases of substitution, the substitute must serve to the institute, although he may have predeceased the granter of the deed. The opposite view, however, appears to be more in accordance with sound legal principle; and so the majority of the court decided in the case of *Fogo v. Fogo*, 11th March 1842, 4 D. 1063. In the House of Lords the judgment of the court was affirmed; but it was unnecessary to deter-

mine whether a service by a substitute to an institute who had predeceased the granter, was necessary or not, because the party whose deed was challenged had, in point of fact, served to the predeceasing institute; and therefore there was no necessity for the point adverted to being decided. The point, however, may be held to be ruled by the opinions of the majority of the court below. See *Menzies's Lectures on Conveyancing*.

**Condonation**; forgiveness; usually applied, in Scotch law language, to the plea of *remissio injuriæ*, as a defence against an action of divorce on the ground of adultery. See *Remissio*.

**Confarreatio**; the most sacred of the three solemn modes of contracting marriage among the Romans. It consisted, as the name imports, in the *pontifex maximus* and *flamen dialis* joining and contracting the man and woman, by making them eat of the same cake of salted bread; or, according to Ulpian, in the offering up of some pure wheaten bread, each of the parties eating a portion, and throwing a portion upon the victims sacrificed on the occasion. See *Marriage*.

**Confession**; the acknowledgment or avowal of a fact. A confession or declaration of guilt made by a criminal, in presence of a judge, is not admitted of itself as evidence against him; but it affords a presumption: and being proved to the jury on the trial by those present at the time when the confession was made, to have been truly the voluntary confession of the criminal, it will be held to be evidence, in terms of the act 1587, c. 91. The evidence required for establishing the fact of the acknowledgment having been made by the panel, is that of two concurring witnesses. But this declaration is not equivalent to a confession by the panel in presence of the jury, which is conclusive evidence against him; 9 *Geo. IV.*, c. 29, § 14; nor will it by itself be received as a proof of the crime. It will necessarily affect the minds of the jury in weighing the evidence in the cause, but it ought to do no more; *Hume*, vol. ii. p. 324; *Burnett*, 488; *Alis. Prac.* 578; *Bell's Notes*, 239; *Dickson on Evid.* 722, 734. Accordingly, if the only evidence against a panel, besides his declaration confessing the crime, is proof of the *corpus delicti*, the court will direct the jury to acquit, on the ground that the evidence is insufficient in point of law; and the same course is followed where some slight suspicion only attaches to the panel from other evidence. A confession, before ecclesiastical courts, of adultery, or of any other offence which gives the church scandal, being held as extrajudicial as to prosecutions on the same grounds before other courts, is no proof against the party either as to civil or criminal effects, even although it be followed by



public church censure; *Bank. B. iv. tit. 32, § 20*. In ordinary civil actions, a party may be called upon to confess or deny any relevant matter of fact, and, if he refuse, he will be held as confessed. By *A. S. 11th July 1828, § 105*, it is declared that where a statement in point of fact, within the opposite party's knowledge, is averred on the one side, and not denied on the other, he shall be held as confessed. The judges in inferior courts are also empowered, either before or after closing the record, to order the parties, either by writing under their hands, or at a judicial examination, to confess or deny such facts as may be thought pertinent; and the party failing to comply with the inferior judge's order will be held as confessed; *A. S. 10th July 1839, § 66, 67*. As to the older practice, see *A. S. 1st Feb. 1715, § 6 and 7; 7th Feb. 1810; Stair, B. iv. tit. 44, § 1, et seq.* See also *Calumny, Oath of. Condescendence. Declaration. Criminal Prosecution.*

**Confident Person.** In the sense of the act 1621, a confident person may be defined generally to be an intimate and confidential friend. The term seems applicable in particular to a partner in trade, a factor or steward, a confidential man of business, or a servant or other dependent. The deeds of an insolvent person in favour of those so connected with him, if granted without a just and necessary cause, and a price *bona fide* paid, are reducible at the instance of his prior creditors, under the act 1621, c. 18. The proof of the confidential situation of the grantee lies with the challenger of the deed, and that being proved, the person founding on the deed challenged has the burden of proving that it does not fall under the act; for a conveyance to a confident person is not null *præsumptione juris et de jure*. *Stair, B. i. tit. 9, § 15; More's Notes, p. lxi.; Bell's Com. vol. ii. p. 187, 5th edit.* See also *Conjunct Persons. Collusion.*

**Confidentiality.** In order to insure perfect freedom of communication between a law-agent and his client, a bar is generally placed upon the production, *in modum probationis*, of their communications. Neither can an action of damages be founded upon confidential letters by a law-agent to his client, nor upon statements made by a client to his agent, in reference to a depending or threatened process. But an agent must produce all writings which the party himself would have been bound to produce; and even letters between the client and another party, put into the hands of the agent as legal adviser. It has been decided that a former agent is bound to secrecy. But there are conflicting decisions upon the point, whether the production of communications made without reference to any suit, depending or anticipated, can be en-

forced. The authorities will be found collected in *Dickson on Evidence*, p. 930. In England it is settled that the privilege of confidentiality is not qualified by any reference to proceedings pending or in contemplation; and that it extends to attornies consulted on title, as well as those employed in a cause. An agent concealing that the debt for which he demands and attempts to enforce payment is already paid, is liable to repeat it. The client, by calling his own agent as a witness, waives the privilege of his agent's silence; *15 Vict., c. 27, § 1*. The privilege extends only to professional legal advisers, with their clerks; non-professional persons, except in certain special cases, or factors, accountants, &c., are not included under the rule of silence. Communications between several parties engaged on the same side of a suit, and between the counsel and agents of the respective parties to an action, are privileged. There are, however, other relations in which confidentiality is preserved. Thus, public officers are not entitled nor compellable to produce written communications made to them officially, relative to the character and conduct of a party applying for a public office, where the production is demanded, in contemplation of an action of damages against the writer. An agent in a criminal trial has the same privilege in reference to anything he knows as agent. It is not settled whether confessions made by a criminal to a clergyman, to relieve his burdened conscience, are privileged; and distinctions have been attempted to be made between such confessions by a prisoner in custody with a view to trial, and confessions made prior to incarceration by a party conscious of guilt, the latter being thought to form part of the history of the crime, and to be unprivileged; *2 Hume, 335, 350; Alison's Prac. 471, 537, 586*. The point is still open in Scotland, though in England such communications have been decided not to be privileged. Professional men, as surgeons, physicians, &c., are not entitled to withhold anything, however confidential. While husband and wife are now admissible as witnesses for and against each other in most civil cases, no husband is competent or compellable to give, against his wife, evidence of any matter communicated by her to him during marriage, nor, *vice versa*, any wife competent or compellable to give such evidence against her husband; *16 Vict., c. 20, § 3*. See, on the subject of this article, *Stair, iv. 43, 9; Ersk. Inst. iv. 2, 25; Hume, ii. 350; Bell's Princ. § 2254; Shand's Prac.* See *Agent. Evidence.*

**Confirmation, Charter of.** The modern form of a disposition to a purchaser, includes the clauses of a charter *a me* as well as *de me*.

and when the donee has taken infeftment on the indefinite precept of sasine, contained in a disposition, with this double manner of holding, such infeftment will not only constitute a valid *base* right in the person of the donee, from the date of the infeftment; but the superior may, by confirmation, render that infeftment equivalent to infeftment on a precept of sasine granted by himself, and thus render the right *public*. This is accomplished by a charter of confirmation from the superior; so called, because it ratifies and confirms the right granted to the purchaser, and the sasine following upon it. The charter of confirmation narrates and specially confirms the whole conveyances and infeftments since the last public infeftment, and declares them to be as effectual as if they had been *verbatim* engrossed in the charter of confirmation, or as if it had been granted before taking the infeftment. The other clauses do not materially differ from those in an original grant, except that, as infeftment has been already taken, the charter of confirmation contains no precept of sasine. The confirmation in the ordinary case operates *retro* to the date of the infeftment, and renders it as effectual as if it had proceeded from the first on the superior's precept. A charter of confirmation is one of the most ordinary methods of completing a purchaser's title; at the same time, where the progress is intricate, unless particular attention be paid to the state of the titles, serious mistakes may be committed. When the donee wishes to confirm intermediate base rights, and to resign on the procuratory of his immediate author, so as to complete his own title by a charter of resignation from his superior, care ought to be taken that the confirmation ends with the sasine in favour of the grantor of the procuratory on which the resignation is intended to proceed; for, by confirming the donee's own sasine, his right becomes public, and his author's procuratory useless, as in the case supposed; *Jurid. Styles*, vol. i. pp. 493, 524. Although the disposition to a purchaser, in its ordinary form, contains a double manner of holding,—that is, a holding either *a me de superiore meo*, or *de me*,—yet it may happen that a holding *a me* only is inserted. In that case, a mere infeftment on the precept will carry nothing until confirmed by the superior; and, in the event of double rights to the same subject being granted by dispositions containing holdings *a me* only, the preference will depend, not on the date of the registration of the sasine on the rights confirmed, but on the date of the confirmation; because, as such rights are imperfect without confirmation, the right first perfected must be preferable; *Ersk. B. ii. tit. 7, § 14*. And on the same principle,

a charter of resignation, proceeding on the procuratory in a disposition containing such single manner of holding, will carry the property in preference to an unconfirmed sasine on the precept. An improper use of confirmation, or a neglect of due attention to its effect, may give occasion to questions of great nicety and difficulty in the completing of titles. See *Consolidation. Base Right. Public Right. Charter. Resignation*. Where a donee dies base infeft, his heir may complete his title by a charter of confirmation and precept of *clare constat* contained in the same deed, whereby the superior, in the first place, confirms the ancestor's base infeftment, and then grants a precept for infefting the heir. *Stair, B. ii. tit. 3, § 28*; *More's Notes*, p. clxvii.; *Ross's Lect. ii. 149, et seq.*; *Ross, L. C. vol. 2, p. 127*; *Menzies's Lectures. See Clare constat*.

A donee who has taken infeftment on the precept in his disposition, and whose infeftment has been confirmed, is not barred from resigning on the procuratory in the disposition, and taking an infeftment in a charter of resignation expedite on the procuratory. The donee taking this step is held to have two completed titles in his person, and to hold the one without prejudice to the other. See *2 Ross, L. C. 157*.

**Confirmation of Executor**; is the form in which a title is conferred on the executor of a person deceased, to intronit with and administer the defunct's moveable effects, for behoof of the executor himself, or of those interested in the succession. There are, properly speaking, only two cases recognised in the law of Scotland, where the interposition of judicial authority is in this respect dispensed with, viz.,—*1st*, With regard to those effects of which the next of kin, when not excluded by a preferable title, can obtain actual possession; and, *2d*, With regard to those which the deceased has specially conveyed to another, either *per expressum*, or by reference to an inventory; an exception from the general rule introduced by the act of Parliament, 1690, c. 26. It has also been said, that *legitim* and *jus relictae* are exceptions, since both vest without confirmation; and that the same is the case, where the representative of the defunct gets from the defunct's debtor a bond of corroboration; but *legitim* and *jus relictae* do not vest *jure representationis*; and in the case of a bond of corroboration, confirmation is obviously rendered unnecessary by the substitution of a new obligation. Hence, the two above specified seem to be the only proper exceptions. Confirmation must be expedite before the commissary of the district in which the deceased has had his principal domicile, or, if he had no fixed domicile, in that where he had lived

for the forty days preceding his death. In the case of those to whom this rule will not apply, from the want of a proper domicile; and of those who have died abroad, and who went there *animo remanendi*, the confirmation proceeds at Edinburgh as the *commune forum*. In confirming executors, the commissary is bound to follow certain prescribed rules as to the order of preference, which will be found particularly explained, *voce Executor*. As to the form of procedure; where the executor is an executor-nominate, he lodges with the clerk of court the deed containing his nomination, along with an inventory of the defunct's moveable estate. It was formerly necessary for him to find caution; but, by 4 Geo. IV., c. 98, § 2, this is dispensed with in the case of an executor-nominate; and an extract, containing the inventory and a copy of the deed, with the act of confirmation by the judge, completes his title. This is called a confirmation of a testament-testamentary. In the case of an executor-dative, the party promoting the procedure receives from the court what is called an *edict*, which is published on *inducia* of nine days by a messenger-at-arms or officer of court, on a market-day, at the market-cross of the head burgh of the county where the deceased lived, and at the parish-church door, at the dismissal of the congregation on a Sunday. See *Edict*. This edict is afterwards called in court; and when a competition ensues, the judge is guided by the rules explained *voce Executor*. The office of executor is conferred by decree-dative; an inventory is lodged; caution is found by the executor; and his title is then in all respects analogous to that of an executor-nominate. This is called a confirmation of a testament-dative. Where the edict has been moved by one of the nearest of kin, or by a creditor, any other equally near in kin, or any other creditor *in pari casu*, may be conjoined in the office on application. By the existing statutes regulating the duties on moveable succession, it is incumbent on every person who applies to be confirmed executor, whether testamentary or dative, to give up on oath a full inventory of the deceased's moveable estate, so far as known to him; and the whole moveable estate of the deceased known at the time must now be confirmed. But it is lawful to make an *oït* to such confirmation, also upon oath, of any part of the estate which may be afterwards discovered, special assignments under the act 1690, c. 26, being excepted; as also in the case of confirmations by executors-creditor, the confirmation may be limited to the amount of the debt and sum confirmed, to which the creditor must make oath; every application for confirmation as executor-creditor being notified in the

*Edinburgh Gazette*, at least once, immediately after such application shall be made; which must be proved by production of a copy of the *Gazette*, before the confirmation can be further proceeded in; 4 Geo. IV., c. 98, §§ 3 and 4. A mere nomination as executor, or a mere decree-dative without a confirmation, vests no right, except a title to pursue. It is the confirmation which confers the right to recover and discharge. As to the transmission of the right to confirm, it is enacted by the above statute, that in all cases of intestate succession, where the person who, at the death of the intestate, was his next of kin, dies before confirmation is expedite, the right of such next of kin shall transmit to his or her representatives, so that confirmation may be granted to such representatives in the same manner as might have been granted to the deceased next of kin, immediately on the death of the intestate; 4 Geo. IV., c. 98, § 1. See, on the subject of this article, *Stair*, B. iii. tit. 8, § 54; *More's Notes*, ccliv; *Ersk. B. iii. tit. 9, § 27, et seq.*; *Bank. vol. 2406*; *Bell's Com. i. 81*; *Bell's Princ. § 1888, et seq.*; *Jurid. Styles* ii. 500, 3d edit. See *Executor. Executor-creditor. Licence to pursue*.

**Confirmation**; in English law, a conveyance of an estate, or right *in esse* which one hath in or to lands, &c., to another that hath the possession thereof, or some estate therein.

**Confiscation**; is a forfeiture of lands or goods to the Crown, being part of the punishment of certain crimes. See *Stair*, B. iii. tit. 3, § 1, *et seq.* See *Escheat*.

**Conform, Decree**. See *Decree Conform*.

**Conform, Letters**. See *Letters Conform*.

**Confusio**; is a kind of specification, and is used to express the mixture of liquids or fluids; *Ersk. B. ii. tit. 1, § 17*; see *Commixtion*. A debt, again, is said to be lost *confusione*, where the debtor succeeds to the creditor, or the creditor to the debtor, so that the same person becomes both debtor and creditor. See the following article.

**Confusio**; is one of the modes by which obligations may be extinguished. It takes effect where the debt and credit meet in the same person, either by succession or by singular titles; for, as one cannot be a creditor or a debtor to himself, the law holds the debt to be extinguished *confusione*, whenever a person stands in that predicament, whether he has succeeded as heir, or has acquired right by assignation. But, although this be the general rule, there are certain modifications and exceptions which must be kept in view in applying it. 1. Where a cautioner for a debt succeeds to that debt, or acquires right to it, his cautionary obligation is of course extinguished; but the principal obligation remains as effectual as ever. 2. Where a

creditor in a moveable debt succeeds to the heritable estate of his debtor, the debt is not extinguished. It is not lost *confusione* by that succession; for, though the heir in heritage be liable, it is only *subsidiarie*, and, therefore, he may demand the debt from the executor, who is primarily liable in personal debts. 3. Where an executor acquires right to an heritable debt, the debt, in like manner, is not extinguished, but may be made effectual against the heir in heritage. 4. A debt affecting the ancestor's estate, acquired by an apparent heir after the death of the ancestor, is not extinguished *confusione* by being vested in the person of the apparent heir; for the heir, while unentered, does not represent the debtor, and, consequently, the debt and credit do not meet in the same person. Upon the same ground, a debt purchased by the debtor's heir, who is liable *præceptione hereditatis*, is not extinguished in the person of the heir; a *præceptio hereditatis* not being considered as conferring such an universal active title as renders the heir *eadem persona cum defuncto*. 5. The conveyance of a debt affecting an entailed estate, in favour of one of the heirs of entail and his heirs whomsoever, may not have the effect of extinguishing the debt *confusione*. The debt, indeed, is dormant during the life of the heir of entail to whom it was conveyed; but if the next heir of entail is not also heir of line to his predecessor, the debt will revive in the person of the heir whomsoever against the heir of entail; *Gordon*, 1st Dec. 1757, *Fac. Coll.*, *Mor.* p. 11161; *Crawford*, 11th Mar. 1809, *Fac. Coll.* A debt does not become extinguished *confusione*, when the succession to the fund or subject liable for it, happens to be afterwards divided from the succession to the debt itself. See *Stair*, B. i. tit. 18, § 9; *Ersk.* B. iii. tit. 4, § 23, *et seq.*; *Bank*, vol. i. p. 496, *et seq.*; *Bell's Princ.* § 580, 1298.

The general rule is, that confusion is properly not an absolute extinction, but rather a suspension of obligations. Wherever, therefore, the creditor in the obligation has an interest to keep up the debt, it is held to be only suspended, and not extinguished.

**Conge D'Elire**; is the name given to the King's licence or permission, sent to a dean and chapter, to proceed to the election of a bishop, when any bishopric becomes vacant. *Tomlins' Dict.*

**Conjoining of Processes.** Where two or more processes in the Court of Session, relating to the same subject-matter, and in which the same parties are interested, are in dependence, and it appears expedient that they should be discussed together, the Lord Ordinary before whom they depend, on the motion of the parties, may pronounce an inter-

locutor conjoining the processes; after which they are proceeded in as one process. The processes at the time of being conjoined, must be both awake and in dependence before the same judge. Where, therefore, they have been originally brought before different Lords Ordinary, it is necessary that they should be remitted *ob contingentiam* to the leading process, and both in the roll, or at *avizandum*, together, before an interlocutor conjoining them can be pronounced; *A. S.* 24th Dec. 1838. Where necessary, the court may disjoin conjoined processes. See on the subject of this article, *Ivory's Form of Process*, ii. 52; *Bevridge*, ii. 599, *et seq.*; *Shand's Prac.* 500; *M'Glash. Sher. Court Prac.* 321. See *Contingency*.

**Conjunct Rights**; are rights taken to two or more persons jointly.

*Conjunct rights to strangers.*—Where a right is granted in favour of two persons, strangers to each other, “*in conjunct fee and liferent, and their heirs*,” the two are equal fiars during their joint lives. On the death of either of them, the survivor has the liferent of the whole, and after the survivor's death, the fee divides equally between the heirs of both. Where the right is taken “*to two jointly and their heirs*,” the conjunct fiars enjoy the subject equally during their lives; and on the death of either, his share descends to his own heir. Where the right is taken “*to two jointly, and the longest liver and their heirs*,” the expression, “*their heirs*,” is understood to mean the heirs of the longest liver; and therefore, although the creditors of either of the conjunct fiars may attach their respective shares while both are alive, yet, upon the death of either, the survivor has the fee of the whole, exclusive of the heir of the predeceased, in so far as the predeceased's share is not exhausted by his debts. Where the right is taken “*to A and B jointly, and to the heirs of B*,” the heirs of B are substituted both to A and B, and will take the whole, if neither A nor B have disposed of their shares, to the exclusion of the heirs of B. *Stair*, B. 2, tit. 6, § 10; *Ersk.* B. iii. tit. 8, § 35.

*Conjunct rights to husband and wife.* In questions between husband and wife, where the right is taken to them, “*in conjunct fee and liferent, and the heirs of their body*,” or “*their heirs*” indefinitely, the general rule is, that the husband is sole fiar, and the wife a mere liferentrix; “*their heirs*,” therefore, are held to be the heirs of the husband, and his creditors may attach the right, subject only to the wife's liferent. But this general rule suffers several exceptions, founded on the presumed intention of the parties, as arising out of the different circumstances of particular cases. Thus, where the subject comes from the wife,

or her relations, and the expression is not such as to indicate a preference in favour of the husband, the wife is *fiar*, the husband merely *liferent*, and his creditors cannot attach the subject. The wife, however, cannot convey it, nor can her creditors attach it, without a reservation of the husband's *liferent*. The wife is also *fiar* on her *survivance*, if the fee be destined to the survivor. Where the destination is to husband and wife, and the survivor, and "*their heirs*," if the husband predecease, the fee will be held to be in the wife and her heirs, not in the heirs of the marriage. In a case where heritable property was conveyed by a husband, in an antenuptial contract of marriage, to himself and wife, "in conjunct *liferent*, during all the days of their lifetime, and to the longest liver of them, and their heirs or assignees, in fee," the fee was held to be in the surviving wife; *M'Grigor*, 3d Jan. 1831, 9 S. & D. 675. But where the subject so destined belonged originally to the husband, it would seem that, during his life, he may alienate it, or his creditors may attach it; *Ferguson*, 22d July 1739, *Mor.* p. 4202; *Riddels*, 6th Nov. 1747, *Mor.* p. 4203. Where the subject has come from the wife as tocher, and has been destined to the husband and wife in conjunct fee and *liferent*, the strongest expressions of preference in favour of the wife will be required, in order to vest her with the fee; *Bruce Henderson*, 20th Jan. 1790, *Fac. Coll.*, *Mor.* p. 4215, where the fee was held to be in the husband. If the wife's heirs are preferred in the destination, the fee is also in the wife. It is to be observed, however, that it is not a proper criterion of this preference, that the wife's heirs are last named in the substitution, unless there be no intermediate substitutes between the heirs of the marriage and them; for where there are such substitutes, that spouse is deemed *fiar* where heirs are first called after the heirs of the marriage. *Stair*, B. ii. tit. 6, § 10; *Ersk. B. iii. tit. 8, § 36*; *Bell's Com.* vol. i. p. 56, *et seq.* 5th edit.; *Bell's Princ.* § 1953; *Jurid. Styles*, 2d edit. vol. ii. p. 33. See *Ross, L. C.* vol. iii.

*Conjunct rights to parents and children.* Where rights are taken to a father in *liferent*, and to his children *nascituri* in fee, the fee is in the father, and the children have a mere *spes successionis*, defeasible by the father's creditors; *Frog's Creditors*, 25th Nov. 1735, *Mor.* p. 4262. But where the children are in existence, and the right is taken to the child or children *nominatim* in fee, the fee is held to be in the child named, even although the right has been acquired by the father, and destined to the child gratuitously; *M'Intosh*, 28th Jan. 1812, *Fac. Coll.* Even where the children are not yet born, if the right be taken to the

father in *liferent*, "*for his liferent use allenarly, and to his children nascituri in fee*," this form of expression will limit the father's right to a mere fiduciary fee, for behoof of the children, which cannot be affected by the father's debts or deeds; *Newlands*, 9th July 1794, *Fac. Coll.*, *Mor.* p. 4289, affirmed on appeal; *Watherstone*, 25th Nov. 1801, *Fac. Coll.*, *Mor.* p. 4297; *Harvey*, 26th May 1815, *Fac. Coll.* But the words, in order to exclude the father, must be clearly taxative; a destination of the subject to the father "*during all the days of his life, and to the children in fee*," will import a full fee in the father; *Lindsay*, 9th Dec. 1807, *Fac. Coll.*, *Mor. App. voce Fiar*; *Robertson*, 20th Nov. 1806, *Fac. Coll.*, *Mor. App. Fiar absolute, limited.* It is quite settled that, where a subject is conveyed to trustees for behoof of a certain person in *liferent*, and of his children *nascituri* in fee, the father is not *fiar*; *Seton*, 6th March 1793, *Fac. Coll.*, *Mor.* p. 4219. Where a subject had been taken to husband and wife, "and longest liver of them two in conjunct fee and *liferent*, for her *liferent* use allenarly, and to their son *nominatim* in fee," with a reserved power of disposal to the father, the fee was found to be in the father, on the ground apparently, that, by the terms of the destination, there was a fee actually vested in him; *Wilson*, 14th Dec. 1819, *Fac. Coll.* See this case particularly, and the authorities there cited. See also on this subject, *Stair*, B. ii. tit. 6, § 10; *Ersk. B. iii. tit. 8, § 35, et seq.*; *Bank.* vol. i. p. 575, and vol. ii. p. 337; *Bell's Com.* i. 56, *et seq.* 5th edit.; *Jurid. Styles*, 2d edit. vol. i. p. 108. See also *Ross, L. C.* vol. iii. p. 602, *et seq.*; *Menzie's Lectures.*

*Conjunct or Confident Persons.* By the act of Sederunt 12th July 1620, ratified and approved as law by stat. 1621, c. 18, the Court of Session declares that, in all actions pursued by any "true creditor for recovery of his just debt, or satisfaction of his lawful action and right, they will decreet and decern all alienations, dispositions, assignations, and translations whatsoever, to any conjunct or confident person, without true, just, and necessary causes, and without a just price really paid, the same being done after the contracting of lawful debts from true creditors, to have been from the beginning, and to be in all time coming, null, and of no avail, force, or effect, at the instance of the true and just creditor, by way of action, exception, or reply, without further declarator." And in case any one shall have *bona fide* purchased the subject from the conjunct or confident person for a fair price, or shall have obtained it in satisfaction of a just debt, in that case, "the right lawfully acquired by him, who was nowise partaker of the fraud, shall not be annulled in manner foresaid, but the receiver

of the price of the said lands, &c., from the buyer, shall be holden and obliged to make the same forthcoming to the behoof of the bankrupt's true creditors in payment of their lawful debts. And it shall be sufficient probation of the fraud intended against the creditors, if they, or any of them, shall be able to verify, by writ or oath of the party receiver of any security from the dyvour or bankrupt, that the same was made without any just and necessary cause, or without any true and competent price; or that the lands and goods of the dyvour and bankrupt being sold by him who bought them from the said dyvour, the whole or the most part of the price thereof was converted, or to be converted, to the bankrupt's profit and use." In the sense of this act, conjunct persons are brothers, sisters, sons, sons-in-law, uncles by consanguinity or affinity, stepsons, sisters or brothers-in-law, and, in general, all persons who, by their relationship to the insolvent person, would be legally incapable of acting as witnesses or judges in a cause in which he was concerned. A confident person is a confidential and intimate friend; *e.g.*, a partner in trade, or a factor, or steward, or confidential man of business, or a servant, or other dependant. See *Confident Person*. With regard to this statute, which has given rise to questions of construction of considerable difficulty, it may be observed in general, that it was intended to aid the common law, by which, independently of statute, all fraudulent alienations by insolvent persons, to the prejudice of their lawful creditors, are reducible. The chief benefit, indeed, conferred by the act 1621, seems to be that of creating certain legal presumptions, which have the effect of throwing the burden of disproving fraud on the parties concerned in the transaction, wherever they are so connected as to give rise to strong suspicions of collusive or fraudulent proceedings; and it would rather appear that, with reference to this object, the statute has been liberally interpreted. It is not meant to detail here the various difficulties which have occurred in the application of this act, but the following points in the construction of it deserve attention:—1. The challenging creditor must have been a creditor at the date of the alienation challenged; or, at least, his debt must have had its origin prior to the date of the alienation, or he must have lent money to pay off prior creditors, so as to come into their place. It is sufficient, however, that the debt of the challenging creditor is conditional, or even gratuitous; and, where the challenge is at the instance of a trustee for creditors, it is enough if the debt of any of his constituents is prior to the alienation. 2. The deeds liable to challenge are all conveyances or obliga-

tions, direct or indirect, which may confer on the grantee property belonging to the debtor, or which may enable the grantee to claim in competition with onerous creditors, or save him from a demand for payment of a debt due by him to the debtor. 3. The proof of conjunct or confident lies with the challenging creditor; but, if that be proved, the presumption of law is, that the debtor was insolvent at the time of granting the deed, and that it was granted without value; and, in order to support it, the person founding on it must prove either that the granter was solvent at the time of granting it, or that a just price, or some other onerous consideration, was given for it. 4. With regard to the consideration, it must be a fair price paid *bona fide*, and not collusively, to answer the debtor's purposes. It is not necessary, however, that the consideration should be a payment in money; it will be a sufficient onerous cause to support the deed challenged, if it has been granted in consequence of a legal obligation undertaken during solvency, or if it be a deed in implement of an antenuptial contract of marriage. It is a more difficult question where the deed has been granted in implement of a mere natural obligation, as in the case of provisions made for a wife or children in a postnuptial contract; but even in such a case it would seem that the marriage will be regarded as a sufficient onerous cause, to support moderate provision, provided they are not struck at by the act 1696, c. 5, nor are otherwise objectionable; *Ersk. B. iv. tit. 1, § 33, et seq.* 5. It is a sufficient defence against a challenge under this act, that the debtor was solvent at the time of granting the deed challenged; *Ersk. ib. § 32.* 6. The challenge is competent before the Court of Session only; and, by invariable practice, it is made in the form of an action of reduction, although that form seems not to be indispensable. 7. The effect of a decree of reduction is a *restitutio in integrum*, as between the parties to the fraud; but where a third party has *bona fide* purchased from the conjunct or confident person, without being aware of the nullity to which his title was exposed, the sale will be effectual, the challenger's remedy in that case being a claim against the *bona fide* purchaser for the price if not paid, and, if paid, an action against the receiver of the price for restitution. *Lastly*, The benefit of the legal presumptions created by this act may be lost by undue delay, or *mora*, in bringing the challenge. See the subject of this article fully treated, *Ersk. Princ. 12th edit. 457; Bell's Com. vol. ii. p. 186, et seq. 5th edit.* See also *Collusion. Diligence.*

**Conjunction of an Adjudication.** When a first adjudication is called in court, the pro-

cess must be intimated on the walls and in the minute-book, in terms of the statute 54 Geo. III., c. 137, § 9, that those ready to adjudge may be conjoined. For this purpose, twenty seuerunt-days are allowed, in order that those who have liquid grounds of debt, and summonses of adjudication libelled and signetted, may produce them in the clerk's hands, and be conjoined in the adjudication. *Bell's Com.* vol. i. p. 723, 5th edit. See *Adjudication*.

**Conjunctly and Severally.** When two or more persons are bound conjunctly and severally to perform an obligation, they are liable *singuli in solidum*, and it is in the option of the creditor to exact performance, either from each of them proportionally, or to enforce the obligation to the full extent against any one of them, leaving him to seek his relief from the rest. The general rule in joint obligations is, that the obligants are bound *pro rata*, unless the contrary be expressed, or unless in the case of bills of exchange, or where the obligation is an obligation *ad factum præstandum*, and so indivisible. *Ersk. B. iii. tit. 3, § 74; Alexander*, 28th Nov. 1827, 6 S. 150; *Darlington*, 6th Dec. 1836, 15 S. 197; *Menzie's Lect.*; *Ross's Lect.* i. 77, 287; *Thomson on Bills*, 88. See *Solidum et pro rata. Joint Obligant. Singuli in Solidum*.

**Conquest.** In explaining this term, it is necessary to distinguish between its meaning, as applied to succession in heritage, and the construction it receives when it occurs in a contract of marriage.

**Succession of Conquest.** Those heritable rights to which the deceased has succeeded as heir to his ancestor, are sometimes termed *heritage* in a strict sense, in contradistinction to *conquest*, which term is applied to such heritable rights as the deceased has acquired by singular titles, e.g., by purchase, donation, or even excambion. When left to the destination of the law, heritage, as thus limited, descends to the heir of line, and conquest ascends to the heir of conquest. There is room for this separation in the succession, however, only where the deceased has died without lawful issue, leaving brothers both older and younger than himself, or the issue of such brothers, or two or more uncles, older and younger than the father of the deceased, or the descendants of such uncles. In such cases *heritage* descends to the immediate younger brother of the deceased, or to the next younger brother of his father, but *conquest* ascends to the immediate elder brother or uncle. Where the deceased is the youngest brother, and leaves two elder brothers, the youngest surviving brother is heir both in heritage and conquest; and where the deceased leaves but one brother, he is ne-

cessarily heir both of line and conquest. In conquest as well as in heritage, the whole blood excludes the half blood. Conquest can ascend but once. Thus, where one who has acquired an estate by singular titles dies, although this estate may ascend to the heir of conquest, yet in the person of such heir it becomes heritage, and will descend to his heir of line. Where a father propels an heritable subject to his eldest son, who at the date of the gift is heir *aliiquei successurus*, it will not be conquest in the son. But such a grant in favour of an heir presumptive merely seems to be conquest; if the right was granted, for example, by a person having no lawful issue, in favour of his brother, it is conquest in the brother; *Ersk. B. iii. tit. 8, § 15*. See also *Short*, 13th Feb. 1771, *Fac. Coll., Mor.* p. 5615. All rights to lands, and other heritable rights which require sasine to complete them, fall under conquest, including heritable bonds; but rights to teinds, leases, annuities, pensions, and personal bonds, excluding executors, descend to the heir of line. *Ersk. ib. § 16; Stair, B. iii. tit. 5, § 10*. See *Succession*.

**Provision of Conquest in a contract of marriage.** In contracts of marriage, the conquest acquired during the marriage, or a certain proportion of it, is frequently settled either on the heir or on the issue of the marriage; and in giving effect to a provision of this kind, it is to be observed, that conquest in this sense means only such an accession of fortune as renders the husband *locupletior*, and does not therefore necessarily include all that has been acquired during the marriage by singular titles. A subject purchased with money acquired by industry or economy is conquest in this sense; but land or any other subject purchased with borrowed money, is not conquest of the marriage, except in so far as the subject may be of greater value than the price paid for it. A clause of this kind will be defeated by onerous or rational deeds, but a deed merely gratuitous would be reducible, as granted *in fraudem* of the provision. The father retains, however, during his life, the uncontrolled right of fee in the conquest; and notwithstanding the dissolution of the marriage, no action lies at the instance of any of the children for enforcing the provision; so that the conquest *quoad* the father must be computed, not as at the time of the dissolution of the marriage, but at the time of his death; *Ersk. B. iii. tit. 8, § 43*. The question as to what subjects fall under a clause of conquest, will be determined by the expressions used in the particular clause out of which the question arises. Without an express provision to that effect, it will not include what devolves on the husband by suc-

cession; *Stair*, B. iii. tit. 5, § 52. Thus legacies to a wife *stante matrimonio*, falling to the husband *jure mariti*, were found not to be conquest under such a clause, generally expressed; *Rae*, 23d Jan. 1810, *Fac. Coll.* But, on the other hand, where the clause conveyed "all heritages, goods, gear, debts, sums of money, or other moveables which should be acquired during the standing of the intended marriage," it was held to carry leases acquired during the marriage, although leases do not, in their own nature, fall under the denomination of conquest. *Duncan*, 15th Feb. 1810, *Fac. Coll.*; *Ersk. Princ.* 12th edit. 387, 398; *Bell's Princ.* § 1656, *et seq.*, 1974, *et seq.*; *Sandford on Heritable Succession*, vol. i. p. 3, 30, *et seq.* See *Kames' Elucidations*, art. 6.

**Conquests**; succession of conquest; *Skene*, h. l. See *Conquest*.

**Consanguinity**; is the relationship of persons descended from the same ancestor. It is either lineal or collateral. Lineal or direct consanguinity is that formed between the persons generating and generated; and is either descending, as in the case of parent and child,—or ascending, as from the child to the parent. Collateral consanguinity, termed also transverse or oblique, is that which exists between persons descended from the same common ancestor, but not from one another, as brothers, uncles, and nephews. *Bell's Princ.* § 1527, 1646, *et seq.* See *Heir*.

**Consensus, non Concubitus, facit Matrimonium**; a Roman law maxim, adopted in the law of Scotland, importing that marriage is constituted by the *conjunctio animorum*, or consent alone; so that, though the parties, after consent given, should, by death or disagreement, or from any other cause, except impotency, happen not to consummate the marriage, *conjunctio corporum*, they are nevertheless entitled to all the legal rights consequent on marriage. *Ersk. B. i. tit. 6, § 2, 5, note by Ivory.* See *Marriage. Consent. Impotency. Divorce.*

**Consent.** The consent of parties is implied in all legal and binding contracts; hence persons legally incapable of giving consent, as idiots, pupils, &c., cannot be parties to a contract. By the Roman law, and by our more ancient usage, this disability was extended to deaf and dumb persons; but if this be the general rule of the law of Scotland, it plainly must suffer exceptions in favour of those persons who, notwithstanding this infirmity, possess abilities which qualify them for the discharge of the most important duties of life. Persons in a state of absolute drunkenness cannot give legal consent, although a lesser degree of intoxication will not afford sufficient ground for annulling a contract. The consent, although given by a

person labouring under no disqualification, is null where it proceeds on essential error, or where it has been obtained by fraud, or by force and fear. *Stair*, B. i. tit. 10, § 11; *More's Notes*, p. clix. and cclxiv; *Ersk. B. iii. tit. 1, § 16*; *Bell's Com.* vol. i. p. 294, 5th edit.; *Bell's Princ.* § 10, *et seq.*; *Bell's Illust.* § 8, *et seq.*; *Brown on Sale*, p. 152. See *Deaf and Dumb*.

**Consenter.** Where one signs as consenter to a deed, by which land is conveyed, his consent is held to amount to a total conveyance of his right to the subject, whatever that right may be; or, at least, such consent will import a valid obligation on the consenter to grant such a conveyance. But where a person, who holds an heritable security over lands, signs as consenter to a disposition of those lands, his consent imports merely that he is not to use his security to the prejudice of the donee's right, not that he is to discharge his claim for the debt against the debtor personally; *Ersk. B. ii. tit. 3, § 21*. A mere consenter is not liable in any implied warrandice, for he is not the seller, and only gives his consent at the purchaser's desire; and although he thus resigns his own right entirely, he incurs no obligation to warrant the right conveyed, unless his warrandice is made matter of express stipulation. *Ersk. B. ii. tit. 3, § 25.* See *Ross, L. C.* vol. i. p. 33.

**Consequential Damages.** See *Damage*.

**Conservator.** The conservator of the Scotch privileges in the Netherlands formerly held a mercantile court for Scotchmen resident in the Scotch factory at Campvere, to which he had four merchants as assessors; 1503, c. 81; 1597, c. 259. The Court of Session had a cumulative jurisdiction with the conservator's court over Scotchmen established at the factory. This was one of the offices the appointment to which vacated a seat in the House of Commons. *Ersk. B. i. tit. 4, § 34.*

**Consideration**; is the name given to the cause or reason of granting a deed, or of entering into a contract. The consideration may be either onerous or gratuitous. Where value in money, or goods, or services, has been given in return for the deed, the consideration is said to be onerous. Where the deed is granted without value, and from mere love and favour to the grantee, the consideration is termed gratuitous. But where the deed is granted in implement of a natural obligation, such, for example, as the natural obligation on a husband to make a rational provision for his wife or children, it would seem that, although the consideration for such a deed does not fall properly under the denomination of onerous, as above explained, yet that it differs essentially from a consideration merely gratuitous; *Ersk. B. iv. tit. 1, § 33.*



By the law of Scotland, a deed granted for a gratuitous consideration, where not struck at as a fraud against generous creditors, is as effectual as a deed granted for a valuable consideration, or in implement of a valid legal obligation. *Bell's Com.* ii. 187; *Ross's Lect.* ii. 232; *Thomson on Bills*, p. 103-30, *et seq.* See *Conjunct and Confident. Collusion.*

**Consignation**; is the deposition in the hands of a third party of a sum of money, which is the subject either of a dispute or of a competition. Consignation may be made where the existence or amount of the debt is judicially questioned, as in a suspension; or where the creditor refuses to receive his money, as in wadsets and other redeemable rights; or where it has not been finally determined to whom the money is to be paid, as in the case of consignation of the price of subjects bought at judicial sales, or of the fund *in medio* in a process of multiplepounding. The general rules as to consigned money are,

—1. That the risk of loss, either from the failure of the consignee, or the loss of interest, or the expense of consignation, lies with the consigner, where he ought to have made payment, and not consignation, or has consigned a part only, or has chosen as consignee a person neither authorized by law nor named by the parties; *Ersk. B. iii. tit. 1, § 31.* 2. The charger or other creditor runs the same risk if he has charged for sums not due, or has, without good reason, refused payment when offered, whereby the consignation has become necessary; *Ersk. ib.* Where, indeed, the creditor has unwarrantably refused to take the money when tendered to him, consignation in the hands even of a private party who is solvent, not only stops the currency of interest against the debtor, but is said by Erskine to be equivalent to payment of the debt; *Ersk. B. iii. tit. 4, § 5.* 3. It is the duty of the consignee to keep the money in safe custody until called for. If, therefore, he puts it out to interest, he does so at his own risk; but, for the same reason, he has right, according to Erskine, to the interest he draws, without being liable in interest to the consigner; *Ersk. B. iii. tit. 1, § 31.* This doctrine, however, appears to be questionable; and, in practice, it is usual to consign money in a public bank, so that the party entitled to it receives it with bank interest for the time it has remained consigned. 4. By 1695, c. 6, the purchaser at a judicial sale was entitled, a year after the decree of sale, to consign the price of the lands, and interest due to the date of consignation, in the hands of the town-council of Edinburgh, or their treasurer; but, by 54 Geo. III., c. 137, § 6, this statute is so far repealed, and it is made lawful for the purchaser at a judi-

cial sale, at any term of Whitsunday or Martinmas after the term of payment of the price, to lodge the same, with the interest due on it, in the Royal Bank, or the Bank of Scotland, or the Bank of the British Linen Company, at such interest as can be procured for it; and by doing so, and intimating it to the agent in the sale, the purchaser shall be discharged of the price. By the same section of the statute, the Court of Session is empowered, upon the application of any of the creditors, to order the purchaser to lodge the price and interest in one of those banks, at any of the foresaid terms after the term of payment, sufficient intimation of such application being given to the purchaser and the common agent. 5. The effect of consignation in terms of this statute seems to be, that each creditor's right, whether previously secured over the lands heritably or not, becomes merely personal, and may be attached by the diligence applicable to moveables; *Bell's Com.* vol. ii. pp. 6 and 276, 5th edit. In wadsets, money consigned for the redemption remains heritable until declarator of redemption; *Ersk. B. ii. tit. 8, § 23.* And, on the same principle, consignation made in terms of the clause of redemption in an heritable bond, will not have the effect of rendering the sum moveable until redemption. *Stair, B. i. tit. 13, § 6, and tit. 18, § 4; More's Notes*, p. lxxviii.; *Ersk. Princ.* 11th edit. 217, 296; *Bell's Princ.* § 215; *Illust. ib.*; *Jurid. Styles*, 2d edit. vol. i. p. 608; vol. iii. p. 979; *Thomson on Bills*, p. 410, *et seq.*; *Hunter's Landlord and Tenant*; *Ross's Lect.* i. 383, 458; ii. 363.

**Consignatory**; a consignee, or the person in whose hands consignation is made; *Ersk. B. iii. tit. 1, § 31.*

**Consignment.** In mercantile law, the term consignment is generally applied to goods delivered over or transmitted by one merchant to another, or by a merchant to a mercantile agent or factor, for sale, or for some other specific purpose. The bankruptcy of either the consigner or the consignee may give occasion to questions of considerable difficulty both in regard to reputed ownership, and on other points connected with the rights of the parties or their creditors. But these are questions which must obviously depend in a great degree on the circumstances under which they arise, so that it would be difficult to comprehend them under any general rule. One very ordinary transaction, however, is for the consignee to make advances, either in money or bills, to a certain extent, on the faith of the expected sales of the goods consigned; and, in such a case, the following general rules seem to be fixed:—1. If the consignee should fail, and the consigner be obliged to

pay the bills granted to him for such advances, the consignor may demand back his consignment in so far as unsold. 2. If the consigner should fail, the consignee has a lien over the consignment, to the amount of all engagements on the faith of the goods consigned. 3. When both parties fail, the holder of such bills may rank upon both estates for the full amount of the bills, provided he does not draw more than twenty shillings in the pound on his debt. *Bell's Com.* vol. i. p. 269, 5th edit.; *Bell's Princ.* § 1456; *Bell's Illust.* § 1456; *Shaw's Digest*, p. 20. See *Factor*.

**Consistorial Court.** This term was applied to the commissary-court, lately abolished, which came in place of the bishops' court; and the bishops' court derived the term from the courts held by the Roman emperors. See *Commissaries*.

**Consistory;** in English law, a *prætorium* or tribunal. It is commonly used for a council-house of ecclesiastical persons, or place of justice in the spiritual court: a session or assembly of prelates. *Tomlins' Dict. h. t.*

**Consolidation;** in feudal law, is the reunion of the property, or *dominium utile*, with the superiority, or *dominium directum*, after they have been feudally disjoined. A proprietor may sub-feu his lands to be holden of himself as superior. The sub-feu is called a base right, and conveys what is denominated the *dominium utile*, or property; that which remains with the grantor of the sub-feu being termed the *dominium directum*, or superiority. When the sub-vassal wishes to reconvey the property to his superior, he does it by a resignation *ad remanentiam* in the superior's favour; a mere renunciation of the sub-feu not being held sufficient to accomplish this object. By such resignation the *dominium directum* and the *dominium utile* are again united or consolidated as one property in the person of the superior. Where the superior succeeds to the *dominium utile*, as heir to the vassal, it is necessary for him to complete his title to the property by a precept of *clare constat*, granted by himself, in his character of superior, to himself as heir to his vassal, on which precept he is infeft. He will then hold the superiority under his former titles, and the property under the precept of *clare constat* and infeftment; the two estates, although vested in the same person, being entirely distinct. In order to unite them, the proprietor must, in the double capacity of superior and vassal, resign the *dominium utile* in his own favour *ad remanentiam*; and in this, as in the former case, consolidate the two estates of property and superiority. In like manner, if the vassal should succeed to the superiority, it would be necessary for him,

after having completed his title to the superiority, to consolidate the two estates in the same manner, by resignation *ad remanentiam*. The same rule holds where, by adjudication or otherwise, the two estates have come to be vested by separate titles in the same person. According to our more ancient practice, it was considered incongruous for the same individual to act in the double capacity of superior and vassal to himself, so that, wherever the two estates came to be vested in the same person, an *ipso jure* or virtual consolidation was held to have taken place. But the practical inconvenience attending this notion of *ipso jure* consolidation, and, in particular, its prejudicial effect on the security of the records, led to the adoption of a different view; and it was at last settled, by an almost unanimous decision, that consolidation could not be effected *ipso jure*, or without resignation *ad remanentiam*; *Bald v. Buchanan*, 8th Mar. 1786, *Fac. Coll., Mor.* p. 15084; *affirmed on appeal*. The separation of property and superiority may take place, not only by a regular sub-infeudation, but also where a conveyance has been made by a disposition containing a double manner of holding. If, for example, the disponee were to die after taking infeftment on the precept of sasine in such a deed, and his heir were to make up his title, by serving heir in general to his ancestor, so as to carry the unexecuted procuratory of resignation, and were then to expedite, and be infeft on, a charter of resignation on the unexecuted procuratory, to which he had thus acquired right, he would carry the mid-superiority merely, and would leave the property in *hereditate jacente* of his ancestor. In order to complete his titles, and unite the property and superiority, it would be necessary for him to grant a precept of *clare constat* to himself, as heir to his ancestor in the property, and afterwards to consolidate the two estates by resignation *ad remanentiam* in his own hands. Where the disponee, in a disposition containing a double manner of holding, has first taken infeftment on the precept, without taking a charter of confirmation, and has afterwards resigned upon the procuratory, and obtained a charter of resignation, the property and superiority are held to be separated, although a different doctrine is held by Lord Stair. See *Stair, App.* p. 787, and *Bell on Purchaser's Title*, 319, *et seq.*; *More's Notes to Stair*, pp. ccv. cclxiii.; *Ersk. Princ.* 12th edit. 209, 444; *Bell's Princ.* § 821; *Ross's Lect.* ii. 222, 292, 368. See also *Confirmation. Resignation. Disposition. Charter*.

The *dominium utile* may be consolidated with the *dominium directum*, by a prescriptive possession of the former following on a title

to the latter; and this will take place although the effect of the consolidation may be to bring the *dominium utile* under the fetters of a strict entail. *Lord Elibank v. Campbell*, 21st Nov. 1833, 12 S. 74; *Bartrie v. Graham*, 2d March 1837, 15 S. 711; affirmed in the *House of Lords*, Aug. 6, 1840, 1 Bell, 347; *Wilson v. Pollock*, 29th Nov. 1839, 2 D. 159. See also 3 Ross, L. C. 534.

**Constat, Precept of Clare.** See *Clare Constat*.

**Constable of Scotland.** The office of Lord High Constable of Scotland is one of great antiquity and dignity. The Lord High Constable had anciently the command of the King's armies while in the field, in absence of the King. He was likewise judge of all crimes or offences committed within four miles of the King's person, or within the same distance of the Parliament, or of the Privy Council, or of any general convention of the states of the kingdom. The office is hereditary in the noble family of Errol, and is reserved, both in the Treaty of Union, and in the statute 20 Geo. II., c. 43, by which heritable jurisdictions were abolished. *Ersk. B. i. tit. 3, § 37*.

**Constables;** are the officers of the justices of the peace, entrusted with the execution of their warrants, decrees, or orders. They are appointed by the justices at their quarter-sessions, two at least for every parish, and more if thought necessary. In royal burghs, constables are appointed by the magistrates. It is the duty of constables, *ex officio*, and without any special warrant from a justice of the peace, to apprehend offenders against the peace, vagrants, and such as can give no account of themselves, and take them to the next justice. It is also their duty to suppress riots, and apprehend the rioters; but, after the riot is over, a constable is not authorized to apprehend, *brevi manu*, any person concerned in it, unless one has been dangerously wounded in the fray. See 1617, c. 8; 1661, c. 38. *Ersk. B. i. tit. 4, § 16*; *Hume*, i. 386, ii. 75; *Tait's Justice of Peace, h. t.*, and *Tait on Duties of a Constable*; *Blair's Justice of Peace, h. t.*

The act 1 Geo. IV., c. 37, authorizes justices to appoint special constables, not only in case of actual tumult, riot, or felony, but also where they have information that any such tumult, &c., has taken, or is likely to take place, and may be reasonably apprehended, such special constables being authorized to act for such time, and in such manner, as the justices shall deem fit and necessary for the preservation of the public peace. Parties appointed under this act generally continue to act until they are removed, or their resignations accepted by the Quarter Sessions. The statute 2 and 3 Vict., c., 65, authorizes com-

missioners of supply to establish and maintain an efficient constabulary, or police force, in their respective counties, for the prevention of crime, and to levy an assessment for such purpose, in addition to the fund called *Rogue Money*. The statute 8 Vict., c. 3, provides for the appointment, by the Sheriff or Justices, of persons to act as additional constables and peace officers within the limits of public works—*e.g.*, railways and canals—in process of construction, and within a mile therefrom, with a view to repress the mischiefs arising from the violent and unlawful behaviour of the labourers at such works. See *Barclay's Digest*, which contains an abstract of the various statutes, and gives also the instructions framed by the present Lord Justice-General for the guidance of the constables of the county of Perth.

**Constitution, Decree of.** Every decree by which the extent of a debt or obligation is ascertained, is a decree of constitution; but the term is usually applied especially to those decrees which are requisite to found a title in the person of the creditor, in the event of the death of either the debtor or the original creditor. Thus, where the debtor dies, the creditor must obtain a decree, constituting the debt against the heir of the debtor, before he can proceed with diligence to attach the debtor's heritable or moveable estate, unless the heir chooses voluntarily to grant a new obligation in his own name for the debt; or unless he renounces the succession, in which last case a decree of cognition is pronounced. *Jurid. Styles*, 2d edit. vol. iii. pp. 328, 363. See *Cognitionis Causa. Bond of Corroboration. Adjudication*.

**Constitution;** means an ordinance, decision, regulation, or law, made by authority of any superior, ecclesiastical or civil. The constitutions of the Roman emperors had the authority of laws. See *Roman Law*.

**Constructure.** See *Contexture*.

**Consuetudinary Law.** Consuetudinary or customary law, in contradistinction to written or statutory law, is that law which is derived by immemorial custom from remote antiquity. Such is the common law of Scotland. *Stair*, B. i. tit. 1, § 16; *Ersk. B. i. tit. 1. § 43, et seq.* See *Common Law*.

**Consultation of Judges.** In cases of difficulty it occasionally happens that the judges of one Division of the Court of Session, consult those of the other Division; or the record and pleadings in the cause are laid before the whole judges for their opinion, on questions stated in writing. In such cases it is enacted, by 6 Geo. IV., c. 120, § 24, that, when consultations take place, "the judgment to be pronounced in the cause shall be according to the opinion of the majority of all the judges

so consulted, and shall bear that it is the judgment of the Division before which the cause depends, after consulting with the other judges." This is interpreted to mean the majority of the judges consulting and consulted. See *Shand's Prac.* 57, 957.

With the view of remedying the disadvantages arising from the judges being called upon to give opinions in cases without having heard the debate, the statute 13 and 14 Vict., c. 36, § 35, lays down the procedure to be adopted when one Division consults the other, as follows:—The judges of either Division, in any cause in which they are equally divided in opinion, may appoint it to be heard and judged by the Inner-House judges of both Divisions, either on any sederunt-day during session, or at any time during the sittings of the Lord Ordinary. The cause is thereupon heard before the judges of the Division before which it depends, with the addition of three judges of the other Division. The judgment must be according to the opinion of the majority; and the interlocutor bears to be the judgment of the Division before which the cause depends, after consulting with the other Division. If present, the Lord Justice-General presides. See *Session, Court of. Hearing.*

**Contempt of Court.** This term is generally applied to any disrespect or indignity offered to judges while sitting in judgment, or on account of their proceedings in their judicial capacity; including personal violence or indecorous expressions towards the court or its members, libellous attacks written or spoken against the judges or their mode of administering justice, and contemptuous or illegal disobedience to the orders of the court, or to the rules prescribed by the court for the conduct of business before it. Outrageous contempts, such as striking or threatening judges for their proceedings as such, or committing an assault in open court, are offences punishable either capitally or by very severe arbitrary pains; 1593, c. 173; 1600, c. 4. See *Beating of Judges.* Inferior acts of insult or contempt, although they may not fall under any statutory enactment, are nevertheless punishable at common law. The defaming of judges, or casting imputations upon the integrity of the court, are offences of this description; and if committed in the course of a depending process, or connected with a process which has been lately in dependence, they may be punished summarily *ex proprio motu* of the court to which the insult has been offered. See *Jamieson, A. S. 17–28th January 1815.* In like manner, every court must necessarily be vested with the power of inflicting punishment summarily, for all disorders, or acts of contempt, committed during the sitting of the

court. Where the contempt has not been committed in the immediate presence of the court, but has relation to a matter in dependence, or recently before the court, the proper form seems to be to bring the offence under the notice of the court by summary complaint at the instance of the public prosecutor. And in such cases, the punishment of censure, fine, or imprisonment may be inflicted. See *Lord Advocate v. Jamieson*, 1st Feb. 1822, 1 S. 285; *Lord Advocate v. Hay*, 1st Feb. 1822, 1 S. 288; *Stair, B. iv. tit. 37, § 8.* See also *Hume*, vol. i. p. 405, *et seq.*, vol. ii. p. 138, *et seq.*; *Alison's Princ.*; *Barclay's Sher. Court Prac.* 409, 419. See *Caption. Process.*

**Contexture;** is a mode of industrial accession, borrowed from the Roman law. It takes place "where things belonging to one are wrought into another's cloth, and are carried therewith as accessory." It is similar to construction, whereby, if a house be repaired with the materials of another, the materials accrue to the owner of the house, full reparation, however, being due to the owner of the materials. If the materials have been obtained *mala fide*, the person using them will be liable for their value, ascertained by the owner's oath *in litem*; or he may be prosecuted for theft, according to the circumstances under which he has acquired them. It would also appear, that where there has been *mala fides*, the former owner may estimate the materials *per pretium affectionis*. *Stair, B. ii. tit. 1, § 39; Bank, B. ii. tit. 1, § 17.* See *Adjunction. Accession.*

**Contingency of a Process.** "Where two or more processes are so connected that the circumstances of the one are likely to throw light on the rest, the process first enrolled is considered as the *leading process*, and those subsequently brought into court, whether before the same Division or not, may be remitted to it *ob contingentiam*;" *Ivory's Form of Process*, vol. ii. p. 51. If both cases come into court the same week, that enrolled before the senior Lord Ordinary is deemed the leading process, and the other is remitted to his Lordship, and belongs to the same Division with the leading cause. If cases having a contingency are enrolled the same week before the same Ordinary, and marked for different Divisions, his Lordship determines to which Division they shall belong; *A. S. 24th Dec. 1838.* The remit is usually made on a simple motion at the bar. The effect of remitting processes in this manner is merely to bring them before the same division of the court, or the same Lord Ordinary. In other respects they remain distinct; the pleadings may be unconnected; and no step taken in the one will prevent the other from sleeping. Where an action has been brought into the

Court of Session, and a process between the same parties in relation to the same subject-matter is depending in an inferior court, it is usual to bring the case from the inferior court into the Court of Session, by an advocacy *ob contingentiam*, which is competent at any stage of the inferior court process; 50 *Geo. III.*, c. 112, § 36. See also 48 *Geo. III.*, c. 151, § 9; *Shand's Prac.* 501; *Shaw's Digest*, 407. See *Advocation. Conjoining.*

**Contingent Debts**; are debts due provisionally, in a certain event. Creditors in such debts are, by the law of Scotland, entitled to rank upon the estate of a bankrupt, and formerly they had security found for the payment of their debts, proportionally with those of the other creditors, on the emerging of the contingency. A discharge obtained under the sequestration statute operates against such debts, as well as against debts due at the time of the bankruptcy, although it would appear that in England the rule is different; *Bell's Com.* vol. i. p. 315, 5th edit. A contingent creditor, however, is not entitled to concur as a creditor in the petition for sequestration, or to vote in the election of the trustee, or in the other steps of the procedure until his claim shall be valued; 19 and 20 *Vict.*, c. 79, § 14.

When the claim of a creditor depends upon a contingency which is unascertained at the date of his lodging his claim, he is not entitled to draw a dividend in respect of such contingent debt; but on applying to the Sheriff or the trustee, a value is put on the debt as at the date of the valuation, and the creditor votes and draws dividends in respect of such value, and no more; *Ib.* § 53.

**Contingent Legacy**; is a legacy, the existence of which depends upon an uncertain future event, as where a legacy is given, provided the legatee shall arrive at a certain age. See *Conditional Obligation. Legacy.*

**Continuation of the Diet.** The summons in a civil process authorizes the defender to be cited to appear on a certain day, "with continuation of days," and the summons may be called in Court, either on the day named, or within year and day of the day of comparance, unless it be forced on by protestation. (See *Calling of a Summons. Protestation.*) But in a criminal prosecution the diet is peremptory, and the libel must be called on the precise day, and, in some way or other, disposed of; otherwise the action falls, and cannot be resumed. The diet may be continued, however, by an act of Court, made in the presence of a single judge, and in the absence of the parties. Such an act is not even signed by the judge, but merely entered in the books of adjournal by the clerk, in the judge's presence. The diet must be continued, not indefinitely, but to a fixed day. So, when

after a verdict of guilty on a charge of murder, the judges on circuit certified the case to the High Court, with reference to a question as to the admissibility of evidence, but did not name a diet for the cause being taken up, it was held that, on account of the generality of the certification, the diet had fallen, and the panels were accordingly discharged; and subsequently a new indictment and trial were held incompetent, in respect that the panels had already tholed an assize; *Frasers*, 9th June and 12th July 1852; 1 *Irvine*, pp. 1, 66. *Stair*, B. iv. tit. 2, § 2, and tit. 38, § 2; *A. S.* 8th July 1831; *Hume*, ii. 263, 275, 417; *Bell's Notes*. See *Diet. Criminal Prosecution.*

**Contra non Valentem agere non Currit Præscriptio**; a Roman law maxim, received in the law of Scotland, importing that prescription does not operate against one under a legal incapacity to interrupt it. *Ersk.* B. iii. tit. 7, § 37. See *Prescription. Citation.*

**Contraband Goods**; are those goods which are imported to this country, or exported from it, without paying the duties imposed by law. Contracts for smuggling, or for the delivery of goods known to be contraband, found no right of action; and no party participant in the smuggling, or by whom the contraband goods have been delivered in this country, can legally claim under the contract. But foreigners, or even native Scotchmen settled abroad, selling and delivering goods which are afterwards smuggled into this country, have action here for the price, even although the seller suspected or knew that the buyer meant to smuggle the goods into Britain, provided the seller was not himself accessory to the smuggling; *Cullen and Company*, 15th May 1793, *Fac. Coll.*, *Mor.* p. 9554; *Reid*, same date, *Mor.* p. 9555. Where the buyer of contraband goods knows them to be contraband, he has no claim for delivery, or no action of damages for breach of contract, the maxim being, that, in all demands upon illegal contracts, *Potior est conditio possidentis et defendentis*. It seems, however, to have been thought at one time, that where a bill was granted for the price of contraband goods, action or diligence was competent on the bill; but more recently action has been refused, where the bills were in the hands of the original parties, or of their trustees. See *Stair*, B. ii. tit. 2, § 14; *Bell's Com.* vol. i. p. 305, 5th edit.; *Bell's Princ.* § 42, *et seq.*; *Bell's Illust.* § 42, and *Mor. Dict. voce Pactum illicitum*, p. 9533, *et seq.*, and *App.* same title, No. 1.

**Contract.** A contract is "the voluntary agreement of two or more persons, by which something is to be given or performed upon one part, for a valuable consideration, either present or future, on the other part;" *Ersk.* B. iii. tit. 1, § 16. Consent of parties being

implied in all contracts, persons incapable of consent, such as idiots, pupils, persons absolutely drunk, &c., cannot contract. Persons who have been compelled to give their consent by force or fear, or who have been induced to consent by means of fraud or deception, cannot be said to have legally consented; and all contracts, therefore, exposed to such objections, are null and reducible. In like manner, error in the essentials,—*e. g.*, either in regard to the contracting parties, or the subject-matter of the contract—will vacate the agreement. A contract, by which the parties, or any of them, become bound to perform what is naturally impossible, or to do any illegal act, or in which stipulations *contra bonos mores* are inserted, can found no action; and the contracting parties are neither liable in performance nor in damages for non-performance. But all facts, in themselves legally possible, are the subjects of obligation, although beyond the power of the contracting party, and he is liable in damages if he cannot perform; *Ersk. B. iii. tit. 3, § 83, 84.* Things exempted from commerce, either by nature, by destination, or by statute, cannot be the subject of obligation. The *nominated* contracts in Scotch, as in the Roman law, are loan, commodate, deposit, pledge, sale, permutation, location, society, and mandate,—for which see separate articles. There are also in our law, as well as in the Roman law, a great variety of contracts, which, not having been distinguished by special names, are termed *innominate*, all of which are obligatory on the contracting parties from their date; so that neither party can resile, even although one has, and the other has not, performed his part of the contract; *Ersk. B. iii. tit. 1, § 35; Bank. vol. i. p. 328.* Breach of contract subjects the party guilty of it not only to an action for enforcing it, but also to a claim for damages. *Stair, B. i. tit. 10; More's Notes, p. lxii. et seq.; Bell's Com. vol. 1. p. 293, et seq. 5th edit.; Bell's Princ. § 5, 15, et seq.; Bell's Illust. p. 1, et seq.* For an explanation of the different degrees of diligence prestable under contracts, see *Culpa.* See also *Damages. Feu-Contract. Lease. Marriages, &c.*

**Contract of Marriage;** is the technical name given to a written contract entered into between parties, who are either about to become husband and wife, or actually married to each other. In the one case, it is termed an antenuptial contract, and in the other a postnuptial contract.

1. *Antenuptial Contract.*—The object of this contract generally is, to make some modification on the legal rights of the parties and their children, and more effectually to guard against the risk of the husband's insolvency.

An antenuptial contract is held to be strictly an onerous deed, by which either a real security or a *jus crediti*, may be constituted in favour of the wife or children, which will, in the one case, give them a preference, and, in the other, entitle them to rank as creditors. With regard to the wife.—Instead of her legal provisions of terce and *jus relictæ*, the husband may become bound to infest her in liferent in certain lands; and infestment on the contract will render her right real. Lands thus set apart for the wife are called *locality lands*: or he may secure her by infestment in an annuity, which is termed a *jointure*: or he may bind himself to invest money in real security for her behoof, or to provide her in a certain annuity. All which obligations, if expressed with sufficient precision, will vest a *jus crediti* in the wife, which, in case of the husband's insolvency before they are made real by infestment, will entitle her to rank as a creditor for such provisions, or if previously realized by infestment, will give her an absolute preference. By contract of marriage, the *jus mariti* may be excluded as to a particular subject, but it cannot be excluded *per aversionem*; *e. g.*, an annuity may be purchased by the husband for the wife for her aliment, or a bond may be taken, payable to her, excluding the *jus mariti*, provided this is done by an antenuptial deed; for, after marriage, all such provisions between husband and wife are revocable as donations. The terce is excluded by a conventional provision to the wife, unless the contrary be expressed; 1681, c. 10. The rule is different with regard to the *jus relictæ*, which requires an express exclusion, even where conventional provisions are made. *Bell's Com. i. 636, 5th edit.*

Provisions in favour of children, in an antenuptial contract, are also held to be onerous deeds; but it depends entirely upon the manner of expressing the provisions, whether they shall confer either a preference or a *jus crediti*. In the ordinary case, the contract makes the children merely heirs, having only an expectancy, or *spes successioni*; but, on the other hand, it is not possible, by means of a contract of marriage, whether antenuptial or postnuptial, to deprive the children of the marriage of their legal provision of *legitim*, without providing them with an equivalent. And even in that case, they will have an option either to accept the conventional provision, or to reject it, and insist for the *legitim*. See *Legitim*. Where the property is settled on the children *nascituri* in fee, or the provisions made payable after the death of the father, the children cannot compete with onerous creditors, although they may reduce gratuitous alienations to the prejudice of their provisions. In order to confer

a *jus crediti*, the children must be vested with the character of creditors, during their father's life, which may be done by an obligation to pay the provisions, or the interest on them, at a term which either must or may happen during the father's life. Where it is intended to give the heir or children a preferable right, to be effectual against onerous creditors, it may be done by the father in an antenuptial contract, binding himself not to contract debt, or to infest the heir against a determinate day, or by a clause restricting his own right to a mere life; and such obligations, though granted *liberis nascituris*, when secured by proper diligence, and perfected by sasine, found a preference against all posterior deeds of the father. Where the husband or wife's titles are not complete, or where any other obstacle prevents the execution of a regular antenuptial contract, antenuptial marriage articles may be entered into, under which a *jus crediti* may be effectually vested in the parties; and any deed after marriage in implement of these articles, if it does not fall within the bankrupt statutes, and if it be otherwise unobjectionable, will be effectual. *Ersk. B. iii. tit 8, § 40.*

2. *Postnuptial Contracts.*—After marriage, the wife and children can take nothing in competition with his creditors, which the husband cannot legally bestow. Postnuptial contracts must always be construed with reference to this principle, in so far as creditors are concerned; and, in so far as regards the husband and the wife, they are exposed to the risk of revocation by either of the parties, as *donationes inter virum et uxorem*. See *Ersk. B. i. tit. 6, § 29*. As to the wife's provisions under such a contract, it has been held, in questions with creditors, that a moderate provision granted to her during her husband's solvency will be effectual; and to the extent of a moderate aliment, even after the contraction of debt by the husband. And as to children, it is held that provisions to them made in a postnuptial contract, after contraction of debt, are ineffectual, although granted in implement of the natural obligation to aliment. Where insolvency does not follow, and where the provisions are reasonable and proper, the rights of the parties (with the exceptions above-mentioned) may be effectually settled in a postnuptial contract of marriage. See *Jeffrey v. Campbell's Children*, 24th May 1825, 4 S. & D. 32. It may be proper to observe here, that where a separation has taken place between the husband and wife, without a dissolution of the marriage, whether the separation has been judicial or by decree-arbitral, or by voluntary contract of separation, the husband may, in such a

case, vest his wife either with a *jus crediti*, or a preference for her aliment or other stipulated provision, according as his obligation is personal, or completed by infestment in security, provided such provision is made during solvency. The provisions of such contracts are of course revoked by a reconciliation; *Bell's Com. vol. i. p. 641, 5th edit.* The framing of the contract of marriage, so as to provide for the various events contemplated by that deed, and to secure the fulfilment of the different stipulations, is one of the most important and difficult duties of a conveyancer; and, as it is a duty requiring much professional circumspection, it may not be improper to close the present short notice of this important deed by the following references to authorities on this subject:—*Stair, B. ii. tit. 3, § 41; Ib. tit. 6, passim; Ib. B. ii. tit. 5, § 19; Ib. tit. 8, § 45; Ersk. B. i. tit. 6; Ib. B. iii. tit. 3, § 30; Ib. tit. 8, § 38, et seq.; Bank. B. i. tit. 5, § 1; Bell's Com. vol. i. p. 636, et seq., 5th edit.; Bell's Princ. § 1941, et seq.; Jurid. Styles, 173; Menzies's Lectures.* See *Marriage*.

**Contract of Copartnership.** See *Society*.

**Contrario Actio.** See *Actio directa*.

**Contravention;** may be defined generally to be any act done in violation of a legal condition or obligation, by which the contravener is bound. The term, however, is most frequently applied to an act done by an heir of entail in opposition to the provisions of the deed, whereby a forfeiture of the contravener's right may be incurred; or to acts of molestation or outrage committed by a person in violation of lawborrows, whereby the contravener exposes himself to the penal action of *contravention of lawborrows*. *Stair, B. i. tit. 9, § 30, and B. iv. tit. 48; Jurid. Styles, 2d edit. vol. iii. pp. 96, 190.* See *Tailzie. Lawborrows*.

**Contribution;** takes place where several parties pay their share of a common expense. The term, in a legal sense, is generally applied to contributions made for equalizing the loss arising from sacrifices made for the common safety in sea-voyages, where the ship is in danger of being lost or captured. The basis of our law upon this subject, is the celebrated *Lex Rhodia de jactu*, the natural equity of which has led to its adoption in the maritime law of most European states. The general rule in this country seems to be, that where any part of the ship or cargo has been sacrificed to save the rest, the loss is to be adjusted by a contribution from all who have partaken of the benefit. In this contribution, or general average, as it is also termed, the most valuable goods, though their weight should have been incapable of putting the ship in hazard, such as diamonds or other

precious stones, are to be estimated at their just price, on the ground, that they could not have been saved but for the ejection of the other goods. Persons on board, however, bear no share in the contribution, *quia liberi corporis nulla est aestimatio*. The ship's provisions are also exempted from contribution; but wearing apparel is estimated, and pays in proportion to its value. In this estimation, the goods ejected are valued at prime cost, and the goods saved, at the price they would bring at the port of arrival—freight, duties, &c., deducted. If a mast has been cut away, or an anchor parted with, in order to save the ship, contribution takes place; but if they have been lost in a storm, the loss falls on the ship alone. In order to found the right to contribution, it is necessary that the goods shall not have been rashly or unnecessarily sacrificed, but after such consultation as the exigencies of the occasion may admit of; and in case of difference of opinion amongst the crew as to the necessity of the sacrifice, a majority shall determine. In such a case, the opinion of the master, where he had no adverse interest, would be entitled to great weight. In all cases in which a part either of the ship or cargo has been sacrificed for the common benefit, an account of the circumstance under which it happened ought to be entered in the log-book, with a specification of the articles thrown overboard, or otherwise destroyed, to which affidavit should be made at the first port, otherwise the presumption will be against the master and crew. *Ersk. B. 3, tit. 3, § 55; Bank. i. 233; Bell's Com. i. 580, 5th edit.; Princ. § 437*. See also *Salvage. Collision of Ships. Jactus Mercium*.

**Contributory.** See *Joint-Stock Company*.

**Contumacy;** is a wilful disobedience to any lawful summons or judicial order. In a criminal process, the punishment of contumacy in the accused person is sentence of fugitation. In a civil action, the only consequence of the defender's contumacy, in refusing obedience to the citation, is, that the judge will take cognizance of the cause, and decern in his absence. *Stair, B. iv. tit. 3, § 27, et seq., and tit. 38, § 27; Ersk. B. iv. tit. 1, § 7*. See *Fugitation. Decree in absence. Contempt of Court*.

**Conventicle;** in English law, a private meeting or assembly for the exercise of religion; first used as a term of contumely for the meetings of Wickliffe above 200 years ago; and now applied to the meetings of dissenters from the Established Church. *Tomlin's Dict. h. t.; Wharton's Lex. h. t.*

**Convention of Estates.** In Scotland, before the Union, a convention of the estates of the kingdom was in use to be summoned, for the purpose of imposing a taxation to answer a present exigency, or upon any special

occasion requiring immediate deliberation. These conventions consisted of any number of the estates that might be suddenly called together without the necessity of a formal citation, such as was required in summoning a regular parliament. The power of the convention was limited to that particular business for which it had been assembled; and, regularly, the estates could be so convened only by royal authority; but, in case of absolute necessity, they met without it, as in the convention for settling the government at the Revolution of 1688. *Ersk. B. i. tit. 3, § 6; Bank. vol. iii. p. 449; Mackenzie's Inst. B. i. tit. 3, § 5*. See *Parliament*.

**Convention of Royal Burghs.** By the act 1487, c. 111, the royal burghs are ordered to meet once a-year, by commissioners, to treat of the "welfare of merchandise, the gude rule and statutes for the common profite of burrows, and to provide for remeid upon the skaith and injuries sustained within the burrowes." These powers are renewed by later statutes; and accordingly, commissioners from each burgh meet annually in Edinburgh, to treat of the subjects committed to their charge. The powers, however, of this convention were never understood to be final or uncontrollable; consequently, its deliberations excite little interest, and are, in general, directed to matters of no public importance. See on this subject, *Ersk. B. i. tit. 4, § 23; Bank. vol. ii. p. 579; Bell's Princ. § 2175; Hume, i. 400; ii. 135; Report by the Commissioners on Municipal Corporations (1835), p. 52*.

**Conventional Obligations;** are obligations resulting from the special agreement of parties. The term is generally used in contradistinction to *natural or legal obligations*, which arise from the operation of the law itself, independently of contract. *Stair, B. i. tit. 9; Bell's Princ. § 7; Bell's Illust. p. 1*. See *Obligations. Contract*.

**Conveyance;** is a deed executed according to all the forms required by law, and by which a right is either created, or transferred, or discharged.

**Conveyancing.** The literal meaning of this term is, the preparing of conveyances; and, in professional language, the word *conveyancer* is sometimes used as contrasted with that of *agent*; the one being regarded as a preparer of deeds, and the other as a conductor of law-suits. But, in its larger acceptation, the term conveyancing not only includes the preparation of all voluntary deeds, constituting, transmitting, or extinguishing rights or obligations, but extends to those forms prescribed by law, for accomplishing the same objects, when the party is either unwilling or unable to do so by a voluntary act. The object of voluntary written deeds, generally



speaking, is to express the purpose of the parties, or to impose obligations on them in apt terms, so as to insure their being carried into full effect; and, as practice and adjudged cases have attached certain determinate meanings to many of the terms employed in deeds, it is necessary that a conveyancer should be intimately acquainted, not only with the various deeds themselves, and the clauses peculiar to each, but that he should be fully aware of the legal import of every clause or expression which he may have occasion to use in expressing, in technical and formal language, the intentions of the parties. In Scotland, as in every other country of Europe, the forms of the deeds which relate to land rights have been very much modified by the feudal system; and, by a concurrence of circumstances, partly accidental, the feudal forms have, in this country, been combined with a system of records, remarkable both for its completeness and utility. The titles to landed property in Scotland have thus attained a very high degree of security. The forms of Scotch deeds concerning moveable property are, in general, simple and natural; and the authentication or testing of all formal deeds, whether relating to heritable or moveable property, is regulated by statutory enactments, calculated, as far as seems practicable by human ingenuity, to guard against fraud or interpolation. These, however, as well as the forms of voluntary and judicial conveyancing, are subjects which are necessarily treated of in separate articles. See *Ross's Lect.* i. 147; ii. 1, *et seq.* See also *Charter. Disposition. Sasine. Bond. Assignment. Adjudication. Ranking and Sale. Records. Registration. Testing Clause.*

**Convict**; is a person found guilty of a crime. Convictions generally proceed on the verdict of a jury; but our law also admits of summary convictions, without the intervention of a jury, in certain circumstances, as in cases of contempt of Court, of attempts to corrupt or withhold evidence, of malversation by persons intrusted with the criminal police of the country, of certain offences against the revenue laws provided for by special statute, and in proceedings before sheriffs, police magistrates, and justices of the peace for minor offences. See *Hume*, vol. ii. p. 138, *et seq.*

**Convocation**; in England, an assembly of the representatives of the clergy, to consult of ecclesiastical matters, of which there is one in each province. In the province of Canterbury, it consists of two houses, an upper and lower; in that of York, of one house only. From the judicial determinations of convocation, an appeal lies to the Queen in Council. *Tomlin's Dict.* h. t.

**Convocation of the Lieges.** See *Mobbing.*

**Convoy**; is the name given to the ship or ships of war, appointed by Government, to accompany merchant vessels during war, as a protection against capture. During the wars with France, merchant ships were prohibited by statute to sail without convoy. During war, the obligation to sail with convoy is an implied condition of the contract of affreightment; and, in case of insurance, it is a warranty in the contract with the underwriters. It is sufficient implement of this obligation if the vessel join the convoy at the usual place of assembling, and accompany it as far as it goes on the destined voyage, provided it is the only convoy appointed for vessels destined to that port. If, however, the convoy have sailed, the vessel cannot legally endeavour to overtake it; although, if the vessel have sailed with convoy, and is driven back, she need not wait for new convoy, but may proceed on the voyage. The convoy must be the naval force appointed for the purpose, and the vessel must continue with it, unless driven off by stress of weather or other inevitable accident. It is not sufficient to sail with any ship of war about to undertake the same voyage, unless such ship be also appointed a convoy. See *Bell's Com.* vol. i. p. 555, 5th edit.; *Bell's Princ.* § 408; *Bell's Illust.* § 408.

**Co-obligants**; though bound *in solidum* to the creditor, are liable *inter se*, only *pro rata*; and any one of them paying more than his share is entitled to relief from the rest. *Bell's Princ.* § 62; *Illust.* ib. See *Conjunctly and Severally. Correi debendi, and authorities there cited.*

**Copartnership**; is a contract, by which the several partners agree concerning the communication of loss or gain arising from the subject of the contract. See *Society.*

**Copartner**; is a member of a copartnership. He may be either an ostensible partner known to the public as such, or a latent, dormant, or *sleeping partner*, as he is colloquially termed; and in either case he is liable in all the legal obligations arising out of the contract of society or copartnership. See *Society.*

**Copyhold**; is a tenure in English law, for which the tenant has nothing to show but the copy of the rolls made by the steward of the lord's court, on the tenant being admitted to the possession of the subject as a part of the manor. It is also called *base tenure*. Copyhold property cannot now be created, for the foundation on which it rests is, that the property has been possessed, *time out of mind*, by copy of court roll, and that the tenements are within the manor. *Tomlin's Dict.*; *Wharton's Lex.* This tenure is unknown in the law of Scotland. *Ross's Lect.* ii. 479.

**Copyright**; is the exclusive right of print-

ing and publishing any literary work; extended also to engravings and music. *Jurid. Styles*, 2d edit. vol. iii. p. 104. See *Literary Property*.

**Corn.** See *Growing Corn*.

**Cornage**, *Horn-geld*, *Newt-geld*, or *Neat-geldt*; an ancient English tenure, the service of which was to blow a horn when any invasion of the Scotch was perceived. *Tomlins' Dict. h. t.*; *Camb. Brit.* 609.

**Coroner.** In England, the coroner is an officer who possesses both judicial and ministerial authority. In his judicial capacity, he takes inquisitions in cases of violent deaths: it is his duty also to inquire after the lands and goods of murderers, treasure trove, wreck of the sea, deodands, &c. The coroner acts ministerially in the execution of the king's writs, when the sheriff is disqualified by relationship to the parties, or interest in the suit, or otherwise. Coroners are chosen by the freeholders in the county courts; and four are usually named for each county; *Tomlins' Dict.* They may also be appointed for districts within counties; 7 and 8 *Vict.*, c. 92. County coroners may appoint deputies; 6 and 7 *Vict.*, c. 83. Even boroughs having a separate quarter session has a coroner; 5 and 6 *Will. IV.*, c. 76. See *Jervis on Coroners*; 2 *Steph. Com.* 619. The office of coroner is said to have been known in Scotland formerly. See *Hume*, vol. ii. p. 24, note.

**Coroner, Crowner.** According to Skene the coroner is he who inquires by an inquest concerning murder and slaughter. Skene defines this word as one of those which occurs in the *Regiam Majestatem*, from which it may be inferred that the coroner was a functionary at one time known in the practice of Scotland. This, however, is doubtful. See *Regiam Majestatem*; see also *Skene, h. t.*

**Corpora of Moveables**; are moveable subjects which may be seen and felt, as corn, furniture, &c., or cattle, which move of themselves. In speaking of moveable property, the term *corpora* is used in contradistinction to *nomina debitorum*, or obligations of debt, which, in our law, also fall under the denomination of moveables. *Ersk. B. ii. tit. 2, § 1, et seq.*

**Corporation or Community**; is a fictitious person or body politic, enduring in perpetual succession, with power to take and grant, and to sue and to be sued. See *Community*.

**Corporeal and Incorporeal.** Both by the Roman law and by the law of England, the subjects of rights are divided into corporeal and incorporeal. Corporeal are such as fall under the senses, and may be seen and handled, as the *ipsa corpora* of things moveable or immoveable. Incorporeal, are things not subject to the senses, but which exist in law, as

rights and obligations of all kinds. This distinction is not much regarded in the law of Scotland, according to which, the great division of rights, and the subject of rights, is into heritable and moveable. *Ersk. B. ii. tit. 2, § 1, et seq.*; *Bell's Princ.* § 1455, 1471. See *Heritable and Moveable*.

**Corpse.** See *Dead Body*.

**Corpus Delicti.** In the criminal law of Scotland, the *corpus delicti* is the substance or body of the crime, or offence charged, with the various circumstances attending its commission, as specified in the libel. It follows, that before a conviction can take place, the *corpus delicti* must be clearly made out. Thus, for example, if a person be charged with murder, it must be proved that the deceased came by his death in consequence of the injury libelled, otherwise the *corpus delicti* will not be established. *Hume*, i. 115; ii. 320, 391.

**Correi Debendi.** Two or more persons, who are bound as principal debtors to pay or to perform, are termed in the Roman law *correi debendi*. Where the obligation is indivisible, e.g., an obligation for the delivery of a special subject, the co-obligants are bound *singuli in solidum*; but where the obligation is to deliver a certain quantity of corn or money, the obligation may be divided into parts, and each obligant can be sued only for his own share, or *pro rata*, unless the obligants are expressly taken bound conjunctly and severally. From this rule, however, there are excepted—1st, Contracts importing a co-partnership; and, 2d, Bills of exchange; in both of which cases the co-obligants are bound *singuli in solidum*, whether the obligation be so expressed or not. By the Roman law, every one of several cautioners became bound *in solidum*; and where all the cautioners remained solvent, any one of them who was sued had the equitable remedy of the *beneficium divisionis*. But where, for example, all the cautioners but one became insolvent, the solvent cautioner might be sued for the whole debt. This could not happen with us, because, if the cautioners were bound severally, they would only be liable *pro rata*; and if bound conjunctly and severally, they would be liable *singuli in solidum*, and could not claim the *beneficium divisionis*. *Stair*, B. i. tit. 9, § 9, and tit. 18, § 20; *More's Notes*, pp. lvi. and cxviii.; *Ersk. B. iii. tit. § 74*; *Kames' Princ. of Equity* (1825), 78; *Jurid. Styles*, 2d edit. vol. ii. p. 371, 87; *Ross's Lect.* i. 76. See *Conjunctly and Severally*.

**Corroboration, Bond of.** See *Bond of Corroboration*.

**Corruption of Judges.** By a variety of acts of the Scotch Parliaments, and, in particular, by 1579, c. 93, and 1540, c. 104, judges, whether of the Court of Session, or

in inferior courts, who, through corruption or partiality, use their authority as a cover for injustice or oppression, are punishable with confiscation of moveables, loss of honour, fame and dignity, besides an arbitrary punishment in the person. See *Hume*, i. 407.

**Corruption of Blood.** When a person has been attainted of treason, his blood is said to be corrupted; and neither his children nor any of his blood can be heirs to him or any other ancestor. If the attainted person be a nobleman, he and his posterity are by the attainder rendered base and ignoble. Corruption of blood cannot be entirely removed, except by act of Parliament; for the king's pardon does not restore the blood, so as to make the attainted person "capable either of inheriting others, or being inherited himself by any one born before the pardon." *Stair*, B. iii. tit. 3, § 37; *More's Notes*, p. cccxii.; *Bell's Princ.*, § 1645; *Tomlins' Dict.* See also *Bank.* vol. ii. p. 275.

**Corvinum Pactum.** See *Pactum Corvinum*.

**Costs of Suits.** See *Expenses*.

**Council and Session.** The Judges or Senators of the College of Justice are also called Lords of Council and Session. The "*Books of Council and Session*" is the name given to the records in which deeds, and other writs competent to be inserted in the record of that court, are registered in virtue of the clause of registration. See *Registration*. *Session, Court of*.

**Council Privy.** See *Privy Council*.

**Councillor of a Royal Burgh.** The municipal affairs of royal burghs are intrusted to the direction of a provost, magistrates, dean of guild, and councillors. See *Burgh Royal*.

**Counsel;** an advocate or barrister. A counsel is not responsible for the result of the advice he gives, provided he gives it honestly and to the best of his judgment; *Bank.* vol. iii. p. 76. By the criminal law of Scotland, the accused party is allowed the benefit of counsel, who, if not retained by the party, will be nominated by the Court to undertake the defence; an advantage which, except in cases of treason, was not enjoyed in England prior to 1836. 6 and 7 *Will. IV.*, c. 114; *More's Notes to Stair*, p. cccxcv.; *Hume*, i. 5, and ii. 283; *Bell's Princ.* § 2051. See *Advocate. Barrister*.

**Count and Reckoning;** is the technical name given to a form of process, by which one party may compel another judicially to account with him, and to pay the balance which may appear to be due. The summons in this process calls on the defender to produce a full statement of his accounts and intrusions, so that the balance may be ascertained; and it also concludes for a random

sum, as the amount of the supposed balance: for which sum a decree will be given, in case the defender fails to appear, or to render the statement required. The Act of Sederunt 22d Nov. 1711, makes various regulations for expediting the discussion of processes of this description in the Court of Session; but according to the present practice, such actions proceed according to the ordinary routine; *A. S. 22d Nov. 1711*, § 2. In actions of count and reckoning a remit to an accountant is usually made. See *Ivory's Form of Process*, vol. i. p. 270, *et seq.*; *Jurid. Styles*, 2d edit. vol. iii. pp. 34, *et seq.* 50, 109, 113; *Shand's Prac.* 738, and note to p. 740. See *Process, Record*.

**Counterpart.** In England, when the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are counterparts. *Tomlins' Dict. h. t.*; *Wharton's Lex.*

**County.** By 1 Vict., c. 39, it is enacted, that the word "county" occurring in any existing or future act shall comprehend and apply to any stewardry in Scotland, excepting where otherwise specially provided, and excepting cases in which there is anything in the subject or context repugnant to such meaning and application.

**County Election.** See *Reform Act*.

**Court.** The Courts of Scotland have been divided into superior, inferior, and mixed. The Court of Session, in which the Court of Exchequer is now merged, is the Supreme Civil Court. Its jurisdiction in all civil and revenue causes is universal over the whole kingdom; the sentences of all the inferior courts of Scotland being subject to its review, unless where special statute interposes. The Court of Justiciary is the Supreme Criminal Court. Inferior courts are those of which the sentences are subject to the review of one or other of the Supreme courts, and whose jurisdiction is confined to a particular territory, as the Sheriff-court, Bailie-court, Justice of Peace court. The courts formerly possessed of a mixed jurisdiction were the High Court of Admiralty, the Commissary Court of Edinburgh, both of which had an universal jurisdiction over Scotland, by which they reviewed the decrees of inferior admirals and commissaries; but as their own decrees were subject to the review of the Courts of Session or Justiciary, they were in that respect inferior courts. These two courts are now abolished. *Ersk. B. i. tit. 2, § 5 and 6*; *Bell's Princ.* 4th edit., art. 2205, *et seq.*; *Shaw's Digest*, tit. *Jurisdiction*. See *Admiralty. Commissary Court*.

**Court of Session.** See *Session, Court of*.

**Court of Justiciary.** See *Justiciary Court*.

**Court of Exchequer.** See *Exchequer*.

**Court of Admiralty.** See *Admiralty*.

**Court-Martial**; is a court for trying the military offences of officers, whether naval or military, and of soldiers, and of sailors in the royal navy. Military Courts-Martial are either regimental or general. The latter must consist of at least thirteen judges, all commissioned officers, the president being a field-officer. The jurisdiction of these courts is limited to points of military discipline; e.g., mutiny, desertion, neglect of duty, beating or insulting an officer or fellow-soldier, &c. In all other matters, both officers and soldiers are amenable to the ordinary courts of law. No capital punishment can be inflicted by a military Court-Martial, unless nine of the judges present shall concur. Where these courts do not exceed their powers, no appeal lies to any other court; the only remedy resting with the king, to whom their sentences are reported, before they are promulgated. But, if they exceed their powers, the party injured may obtain redress in the Civil Court. The rules by which military Courts-Martial are to be guided are explicitly stated in the annual Mutiny Act and the Articles of War; and the laws in relation to naval Courts-Martial were reduced into one act; 22 *Geo. II.*, c. 33, explained and amended by 19 *Geo. III.*, c. 17. See also 24 *Geo. III.*, st. 2, c. 56; 37 *Geo. III.*, c. 140; 55 *Geo. III.*, c. 156; and 56 *Geo. III.*, c. 5. See on this subject, *Tytler's Essay on Military Law*; *Adyes' Treatise on Courts-Martial*; and *M'Arthur on Naval Courts-Martial*; *Wickman on Naval Courts-Martial*; *Simmons' Prac. of Courts-Martial*.

**Courtesy or Curiality.** The courtesy of Scotland, as it is termed, is a liferent conferred by the law, on the surviving husband, of all the heritage in which his deceased wife died infest, as heir to her predecessors. It is essential to the existence of this right—1. That there shall have been a living child born of the marriage, and heard to cry, otherwise courtesy is not due, however long the marriage may have subsisted; 2. That the child shall be the mother's heir. Thus, if there be a child of the wife in existence by a former marriage, who is her heir, courtesy is not due to the second husband, while such child exists, although there be also children of the second marriage. Hence, it has been said, that courtesy is due to the surviving husband, rather as the father of an heir than as the widower of an heiress. In order to confer the right, however, it is not necessary that the child survive: it is enough that it was once in existence, although it should have died immediately after its birth. The heritage, to which courtesy extends, is that to which the wife succeeds as heir of line, tailzie,

or provision, to her ancestor, whether the succession opens to her before the marriage or during its subsistence. But it does not extend to conquest; that is, the heritage acquired by purchase, donation, or other singular titles, unless where the heritage has been put forward to the wife by her ancestor *præceptione hæreditatis*, in which case the courtesy extends to the property so put forward; *Primrose*, December 10, 1771, *Fac. Coll., Mor. App. Courtesy*, No. 1. Burgage property also falls under the courtesy, although it is excluded from terce. The wife's sasine is the measure of the courtesy; hence any real burden or infestment, preferable to her sasine, excludes the courtesy; and as the husband enjoys the liferent of the wife's estate *titulo lucrativo*, he is considered as her temporary representative, and, as such, is liable not only for all annual burdens affecting the lands, but also for the current interest of her personal debts while his rights subsist, in so far, at least, as he is *lucratus*. But he will have recourse against the wife's executors, or her heirs succeeding in such property, as does not fall under the courtesy, for the personal debts which he may thus pay. In this respect, courtesy differs from the widow's terce, which is in no degree affected by the husband's personal debts. The two rights also differ in this, that a widow, whose right of terce has been declared by service, transmits to her executors the right to receive the rents falling under the terce, and not drawn during her life; whereas, if a husband has not exercised his right of courtesy during his life, by drawing the rents, his executors will have no right to receive them; the courtesy being held as a privilege personal to the husband, who will be understood to have renounced it in favour of the heir, if, during his life, he has suffered him to draw the rents. The courtesy vests in the husband *ipso jure*; and, immediately on the wife's death, he may enter into possession of her lands, without service or any other legal formality; and, in virtue of this right, under the former election law, he enjoyed, not only during the marriage, but after the wife's death, the right of electing and being elected to Parliament on her freehold; 1681, c. 21; 12 *Anne*, c. 6, § 5. But it has not been decided whether a liferenter by courtesy is entitled to any of the casualties of superiority. It would rather appear, however, that as the person entitled to those casualties must be infest, the husband who is not infest can have no right to them under the courtesy; but he is entitled to the feuduties, although these do not fall under terce. *Stair*, B. ii. tit. 6, § 19; *More's Notes*, clxxxvii. *et seq.*; *Ersk.* B. ii. tit. 9, § 52, *et seq.*; *Ersk. Princ.* 12th edit. 244; *Bank.* i. p. 663; *Bell's*

*Com.* vol. i. p. 60, 5th edit.; *Bell's Princ.* § 1065, *et seq.*, 1948; *Sandford on Heritable Succession*, vol. ii. p. 117; *Kames' Princ. of Equity* (1825), 86. See *Reform Act. Terce.*

**Covenant**; is defined, in the law of England, the agreement or consent of two or more, by deed in writing, sealed and delivered, whereby one of the parties promises to the other that something is or shall be done. The promiser is called the *covenantor*, the other party the *covanteee*. *Tomlins' Dict. h. t.*

**Covin**; in English law, a deceitful compact between two or more to deceive or prejudice others. *Tomlins' Dict. h. t.*

**Credit, Letter of.** See *Letter of Credit.*

**Credulity, Oath of.** See *Oath of Credulity.*

**Cruifera**; used in the *Leges Burgorum*; a cruiffe or cruive for swine, otherwise a styte. *Skene, h. t.*

**Crew.** Under the contract of affreightment, the owners and master are bound to be provided with a crew of sufficient skill and strength for the voyage. *Bell's Com.* i. 551, 5th edit.; *Princ.* § 408, and cases there cited.

**Crime.** A crime may be defined to be any act done in violation of those duties which an individual owes to the community, and for a breach of which the law has provided that the offender shall make satisfaction to the public; besides repairing, where that is possible, the injury done to the individual. Dole, or corrupt and evil intention, is essential to the guilt of any crime. It is not necessary, however, for the prosecutor to prove the intention to commit the particular offence, out of enmity to the individual injured; it is enough that the act is attended with circumstances indicating a corrupt or malignant disposition, regardless of order and social duty. Thus, it is murder if A be killed by mistake instead of B, unless the killing of B would have been justifiable or excusable. So also it is murder to fire without legal cause, into a crowd and kill a person; *Hume*, i. 21, *et seq.* In order to constitute a crime, there must always be an act done in prosecution of the criminal purpose. This gives rise to several difficult questions, as to how far an attempt to commit a crime, is punishable; and the general rule seems to be, that where unequivocal acts, indicating the criminal intention, are proved, they are punishable, but not to the same extent, as the completed offence; but, on the other hand, the law takes no cognizance of remote acts of preparation, even although they be pretty distinctly referable to a criminal purpose; see *Hume*, *ib.* See *Attempt*. Where dole is wanting, either entirely or to a certain extent, there is, in the one case, no crime at all, and, in the other, a proportional mitigation of the punishment. Thus, pupils under seven years of age are legally incap-

able of crime; in like manner, insane persons are held to be incapable of dole. But, on the other hand, pupils above seven years of age, and minors who have reached puberty (which in this question is fourteen years of age, both in males and females), are held to be capable of dole, and are consequently punishable for the greater crimes, of the guilt of which they must be presumed to be aware. Minors under sixteen years of age, however, except in very flagrant cases, seem hardly liable to capital punishment. With regard to defect of intellect, if it amount to mere weakness or craziness, it is not sufficient to exempt from punishment, but may be the ground of an application for mercy. The defence of compulsion, where *vis major* has been used will be sustained. See *Compulsion*. But it will be no defence, that the crime was committed by a wife or child, under the influence of subjection to the husband or father, if it be one of the greater crimes; although such subjection may perhaps be successfully pleaded in minor delicts. The subjection of a servant to his master affords no defence whatever to the servant who has committed a crime, unless he can prove coercion, or the fear of violence, against which he had no protection at hand. Magistrates or officers of the law, acting *bona fide* in the administration and execution of the law, unless perhaps there be gross ignorance or carelessness,—and soldiers acting under the orders of their officers in the known and customary line of their duty,—are not liable to a criminal charge for acts done under such circumstances. The compulsion of extreme want is held to be no excuse for a crime; but it may be the ground of an application for mercy. See, on the subject of this article, *Hume*, vol. i. p. 21 to 56; *Ersk. B.* iv. tit. 4; *Ersk. Princ.* 514, 12th edit.; *Tait's Justice of Peace*, h. t.

**Crimen Falsi**; the crime of falsehood or fraudulent mutation, or suppression of the truth, to the prejudice of another. See *Falsehood. Forgery. Perjury.*

**Crimen Violati Sepulchri.** See *Dead Body.*

**Crimen Repetundarum.** By the Roman law, all judges and magistrates who accept bribes to pervert judgment, were said to be guilty of this crime, and punished accordingly. With us, this offence is known by the name of *Baratry* or *Bribery*. See *Baratry. Bribery. Corruption of Judges.*

**Criminal Prosecution**; includes the whole form of process by which a person accused of a crime is brought to trial; and the procedure will here be briefly traced from its commencement to its close in the supreme criminal court. When a crime has been committed, the first step is to arrest the supposed offender; and this may be done under authority

of any sheriff, justice of peace, or other magistrate. Those magistrates may grant warrant to arrest persons charged with offences, in the trial of which they have themselves no jurisdiction. Thus, a sheriff may commit for treason, or the magistrate of a royal burgh for pleas of the Crown. The warrant for apprehension must be granted on sufficient information, written or verbal; but there ought to be a formal written and signed application wherever possible. The oath of the informer, even where he is a private party, is not indispensable, except as to offences under special statutes; and when the procurator-fiscal applies for the warrant, his oath is never required. The warrant must bear the date and place of granting, and be under the hand of the magistrate in whose name it runs. It would seem that it may be general as to the nature of the crime to be charged; but it must not be general in the description of the person or persons to be apprehended, nor leave any discretion to the officer to arrest all suspected persons. The warrant may be, to bring the accused before either the granter of the warrant, or some other competent magistrate; and it may be addressed either generally to the officers of the magistrate who grants it, or to messengers-at-arms; or even, in case of need, to a private individual, who is thus invested, *pro hac vice*, with the powers, privileges, and protection, given to an officer, provided the person intrusted with it proceed regularly in the execution of the warrant. In executing the warrant, it is necessary that the officer should attend—1st, Not to execute it beyond the jurisdiction of the granter, without the indorsation of a magistrate within the jurisdiction into which the offender has fled, unless where such indorsation is rendered unnecessary by special statute, as in the case of sheriffs' warrants under 1 and 2 Vict., c. 119, § 25. See *Backing of a Warrant*. 2d, He must communicate to the party the import of the warrant; and if the officer be acting beyond his ordinary bounds, he must show the warrant on demand, but he is not bound to part with it. 3d, The officer has no authority to break open doors, unless he has intimated to those within the purpose of his errand; and after that, and on refusal to open, he may break open the door, and take the party against whom the warrant is directed, or the person whom he has probable reasons for believing to be the person meant. 4th, Having taken the person, the officer cannot, on his own authority, commit him to jail, but must take him before a magistrate, to be dealt with according to law; except in the case where the warrant contains authority to commit *de plano*, as is the case with judiciary warrants, under which, of course, the officer

is in safety to commit the accused to prison at once. In the case where the party is brought before a magistrate for examination, it is the duty of the magistrate—1st, To see that the prisoner is in a fit state to undergo an examination; 2d, That he is warned of the use which may be made of what he says; and, 3d, That the declaration is taken down in writing in the presence of credible witnesses, who will sign it along with the magistrate and the prisoner, in order that, if necessary, they may be able, at the trial, to authenticate it and to swear to what passed. When the prisoner cannot or will not sign his declaration, the magistrate may sign it instead of him.

Unless the magistrate see reason immediately to release the prisoner, his next step is to commence an inquiry, or *preognition* as it is termed, concerning the grounds of suspicion, in which he will take the declarations of such persons as have cause of knowledge of the offence, and the prisoner's participation in it. This is necessary, not only in order that speedy justice may be done to the accused, but also for the information of the public prosecutor, so as to enable him to lay his charge properly. While the preognition is going on, the magistrate may, if necessary, commit the accused to prison for further examination, or to abide the result of the preognition; and, in that case, the prisoner is not entitled to bail under the act 1701, c. 6, although it is not unusual to liberate him on bail at this stage of the proceedings. The magistrate must proceed with the preognition without undue delay, otherwise he will be liable at common law for malversation and oppression. Witnesses may be compelled to attend the preognition by letters of first and second diligence; and, in extreme cases, the witnesses may be examined upon oath, although that is not usual. If the witnesses refuse to attend or to swear, they may be imprisoned. Neither the accused nor his friends are entitled to be present at the preognition; nor can they insist for a copy or for a perusal of the declarations of the witnesses. The preognition must be finished before the libel is executed, because, after the execution of the libel, the process has commenced, and all intercourse with the witnesses after that is suspected and "utterly forbidden." In whatever way the examinations of the witnesses at the preognition are taken, whether by oath or simple declaration, they never can be used in any shape against the witnesses, who may insist on having them destroyed before they give their testimony on the trial. Articles to be founded on as proving the crime, ought to be identified at the preognition, either by the subscription of the judge and witnesses, or by

some other mark, and a reference to the declaration of the witnesses; and such articles ought to be put in safe custody. The entire charge of conducting precognitions is now committed to the procurator-fiscal, sheriff, justices of the peace, and other inferior magistrates, although, formerly, precognitions were sometimes conducted by the Lord Advocate, in presence of the Lords of Justiciary. See *Precognition*. The precognition being concluded, and the facts being such as to warrant a commitment, the accused is then committed for trial, on a regular written warrant, specifying the offence for which he is committed, and proceeding on a signed information. With regard to the form of a warrant of commitment, and the steps necessary to be taken in order to obtain bail, or liberation under the act 1701, c. 6, see *Commitment for Trial. Bail. Liberation*.

The right to prosecute for a crime is vested, by the law of Scotland, either in the party injured, or in the Lord Advocate, who is the only prosecutor for the public interest; the popular actions of the Roman law being unknown in our practice. A criminal prosecution by the private party embraces not only the private interest and damages, but the full pains of law. But, in order to support the private instance, the party must be able to show some substantial and peculiar interest in the issue of the trial, not a mere remote interest as a member of the community, or even as the member of a portion or class of it, which has been particularly injured. It does not appear to be quite fixed, what degree of relationship to an injured party entitles a private party to prosecute; but perhaps the right is vested in the next of kin, however remote in degree; *Hume*, vol. ii., p. 124. But, in the Court of Justiciary, every libel at the private instance must be raised with concurrence of the Lord Advocate; see *Concourse*. The Lord Advocate is the public accuser, who insists in the Sovereign's name, and for his (or her) Majesty's interest, in the execution of the law; and he is vested with an uncontrolled right to exercise his discretion, either in commencing or in following forth a trial; and, at any time in the course of it, either before or even after the return of the verdict of the jury, he may, in the case of a capital offence, restrict the libel to an arbitrary punishment. See *Advocate, Lord*.

The trial of an accused party proceeds before the Court of Justiciary, either on *indictment* or on *criminal letters*. The process by indictment is the exclusive privilege of the Lord Advocate, in whose name, as public prosecutor, it proceeds. Criminal letters resemble a summons in a civil action; they proceed in the Sovereign's name, and, like the

summons, they are addressed to messengers, and other executors of the law, who are commanded to cite the accused. See *Indictment. Criminal Letters*. The form of indictment is commonly used where the accused is in prison; and that of criminal letters where he is at large, either on bail or otherwise, although there is no invariable rule on that subject. The indictment or criminal letters must be executed against the accused by a messenger-at-arms, or by a macer of the Court of Justiciary, or other officer properly authorized, who must serve the party with a copy of the libel, with a notice attached, requiring him to appear on a day certain to take his trial. See 9 *Geo. IV.*, c. 29, § 36, *et seq.*, and *Schedules thereto annexed*; see also 11 and 12 *Vict.*, c. 79, § 6. The accused must, at the same time, be served with a list of the witnesses who are to be examined against him, and of the whole assize of forty-five, out of which the jury is to be selected. If the accused cannot be found, he must be cited in the same form at his dwelling-place, and at the market-cross of the head burgh of the county in which he resides. When he is abroad, an edictal citation of sixty days at the market-cross of Edinburgh, and the pier and shore of Leith, is necessary. The diet to which he is cited in a criminal process is peremptory. See *Calling of Diet*. And, on the day fixed, the accused and the prosecutor, whether public or private, must appear in the Court, the Lord Advocate having the privilege of appearing by his deputies; but the personal presence of the private party, where he is the prosecutor, being indispensable. The accused must also be present, otherwise the trial cannot proceed; and, if he is wilfully absent, sentence of fugitation will be pronounced. See *Fugitation*. When both parties are present, and the trial is not adjourned, the Court, upon the prosecutor's application, and on cause shown, may desert the diet *pro loco et tempore*; after which the accused may be served with a new libel; or the prosecutor may desert the diet *simpliciter*, which puts an end to all farther prosecution for the same offence; *Hume*, ii. 275, *et seq.* When both parties are present at the calling of the diet, and there is no desertion, this is the proper time, *in limine* of the process, to state all objections to the execution of the citation of the party. The panel is also then called on to state any objection to relevancy of the libel, and the relevancy, whether objected to or not, is disposed of before he is called on to plead. When the libel is found relevant, the same is read, unless the reading is dispensed with (which is always held to be done in practice unless the contrary is stated); the panel is called upon to plead guilty or not guilty; and his plea is entered

on the record; if he plead guilty, the Court passes sentence, and if not guilty, the Court remits him and the libel to an assize; 11 and 12 *Vict.*, c. 79, § 9, altering 9 *Geo. III.*, c. 19, § 12. Objections to relevancy are disposed of after a *viva voce* debate, either by immediate decision, or by an order for farther pleadings in the shape of printed *informations*, in which latter case the trial is adjourned. Even where the accused pleaded guilty, it was formerly the practice to empanel a jury, before whom, if he repeated his plea, he was found guilty by the jury on his own confession; but, by 9 *Geo. IV.*, c. 29, § 14, the necessity of empanelling a jury, where the accused pleads guilty, is dispensed with. Where, in addition to the general plea of not guilty, the accused means to insist on some special defence, he must, at this stage of the proceedings, either by himself or his counsel, state generally the nature of the course of defence he means to adopt. By 20 *Geo. II.*, c. 43, it is required, that, in such a case, the accused shall, on the day before his trial, lodge with the clerk of Court a written statement or defence, signed by himself or his counsel, of the facts he alleges, and the heads of the objections or defences he means to maintain; and, where such a defence is not lodged, it would seem that the prosecutor, on the day of trial, may at least insist on having an outline of the course of defence; and, accordingly, in all cases where such special defence is pleaded, it is usual either to lodge defences, or to explain the nature of the defence in the outset of the trial. A list of any exculpatory witnesses must also be lodged the day before trial. When the libel is remitted to an assize, a jury of fifteen persons from the assize of forty-five is ballotted for; the prosecutor and the accused having each of them five peremptory challenges and an unlimited number of challenges upon cause shown; 6 *Geo. IV.*, c. 22. As to the mode of citing the jury, see *Jury*. The jury are then sworn in, and the trial proceeds,—the prosecutor, in the *first* place, leading evidence in support of the libel, after which the exculpatory evidence is adduced. After the proof on both sides has been concluded, the counsel for the parties address the jury, on the import of the evidence, the counsel for the accused, except in cases of treason, having the last word; *Regulations*, 1672, No. 10. The presiding judge then sums up the evidence, and states the law to the jury. The jury need not be unanimous in their verdict; and, in case of difference, the majority decide. Formerly, no verdict of a jury was good if made up in open court; but, by 54 *Geo. III.*, c. 67, the Court of Justiciary and Circuit-courts were authorized to receive verdicts from the jury, by the mouth

of their chancellor, on a consultation in the jury-box, provided the whole jurymen were agreed in their verdict; and, even when the jury had retired, the Court was authorized, by the same statute, to receive *viva voce* verdicts, provided the jury were all agreed in the verdict, and that the judges were then sitting in Court. And now, by 6 *Geo. IV.*, c. 22, § 20, all verdicts in the High Court of Justiciary, or the Circuit-court, or in inferior courts, whether the jury are unanimous or not, and whether on a consultation in the jury-box, or after having retired, may be returned by the mouth of the chancellor of the jury, unless the Court has directed a written verdict to be returned. But where the jury is not unanimous, the chancellor must announce the fact in order that it may be entered on the record; and when, in such cases, a jury is inclosed, the jury is not allowed to separate, or to hold communication with other persons, until their verdict has been returned in their presence by their chancellor. The verdict must be returned to the Court in presence of the accused and of the whole jury. The verdict, when in writing, is authenticated by the subscriptions of the chancellor and clerk of the jury, and accompanied with a list of the names of the jurors, and a state of the vote of each individual, "whether condemning or assolilzeing;" *Regulations*, 1672, No. 9. See *Verdict*. If the verdict be *not guilty*, or *not proven*, or in any other way amount to an *absolutor* of the crime libelled, the accused is immediately dismissed from the bar. If the verdict be condemnatory, the prosecutor then moves the Court to apply it. If there be no pleas stated by the accused in arrest of judgment, it was formerly the practice for sentence to be pronounced by the presiding judge, and afterwards read out by the clerk from the record, and subscribed by all the judges present. Now, however, this is only necessary in cases of capital sentence. In all other cases, all that is now required is a short entry of the sentence in the record, signed by the clerk, but not by the judge, and not read out by the clerk; 11 and 12 *Vict.*, c. 79, § 10; and *Act of Adjournal*, 1 Aug. 1849, § 6. In Scotland, a sentence importing capital punishment cannot be carried into execution within less than fifteen, or more than twenty-one days after its date, if pronounced to the southward of the Forth, or within less than twenty, or more than twenty-seven days, if to the north of that river. Inferior corporal punishments may be carried into execution after the lapse of eight or twelve days from the passing of the sentence, according as it is pronounced on the south or north of the Forth; 11 *Geo. I.*, c. 26, and 3 *Geo. II.*, c. 32; 1 *Will. IV.*, c. 37, § 2. See *Execution of Sen-*



ences. And the Court of Justiciary has a power to interfere in altering the day for the execution of sentences, when particular circumstances render such an interference necessary; *Hume*, vol. ii. p. 473. The sentences of the Court of Justiciary are not subject to review, or to appeal to the House of Lords; and, unless the royal mercy be interposed, execution will follow in terms of the sentence; *Hume*, vol. ii. p. 504. See *Pardon*.

The account of criminal process, which has now been given, has reference to proceedings in the High Court of Justiciary at Edinburgh, and in the circuits of that Court, where the forms of process are almost precisely similar. See *Circuit Court of Justiciary*. The sheriff also has a very extensive criminal jurisdiction, extending to the trial of many of the higher crimes by means of a jury, and entitling him to convict summarily without the intervention of a jury, in minor offences; the privilege of summary conviction being a branch of the criminal jurisdiction of the sheriff, which he shares with justices of the peace and the magistrates of royal burghs. As to the form of procedure before the sheriff under criminal libel, see 16 and 17 *Vict.*, c. 80, § 33, *et seq.* With regard to those inferior jurisdictions, it may be observed in general, that, where express statute does not interfere, the criminal proceedings in all of them are subject to the review of the High Court of Justiciary. See *Sheriff. Justice of Peace. Review. Bill of Advocation. Bill of Suspension. Circuit Court. Procurator-Fiscal*.

The Court of Session, partly by usage and partly by statute, may take cognizance of the crimes of forgery, perjury, deforcement, fraudulent bankruptcy, contempts, &c. This Court tries and punishes those offences without the intervention of a jury; and its sentences are not subject to review in the Court of Justiciary; *Hume*, vol. iii. p. 509. But the criminal jurisdiction of the Court of Session is never exercised, unless where the offence has been committed or discovered in the course of proceedings in a civil action before it; and, even in that case, the practice now is to remit the criminal part of the case to the Court of Justiciary. See *Court of Session. Contempt of Court*.

**Criminal Letters.** In the preceding article it has been stated that a criminal process may be brought into the Court of Justiciary either by criminal letters, or by indictment. In form, criminal letters resemble a summons in an ordinary civil action. They run in the Sovereign's name, state the charge laid against the accused, and the conclusions founded on the charge, and they conclude with the royal *will*, commanding the officers of the law to summon the accused party to appear on a day named, and find caution to underlie the law.

They also contain a warrant for citing the witnesses and the jury, according to correct lists which accompany the criminal letters. These letters pass the signet of the Court of Justiciary, on a bill presented to the Court, in which the tenor of the criminal letters is engrossed at large. The bill is signed by the Lord Advocate, or some of his deputies, when he is the sole prosecutor; and, when the prosecution is at the instance of a private party, the bill must be signed by the party, with the Lord Advocate's concurrence. A deliverance on the bill, signed formerly by one of the Justiciary Judges, now by one of the clerks of court (11 and 12 *Vict.*, c. 79, § 3), authorizes the criminal letters to be raised, and is the warrant for their passing the signet of the Court; *Hume*, vol. ii. p. 154. The record copy of the letters may now be printed in whole or in part; § 1 of *said stat.* As to the form of executing criminal letters, see *Criminal Prosecution*. See also *Concourse. Indictment*.

**Criminal Conversation;** is the technical term, in questions of divorce, applied to the criminal intercourse of the party charged with incontinence. See *Divorce*.

**Cro;** in the Scotch acts of Parliament, signifies the satisfaction or assyhtment for the slaughter of a man. *Skene, h. t.*

**Croft;** in England, a little close adjoining to a dwelling-house, and inclosed for pasture, or arable, or any particular use. *Tomlins' Dict., h. t.*

**Crop.** The landlord has a hypothec over the crop, for the rent of the year of which it is the crop; and so long as that crop remains in the tenant's possession, the right continues in force. The landlord, under his right of hypothec, cannot sequestrate the crop of any one year, in security or payment of the rent of a preceding or following year, although, of course, the crop on the ground, like any other moveable property belonging to the tenant, although it may not be hypothecated, may be open to the diligence of pointing at the instance of the landlord, as an ordinary creditor. *Bell's Princ.* § 1239; *Bell on Leases*, i. 362, *et seq.* 430, 499, 513; ii. 25; *Hunter's Landlord and Tenant*, ii. 370. See *Hypothec. Currente termino. Waygoing Crop. Furniture*.

**Cropping.** An important clause, termed the *clause of management*, is now generally inserted in leases, providing, among other things, for the rotation of crops, and prohibiting the taking of certain crops in succession. It varies according to the soil, climate, and other circumstances of the farm. But, even in the absence of such a clause, there is an implied obligation on the tenant to cultivate according to the rules of good husbandry; and, by the common law, a tenant is restrained from deteriorating a farm by mis-labouring or

place through the panel's want of caution; 2, When the panel has committed slaughter while prosecuting an illegal act; 3, When the panel had intent to do some bodily harm, from which it was not probable that death would follow; and, 4, When the killer was actuated by a mortal purpose, arising, not from hatred to the deceased, but from sudden resentment for high and real injuries sustained, accompanied by such terror and perturbation of spirits as, in a certain sense, deprived him of the use of reason. The punishment of culpable homicide is arbitrary, varying from imprisonment for a few weeks to transportation for life. Scourging was, in a few instances, formerly added. *Hume*, i. 191-3, 233-52; *Alison*, 92, et seq.; *Burnett*, 6, 14; *Syme*, 255, 321; *Steele*, 76.

**Culprit**; is an English law term, signifying a prisoner accused for trial; *Tomlins' Dict.*

**Culrach**; is defined by Skene, a *backburgh* or cautioner, for the appearance of a party who has been repledged from one Court to another; the *culrach* being answerable in the event of wrongful repledging; *Skene*, h. t.

**Cumulo Valuation**. See *Teinds*. *Valuation*.

**Cunninghares**; rabbit warrens. See *Rabbits*.

**Curatory**. To persons who of themselves are incapable of managing their affairs, the law affords the means of doing so by the appointment of curators. The powers and duties of curators differ according to the nature of their appointment, and the condition of the parties to whom their curatory extends. Their several denominations may be classed under these heads,—1. *Curator to a minor*. 2. *Curator to an idiot*. 3. *Curator bonis*. 4. *Curator ad litem*.

1. *Curator to a minor*. A minor, until he arrives at the age of puberty, has no *persona standi in judicio*; and, therefore, during his pupillarity, both his person and his property are placed under the guardianship of tutors. See *Pupil*, also *Tutor*. At the age of puberty, which in males is fourteen, and in females twelve years, a minor, although he becomes invested with certain powers in the management of his own affairs, is still held to be a proper object of the protection of the law against deception on his inexperience. The father, while alive, is the natural guardian and administrator-in-law for his lawful children who are minors; the father's guardianship comprehending the characters of tutor to his children while they are pupils, and of curator to them after they become *puberes*, and until their majority, which, in both sexes, is fixed at twenty-one years of age. The natural guardianship of the father, however, is restricted by the Scotch law to those child-

ren who are not *forisfamiliated*. See *Forisfamiliatio*. It vests in the father without any form of legal process; and he is exempted from the observance of certain formalities, as well as from the strict responsibility required of other curators. 1st, He is not bound to take the oath *de fidei administratione*; nor, 2dly, to make up inventories; nor, 3dly, to find caution, unless where he is in embarrassed circumstances; and, 4thly, he is not held liable for omissions. Although the curatory of the father may, with his own consent, be superseded by the minor *pubes* making choice of other curators, in the manner to be afterwards explained, yet this cannot be done by the minor without the concurrence of his father as curator. But the father's office of administrator-in-law is excluded where property has been left to the minor under other administrators, or exclusive of the father's administration; and upon the marriage of a daughter, the curatorial office is by law transferred from the father to the husband, if he be major, although it will revert to the father if the husband die before his wife attain majority. When the minor has a claim against his father, a curator *ad litem* may be appointed to him. The father's powers of administration have been extended by the statute 1696, c. 8, by which a father is empowered, while in *liege pousitie*, to name tutors and curators to act for his children after his own death. The powers conferred on curators so nominated are as extensive as those possessed by the father himself; but the curators accepting the office subject themselves to the same formalities and responsibilities which are required of other curators, except that they are not bound to find caution; and under the statute, their nomination may contain a declaration that they shall not be liable for omissions nor *singuli in solidum*, but each for his own actual intrusions only. But this power of dispensation is limited by the statute to the means and estate descending from the father himself. The effect of the statute being to confer authority upon the father to delegate and continue his own curatorial power, a nomination by him precludes any choice of curators by the minor himself, unless with the consent of the curators named by his father; *Pitcairn*, Feb. 1731, *Mor.* p. 16339; *Drumore*, 27th Jan. 1744, *Kilk.* p. 586; *Mor.* 16349; *Ersk.* B. i. tit. 7, § 11. A father, however, has not the same power to name curators to his natural children, who are in law regarded as strangers to him; *Wilson*, 10th March 1819, *Fac. Coll.*

A minor whose father has not named curators may take the management of his estate upon himself, or put himself under the direction of curators, in the manner prescribed

by the act 1555, c. 35. This act, as it has been judicially interpreted, requires that the minor shall cite at least two of his nearest of kin on the father's side, and two on the mother's side, personally, or at their dwelling-places, and all others having interest, edictally, at the head burgh of the jurisdiction within which the minor's lands lie, to appear before his own judge ordinary; *Wallace*, 29th July 1674, *Mor.* p. 16290. In case the minor has no heritable property, the publication of the edict is made at the head burgh of his own domicile. On the day of appearance, the minor, in presence of the judge, chooses his curators; and such of them as are willing to undertake the office, sign their acceptance, take the oath *de fidei administratione*, and give security to account for their intromissions. Upon this being done, the judge interpones his authority to the appointment, and an act of curatory is thereupon extracted, which is sufficient to vest the legal powers in the curator. Curators, whether nominated by the father, or chosen by the minor, are required, by the act 1672, c. 2, to make up a complete inventory of the minor's estate, of which inventory, three copies, all signed by the curators and the next of kin on both sides, must be judicially produced before the minor's judge ordinary; and after being signed by the clerk of court, one copy is given to the next of kin by the father, another to those by the mother, and a third to the curators. See *Inventory*. In case of neglect to comply with this requisite, the statute declares,—1st, That the curators shall not be allowed credit for any expense incurred in the minor's affairs, which, by Act of Sederunt, 25th Feb. 1693, has been explained to mean, such expenses as have been laid out in lawsuits and legal diligence; 2d, That they shall be liable for omissions, a liability to which, it may be observed, that they are at any rate subject at common law; and, 3d, That they may be removed from their office as suspect. The statute farther declares that curators shall have no power to act until the inventories be made up. Yet a payment made to a curator, who had not made up inventories, was sustained; *Logan*, Dec. 1772, cited in *Ersk. B. i. tit. 7, § 23*. When a minor names curators, he sometimes declares them exempt from liability *singuli in solidum*; but it has been held that curators cannot be so exempted from liability for omissions; *Watson*, 16th July 1773, *Fac. Coll.*, *M.* 16369; and the efficacy of an exemption from any of the legal responsibilities of the office by the minor's declaration, when he appoints them, is extremely questionable.

There is still another mode by which minors, in the management of their property,

may be put under the direction of administrators, which, although it does not appear to fall properly under the character of curatory, has yet been treated in our law books under that title. A person making a gratuitous conveyance of property to a minor is held to be entitled to appoint curators for him, to the effect of managing, on his behalf, the property so conveyed. Such an appointment can only infer a partial power of administration, which, although it excludes the management of ordinary curators as to the property so conveyed, is not incompatible with the existence of proper curators, either by the father's nomination or the minor's choice. A stranger has no power, either at common law or by statute, to appoint curators to a minor; but, on the other hand, any one in giving his property is entitled to annex to the gift whatever legal conditions he may think proper as to the administration or management of it. And as the deed under which administrators appointed in this manner are to act, must itself show the extent of the property placed under their management, it seems not to be clear that curators so appointed (if they can be called curators), are bound to make up inventories, or to comply with the other statutory requisites. It rather appears that they are to be regarded as ordinary managers, liable to be called to account by the proper curators of the minor. Accordingly, it has been held that a nomination of this kind does not prevent the minor from choosing curators for himself. This was decided in a case where the minor was a natural child, and where the nomination of administrators was made by the reputed father; *Wilson*, 10th March 1819, *Fac. Coll.*

Although, after curators have been appointed, their consent is essential to the validity of every act of the minor, yet, a minor to whom no curators have been nominated, and who has not chosen curators for himself, may do every act which the consent of curators, if he had any, would warrant; and the interposition of curators will not protect the acts of the minor, from any challenge to which they would have been liable, had they flowed from a minor without curators. Thus, in both cases, the deeds of a minor may be reduced on the head of lesion. See *Minor*. Curators, whether nominated by the father or chosen by the minor, must be governed as to their manner of proceeding by the tenor of their appointment. In general, the majority are entitled to act, unless a certain number has been declared to be a quorum, or one of the curators named *sine quo non*; and in these cases, the quorum, or *sine quo non*, must accept and continue to act, otherwise the nomination falls. A curator *sine quo non* cannot act by him-

self, but he has a negative on the acts of the other curators; *Vere*, 1st June 1791; *Mor.* 16,378; *Bell's Princ.* § 2064. See *Quorum. Sine quo non.*

The object of the curatorial office being the control and management of the minor's affairs, it is the duty of the curators to advise with the minor as to all deeds required to be granted by him, and to concur with him in such as are proper; and any deed granted, or contract entered into, without their consent, is null by way of exception, in so far as the minor is concerned; although, if beneficial for the minor, it may be held obligatory on the other contracting party. For a minor, even without the consent of his curators, may better his condition, although he may be reponed against transactions which make it worse; *Stair*, B. i. tit. 6, § 33; *Ersk.* B. i. tit. 7, § 33. On the other hand, the curators cannot act for the minor, who is himself vested in the right of his own property; they can merely authorize his acts by their consent. If, however, the minor will not act as his curators advise, they may apply for exoneration from their office. It is not the duty of curators to dispose of the minor's property, unless under circumstances of necessity, or where the transaction is for the manifest advantage of the minor; and, in such circumstances, curators have frequently applied to the Court of Session for their sanction to any extraordinary step of this kind; but the Court have refused to interpose their authority as "*unnecessary*," on the ground that "the minor and his curators could sell without judicial authority, and that no decree of the Court could prevent a reduction by the minor;" *Wallace*, 8th March 1817, *Fac. Coll.* See *Judicial Factor*. Such is the rule of law, so far as relates to the disposal or transference of the minor's property; but, in the general management of the minor's affairs, a wider power seems to be intrusted to curators. Thus, although they cannot by themselves grant discharges for money, which has been invested on behalf of the minor, it rather appears that they may of themselves receive the interest; and further, when the money has been uplifted, they are intrusted with the disposal and reinvestment of it. In like manner, they are entitled to uplift rents falling due from the minor's estate, and even to grant leases. There is this distinction, however, to be observed, that a lease granted by curators *alone*, necessarily determines with their office, *Resolutio enim jure dantis resolvitur jus accipientis*; while a lease by a minor himself, with consent of his curators, will be as effectual for the whole stipulated period of endurance, as it would be, if granted after a majority, provided there be no objection on the head of

lesion; *Ersk.* B. i. tit. 7, § 16. It is the duty of curators to see that the title-deeds and writings belonging to the minor are preserved, and his titles completed. Such of his moveables as cannot be preserved must be disposed of; and the curators will be liable for any damages, arising from neglect in either of those points. The curators must pay off all burdens affecting the estate of the minor, and perform the acts which the minor is bound to perform. They must see the minor's money lent out on good securities, and draw the interest of the money and rents of the heritage regularly as they fall due; and, in so far as those exceed the annual expense of the minor, the surplus must be lent out on proper securities; and where the minor has received interest, rents or principal sums from his debtors, without the curators' consent, they must prosecute the debtors for payment, as if no such payments had been made to the minor, unless the money has been profitably employed for the minor's use; *Stair*, B. i. tit. 6, § 33; *Ersk.* B. i. tit. 7, § 33. The rule with regard to the laying out of money recovered by the curators, seems to be this: When the money arises from moveables sold, a year is allowed for recovering the price, and procuring proper securities; where rents are payable in grain, the same period is allowed; where the rent is payable in money, half a year only is given; but although the accruing interest on money lent, over and above what is necessary for a pupil's annual expenses, must be brought into a capital sum, either before or at the expiration of the office of tutory, curators are under no such obligation. It is sufficient that the money remain in the hands of the debtors, undrawn by the curator; if it have been drawn, it ought to be laid out within a reasonable time. Curators may better the minor's condition, by converting moveable debts into heritable; but they cannot, by any act in which the minor does not take a part, make any change on the nature of the succession to the minor. Such debts will remain *moveable* as to succession; *Ersk.* B. i. tit. 7, § 18. See also *Ross*, 31st Jan. 1793, *Mor.* p. 5545; *Graham*, 6th March 1798, *Mor.* p. 5599; and *Morton*, 11th Feb. 1813, *Fac. Coll.* Curators are allowed to employ, not only the annual income of the minor's estate on his education and maintenance, but, should it be requisite, they may encroach on the principal, in order to put the minor into a profession, or to establish him in life; *Ersk.* B. i. tit. 7, § 24. Curators have no control over the minor's person. A minor *pubes* may marry without the consent of the curators, but cannot make any conventional provisions by marriage-contract without their concurrence. A minor may also bequeath

his moveable estate by testament, without the consent of his curators; but he cannot, even with their consent, make a settlement of his heritage; *Ersk. B. i. tit. 7, § 14 and 33*. Curators are liable *singuli in solidum* for their intrusions and for diligence, unless where this responsibility is restricted in the manner already explained. They are entitled to no salary or allowance for their trouble; but it has been held, that they may appoint a factor with a proper salary; *Ersk. ib., § 16; Lord Macdonald, 13th Nov. 1780, Mor. p. 13437*. In no case can a curator be *auctor in rem suam*; *Ersk. ib. § 19*. Any one of full age may competently be appointed to the office of curator, excepting married women, who, by law, are themselves placed under the curatory of their husbands; *Ersk. B. i. tit. 7, § 12*. Hence, where an unmarried woman has been nominated, and has acted, her office falls on her marriage. Procurators,—that is, persons who, without any legal title, have taken upon themselves to act in the capacity of curators,—are, by act of Sederunt, 10th June 1665, subjected to the same liability in all points, with proper curators; *Ersk. ib. § 28*. See on the subject of this article, *Stair, B. i. tit. 6, § 29, et seq.; Ersk. B. i. tit. 7, § 11, et seq.; Ersk. Princ. 12th edit. 90–91; Bank. vol. i. p. 174, et seq.; Bell's Princ. § 2087, et seq.; Shand's Prac. 141, 560, et seq.; Brown on Sale, p. 194*. See also *Minor*.

2. *Curator to an idiot or to an insane person*. Idiots or insane persons are another class to whom the law of Scotland provides curators. It does not appear, however, that the parents of such persons have, *ipso jure*, any right of administration for them after they attain majority. Neither is there any instance of a testamentary nomination of such curators, although Erskine seems to think this competent in our law, as it was in the Roman law; *Ersk. B. i. tit. 7, § 49*. The method pointed out by our law, for declaring fatuity or furiosity, is by a brieve issuing from Chancery, directed to the judge ordinary of the territory within which the person resides. The judge is directed to hold an inquest, for inquiring—1st, Into the state of mind of the person; and 2d, Who is the next male agnate on whom the office of curatory may be conferred. The person to be cognosed must be brought before the inquest; *Devor, 25th Feb. 1809, Fac. Coll.*; and, by the act 1475, c. 66, the verdict of the jury must state, not only his present condition of mind, but how long he has been fatuous or insane. The same statute declares that no alienation made by him, after the time fixed by the inquest as the commencement of his distemper, shall be valid. It may be observed, however, that the verdict of the inquest, fixing retrospectively the date of the insanity,

will not preclude a person interested in any deed, falling within the period, from proving that, at the date of that particular deed, the granter was of sane mind. The only effect of the verdict seems to be, to reverse the ordinary presumption of sanity, and to lay the burden of proving the sanity of the granter on the person who founds on the deed. The next male agnate of twenty-five years of age, who is himself capable of managing his own affairs, is the person entitled to the office; 1474, c. 52, and 1585, c. 18. The guardianship of insane persons, although generally treated of under *curatory*, seems rather to correspond with *tutary*. The curator to an idiot is intrusted with the charge of the person, as well as the estate of his ward; and a person under such guardianship, being incapable of will or consent, the curator must transact everything in his own name. In every other respect, the powers and duties of the office are similar to those which have been already explained in treating of curators to a minor. The persons entitled to institute proceedings for having a curator appointed to an insane person, are his next of kin; and the curator-at-law is the nearest male agnate, except where a wife is fatuous, in which case the husband, as her administrator-in-law, excludes agnates; *Haliburton, June 1791; Mor. p. 16379*. Curators to insane persons are subject to the provisions of 12 and 13 Vict., c. 51. See also *Ersk. B. i. tit. 7, § 50; Bell's Princ. § 2104, et seq.; Jurid. Styles, 4th edit. vol. i. p. 308*.

3. *Curator bonis*. Where an heir is deliberating whether or not he shall enter,—or where an infant is without tutors,—or where a succession opens to one who is resident abroad,—or where a person is labouring under some temporary incapacity to conduct his own affairs,—and in other cases of a similar description,—the Court of Session may appoint a *curator bonis* to manage and preserve the property, until the person to whom it belongs is in a situation to act either for himself or by means of other managers. *Curators bonis* are also named for the management of trust-estates, where the trustees have all declined to accept, or cannot legally do so. The office of *curator bonis* is conferred by the Court on a summary application, when unopposed, on the production of medical certificates; but if opposed and counter medical certificates are produced, inquiry will be requisite. See *Lockhart v. Ross, July 17, 1857, 19 D. 1075*. The curator so appointed is subjected to all the rules prescribed by the act of Sederunt, 13th Feb. 1730, relative to judicial factors; and a *curator bonis* for imbecile or absent persons is subject to the provisions of 12 and 13 Vict., c. 51. See *Ersk. B. ii. tit. 12, § 58; Bank. vol. i. p. 179; Kames'*

*Princ. of Equity* (1825), 12414. See *Judicial Factor*.

4. *Curator ad litem*. Judicial proceedings, in which a minor is interested, may be of so serious importance to him, that, in every case, our law requires that a curator for the minor be made a party. Where the minor has already curators, they are his proper advisers in the law-suits in which he may be engaged, and must be cited along with him; *M'Turk*, 7th Feb. 1815, *Fac. Coll.* Where the minor has no tutors or curators, it is necessary not only that tutors and curators be cited edictally, but also, when appearance is made for the minor, that a *curator ad litem* be appointed for him; and, if this be omitted, any decree *in foro* against the minor may be opened up as a decree in absence; *Sinclair*, 15th Jan. 1828, 6 *S. and D.* 336; *Dick*, 15th May 1828, 6 *S. and D.* 798, and 5th Feb. 1829, 7 *S. and D.* 364. In like manner, if a minor be engaged in a law-suit with his tutors or curators, or a wife in a suit with her husband, a *curator ad litem* must be appointed to conduct the process. The appointment is made, on the motion of either party, by the judge before whom the process already depends. The Court will not appoint a curator to concur in raising an action. The appointment is confined to the particular suit in which it is made; and the *curator ad litem* appears at the bar, and takes the oath *de fidei administratione*, of which proceeding a minute is made by the clerk of Court, which completes the curator's title. A *curator ad litem* having no authority to intromit with the minor's estate, is not under the necessity of finding caution; nor is he liable for the expenses of Process; *Fraser*, 9th March 1847, ix. *D.* 903. Where a motion for the appointment of a *curator ad litem* is not made by either party, the judge ought to make the appointment *ex proprio motu*; *Ersk. B. i. tit. 7, § 13*. See also *Stair*, B. i. tit. 6, § 31, and *Bank. vol. i. p. 175*. See, on the subject of curatory generally, *More's Notes to Stair*, pp. xvi. xxviii., *et seq.*, lxxvi.; *Bell's Com.* 5th edit.; *Bell's Princ.* § 2087, *et seq.*; *Watson's Stat. Law, h. t.*; *Kames' Princ. of Equity*, (1825), 467, 490.

**Curatorial Inventory.** See *Inventory*.

**Curfeu**; in England, a bell which rang at eight o'clock in the evening, in the time of William the Conqueror; on hearing which every person was obliged to rake up or cover over his fire, and put out his light. *Tomlins' Dict. h. t.*

**Curia**; a court civil or ecclesiastical. *Skene, h. t.*

**Curialitas**; the courtesy of Scotland. *Skene, h. t.* See *Courtesy*.

**Currente Termino**; in reference to leases,

means "during the currency of a term." Poining *currente termino* may be warrantably stopped by sequestration under the landlord's hypothec, unless the creditor offers consignment, or sufficient security for the hypotheated rent. In the general case, the landlord cannot apply for sequestration *currente termino*, or before the rent falls due; but he may do so on cause shown. It has been doubted whether the furniture of a dwelling-house can be sequestrated *currente termino*, even although the tenant be *vergens ad inopiam*, since a dwelling-house cannot be possessed without furniture. *Bell on Leases*, i. 369, 389; ii. 25; *Hunter*, ii. 377, 404.

**Cursing of God.** Those who, "not being distracted in their wits," rail upon, or curse God, or any of the persons of the Blessed Trinity, are, by 1661, c. 21, punishable with death. *Hume*, vol. i. p. 568.

**Cursing of Parents.** The statute 1661, c. 20, provides the punishment of death for every child above the age of sixteen years, who, not being distracted, shall curse or beat a parent. Children under that age, and past pupilarity, who may be guilty of this offence, are punishable arbitrarily. It seems to be a good defence against the capital charge, that the parent has provoked the injury by treating the child with unreasonable harshness and severity. *Hume*, i. 324.

**Cursing and Swearing.** The offence of profane cursing and swearing is punishable by certain pecuniary penalties, proportioned to the rank of the offender; and, on failure to pay, by imprisonment, or setting in the stocks, or, in cases of obstinate perseverance in the offence, by banishment. The statutes imposing the penalties are, 1551, c. 16, and 1581, c. 103. The more recent statutes are, 1661, c. 19, and 1661, c. 38, § 25, by which the execution of those laws is particularly committed to justices of the peace; and, by 1696, c. 31, it is made competent for any person to pursue. *Hume*, vol. i. p. 572; *Hutch. Justice of Peace*, vol. iii. p. 332, 2d edit.

**Cursing, Letters of.** Letters of excommunication were anciently termed letters of cursing. Those letters passed on the decrees of Church courts; and, if the person against whom they were directed remained for forty days contumacious and unrepentant, letters of caption were issued against him at the King's instance, not on account of his failure to pay or perform in terms of his obligation, but as a punishment for his impious contempt of the censures of the Church. At the Reformation, letters of cursing were abolished, along with the ecclesiastical system, of which they formed a part; and afterwards, on the establishment of the commissary courts in 1563, the place of letters of cursing was supplied by letters of

horning and caption, which the Court of Session was directed by Queen Mary to award on the decrees of the commissaries. *Ross's Lect.* vol. i. p. 100 and 269; *Jurid. Styles*, 2d edit. iii. 570. See also *Balfour's Practicks*, p. 564.

**Custom or Customary Law**; is the unwritten law of the country, founded on immemorial custom, in contradistinction to the statutory or *written law*, as it is termed. Customary law derives its force from being considered as the implied ordinance of the legislative power. Uniform custom has, in some respects, the same effect with express statute; thus, it will afford a rule in interpreting statutes contrary to the words of the enactment; and an immemorial and uniform custom to the contrary will even have the effect of abrogating a statute. *Ersk. B. i. tit. 1, § 30, 43, et seq.*; *Bank.* vol. i. p. 24; *Bell's Com.* vol. i. p. 433, 5th edit.; *Brown's Synop.* tit. *Consuetude*, and pp. 308, 1105; *Shaw's Digest*, tit. *Consuetude*. See also *Desuetude. Usage. Decisions.*

**Customs**; are duties imposed by authority of Parliament on the importation and exportation of certain commodities. Those duties depend upon the particular statutes in force

at the time, and vary with the exigencies of the state, or with the views of policy which may render it expedient to encourage or discourage particular exports or imports. By the Treaty of Union, the laws in relation to customs are made the same in Scotland as in England. In 1845 a consolidation of the whole laws relative to the customs was effected by eleven separate acts of Parliament, which form 8 and 9 Vict., c. 84 to c. 94 inclusive. See *Barclay's Digest*, *h. t.*

**Custos Rotulorum**; the keeper of the rolls or records of the county; the officer intrusted with the custody of the rolls of the sessions of the peace, and also of the commission of the peace. He is always a justice of the peace of the quorum of the county, and generally some person of quality. He is appointed by a writing, signed by the Sovereign, which is a warrant to the Lord Chancellor to put him on the commission. He may execute his office by deputy, and has power to appoint the clerk of the peace; *Tomlins' Dict.* This office is not now in use in Scotland, although it is mentioned in the statutes 1617, c. 18, and 1661, c. 38, and also in Cromwell's instructions to the justices of the peace. *Hutch. Justice of Peace*, B. i. c. 1, § 10.

## D

**Daily Council.** By the act 1503, c. 58, the power which had been formerly vested in the *Session* was transferred to a new court, to be named by the King, called the *Daily Council*, which was appointed to hold its sittings at Edinburgh, or where the King should direct, for the purpose of deciding in civil causes, daily as they should occur. This was the court which immediately preceded the institution of the College of Justice, and from which the present court derives its title of "Council and Session." *Stair*, B. iv. tit. 1, § 18; *Ersk. B. i. tit. 3, § 11.* See *College of Justice. Session, Court of.*

**Damages.** In legal phraseology, the term damages is usually applied to the pecuniary reparation due for loss or injury sustained by one person, through the fault of another. Every illegal, unwarrantable, or malicious act, whether fraudulent or not, by which another is injured, either in his patrimonial interests, or in his person or feelings, founds a civil claim for damages against the person who has caused the loss or injury. This claim may be grounded on a breach of contract, or on a crime or *delict*, or *quasi delict*, or on any blameable omission or neglect of duty; the civil claim for reparation, at the instance of the private party who has suffered, not being

incompatible with proceedings *ad vindictam publicam*, at the instance of the private party, or of the public prosecutor. Damages for breach of contract are due only where it is impossible to enforce specific performance; for it is not optional to the obligant to perform his obligation, or to pay damages; and even where a specific penalty is annexed to a failure in performance, so long as performance is possible, the debtor in the obligation is not entitled to pay the penalty, and so to get quit of his obligation. The damages cover the loss, together with the expense of the proceedings necessary for obtaining reparation; but, where there is no fraud or delinquency, remote or consequential damages will not be given. Where, for example, the claim is founded on a failure to pay a sum of money, the principal sum, with the legal interest, is all that can be demanded as damages; not the possible profit, which the creditor might have derived, from the use of the money, had it been paid in terms of the obligation. In the same manner, where a particular subject has been lost, destroyed, or injured, without fraud or criminality, the person who has sustained the loss, in claiming reparation, must estimate the subject at its real value, and not at the *pretium affectionis*, or imaginary value, which he may himself

put upon it. Where, on the other hand, the loss or injury has arisen from fraud or delict, the sufferer is not only entitled to demand a *pretium affectionis*, but may insist for consequential damages, subject to the modification of a judge or of a jury. Culpable neglect or ignorance, without any positive criminality, is also a ground for damages. Thus, a jailer who, through negligence, allows an imprisoned debtor to escape, will be liable for damages; which will be estimated at the full amount of the debt, even although the debtor may have been utterly bankrupt. In like manner, a clerk of Court will be liable in damages if, through carelessness, he lose the documents produced by a party in a process. So also, if a coal-pit be left improperly fenced, or if an opening be made in the streets of a town, without due precautions being taken to guard against accidents, the proprietor of the coal-pit, or the magistrates of the burgh, will be liable in damages for any loss or injury which may arise from such neglect; *Black*, 9th Feb. 1804, *Mor.* p. 13905; *affirmed on appeal*, 20th Feb. 1812; *Innes*, 6th Feb. 1790, *Mor.* p. 13189. A professional person, or an artist, or a tradesman, on the same principle, is liable for damages occasioned by his ignorance or want of skill in his calling. As to injuries done by domesticated animals, or by animals which have been appropriated, our law is not so well digested as the Roman law was. By that law, when cattle were driven illegally into pastures, the driver was responsible for the damages: when they strayed in, of their own accord, the action lay against their owner. He who provoked an animal until it hurt him, had no claim for reparation; but if the excited animal injured some one else, the provoker was liable. The owner of an animal which, unprovoked, inflicted bodily injury on some one, was liable in damages. In case of a scuffle between two animals in a pasture, in which one of them was slain, no action was competent, either when it was not ascertained which of them was the aggressor, or when it was known that the slain animal was the aggressor. But if the aggressor killed his opponent, the owner of the slain animal had an action against the aggressor's owner. If a savage dog had been let loose in a court, and bit one coming in, the sufferer had an action, but not if the dog was chained. One who was leading a dog, which made its escape and injured any one, was liable, if he were at all careless, or were leading it where it should not be. The tenor of these actions generally allowed the defender the alternative of delivering up the animal, or paying the damages. The distinction between an animal which was, and one which was not previously known to be vicious, is not recognised in the Roman

law. In the law of Scotland, these rules have not been uniformly adopted; but they are valuable, as suggesting the principles which govern such cases. Dogs and cattle are the animals from which injury is most frequently sustained in this country, and the general rule appears to be, that where the animal is vicious, the owner is answerable; *Bank. B. i. tit. 10, § 47, et seq.*; *Turnbull*, 6th Dec. 1735, *Elchies, Reparation*, No. 1. In *Fleming v. Orr*, 5th March 1853, 15 *D.* 486, the Court found that the owner of a dog which had destroyed sheep was liable, although it was not proved that the owner knew the dog to be vicious; but the judgment was reversed by the House of Lords, April 3, 1855; 1 *Macquoen*.

A master is civilly liable for the negligence of his servants, or others employed by him. Thus, the proprietors of stage-coaches will be subjected in damages for injuries arising from careless driving; *Drummond*, 26th Feb. 1813, *Fac. Coll.* This liability, however, may be said to arise *ex contractu*, since such persons engage to convey passengers in safety. But, independently of any express contract, a master has been found liable for damages done by those employed by him, although he was absent, and they were acting against his orders; *Lord Keith*, 10th June 1812, *Fac. Coll.* The correctness, however, of that decision was questioned in a more recent case, in which a landed proprietor was held not to be liable in damages, for an accident which occurred from cutting a tree on his estate, through the negligence of those employed by him, while he was residing at a distance, and not aware that the operation which led to the injury was going on; *Linwood*, 14th May 1817, *Fac. Coll.*, *affirmed in the House of Lords*. A person is also liable in damages for the negligence of persons employed by him; *e. g.*, a creditor will be responsible for the illegal proceedings of a messenger-at-arms, whom he has employed to execute diligence against his debtor; and one messenger was held liable for a loss arising from the insolvency of another messenger, to whom he had committed the duty assigned to himself; *Hamilton*, 14th Feb. 1817, *Fac. Coll.* By the law of England a master is not liable to a servant for damages occasioned by a fellow-servant, if he has taken reasonable care to protect his servants from the risk of injury, by associating them only with servants of ordinary skill and care—a servant being held to run the risk arising from negligence of his fellow-servants. See the case of *Priestly v. Fowler*, 3 *Mees. and Wels.* 1; also the case of *Hutchison v. York and Berwick Railway Company*, May 22, 1850, 19 *L. J. Ex.* 296. A different rule, however, prevails in the law of Scotland. See the case of *Gray v.*



*Brassey*, Dec. 1, 1852, 15 D. 135; also 3 *Ross*, L. C. 296, *et seq.*; see also the cases of *Reid v. Bartonshill Coal Company*, July 3, 1855, 17 D. 1017, and *M'Naughton v. Caledonian Railway Company*, Jan. 15, 1857, 19 D. 271. Shipowners are liable, to the extent of the value of the ship and freight, for injuries done to goods on board, through the negligence of the master or mariners, with the exception of losses by fire in the ship, and the loss of gold, silver, precious stones, &c., unless entered as such; 7 *Geo. II.*, c. 15, § 1; 26 *Geo. III.*, c. 86, §§ 1, 2, 3; 53 *Geo. III.*, c. 159. Special statutes have introduced certain responsibilities in the reparation of particular injuries; such, for example, as the statutes about destroying plantations, and the damages done by rioters. See *Planting and Inclosing. Riots.*

A principal is not liable for any damages occasioned by the acts of a sub-agent; *Quarman v. Curnett*, 1840, 9 M. and W.; *Rapson v. Cobitt*, April 2, 1842, 6 M. and W. 716; *M'Lean v. Russell*, March 9, 1850, 12 D. 887. See 3 *Ross*, L. C. 266. A principal is not liable for damages occasioned by his agent on any matters beyond his agency; nor is a master liable for the wilful and malicious acts of his servant, although committed by him while acting in the service of his master; *M'Manus v. Crickett*, 1 E. 106; *Croft v. Allison*, 4 B. and Ald. 590. See 3 *Ross*, L. C. 291.

By the Jury Court Act, 59 *Geo. III.*, c. 35, § 1, actions of damages, where the title was not in question, and where the conclusion was for damages and expenses merely, were directed to be remitted to the jury court as soon as defences were lodged. But this enactment was so far repealed by the Judicature Act, 6 *Geo. IV.*, c. 120, which provides that the following actions shall be held as appropriate to the jury court, viz., "All actions, on account of injury to the person, whether real or verbal, as assault and battery, libel or defamation; all actions on account of any injury to moveables, or to land, where, in this last case, the title is not in question; all actions for damages on account of breach of promise of marriage, or on account of seduction or adultery; all actions founded on delinquency, or quasi delinquency of any kind, where the conclusion shall be for damages and expenses; all actions on the responsibility of shipmasters and owners, carriers by land or water, inn-keepers or stablers, for the safe custody and care of goods and commodities, horses, money, clothes, jewels, and other articles, and in general all actions founded on the principle of the edict, *Nautæ, caspones, stabularii*; all actions brought for nuisance; all actions of reduction, on the head of furiosity and idiotcy, or on facility and lesion, or on force and fear; all actions

on policies of insurance, whether for maritime, or fire, or life insurance; all actions on charter parties and bills of lading; all actions for freight; all actions on contracts for the carriage of goods by land or water; and actions for the wages of masters and mariners of ships or vessels." By 13 and 14 *Vict.*, c. 36, § 49, the Court may allow a proof by commission in any of the above enumerated causes, where the action is not one for libel or nuisance, or properly and in substance an action of damages. See *Macfarlane's Jury Prac.* 27, *et seq.*

Actions for damages are also competent before the sheriff-court, and other inferior courts. With regard to the jurisdiction of the High Court of Justiciary in such actions, it seems to be settled, that if the libel raised in that Court embrace both the public and private interest, although the prosecution for the public interest should be disappointed by the plea of *res judicata*, or by a pardon, yet the process may be proceeded in to the effect of recovering the damages and expenses due to the private party. But there is no instance of a prosecution in the Court of Justiciary, with a conclusion for pecuniary reparation merely, to the private party, without regard to the punishment of the offender; *Hume*, ii. 33 and 34. All the parties concerned in committing a wrong are liable, *singuli in solidum*, for the pecuniary reparation to the party injured; and, although no criminal prosecution for a delict can be instituted after the death of the offender, yet the civil claim for damages, at the instance of the private party, is not affected by the delinquent's death, but may be made effectual against his representatives, like an ordinary civil debt; and this, whether the action for reparation has been commenced before or after his death; *Morrison v. Cameron, &c.*, 25th May 1809, *Fac. Coll.* and note to the report of that case. See, on the subject of this article, *Stair*, B. i. tit. 9, § 3, *et seq.*; *More's Notes*, pp. lvii. lxi. xcii.; *Brodie's Supp.* 1003; *Ersk.* B. iii. tit. 1, § 12, *et seq.*; *Bank.* vol. i. p. 252; *Kames' Equity*, 41, 62, 211; *Shand's Proc.*, *passim*; *Bell's Princ.* § 29, *et seq.*, 545, *et seq.* See *Malice. Jury Trial. Defamation.*

**Dammum**; in the Roman law, signified any loss sustained in person or property. *Dammum* was either *injuria datum* or *absque injuria*. *Dammum injuria datum*, was any loss occasioned by a free person, *versans in illicito*, and consequently guilty either of *dole* or *culpa*. *Dammum absque injuria*, meant a loss which a person sustained through no illegal or unjust act on the part of another free and responsible being; e.g., loss inflicted by an animal or a slave, or happening accidentally, or occasioned by a free person in the prosecution of a justifiable act. The loss inflicted by a slave was called *noxia*,

by an animal *pauperies*, and for these the proprietor was responsible. But with us, although perhaps incorrectly, the expression, *Damnum absque injuria*, is sometimes applied to those losses for which the sufferer can make no legal claim for reparation against any one. An illustration given of such a loss, is the establishment of a rival school which draws away the scholars from a school previously established; *Tomlins, h. t. Damnum infectum* was a term used to express loss not yet suffered, but only apprehended; as, for instance, if persons were mining below a house, or heaping up materials against a wall, or had threatened some one; the prætor was accustomed to demand from them *cautio damni infecti*. See *Damages. Suspension and Interdict*.

**Damnum Fatale**; is a loss arising from inevitable accident, such as no human prudence can prevent;—such, for example, as the losses occasioned by storms or tempests, lightning, floods, over-blowing with sand, or, in general, by any calamity falling within the legal description of an act of God. *Bell's Com.; Bell on Leases*, 4th edit. vol. i. p. 429; *Hunter's Landlord and Tenant*; *Brodie's Supp. to Stair*, 989. See *Act of God*.

**Date of a Deed**. It is the invariable practice to insert the date of the deed, in the testing clause, either by specifying the day on which the deed has been signed, or by referring to the date prefixed to the deed, or mentioned in the course of it. But although this is now the practice, the date is not a statutory requisite, and the want of it would not, of itself, be fatal to the deed. Yet, if there be circumstances of suspicion attending the omission of the date, every presumption will be admitted against the deed; or, at least, it will be held to be of the date most unfavourable to its validity. If the date be fraudulently falsified to serve a purpose—as, for example, to secure a preference in a competition—such a fraud will be fatal to the deed; *Stair*, B. iv. tit. 42, § 19; *More's Notes*, p. cccvii.; *Ersk. B. iii. tit. 2, § 18*; *Bank. vol. ii. p. 634*; *Ross's Lect. vol. i. p. 132*; *Bell's Com. 6th edit.*; *Dickson's Evidence, passim*; *Thomson on Bills*; *Menzie's Lectures on Conveyancing*; *Duff's Feudal Conveyancing*; *Duff on Deeds*. See also *Testing Clause*. In questions of reduction on bankruptcy, under the act 1696, c. 5, all deeds relating to heritable rights which require to be completed by infeftment, are reckoned of the date of the registration of the sasine following on them; and all dispositions, assignations, and venditions, which do not require sasine, but to the completion of which, as transferences or securities, intimation or delivery is requisite, are held to be of the date of the intimation, delivery, or other act requisite for completing the right

under them; without prejudice to the validity of all such deeds in other respects; *54 Geo. III., c. 137, §§ 12 and 13*. By 19 and 20 Vict., c. 79, § 6, it is enacted that the date of a deed under that act (the new Bankruptcy Act), or under the act 1696, c. 5, shall be the date of recording the sasine, where sasine is requisite, and, in other cases, of registration of the deed, or of delivery, or of intimation, or of such other proceeding as shall, in the particular case, be necessary for rendering such deed completely effectual. See *Bankrupt. Holograph deeds without witnesses* do not prove their own dates, where the date is of consequence, as in questions under the law of deathbed, or in competitions, but the date may be proved, *aliunde*, by adminicles (*Ersk. B. iii. tit. 2, § 22*); or by two unexceptionable witnesses (*Bank. vol. i. p. 333*). And in *re mercatoria*, holograph writings will prove their date, to the effect at least of throwing the *onus probandi* on the objector. *Stair*, B. iii. tit. 4, § 29; *More's Notes*, p. cccxvi.; *Bell's Com. p. 53*, 6th edit. See also *Holograph Writings*.

**Day**. The day is either natural or artificial. The artificial day is the time from sunrise to sunset. The natural day consists of twenty-four hours; which period is also termed the astronomical day, or the civil day. The astronomical day begins at noon; the civil day is reckoned by some nations from sunrise, by others from sunset, and by others from midnight. By the Roman calendar, the civil day commenced at midnight; and the British and most other European nations reckon in the same manner. All the days of the week except Sunday, or the fast-days appointed by Government, are called *lawful days*; and no legal diligence, either against person or property, can be executed except on a lawful day. But criminal warrants, and warrants for apprehending a debtor, as in *meditatione fugæ*, may both be granted and executed upon a Sunday, or upon a fast-day, as well as on a lawful day. *Bell's Com. 6th edit.*; *Bell's Princ. § 431*; *Ross's Lect. vol. i. p. 329*.

**Day-Writ or Day-Rule**; in England, a rule or order of Court, permitting a prisoner in custody in the King's Bench prison, &c., to go without the bounds of his prison for *one day*. *Tomlins' Dict. h. t.*

**Days of Grace of a Bill**; a prolongation of the time of payment of a bill formerly granted as a mere indulgence, but now as a matter of legal right, wherever the bill is drawn payable at a certain distance of time after date, or after sight. The number of these days differs in different countries. In Scotland, three days of grace are allowed. When the bill is drawn payable *at sight*, or *on demand*, there are no days of grace. A

bill may be protested for non-payment on the day after the nominal day of payment; but the practice is to present the bill for payment on the last day of grace, or, if that should fall upon a Sunday, on the Saturday preceding, and if not then paid, to protest it for non-payment; *Ersk. B. iii. tit. 2, § 33; Bell's Com. p. 324, 6th edit.; Bell's Princ. § 327; Thomson on Bills, p. 405, et seq.; Menzies's Lectures, p. 354. See Bill of Exchange.*

**Deacon.** Before the passing of the Burgh Reform Act, the deacons of the crafts formed a constituent part of the town council in royal burghs, and represented the trades. They were elected by their respective incorporations, generally, if not universally, under the control of the town council. The subordinate incorporations, prior to the election of deacons, made up a list of six of their members, which they presented to the council, who struck off three from the number, and returned the remaining three names to the incorporation, as a *leet* or list, out of which the incorporation should elect their deacon for the ensuing year. The election, when made, was reported to the council, and approved of; after which the new deacon entered upon the duties of his office; or, if any dispute arose as to the election, the council had power, in the first instance, to hear and determine it; their decision being subject to review by summary complaint to the Court of Session, provided the complaint were presented within two calendar months after the annual election of magistrates and councillors; 16 *Geo. II., c. 11.* But by the Burgh Reform Act, 3 and 4 *Will. IV., c. 76, § 19*, it is enacted, that the deacons shall no longer be recognised as official and constituent members of the town council; but the rights of the crafts to elect their deacons and other officers, for the management of their affairs, in such form as they were in use to adopt, are preserved, and are exercised, without control on the part of the town council. The deacon-convenor of the trades in Edinburgh and Glasgow still continues a constituent member of the town council. The deacon is preses of his own incorporation; and signs the record of its acts. Some of our older statutes confer on deacons a mastership or jurisdiction over the rest of their trade, and a power to essay their work; but at present they exercise no such power or jurisdiction. *Bank. B. i. tit. 1, § 20; Bell's Princ. §§ 2176, 2186; Wight on Elections, 340, and Supplement, 141.*

**Dead Body.** The offence of disinterring a dead body, or *crimen violati sepulchri*, is punishable arbitrarily, by fine, imprisonment, whipping, or transportation, according to the circumstances attending the commission of the crime. This offence is not regarded properly as a theft, but as a great indecency, and a

crime of its own nature. The stealing of a corpse before interment seems to be punishable on the same principle. In England, if the shroud or other apparel be carried off with the body, an indictment lies for theft; but the carrying away of the body itself, is not held to be theft either by the English or Scotch law. *Hume, i. 85; More's Notes to Stair, p. cclxxxvii; Tomlins' Dict. voce Corpse.* See also the *Anatomy Act, 2 and 3 Will. IV., c. 75*, which provides regulations as to bodies intended to be made use of for anatomical purposes, which must be observed under sentence of fine or imprisonment.

**Dead Freight.** A merchant who freights a whole ship is liable to pay freight for the goods transported, and a compensation for any loss arising from his failure to supply a full cargo. The sum paid for the unoccupied space is called *dead freight*; it is not, however, properly freight, but, strictly speaking, a claim of damages for the loss of freight; and, therefore, the shipmaster has no lien over the goods on board, entitling him to retain them against the consignee in security of this claim, which must be made effectual by a personal action against the freighter. But, although there be no such *lien* by implied contract, it may be constituted by an express stipulation to that effect, in the charter-party. *Bell's Com. p. 430, 6th edit.; Brodie's Supp. to Stair, 918.*

**Dead's Part;** is that part of a man's moveable succession which he is entitled to dispose of by testament. If a man have neither wife nor children, or is not survived by either, his whole free moveable estate (with the exception of heirship moveables), is called *dead's part*, and he may bequeath the whole of it. If he leave a widow and no children, the widow is entitled to one-half of the free moveables, as her *jus relictæ*; and the other half is dead's part. If he leave a child or children but no widow, the one-half of the free moveable estate is dead's part, and the other goes to the child or children as *legitim*. Where, again, he leaves both a widow and a child or children, the widow has a third as her *jus relictæ*; the child or children a third as *legitim*; and the remaining third is the dead's part. But this legal distribution of the moveable estate may be affected by special provisions in a contract of marriage, which may increase or diminish the share of the moveable estate at the father's disposal by testament; or the same consequence may result from renunciations or discharges of their legal rights by the wife or the children. On the father's death, the *jus relictæ* and *legitim* vest, *ipso jure*, in the wife and in the children, without confirmation; but it is otherwise with the dead's part, which, in so far as undisposed of by testament, must be taken up

by the next of kin by confirmation. *Stair*, B. iii. tit. 4, § 24, and tit. 8, § 54; *Ersk.* B. iii. tit. 9, § 18, *et seq.*, and § 30; *Bank. B.* iii. tit. 8, vol. ii. pp. 379 and 407. See also *Confirmation of Executor. Jus Relictæ. Legitim. Goods in Communio. Contract of Marriage.*

**Deaf and Dumb.** Persons who had been deaf and dumb from their birth, were held by the Roman law to be incapable of consent, and consequently unfit to enter into a legal obligation or contract. But, by the law of Scotland, such persons may contract, if they have the use of reason, and if it appear that they understand the nature of the engagement which they are undertaking, and that they have expressed their consent by the usual signs. The law provides tutors to such deaf and dumb persons as are incapable, from that infirmity, of managing or understanding their own affairs. Those tutors are appointed in the same manner as tutors to idiots or insane persons. *Stair*, B. i. tit. 6, § 25, and B. i. tit. 10, § 13; *Ersk.* B. iii. tit. 1, § 16; *Bank. B.* i. tit. 7, § 11; *Fraser's Domestic Relations*, ii. 133. In one instance, a woman born deaf and dumb was subjected to a criminal trial for murder, proof being offered that she knew right from wrong, and that punishment is the consequence of guilt, and that she was able to conduct herself properly in all the ordinary affairs of life. She pleaded not guilty by signs; and the evidence on the trial having turned out favourably for her, she was acquitted; *Hume*, i. 45, ii. 278, *noté*; *Alison's Princ.* 667. It is almost superfluous to observe that it is a valid objection to a jurymen that he is deaf or dumb; *Hume*, ii. 310. By the law of England, a man born deaf, dumb, and blind, is looked upon in the same light as an idiot. *Tomlins' Dict. h. t.*

**Dean of Guild**; the head of the Guild-brethren or Merchant Company. By 1593, c. 180, power was conferred on the dean of guild to judge, in mercantile and maritime causes, within burgh; but it is long since he ceased to exercise that branch of his jurisdiction. The proper duty of this magistrate now is, to take care that buildings within burgh are sufficient; that they are erected agreeably to law; and that they do not encroach either on private or public property. He may order insufficient buildings to be taken down; but in other respects, his jurisdiction is strictly confined to possessory questions. Although the dean of guild was formerly a magistrate of a royal burgh, and, indeed, in certain of the burghs still continues to be so, his jurisdiction is unconnected with the bailie court. His judgments are liable to review in the Court of Session, by advocacy, suspension, or reduction. By the Burgh Re-

form Act, 3 and 4 Will. IV., c. 76, it is declared, that while the right of the guildry to elect their dean shall be preserved, he shall no longer be recognised as an official and constituent member of the town council, and that his functions shall be performed by a member of the council, elected by the majority of councillors. But the deans of guild in Edinburgh, Glasgow, Aberdeen, Dundee, and Perth, elected as heretofore, are continued as constituent members of the council, to perform all the functions of their office. *Ersk.* B. i. tit. 4, § 24; *Bank. B.* iv. tit. 22; *Bell's Princ.* §§ 2176, 2184; *Jurid. Styles*, iii. 678, 756. See *Burgh Royal*.

**Dean of Guild Court.** In Edinburgh, the dean of guild court consists of the dean of guild, the old dean of guild, and a council of merchants and tradesmen annually chosen. The law assessors of the magistrates of Edinburgh act as assessors, and the usual practitioners before the court are the members of the society of solicitors-at-law. The jurisdiction of the court is confined to the regulation of buildings within the royalty; to the prevention of obstructions in the streets; to the removal of old and ruinous tenements; and, in general, to such matters of police as have any connection with buildings; including the enforcement of the act 1698, c. 8, as to the height and structure of houses in Edinburgh. No building can be erected, demolished, or materially altered, within burgh, without a warrant from this court, after all parties interested have been cited. The court has also a jurisdiction in regulating weights and measures. Where not moved in by private parties, these matters, so far as regards the public interest, are brought under the notice of the dean of guild court by the procurator-fiscal of that court. The jurisdiction is confined to possessory questions; and the decrees of the court may be enforced by letters of horning, obtained on a bill at the Bill-Chamber, as in the ordinary case of the decrees of magistrates of royal burghs. The dean of guild courts in other royal burghs, of sufficient size, have an analogous jurisdiction; and the form of process before the dean of guild is similar to that in other inferior courts; except that, in processes of *lining*, the action may proceed on the original petition alone, without any farther written pleadings; the parties or their procurators being heard *vice voce*. The facts, and the rights of the parties, may also be ascertained, when it shall appear proper, by judicial inspection of the premises, or by judicial remits to skilful tradesmen, who may be put on oath if required, and by the exhibition of plans. See *authorities as in preceding article*. See also *Boyd's Judicial Proceedings*, B. v. tit. 3; *Ersk.* B. i. tit. 4, § 24,

and notes; and B. ii. tit. 9, § 9; *Jurid. Styles*, iii. 678; A. S. 12th Nov. 1825 (*Burgh Courts*), part iii., c. 1. See *Judge and Warrant. Weights and Measures. Edinburgh. Lining.*

**Dean of Faculty.** The corporation of advocates or barristers in Edinburgh is called the *Faculty of Advocates*, and the Dean of Faculty is one of their number elected annually to preside at their meetings, and to sign the acts of the Faculty. *Bank. B. iv. tit. 3, § 8. See Advocate.*

**Dean;** is an ecclesiastical dignity in the Church of England, next in degree to a bishop. See *Tomlins' Dict.*

**Deans of the Chapel-Royal.** The Chapel-Royal in Scotland was a collegiate church, founded by the Scottish kings for their own use, the superior of which was called Dean of the Chapel-Royal. This benefice was, after the Reformation, conferred first on the Bishop of Galloway, and afterwards annexed to the see of Dunblane. Since the abolition of Episcopacy, the revenues of the benefice have been in the Crown; and the Sovereign bestows them on one or more clergymen of the Church of Scotland, who are denominated deans and chaplains, and who hold the appointment during pleasure. The patronage of the churches which belonged to the ancient deanery is now in the Crown, unless expressly conveyed to the chaplains, in their gift of the profits and emoluments of the deanery. *Bank. B. ii. tit. 8, § 101.*

**Death, Punishment of.** See *Capital Punishment.*

**Death;** is either natural or civil. *Natural*, is when life is actually extinct; *civil*, is when a person is adjudged dead by the law. Death has various effects, according to the circumstances in which it takes place. The death of the person behaving as heir purges vicious passive titles. The death of a partner dissolves a company, in absence of agreement to the contrary. Death obliterates crimes as to the punishment; but the right arising to the superior in the fee, from the delinquency, as a resolute condition, is not excluded by the vassal's death. The case of the death or sickness of any of the judges of the Court is provided for by 2 Will. IV., c. 5. See *Shand's Prac. p. 54.* Where either of the parties to a process dies, the proceedings must stop till his representatives are cited; for any judgment pronounced in an action against a party previously dead is null. Formerly an action of transference was necessary, in case of either the pursuer's or defender's death; but the necessity was taken away in the case of the pursuers by 1693, c. 15, which allows his "heir, executor, or assignee, upon production of his service or retour, or confirmed testament, or special assignation, though not inti-

mate, to insist in the principal cause;" and successors or purchasers may proceed with the action on producing their title, and being assisted by a minute. On the defender's death, however, and on the refusal of his representative to assist himself, an action of transference is necessary, and the principal cause cannot be proceeded in till decree of transference is pronounced. Provision is made for the substitution, at some future day, of services and notices in lieu of actions of transference, by 13 and 14 Vict., c. 36, § 54. A forthcoming may be raised on an arrestment, notwithstanding the death of the arrester, arrestee, or common debtor. For the rules on this subject, see *Arrestment.* A presumption exists in favour of life for a reasonable number of years, so as to throw the *onus probandi* upon the party alleging death. But this presumption may be overcome by a counter presumption of death, arising from the circumstances of the case. No general rules can be given upon this point; but a number of decisions will be found cited in *Dickson on Evidence*, p. 183, *et seq.* The registration of deaths, as well as of births and marriages, is regulated by 17 and 18 Vict., c. 80, which contains provisions for making registration compulsory. See *Dickson on Evidence*, p. 578, and *Seton's Analysis of this statute; Stair, B. ii. tit. 11, § 33; B. iii. tit. 5, § 34, tit. 6, § 15; More's Notes*, pp. cii. ccvii. cccxv.; *Ersk. B. iii. tit. 3, § 42; B. iv. tit. 1, § 61; Bell's Com., passim; Princ. §§ 228, 375, 1528; Illust. §§ 228, 375; Watson's Stat. Law, h. t.; Kames' Stat. Law, h. t.; Shand's Prac., passim; Chambers' Election Law, h. t. See Transference. Forthcoming. Wakening. Registration.*

**Deathbed, Law of.** By the law of deathbed (which is peculiar to Scotland), the heir in heritage is entitled to reduce all voluntary deeds granted to his prejudice by his predecessor, within sixty days preceding the predecessor's death; provided the maker of the deed, at its date, was labouring under the disease of which he died, and did not subsequently go to kirk or market unsupported. Such deeds, granted *in lecto*, as it is called, are contradistinguished from deeds granted by a person in what is termed *liege poustie*, (*legitima potestate*); that is, where the grantor is legally presumed to have been of a sound and disposing mind. But deathbed deeds, although challengeable by the heir, are effectual, unless challenged by way of reduction, and are not null *ope exceptionis*. The law of deathbed, which is part of our ancient common law, is of uncertain origin; but some interesting speculations concerning the principle on which it is supposed to rest, will be found in the following authorities:—*Reg. Majestatem*, tit. ii. c. 18, §§ 7 and 9; *Craig de Feudis*, lib.

i. dieg. 12, § 36; lib. ii. dieg. 1, § 28; *Dirlton's Doubts, voce Legitima Liberorum*; *Stair*, B. iii. tit. 4, § 28; *More's Notes*, cccxiii. *et seq.*, and B. iv. tit. 20, § 41; *Mackenzie's Inst.* B. iii. tit. 8; *Bank. B.* iii. tit. 4, § 32; *Ersk. B.* iii. tit. 8, § 95, *et seq.*; 1696, c. 4; *A. S.* 29th Feb. 1692. The leading rules of the doctrine, as now settled, may be thus arranged:—

1. *Nature of the disease.* It is not sufficient to invalidate the deed, that death has happened within sixty days after its date, if the granter was then in good health, although he may have afterwards died from accident or supervening disease. Neither is it sufficient that, at the date of the deed, the granter was ill of one disease, if he died of a different disease (see *Mackay v. Davidson*, 17th Jan. 1828, 6 S. 363, *affirmed on appeal*, 1831); provided the latter disease was completely distinct from, and not a manifest sequel of, that under which he was labouring at the date of the deed, or so connected with it as to have been accelerated or increased by it. If, however, the disease existing at the date of the deed has been clearly the immediate or ultimate cause of death, its character is immaterial. Thus, it is of no consequence whether it have been slow or acute, constant or recurring, local or general; and even, extreme old age alone, if attended with appearances obviously indicating the approach of death, is sufficient. Nor is it necessary that the disease shall have confined the party to bed or to the house, and still less, that it shall have affected his judgment, or incapacitated him for managing his affairs, the meaning of the law being to exclude such investigations by a general presumption of incapacity.

2. *Exception of kirk or market.* The deed will not be reducible *ex capite lecti*, if it can be proved that after the date of the deed the granter appeared publicly at kirk or market; it being absolutely presumed, that if he was able to do so, he was not in such a state of weakness as to fall within the reason of the law. And as, on the one hand, this exception of kirk or market is admitted (although *Erskine* seems to state a contrary doctrine, B. iii. tit. 8, § 96), whatever may have been the state of health at the time; so, on the other hand, the want of this act cannot be supplied by proof of capability to execute the deed. It is declared, by Act of Sederunt, 29th Feb. 1692, that in order to be effectual, the act of going to kirk or market must be performed “in the day-time, and when people are gathered together in the church or church-yard for any public meeting, civil or ecclesiastic;” or, “in the market-place for public market;” and that no instrument taken on the fact shall bear faith, unless it expressly set forth “that it was taken in the audience

and view of the people gathered together as aforesaid.” This public appearance, besides, must be proved satisfactorily to have been such as to indicate a certain degree of bodily ability; for the person must have gone to church or market, and returned unsupported. But the circumstance of his having been on horseback is not regarded as support, unless he has been helped on and off. If he have continued in the kirk or market long enough to afford evidence of his having been there, it is unnecessary that he shall have continued for any definite time, or that he shall have transacted business in the market. Neither is it required that he shall have exhibited the appearance of recovery, the act not being legally regarded as symptomatic of re-convalescence, but as affording an insuperable presumption of capability to execute the deed. On this point the following cases may be consulted:—*Faichney*, 9th July 1776, *Mor. App. Deathbed*, No. 1; *Maitland*, 16th May 1815, *Fac. Coll.*; *Rait*, 27th Nov. 1818, *Fac. Coll.*, and other authorities *infra cit.*

3. *Period of sixty days.* If the granter survive for sixty days after the date of the deed, that alone, by stat. 1696, c. 4, “shall be a sufficient exception to exclude the reason of deathbed.” In computing this period, the day of signing the deed is not reckoned; but it is sufficient, on the other hand, that the granter has survived until the running of any part of the sixtieth day. See *Computation of Time*. If the deed have been ante-dated to provide against the objection of deathbed, it seems to be subject to reduction, whatever may have been its true date; *Merry v. Howe*, 6th Feb. 1801, *Mor. App. voce Writ*, No. 3; *affirmed in the House of Lords*. Holograph deeds not tested do not prove their dates in questions under the law of deathbed. See *Holograph Deeds*. Some authorities mention the cases of deeds granted by persons under sentence of death, and by persons who have fallen in duels within the sixty days, as subject to this law, but without any good reason, so far as regards the latter class of deeds; and with regard to the former, they may be reducible, but obviously not on the head of deathbed. See *Bank. B.* iii. tit. 4, § 33; *Bell's Com.* vol. i. p. 87, *et seq.* 5th edit.

4. *Deeds affected by this law.* These are in general all deeds to the heir's prejudice, and all deeds done in consequence of them; such, for example, as a sale by trustees under a deathbed settlement. Generally speaking, the deeds struck at by the law of deathbed, are settlements and alienations, onerous or gratuitous, in property, or in security, or subjects heritable *ex sua natura*, or by destination; conveyances for a tract of years of the profits of such subjects; leases of extraordi-

nary duration, or for unusually low rents, or for grassums; but leases for adequate rents, and in the ordinary course of management, are not reducible, although granted *in lecto*; *Semple*, 1st June 1813, *Fac. Coll.* Alienations of heirship moveables made *in lecto* are also under the law; likewise gratuitous discharges or renunciations of heritable rights or claims; gratuitous bonds or obligations to the prejudice of the heir, whether taken payable by the heir in heritage, or by heirs in general, if the grantor's moveable funds are insufficient to discharge them; gratuitous bonds of corroboration of prior debts creating an obligation on the heir, in which he would not have been otherwise liable, and legacies and bequests made a burden on him; voluntary provisions to his prejudice in favour of wives or children; and generally, all such alterations in the nature of the subject as prejudice the heir's interest. If the effect of the deed be injurious to the heir, it is of no consequence whether it has been granted by the deceased, or to him, in a form dictated by himself, or whether the subjects were vested in the deceased, or in a trustee for his behoof, and who has acted in obedience to his directions given *in lecto*. Even a deathbed alteration of a previous nomination of curators is reducible. *Crawford*, Feb. 1751; *Mor.* 3230. On the other hand, it is necessary that the deed be strictly of a voluntary kind, and such as the party could not have been compelled to grant. Thus a disposition executed on deathbed, in implement of missives executed *in liege pousitie*, is not struck at; because, even had no disposition been granted by the ancestor, the heir would have been bound, as his representative, to implement any *liege pousitie* obligation incumbent on his ancestor.

5. *Tiile to pursue*. "The right of reduction *ex capite lecti* is introduced in favour of that heir who was *alioqui successurus*, in the subject alienated by the deathbed deed." *Ersk.* B. iii. tit. 8, § 100; provided always that the heir has done nothing to ratify or homologate the deed. Such homologation, however, will not be inferred from his having previously accepted a provision of other property from his ancestor, as in full. The privilege of reducing a deathbed deed may be exercised by an apparent heir; and it is not limited to the immediate apparent heir at the time of the grantor's death; if that heir die without ratifying or homologating the deathbed deed, and if the deed be to the prejudice of the next heir also. That next heir's right, however, is excluded by the prior heir's *liege pousitie* ratification or homologation; if the prior heir be legally capable to ratify or homologate, and that even although the deed should have been to the prejudice of the re-

moter heir only, and not to that of the heir homologating. The privilege is also competent to the creditors of the heir possessing it, who may, according to *Erskine* (B. iii. tit. 8, § 100), exercise it without any previous adjudication of the faculty to reduce, if the heir himself have not homologated the deathbed deed. The privilege of reducing *ex capite lecti* is also competent to the Crown as *ultimus hæres*, or to the Crown's donator; *Brock*, 2d Feb. 1809, *Fac. Coll.* Wives and children have the privilege of setting aside deathbed settlements of moveables, in so far as such deeds affect their legal provisions of *ius relictoæ* and *legitim*; *Ersk.* B. iii. tit. 9, § 16. See *Legitim. Jus Relictoæ*.

It is incumbent on the pursuer of a reduction *ex capite lecti* to show that the prejudice to him arises from the particular deed sought to be reduced, and that such prejudice would be removed by the reduction, otherwise he has no interest to challenge it. On this subject, it is sufficiently plain that no mere donee (not being heir *alioqui successurus*) under a deed executed *in liege pousitie*, has a right to challenge a deathbed exercise of a faculty of revocation, contained in the disposition. But questions of more difficulty have occurred regarding the effect of deathbed revocations, of prior *liege pousitie* deeds to the heir's prejudice, when the deeds containing such revocations also exclude the heir. In cases of this kind one difficulty is founded on the doctrine of *approve* and *reprobate*, it having been at one time thought that the heir could not challenge the deathbed deed, in so far as it was to his prejudice, while, at the same time, he took the benefit of the revocation contained in it. Another difficulty arose from the supposed want of interest in the heir, to reduce the deathbed deed, since by doing so he would revive the prior *liege pousitie* deed which excluded him. The result of a good deal of discussion on this subject, both in the Court of Session and in the House of Lords, seems to be, that the heir is entitled to take the benefit of the deathbed deed, in so far as it revokes prior deeds, while he may reduce it in so far as it is to his prejudice; and this even where it appears to have been the grantor's meaning, that if the deathbed deed should prove ineffectual, the *liege pousitie* deed should revive. The following cases may be consulted:—*M'Keay*, 16th Jan. 1740, *Mor.* p. 3277; *Rowan*, 22d Nov. 1775, *Mor.* p. 11371; *Finlay*, 29th July 1779, *Mor.* p. 3188; *Crawford v. Coutts*, 17th Nov. 1795, and 3d Feb. 1801, *Mor.* p. 14958; and *App. Deathbed*, No. 3; *Signet Cases*, p. 207, reversed in the House of Lords, 14th March 1806; *Lockhart Muir*, 1st June 1813, *Fac. Coll.*; *Bailey*, 2d Feb. 1815, *Fac.*

*Coll.*; *Duke of Roxburghe*, 13th Dec. 1816, *Fac. Coll.*; *Moir*, 2d March 1820, *Fac. Coll.*; *S.* vol. xi. p. 612; xii. 569. See 1 *Ross, L. C.* 594, *et seq.* With regard to the various devices by which it has been attempted to elide the law of deathbed,—as, for example, by reserved powers to dispoise, *etiam in articulo mortis*; by trust-deeds, with directions to the trustees, given *in lecto*; by dispensations with the law in Crown charters, and similar expedients *fraudem legi facere*,—it may be observed in general, that all such devices have proved unavailing. This salutary provision of the law cannot be evaded either directly or *per ambages*; for it has been justly held that one might as well think of reserving a power to dispoise after he shall have become *non compos mentis*, as attempt to secure to himself, during a mortal disease, a capacity which the law holds one in that extremity not to possess. See *Fountainhall*, vol. i. p. 479; vol. ii. p. 324, and *Mor.* p. 3254; *Stair, B.* iii. tit. 4, § 29; *Dirleton and Stewart, vocs Reduction ex capite lecti*, and *Faculty to alter*; and *Davidson*, 17th Nov. 1687, *Mor.* p. 3255. Sometimes the heir himself has been prevailed upon to approve of a deed already executed by his ancestor, or, prospectively, to renounce his right to reduce any deed to be made by the ancestor even *in lecto*. In such cases the rule seems to be, that although the heir may be barred, *personali exceptione*, from challenging a particular deed which he has seen and approved of, yet no antecedent general renunciation of his right to reduce *ex capite lecti* will deprive him of that privilege; *Ersk. B.* iii. tit. 8, § 99. See also *Murray*, 21st Jan. 1826, 4 *S.* 374. The title to pursue a reduction *ex capite lecti* is lost by the currency of the long negative prescription. The Scotch law of deathbed has been extolled by some of the highest authorities in the law of England, and ridiculed by others; and certainly it presents this anomaly, that, while a dying man may dispoise of his moveable property, so far as subject to his testamentary disposal, and however valuable, within the last hour of his life, he cannot prejudice his heir-at-law *quoad* his heritage, no matter how trifling its value may be, by any deed done *in lecto cęritudinis*. See Lord Chancellor Eldon's encomium on the Scotch law of deathbed, in *Crawford v. Coutts*, 2 *Bligh's Reports in House of Lords*, 660; and see, on the subject of this article generally, *Stair, B.* iii. tit. 4, § 27, *et seq.*; *B.* iv. tit. 20, § 37, *et seq.*; *Mor's Notes*, p. cccxiii. *et seq.*; *Ersk. B.* iii. tit. 8, § 95, *et seq.*; *Bank. B.* iii. tit. 4, § 32, *et seq.*; *Bell's Com.* p. 1050, *et seq.*, 6th edit.; *Bell's Princ.* § 1182, 1786, *et seq.*; *Sandford on Heritable Succession*, vol. i. p. 81, *et seq.*; *Kames' Equity*, 282, 462.

**Debating Societies.** Debating societies or

clubs, whose ostensible object was the reform of pretended political abuses, but which, in reality, aimed at the subversion of the existing form of government, had become so numerous in this country about the time of the French Revolution, and threatened consequences so alarming, that it became necessary to strengthen the common and the older statutory law, by several enactments for the suppression of those associations. By 36 Geo. III., c. 7; 37 Geo. III., c. 137; 39 Geo. III., c. 79, and 52 Geo. III., c. 104, the members of clubs or societies in which unlawful oaths are administered, or seditious engagements entered into, are punishable with transportation. The stat. 39 Geo. III., c. 79, contains the regulations under which a lawful society may be formed; and persons entering into the combinations prohibited by that act, may be proceeded against, either summarily before one justice of the peace, or by indictment before the Court of Justiciary, and punished by fine or imprisonment. See *Sedition*.

**De Bene Esse.** In English law, to take or do any thing *de bene esse*, is to admit it as well done for the present, on the understanding, that when it comes to be more fully examined or tried, it shall stand or fall according to its own merits. Thus, in Chancery, upon motion to have one of the defendants in a cause examined as a witness, the Court, not then thoroughly examining the justice of it, or before answer, as we should say, will often order such a defendant to be examined *de bene esse*; that is, his deposition will be taken, and allowed or suppressed, at the hearing of the cause, as the Court shall think fit; *Tomlins' Dict. h. t.* The analogous Scotch law expression is, "*Before answer*," which see.

**Debenture**; an instrument of the nature of a bond or bill to charge Government, &c. "The forging of custom-house debentures is felony." *Tomlins' Dict.*

**Debitor Non Pręsumitur Donare.** A debtor is not presumed to make a gift to his creditor while his debt remains unextinguished. Thus, where a debtor gives money or goods, or grants a bond or an assignation to his creditor, without assigning any special reason for so doing, the legal presumption is, that he has done so in payment or extinction of his debt. This, however, is merely a *presumptio juris*, which will yield to contrary proof, or to stronger presumptions the other way. Where, for example, the obligation expresses a special cause of granting, as where a bond bears to be for borrowed money, without mentioning the former debt, it will not be presumed to have been granted in extinction of [that debt, but will constitute a new and separate obligation against the borrower. In like manner, bonds of provision by a father



to a child, are, from the presumption of paternal affection, presumed to be granted, not in satisfaction of former bonds, but as an addition to the child's patrimony. Even this presumption, however, may be overcome by circumstances proving the father's intention to include the first bond in the last. Thus, a settlement on a daughter in a contract of marriage, is held to be granted in full of all former provisions in favour of the daughter, although it should not bear to be *in satisfaction*, &c., "because, provisions granted by fathers in marriage-contracts, are generally intended to comprehend the whole estate that is to be expected by the husband from the wife or her father in name of tocher." *Ersk. B. iii. tit. 3, § 93.* But such provisions will not be presumed to be in extinction of any undetermined general claim, such as *legitim* or a clause of conquest, which is merely in hope. *Dowds, 24th June 1681, Mor. p. 11478; Gibson, 4th Feb. 1726, Mor. p. 11481, voce Presumption.* See also *Kippen's Trustees v. Kippen, 3d July 1856, 18 D. 1137.*

**Debitum Fundi**; is a real debt or *lien* over land, which attaches to the land itself, into whose hands soever it may come. Such a burden is constituted either *ex lege*, or by paction. Thus, feu-duties, and arrears of feu-duties due to the superior, and the relief and non-entry duties before declarator, are, by law, real debts, or *debita fundi*, which the superior is entitled to make effectual, not only by a personal action against the vassal, but by an action of pointing of the ground. In the same way, an annualrenter, or a creditor by heritable bond, or under a reserved burden, whose right is feudally constituted, is, by paction, a real creditor; and such debts also are termed *debita fundi*, and may, in like manner, be made effectual by pointing of the ground. See *Pointing of the Ground.* All *debita fundi*, so long as they remain undischarged, are effectual against the land, preferably to the rights of the proprietor, and all deriving right from him. In competition amongst themselves, the superior, for his feu-duties and casualties, is ranked in the first place, his right being founded on the original grant to the vassal; and conventional *debita fundi* are preferable according to the dates of the registration of the infestments, by which they are made real. See *Burdens.* Rents, tithes, the land-tax, the expense of repairing churches, manse, &c., and similar burdens, although all claims connected with land, are not *debita fundi.* *Stair, B. iv. tit. 35, § 24; More's Notes, p. clxxii.; Ersk. B. iv. tit. 1, § 11; Bank. B. ii. tit. 5, § 18, et seq.; Bell's Com. p. 735, 786, 945, 6th edit.; Bell's Princ. § 699; Ross's Lect. vol. ii. p. 392, et seq.; Shand's Prac. See Absolute Disposition.*

**Debts, Small.** See *Small Debt. Imprisonment.*

**Deceit.** Any subtle trick or artifice, including all kinds of craft or collusion, used to defraud another, called in the Roman law, *dolus malus.* Deeds or obligations obtained by deceit are reducible on the head of fraud, at the instance of the party imposed upon, but not at the instance of the deceiver; for, in such a case, the maxim, "*Deceptis non decipientibus jura subveniunt,*" is applicable. *Ersk. B. iii. tit. 1, § 16; Bank. B. i. tit. 10, § 62, and B. i. tit. 7, § 80; Kames' Equity, 56.* See also *Fraud. Circumvention. Collusion.*

**Decern.** To decern is to decree. Before the judgment or interlocutor of any court in Scotland can be extracted, to the effect of warranting execution, it must import a decree. Hence, all extractable judgments close with the word "decern." *Barclay's M'Glash. Sheriff Court Prac. 297; Shand's Prac. pp. 347, 594, note. See Extract. Interim-decree. Decree.*

**Decimæ Rectoriæ**; parsonage tithes; *i. e.*, the tithes formerly payable to the parsons of parishes, and which are due from all species of grain produced by culture. See *Teinds.*

**Decimæ Garbales**; teind-sheaves; *i. e.*, the tenth sheaf of the cut corn which the rector of the parish had a right to draw, or lead off from the ground. See *Teinds.*

**Decimæ Vicariæ**; vicarage tithes; *i. e.*, the tithes formerly payable to the vicars of parishes, which are due only according to use and wont, from such articles as wool, grass, flax, hemp, fish, eggs, &c. See *Teinds.*

**Decimæ Inclusæ**; teinds which have never been separated from the stock, and which are not demandable by the titular or minister. *Stair, B. iv. tit. 24, § 8; More's Notes, p. cccxxxix.; Bell's Princ. § 1149; Connell on Tithes; Ersk. Inst. iii. 10, §§ 10-13.* See *Teinds.*

**Decimæ Debentur Parocho.** The meaning of this maxim is, that teinds belong to the minister of the parish, where the subject from which they arise was produced; and that, consequently, he cannot be deprived of them by any species of alienation; which is to have a permanent effect to his prejudice. *More's Notes to Stair, p. cexli.; Connell on Tithes.* See *Teinds.*

**Decisions.** The decision of a court is the judgment pronounced in a cause depending before it; but, in Scotland, the term *Decisions* is usually applied to the printed reports of cases decided in the Court of Session. It has been said, that a uniform tract of decisions of that Court is to be held as law; *Mackenzie's Inst. B. i. tit 1, § 10.* But even Mackenzie admits that the judges are not absolutely bound to receive the judgments of their pre-

decessors as law; and all that can safely be said seems to be, that, although those decisions are not to be held as equal in authority to our customary or unwritten law, yet they serve to explain the law, and to ascertain ancient usages; and a series of them, uniform upon the same point, is held to have the force of law, more especially where the practice or the conveyancing of the country has been regulated by such precedents. In such cases, two or more solemn and consecutive decisions of the Court of Session, not altered by the House of Lords, appear to be held as absolutely fixing the law. Where, again, there is not the same uniformity in the course of decisions, or where the precedent has fixed no rule on which the country has acted, a greater latitude will be taken, agreeably to the maxim, *Non exemplis sed legibus judicandum*; *Stair*, B. i. tit. 1; § 16; *Ersk.* B. i. tit. 1, § 47; *Bank*. B. i. tit. 1, § 74. It appears that in England the decisions of courts of law are of greater authority; that they are the evidence of what is common law; and that, in order to give permanence and consistency to the law, it is an established rule to abide by precedents, unless the former determination be evidently contrary to reason; *Blackstone's Introduct.*, § 3, vol. i. p. 69, *et seq.*

**Declaration**; in the law of England, a legal specification, on record, of the cause of action, by a plaintiff against a defendant; *Tomlin's Dict. h. t.*; *Wharton's Lex. h. t.*

**Declaration**. In criminal proceedings the account which a prisoner, who has been apprehended on suspicion of having committed a crime, gives of himself on his examination, is taken down in writing, and called a declaration. It is the duty of the magistrate to take the declaration immediately on the prisoner being brought before him; but, before doing so, he must ascertain that the prisoner is in a fit state of mind to undergo an examination; that he is not intoxicated nor disordered in his intellect, nor under the influence of promises or threats. A declaration runs every chance of being cast, if the prisoner was *induced* by the magistrate to emit it, when he would otherwise not have done so, though neither promises nor threats were used; *Wilson's case*, noted in *Hume*, ii. 331. The magistrate's proper duty is distinctly to inform the prisoner not only that it is optional for him to make a declaration or not as he pleases, but also that what he says may be afterwards used against him on his trial. After those preliminaries, without attending to which the declaration will be of no value, the examination will be proceeded with in the presence of the magistrate. It is in practice generally conducted by the fiscal, who knows the particulars of the case more fully

than the magistrate; but the latter must of course see that the questions are confined to the particular charge, and are made intelligible to the accused; and so a declaration, not emitted, but only adhered to, before the magistrate, is inadmissible evidence. The declaration must be taken down at large in writing, as given by the prisoner. It ought to be written by a neutral person appointed by the magistrate for the purpose, and not by a clerk or apprentice of the party conducting the prosecution. It ought to contain the name, designation, and age of the declarant; and the parish and county in which the crime is said to have been committed should be distinctly and carefully specified. The declaration itself should be written on a sheet or sheets of paper distinct from the rest of the precognition; and after it is written out it must be read over to the declarant, who, along with the magistrate, must sign every page of it; or, if the declarant cannot or will not write, the magistrate signs the declaration in his stead. All this ought to take place in the presence of two or more creditable witnesses who have heard and seen the whole examination, and who must sign each sheet as witnesses, not to the subscriptions merely of the prisoner and the magistrate, but in order that, if necessary on the trial, they may be able to authenticate the declaration, and bear testimony to what passed on the occasion. A formal testing clause with the writer's name is not required; but the declaration ought to conclude with a docket, mentioning the names and designations of the magistrate and witnesses, the number of pages, and any alterations by way of marginal addition, deletion, erasure, or otherwise. If the prisoner does not understand English, the use of a sworn interpreter is necessary, and the witnesses must also understand the foreign language, because they must know all that is taking place. It frequently happens that more than one declaration is emitted by the prisoner. This is quite competent; and such declarations may be taken even after commitment for trial, but not after the libel has been served. Care, however, should be taken that all the prisoner's previous declarations are read over to him before another is taken; and the previous declarations ought to be referred to in the last declaration. All the declarations must be preserved. The declaration will not be allowed to be produced on the trial, if the magistrate have delegated the taking of it to the clerk or to any one else not a magistrate.

With regard to the use to be made of the declaration on the trial, it is settled, that although a confession made by the prisoner out of the presence of the jury is not of itself

a sufficient ground of conviction, yet it does not follow that a solemn and deliberate acknowledgment of guilt, proved to have been made before a magistrate, is to have no effect when corroborated by the other evidence adduced; and, accordingly, the panel's declaration is now invariably received as an article of evidence on his trial, although it will have no effect as evidence against any other person whom the declarant may have named as participating in his guilt. Further, the prosecutor can, as he chooses, put in the declaration or not at the trial, while the declarant cannot call for it; *Kennedy*, 1 *Brown's Rep.* 497. But if one of several declarations is laid before the jury, all the others must, if the panel wishes it, be produced also. *Hume*, vol. ii. p. 324, *et seq.*; *Burnett, Cr. Law*, 488; *Alison's Prac.* 557; *Bell's Notes to Hume*, 239; *Dickson on Evidence*, p. 711. See *Criminal Prosecution. Confession.*

**Declaration, Dying.** The law of Scotland properly rejects *hearsay* evidence, *i.e.*, the testimony of a witness to that which he has heard from another. But to this rule there is a general exception in cases where the person whose statement is narrated was admissible when he spoke, but died before the trial; *Bell's Princ.* p. 2259. Such evidence is especially necessary to secure the ends of justice in criminal cases, where a party has died from the result of injuries made the subject of trial. Thus, in cases of murder, the dying declaration of the sufferer as to the circumstances of the mortal injury, is always admitted as evidence on the trial of the person charged with the murder, provided the declaration has been deliberately emitted while the deceased was in the possession of his faculties, and that it is proved by creditable witnesses. Where the declaration has not been committed to writing, its import may be proved by parole evidence; but much more weight will be given to it where it has been written down at the time it was made, in the presence of those who heard it, and who can swear to the circumstances under which it was emitted. In committing such declarations to writing, it is not necessary to observe the same formalities which are required in the authentication of the declaration of a prisoner. On the contrary, it is enough that the dying declaration be proved to have been freely given and fairly taken down in the presence of the witnesses, and that the witnesses can identify the writing produced on the trial as that which was drawn up on the occasion. Evidence of this kind may be adduced *for* as well as *against* the accused; and there are several instances on record in which the dying declarations of persons who have met their death by accident have been suc-

cessfully used to exculpate from a charge of murder. *Hume*, ii. 406, *et seq.*; *Alison's Prac.* 515; *Bell's Notes*, 291; *Dickson on Evidence*, p. 66. See *Hearsay.*

**Declaration, Judicial.** In civil causes, both in the Court of Session and in the inferior courts, it sometimes happens, that where the statements of the parties in point of fact are at variance, the judge ordains one or other of them to be judicially examined as to the particular facts on which the case rests. This form of proceeding is not confined to any particular class of cases, but may be resorted to wherever the circumstances are such, in the opinion of the judge, as to render that mode of investigation expedient. It is a matter solely within the discretion of the judge, and is only resorted to when he has solid ground for suspicion of the undue concealment of material facts within the knowledge of the party. A party failing to appear may be held as confessed; but no one is forced to undergo a judicial examination in any matter on which he may be criminally prosecuted. A declaration made in this way can never be regarded as any thing more than the deliberate declaration of the party making it. It is not given upon oath; nor is it exclusive of other proof; and it is in the power of the opposite party to rebut the statement of the declarant, if he can, by legal evidence. The examination in the ordinary case is taken down in writing by the clerk of Court as commissioner, the judge not being present. In practice, the interrogatories are usually put by the counsel or agent for the adverse party. Judicial examinations are regarded unfavourably by the Court; and are now of less consequence than formerly, since the enactments under which a party to a cause may now, in general, be examined as a witness. *Dickson on Evid.* 705. See *Calumny, Oath of.*

**Declaration.** In English judicial proceedings, the declaration is a legal specification, on record, of the cause of action by a plaintiff against a defendant. *Tomlins' Dict.*

**Declarator**; a declaratory action. This is a form of action by which some right of property, or of servitude, or of *status*, or some inferior right or interest, is sought to be judicially declared. Such are—declarators of property, where the property of one person is illegally in the possession of another,—of trust and denuding, where a trustee holds property by titles *ex facie* absolute, and illegally refuses to divest himself in favour of the real proprietor (see *Trust*),—of contravention under an irritancy in an entail,—of irritancy *ob non solutum canonem*,—of non-entry,—of tinsel of superiority,—of servitude,—of expiry of the legal,—of marriage,—of bastardy, and

many others. Declaratory conclusions are generally, though not necessarily, followed up by petitory or possessory ones, to give effect to the right declared. Declarators of property of heritable subjects, by persons *in petitorio*, are now rare; an action of reduction-improbation being in that case a more effectual method of attaining the object. But it frequently happens that a person in possession, who is doubtful of his right, has it ascertained by a declaratory action; and such an action may be brought, although there be no one disputing the right, and even although no immediate interest to challenge it has emerged. In order, however, to entitle a party to bring an action of declarator, he must show that he has a substantial interest to insist in the declaratory conclusions, and that it is an interest of which the Court of Session can competently judge. It is not competent to ask the Court to declare a fact or a right in the abstract, without pointing out the consequent right to the party who concludes for such declarator; *Gifford*, 8th July 1829, 7 S. 854; *Lyle*, 17th Nov. 1830, 9 S. 22. Under the class of declaratory actions may be comprehended such rescissory actions as merely conclude that the deed or right libelled may be declared null, without any conclusion against the defender himself. Decrees upon actions properly declaratory confer no new right, but only declare that a right exists in the pursuer; and, consequently, such decrees have a retrospective operation to the period at which the right commenced. Declaratory actions, properly so called, are not competent except in the Court of Session. But it is competent for a party to ask an inferior court to pronounce declaratory findings, leading to the conclusions in law deduced in the summons; for declaratory findings do not necessarily infer a declaratory summons, so as to render the action incompetent in an inferior court; *Hall*, 19th May 1831, 9 S. 612. It would appear that a declarator of servitude, or immunity from servitude, is competent before the Sheriff under 1 and 2 Vict., c. 119, § 15; and an action equivalent to a declarator of irritancy *ob non solutum canonem*, under 16 and 17 Vict., c. 80, § 32. Declaratory actions, although they form a great and valuable class of actions in the law of Scotland, are unknown in the English practice. *Stair*, B. iv. tit. 3, § 47; *Ersk. B. i. tit. 3, § 19*; B. iv. tit. 1, § 46; *Bank*, B. iv. tit. 24, § 21; *Bell's Com.* vol. i. p. 751, 5th edit.; *Bell's Princ.* §§ 706, 735, 830, 905; *Jurid. Styles*, iii. p. 135, *et seq.*; *M'Glashan's Sher. Court Proc.* 16-18, 175. See *Marriage. Commissaries. Irritancy.*

**Declaratory Adjudication.** See *Adjudication, Declaratory.*

**Declinature**; is the term applied to the privilege which a party has, in certain circumstances, to decline judicially the jurisdiction of the judge before whom he is cited. A judge may be declined,—1st, On account of incompetency to decide the particular action brought before him. Thus, a sheriff may be declined in an action of declarator of property in heritage, such an action being competent only in the Court of Session. 2d, A judge may be declined where the party is exempted by special privilege from his jurisdiction. Thus, members of the College of Justice formerly might decline the jurisdiction of all courts inferior to the Court of Session; but this privilege was abolished as to small debt courts by 6 Geo. IV., c. 48, § 24, and 1 Vict., c. 41, § 35; and as to sheriff courts generally, by 16 and 17 Vict., c. 80, § 48. It may be observed, however, that there is a distinction between the former and the latter ground of declinature. In the former case, where the judge is incompetent to decide, his proceedings are null, whether the party appears and pleads the declinature or not; whereas, if the declinature be founded on a special personal privilege, the privilege must be pleaded before it can operate. Thus, formerly, a decree of an inferior court, pronounced in absence, against a member of the College of Justice, would be effectual, the declinature not having been pleaded; *Ersk. B. i. tit. 2, § 24*. A judge may also be declined *ratione suspecti judicis*.—1st, Where he bears capital enmity to one of the parties, such enmity being qualified and proved by facts and circumstances importing it; *Bank. B. iv. tit. 2, § 37*. 2d, Where either the judge or his near kinsman has an interest in the cause. But, although a judge who is a partner in a private trading company may be declined in a question where the interest of that company is concerned, yet, where the company is a public one, constituted either by patent or by act of Parliament, it is no ground of declinature that the judge is a proprietor, director, or shareholder; see *A. S., 1st Feb. 1820*; and *Blair*, 26th Feb. 1814, *Fac. Coll. App. to vol. for 1814-15*. In certain cases, indeed, even where the interest of the judge was more of a private nature, the Court repelled the declinature, on the special ground, that, if it were sustained, there would not be a *quorum* of the judges left to decide the cause. See *A. S., 22d July 1774*, and *22d Jan. 1789*; *Printed Acts*, p. 644. 3d, The relationship of the judge to one or both of the parties is a ground of declinature. By the law of Scotland, no judge, supreme or inferior, can judge in the cause of his father, brother, or son, whether by consanguinity or affinity; nor in the cause of his uncle or nephew by consanguinity; 1594, c. 212, and 1681, c. 13.

Some authorities hold that this ground of declinature is removed, where the judge stands in the same degree of relationship to both parties (*Stair*, B. iv. tit. 39, § 14); but the statutes make no such exception; and were a case of that kind to occur, no doubt the statutes would be taken as the rule. See *Ersk.* B. i. tit. 2, § 26, and *Bank*, B. iv. tit. 2, § 38. It is no ground of declinature that the defender's wife is the sister of the judge's wife, the relation there being only *affinitas affinitatis*; *Binny*, Dec. 1687, *Mor.* p. 3420; *Goldie*, 16th Feb. 1816, *Fac. Coll.* and *A. S.*, 16th Feb. 1816. But, in a competition of briefs as to the succession of an entailed estate, a declinature of one of the judges of the Court of Session was sustained in one of the Divisions of the Court, on the ground that the second son of one of the claimants had married the judge's daughter; *Sir M. Shaw Stewart*, 30th May 1820, *Fac. Coll.* In this case, however, as to which the whole judges were consulted, eight of the fifteen (which was at that time the number of the judges) were of opinion that there was no ground of declinature. But, according to the regulations then in force, the decision of the Division of the Court in which the case occurred, differed from that of the majority of the whole judges. See *Session, Court of Consultation of Judges*. It seems to be quite understood, that where there is ground for a declinature of this kind, it cannot be waived by consent of parties (see *Sir M. Shaw Stewart's case*, *ut supra*, note); and where ground for declinature of a judge has existed, the proceedings before him are null, though the objection be not taken at the time; *Omanney*, 13th Feb. 1851, 13 D. 678. A judge, it is said, may be declined, *si foveat consimilem causam*; that is, if the judge have a cause of his own, to be decided by the same rule which is applicable to the case brought before him; *Bank*, B. iv. tit. 2, § 37. With regard to the declinature of a deputy, in a cause where the principal judge is a party concerned, the rule appears to be, that the deputy may be declined as suspected, where the principal is a party (1555, c. 39); except in certain cases, in which the deputy is authorized to judge by special statute; 1579, c. 84. See, on the subject of this article, *Stair*, B. iv. tit. 39, § 14, *et seq.*; *More's Notes to Stair*, p. cccxxxvi.; *Ersk.* B. i. tit. 2, § 24, *et seq.*; *Bank*, B. iv. tit. 2, § 37, *et seq.*; *Kames' Stat. Law Abridg. h. t.*; *Shand's Prac.* 59, *et seq.* See *Small Debts. College of Justice. Advocation*.

**Decree.** A decree or decret is the final judgment or sentence of a court, whereby the question at issue between the parties is decided. Decrees are said to be either *condemnator* or *absolutor*: the former term being

applied where the decision is in favour of the pursuer, the latter where it is in favour of the defender. The decree, of course, partakes of both characters, when the defender is absolved in part and condemned in part; *Bank*, B. iv. tit. 36, § 3. Decrees of the Court of Session are pronounced either by a Lord Ordinary, or by one or other of the Divisions of the Court; and a decree pronounced by a Lord Ordinary, if allowed to become final, is as effectual as one pronounced by either of the Divisions; *Ersk.* B. iv. tit. 3, § 5. See *Appeal*. Decrees are either *in absence*, or *in foro contradictorio*, as they are termed. A decree in absence is a decree pronounced against a defender who has not appeared, and pleaded on the merits of the cause. Such a decree may be opened up, or, if the decree has been extracted, the defender or his representative has the remedy of suspension or reduction, at any time within the period of the long prescription of forty years, unless the party entitled to reduce or suspend, or the person through whom he derives right, has deprived himself of his right of challenge by homologation, or is otherwise barred from insisting in the action. A decree *in foro contradictorio* or *contentioso* is a decree in a cause which has been litigated by both parties. Decrees *in foro* of the Court of Session operate as *res judicatae*, and cannot be reduced or suspended, or submitted to review, reversed, or altered, unless by appeal to the House of Lords, except on the ground,—1st, That the decree is *ultra petita*; or, 2d, That it is disconform to its warrants; or, 3d, That it is founded on an *error calculi*; or, 4th, That the party against whom the decree is obtained has, after its date, recovered evidence sufficient to overturn it, of which he knew not before; *Stair*, B. iv. tit. 1, § 44, 50, *et seq.*; *Ersk.* B. iv. tit. 3, § 3. See also *Competent and Omitted*. Questions have sometimes arisen, as to what sort of appearance for the defender in an action will be sufficient to render the decree pronounced a decree *in foro*; and it seems to have been settled,—1st, That the mere act of taking out a summons to see for the defender, and returning it without a defence, is not sufficient. 2d, That putting in a dilatory defence is not sufficient; *Stair*, B. iv. tit. 40, § 12; *Ersk.* B. iv. tit. 1, § 69; and *Ibid.* tit. 3, § 6; but now both dilatory and peremptory defences are stated above; *Shand's Prac.* p. 311. 3d, It is not even sufficient that an interlocutor refusing a short representation for the defender, has been allowed to become final, if the cause has never been argued on its merits; *Young*, 10th Feb. 1803, *Mor. voce Process*, p. 12178. See also *Litiscontestatio. Res judicatae*. Decrees of inferior courts, whether *in foro* or not, have so little the character of *res judicatae*, that a competent defence, although

omitted through negligence in the inferior court, may be the ground, in the Court of Session, of reversing the inferior court decree; because it is said there is not presumed to be a *copia peritorum* in inferior courts, and parties are not to suffer from employing ignorant procurators in a court, where perhaps no better are to be had; *Ersk. B. iv. tit. 3, § 7; Stair, B. iv. tit. 1, § 50*. In the Court of Session, and also in inferior courts, after any judgment has been pronounced (prior to the judgment which, according to the forms of proceeding in the particular court, must be the final one), a certain time is generally allowed for submitting the judgment to the review, either of the judge by whom it was pronounced, or, if it be the judgment of a Lord Ordinary in the Court of Session, to the review of the Division of the Court to which he belongs; and, if such judgment be not submitted to review within the time allowed, it becomes the final judgment in the cause. In the Court of Session, the time allowed for this purpose is twenty-one natural days for interlocutors disposing, in whole or part, of the merits of the cause, and ten days for other interlocutors (13 and 14 *Vict.*, c. 36, § 11); and, if the judgment be not reclaimed against within that period, or (if the days expire in the vacation) against the first box-day in the vacation, the judgment becomes a final judgment of the Court of Session. See *Reclaiming Days. Reporting*. When it becomes necessary to enforce implement of a decree, the proper and only regular warrant under which legal execution can be obtained, is an extract of the decree, authenticated according to the forms of the particular court in which the decree has been pronounced. The extracts of the decrees of the Court of Session formerly contained a minute detail of all the steps in the process from first to last, with the pleadings and various interlocutors engrossed *verbatim*; and although this cumbersome and expensive practice was reprobated by Lord Stair (*B. iv. tit. 46, § 27*), it was not until the 50 *Geo. III.*, c. 112, that those long extracts were abolished, and certain abridged forms of extracts substituted, in which the object and conclusions of the action are shortly narrated, followed by the decree ordaining execution to follow in terms of the judgment of the Court. Those extracts were formerly authenticated by the subscription of one of the principal clerks of Session; but now, by 1 and 2 *Geo. IV.*, c. 38, § 17, extracts of decrees are authenticated by the signature of the extractor by whom they are prepared. A final decree of the Court of Session was always extractable, but an interim decree formerly could not be extracted without a judicial warrant to extract it, which, however, was rendered un-

necessary by 13 and 14 *Vict.*, c. 36, § 28. Under 1 and 2 *Vict.*, c. 114, extract decrees now contain warrant to charge, arrest, poind, and imprison, upon which diligence may proceed as formerly on letters of horning and caption. See *Caption; Tait on Evidence; Dickson on Evidence; Jurid. Styles*, vol. iii. p. 233, *et seq.* See *Diligence. Interim Decree. Execution. Signet Letters.*

**Decree of Registration**; is a decree *fictione juris* of the Court of Session, or of any other competent court, interposed without the actual intervention of a judge, in virtue of the party's consent to decree going out against him in terms of his obligation. This consent is expressed in the clause of registration usually inserted in all formal deeds importing an obligation, and an extract of the deed from the Court books is tantamount to an extracted decree of the Court in the books of which it has been recorded. See *Extract*. By this expedient, the expense and delay of an action for constituting the obligation is avoided, and summary execution obtained at once. Such decrees have not the effect of decrees *in foro*, and they may therefore be brought under review of the Court of Session by suspension. It is upon the principle of the decree of registration that the benefit of summary execution has been extended in Scotland to bills of exchange and promissory notes; 1681, c. 20; 1696, c. 36; 12 *Geo. III.*, c. 72; *Ersk. B. ii. tit. 5, § 54, et seq.*, and *B. iii. tit. 2, § 35; Bell's Princ.* § 68. See this subject more fully explained, under the article *Registration*.

**Decree**; in English law, the judgment of a court of equity on any bill preferred. *Tomlins' Dict. h. t.*

**Decree-Arbitral**. See *Arbitration*.

**Decree Cognitionis Causa**. See *Cognitionis Causa*.

**Decree-Dative**; is the technical name given to the decree of the commissaries conferring on an executor (not being an executor-nominate) the office of executor. See *Executor. Confirmation of Executor*.

**Decree of Modification**; is a decree of the Teind Court modifying a stipend to the clergyman, but not allocating it upon the different heritors. See *Teinds*.

**Decree of Locality**; is a decree of the Teind Court allocating the modified stipend on the different heritors, in the proportions in which they are to pay it. See *Teinds*.

**Decree of Valuation of Teinds**; is a decree of the Teind Court, determining the extent and value of an heritor's teinds. For the rules according to which this is done, see *Teinds*.

**Decreet Conform**. Decrees conform were decrees of the Court of Session, formerly in use to be issued, when diligence under the

Signet was required on the decrees or precepts of inferior courts. The Royal Signet in Scotland is under the control of the Court of Session; and all diligences, as they are termed,—that is, letters under the Signet authorizing execution, either against person or property,—must proceed on a warrant from the Court of Session, interposed either in the shape of a decree of that Court, or of a deliverance on a bill,—*i.e.*, a petition to the Court praying for the letters. Sheriffs, and other inferior judges (the magistrates of royal burghs, and justices of the peace, or sheriffs under the small debt acts, excepted), have no power to grant execution against the person of the debtor: they can only authorize poinding and arrestment within their own jurisdictions. But the Court of Session has always been in the practice of interposing its authority in aid of the decrees of inferior judges; and this was formerly done upon a second summons against the debtor, citing him to appear in the Court of Session, and show cause why that Court should not authorize all legal execution to follow on the inferior court decree. The decree issued by the Court of Session in aid of the inferior court decree, was called a *decree conform*—*i.e.*, a decree in the precise terms of the former decree, with the additional sanction of the Court of Session, which warranted all execution competent upon a decree of the Supreme Court. This practice yielded long ago to the shorter course, of bills presented to the Court of Session, through the Bill-Chamber, which pass of course, and the deliverance on which authorizes diligence under the Signet, on the same principle with the ancient decrees conform; *Ross's Lect.* vol. i. pp. 237 and 270. This practice has, in its turn, been practically superseded by the Personal Diligence Act 1 and 2 Vict., c. 114. Sheriff-court decrees now contain warrant to charge, arrest, poind, and imprison; and when the decree is to be executed in a different territory, a warrant of concurrence is obtained in the Bill-Chamber. See *Caption*; see also *Bills of Signet Letters. Bill-Chamber. Diligence. Act of Warding. Small Debt Court.*

It was also the practice, formerly, for the minister of a parish, whose predecessor had got a decree of locality for payment of his stipend, to obtain a decree conform from the Court of Session, in order to authorize execution at his own instance on the decree in favour of his predecessor. But by the Act of Sederunt, 22d June 1687, this practice was abolished; and it was provided, that the succeeding minister, upon presenting a bill at the Bill-Chamber, in the ordinary way, and producing his presentation, collation, and institution, with the decree of locality obtained by his predecessor, may have a warrant for

letters of horning against those liable to pay the stipend. See *Teinds. Locality.*

**Decretum et Decretalia.** The body of the canon law consists, *first*, of the *Decretum*, which is a collection of the opinions of the fathers, popes, and church councils made by a Benedictine monk, towards the close of the twelfth century, in imitation of the Roman Pandects; and, *secondly*, of the *Decretalia*, which were collected by Pope Gregory IX., nearly a century afterwards, from the decretal re-scripts or epistles of the popes; as Justinian's code was from the imperial constitutions; to which decretals new collections were made by succeeding popes. *Ersk. B. i. tit. 1, § 28.*

**Deed Poll.** In the law of England a deed poll, as contradistinguished from an *indenture*, is a unilateral deed, executed by a party whose consent or act alone is sufficient to complete the right or obligation, and testifying accordingly that the party has put his seal to the deed. The etymological derivation of the term is, that a deed poll is *close cut, or shaved*, as it is expressed; whereas an indenture is *indented at the top. Tomlins, voce Deed*; also, *voce Poll. See Indenture.*

**Deeds.** In law language, a deed is a formal written instrument, executed and authenticated according to certain technical forms, setting forth the terms of an agreement, contract, or obligation, whether in relation to persons or things, and comprehending every description of formal writing required for the voluntary constitution, transmission, or discharge of rights or obligations *inter vivos* or *mortis causa*, relating either to heritable or moveable property; with all the modifications, qualifications, and combinations of which such documents are susceptible, in order to fit them for the various and complicated transactions to which they may be applied. The particular deeds known in the law of Scotland will be more appropriately treated of under their respective heads; but there are certain essentials common to all deeds, to which it may be proper here shortly to advert. Thus, 1st, Every deed requires a party or parties capable of contracting obligation, and subject to no legal disqualification, either actual or presumed. See *Consent. Idiot. Pupil. Minor. Marriage. Deathbed. Bankrupt. Con-junct and Confident. Fraud. Force and Fear. 2d.* It is essential to a deed, whatever be its nature, that it contains a definite and distinct obligation or agreement, capable of explication, either judicially or otherwise; that the subject-matter of the deed be legally in the possession, or at the disposal of the party who contracts in regard to it; and that neither party be bound to do an act which is fraudulent, or *contra bonos mores*, or otherwise in-

consistent with established law. See *Pactum Illicitum*. 3d, Every deed must be legally authenticated as the deed of the party or parties who become bound by it. The rules prescribed for the authentication of deeds are partly statutory and partly consuetudinary; and, in practice, those rules have been found exceedingly well adapted to the object in view. See *Testing Clause*. With regard to delivery, considered as essential to the validity of deeds, see *Delivery*. In Scotland we have not the technical distinction recognised in the law of England between *deeds poll* and deeds by *indenture*; the former being unilateral deeds, or deeds by one party, whose consent or act alone is sufficient, as is the case in our charters, dispositions, bonds for borrowed money, and the like; the latter being deeds in which two or more parties become bound to each other, as in the contract of lease or of copartnership. Neither is it necessary, in Scotland, that, in every case, a deed should be granted for a valuable consideration. If there be no fraud, or illegal preference in contemplation of bankruptcy, or if the maker of the deed be not otherwise incapacitated from granting it, the circumstance of its being gratuitous will have no effect on its validity. See *Gratuitous Deed*. *Conjunct and Confident*. *Apparent Heir*. Except in deeds relating to heritage, or by which an obligation is constituted, we have not in our deeds any settled and precise clauses of form. Wherever words are used sufficiently explicit to bind the party, and to confer a right known and acknowledged in law, the deed will constitute a valid obligation, effectual until set aside on legal grounds; the burden of reducing or setting aside an *ex facie* regular deed being laid on the party who calls it in question. And, in general, it may be observed, that all our deeds are appropriate and simple in their structure and phraseology, and comparatively free of the technicalities and redundancies, which are remarkable in the conveyancing of other countries. The clause of registration, which is introduced in all formal deeds importing obligation, is a valuable expedient, peculiar to the law of Scotland, for giving summary execution, without the expense or delay of a regular action. See *Decree of Registration*. The deeds of greatest nicety in our practice, and the construction of which have most frequently required the intervention of courts of law, are deeds containing destinations of heritable property, particularly contracts of marriage, family settlements, and deeds of entail. But even as to those the legal rules of interpretation are not complicated, nor, in the ordinary case, difficult of application, although the haste or negligence with which

deeds of this kind are sometimes prepared, combined with the difficulties inseparable from every attempt to regulate prospectively the various conflicting interests which may emerge in the course of a destination, or which a marriage-contract or family settlement may create, naturally give rise to questions which can be solved only by judicial interposition. *Holograph deeds*—that is, where the whole deed is in the handwriting of the grantor—are exempted from the rules with regard to the authentication of ordinary deeds. Thus, *holograph deeds* do not require to be executed before witnesses, although, without witnesses, they do not prove their own dates. See *Holograph Deed*. So also bills of exchange, and other documents or writings *in re mercatoria*, are, by the usage of trade (which, from favour to commerce, has to this extent become part of our common law), exempted from the statutory regulations as to authentication. See *Bills of Exchange*. *Evidence*. And even deeds possessing none of those privileges, and defective in the legal solemnities, or otherwise informal, may acquire all the efficacy of regular deeds by a *rei interventus*, or by homologation on the part of the person entitled to call them in question. *Bell's Com.* i. 323; *Bell's Princ.* § 18, *et seq.*; *Kames' Equity*, 128, 154, 168; *Ross's Lect.* i. 94, *et seq.* See *Homologation*. *Rei Interventus*.

**Deemsters**; are a kind of judges in the Isle of Man, who elect their successors, and who, without process, or any charge to the parties, decide all controversies in that island. *Tomlins' Dict.* h. t.

**Deer**. The hunting or killing of deer seems to be *inter regalia*, except as to those who have the deer within proper inclosures. But although one is not entitled to kill deer found trespassing upon his property, he may drive them off; *Stair*, B. ii. tit. 3, § 68; *Ersk.* B. ii. tit. 6, § 14. The offence of breaking into a deer park, whether belonging to the Crown or to a private party, and shooting or stealing deer, is punishable as theft. The shooting of stray deer without the owner's consent seems to be punishable by fine, but not as theft. The statutes relating to offences of this description are, 1503, c. 69; 1535, c. 13; 1579, c. 84; 1587, c. 59; and 1607, c. 3. See also *Hume*, vol. i. p. 81; *Bell's Princ.* § 1290.

**De Facto**; signifies a thing actually done; that is, done *in deed*. It also signifies *in fact*. A king *de facto*, as contrasted with a king *de jure*, is a king in the actual possession of the crown, which of right belongs to the other. *Tomlins*, h. t.

**Defamation**; is the uttering of reports injurious to the good name and reputation of an individual, whether they affect his life,



liberty, estate, character, trade, or profession; or are calculated or intended merely to render him ridiculous or contemptible. This offence may be the ground either of a criminal prosecution, or of a civil action for reparation, or of a combination of both. If a criminal prosecution be resorted to, the libel may conclude not only for punishment *ad vindictam publicam*, but also for damages to the private party. In the Court of Session, or in any other civil court, the conclusion is usually for reparation or damages to the private party only. Prosecutions for verbal injuries occur but rarely in the Court of Justiciary. The verbal injuries which seem to be properly cognisable before the Supreme Criminal Court are, — 1st, Defamation of magistrates or judges, such as charging them with neglect of duty, corruption, partiality, or oppression. 2d, Defamation in the shape of false and malicious prosecutions for crimes, or defamatory and calumnious information of crime, such as falsely and maliciously charging one with a crime of which he is not guilty. Lastly, The Court of Justiciary will take cognisance of the offence where the defamatory words are uttered in presence of the injured party, and accompanied with circumstances of outrage or violence likely to be productive of farther mischief; *Hume*, i. 333, *et seq.* The punishment for this offence is arbitrary, and generally consists of fine or imprisonment, according to the condition of the parties and the circumstances of the case. In the commissary court (now abolished), it was usual to conclude also for a palinode (see *Palinode*); and in a late case it was held that the sheriff, as coming in place of the commissary, under the statute 4 Geo. IV., c. 97, might competently entertain an action for slander, concluding, with concurrence of the procurator-fiscal, for damages, fine, and palinode; *Turner*, 21st June 1831, 9 S. 774. The *animus injuriandi*, which is the essence of this crime, must necessarily be matter of inference, and will, in the ordinary case, be presumed from the injurious words themselves; although that is a presumption which may be weakened or elided, by special circumstances indicating the absence of any deliberate intention to injure. But although the offender may be thus freed of the criminal charge, it does not necessarily follow that he is discharged of his obligation to repair the injury done to the private party; for, if what is said be injurious, mere petulance or indiscretion in uttering it, without positive malice, may be the ground for awarding damages; *Hume*, i. 340; *Ersk.* B. iv. tit. 4, § 80. The question of greatest difficulty, in prosecutions or actions on account of defamation, relates to the defender's right to prove, in bar of the action, the *veritas convicii*,

or truth of the offensive words which he has uttered. In England, if the party defamed resort to a civil process for damages, the defendant may prove what he has said to be true, and if he succeed in doing so, the action falls; for, although damage may have been suffered, the law of England holds it to be a damage, for which no reparation can be claimed. If, on the other hand, the defamer be proceeded against by a criminal prosecution, it was formerly the law, that what he had said, being criminal in its nature, and calculated to create animosities, and to disturb the public peace, he was not entitled to prove its truth; *Blackstone*, B. iv. c. 11, p. 150, and B. iii. c. 8, p. 125. This, however, has been modified by 6 and 7 Vict., c. 96. In Scotland the *veritas convicii*, or even a probable ground of suspicion, is a justification, and may be pleaded as a defence in bar of the action, wherever the injury has been done by the defender in the discharge of a public duty, or in a *bona fide* endeavour to detect malversation or crime; *Bank*. B. i. tit. 10, § 31; *Ersk.* B. iv. tit. 4, § 80; *Thomson*, 16th May 1810, *Fac. Coll.* Where the words said to be injurious are uttered by a party in a process, and appear to have some foundation in fact, an intention to defame will not be presumed; for statements made in a court of law, however injurious they may be to another, if they be pertinent to the cause, and not imputable to malice against the party who is the object of them, are privileged, and found no action for defamation; *Ersk.* ib.; *Forteach*, 18th Nov. 1819, *Fac. Coll.*; *Davidson*, 12th May 1821, 1 S. and D. 7. At one time, it appears to have been thought that a party not in a privileged position was not entitled to plead the *veritas convicii* in bar of an action for reparation. But it is now settled, that an issue in justification on this ground is competent. See *Taylor v. Anderson*, Mar. 19, 1844, 6 D. 1026; *M'Neill v. Robison*, Nov. 12, 1847, 10 D. 15; and *M'Rostie v. Ironside*, Nov. 14, 1849, 12 D. 75. By the Jury Court Act, 59 Geo. III., c. 35, § 1, actions of defamation were specially included in the list of actions which were to be remitted *de plano* to the Jury Court; and under the Judicature Act, 6 Geo. IV., c. 120, § 28, actions on account of libel or defamation are enumerated as appropriate for jury trial. *Macfarlane's Practice*, pp. 18, 23, 70. See *Injuries. Scandalum Magnatum. Leasing-making. Veritas Convicii.*

**Default**; is an English law term, commonly taken for *non-appearance* in Court at a day assigned; though it extends to any omission of that which we ought to do. If a plaintiff makes *default* in appearance in a trial at law, he will be non-suited; and where a defendant makes *default*, judgment will be had against

him by *default*. In judicial procedure in Scotland, similar consequences result from failure in compliance with the rules or orders of Court. Thus in the Court of Session, where a party fails to lodge papers against the day appointed, or where he improperly refuses to close the record, judgment may in general be pronounced against him. In these and similar cases the party may be reponed against the judgment by default, on presenting a reclaiming note, with the requisite paper, or stating his readiness to comply with the order. But this indulgence is not granted except on payment of such expenses as may be thought reasonable; and in the particular case of failure to lodge *Cases*, where they have been ordered, the party cannot be reponed but on payment of the whole previous expenses. *Tomlins' Dict. h. t.* See *A. S. 11th July 1828*, §§ 57, 60, 62, 112. *Shand's Prac.* 961. See also *Decree. Absence. Reponing. Reclaiming Note.*

**Defences.** The term *Defences* is a general name given to the pleas offered for the defender, in order to elide or exclude the action, and comprehending all exceptions, objections, or allegations of whatever kind, which may be stated against the conclusions of the libel. Those pleas are generally all stated in the first paper which is put into process on the part of the defender; and in the judicial procedure in all ordinary actions, that paper is called the *Defences*. Defences are either *dilatory* or *peremptory*. Dilatory defences are those which have the effect of absolving the defender without cutting off the pursuer's right to bring a new action: such are all objections to the competency of the action as laid, or to the title of the pursuer, or to the formality of the execution of the summons, &c. Peremptory defences, on the other hand, are positive allegations which enter into the merits of the cause itself, and have the effect either of taking away the ground of action, or of extinguishing its effects. Such are the exceptions of payment,—of compensation,—of homologation or *rei interventus*,—of *res judicata*,—of *lis alibi pendens*,—of prescription,—of fraud, force or fear. These, and all similar defences, if established, not only absolve the defender from the action as laid, but totally extinguish the pursuer's right of action on that claim. It may be observed, however, that the exception of fraud, or force and fear, is not relevant against all actions; for, if the pursuer's title be a right to land, or other heritable right, which is alleged to have been fraudulently obtained, it is not competent to plead fraud by way of exception, but only by reduction, unless where the deed is *ex facie* incomplete. See *Stair*, B. iv. tit. 40, § 21. Correctly speaking, no defence ought to get the

name of an *exception* which does not expressly, or by implication, admit the relevancy of the libel and the justice of the conclusion, if it were not elided by the exception pleaded. All other pleas, such as incompetency, irrelevancy, want of title, and the like, ought properly to be called *allegations*, *objections*, or *answers*; but, in the judicial proceedings in our Courts, this is a distinction not much attended to; although, with a view to accuracy and precision in pleading, it seems deserving of attention; see *Stair*, B. iv. tit. 40, § 15; *Ersk. B. iv. tit. 1*, § 68, *et seq.* See *Decree.* *Stair* classes *declinatures* among dilatory defences; but it is observed by Erskine, that a declinature is not a defence at all, but, on the contrary, an express refusal to state defences; *Stair*, B. iv. tit. 39, § 44; *Ersk. B. iv. tit. 1*, § 67. See *Declinature.* The time within which defences must be lodged, according to the regulations of the Court of Session, is mentioned, *voce Calling of a Summons*; and in the defences, the defender, according to the directions of the judicature and Court of Session acts, must state, in explicit terms, every defence, both dilatory and peremptory, on which he means to rely. In particular, he must meet the statement of facts, and the conclusions deduced from them in the summons, by either denying or admitting the alleged facts in articulate answers to the condescendence, by setting forth, in explicit terms, the facts on which he founds his defence in an articulate statement of facts, and by subjoining a note of pleas in law, and producing the writings, if any, founded on, so far as in his custody or within his power. If the defences are improperly prepared, they may be ordered to be amended; the defender being subjected in the expenses thence resulting. Admissions made in defences will not be easily allowed to be retracted; and where falsehood or forgery is alleged in defence, *exceptio falsi est omnium ultima*; so that if the defender propone improbation, and fail in this defence, he cannot make any other objection against the writing,—*e.g.*, that it was extorted, or the like. This rule, however, applies only where forgery is pleaded as a defence, or reply; for, when brought forward in the form of an action of reduction-improbation, the pursuer, though he fail, may plead other nullities. When a number of defenders are called in separate actions relating to the same matter, and where they have all precisely the same defences, one defence should be lodged, containing the defence which is applicable to the whole, and separate *pro forma* defences lodged for each defender; and where, after defences have been lodged, one of several pursuers withdraws, the defender is entitled to lodge additional defences applicable to the altered circumstances of the case. If there be dila-

tory defences, they must be disposed of before the record is closed, unless they require probation; and if the dilatory defences are sustained, the action will be dismissed, and the question of expenses decided. If the dilatory defences are repelled, it is not competent to pronounce any decision at that stage of the cause on the question of expenses, unless the defender announces his intention of reclaiming, in which case the Lord Ordinary will award expenses against him; and if, after such notice, the defender should not reclaim within the usual period (see *Reclaiming Days*), the decree for expenses, and for the expense of extract, will be allowed to go out and be extracted as an interim decree. On the other hand, if the defender reclaim, and if the Court adhere, such adherence now carries with it a finding of the additional expenses under the note; the clerks being authorized to insert a finding to this effect in the interlocutor adhering. Where the action is not dismissed on the dilatory defences, no appeal to the House of Lords against the judgment can be taken without the leave of the Court; but the effect of the defence is reserved in case of an appeal after a final decision on the merits; 6 *Geo. IV.*, c. 120, § 51. Dilatory defences in jury causes are disposed of in the same manner. When a dilatory defence has neither been repelled nor expressly reserved, but has been repeated in the pleas in law in the closed record on the merits, it is held as reserved. But it is for the interest of both parties, and particularly of the pursuer, to have all dilatory defences disposed of before incurring the expense of making up a record on the merits; which record, if the dilatory defence is ultimately sustained, may prove useless. Such dilatory defences, however, as require probation, may be reserved until the record is made up; and when there are no dilatory defences, or when they have been all repelled or otherwise disposed of, in practice, the record is either closed on the summons and defences, and decided in the usual way, or (which is by far the most frequent course) the record is made up by revised condescence and revised defences, in the manner explained, *voce Record*. In the special case of actions of reduction (which are peculiar to the Court of Session), if the defender is to object to the title of the pursuer, or to plead on an exclusive title, or to state any other objection against satisfying the production, he must return defences confined to these points; but otherwise, no defences need be given in before the production is satisfied. It is competent, however, to the Lord Ordinary, on cause shown, and even although no defences should have been given in before satisfying the production, to reserve all objections to the title

till the cause is heard on the merits. These defences against satisfying the production, are usually called *preliminary*, not *dilatory* defences; and if no such defences are lodged, it is held, that the production is to be satisfied, and that, if the defender is to make any defence at all, it is to be a defence on the merits of the reduction, after the production is satisfied. In such cases, accordingly, the practice is, in the first place, to get the production satisfied in the manner elsewhere explained, and then to take an order for defences against the reasons or summons of reduction, which defences may be both dilatory and peremptory; 6 *Geo. IV.*, c. 120, § 5, 27, 50; *A. S. 11th July 1828*. See *Reduction*. In the inferior courts, where the record is not closed on the Sheriff's minute, the regulations concerning defences are similar to those of the Supreme Court. See, on this subject, 6 *Geo. IV.*, c. 120; *A. S. 11th July 1828*, *A. S. 12th Nov. 1825*, and *A. S. 10th July 1839*, as to inferior courts; also *Shand's Prac.* 287, 317, *et seq.*; *M'Glashan*, 198, *et seq.*; *Barclay's Notes*, p. 15, *et seq.*; and for the older regulations, see *A. S. 11th Aug. 1787*, 7th Feb. 1810, 11th Mar. 1814; *Stair*, B. iv. tit. 39 and 40; *Ersk. B. iv. tit. 1*, § 66, *et seq.*; *Bank. B. iv. tit. 25*.

Procedure in the Court of Session is now regulated by the act 13 and 14 *Vict.*, c. 36., 1850, and in the Sheriff Courts, by the act 16 and 17 *Vict.*, c. 80, 1853. See also *Record. Condescence. Replies. Calling of a Summons. Defender*.

In a criminal prosecution before the Court of Justiciary, when the panel, besides the general plea of *not guilty*, means to maintain some special defence, the statute 20 *Geo. II.*, c. 43, No. 41, requires that, on the day before the trial, he shall lodge with the clerk of Court a written statement, signed by himself or his counsel, setting forth the facts he alleges, and the heads of the objections or defences he means to maintain. In practice, however, instead of lodging written defences, it is usual for the counsel for the panel, in the outset of the trial, orally to explain to the Court the course of defence which is to be followed. Were the panel or his counsel, in the hope of gaining some advantage, to withhold this explanation, and not to lodge written defences, the Court, or the public prosecutor, might insist for a written defence in terms of the statute, the departure from which is an indulgence to the panel. *Hume*, ii. 283. See *Criminal Prosecution*.

**Defendant**; an English law term, signifying the party sued in a *personal action*. *Tomlins' Dict.*

**Defender**; is the party against whom the conclusions of a process or action are directed.

Where a minor is called as a defender, his father, or, if the father be dead, the tutors or curators of the minor, must be cited along with him, otherwise any decree pronounced against him in the action will be reducible on that ground. See *Curatory. Pupil. Tutor*. In like manner, when a married woman is sued (where that is competent), her husband must be cited for his interest. See *Marriage*. Where a pursuer is abroad, or a foreigner, his mandatory who conducts the action for him in this country is personally liable for the expenses of process, in case they may be awarded to the defender; *O'Haggen*, 31st July 1761, *Mor.* p. 4644. A different rule was at one time recognised in the case of the mandatory of a defender abroad, or a foreigner; *Leigh*, 19th Dec. 1792, *Mor.* 4645. Now, however, it is settled that the mandatory of a defender is, in this respect, in the same situation with the mandatory for a pursuer; *Shand's Prac.* 160, and cases there cited. If the defender die in the course of a process, the action must be transferred against his representatives. See *Transference*. No more than six defenders, with separate and distinct interests, can be sued in one and the same summons (*Art. of Reg.* 2d Nov. 1695, § 28); and the same rule applies in inferior courts; *A. S.* 12th Nov. 1825. See *Summons. Mandatory. Foreigner. Forum competens*. In a criminal prosecution, whether against a minor or a married woman, there is no occasion to call either the tutors or curators, or the husband (*Hume*, vol. ii. p. 162); and where such an action concludes for a fine, and is purely criminal, it falls by the death of the defender, and cannot be transferred against his representatives, even after litiscontestata; *Gray*, 18th Feb. 1773, *Mor.* p. 10361. But the civil claim for damages at the instance of the private party is transmitted to representatives, like an ordinary debt, whether the action has been raised before or after the death of the delinquent. See *Damages. Delict*.

**Defender of the Faith**; is a title peculiar to the King or Queen of England. It was first conferred by Pope Leo X. on Henry VIII. in 1521, as a reward for writing against Luther; and it has been used by the Kings of England ever since. *Tomlins' Dict.*

**Defending Forcibly**. Forcible defence, or resistance against the execution of personal diligence by horning and caption, is one of the equivalents to imprisonment, mentioned in the act 1696, c. 5, and also in 19 and 20 Vict., c. 79, 1856, in specifying the requisites of notour bankruptcy. See *Bankrupt*. And by the said statute of Victoria, such resistance will entitle a creditor, to the requisite extent, to apply for mercantile sequestration of the estates of his

debtor, provided the debtor fall within the description of persons against whom sequestration may be awarded. See *Sequestration*. The fact of forcible resistance can hardly be ambiguous; and the proper evidence of it is the attestation of the messenger and witnesses, contained in an execution or return. But a general proof will also be admitted. *Bell's Com.* vol. ii. p. 172-6-7, 5th edit. See *Imprisonment. Apprehending a Debtor*.

**De Fideli**. The oath *de fideli administratione* is an oath taken by persons on entering on the duties of professions or offices of public trust. Thus, this oath is administered to the judges and other members of the College of Justice, including all practitioners before the Court of Session. The takers of the oath simply swear to be faithful in the discharge of the duties of the office. A breach of the oath *de fideli* does not amount to the crime of perjury. See *Hume*, vol. i. p. 371. See *Oaths*.

**Deforcement**; is an act of contempt of the law, consisting of a violent opposition and hindrance to an officer of the law in the execution of his official duty. The officer must be a lawful officer, either a messenger-at-arms, or other officer to whom the execution of the diligence, or other warrant or order, may be legally intrusted; and the resistance must be offered to him while engaged either in the formal execution of the official act, or after he has assumed the official character, and is in immediate preparation (*in actu proximo*) to enter on the formalities. The officer must notify who he is, and the purpose of his errand; and, if required, he must exhibit his warrant, although he need not part with it. A messenger-at-arms must also exhibit his blazon, and an inferior officer his baton or other badge of office; and, in the attempt to execute his duty, he must have been himself proceeding, in every other respect, in a lawful manner. The obstruction offered must relate to the duty in which the officer is engaged; and it must be such an act of violence as to create either an actual impediment, or to excite a well-grounded alarm for his personal safety. It must be an actual hindrance; for, if the officer proceed and accomplish his object, the offence will amount to no more than an attempt to deforce, or an assault. All parties concerned in the resistance, whether the party against whom the proceeding is directed, or others, are guilty of the deforcement; *Hume*, vol. i. p. 386, *et seq.*; *Ersk.* B. iv. tit. 4, § 33, *et seq.* The statutes relating to the punishment of this offence are—1581, c. 118, which provides that those convicted be punished by escheat of moveables, the creditor being preferable for his debt, expenses, and damages; 1587, c. 84, which provides that persons guilty

of deforcement be prosecuted, either civilly or criminally, at the option of the pursuer, and that their lives and goods be at the King's will; and 1592, c. 150, which makes deforcement an officer of the law, or molesting him to the effusion of his blood, punishable by forfeiture of moveables, one-half to the King, and the other to the pursuer. It does not appear, however, that, under these statutes, anything more than an arbitrary punishment has ever been inflicted. The ordinary punishment is fine or imprisonment, accompanied with damages to the private party. It might be inferred, from the words of the act 1592, c. 150, and from *Ersk. B. iv. tit. 4, § 34*, that the deforcement must be accompanied with effusion of the officer's blood, before it can be the ground of a prosecution *ad vindictam publicam*; but, from a more recent authority, it appears that this is not necessary. See *Hume, i. 394*. The competent prosecutors for deforcement are either—1st, The Lord Advocate; or, 2d, The messenger-at-arms and the Lord Lyon, even without the concurrence of the party employer; or, 3d, The party employer. The competent court is either the Court of Justiciary or the Court of Session; and inferior courts may also protect their officers from injury in the execution of their duty; *Hume, i. 399*. The statutes referred to recognise the jurisdiction of the Court of Session in cases of deforcement; but, according to the present practice, when the action is brought in that Court, the conclusion is not for the statutory pains, but merely a civil action for payment of the debt, with interest, damages, and expenses; although, were an aggravated case to occur before the Court of Session, the Court might no doubt remit it to the Lord Advocate, with a view to his instituting proceedings *ad vindictam publicam*. Formerly, the employer of the officer who had been deforced could not be a witness, even in a prosecution by the public prosecutor, unless he discharged his interest in the escheat, and for the recovery of his debt; but all objections to the admissibility, as witnesses, of the employer, and of near relations of the party prosecuting, have been removed by the recent Evidence Amendment Acts. It would appear, that although the defender be assolized in the criminal process, yet he may be pursued civilly, and the fact of the deforcement referred to his oath; *Mackenzie, B. iv. tit. 2, § 39*. See also *Ersk. B. iv. tit. 1, § 64*. The deforcement or forcible resistance of revenue officers in the execution of their official duty, or such resistance offered to any of Her Majesty's naval or military forces, or to any other person or persons acting in aid of the revenue officers, is, in some cases, a capital crime, as to which there have been various statutes. By the statute 52

Geo. III., c. 143 (which appears to be still in force), it was provided that where a person has been killed in the execution of this duty, if any individual shall be charged on oath, before a justice of peace or other competent person, with having been concerned in the resistance which led to the death, Her Majesty's Council may issue an order on the person so charged, to surrender himself within sixty days; and if, after due publication of this order, in the manner pointed out by the act, he fail to do so, "he shall then be adjudged, decerned, and taken to be convicted of a capital crime, and shall suffer the pain of death and confiscation of moveables, as in the case of a person found guilty of a capital crime, and under sentence for the same; and it shall be lawful for the Court of Justiciary, or the Lords of Justiciary, in their circuits in Scotland, to award execution against such offender, in such manner as if he had been found guilty and condemned in the said Court of Justiciary, or Circuit Courts respectively;" 4 and 5 Will. IV., c. 13, § 2. See also *Hume, vol. i. p. 488, et seq.* See, on the subject of this article, *Stair, B. i. tit. 9, § 29*, and *B. iv. tit. 49*; *Mackenzie, B. iv. tit. 4, § 17*; *Ersk. B. iv. tit. 4, § 32, et seq.*; *Bank. B. i. tit. 10, § 190, et seq.*; *Ross's Lect. vol. i. p. 338*; *Tait's Just. of Peace, h. t.*; *Hutcheson's Just. of Peace, vol. i. p. 325, 2d edit.*; *Jurid. Styles, vol. iii. p. 102*.

**Defrauding of Creditors.** Creditors may be defrauded by the funds of their debtor being concealed, or illegally diminished, or by their being conveyed to favourite creditors, to the prejudice of the rest, or by the undue increase of debts or claims against the debtor's estate. Wherever any of those objects has been fraudulently accomplished, redress may be had either at common law or under the bankrupt statutes. If debts be improperly increased, or if any other fraudulent device be fallen upon, either to conceal the debtor's funds, or to confer undue preferences (where the case does not fall within any of the statutes), the common law affords a remedy; the burden of proving the fraud being laid, in common law actions, on the person objecting to it. But besides an action for fraud at common law, the several bankrupt statutes have introduced certain legal frauds, or presumptions of fraud, which either have the effect of annulling entirely the transactions in which they occur, or which lay the *onus probandi* on the person favoured by the deed. Thus, the act 1621, c. 18, provides that all alienations granted after the contraction of debt in favour of a conjunct or confident person, without necessary cause or a just price, shall be null; the burden of proving an onerous cause being laid on the person founding on the deed. See *Conjunct and Confident*.

Another branch of this statute entitles a creditor, who has begun diligence against his debtor's person or estate, to reduce any voluntary security or payment subsequently made, in defraud of the begun diligence, unless there has been undue delay, or *mora* in the prosecution of the diligence. See *Diligence. Mora*. And the act 1696, c. 5, which was intended to guard against fraudulent alienations by bankrupts, to the prejudice of their creditors, provides that all voluntary alienations or other deeds (whether fraudulent or not), granted, either directly or indirectly, by a bankrupt, within sixty days of his bankruptcy, in favour of a creditor, either for his satisfaction or further security, in preference to other creditors, shall be void and null. See *Bankrupt. Sequestration. Fraudulent Bankruptcy*.

**Defrauding the Revenue.** Any fraudulent contrivance, by which the payment of a tax or duty imposed by Government is evaded, falls under the general description of a fraud against the revenue. The penalties inflicted upon persons guilty of such offences are regulated by the particular statute imposing the tax or duty. It does not fall within the plan of this work to attempt a summary of the numerous revenue statutes; but it may be observed—1st, That the laws upon this subject, and the forms under which they are administered, are, by the Treaty of Union, made the same in Scotland as in England, with certain unimportant exceptions specified in the treaty; 2d, That the question, whether a fraud has been committed, must, of course, depend upon the terms of the particular statute imposing the tax, and the circumstances under which an evasion has been attempted; and, 3d, That the Supreme Court in Scotland for the trial of offences against the revenue is now the Court of Session; the Court of Exchequer being now merged in the Court of Session. But particular statutes sometimes confer a subordinate jurisdiction on commissioners to be appointed under the statute; and the power of summary conviction is also vested by some of the statutes in justices of the peace, as to certain offences, particularly in the case of offences against the laws relating to the excise and customs. In such cases, the statute commonly prescribes rules, both as to the form of the prosecution and the evidence necessary for a conviction. See *Smuggling. Excise. Revenue. Exchequer. Justice of the Peace. Quarter Sessions*.

**Defunct**; a deceased person; see *Stair, B. iv. tit. 43, § 21*. See *Confirmation*.

**Degradation**; a term used in English law to signify an ecclesiastical censure, by which a clergyman is divested of his holy orders. There are two sorts of degrading by the canon law,—one *summary*, by word only; the other

*solemn*, by stripping the party degraded of those ornaments and rights which are the ensigns of his order or degree. Analogous to the latter form of degradation is the degradation of a nobleman, or of a knight, at common law, when attainted of treason. A similar degradation may also be inflicted by act of Parliament. See *Tomlins' Dict. h. t.*

**Degrees of Kindred.** Persons standing in certain degrees of relationship to each other cannot lawfully intermarry. Thus, that connection cannot be formed between parties nearer in degree to each other than cousins-german, whether by consanguinity or affinity. See *Marriage*. In like manner, a judge who stands in certain degrees of relationship to a party is disqualified to judge in his cause. See *Declinature*. So also, under the bankrupt statutes, gratuitous alienations in favour of relations are, in certain circumstances, reducible. See *Conjunct and Confident*. As to degrees of kindred considered in relation to succession, see *Succession. Heir. Executor. Consanguinity. Affinity*.

**Deism**; is the opinion of those who acknowledge the existence of a God, without admitting the truths of Christianity. Any attempt to propagate this doctrine would be punishable as an offence against the established religion. See *Atheism. Blasphemy. Religion*.

**Delay.** See *Mora*.

**Del Credere**; is an Italian mercantile phrase, similar in import to the English term *guarantee*. It has been adopted in this country, and is used amongst merchants to express the obligation undertaken by a factor, broker, or mercantile agent, when he becomes bound, not only to transact sales, or other business for his constituent, but also to guarantee the solvency of the persons with whom he contracts. On account of this guarantee, a higher commission, called a *del credere* commission, is paid to the factor. The most ordinary examples of this obligation occur in cases of sales made by a factor or agent to whom goods have been consigned for sale. The usual commission paid to the factor for his trouble in effecting sales and remitting the money, or procuring bills for the price, is two-and-a-half *per cent.* on the price, and two-and-a-half *per cent.* more is generally paid as *del credere* commission, where the factor guarantees the solvency of the purchasers. The obligation thus undertaken by the factor is not a *cautionary* obligation, in the ordinary sense of that expression; for the factor is liable directly, and without the benefit of discussion. Neither is it properly a *delegatio debiti*; for, if the factor fail, the principal is entitled to recover from the purchaser. In cases of insolvency, the following seem to be the rules of ranking:—

1st, If the factor continue solvent, he is entitled to claim on the bankrupt estate of the buyer, or other person, whose solvency he has guaranteed, provided, however, that the principal do not himself rank on the buyer's estate for the same debt; 2d, If the agent or factor be insolvent, the principal may claim on the estate of the proper debtor, unless the proper debtor has already paid the price to the factor; and, 3d, If both the factor and the purchaser be insolvent, the principal may rank for the whole debt, both on the estate of the factor, who stands *del credere*, and on the estate of the purchaser; so, however, as not to draw more than twenty shillings in the pound on his whole debt; see *Bell's Com.* i. 377. See also *Ranking*. As to the cases in which payment to the factor discharges the purchaser, see *Factor*. See also *Brodie's Supp. to Stair*, p. 921, 941; *Bell's Princ.* §§ 222, 286; *Bell's Illust.* § 286.

**Delectus Personæ**; is the choice or selection, either express or presumed, of a particular individual, on account of some personal qualification. Thus, in the case of an agricultural lease of ordinary endurance, the landlord is presumed to have chosen his tenant with a special view to his personal qualifications; and although the *delectus personæ* does not now exclude the tenant's heirs, yet, without the landlord's consent, either express or implied, such a lease cannot be voluntarily assigned or sublet. But an express exclusion of assignees is required in order to prevent the creditors of the tenant from adjudging the lease. The *delectus personæ*, however, is not presumed, if the lease exceed the ordinary endurance (nineteen or twenty-one years); and in leases, however short, of urban subjects, it is never presumed. In the same manner, under the contract of society, there is an implied *delectus personæ* inseparable from the nature of the contract, which bars the admission of new partners, either by succession or by alienation, unless the contract contain an express stipulation entitling the heirs of partners to succeed to their predecessor's share in the concern, or empowering the partners themselves to assign their shares. See *Society*. So also offices in which there is a personal trust reposed, are neither saleable or adjudgeable for debt, although, in the ordinary case, the emoluments of an office are attachable by diligence. *Ersk.* B. ii. tit. 6, § 31, *et seq.*; *Bell's Com.* i. 75, *et seq.* 126; *Bell on Leases*, 4th edit. vol. i. p. 180, *et seq.*; *Hunter's Landlord and Tenant*, i. 171, 203, 222; *Bell's Princ.* § 358, 1215; *Bell's Illust.* § 358; *Ross's Lect.* ii. 481. See *Offices. Lease*.

**Delegate**; a person deputed to act for another, or for others. The delegate of a royal burgh, under the old election law, was a per-

son appointed, according to certain statutory forms, by the town council of the burgh, to meet with the delegates from the other burghs of the district, and to vote in the election of a member to represent the district of burghs in Parliament. See *Wight on Elections*, B. iv. c. 2, p. 362; *Bell's Election Law*, p. 509. See also *Election. Laws*.

**Delegated Jurisdiction**. Delegated jurisdiction, as contradistinguished from *proper jurisdiction*, is that which is communicated by a judge to another, who acts in his name, called a depute or deputy. One named by a deputy, who has himself the power of deputation, is called a *substitute*. Jurisdiction being an office implying certain qualifications personal to the judge, cannot be delegated without an express power of delegation contained in the grant. Such a power is given in all personal grants of sheriffship or stewardry, admiralty, &c.; but justices of the peace and magistrates of burghs have no power of delegation. Before the abolition of heritable jurisdictions, it frequently happened that the inheritor of a jurisdiction was unfit to discharge his judicial duties in person; hence the act 1424, c. 6, empowered those possessing patrimonial jurisdiction to appoint deputies, for whom they should be answerable, and to whom they communicated the entire jurisdiction which was vested in themselves. The sheriffs of counties in Scotland, appointed under the Jurisdiction Act, 20 Geo. II., c. 43, are improperly called *deputies* in that statute: for they have not a *delegated* but a *proper jurisdiction* conferred upon them by the Sovereign, not by the high-sheriff of the county, and are authorized to appoint deputies, who are called *substitutes*, to exercise jurisdiction over the whole, or over particular districts of the county. It is of importance to observe, that delegated jurisdiction is not held in law to be the jurisdiction of the substitute, who has no proper jurisdiction, but of the judge who appoints him. Hence the acts of the substitute are held to be the acts of the principal judge, who is responsible for them; 1424, c. 6; 1469, c. 26. Here also the maxim, *Delegatus non potest delegare* applies, the substitute having no power to delegate his duties to another. In *delegated jurisdiction* the appeal must not be from the substitute to the principal judge; for the decree of the depute is held to be the decree of the principal; and no inferior judge, without express powers, can review his own decrees. *Ersk.* B. i. tit. 2, § 13, *et seq.*; *Kames' Stat. Law, voce Jurisdiction*. See *Appeal. Jurisdiction*.

**Delegation**; is a method of extinguishing an obligation by substituting one debtor for another, with the creditor's consent, and thereby discharging the first debtor; as where the debtor in a bond substitutes a third party,

who becomes bound in his place to the creditor. But an arrangement of this kind requires the express consent of the creditor; for no debtor can relieve himself of his obligation without the creditor's consent, except by actual payment or performance; and no creditor can be compelled to accept of one debtor for another. Delegation is not presumed; for a creditor cannot lose his right by implication; hence the new obligation will, *in dubio*, be accounted merely corroborative of the old; although, if the new obligation bear to be granted in satisfaction of the former, this will be construed to be a discharge of the first obligant. *Stair*, B. i. tit. 18, § 8; *More's Notes*, p. cxxxvi.; *Ersk.* B. iii. tit. 4, § 22; *Bank*, B. i. tit. 24, § 38; *Bell's Princ.* § 577; *Bell's Illust.* § 576. See *Novation. Innovation. Expromissor.*

**Delegatus non Potest Delegare**; a law maxim, importing that a party to whom any office or duty is delegated cannot lawfully devolve the duty on another. This maxim applies especially in matters of jurisdiction; and although jurists have differed on the point, the principle of the maxim is universally applicable; *e. g.*, in the case of mandate and the like. See *Stair*, B. i. tit. 12, § 7. See also *Delegation. Jurisdiction.*

**Delation in Writs.** See *Vitiation. Writ. Erasures.*

**Deliberandi Jus.** See *Jus Deliberandi.*

**Delict and Delinquency.** These terms, used comprehensively, include all wrongs of the nature of crimes or offences, inferring punishment *ad vindictam publicam*, in contradistinction to mere civil wrongs. A person guilty of a delinquency is held to have incurred an obligation to atone for his offence against the public, by suffering punishment, and at the same time to repair the injury he may have done to the private party, by paying damages. Delinquencies, considered as the grounds of civil claims for reparation, are divided into *delicts* and *quasi delicts*,—the former being offences committed with a malicious or criminal purpose, the latter including injuries arising from a degree of culpable negligence, amounting almost to crime, and inferring an obligation to repair the injury, although there may be no ground for a criminal prosecution. If more persons than one have been guilty of the crime or delinquency, they are all held as co-obligants, liable *singuli in solidum* for the civil debt of reparation; although he who pays seem to have an equitable claim for a proportional relief from his accomplices. But where a fine is imposed *ad vindictam publicam*, the co-delinquents are only liable *pro rata* for their proportions of the penalty, unless the fine be otherwise allocated by the judgment of the Court. On the

same principle the obligation to repair the injury, considered as a civil debt, transmits to representatives, whether proceedings have been commenced during the delinquent's life or not; whereas all proceedings *ad vindictam publicam*, fall by the death of the delinquent. The civil claims for reparation on account of delinquencies have been classed by law authorities under the following heads:—Assyment, Claims arising from Injuries verbal or real, Damage, Extortion, Circumvention, Spuilzie, Intrusion, Ejection, Molestation, Contravention of Lawburrows, Battery *pendente lite*, Breach of Arrestment, Deforcement, Escape of a Prisoner, Excessive and deceitful Gaming, Forgery of Writing, and Perjury. See, on the subject of this article, *Stair*, B. i. tit. 9, § 4, *et seq.*; *Ersk.* B. iii. tit. 1, § 12, *et seq.*; *Bank*, B. i. tit. 4, § 26, *et seq.*, and tit. 10, §§ 4, 14, *et seq.*; *Mor. voce Delinquency, Reparation, Damage and Interest*; and in the Dictionary the different articles in the foregoing classification. *Bell's Princ.* § 543, *et seq.*; *Bell's Illust.* § 543; *Hay*, 11th Jan. 1763, *Mor.* 14658; *Gray*, 18th Feb. 1773, *Mor.* 10361; *M'Naughton*, 17th Feb. 1809, *Fac. Coll.*; *Morrison*, 25th May 1809, *Fac. Coll.* Also *Crime. Defamation. Seduction. Damages.*

**Delivery.** Delivery, either actual or constructive, or symbolical, is the test of the transfer of property, whether heritable or moveable. Actual delivery of heritage is impracticable; but the law of Scotland has recognised a symbolical delivery, which is indispensable in the transference of such property, and the want of which cannot be supplied by acquiring actual possession. See *Sasine*. Moveables, on the other hand, may be actually delivered; and without actual delivery, or a delivery which the law holds equivalent to actual delivery, the property of moveables cannot be effectually transferred. In the Roman law, delivery was of two kinds, *traditio vera*, or true or actual delivery, and *traditio ficta*, or constructive delivery; and the same distinction is recognised in the law of Scotland. Thus, under the contract of sale, *actual delivery*, in our acceptation of the term, consists in giving real possession to the purchaser, or his servants, or special agents who represent him; and *constructive delivery* comprehends, generally speaking, all those acts which, although they do not confer on the purchaser the actual possession of the thing sold, have been held, *constructione juris*, equivalent to acts of real delivery. The following are examples of *actual delivery*:—1. Delivery *de manu in manum*. 2. Delivery into the hands of the buyer's clerks or servants, or special agents, or into his warehouse, or his carts or vessels, under the direction of his servants, or of others hired by him. 3.



Delivery into a wharfinger's warehouse, which the buyer has been accustomed to hold as his own. 4. Delivery of goods into the king's warehouse for behoof of the buyer. 5. Delivery of the key of the cellar or other repository where the goods are deposited. And, in general, all deliveries analogous to any of those now specified. The examples of *constructive delivery* are,—1. Marking or setting apart the goods for the purchaser; e.g., marking trees or cattle purchased by him with his peculiar mark, or setting apart the goods for the buyer in the seller's warehouse, and charging the buyer with warehouse rent for them. 2. Intimating a delivery order to the custodian of the goods. 3. Transferring the goods in the custodian's books from the name of the seller to that of the buyer; and similar acts. While the parties remain solvent, the distinction between *actual* and *constructive* delivery is not of much consequence, since it is at least quite certain that, if the price be paid, either the one delivery or the other is sufficient to transfer the property. But questions of considerable difficulty have arisen out of the seller's right, in case of the buyer's insolvency after the sale, but before the transfer, to retain the undelivered goods, or to stop them on their way to the buyer, or *in transitu*, as it is termed, until he either pays the price, or gives security to pay it at the stipulated time. The English law doctrine of stoppage *in transitu* was introduced into the law of Scotland by a judgment of the House of Lords in 1790, reversing the judgment of the Court of Session in *Allan v. Stewart and Company*, 4th Dec. 1788, *Mor.* p. 4949. Our law writers, in endeavouring to give a systematic classification to the decisions which have been pronounced in questions of actual and constructive delivery, seem to be in some danger of falling into a controversy. According to one authority, stoppage *in transitu* is absolutely barred by *actual delivery*; but *constructive delivery* completes the transfer, so as to prevent stoppage *in transitu*, only where the price has been paid; *Bell's Com.* i. 166, *et seq.* On the other hand, a very able writer on the subject holds that *constructive* as well as *actual* delivery completes the transfer, whether the price has been paid or not, and absolutely bars the seller's privilege of stoppage *in transitu*, or of retention; *Brown on Sale*, p. 451, *et seq.* The latter doctrine is perhaps more consonant with principle; and Mr Brown's illustration of it may have the effect of giving to future determinations more of a systematic character; but it is obvious, from the authorities cited by him, that the law upon this subject has been only progressively acquiring consistency, and that the decisions hitherto pronounced are not easily reducible to one

uniform principle. See 2 *Ross, L. C.* 92, *et seq.*; also p. 585 and p. 784, *et seq.* See *Sale. Stoppage in transitu*. With regard to false credits raised by apparent or reputed ownership, after constructive or symbolical delivery of moveables, see *Possession*. On the subject of this article, see *Stair, B. i. tit. 1, § 15*; *More's Notes*, p. lxxxix.; *Brodie's Supp.* p. 875, *et seq.*; *Ersk. B. ii. tit. 1, § 19*; *Bell's Princ.* §§ 108, 114, 120, 1300, *et seq.*; *Bell's Illust.* §§ 108, 120, 1299, *et seq.*; *Kames' Equity*, 325, 387.

Goods sold but not delivered are not now attachable by the seller's creditors; and a seller is not now entitled to retain goods sold, against any subsequent purchaser on account of any separate debt or obligation due to him by the original purchaser, but must make delivery on the price being paid, and the conditions of the contract of sale being performed by the subsequent purchaser. See 19 and 20 *Vict.*, c. 60, 1856.

**Delivery of Deeds.** While a deed or writing remains in the custody of the granter or of his agent undelivered, it is not obligatory; for, so long as it remains within the granter's power, he cannot be said to have finally resolved to be bound by it. In order to render the deed effectual, it must have been delivered either to the grantee or to a third party; and where it has been put into the hands of a third party, the presumption of law rather seems to be, that it has been delivered to him unconditionally for the grantee's behoof. But this presumption may be elided by the grantee's writ or oath, and, in special cases, even by the evidence of the writer of the deed, and the instrumentary witnesses; *Drummond*, 5th July 1662, *Mor.* p. 12309. And where the deposition is either acknowledged by the grantee, or otherwise sufficiently verified, the conditions under which the deed is to be delivered, if not stated in writing by the granter, may be proved by the oath of the depository. Where the deed is gratuitous, and deposited with a person who is a stranger both to the granter and the grantee, it appears that it will be held to have been deposited under the implied condition, that it is to be returned to the granter, if he require it during his life, but that if he do not, the depository shall deliver it to the grantee; *Ker*, 25th Jan. 1677, *Mor.* p. 3249. A deed put by the granter into the hands of a person who is agent for both granter and grantee, will be presumed to have been delivered for behoof of the grantee; *Ramsay*, 15th Jan. 1828, 6 *S.* 343. And if the deed be found in the custody of the grantee himself, the presumption of delivery cannot be elided but by the writ or oath of the grantee. Deeds so found in the hands of the grantee are presumed to have

been delivered at their dates, especially where they are onerous or rational. See *Ersk. B. iii. tit. 2, § 43*. The following are exceptions to the rule with regard to delivery:—1st, Where the deed contains a clause dispensing with delivery, it is effectual although found in the grantor's repositories after his death. 2d, No deed of a testamentary nature requires delivery; because such deeds take effect only at the period of the grantor's death. 3d, Bonds and other writings by parents in favour of their children require no delivery, because parents are the natural custodiers of their children's writs. Children, although forisfamiated, and even natural children, have the benefit of this exception. On the same principle, postnuptial settlements by a husband in favour of his wife do not require delivery, the husband being the legal custodian of the writings belonging to his wife. 4th, A deed in which the grantor himself has an interest requires no delivery, e.g., a reserved liferent; because the presumption there is, that the grantor holds the deed, not because his mind is not made up in regard to it, but in order to secure his own reserved liferent. 5th, Deeds which the grantor lies under an antecedent obligation to execute require no delivery. 6th, A mutual obligation or contract, signed by two or more parties for their respective interests requires no delivery; because such a deed, when executed, becomes a common right to all the contractors; the mere subscription of the several parties proving the delivery, by the other subscribers, to him in whose hands the deed is found; and if the holder of the deed can use it as effectual to him, it must be effectual to the rest of the contracting parties. Lastly, If the grantor inserts the deed in a public record, it is held to be equivalent to delivery; *Ersk. ibid. § 44*. Lord Kames attempts to deduce the doctrine of the delivery of deeds from the grantor's right of property in the paper or other material on which the deed is written; but there is no occasion for resorting to a subtlety of this kind, the principle of which, if introduced into conveyancing, would be attended with very pernicious consequences. See *Kames' Elucidations*, art. iv. Delivery renders a deed obligatory on the grantor; but, in order to bind the grantee, the deed must be accepted. See *Acceptance*. See *Menzies' Conveyancing; Stair, B. iv. tit. 42, § 8, and B. i. tit. 7, § 14; More's Notes, p. li. and cccviii.; Mackenzie, B. iii. tit. 2, § 6; Bank. B. i. tit. 11, §§ 36 and 48, et seq.; and B. ii. tit. i. § 25; Ersk. B. iii. tit. 2, § 43, et seq.; Mor. Dict. voce Writ, § 10; Bell's Princ. § 23, et seq. 84; Bell's Illust. § 23; Jurid. Styles, vol. iii. p. 900.*

**Demand**; a call upon a person for anything

alleged to be due. This term can hardly be said to have any technical meaning in the law of Scotland different from its ordinary acceptation. In England it is a legal term, and may either be in *deed* or in *law*. Demand in *deed* is an express demand; in *law* it is implied, as by distress for rents, taking of goods, &c. See *Tomlins' Diet*.

**Demembration**. This term, as used in law, is applied to the offence of maliciously cutting off, or otherwise separating any limb, or member, from the body of another. Demembration was at one time regarded as a capital crime (1491, c. 28); but there appears to be no instance on record of a capital conviction. The punishment has long been arbitrary, and depends upon the circumstances attending the commission of the offence, and the degree of injury inflicted. Besides a prosecution *ad vindictam publicam*, an action for damages at the instance of the injured party is competent. By the former practice, a prosecution for demembration could not be instituted until year and day after the date of the injury; but such a delay is not now required. *Hume, i. 330, et seq.; Ersk. B. iv. tit. 4, § 50.*

**De Minimis Non Curat Prætor**; a Roman law maxim, importing that courts of justice do not take trifling and immaterial matters into account. Stair applies the maxim to the case of an appraising, where the debt has been extinguished, to all but a trifle, during the *legal*, by the creditor's intromissions with the rents; and observes, that in such a case, even under the old law, a small remainder, or balance, outstanding after the expiry of the *legal*, would not have been sufficient to exclude the debtor's right of redemption; *Stair, B. iii. tit. 2, § 39. See Legal.*

**Demise of the Crown**. In law, the Sovereign never dies; for, immediately on the decease of the reigning monarch, the royal dignity is, by the act of the law, vested in his successor, who is *eo instante* Sovereign to all intents and purposes; or, as it is expressed in the law of England, the kingdom is *demised*, or transferred to the heir to the Crown, so that the royal dignity remains perpetual; *Blackstone, vol. i. 249. See King.*

**Demission**. A clergyman of the Established Church of Scotland may voluntarily demit his charge; and, in such cases, the presbytery judges whether or not the demission ought to be accepted. If the minister has pursued schismatical and divisive courses, the presbytery cannot competently accept his demission, but may consult the commission of the General Assembly, and, if necessary, proceed against the minister by libel, censure, or even deposition; *Hill's Prac. 56, and authorities there cited. See Deposition.*

**Demurrage**; is the allowance or compen-

sation due to the master or owners of a ship, by the freighter, for the time the vessel may have been detained beyond the time specified, or implied, in the contract of affreightment or charter-party. In charter-parties, there is usually a clause regulating the time during which the master shall be obliged to remain with his ship, for the purpose of receiving a cargo, or sailing with convoy, or of unloading at the port of delivery. In the ordinary case, it is stipulated that the vessel shall remain for so many days, called *lay days*, the number being fixed according to the customary time required for receiving or delivering the cargo; and also, that it shall be in the power of the freighter, or his correspondents or assignees, to detain the vessel for so many days longer, called *days of demurrage*, at a certain rate of demurrage for each day. The following points with regard to the claim for demurrage seem deserving of attention:—*1st*, If the ship be improperly detained, demurrage is due, not only under the express or implied contract of charter-party, but on the principle of damage, arising to the owners from the undue detention. *2d*, If the charter-party or bill of lading contain no stipulation of *lay days*, or if it be merely provided that the usual time for loading and unloading shall be allowed, the customary, or a reasonable time, or (where a delay arises from no fault of the freighter) the time necessary for loading or unloading, will be given. After the elapse of that time, the master will be entitled to sail, if no demurrage has been stipulated; or, if he be detained longer, he may claim damages. It follows, from this rule, that no demurrage will be due where the delay has been occasioned by the crowded state of the docks, or where the customary mode of delivery of the particular cargo requires more time than an ordinary delivery. But, whenever the delay is imputable to any fault of the freighter or the consignee, demurrage will be due. *3d*, If a specific number of *lay days* be allowed, the days of demurrage will commence on the expiration of the lay days, however blameless the freighter or consignee may have been. As to this, the rule is, that, during the loading or unloading of the ship, the freighter runs all the risk of necessary, or of accidental, interruptions; but, after the loading or unloading is complete, the risk of interruptions is transferred to the shipmaster or owners. *4th*, The indorsee of a bill of lading will have no defence against a claim for demurrage, on the ground that he got no notice of the arrival of the vessel; for it is the duty of the indorsee or consignee to watch the arrival. But if the ship's name be incorrectly entered at the customhouse, so that the consignee, after due inquiry, cannot discover

the arrival, that will liberate him from any claim for demurrage arising out of such inaccurate entry. *5th*, In settling the lay days and the days of demurrage, the charter-party specifies "*working days*" or "*running days*." The former stipulation excludes Sundays and customhouse holidays; under the latter, the days are reckoned as in a bill of exchange. Where the expression used is "*days*" merely, running days are presumed; but special usage may overcome this presumption. *6th*, If there be no stipulation for demurrage, the master may sail on the expiration of the lay days stipulated or reasonable; or if he stay voluntarily, or otherwise, he will be entitled to damages of the nature of demurrage. *7th*, If the days of demurrage be limited, and the ship be detained beyond them, the sum fixed for demurrage will be taken as the best measure of the compensation due for the damage arising from longer delay. But it will be open to the shipowners to show, that greater damage has been sustained; and to the freighter, to show that an allowance, at the rate of the stipulated demurrage, will do more than compensate the damage. *8th*, Demurrage is due even in the case of a *general ship*. This may arise from the delay of a merchant who has engaged freight in a general ship, and has failed to bring forward his goods in due time. Or it may arise where, in the delivery of the cargo from a general ship, delay has arisen in consequence of the several parties to whom the goods are addressed not being ready to receive them. In either of those cases, demurrage is sometimes stipulated; and, in such a case, where the demurrage is incurred in unloading the cargo, it seems to be settled that the merchant whose goods are last delivered, or lowest in the hold, is liable for the demurrage, even although the delay may have been occasioned by no fault whatever of his. The person who pays the demurrage, however, will be entitled to recourse against the parties in fault. *9th*, Demurrage stipulated to be paid, for the time spent in waiting for convoy, ceases as soon as the convoy is ready to depart; and, in the ordinary case, after the ship is laden, and has got the necessary clearances, the claim for demurrage stops. *10th*, A protest on account of demurrage, although not indispensable, ought always to be taken. The protest ought to set forth the circumstances attending the delay, and such other facts as are material, and indisputable at the time, although the want of an instrument of this kind may render the proof of them difficult afterwards. *Lastly*, The doctrine of the law of England, which is of high authority with us in such cases, seems to be, that the freighter is responsible for all the

various risks, vicissitudes, or casualties which may prevent him from returning the vessel to the owners within the stipulated time, including the case of the vessel being frozen up. The shipmaster has no implied *lien* over the goods for demurrage; but a *lien* may be created for this claim by an express and unambiguous stipulation. *Brodie's Supp. to Stair*, 981; *Bell's Com.* vol. i. p. 575, *et seq.*, and vol. ii. p. 100, 5th edit.; *Tomlins' Dict. h. t.*; *Holt on Shipping*, ii. 13, *et seq.*; *Jurid. Styles*, ii. 539 and 552, 2d edit.; *Bell's Princ.* § 431, *et seq.*; *Bell's Illust.* § 431. See *Charter-Party*.

**Demurrer**; is an English law term, signifying a pause or stop put to any action upon a point of difficulty in law, which must be determined by the Court before any farther proceedings can be had. A demurrer, therefore, is an issue in point of law. Conceding the fact as stated by the opposite party, it denies the legal inference thence deduced. *Tomlins' Dict. h. t.*

**Denial.** Denial in law imports no more than *not confessing*. It does not amount to a positive assertion of the falsehood of that which is denied. In the judicial procedure of the Court of Session, where a fact is, or ought to be, within the knowledge of his opponent, is averred by one party, and not explicitly denied by the other, he is held as confessed, and the fact taken as definitely proved against him. *Stair*, B. iv. tit. 44, § 1; *Ersk. B. iv. tit. 2*, § 16; *A. S. 1st Feb. 1715*, § 6; *7th Feb. 1810*, and *11th July 1828*, § 105. See *Calumny, Oath of. Condescendence. Confession*.

**Denizen**; is an alien born, who has obtained from the Sovereign letters of denization, in virtue of which he is entitled to purchase and transmit lands, although he cannot take by inheritance. The right to grant letters of denization is a high and incommunicable prerogative of the Crown. *Bell's Princ.* § 2136; *Hunter's Landlord and Tenant*. See *Act 7 and 8 Vict.*, c. 66; *Menzies' Conveyancing*, p. 46. See also *Alien*.

**De Non Apparentibus et Non Existenti- bus Eadem Est Ratio**; a maxim, importing, as usually applied in law, that deeds or writings founded on by a party, but not produced or recovered, or the loss of which cannot be supplied, in the manner which the law has prescribed, are to be treated precisely as if non-existent. See *Proving of Tenor*.

**Denunciation**; is the act by which a person who has disobeyed a charge is proclaimed a rebel. The act was performed, before the recent Diligence Act, by a messenger-at-arms, who proceeded to the cross of Edinburgh, or to the market-cross of the head burgh of the county within which the party charged

resided, and there, in presence of two witnesses, cried three several *oyesses* with an audible voice, and then read publicly the letters of horning and the execution of charge, and thereafter denounced the debtor rebel, and put him to the *horn*, as it is termed, by three blasts of a horn. If the debtor was furth of the kingdom, the denunciation was proclaimed at the cross of Edinburgh and the pier and shore of Leith. The execution returned by the messenger detailed this solemnity as having been actually gone through; and should the execution not specify the several formalities, the omission could not be supplied by parole proof that they were observed. The denunciation was declared null, if the letters of horning and the execution were not registered within fifteen days after the denunciation, in the sheriff-court books of the jurisdiction within which the debtor resided, or in the General Register at Edinburgh; 1579, c. 75; 1597, c. 265; 1600, c. 13; and where the registration had been omitted, the practice was to denounce of new, and register the second execution. Denunciations may also proceed against persons cited to the Court of Justice on account of crimes.—1st, Where they appear there with more followers than are permitted by 1555, c. 41; or, 2d, Where, in consequence of a failure to appear, sentence of fugitation has been pronounced against them. In the first case, the denunciation must take place at the market-cross of the head burgh of the shire where the court is held, and must be registered, either in the books of the shire of the rebel's domicile, or in the books of adjournal of the Court of Justice. In the case where denunciation has followed a sentence of fugitation, it is as effectual if it be made at the market-cross of Edinburgh within six days after the sentence of fugitation, as if it had been made at the county town of the domicile; 1584, c. 140; 1592, c. 126. The chief, and almost the only purpose to which denunciation on account of a civil debt was applied, was to warrant the issuing of letters of caption against the party denounced. See *Caption*. But the consequences of denunciation, whether on account of civil or criminal matters, were formerly highly penal. Thus,—1st, The rebel's single escheat fell,—that is, his whole moveable effects were forfeited to the Crown, and his liferent escheat fell to the superior, if he remained a year and a day unrelaxed (see *Escheat*); 2d, Prior to 1612, persons denounced, even for a civil debt, might be put to death with impunity; and, 3d, After denunciation, the rebel had no *persona standi in judicio*. But the severity of those provisions has been much mitigated, both by legislative enactments and by the progress of civilization. By the statute 20 Geo.

II., c. 50 (1748), escheat upon denunciation for civil causes is entirely abolished. The act 1612, c. 3, provides that denunciation for a civil cause shall be no justification for any personal injury to the party denounced; and the provision, that the rebel shall have no *persona standi in judicio*, is not now favoured by the law. It is merely personal, and cannot be pleaded against the rebel's assignee, even although the assignation should be dated after the commencement of the action; and it is probable that, if pleaded against a person denounced on account of a civil debt, the plea would be repelled; *Ersk. B. ii. tit. 5, § 60*. If no denunciation be made within year and day of the date of the execution of the horning, the charge falls, and the horning must be executed of new. By 1621, c. 20, it is provided, that after denunciation, the sum in the horning shall bear interest until paid; and the construction put on this statute is, that denunciation operates as an accumulation of the principal and interest due at the date of the denunciation into a principal sum bearing interest. But, in order to produce this effect, the denunciation must have been performed precisely in terms of the statutes; for, although a denunciation at the cross of Edinburgh, even where the debtor resides beyond the county, will be sufficient to warrant letters of caption; yet, in order to accumulate principal and interest, the denunciation must be made at the head burgh of the debtor's residence, or at the market-cross of Edinburgh and the pier and shore of Leith, if he be furth of the kingdom; *Cochran, 7th July 1743, Mor. p. 494; Bell's Com. vol. i. p. 652-653, and vol. ii. p. 543, 5th edit.* Registration of the extract, and execution of an expired charge in the register of hornings, has now the same effect as if the debtor or obligant had been denounced rebel in virtue of letters of horning, and has the effect of accumulating the debt and interest into a capital sum on which interest shall become due; *1 and 2 Vict., c. 114, §§ 5 and 10*. This statute has practically superseded the procedure for recovery of civil debt by horning, denunciation, and caption, though that is still competent. See *Caption*. Denunciation on account of crimes is still followed by escheat and the other penal consequences already mentioned, except that it is not allowable for any one to kill or mutilate the rebel, unless he has been denounced for a capital crime, and has been killed or injured while making a forcible resistance to those who were pursuing him for the ends of justice; *1661, c. 22; Hume, vol. i. p. 182, et seq.* See, on the subject of this article, *Stair, B. iii. tit. 3, § 7, et seq.; Bank. B. iii. tit. 3, § 2, et seq.; Ersk. B. ij. tit. 5, § 56, et seq.; Ross's Lect. vol. i. p. 305; Bell's Princ. § 2397; Brown's*

*Synop. pp. 27, 585, 1272; Jurid. Styles, 2d edit. vol. iii. pp. 737-989.*

**Deodand.** The literal meaning of this term is, dedicated or devoted to God. By the law of England, any of the lower animals, as a horse or ox, or any moveable subject, such as a cart or carriage, which has been the immediate cause of the death of a human being, is forfeited to the Crown to be applied to pious uses. Deodands were originally designed as an expiation for the souls of those who were cut off by accident, and were devoted to the purchase of masses. It is now the practice for the jury who declare the deodand, to fix a certain value upon it, which, when there has been blame imputable to the owner, operates as a fine; and, where no blame attaches, the jury usually make the deodand merely elusory, by declaring some trifling thing, or a part of an entire thing, to have been the occasion of the death. There can be no deodand unless it is declared such by a jury; and the verdict of the jury on that point will be with difficulty interfered with; *Blackstone, vol. i. p. 300, et seq.* See also *Tomlins' Dict. h. t.* A similar forfeiture is said, on the authority of the *Regiam Majestatem*, to have been known in our older law; *Bank. B. i. tit. 8, § 10*.

**Depending Action.** An action is held to be in dependence from the moment of the citation, until the final decision of the House of Lords; and, upon such a dependence, it is competent for the pursuer to use either inhibition or arrestment, as a security to him for implement of the decree, in case he shall succeed in obtaining one. Warrant for an inhibition on the dependence will be obtained upon production, at the Bill Chamber, of the summons duly executed. The inhibition must bear a distinct reference to the action on which it proceeds. Where the summons concludes for a precise sum, the sum must be specified in the inhibition; and where it is impossible to specify any sum, the nature of the action must be particularly mentioned. The effect of an inhibition on the dependence rests entirely on the decree; and where the action does not terminate in a decree, the inhibition is not effectual. Thus, if the case be taken out of Court by arbitration, the inhibition will not cover the sum decreed for by the arbiter; *Reids, &c., 3d July 1751, Mor. p. 6993, and Elchies, Inhibition, No. XVII.* But in such a case the effect of the inhibition may be reserved by an express stipulation that the pursuer shall consent to a judicial decree in terms of the arbiter's award; *Stewart, 16th Feb. 1770, Mor. p. 7004; Anderson, 25th May 1821, 1 S. 31.* The same rules apply to arrestment on the dependence of an action. Warrant for the arrestment may be obtained summarily on production of the

libelled summons before it is executed; 54 *Geo. III.*, c. 137, § 2. So also the wills of summonses, both in the Court of Session and in the Sheriff-court, may, and usually do, contain a warrant to arrest on the dependence; and wherever an arrestment on the dependence is used on the unexecuted summons, if the summons is not executed within twenty days next after the date of executing the arrestment, and the summons called within twenty days after the diet of comparance, or if the vacation intervenes, on the first calling day thereafter, the arrestment is null, without prejudice to any subsequent arrestment on the same precept; 1 and 2 *Vict.*, c. 114, §§ 16 and 17; *A. S.*, 10th July 1839, § 12; 16 and 17 *Vict.*, c. 80, § 1. See *Arrestment*. Arrestments on the dependence do not prescribe in three years from their date, but in three years from the date of the decree in the action; and all arrestments on the dependence may be loosed on caution. Between the final decree in the Court of Session and the entry of an appeal, the creditor may inhibit or arrest as upon a final decree; but the appeal revives the depending process. See *Bell's Com.* ii. 144, *et seq.* and 67, *et seq.* 5th edit.; *Jurid. Styles*, vol. ii. pp. 185, 196; *Ross's Lect.* i. 449, 485, 490. See also *Arrestment*. *Loosing Arrestment*. *Inhibition*.

**Deponent;** a person who makes oath judicially. The term is usually applied to a witness whose testimony is taken down in writing, and authenticated by his subscription. See *Deposition*.

**Deposition or Deposit;** is a contract, by which a subject, belonging to one person, is intrusted to the gratuitous custody of another, to be re-delivered on demand. He who deposits or gives in custody, is called the *depositor*; and the person with whom the deposit is made, is called the *depository*. The contract is completed by delivery of the subject. The property of the subject and the risk remain with the depositor; consequently, if the subject perish accidentally, it perishes to him. The depository, until the subject is demanded back, is liable only for gross negligence, and bound to such diligence as he uses in his own affairs; but if he unduly delay to re-deliver the subject, after requisition, he will be liable in the most exact diligence; and if, after that, the subject should perish, even accidentally, he will be answerable for its value. Where a box or other repository, under lock and key, is deposited without delivery of the key, the depository will be answerable only for the repository itself, and not for its contents. If, on the other hand, the key be delivered, the rules just explained as to diligence will apply. Where a subject is committed to the custody of two persons,

they are liable *singuli in solidum* for restitution. Deposition is divided into *proper* and *improper*. The former is where a special subject is deposited, to be restored without alteration; the latter where money, or other fungibles, are deposited to be returned in kind. In *proper* deposition, the real right of the subject remains with the depositor, the depository having neither the use nor the disposal of it; and although it seems to be doubtful, whether a *bona fide* purchaser from a depository, who has fraudulently sold the subject, will be safe from the owner's claim for restitution, it is certain that, where there has been no fraud, and while the subject remains with the depository himself, his creditors have no right to it in competition with the owner. In *improper* deposition, however, the rule is different; for there the real right is transferred to the depository, and the depositor becomes a creditor merely for the quantity of fungibles, or money, deposited. But there may be *proper* depositions even of money or other fungibles, provided they are delivered as a specific subject, marked so as to be distinguishable from the depository's ordinary stock. So also bills and other negotiable instruments may be the subject of *proper* deposition, provided the power of negotiation is not with the depository. The result, therefore, is,—1st, That where deposited goods are extant and distinguishable, the depositor, in all cases of *proper* deposition, is entitled to have them set apart from the common fund, and re-delivered to him; and, 2d, That where the subject deposited is to be returned in kind, the depositor is only a personal creditor of the depository. The depository is bound to restore the subject with all its fruits and accessaries; and this obligation is enforced by the *actio directa*. The *actio contraria* of deposition is competent to the depository against the owner, for indemnification of any loss or expense, which he may have incurred through the custody of the subject. On account of the exuberant trust implied in this contract, the depository is not entitled, either in *proper* or *improper* deposition, to plead compensation or retention against the depositor, in payment or security of another debt, due by the depositor to the depository. But where the depository's claim arises from damage, occasioned by the subject of the deposition itself, or on account of money disbursed in the custody of it, the depository may retain the subject, until he is fully indemnified for such loss or expense. If, on the depository's death, his heir, ignorant of the deposition, *bona fide* sell the subject, he is accountable only for the price received by him, or, if he have not received the price, he will be discharged of his obligation, by assigning his claim for the price to the

depositor. There are several special kinds of deposition, which will be more appropriately considered under separate articles. Such are depositions giving rise to claims under the edict *Nautæ, cauponæ, stabularii*,—sequestration, voluntary and judicial,—consignation of money,—and trust, which is a sort of deposition. These, however, although classed by our law writers under deposition, differ in some essential particulars from deposition properly so called. See the following articles in this Dictionary:—*Consignation. Nautæ, cauponæ, &c. Sequestration. Trust.* See, on the subject of this article, *Stair*, B. i. tit. 13; *More's Notes*, p. lxxvii; *Bank*, B. i. tit. 15; *Ersk.* B. iii. tit. 1, § 26, *et seq.*; *Bell's Com.* i. 257, *et seq.*; *Bell's Princ.* § 210, *et seq.*; *Bell's Illust.* § 212.

**Deposition**; is the testimony of a witness, who is called also a deponent, put down in writing. Prior to the introduction of jury trial in civil causes, all proofs by witnesses, whether taken before the Court of Session or before an inferior court, or before a commissioner named by the Court to take the proof, were committed to writing, for the consideration of the Court which was to decide on the import of the proof adduced. This mode of taking evidence has been to some extent superseded in the Court of Session by the introduction of jury trial; but it is still competent, even for that Court, to authorize the testimony of witnesses to be taken according to the old form, and it is proper to explain the manner in which it is done. The deposition is taken in presence of the parties, or their counsel or agents, either by the judge, or by a commissioner, who administers the oath to the deponent. The interrogatories are put by the counsel or agent of the parties, under the control of the Court or of the commissioner, and the answers, as given by the witness, are taken down in writing by the clerk to the proof. If there be any objection to the competency of the questions, or to the admissibility of the witness, the objection is stated to the judge, or to the commissioner, who either disposes of it immediately, or reserves it for the opinion of the Court, his judgment either repelling or sustaining the objection, being subject of course to the review of the Court. Those objections, with the whole pleadings upon them before the commissioner, were formerly in use to be engrossed *verbatim* in the report of the proof; but the act of Sederunt 11th March 1800, in order to put an end to this practice, directs that, in proofs taken on commission from the Court of Session, the commissioner shall exercise his own judgment in excluding from the report of the proof all unnecessary pleading or altercation about the competency of questions, or the ad-

missibility of witnesses, and that he shall take separate notes of such objections as he thinks of importance, for the information of the Court. He is also directed to take a note of any peculiarity in the witness's manner of giving his testimony. The examination of the witness being finished, the deposition is read over to him, so as to give him an opportunity of correcting any error which may have been fallen into in taking it down; and it is closed by a declaration that the whole of it is truth, as the deponent shall answer to God. The deposition is authenticated by the subscriptions of the deponent, and of the judge or commissioner, and the clerk to the proof. If the deponent cannot write, that circumstance is mentioned in the deposition; and the subscriptions of the judge or commissioner, and the clerk, are sufficient. By the act 16 and 17 Vict., c. 80, § 10 (1853), the notes of the evidence led in the Sheriff-courts must be taken by the Sheriff with his own hand. In the Court of Justiciary, the testimony of the witnesses, as delivered to the jury, was taken down at large in writing, until the statutes 21 Geo. II., c. 19, and 23 Geo. III., c. 45, put an end to the practice; leaving to the Court an option to proceed according to the old form, if they see cause; *Hume*, ii. 382. A similar change was made in criminal trials by jury before sheriffs, by 9 Geo. IV., c. 29, § 17. Where it is found necessary to take the depositions of the witnesses examined on a precognition, in ordinary criminal cases, the formalities just explained are observed. In criminal trials before sheriffs, justices, and other inferior judges, without a jury, the depositions are taken down by the clerk of Court, and signed by the witnesses and judge. See 9 Geo. IV., c. 29. As to the mode of taking proofs in consistorial causes, see *Commission for taking Proof*; and as to depositions of witnesses taken to lie *in retentis*, see *Evidence*. See also, on the subject of this article, *Dickson on Evidence*, p. 120, *et seq.*; *More's Notes on Stair*, cccxcv. See also *Reprobator. Precognition. Criminal Prosecution. Evidence*.

**Deposition of a Clergyman.** The minister of a parish who has been guilty of scandalous or immoral conduct, or of any other offence against the Presbyterian scheme of ecclesiastical discipline, may be deposed from his holy office by sentence of the Church judicatories, and so deprived of the temporalities of his benefice. After the Reformation, sentence of deposition by a Church court, did not disqualify the deposed minister from enjoying the benefice for life, that being considered as a civil right conferred on him by the patron. But the statute 1592, c. 115, declares, that sentence of deposition by a Church court shall

have the effect of depriving the deposed minister of the rents and emoluments of his benefice, and that the benefice shall thereby become vacant. The steps are in all respects similar to those taken on the occasion of a vacancy by death or translation. After the sentence of deposition is extracted and shown to the patron, he is allowed, by the same statute, six months to supply the vacancy; and if he fail to present within that time, the right to supply that vacancy devolves upon the presbytery within which the benefice is situated. A minister once deposed, may be restored to the exercise of his ministry by the General Assembly; but regularly he ought not to be settled in the same church, because it is held that the stigma attached to his character by the deposition, is likely to impair the usefulness of his ministry in that parish. Sometimes, instead of sentence of deposition or deprivation, the Church judicatory takes a more lenient course, and merely declares the relation between the minister and his parish to be loosed,—a declaration which is equivalent in effect to a deposition, and which is usually resorted to, where the clergyman is contumaciously disobedient to the Church courts, or where he promulgates doctrines inconsistent with the tenets of our national Church. Where sentence of deposition is pronounced by an inferior Church court, and afterwards reversed on appeal to a higher court, it is held as if it had never been pronounced; but, if the sentence be affirmed, the minister's right to the profits of his benefice ceases from the date of the sentence of the inferior court. A minister who has been deposed may, on reasonable considerations, be restored to his sacred functions by the General Assembly, without any new ordination; hence it appears that the ecclesiastical character is to that extent indelible, although, after deposition, the party is not to be regarded as a minister of the Church, nor entitled to any privileges as such, even if he should be reposed, unless he is again settled in a ministerial charge. Sentence of deposition cannot be pronounced by a presbytery in absence of the minister who is to be deposed, unless by authority of the General Assembly. Where the deposition has been on account of immorality, the minister cannot be restored to his former charge, under any circumstances, without the special authority of the General Assembly. *Bank. B. ii. tit. 8, § 220, et seq.*; and *B. iv. tit. 22, § 21*; *Hill's Prac. 57*; *Cook's Styles, p. 123*. See *Minister. Church Judicatories*.

**Deprivation or Hershship**; is the offence of driving away numbers of cattle or other *bestial*, by the masterful force of armed persons. This crime, although now almost unknown in

this country, was at one time very prevalent. The punishment is capital. *Hume, i. 110*. See *Hershship*.

**Deprivation of a Clergyman**. See *Deposition*.

**Deputy**; one who exercises an office under another. A deputy differs from the assignee to an office: the principal is liable for the acts of his deputy, but the grantor is not liable for the acts of his assignee. No judge has the power to name a deputy, unless he is expressly authorized to do so by the grant to himself. A deputy appointed by a deputy, who has a power of deputation, is usually called a substitute. *Ersk. B. i. tit. 2, § 13*. See *Delegated Jurisdiction*.

**Derelict**; is an English law term, signifying anything forsaken or left, or wilfully cast away. Derelict lands suddenly left by the sea belong to the Crown; but if the sea recede gradually, and by imperceptible degrees, the gain will go to the owner of the adjacent lands. By statute 54 Geo. III., c. 81, § 21, *et seq.*, certain goods derelict (spirits and tobacco), are liable to the duties of customs, as if legally imported; *Tomlins' Dict. h. l.* As to derelict ships, *i.e.*, vessels forsaken at sea, see *Wreck*.

**Dereliction**. The term dereliction, in Scotch law, is nearly similar in import to the English term derelict. Stray cattle not claimed within year and day are held to be dereliquished, and are escheated to the King. But if the thing found be inanimate, it would appear that the presumption of dereliction does not hold, and that the owner may reclaim it at any time within the period of the long prescription of forty years; *Stair, B. ii. tit. 1, § 20*; *Ersk. B. ii. tit. 1, § 12*; *Bank. B. i. tit. 8, § 4*. With regard to land gained from the sea, we have not recognised the distinction of the English law. In Scotland, the shores of the sea are held to belong to the public for the purposes of navigation, and to the Sovereign as trustee for the public. But this right is confined to the shore of the sea only, and is not understood to confer on the Sovereign anything like a right of private property. If, therefore, the sea were to recede either suddenly or imperceptibly, the land so gained would belong to the adjacent proprietors whose property is bounded by the sea-shore. *Bank. B. i. tit. 3, § 4*; *Ersk. B. ii. tit. 1, § 6*, and *tit. 6, § 17*. See *Strays. Waifs. Wreck. Regalia. Sea-greens*.

**Dereliction, in teind law**. The teind-court will pronounce a decree approving of a valuation of tithes by the sub-commissioners, although the sub-valuation has not been acted upon for upwards of forty years. But if there has not been a use of payment of a higher rate of teind than that fixed by the sub-com-



missioners, the sub-valuation will be held to be derelinquished, and the Court will not approve of it, even although the long prescription has not run on the higher rate. It appears, however, to be now settled, that the same rule does not apply to the case of a valuation by the High Commission, or to a sub-valuation approved of by that Court; for it has been decided that a decree of valuation by the High Commission will not be held to be derelinquished by prescription, or by a contrary and a higher rate of payment for any period, however long. See *Connel on Tithes*, i. 376, 386; see also *Tennds*.

**Descendants**; are all the persons descended from one common ancestor. Thus, the son, the grandson, and the great-grandson, are descendants in the direct line. The children of younger brothers are descendants in the collateral line. In legal succession, descendants are always preferred to ascendants, according to certain rules, fully explained under the article *Succession*. See also *Heir. Executor. Conquest*.

**Desertion**; in martial law, is the offence of a soldier or sailor who quits the army or navy without being discharged, or without leave of absence. By the annual mutiny act, military desertion is punishable with death, or with such other punishment as a court-martial may think proper to award; *Tomlins' Dict. voce Soldiers*. Desertion from the naval service of Great Britain is in like manner punishable at the discretion of a court-martial. By the articles of war regulating this branch of the service (arts. 15 and 16), it is provided, that "every person who shall desert to the enemy, or run away with any ship, ordnance, &c., to the weakening of the service, or yield up the same cowardly or treacherously to the enemy, shall suffer death;" and "every person who shall desert, or entice others to do so, shall suffer death, or such other punishment as a court-martial shall think fit;" *Tomlins' Dict. voce Navy*. Where a person is suspected to be a deserter, either from the military or naval service, he may be apprehended by any constable, or by any officer or soldier in the service, and brought before the nearest justice of the peace; and if, by the party's own confession, or by the oath of one witness, or by the knowledge of the justice, it appear that he is a deserter, the justice may commit him to prison, and transmit an account of the commitment, in a prescribed form, to the Secretary at War in London, or to the Secretary of the Admiralty. And, on receiving authority from either of those functionaries, the justice may grant an order on the collector of the land-tax of the place of commitment, for a reward not exceeding forty shillings to the person who apprehended the deserter. A person guilty of

concealing or assisting a deserter forfeits L.20 on conviction, by the oath of one witness, before any justice; the fine to be levied by distress—half being paid to the informer, and half to the officer commanding the regiment or corps. Failing distress, or if the guilty person do not pay the fine within four days after conviction, he is to be committed, by warrant under the hand of the justice, to jail for six months. The forcible entering or breaking open any dwelling-house or out-house on pretence of searching for a deserter, without a written warrant, is illegal, and subjects the party in fault to a penalty of L.20; but a justice of the peace may lawfully grant warrant for such a search. Desertion is not a crime cognizable by the ordinary courts of law in Scotland. But to seduce a soldier or a sailor to desert is an offence punishable, arbitrarily, at common law; *Hume*, i. 528 and 560; ii. 34, 41. And by 37 Geo. III., c. 70 (made perpetual by 57 Geo. III., c. 7), the attempt to seduce a soldier or a sailor from his duty, is declared a capital offence; *Tait's Justice of Peace*, 387; *Blair's Justice, voce Soldiers*, p. 320; *Hutcheson's*, i. 296. See *Soldiers. Navy. Court-Martial. Mutiny Act*. In the merchant service, a seaman who deserts the ship before the expiration of the term of his agreement, forfeits all his wages, and renders himself liable to imprisonment; 17 and 18 Vict., c. 104. But it is not held to be desertion if the seaman forthwith enter into Her Majesty's service; 7 and 8 Vict., c. 112, § 50, and 17 and 18 Vict., c. 194. In either case, he is entitled to his wages up to the period of his entry into the Queen's service, provided the ship which he has left has arrived at her port in safety. Neither is it desertion if the master compel the seaman to quit the ship by harsh treatment. See *Seymour's Merchant Shipping Acts*, p. 196; *Brodie's Supp. to Stair*, 978; *Bell's Com.*, vol. i. p. 514, 5th edit.

**Desertion of Married Persons**. Wilful and malicious desertion or abandonment of the conjugal society, on the part either of a husband or of a wife, may be the ground of a divorce under the statute 1573, c. 55. Where either party has deserted from the other without reasonable cause, and has remained maliciously separate for four years together, the party deserted may pursue a process of adherence either before the Sheriff or the Court of Session; and where the action is pursued by the wife, it is competent for her in the same summons to conclude for aliment. The pursuer must prove both the marriage and the desertion; and the decree of adherence may be enforced by letters of horning. After this the Church is directed by the statute to proceed against the defender, first by admo-

dition, and then by excommunication. And if all these be disregarded, an action of divorce may be pursued before the Court of Session, as coming in place of the Commissary Court. The action of adherence may be raised, and sentence of adherence pronounced, after one year's desertion; but four years must intervene between the first desertion and the decree of divorce. If the decree of adherence and the subsequent admonition of the presbytery (as coming in place of the bishop), have been disobeyed, and if the desertion have continued for the statutory period of four years, the pursuer may then raise an action of divorce before the Court of Session, reciting the procedure in the action of adherence and before the presbytery, and concluding for divorce on the ground of wilful desertion. If no appearance be made for the defender in this action, the pursuer must appear and depone *de calumnia*; after which no farther proof is required in support of the action than production of the documents libelled on. In like manner, also, where the defender appears and opposes the action, the pursuer must swear the oath of calumny; but at this stage of the proceedings the defender is not entitled to bar the decree of divorce by offering to adhere. Where the party accused of desertion is forth of the kingdom (especially where no *personal notice* of the action has been served), it has been doubted whether the action of divorce can proceed; although it has been said that such absence will be no defence where the offending party has gone abroad with the deliberate purpose of avoiding conjugal adherence; *Ersk. B. i. tit. 6, § 44*; and reference may be made to *Walker v. Walker*, 7th Dec. 1844, 7 *Jur.* 87, and *A. B. and C. D. Duke v. Duke*, 1st Mar. 1845, 7 *D.* 556. But where the husband or wife is so absent about his or her lawful affairs, or in pursuance of a sentence of banishment, no action can be instituted; and if during such absence the party remaining at home should enter into another marriage, in the *bona fide* belief that the absent party is dead, the husband or wife, on his or her return, may either resume the former connection, or sue for a divorce on the ground of adultery. The *bona fides*, however, will be a protection against any criminal prosecution, either on the ground of bigamy or of adultery. The effect of divorce on the ground of desertion is declared by the statute 1573, c. 55, to be, that the party offender shall "tyne and lose their tocher, *et donationes propter nuptias*,"—that is, the offending husband is bound to restore to the wife her tocher, and to pay or implement to her all her provisions, legal or conventional; and, on the other hand, the offending wife forfeits to the husband her tocher, and all the rights which

would have belonged to her had the marriage been dissolved by the predecease of the husband; *Ersk. B. i. tit. 6, § 46*. See on the subject of this article, *Stair, B. i. tit. 4, §§ 8 and 20*; *More's Notes*, p. xvii.; *Bank. B. i. tit. 5, § 127, et seq.*; *Ersk. B. i. tit. 6, § 44, et seq.*; *Bell's Princ. §§ 1537, 1621*; *Shand's Prac.*; *Lothian's Consistorial Law*, pp. 96–117; *Fraser's Personal Relations*, p. 677. See also *Marriage. Divorce. Oath of Calumny. Commissary Court. Adherence.*

**Desertion of a Tenant.** The Act of Sederunt 1756, § 5, provides, that "where a tenant shall run in arrear of one full year's rent, or shall desert his possession, and leave it unlaboured at the usual time of labouring, in these, or either of these cases, it shall be lawful to the heritor, or other setter of the lands, to bring his action against the tenant before the judge ordinary, who is hereby empowered and required to decern and ordain the tenant to find caution for the arrears, and for payment of the rent for the five crops following, or during the currency of the tack, if the tack is of a shorter endurance than five years, within a certain time to be limited by the judge; and, failing thereof, to decern the tenant summarily to remove, and to eject him in the same manner as if the tack were determined, and the tenant had been legally warned, in terms of the foresaid act 1555." But, independently of the Act of Sederunt, it appears to be settled at common law, that where a tenant deserts his possession for any considerable length of time, or in such a manner as to indicate a decided intention on his part to abandon his lease, the landlord is entitled to enter into possession of the farm, and to prevent the tenant from resuming possession. As the fact of desertion, however, may be ambiguous, it seems proper, in order effectually to exclude the tenant, to have the forfeiture of his lease judicially declared; and where circumstances admit of it, the action ought to be laid upon the Act of Sederunt 1756. See *Taylor*, 28th Nov. 1728, *Mor.* p. 15310; *Bell on Leases*, vol. i. p. 324, *et seq.* 4th edit.; *Hunter's Landlord and Tenant*, ii. p. 119, *et seq.* See also *Lease. Declarator. Irritancy.*

**Desertion of the Diet.** To desert the diet in a criminal process is judicially to abandon proceedings on the particular libel, in virtue of which the panel has been brought into court. The Court may declare the diet to be deserted: 1st, In consequence of the absence of the prosecutor at the calling of the diet, which will have the effect of freeing the panel from a prosecution on that particular libel, but will not prevent a new process being raised on the same grounds. 2d, Where some defect or informality has been discovered in the libel, or where there is a good objection to the relevancy, the Court,

on the application of the prosecutor, may desert the diet *pro loco et tempore*, as it is expressed. In this case the prosecutor acquaints the Court and the panel, that he wishes to pass the prosecution for the time and occasion only, but to reserve his right to insist of new, if he shall see cause; and if the Court, in the exercise of their discretion, accede to the prosecutor's motion, the desertion *pro loco et tempore*, does not bar the prosecutor from raising a new libel, in which the error may be corrected. The diet, however, must be deserted as to the one libel before the other can be insisted in. *Lastly*, If the prosecutor thinks proper entirely to abandon the prosecution, he may move the Court to desert the diet *simpliciter*,—a motion which will be acceded to as a matter of course, and the effect of which will be to put a final stop to all further proceedings against the panel for the same offence. The prosecutor may move for a desertion of the diet *pro loco et tempore*, even after a plea of guilty has been recorded. But after the jury is once sworn, no desertion *pro loco et tempore* is competent, and the libel, such as it is, must take its fate. The public prosecutor, however, even after a verdict of guilty has been returned by the jury, may desert the diet *simpliciter*, if he think proper; the consequence of which will be, that the panel will be free of punishment for his offence, and of all future question on that account. A prisoner who has *run his letters*, as it is termed, under the act 1701, c. 6, and who, after the expiration of the sixty days, has been served with new criminal letters for the same offence, is entitled, under the statute, to have the diet deserted *simpliciter*, if the libel be not prosecuted to a final sentence, within forty days after the prisoner is of new incarcerated, unless the delay has taken place at his desire. The effect of such a desertion of the diet is declared to be, that the panel shall be for ever free of all challenge or question touching that offence. The construction of this provision of the statute, however, has given rise to considerable doubts. See *Hume*, 102, 263, *et seq.*; *Alison's Prac.* 98, 343, *et seq.* See also *Liberation. Diet. Criminal Prosecution.*

**Designation**; is the addition or description of a person. It is necessary in all deeds to design or identify the parties in such a manner as to distinguish them from all others; and, in practice, this is done by setting down the title of nobility, or the name and surname of the party, with his addition or description, by his estate, profession, trade, or place of residence. The witnesses to the execution of a deed, and the writer of it (except in the case of holograph deeds), must also be named and designed in the testing clause, otherwise the deed will not be probative. The statutes re-

gulating this subject are—1579, c. 80; 1593, c. 175; and 1681, c. 5. See *Stair*, B. iv. tit. 42, § 19, and tit. 20, § 25; *More's Notes*, p. cccc; *Bank*. B. i. tit. 11, § 24; *Ersk.* B. iii. tit. 2, § 6, *et seq.*; *Bell on Testing of Deeds*; *Ross's Lect.* vol. i. p. 130, *et seq.*; vol. ii. p. 156, *et seq.*; *Monzies' Conveyancing*; *Duff on Deeds*; *Duff's Feudal Conveyancing*. See also *Testing Clause. Writ. Falsa Demonstratio.*

**Designation of a Manse and Glebe.** Manses and glebes for the clergy are designed, or set apart, from the Church lands in the parish, by the presbytery of the bounds. For a detailed account of the nature and extent of these accommodations, see *Manse. Glebe.* After a designation by the presbytery, if the possessors of the lands, designed for manse or glebe, do not yield possession to the minister, he, on producing the designation at the Bill-Chamber, may obtain warrant for letters of horning to charge the possessors to remove; and disobedience to this charge may be followed by caption; 1572, c. 48; *Bank*. B. ii. tit. 8, § 120. See, as to this article, *Stair*, B. ii. tit. 3, § 40; *More's Notes*, p. clxxii.; *Bank*. B. ii. tit. 8, § 119, *et seq.*; *Ersk.* B. ii. tit. 10, § 55, *et seq.*; *Jurid. Styles*, 2d edit. vol. iii. pp. 698, 929, *et seq.*; *Bell's Princ.* § 1173; *Dunlop's Parish Law*, p. 95 and 156.

**Designs.** As to the copyright of designs for ornamenting articles of manufacture, and for the shape and configuration of such articles, see the statutes 5 and 6 *Vict.*, c. 100; 6 and 7 *Vict.*, c. 65; 13 and 14 *Vict.*, c. 104; 14 *Vict.*, c. 8; and 15 and 16 *Vict.*, c. 12.

**Destination.** The series of heirs called to the succession of heritable or moveable property, either by the provision of the law or by the will of the proprietor, is, generally speaking, termed a destination; but the term is usually applied, in a more limited sense, to a nomination of successors in a certain order, regulated by the will of the proprietor. The rules of legal succession, whether in heritage or moveables, are stated under the article *Succession*; and the destination of moveables, by the will of the proprietor, under the articles *Substitutions, Legacy, Institute, Executor*. The present article relates chiefly to destinations of heritage. An absolute proprietor of heritage is under no legal restraint as to the order in which his heirs, or successors, are to be called to succeed him, or as to the manner in which his property is to be distributed. He may substitute a son to a daughter, or an elder child to a younger one; or he may exclude all his children and prefer a stranger; and provided the destination be explicable, and properly fortified by prohibitory, irritant, and resolute clauses, the estate will descend in the course pointed out by the proprietor. But, without entering into the peculiarities

of special, or of capricious destinations, the following enumeration comprehends some of the rules with regard to the construction of the terms used in destinations, and as to the formation of ordinary destinations. (1.) A destination "to A. and his heirs," or "to A. and his heirs-at-law," is merely a confirmation of the legal disposition of the property. (2.) A destination "to A. and his heirs of line," carries the property to the heir in heritage, exclusive of the heir of conquest. (3.) The term "heirs whatsoever," is synonymous with "heirs-at-law." (4.) A destination to heirs-male excludes females. An heir-male is a person who is himself a male, and connected by males. A grandson by a daughter is not an heir-male. (5.) The heir-male of line in a destination is the heir-male, excluding the heir of conquest; Sinclair, 24th June 1766, *Mor.* p. 14944. (6.) "Heir-female," is the male or female heir, connected by females. In legal succession, the heir-female is the nearest heir, failing the heir-male. The son of a daughter may be the heir-female under a destination to heirs-female; *Ersk.* B. iii. tit. 8, § 48. (7.) A destination "to heirs-male of the body" carries the property first to the eldest son and his male descendants, then to the second son and his male descendants, and so on through the sons in succession, to the exclusion of females, and of males connected through females. (8.) A destination "to heirs-female of the granter" will carry the estate to the daughter of a son, preferably to the granter's own daughter; and the same rule applies where the destination is to the heir-female of the body of the granter. In order to carry the estate to the daughter of the granter, she must either be named or described as daughter; see the case of Bargeny, *Elchies*, voce *Provisions to Heirs and Children*, No. 2. The terms *daughter* and *heir-female*, therefore, are not synonymous; nor is *daughter* a vox signata at all in destinations; it merely expresses relationship; *Lady Essex Ker*, 13th Nov. 1810, *Fac. Coll.* Some conveyancers think a destination ill arranged when the estate is given, failing the sons of the maker, and their heirs-male, to the daughters of the maker in their order, and their heirs-male; or where it is given, failing heirs-male, to the heirs whomsoever of the body of the eldest son; whom failing, to the heirs whomsoever of the body of the second son, &c. In place of this, they think it preferable to call the heirs whomsoever of the body of the last heir-male in possession; by which means the daughters of the family in possession, and the heirs of their bodies, are preferred to the daughters of former branches of the destination, who, although nearer in degree to the original maker of the destina-

tion, may, when the succession opens to them, be very remotely connected with the family last in possession of the estate. (9.) When the substitute in a destination is described as second son, or as third son to the maker of the destination, that means the second or third son at the date of the deed, not at the time the succession opens. (10.) A destination to A. simply is understood to carry the property to heirs-at-law; but if it be to A., whom failing, to B. on A.'s failure, his heirs will be excluded, except in the case where A. is the maker of the destination, and, subsequently to its date, has children of his own, so as to admit of the implied condition *si sine liberis*. see *Condition si sine liberis decesserit*. (11.) A destination to A. and his heirs; whom failing, to B., brings in the whole line of descent of A. before B.; *Bailie*, 17th June 1766, *Mor.* p. 14941; and such a destination is held to call, not merely the heirs-male of A.'s body, but his heirs-male generally; *Hay*, 24th June 1788, *Mor.* p. 2315; and this notwithstanding the decision in the Roxburghe case, which proceeded on specialties. See *Sir J. N. Innes*, 23d June 1807, *Mor. App. voce Tailzie*, No. 13. (12.) A destination of lands in a contract of marriage, in favour of the "heirs and bairns," or of the "heirs and children" of the marriage, is held to import a destination to the heir-at-law; that is, to the eldest son of the marriage, when there are more children than one. The word "heirs" in such a destination is held to be the ruling term, and the introduction of the word "bairns" or "children" does not derogate from its meaning. Where, on the other hand, the destination is to the "bairns" or "children" of the marriage, the word "heirs" being omitted, all the children of the marriage succeed equally, with no preference in favour of the eldest son; *Bell's Princ.* § 1962, and authorities there cited; also *Sandford on Heritable Succession*, i. p. 172-179, and cases there cited. See also *Bairns, Heirs and Bairns*. (13.) In order to avoid ambiguity, and such a difficulty as occurred in the Bargeny case, it is proper for the maker of the destination to consider, whether it is his intention to call the heirs-male or the heirs-female of such a person generally, or to limit the destination to the heirs-male or female descended of the person called. Lastly, The destination is usually closed, by calling the heirs whomsoever of the granter, the object of which originally was to defeat the Crown's right as *ultimus hæres*, which was formerly held to open where the destination was not closed in that form. See *Succession. Heirs. Conjoint Rights. Clause of Return*. A destination, the members of which are laid under no restriction as to the use or enjoyment of the subject, nor under any prohibition to alter the pre-

scribed order of succession, is called a simple destination, the only effect of which will be, that the order of succession pointed out by the deed will be observed so long as no alteration is made. But each substitute in the destination being an unlimited fiar, is entitled gratuitously to alienate the estate, or to alter the order of succession precisely as the original proprietor might have done. A simple destination, therefore, merely confers a *spes successionis* on the substitutes, defeasible by each member of the destination in succession; *Ersk. B. iii. tit. 8; § 22.* As to the effect of prohibitory, irritant, or resolutive clauses in protecting destinations, see *Tailzie*; and with regard to the restraints on the right of making destinations imposed by entails, by contracts of marriage, or by other destinations more or less strict, or by insolvency, see, in particular, *Contract of Marriage. Conjunct Rights. Bankrupt. Conjunct and Confident. Bell's Com. 5th edit. i. 44, et seq.; Bell's Princ., § 1704, et seq., 1775, et seq.; Illust. § 1704; Bell on Leases, 4th edit. vol. i. p. 142; Sandford on Heritable Succession, vol. i. p. 158; Hunter's Landlord and Tenant; Ross's Lect. ii. 482; Menzies's Conveyancing; Duff's Conveyancing.*

A subject, moveable in its nature, may be made heritable by destination, either express or implied. Thus, a personal bond taken to heirs, secluding executors, is necessarily heritable by its own terms, and not as having an heritable subject pledged for it; or the materials of a building accidentally thrown down, or materials laid down for the purpose of building, or prepared to be permanently attached to a building, are held to be heritable by destination. *Bell's Com. ii. 6; Bell's Princ. § 1475; Illust. ib. See Heritable and Moveable.*

**Destination of a Ship.** In insurance law, it has been decided in Scotland that concealment of the destination of a ship voids the insurance, although the loss of the vessel should have occurred prior to the actual deviation from the voyage specified to the insurer; *Bain, 20th Nov. 1783, Mor. p. 7087. Bell's Com. 5th edit. i. 621; 6th edit. p. 483. See Insurance. Deviation.*

**Desuetude.** By the law of Scotland, acts of Parliament before the Union were held to lose their force by *disuse*, without any express repeal, or to go into desuetude, as it was termed, and the same is still understood to be the case with regard to the acts of Sederunt of the Court of Session. In deciding causes which turn upon the construction of the old statute law of Scotland, it is sometimes a matter of considerable difficulty to determine whether a particular statute has, or has not, gone into desuetude; *Report of Lords of Session to House of Lords, 27th Feb. 1810; Printed Acts of Sederunt, p. 53. Ac-*

*ording to Mackenzie, if a statute had fallen into desuetude before the Union, it might have been revived by a proclamation of the Privy Council; for, although the Council could not make laws, they could revive them; Mackenzie, B. i. tit. 1, § 10.* No statute, however, can be abrogated by mere *non-usage* for the greatest length of time. There must be some positive act showing the intention of the community to repeal it by a contrary practice; and Erskine limits the right of the King and Council to revive statutes which are in disuse to the case where the usage, contrary to the statute, has not yet acquired sufficient strength to abrogate it entirely. Some authorities limit the statutes which may fall into desuetude to those relating to private rights, and hold, that statutes relating to the public policy of the kingdom, cannot be abrogated by any continuance of a contrary usage, however long. But there seems to be no sufficient reason for this distinction; and, according to the decisions, statutes relating to public policy have been held to be in desuetude by contrary usage; see *Stair, B. i. tit. 1; Ersk. B. i. tit. 1, § 45, and Paterson, 6th Dec. 1810, Fac. Coll. correcting Bank. B. i. tit. 1, § 60. See Usage. Customary Law.*

**Detinue;** in English law, was a form of action for the specific recovery of goods and chattels, or damages for the detainer. In this action the defendant was allowed the privilege of waging his law, or swearing with compurgators in his own favour. To remedy this inconvenience the action of *Trover* was introduced, in which the defendant has no such privilege. *Brodie's Supp. to Stair, 849; Bell's Com. i. 249; Tomlins' Dict. h. t. See Trover.*

**Deviation.** Under the contract of affreightment, if a vessel be compelled by stress of weather, or by a foreign enemy, or by any inevitable accident, to deviate from the appointed voyage, or to take refuge in a port not included in the destination, no claim thence arises at the instance of the freighter against the owners; and where the ship, in consequence of such accident, requires to be refitted, the master may now detain the cargo until the necessary repairs be executed, although formerly the rule was, that he was bound to find another ship in which to embark the cargo. Where the deviation is imputable to the fault of the master, the freighter has a claim for damages, in satisfaction of which he may retain the freight. Deviation, under the contract of insurance, is, strictly speaking, a departure from the course of the voyage insured, made after the voyage has begun, in contradistinction to an *alteration*, which is a complete abandonment of the voyage insured before its commencement, and a resolution to sail on another voyage. Any unnecessary de-

viation from the specified voyage, as being an alteration of the risk insured against, is held to discharge the underwriters or insurers of their responsibility, without subjecting them in any obligation to return the premium. With regard to deviations in questions of this kind the following rules seem to be settled: *1st*, It is a deviation whether the party insured be privy to it or not. *2d*, The mere intention to deviate, or an engagement or instructions to do so, will not annul the insurance if the vessel never have deviated, or have been lost before arriving at the proposed point of deviation; *Bell's Com.* i. 622. See to the contrary, however, *Bain*, 20th Nov. 1783, *Mor.* p. 7087. *3d*, If the deviation be actually committed, the underwriters are discharged, although the vessel has returned to her course, without any apparent injury or change of risk. *4th*, Where the ship has liberty to call at a port not named, but described as upon a particular coast, or in a particular country lying in the course of the voyage, it will be a deviation if the vessel go to a port out of the usual course of the voyage, although the port may be on the coast or in the country mentioned. *5th*, Where the deviation is unavoidable, or necessary for the safety of the ship or cargo, it will not discharge the underwriters, provided it be made in the shortest and most expeditious manner. *Lastly*, The *onus probandi* lies on the underwriters, who allege that a deviation has taken place. *Brodie's Supp. to Stair*, 976; *Bell's Com.* 5th edit.; 6th edit. p. 483; i. 622, *et seq.*; *Bell's Princ.* § 241, 435, 492, *et seq.*; *Bell's Illust.* § 435, 492; *Smith, Dow's App. Cases*, ii. 538. See *Insurance*.

**Devise**; is an English law term, signifying properly, a gift of lands, &c., by a last will and testament,—a form of conveyance *mortis causa* which the English law admits. The giver is called the *devisor*; and he to whom the lands are given is called the *devisee*. The term was formerly particularly applied to bequests of lands, but is now generally used for the gift of any legacies whatever; *Tomlins' Dict. h. t.* By the law of Scotland, lands cannot be conveyed in the form of a last will and testament. See *Testament. Settlement*.

**Devolution**; is a term sometimes applied to the reference made by two or more arbiters who differ in opinion, to an oversman or umpire, to determine the difference. To confer this power on arbiters, an express clause in the submission is necessary. The term is also applied to the devolution of a purchase made under articles of roup upon the next highest offerer, on the failure of the highest offerer to find caution for payment of the price within the time limited by the articles. *Bell's Com.* ii. 274; *Jurid. Styles*, ii. 193. See *Arbitration. Clause of Devolution. Roup*.

**Devolutum Jus.** See *Jus Devolutum*.

**Dice.** See *Gaming*.

**Diem Clausit Extremum**; was the name given to a writ which might be issued from Exchequer, where a Crown debtor had died before any proceedings, by extent or otherwise, had been instituted against him. By this writ, the Sheriff was directed to inquire when and where the Crown debtor died, and what goods, debts, effects, or sums of money he had at the time of his death; and carefully to appraise and extend the same, and to seize them for the Queen's use, to be retained until the Crown be satisfied of the debt; and that the Sheriff should carefully keep what he had so seized, until he received further command; *Bell's Com.* 5th edit. ii. 51; 6th edit. p. 623; *Bell's Princ.* § 2381. The forms of writs of extent are now abolished by 19 and 20 Vict., c. 56. See *Crown Debt. Extent*.

**Dies Inceptus Pro Completo Habetur.** See *Computation of Time*.

**Dies Interpellat Pro Homine.** Where the debtor in an obligation is bound to implement it on a day certain, he will be *in mora*, if he allow the stipulated day to elapse without performance, *nam dies interpellat pro homine*; *i. e.*, the arrival of the day is equivalent to a requisition by the creditor; *Stair*, B. i. tit. 3, § 7; tit. 17, § 15 and 18. See *Mora*.

**Dies Incertus Pro Conditione Habetur.** An obligation exigible on the arrival of an uncertain day, *i. e.*, of a day which may never come, is held to be conditional. See *Conditional Obligation*.

**Dies Cedit, and Dies Venit**; are expressions borrowed from the Roman law, and used in reference to the fulfilment of a conditional obligation. *Dies cedit*, is used whenever the obligation is due; *dies venit* whenever implement may be demanded. If implement of the obligation be deferred to a *determinate* day, then it is said, *dies statim cedit, sed non venit*; but if it depend on the fulfilment of a condition, it is said, *dies nec cedit, nec venit nisi conditio extiterit*. The same rule holds, when it depends upon the arrival of an uncertain day; for *dies incertus pro conditione habetur*; that is, a day, the arrival of which is absolutely uncertain, since it may never arrive; *e. g.*, the day on which a person shall attain majority, or any other specified age, whereas, the day of a man's death, is a day which, sooner or later, must arrive, and therefore, in this sense, it is not uncertain. *Ersk. B. iii.* tit. 1, § 6; *Kames' Equity*, 387. See *Conditional Obligation*.

**Diets of Compareance**; are the days to which a party in a civil or criminal process is cited to appear in Court. In all ordinary summonses in civil actions in the Court of

Session, there were formerly two diets of compareance; the origin of which was, that formerly there were two summonses instead of one. The second summons was long ago dispensed with; but the former practice was so far preserved, that all ordinary summonses specified *two diets* of compareance, one at the distance of twenty-one days after execution, and the other six days after the first, the practical effect of which was, that the *induciae* of the summons were *twenty-seven days*; and, accordingly, the statute 50 Geo. III., c. 112, § 27, enacted "that, in actions at present requiring two diets of appearance against persons within Scotland, there shall be only one diet of twenty-seven days." But, if the defender was furth of Scotland, the summons still required two diets, one of sixty and the other of fifteen days, in all seventy-five days, until the passing of the Judicature Act (1825), whereby it is enacted, that from and after 11th November 1825, the practice of citing defenders on two diets shall in all cases cease, and that all summonses are thenceforward to proceed on one diet,—viz., privileged summonses against defenders within Scotland on one diet of six days, other summonses against defenders residing in Orkney or Shetland, a diet of forty days, and for all other persons within Scotland a diet of twenty-seven days, and for defenders out of Scotland a diet of sixty days; it being thereby declared, that where a person not having a dwelling-house in Scotland, occupied by his family or servants, shall have left his usual place of residence, and shall have been absent therefrom for forty days, without having left notice where he is to be found within Scotland, he shall be held as absent from Scotland, and charged or cited accordingly; 6 Geo. IV., c. 120, § 53; *Ross's Lect.* ii. 536. See *Summonses*. *Privileged Summons*. *Bills of Signet Letters*. *Edictal Citation*. *Calling of a Summons*.

By the act 13 and 14 Vict., c. 36, § 21 (1850), the *induciae* of summonses are shortened in the case of persons within Scotland from twenty to fourteen days, and in the case of persons in Orkney or Shetland or furth of Scotland, from forty and sixty days respectively to twenty-one days. In the Sheriff-courts six days is now the period of *induciae*; 16 and 17 Vict., c. 80. Edicts require ten days.

*Diet in a criminal prosecution*.—The diet of appearance in criminal cases is peremptory. The indictment, or the criminal letters, must be called on the precise day to which the accused is cited; 1578, c. 79; otherwise the *instance* perishes, and a new libel must be raised. But although the diet is peremptory, yet, after the day of appearance has once arrived (but not sooner), the diet may be con-

tinued by an act of the Court, even in absence of the parties, and without calling them. In like manner, where both parties are present, the Court may, for its own convenience, or on sufficient reason stated, either for the prosecutor or for the accused, continue the diet. In all such cases, however, the continuation must be to another day certain, for the diet cannot be continued indefinitely, or *sine die*. See *Continuation of the Diet*. The prosecutor as well as the accused must be personally present at the calling of the diet; and, although objections to the legality of the citation may be discussed in absence of the accused, no other step in the trial of the offence libelled can be taken in absence of either of the parties. Where the prosecutor is absent, the Court may desert the diet, and thus the *instance* will be lost, and no farther proceedings can take place on that libel. And, if the prosecutor be a private party, the Court may also declare his bond of caution to insist to be forfeited. See *Desertion of the Diet*. *Criminal Prosecution*. If the accused be absent at the calling of the diet, no step whatever towards trial of the crime libelled can be taken; but sentence of fugitation or outlawry may be pronounced, in virtue of which the person, in law, of the accused is said to be forfeited, and he may be denounced a rebel. See *Fugitation*. *Denunciation*. If both parties be absent at the calling the diet, in strictness the surety for the prosecutor ought to forfeit his bond of caution, although the Court is not in use, *ex proprio motu*, to declare the bond forfeited. And, on the other hand, the accused, if he has found caution for his appearance (but not otherwise), is liable to sentence of outlawry, and to have the bail-bond declared forfeited if he do not appear; and this may be done by the act of the Court itself, on account of the breach of the engagement to appear, undertaken by the accused in the bail-bond. There are many instances in our former practice of outlawry under such circumstances. *Hume*, ii. 66, 263, *et seq.*; *Alison's Prac.* 343, *et seq.* See *Bail*. *Criminal Prosecution*.

*Digest*; the name given to the Pandects of the Civil or Roman law, called the Digest, as containing "*Legalia præcepta excellenter digesta*." *Du Cange*. See *Pandects*. *Civil Law*.

*Dignities*. Dignities have been divided into superior and inferior. The titles of duke, earl, baron, &c., are the highest names of dignity; and those of baronet, knight, &c., the lowest. Nobility only can give so high a title of dignity as to supply the want of a surname in legal proceedings. No temporal dignity of any foreign nation, can give a man a higher title in Great Britain, than that of esquire; *Tomlins' Dict.* h. t. In former times,

in this country, honours and dignities were annexed to territorial property rather than to the person; and, when the land was alienated, the dignity passed with it. But now dignities and honours are strictly personal, descendible to the heir in the patent, and not transferable by voluntary alienation, nor attachable for debt. The landed estate of a peer, if unentailed, even although it be the estate from which his title is taken, may be sold, and is open to the diligence of his creditors, in precisely the same manner as the estate of a commoner. *Bell's Com.* i. 124.

**Dilapidation of Benefices.** Prior to the Reformation, the clergy in Scotland seem to have exercised the right of granting feus of Church lands, which had the effect of greatly depreciating the value of the benefice, to their successors. Several acts of the Scotch Parliament were passed to check this species of dilapidation; and by statutes subsequent to the Reformation, churchmen are prohibited from granting feus of their benefices, or from charging them with burdens to the prejudice of their successors. Their power of granting leases was also restrained, and subjected to certain regulations; and the clergy were required to find security to leave their benefices in as good a condition as that in which they found them at their entry. See, in particular, the statutes 1564, c. 88; 1581, c. 101; 1585, c. 11; 1606, c. 3; 1617, c. 5; 1621, c. 15. See also *Stair*, B. ii. tit. 8, § 17, *et seq.*; *Ersk.* B. ii. tit. 10, § 7, *et seq.*; *Bank.* B. ii. tit. 8, § 110, *et seq.* With regard to the minister's right to the use of his glebe, and the obligation under which he lies to execute certain repairs on his manse, see *Glebe. Manss.* By the law of England, the incumbent is bound to preserve the benefice, and to transmit it unimpaired to his successor. Thus, he must keep the houses belonging to the benefice in sufficient repair; and if he refuse to do so, the bishop may sequester the profits of the benefice for that purpose. He must not destroy the woods, trees, &c., nor cut timber, except for necessary repairs. Such dilapidations may even be the ground of deprivation. See *Tomlins' Dict. h. t.*

**Dilatory Defence;** is a plea offered by a defender for eliding the conclusions of the action, without entering on the merits of the cause; and the effect of which, if sustained, is to absolve from the *lis pendens*, without necessarily cutting off the pursuer's ground of action. Such are defences founded on informalities in the manner in which the cause has been introduced into the Court, or on the pursuer's want of title, and the like. *Stair*, B. iv. tit. 39, § 13; *App.* § 6; *Shand's Prac.* pp. 288, 317; *Macfarlane's Jury Prac.* p. 28, *et seq.*; *Maclaurin's Forms of Sheriff-Court Pro-*

*cess*, p. 114; *Barclay's M'Glash. Sheriff-Court Prac.* 204. See *Defences*.

**Diligence.** This term is used in three different and unconnected meanings;—1st, It is with propriety used to express the nature and extent of the care and diligence incumbent on the parties to a contract with regard to the preservation of the subject-matter of the contract; 2d, It means the warrants issued by courts for enforcing the attendance of witnesses, or the production of writings; and, 3d, The term is applied generally to the process of law, by which person, lands, or effects are attached on execution, or in security for debt. The reason of the use of the term in the two latter senses is not obvious; and the explanation given by *Stair* does not seem satisfactory. See *Stair*, B. iv. tit. 41, § 1; *Jurid. Styles*, 2d edit. vol. iii. p. 763.

I. *Diligence prestable under contracts.* In the Roman law, diligence in preserving a thing committed to one's care, or in executing a commission, was threefold:—1st, *Ordinary diligence*, such as a man of common understanding exercises in his own affairs; 2d, *Exact diligence*, being that which men of ordinary industry and management practise; and, 3d, *Most exact diligence*, such as the most industrious and expert men exercise in their own affairs. For the rules of our law upon this subject, see *Culpa*. See also *Ersk.* B. iii. tit. 1, § 21; *Bank.* B. i. tit. 23, § 59, *et seq.*; *Brodie's Supp. to Stair*, 923, 932; *Bell's Princ.* § 232, *et seq.*; *Illust.* § 243; *Ross's Lect.* ii. 383.

II. *Diligence against witnesses, and for recovering writings.* When a judge allows a proof of the whole, or of any particular branch of a cause, and for that purpose grants commission to take the proof, he at the same time grants to both parties letters of diligence for citing witnesses, and possessors of writings (or *havers*, as they are technically called), to appear before the commissioner in order to be examined, or for the purpose of producing the writings. In case the citation, given in virtue of these letters of diligence, was disobeyed, the Court might then issue what were called letters of *second diligence*, containing a warrant to apprehend the witnesses or havers, who had been disobedient, and to bring them before the commissioner; the witness requiring such compulsion not being entitled to the expense he may have incurred by attendance; *Ersk.* B. iv. tit. 2, § 30. See also *A. S.* 21st December 1765. On cause shown, the letters of second diligence were often combined with the first; but in practice they were not acted upon, until a certificate of disobedience to the first citation was obtained from the commissioner. Now, by 13th and 14th Vict., c. 36, § 25, a copy of any interlocutor in the Court of Ses-



sion, granting a commission and diligence, certified by the clerk to the havers, has the same effect as the extract under the former practice; and the same is now the practice in the Sheriff-courts; 16 and 17 *Vict.*, c. 80, § 11. Witnesses and havers residing beyond the Sheriff's jurisdiction, may be cited on the warrant being indorsed by the sheriff-clerk of the county in which they reside. In jury causes, warrants of all kinds for citing witnesses and havers, are called letters of diligence; and the Jury Court (now merged in the Court of Session) was empowered to enforce the attendance of witnesses and havers in the same manner with the Court of Session; 59 *Geo. III.*, c. 35, § 28. In the Jury Courts, it is still the practice to take out letters of first and second diligence as formerly; *Dickson on Evidence*, pp. 942, 943. In like manner, the Court of Justiciary, after a libel has been raised, will grant diligence, if required, for the recovery of writings, or other articles meant to be used in evidence, either by the prosecutor or the accused; *Hume*, ii. 154, 398. The letters are issued by the clerk of Court; 11 and 12 *Vict.*, c. 79, § 2. See, on this subject, *Ersk.* B. iv. tit. 1, § 71, and tit. 2, § 30; *Bank.* B. iv. tit. 24, § 59; *Stair*, B. 4, tit. 41, § 6, *et seq.*; *Jurid. Styles*, vol. iii. p. 781, *et seq.*; *Dickson on Evidence*, pp. 628, 941, *et seq.* See *Witness. Evidence. Commission to take Proof. Deposition. Haver.*

III. *Diligence of creditors.* The diligence at the instance of creditors is divisible into that against the heritage, the moveables, and the person of the debtor. It is sufficient here to specify the different forms of proceeding, referring to the particular articles for a more detailed account of each of the diligences mentioned in the following enumeration. Some of these forms are not usually called *diligences* (the application of which term, in practice, seems rather arbitrary); but all of them, in point of effect, operate as attachments, and may therefore, not improperly, be classed under this general head. Indeed, it is not always easy to draw the distinction between a *diligence* and an *action*. The diligence, for example, of *poinding the ground*, has been said to partake more of the nature of a *real action* than a diligence (*per Lord Balgray, in Campbell v. Paul*, 13th Jan. 1835, 13 *S.* 241); and other processes of execution are no less ambiguous. One important characteristic, however, of a diligence is, that its warrant must in every case be a debt or obligation, duly constituted by a liquid document or by a decree, or by an action in which decree is sought; in which last case, although the intermediate *verus* is effectual, yet the ultimate efficacy of the diligence is contingent, on decree being obtained in the depending suit. The dili-

gence against heritage comprises,—1st, *Inhibition*, by means of which the debtor is prevented from selling or burdening his heritage, to the prejudice of the creditor who has used the inhibition. 2d, *Adjudication*, by which the property is judicially transferred, redeemably in the first instance, to the creditor in lieu of his debt. 3d, *Adjudication in implement*, by which the property is irredeemably transferred to the creditor, in implement of a previous obligation to convey that property to the creditor. 4th, *Ranking and sale*, a process which operates as a general attachment for behoof of creditors, and under which the property is sold, and the price judicially distributed amongst the creditors. 5th, *The action of mails and duties*, which, although an attachment of moveables, is classed here as being the consequence of an heritable right, and of the nature of a diligence. By this process, an heritable creditor, or the holder of a personal right to the land, may attach the rents. 6th, *The action and letters of poinding of the ground* (which is of a similar character), by which creditors in what are called *debita fundi* may poind the goods on the property, and also the effects of the tenants, to the extent of the rents due by them; and, lastly, *Mercantile Sequestration*, which is a congeries of all diligences, whether against heritable or moveable property, being a general attachment and transfer of the heritable, as well as the moveable or personal estate, for behoof of all the creditors. The diligence against moveables consists of,—1st, *Arrestment*, by which the debtor's effects, or the debts due to him, are attached in the hands of third parties; and the subsequent action of *Forthcoming*, by which the property of the goods arrested is transferred to the creditor. 2d, *Poinding*, which is in principle an adjudication of the effects to the creditor, although in practice it is nothing more than an appraisal, and judicial sale, of them for behoof of the creditor. 3d, *Mercantile Sequestration*, as above explained, is also a general diligence against moveables. 4th, *Sequestration of a tenant's effects*, by a landlord, under his right of hypothec, may also be classed under this head, as being of the nature of a diligence under which the effects may be judicially sold for payment of the rent, which is due, or attached or hypothecated, in security of the current rent; and, 5th, *Ejection*, by which a tenant at the issue of his tack may be compelled to quit possession. Personal diligence comprehends,—1st, *Letters of Horning and of Caption*, by which a debtor may be charged to pay or perform, in terms of his obligation, and, on failure, imprisoned until he do so. The use of these letters, however, is almost entirely superseded by the Personal Diligence

Act, 1 and 2 Vict., c. 114, which authorizes warrant to charge, arrest, and point to be inserted in extract decrees. To this diligence are analogous the act of warding issued by the magistrates of royal burghs, and the warrant of imprisonment (where now competent), granted by justices of the peace, or by Sheriffs under the Small Debt acts. 2*d*. Under the same head may be classed the *meditatio fugæ* warrant, in virtue of which a debtor, who intends leaving Scotland to avoid performance of his obligation, may be apprehended and detained until (according to the nature of the debt) he either find caution *de judicio sisti*, or *judicatum solvi*; and, 3*d*, *The Border Warrant*, being a warrant issued by the Sheriffs of the counties adjacent to the English borders, for the apprehension and incarceration of any foreigner (*i.e.*, any person not subject to the ordinary jurisdiction of the Court) against whom a debt has been sworn, and who may be found within the jurisdiction of the judge who grants the warrant, until he find caution *judicio sisti*,—a proceeding which seems contrary to that *comitas* by which the law of Scotland is in general distinguished; and which may subject a stranger to the jurisdiction of an inferior judge, and expose him to the hardship and difficulty of finding caution, at the suit of any one who may choose to commit perjury. See those several *diligences* more fully explained in separate articles under their respective heads. See also *Bell's Com.* i. 3, *et seq.*; *Ersk.* B. ii. tit. 5, § 55, *et seq.*, and tits. 11 and 12; and B. iv. tit. 3, § 9, *et seq.*; *Ross's Lect.* vol. i. p. 234, *et seq.*; *Bell's Princ.* § 331, 342, 1231, 1468, 2355, 2381, *et seq.*; *Bell's Illust.* § 342; *Hunter's Landlord and Tenant*. The second branch (as it is usually called) of the act 1621, c. 18, provides for the case of voluntary payments, or conveyances, made by the debtor in defraud of inchoate, or begun diligence, whether against heritage or moveables, or the person of the debtor. According to the construction put on the statute by adjudged cases, it authorizes the reduction of all voluntary deeds granted after such diligence shall have been begun, as law has appointed for the attachment of the subject conveyed by the debtor; provided the diligence was specially directed against that subject, and that the debtor was notoriously insolvent at the date of the deed done, or of the payment made in defraud of the diligence. But, if the insolvency be secret, and unknown to the person favoured by the deed, the challenge will not be successful; *Bell's Com.* ii. 199; *Ersk.* B. iv. tit. 1, § 37. See *Litigiousity. Mora*. Although a bill of exchange may be transferred by indorsation, even after the term of payment, the mere indorsation will not carry the right to the diligence which the indorser may

have done on the bill. To accomplish that, there must be a special assignation of the diligence; *Bell's Com.* vol. i. p. 403; *Thomson on Bills*, 2, 47, 81, 206, 242, 264, 349, 549, 686, 2*d* edit.

**Diminution of Rental.** It is a question of great importance in entail law, whether an heir of entail in possession, can grant leases of the entailed estate, at rents lower than the estate was let for at his entry. The heir's powers, in this respect, must necessarily depend in a great degree on the terms of the particular deed of entail. But, independently of the special terms of the deed, it seems now to be settled, that where the entail contains a prohibition to alienate, the heir in possession, in letting leases, must act *bona fide*, and will not be permitted fraudulently to diminish the rental to the prejudice of his successors. *Sandford on Entails*, p. 200; *Hunter's Landlord and Tenant*, vol. i. p. 85. See *Entail. Grassum*.

**Diocese**; is the circuit of a bishop's ecclesiastical jurisdiction. England is divided ecclesiastically into two provinces, *viz.*, Canterbury and York, each of which is subdivided into dioceses, every diocese is subdivided into archdeaconries, and every archdeaconry into parishes; *Tomlins', h. t.* When the church government of Scotland was episcopal, there were two archbishops; the archbishop of St Andrews, who was called the *primate of all Scotland*; and the archbishop of Glasgow, who was called the *primate of Scotland*; and under them there were twelve bishops, who had particular dioceses; *Connell on Tribes*, i. 38. The ecclesiastical subdivisions of Scotland are now Presbyterian. See *Church of Scotland. Church Jurisdictiones*.

**Directa Actio.** See *Actio directa*.

**Disability**; in English law, an incapacity in a man to take any benefit which he might have otherwise enjoyed, such as inheriting lands. The disability may happen through the act of his ancestor, of himself, or of God, or of the law; *Tomlins' Dict. h. t.*

**Discharge.** To discharge an obligation is to extinguish it. Obligations may be extinguished by payment or performance on the part of the debtor, or by the mere *consent* of the creditor without performance, or by compensation, novation, delegation, or confusion. The discharge may be either verbal or in writing, according to the nature of the obligation. Thus, an obligation contracted verbally may be dissolved by a verbal discharge; but a written obligation requires a written discharge, agreeably to the rule, that the same solemnities which are requisite in the constitution of an obligation are necessary in its extinction.—*unumquodque eodem modo dissolvitur quo colligatur.* See *Payment. Compensa-*

*tion. Novation. Delegation. Confusion.* In the technical language of the Scotch law, the term *discharge* is usually applied to the written instrument by which the creditor discharges the debtor of his obligation. The object of such a discharge is to liberate the obligant; and whether the particular obligation legally requires a written discharge or not, it is desirable, if possible, to have the evidence of its extinction in writing. The clauses usually inserted in a formal deed of this description are,—1st, *The narrative*, in which the obligation, as originally undertaken, is narrated. 2d, A clause specifying the manner in which it has been dissolved, whether by payment, performance, compensation, simple consent of the creditor, or otherwise. 3d, *The clause of discharge*, which is the essential clause of the deed, to which the others are merely subservient. In this clause the proper terms of discharge applicable to the particular obligation must be used. The debt or obligation, the document of debt itself, and all action or execution which has followed or may follow upon it, ought to be distinctly and separately discharged. 4th, *The clause of warrandice*, the ordinary warrandice being *absolute*, unless where the discharge is gratuitous, when it is usually from *fact and deed* only. 5th, *A clause of delivery of the grounds of debt*. The debtor is entitled to have these delivered up to him; and where particular circumstances render that impracticable, the fact ought to be mentioned, and the creditor taken bound to deliver them. 6th, *The clause of registration*, which is not essential to the discharge, and is sometimes omitted. And, *lastly, The testing clause*, which does not differ from the testing clause of any other regular deed. A written discharge is usually a separate deed, and it must be written upon stamped paper. But to this rule there is an exception in the case of receipts written on bills of exchange, promissory-notes, &c., where the bills, notes, &c., have been themselves written on the legal stamps, and also in the case of "receipts or discharges, indorsed or otherwise, written upon or contained in any bond, &c., or other security; or any conveyance, deed, or instrument whatever, duly stamped according to the laws in force at the date thereof, acknowledging the receipt of the consideration-money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured;" 55 *Geo. III.*, c. 184, *schedule annexed*. In virtue of this exception, the discharge of a bond is sometimes written upon the back of the principal bond; and lest such a discharge should, in any case, be thought not to fall within the exception in the statute, it is sometimes the practice at the same time to grant a receipt for the sum on a separate stamped

receipt, referring to the discharge indorsed on the bond. Receipt and discharge stamps are now regulated by the act 16 and 17 *Vict.*, c. 59, 1853. With regard to the discharges of heritable securities, real burdens, &c., see *Heritable Securities. Burdens. Renunciation*. It is a rule in the construction of discharges which contain both general and particular clauses, for ascertaining their extent, that the general clause is not to be extended to subjects or claims of a different kind, or of greater importance than any of the particulars mentioned in the special clause. But a discharge which is entirely general, without mentioning any special debt or claim, will receive a more liberal interpretation, although even such a discharge will not be extended to debts which are not presumed to have been in contemplation either of the granter or grantee, such as obligations of relief from cautionary engagements not yet paid to the creditor, obligations of warrandice not yet incurred, or obligations *ad facta præstanda*. Neither will such a general discharge comprehend, by implication, debts due to the granter by the grantee, and assigned by the granter prior to the date of the discharge, even although the assignation has not at that time been completed by intimation. *Ersk. B. iii. tit. 4, § 9; Bank. B. i. tit. 24, § 19; Stair, B. i. tit. 18, § 2, and B. iv. tit. 49, § 34*. In all yearly or termly payments, such as of rent, feu-duties, interest of money, salaries, pensions, and the like, three consecutive discharges of the yearly or termly duties, raise a legal presumption that all preceding termly duties have been regularly paid. But the discharges must be discharges in full of the respective termly duties, and the three terms must be *consecutive*. Thus the presumption will not be created by two discharges, although they should contain the duties of three or more terms. Nor is the presumption inferred from two discharges by the ancestor, and a third by the heir, even although they be for consecutive terms, unless it appear that the heir knew of the two former discharges. Neither do three consecutive discharges by a tutor or administrator for the creditor, raise the presumption, except as to the terms falling within the period of his administration. A bond granted for arrears of rent or interest will not be presumed to be discharged by three consecutive discharges of subsequent termly duties; and, on the same principle, where the creditor has taken a decree against the debtor for the arrears, the debt covered by the decree will not be affected by three consecutive discharges of posterior years or terms. The implied discharge founded on three consecutive termly discharges, being a *presumptio juris* only, may be elided by the

debtor's oath. *Stair*, B. i. tit. 18, § 2, and B. iv. tit. 40, § 35; *More's Notes*, p. cxvii.; *Brodie's Supp.* 945; *Ersk.* B. iii. tit. 4, § 10; *Bank.* B. i. tit. 24, § 13; *Bell on Leases*, vol. ii. p. 21, 4th edit.; *Bell's Princ.* § 582, *et seq.*, 256, *et seq.*; *Bell's Illust.* 256 and 582; *Thomson on Bills*, 2d edit.; *Hunter's Landlord and Tenant*; *Kames' Equity*, 157. See also *Ross's Lect.* vol. i. p. 212, *et seq.*; and *Jurid. Styles*, vol. i. p. 595, *et seq.*; vol. ii. p. 352, *et seq.*; *Menzies' Conveyancing*; *Duff on Deeds*. See *Apocha trium annorum*. *Implied Discharges*.

**Discharge of a Bankrupt under a Sequestration.** Under the Bankrupt Statute 19 and 20 Vict., c. 79, 1856, a bankrupt may, at any time after the meeting held after his examination, petition for discharge, provided every creditor shall concur in the petition. He may also present a petition to that effect on the expiration of six months from the date of awarding the sequestration, provided a majority in number, and four-fifths in value, of the creditors concur in the petition; and after twelve months, with the concurrence of a majority in number, and two-thirds in value, of the creditors; and after eighteen months, provided a majority in number and value concur. He may also present such petition after two years from the date of sequestration without any consent of creditors. In each case the petition is intimated in the *Gazette*, and to each creditor; and after twenty-one days, if no opposition is made, the bankrupt is found entitled to a discharge; but if opposition is made, the objections shall be judged of, and the discharge granted, or refused, or deferred, or granted with such conditions annexed as the justice of the case may require. See *Statute* § 146, *et seq.*

**Disclaimer**; in English law, is a plea containing an express denial or renunciation of a thing. See *Tomlins' Dict. h. t.*

**Disclamation**; signifies a vassal's disavowal or disclamation of a person as a superior, whether the person so disclaimed be the superior or not. A vassal who deliberately disclaims his superior on frivolous grounds incurs a forfeiture of the fee. This is a rule applicable to all feudal tenures; and, according to our more ancient law, disclamation, even as to a part of the fee, subjected the vassal to the loss of the whole. But now a probable ground of ignorance on the part of the vassal, or a mistake either in point of law or in point of fact, or any colourable excuse, will be sufficient to protect him against this forfeiture. *Ersk.* B. ii. tit. 5, § 51; *Stair*, B. ii. tit. 11, § 29; *More's Notes*, p. cccxxviii.; *Bank.* B. ii. tit. 11, § 24; *Macenzie*, B. ii. tit. 5, § 9. See also *Skene de Verb. Sig. h. t.*; *Bell's Princ.* 3d edit. § 730; *Brown's Synop. h. t.*

**Discontiguous Lands.** As to the form of taking sasine where the lands in which infeftment was given were discontiguous, see *Sasine. Dispensation. Union. Barony. Bell's Princ.* § 874.

**Discount of Bills.** See *Banker. Bill of Exchange*.

**Discretion.** It is a rule of the law of England, that where anything is left to another to be done according to his discretion, the construction of the law is, that it must be done with sound discretion, and according to law; and that rule being founded on a principle universally applicable, has been fully recognised in the law of Scotland. See *Tomlins, h. t.*

**Discussion.** This is a technical term in the law of Scotland, and may be applied either to the discussion of a principal debtor, or to the discussion of heirs.

**I. Discussion of a principal debtor.** Formerly, when a cautioner was bound simply as cautioner, and not conjunctly and severally with the principal debtor, he might insist that, before the creditor used diligence against him, the principal debtor should be discussed; that is, not merely that the debt should be demanded, but that the creditor should carry personal diligence against the principal debtor the length of a registered denunciation on letters of horning,—that he should proceed against his moveables by poinding or by arrestment and furthcoming, and against his heritage by adjudication and sale. The cautioner, however, might be sued in the same summons with the principal debtor; and when decree was obtained, the Court superseded execution against the cautioner until the principal debtor was discussed. When the principal debtor and the cautioner were taken bound, jointly and severally, the creditor might proceed against either of them; for, in that case, the cautioner had not the benefit of discussion, except in the case of a cautioner for another that he should perform a fact, who was in no case liable until the principal obligant was discussed. Where the principal debtor was out of the country, and had no effects within the jurisdiction of the courts of Scotland, the cautioner, even although he was bound simply as cautioner, could not insist that the principal debtor should be discussed in a foreign country. *Bank.* B. i. tit. 23, § 30; *Elams*, 7th Dec. 1757, *Mor.* p. 2110. See, on this subject, *Stair*, B. i. tit. 17, § 4, *et seq.*; *More's Notes*, p. cxliii.; *Brodie's Supp.* 945; *Ersk.* B. iii. tit. 3, § 61, *et seq.*; *Bell's Princ.* § 252, *et seq.*; *Bell's Illust.* § 252; *Ross's Lect.* i. 77; *Bell's Com.* i. 347; *Menzies' Conveyancing*. See also *Beneficium Ordinis. Cautionary*.

The privilege of discussion is now taken away by the act 19 and 20 Vict., c. 60, § 8,

1856, unless expressly stipulated for in the instrument of caution.

II. *Discussion of heirs.* All heirs who have incurred a representation of their ancestor, are liable universally for his debts; but they may insist on being sued in a certain order. In the case of obligations relative to a particular subject, the heir who succeeds to that subject, as being liable in any burden chargeable against it, may be sued without discussing any other heir. So also, where a special heir is burdened with a debt, the creditor must discuss that heir before he can insist against the heir-at-law. But in general obligations, in which the debtor expresses no intention of charging any special heir or estate, the following is the legal order in which the heirs must be discussed:—1st, The heir of line, as being the heir-general by the most universal representation. 2d, the heir of conquest; and, 3d, the heir-male, both of whom succeed to a lesser *universitas*. 4th, Heirs of tailzie and provision, by simple destination, where they represent the debtor; and, lastly, Heirs under marriage-contracts, where they are not themselves creditors, in virtue of the contract under which they have succeeded. See *Bank. B. iii. tit. 5, § 60, et seq.*; *Ersk. B. iii. tit. 8, § 52.* Heirs-portioners, while they remain solvent, are only liable for their respective shares of the ancestor's debts. But, on the bankruptcy of any one of them, the creditor may, after discussing her, insist for her share of the debt against the rest. They are not, however, liable *in solidum*, for the share of the bankrupt heir, but only in so far as they are gainers by their predecessor's succession; *Ersk. ibid. § 53.* By *discussing* an heir is meant, charging him to enter; and if he do not renounce the succession, obtaining decree against him, and raising diligence both against his person and his estate, whether belonging to himself or derived from his ancestor, as in the case of the discussion of a cautioner. If the heir-at-law, or any of the other heirs, renounce the succession, his renunciation protects him from all diligence against his person or his own estate; and if there be no estate belonging to the ancestor, which the renunciation leaves open to the creditor's diligence, then he may proceed against the other heirs in their order. But, before getting decree against any of the subsidiary heirs, the creditor must assign to him all the diligence and decrees affecting the subjects belonging to the original debtor. The subsidiary heir has the benefit of discussion, although he has incurred the passive title of *behaviour as heir*, because that passive title cannot be extended farther than the heir's actual service, in the particular character in which he has acted as heir,

would be; and such service would be no bar to the benefit of discussion; *Ersk. B. iii. tit. 8, § 53.* Where an heir who is liable only *subsidiarie* has paid a debt due by the ancestor, he has an action of relief against the heir primarily liable. And this rule will apply, even although the document of debt subject all the heirs of the debtor in payment, "*without the benefit of discussion,*" such a clause being introduced for the benefit of the creditor, and not being intended to injure the right of relief competent to the one order of heirs against the other; *Bank. B. iii. tit. 5, § 70*; *Ersk. B. iii. tit. 8, § 53.* See also, as to this article, *Stair, B. iii. tit. 5, § 17, et seq.*; *More's Notes*, p. cccxlvii.; *Jurid. Styles*, vol. ii., p. 22, 2d edit.; *Sandford on Entails*, p. 256; *Ross's Lect. i. 74, et seq.*; *Bell's Princ. § 1935*; *Menzies' Conveyancing*. Although the executors or next of kin of a deceased person, as being his heirs *in mobilibus*, are primarily liable for all his moveable debts, yet the heir in heritage, when required to pay a moveable debt, is not entitled to insist that the executors shall be previously discussed. The heir who pays has a claim of relief against the executor; but the creditor is at liberty to proceed at once against the heir without *discussion*. See *Ersk. B. iii. tit. 9, § 48.* See also *Heir. Executor*.

**Disfranchising**; signifies the depriving a person of the rights and privileges of a free citizen or subject. *Tomlins' Dict. h. t.*

**Disgradation, Deposition, or Degradation**; the stripping a person for ever of a dignity or degree of honour, and taking away the title, badge, and privileges thereof. *Enc. Brit.*

**Disability**; is a term sometimes used by our older law authorities, and signifies the corruption of blood consequent upon a conviction for treason. See *Dirleton and Stewart, h. t.*; 1 *Hume*, 549. See *Corruption of Blood. Treason*.

**Dishonour of a Bill.** To dishonour a bill is to refuse to accept it when it is presented for acceptance, or to fail to pay it on the day on which it falls due. *Bell's Com. i. 415, et seq.*; *Bell's Princ. § 340*; *Bell's Illust. § 340*; *Thomson on Bills*; *Jurid. Styles*, 2d edit., vol. iii. p. 491. See *Bill of Exchange*.

**Disjunction of Parishes.** The Court of Session, as commissioners for the plantation of kirks and the valuation of teinds, have the power of disjoining or dividing large parishes, or annexing portions of one parish to another, not only *quoad sacra*, but *quoad omnia*; and of erecting new churches, provided the disjunction or annexation is made with consent of three-fourths of the heritors in the parish, reckoning the votes, not by the number of heritors, but by their valued rent within the parish. *Ersk. B. i. tit. 5, § 21*, and *B. ii. tit.*

10, § 64; *Bank. B. ii. tit. 8, § 47. See Parish. Annexation.*

**Disorderly House**; a house of ill fame, kept for the resort, and commerce of lewd persons of both sexes. "It has not, in any late instance, been thought necessary to curb the vice of incontinence by the public example of a criminal prosecution. It is not, however, to be doubted, that the keeping of an open and notorious house of lewdness, for the reception of loose and dissolute visitors, is of itself such an offence against public decency and the quiet of the neighbourhood, as is punishable at common law (and of this there are daily examples in the burgh courts), with imprisonment or whipping, or banishment from the vicinity to which the scandal or disturbance has been given;" *Hume*, vol. i. p. 478; 2 *Swinton's Rep.* 128, 236, 279. See *Fornication. Nuisance.*

**Disparagement**; inequality in blood, honour, dignity, or otherwise. Under the casualty of marriage in ward-holding, if the superior required the heir to make an unsuitable or disparaging marriage, he or she might legally refuse. The disparity might be either in rank or in years, or in mental or in personal accomplishments. The heir was not bound to accept a person of inferior degree, or who was much senior in years, or whose mental capacity was defective, or who was "lame or blind, or dumb or deaf, or defective or redundant in any member." But mere disparity of fortune was not of itself a sufficient justification of the heir's refusal. *Stair*, B. ii. tit. 4, § 59; *Bank. B. ii. tit. 4, § 59; Skene de Verb. Sig. h. t.* See *Avail of Marriages. Ward-holding.*

**Dispensation, Clause of.** Where heritable subjects lay locally discontinuous, or where the progresses of title-deeds to several parcels of land comprehended in one Crown charter, were different, a clause of dispensation was sometimes inserted, specifying a particular place at which it should be sufficient to take infestment for the whole lands, and other subjects, however discontinuous or dissimilar, and dispensing with any other symbols than earth and stone. The Crown alone could competently grant such a dispensation. *More's Notes on Stair*, p. xciii.; *Menzies' Lect.* See *Union.*

As by the act 8 and 9 Vict., c. 35, § 1, 1845, the ceremony of infestment on the lands is superseded, a clause of dispensation is no longer necessary.

**Disponee**; the person to whom a disposition is granted. For his title to sue and defend, see *Shaw's Digest*, p. 615, § 104; *Hunter's Landlord and Tenant*, p. 429. See *Disposition.*

**Disposition.** In its general acceptance, a

disposition is an unilateral deed of alienation, by which a right to property, either heritable or moveable, is conveyed. The disposition most frequently used in practice is that by which heritable property is conveyed to a purchaser; but a disposition of moveables is also a well-known deed; and where a person wishes to regulate his whole succession, heritable as well as moveable, he may do so by a general disposition and settlement.

I. *Of the disposition of heritage.* The modern disposition is a deed of alienation, by which heritable property is conveyed to a purchaser, or to an heir, for onerous causes, or gratuitously. The disponent or maker of the deed "sells and disposes," or, where the deed is gratuitous, "gives, grants, and disposes," the subject of the deed to the receiver, who is technically called the disponent. As contradistinguished from a charter, a disposition may be said to be the deed by which the feudal right or fee constituted by the charter, is transmitted to a purchaser or new proprietor, a distinction to which Erskine does not appear to have sufficiently attended; see *Ersk. B. ii. tit. 3, § 19; Bell on the Purchaser's Title*, p. 13. See also *Charter.* In the ordinary case, the disposition contains the following clauses:—1st, The *narrative*, called also the *inductive* clause, containing the names of the disponent and disponent, and stating the cause of granting the deed; and, where it is an onerous deed, this clause usually contains an acknowledgment of the receipt of the price or consideration, and a discharge of it. 2d, The *dispositive* clause, containing words of *de presenti* conveyance, the destination of the subject and its description. If any real burden is to be imposed, or if the right is to be otherwise qualified by any conditions or limitations, they must be inserted in this clause. 3d, A clause obliging the disponent to infest the disponent by two manners of holding, the one *de se*, the other *a se de superiori suo*. 4th, A *Procuratory of resignation*, for the purpose of enabling the disponent to complete a public right—i.e., to become the vassal of the disponent's superior. 5th, A *clause of warrandice*; the warrandice, where the deed is onerous, being *absolute*. 6th, An *assignment* to the title-deeds and rents of the subject, with a clause of absolute warrandice of the assignment, in so far as concerns the rents and profits. 7th, An obligation to free the disponent from all public burdens exigible from the subject prior to the term of his entry. 8th, A clause, bearing that the disponent has delivered the title-deeds of the subject to the disponent. 9th, The ordinary clause of registration, both for preservation and execution. 10th, A *precept of sasine*, for enabling the disponent to obtain infestment under the deed. The precept

is what is termed *indefinito*—*i.e.*, it is a precept which may be the warrant for an infeftment, to be holden *base* of the disponent, or of an infeftment which may be afterwards rendered *public* by a charter of confirmation from the disponent's superior. *Lastly*, The deed is authenticated by a testing clause in the usual form.

The clauses formerly in use are shortened by the act 10 and 11 Vict., c. 48, 1847, and some are dispensed with by the Titles to Land Act, 21 and 22 Vict. c. 76, 1858. See the articles *Infeftment*, *Investiture*, and *Sasine*.

The history of the changes which have been made in the form of the disposition is well deserving of the attention of conveyancers, not only as exhibiting the practical application of some of the most important principles of feudal law, but because an acquaintance with those changes will afford the best security against the dangers arising from an unskilful use of the warrants contained in the modern deed. The limits of the present work, however, admit of no more than a short explanation of the manner in which the disponent may, in virtue of the disposition, proceed to complete a feudal title to the subject, to which the mere disposition, not followed by that procedure, never confers more than a *personal right*. 1st, The usual course is, for the disponent to take infeftment, in virtue of the indefinite precept of sasine, which infeftment completes a feudal title in his person, by vesting him with a *base* right, under which he becomes vassal to the disponent. When he wishes to render his right *public*, he may do so at once, by obtaining from the disponent's superior a charter of confirmation of the *base* infeftment. This confirmation operates retrospectively; and the right is held to have been a public one from the date of the disponent's infeftment. 2d, But although this is the most ordinary method of completing a public right under the disposition, the disponent may follow a different course, and complete his title by resignation. The procuratory of resignation contained in the disposition, is of the nature of a mandate by the disponent, authorizing his mandatories (whose names are always left blank) to make a resignation of the subject of the disposition into the hands of the superior *in favorem* (as it is called) of the disponent—*i.e.*, in order that the superior may sanction the substitution of the disponent for the disponent, as his vassal. The superior having, in point of form, got back the subject, grants to the disponent a charter of resignation, as it is termed, containing a precept of sasine for infefting him in the subject formerly held by the disponent, and an infeftment on this charter completes the disponent's title. The superior, in case of

refusal, may be compelled to complete the disponent's title in either form. See *Charge against Superiors*. 3d, If, however, the disponent means to complete his title by resignation, he must take care not to take infeftment on the precept of sasine in the disposition; for where a disponent first takes infeftment on the precept, and then, having obtained no charter of confirmation, resigns upon the procuratory, the superior's charter of resignation, and the disponent's infeftment following on it, will carry nothing but the superiority of the sub-vassalage which the disponent has created by his *base* infeftment unconfirmed. The consequence of this is, that the disponent being vested with the *dominium directum* and the *dominium utile* of the subject, by different titles, must, in the twofold capacity of superior and vassal to himself, resign *ad remanentiam* in his own hands, in order to consolidate the property and the mid-superiority. See *Bell on Title*, p. 1, *et seq.*, and p. 230, *et seq.*; *Ross's Lect.* vol. ii. p. 215, *et seq.* See also, *Confirmation. Resignation. Base Right. Public Right. Consolidation*.

With regard to dispositions of property held by burgage tenure, a precept of sasine is seldom inserted in the disposition to a burgage subject. The title of the disponent is always completed by resignation; the evidence of the resignation by the disponent, and of the infeftment of the disponent under the warrant of the magistrates, being contained in one deed, called an *Instrument of resignation and sasine*. The magistrates, in sanctioning these transmissions, act merely as commissioners for the Sovereign, who is the immediate superior of every vassal who holds by burgage tenure. See *Bell's Princ.* § 818, *et seq.*; *Illust. ib.*; *Jurid. Styles*, vol. i.; *Menzies' Lect.* See also *Burgage Holding*.

The magistrates of a royal burgh are entitled to feu out burgage property held by them for behoof of the burgh. See *Erskine*, B. ii. t. iv. §§ 8 and 9, and *Hope's Minor Practicks*. There seems, therefore, no reason for holding that a burgage vassal may not grant a feu to be held of himself, he remaining a crown vassal, and liable in the prestations incident to a burgage tenure. See case of *Bennet*, M. 6895.

II. *Disposition of moveables*. A disposition of moveables is a deed by which the disponent conveys his moveable estate, either partially or *per aversionem*, to the disponent. Sometimes the disposition bears reference to an inventory, as containing a more particular enumeration of the effects conveyed. Power is given to the disponent to assume possession of the subjects,—the warrandice is usually from fact and deed only,—and the deed is closed by a clause of registration, for preservation and for execution, and by the ordinary testing

clause. The proper way of completing the donee's title is, by actual delivery of the moveable subjects conveyed; but an attempt is sometimes made to accomplish the same purpose by what is called an *Instrument of possession*; that is, a notarial instrument, bearing that the donor, in the presence of a notary-public and witnesses, delivered corporal possession of the moveables to the donee. Where, however, the donor retains possession, this method of transferring the property is not to be relied on; for it will not be effectual against creditors who may have trusted to the donee's apparent ownership. See *Bell's Com.* i. 252; *Jurid. Styles*, ii. 239; *Menzies' Lect.* See also *Possession. Delivery. Assignment.* As to the transference of ships, see *Ships. Vendition.*

III. *Disposition and settlement.* This is the name usually given to a deed, by which a person provides for the general disposal of his property, heritable and moveable, after his death. When the testator's directions are not numerous, and admit of speedy execution, the most convenient form of the deed is that of a direct conveyance to the parties meant to be benefited, under such burdens or conditions as he may choose to impose. It generally happens, however, that the object can be more beneficially attained by a *trust disposition and settlement*;—i.e., a conveyance to trustees with certain powers, and subject to certain directions, as to the interim and final disposal of the property,—a form which, being more comprehensive in effect, and better adapted for contingencies, is advisable whenever the details of management are numerous or complicated, and the operations under the deed likely to be protracted. The technical clauses of the disposition and settlement are,—a special conveyance of the heritable property, belonging at the time to the grantor, and a general conveyance of all other heritage of which he may die possessed;—in virtue of which general conveyance, an adjudication may, if necessary, be led against his heir-at-law; a conveyance in similar terms of the grantor's moveables, which it is more expedient to make special; the necessary obligations and warrants for completing the titles of the donees; the appointment of executors; a reservation of the grantor's liferent; and a clause dispensing with delivery. The directions in the deed, and the powers given to the trustees (when a trust is the form adopted), must depend on circumstances. Reference, however, may be made to the form of a trust disposition and settlement, in the *Juridical Styles* (vol. ii. p. 442, 2d edit.), as being by far the most comprehensive, effective, and accurate form of that deed which is to be found exemplified in any book of styles. *Bell's*

*Princ.* § 1691, *et seq.*; *Illust. ib.* See also *Settlement. Trust.*

**Disposition in Security.** See *Heritable Securities.*

**Dispositive Clause;** is the clause of conveyance in any deed, by which property, whether heritable or moveable, is transferred, either absolutely or in security, *inter vivos*, or *mortis causa*. In this clause, the subject of the conveyance is precisely described, with all the burdens, conditions, or limitations, under which it is given. The purpose of the grant is also mentioned; the grantee must be distinctly named and described; and, where the deed contains a destination, it is in this clause that it is inserted. All the other clauses of the deed are merely auxiliary, or subservient to the dispositive clause, to which they are intended to give effect. *More's Notes to Stair*, p. clviii.; *Bell's Princ.* § 760; *Illust. ib.*; *Ross's Lect.* ii. 157, 233, 287, 344, 380. See *Charter. Disposition. Entail.*

**Disratiener;** from the French word *Disrater*, to fight in single combat. *Skene, h. t.*

**Dissaina;** a French word signifying dispossession, ejection, or spuilzie. *Skene, h. t.*

**Dissenters;** persons who dissent from the doctrines of the Established Church. In Scotland the established religion is Presbyterian; and the term *dissenter*, in its most extensive signification, may be applied to all who do not conform themselves to that system of religious doctrine and worship. The numerous statutes of the Scotch Parliament directed against *nonconformity*, were repealed after the Revolution of 1688, by 1690, c. 5, and 1690, c. 27, and have not since been revived. See also 9 and 10 *Vict.*, c. 59; *Hume*, i. 575, *et seq.*; *More's Notes to Stair*, pp. lxxv. and ciii. See *Nonconformity. Papist. Episcopalian. Test.*

**Dissolution;** a loosing of that which was formerly bound, used in contradistinction to annexation. *Skene, h. t.*

**Distress;** is a term in English law, signifying the seizing of the moveable effects belonging to a debtor, and either retaining them in security, or selling them in payment of the debt, as the case may be. It appears that a distress was formerly regarded as a mere *brevis manu* taking of the effects by the creditor, in security or pledge for the debt or damage—a practice which still prevails in the case of the distraining cattle found trespassing. But from the utility of distresses as a method of recovering payment of debt, they have in England been subjected to several legislative regulations, which have considerably altered their original character; and they are now treated by English authorities under eight distinct classes. See *Blackstone's Com.*; *Tomlins' Dict. h. t.*; *Wharton's Lex.*



*A. t.*; and *Burn, voce Distress*. This term also appears to have been known in our ancient law, and is mentioned by some of our authorities as similar in effect to *poinding*; *Stair, B. iv. tit. 47, § 24*. It seems, however, to have differed from that diligence, in so far as *poinding*, properly so called, is a diligence which can be used only in *execution*, and by judicial authority, whereas *distress* might have been used in *security*, and even without the intervention of a court. The right which a proprietor in Scotland has to seize *bravi manu*, and retain cattle found trespassing on his property, until satisfaction be made to him for the injury done, and the landlord's right of hypothec, seem to be vestiges of the ancient *distress*. See *Ross's Lect. vol. i. p. 385*. See also *Poinding. Hypothec*. Several British statutes, which are in force in Scotland, authorise execution by *distress* and *sale* under warrant of justices of the peace. This is particularly the case as to some of the revenue statutes. Power is conferred on the justices to grant warrant for distraining the effects, and for selling them, if the penalty, and the expenses attending the *distress*, be not paid within a certain limited time; and, where money is ordered to be levied in this way, and sufficient effects are not found within the jurisdiction of the judge who grants the warrant, the person to whom the execution of it is entrusted, may get it indorsed by any other justice within whose jurisdiction the effects belonging to the debtor can be found, on the oath of one witness, that a sufficiency of effects were not to be found within the jurisdiction of the original granter of the warrant. The oath must be indorsed on the warrant; and the justice indorser is not answerable for any irregularity which may have been committed in obtaining the original warrant; *27 Geo. II., c. 20*. Effects seized under *distress* cannot be used by the seizer: cows, however, may be milked, as that is necessary for their preservation. The officer levying a penalty by *distress* is not entitled to break open doors or lockfast places, unless the penalty, or part of it, be given to the Sovereign. Things in which a person has not a valuable property, and animals *feræ naturæ*, cannot be distrained. Nor can things sent to a public place of trade, as a horse in a smithy, or the effects of a traveller in an inn, be distrained for debts due by the person on whose premises they are. Neither can any fixture be taken. The tools and instruments of a man's trade, the beasts for his plough, &c., cannot be distrained, unless the *distress* be by way of execution under a particular statute. Many of the statutes also contain directions as to the manner in which the *distress* is to be levied under them. A *poinding* has been held illegal which pro-

ceeded on the decree of justices of the peace, under the excise statutes ordering *distress*; *King's Advocate against Forgan, 20th Feb. 1811, Fac. Coll. App. No. 1*. See also on this subject, *Hutch. Justice of Peace, B. i. c. 8*; *Tait's Justice of Peace, p. 87*; *Stair, B. ii. tit. 3, § 46*, and *B. iv. tit. 23, § 1*; *Hunter's Landlord and Tenant, vol. ii. p. 339*; *Ross's Lect. i. 389*.

**Districts.** For the more convenient administration of justice, the sheriffs-depute of the larger counties of Scotland are in the practice of appointing substitutes, whose delegated jurisdiction cannot be exercised beyond the limits of their particular district. In the same manner the justices of the peace are in the practice of subdividing extensive counties into districts, in each of which they hold sessions chiefly for the dispatch of the business within the district. But the jurisdiction of each justice remains entire over the whole county, and the justices of one district may hold their court and may act in another. The subdivision clerks and fiscals are appointed by the clerk of the peace, and by the fiscal for the county; and, in case of the absence of either of those officers, the justices may appoint a clerk and fiscal for the particular occasion. The Small Debt Acts, Licensing Acts, and Road Statutes, authorise a subdivision of counties, for the purposes of these acts. *Tait's Justice of Peace, p. 89 and 357*; *Barclay's Law of the Road, passim*; *1 Hutchison's Just. 55*. See also *Sheriff-Courts, Justices of Peace, Small Debt Courts, Road Acts*.

**Dittay**; is a technical term in criminal law, signifying the matter of charge, or ground of indictment, against a person accused of a crime. The manner of *taking up dittay*, as it was termed, or obtaining information and presentments of crime in order to trial, has undergone various changes. See as to the methods formerly adopted, *Skene de Verb. Sig. voce Iter, and Hume, vol. ii. p. 23, et seq.*, and, as to the present practice, see in this Dictionary the articles *Criminal Prosecution, Circuit Court, Porteous Roll*.

**Dividend.** In bankruptcy the share of any inadequate fund, apportioned according to the amount of the debt for which a creditor is ranked upon the estate, is called a dividend.

**Divisible Fund**; is a fund set apart or prepared for distribution amongst several claimants. The term is usually applied to the fund for division amongst the creditors of a bankrupt. The divisible fund, in a mercantile sequestration, consists of the whole estate and effects belonging to the bankrupt at the date of the sequestration, or the produce thereof, after paying all charges. It includes all payments made by the bankrupt to any of his creditors after the date of the

first deliverance, together with all alienations in security of prior debts made after the sequestration, or reducible under the statutes 1696, c. 5, or 1621, c. 18, or as frauds at common law. The fund also includes bank interest for money belonging to the estate deposited, in terms of the statute, or the penal interest of 20 *per cent.* due where such deposit has not been made. The deductions from the fund consist of the expense of management, wages or payments to servants, workmen, carriers, and others engaged in preserving or realising the estate; the expense of litigation, whether belonging properly to the estate, or found due to those against whom litigation has been carried on; the allowance or commission to the trustee; and the allowance to the bankrupt, where such an allowance has been made in terms of the statute. See *Bell's Com.* ii. 421, *et seq.*

**Division, Scheme of;** is a state or cast showing the amount of a divisible fund, and apportioning it amongst the different claimants according to the legal order of ranking. The scheme of division in a process of ranking and sale is made up agreeably to the rights fixed by the decree of ranking. It is then lodged in process, to be examined by the parties interested, and objected to if they see cause. Thereafter it is approved of by the Lord Ordinary, with such alterations as the discussion may have led to. A decree of division, in terms of the scheme, is then pronounced, on which, as on any other decree, diligence may follow; see *Bell's Com.* ii. 288, *et seq.* See also *Judicial Sale.* By the bankrupt statute, 19 and 20 Vict., c. 79, 1856, § 125, *et seq.*, the trustee is directed to make up and exhibit to the commissioners a state of the bankrupt's estate immediately on the expiration of four months from the date of sequestration, and complete a list of the creditors entitled to draw a dividend, &c. This list is held to be the trustee's *decision* on the claims made by the creditors. The decision, however, is subject to the review of the Court, on the complaint of any creditor who is dissatisfied with it.

**Division, Benefit of.** See *Beneficium Divisionis.*

**Division, Brieve of.** See *Brieve of Division.*

**Division of Commonly.** See *Commonly.*

**Divorce.** Marriage may be dissolved either by the death of either of the parties, or by divorce. Divorce is a judicial dissolution of the conjugal society, while both the parties are alive, the effect of which is, to leave them at liberty to intermarry with others. By the law of Scotland a divorce may be obtained on the ground either of adultery or of wilful desertion; but neither of these grounds dissolves

the marriage *ipso jure*; and if neither party institutes a process of divorce, the marriage subsists, notwithstanding the adultery or desertion. In the case of adultery, if the injured party continue the matrimonial connexion, after knowledge of the adultery, that is held to be an irrevocable forgiveness of the offence; and an act of adultery so overlooked, cannot afterwards be the foundation of a process for divorce. (See *Adultery. Remissio Injuriz.*) When the divorce proceeds on wilful desertion, the act 1573, c. 55, requires that the offending party shall, maliciously and without just cause, have abandoned the conjugal society for four years together; and if, after such desertion, he or she disregards the admonition of the church to adhere, a decree of divorce may be pronounced. (See *Desertion.*) The action of divorce formerly proceeded before the commissaries of Edinburgh; but by 1 Will. IV. c. 69, which abolished the commissary-court, it is enacted, that actions of divorce shall be competent before the Court of Session only. (See *Commissaries.*) In every such action, whether founded on adultery or on desertion, the pursuer must make oath that the action is not collusive. But, after decree of divorce has been pronounced, an action of reduction of the decree, on the ground of collusion, seems not to be competent, to the effect of reviving the marriage, although the action may be insisted in, so far as to protect creditors against any fraudulent device for defeating their rights, by means of a divorce; *Ersk. B. i. tit. 6, § 46.* The legal effect of divorce on the ground of desertion is, that the offending party loses the tocher and the *donationes propter nuptias*; 1573, c. 55; that is, the offending husband is bound to restore the tocher, and to pay or implement to the wife all her provisions, legal or conventional; and the offending wife forfeits her tocher, and all that would have come to her, had the marriage been dissolved by the predecease of the husband; and our authorities concur in holding, that the penalties fixed by the statute 1573 extend, by analogy, to the offending party in a divorce for adultery. It has been decided, however, that the offending husband, where the divorce is for adultery, is not bound to restore the tocher; *Justice*, 13th Jan. 1761, *Mor.* p. 334. This decision is said by Erskine to have been pronounced in deference to a uniform train of old decisions; but, on investigation, it rather appears that the course of decisions had fixed an opposite rule; see *Ersk. B. i. tit. 6, § 48*; *Ivory's note*, 177. Bankton (*B. i. tit. 5, § 128*) holds recrimination to be a good defence against divorce for adultery. The contrary doctrine, however, is now settled in the law of Scotland. But although recrimination cannot be pleaded as a

defence in bar of the divorce, yet, as the mutual guilt may affect the patrimonial interests of the parties, it may be stated in a counter-action; *Jardine*, 9th March 1787. *Mor.* p. 338; *Lockhart*, 7th Dec. 1799, *Mor. App. voce Adultery*, No. 1. *Lenocinium*, however,—that is, the husband's participation in the profits of his wife's prostitution, or even the husband's connivance in her guilt, without participating in the gain,—is a good defence to the wife against an action of divorce on the ground of adultery; *M'Kenzie*, 28th Feb. 1745, *Mor.* p. 333; *Bank. B. i. tit. 5, § 130*. See *Recrimination. Remissio Injurix. Lenocinium*. The act 1600, c. 20, declares marriages contracted between the adulterer and the person with whom he or she is declared, by the sentence of divorce, to have committed the crime, to be null and unlawful, and the issue of the marriages to be incapable of succeeding to their parents. This statute, however, has not the effect of bastardizing such issue; *Ersk. B. i. tit. 5, § 51*. See *Bastard. Adultery*. The right to institute an action of divorce is personal to the husband or the wife; and if, after the action has been raised, either party die before the decree of divorce is final, it has been argued, that the natural dissolution of the marriage by death supersedes and definitively closes all inchoate proceedings for dissolving it on any other ground; the natural dissolution being the first effectual one, and that which is to regulate all questions as to the patrimonial rights or *status* of the survivor. The question, how far liti-contestation in such an action renders it transmissible to representatives, was argued, but not decided, in *Campbell* and others against *Macallister*, 1821, First Division, not reported. See, on the subject of this article, *Stair, B. i. tit. 4, § 7, et seq.*; *Moré's Notes*, p. xvii. xxvii.; *Bank. B. i. tit. 5, § 126*; *Ersk. B. i. tit. 6, § 43, et seq.*; *Bell's Princ. § 1531, et seq.*; 1622, *et seq.*; *Illust. ib. Fraser on Domestic Relations; Lothian's Consist. Prac.* 96, *et seq.*, and *Fergusson's Reports on Divorce Cases, passim.*; See also, in this Dictionary, the articles *Marriage. Desertion. Liti-contestation. Domicile. Adherence. Adultery. Commissaries*. As to impotence, considered as a ground of nullity of marriage, see *Impotency*.

**Dock Warrants.** The bonding warehouses in London, mentioned in the stat. 43 Geo. III., c. 132, are those of the London and West India Dock Companies; and when goods are warehoused in those docks, they are entered in the name of the importer, and a certificate given to the owner as a voucher. These certificates are called *dock warrants*. When a transfer is made, the certificate is indorsed, with an order to deliver the goods to the purchaser; and a corresponding entry

in the warehouse books, made by the clerk, completes the transference. The certificates or warrants are transferable from hand to hand by a delivery order, in a prescribed form, which is printed on the certificate with blanks; and the courts in England have recognised this as a legitimate mode of transferring the property of the goods. In Scotland the system is not yet so perfect, but the same object is attained by delivery orders, with indorsed transfers, and corresponding entries in the warehouse books. Unless intimation is made to the keeper of the warehouse the property is not transferred; *Melrose v. Hastie*, Feb. 4, 1850, 12 D. 665. See *Bell's Com. i. 192, et seq.*; *Bell's Princ. § 1305*; *Brown on Sale*, p. 460. See also *Delivery*.

**Dogs.** Dogs are so far the objects of law, that, by the acts 1475, c. 60, and 1621, c. 32, the stealing of hounds (as they are called in the statutes) is punishable by fine. Sir George Mackenzie observes, upon the former of those statutes, that it is clear "that stealing of dogs, hawks, and the like, is not to be punished as theft, but only by a fine or penalty of ten pounds; and, in effect, this is not *contractatio rei alienæ, lucri faciendi causa*—these beasts being rather useful for sport than gain." But he seems to think that the stealing of a dog from a dog-merchant may be punished as theft; *Observations on the Statute*, p. 79. Bankton holds that it is not felony, but that the offender may be subjected to an action for damages; *B. i. tit. 3, § 9*. See also *Hume*, i. 82 and 124. In England, by the statute 10 Geo. III., c. 18, the stealing of dogs is punishable by fine or imprisonment. It appears to be settled, that the owner of a vicious dog is liable for the injuries done by the animal to persons whom it may attack. The owner of a dog in the practice of destroying or worrying sheep, will also be answerable for the loss; and in the inferior courts the owner, besides being held liable to repair the injury to the private party, is sometimes fined, and the dog ordered to be killed. In order to subject the owner in damages, his previous knowledge of the vicious or bad habits of the dog must be proved. Stair holds such previous knowledge to be necessary to found the claim; and it was so decided by the House of Lords reversing the judgment of the Court of Session, in the case of *Fleming v. Orr*, April 3, 1853, 1 *Macqueen*. See *Damages*. The power of magistrates to order dogs into confinement, under pain of their being destroyed, where hydrophobia is prevalent or apprehended, is sometimes conferred by police statutes; but it seems also to fall within the general commission of justices of the peace, as well as the common law juris-

diction of the judge ordinary. In like manner, it rather seems to be lawful to kill a dog found in the act of worrying sheep, although, in one case where two dogs had been shot, and where the defender alleged that he was justified, because, at the time the dogs were shot, they were on his property, and in the neighbourhood of a valuable flock of sheep, he was subjected in damages to the owner of the dogs, on the ground that he had failed to justify the shooting of the dogs; *Grant v. Barclay Allardyce*, 8th Jan. 1830, 5 *Mur.* 130, and *English cases there cited*. Dogs are specially mentioned in the statute against cruelty to animals; 13 *Vict.*, c. 92; and penalties for certain offences—*s.g.*, suffering a rabid dog to go at large, &c.—are imposed by the general Police Acts for the towns in Scotland; 13 and 14 *Vict.*, c. 33. See *Damages. Justice of Peace*.

**Dole**; is the corrupt, malicious, or evil intention which is essential to the guilt of a crime. See *Crime*.

**Dolus Malus**; is craft, guile, or machination, employed for the purpose of deception or circumvention. This term is used, in the Roman law, in contradistinction to *dolus bonus*, which signifies that degree of allowable dexterity, by which a person may advance his own interests; such, for example, as to make the best bargain he can in sale, or to use stratagems in war, or devices for his defence against fraud or violence. By the law of Scotland, *dolus malus* is a ground for reducing any deed, obligation, or transaction in which it occurs. *Stair*, B. i. tit. 9, § 9; *More's Notes*, p. lix.; *Bank*. B. i. tit. 10, § 62; *Ersk.* B. iv. tit. 1, § 27. See also *Fraud. Circumvention. Deceit*.

**Domesday Book**; is an ancient record made in the reign of William the Conqueror, and now remaining in the Exchequer in England, fair and legible. It consists of two volumes, and contains a survey of all the lands in England, except the counties of Northumberland, Cumberland, Westmoreland, Durham, and part of Lancashire. A transcript of the Domesday Book has been made, and printed and published. There are other books posterior in date to the Domesday Book of William the Conqueror, which are also called *Domesday Books*, and preserved in Exchequer. See *Tomlins' Dict. h. t.*

**Domicile**; the place where a person has his home or fixed abode. Moveable property is held in law to follow the person of the owner, and on his decease must be distributed according to the law of the country in which he was domiciled at the time of his death, and not according to the law of the country in which the property is situated. But although the rule of moveable succession is the *lex do-*

*micili*, the mode in which the subjects are to be taken up and vested in the successor, is regulated by the *lex rei sitæ*. Thus, in *Miligan* (4 S. 432), a lady domiciled in Scotland, having died possessed of funds in England, and being succeeded by her children resident in this country, who died without having expedite confirmation, it was held that the funds were vested in them, *ipso jure*, according to the law of England. Where a company has a domicile in more than one country, the proceedings in bankruptcy in any one of the domiciles of the company comprehending the whole personal estate of the entire concern. By the law of Scotland, the residence of a party within the territory of a judge for forty days preceding the citation, establishes a domicile, to the effect of rendering the citation, under the precept of that judge, effectual, and that even although the forty days' residence has been in an inn or hired apartment. But a temporary residence of this kind will not constitute a domicile to warrant denunciation on letters of horning, or the publication of letters of inhibition at the head burgh of such residence, or the confirmation of a testament before the commissary of that district; in all of which cases regard must be had to the principal domicile or place where the party resides with his family, or has his permanent home; *Paterson*, 20th Nov. 1672, *Mor.* p. 3724; *Bank*. B. iv. tit. 6, § 5; *Ersk.* B. iii. tit. 9, § 29. See also *Denunciation. Confirmation. Inhibition*. Where the party possesses two houses within different jurisdictions, either of which is entitled to the appellation of his domicile, he may be cited within either the one or the other jurisdiction. If a person have no fixed domicile, as may happen in the case of a soldier or a travelling merchant, a personal citation will subject him to the jurisdiction of the judge within whose jurisdiction he is so cited. Where a person, not having a dwelling-house in Scotland occupied by his family and servants, has left his usual place of residence, and has been absent therefrom for forty days, without leaving notice where he is to be found, in Scotland, he is to be held as absent from Scotland, and charged, or cited, accordingly; 6 *Geo. IV.*, c. 120, § 53. The Act of Sederunt, 14th Dec. 1805, contained a similar provision; and declared that, within the forty days, a citation or charge, left at the late dwelling-place of the party, should be effectual, unless the party was personally found prior to the execution, or should have taken up some other known and fixed residence in Scotland. It has been doubted, however, whether the Act of Sederunt would be applicable to a citation, even within the forty days, where the party cited, and his family, had unequivocally left their late

dwelling-place before the citation was given—*e.g.*, where another family had taken possession of the house. As this Act of Sederunt related to the bankrupt statute, 33 Geo. III., c. 74, and was not renewed after the expiration of that statute, doubts have been entertained how far the rule laid down in it is to be held as now in force; unless, as has been thought, the Act of Sederunt can be taken as a declaration of the common law upon the point. See *More's edition of Erskine's Principles*, p. 16, note 7; *Bell's Com.* vol. ii. p. 170, *et seq.* in notes, 5th edit. See farther on the subject of this article, *Ersk. B. i. tit. 2, § 16*; *Ivory's edit. notes*, 19, 20, and 21; *Stair, B. ii. tit. 2, § 17*; *iii. tit. 8, § 81*; *Bell's Com.* ii. 681, *et seq.*; *Bell's Princ.* § 1861; *Shand's Proc.*; *Jurid. Styles*, 2d edit. vol. iii. p. 5; *Ross's Lect.* i. 492. See also *Citation. Jurisdiction. Forum competens.*

In connection with the subject of domicile, several important decisions in questions of *status* have been recently pronounced. Thus, in one case, a Scotchman by birth, possessed of landed property in Scotland, had, while domiciled in England, a son born to him of an illicit intercourse with an Englishwoman, whom he subsequently married in Scotland. The Court of Session held the son legitimated by the subsequent intermarriage of his parents, to the effect of entitling him to succeed to his father's property in Scotland. But that judgment was reversed in the House of Lords, it being held that the father was domiciled in England at the date of the marriage, which took place in Scotland; *Rose v. Ross*, 15th May 1827, 5 S. and D. 605; *House of Lords*, 16th July 1830, 4 W. and S. 289. In a more recent case, a Scotchman had a daughter born to him in England by an illicit connection with an Englishwoman, whom he subsequently married in England. The question there was, whether, at the date of the birth of the child, and of the subsequent marriage, the father had acquired an English domicile; and the Court of Session, by the narrowest possible majority of the whole thirteen judges, holding that he had lost his Scotch domicile, and adopting the principle of the judgment of the House of Lords in *Rose v. Ross*, decided that there was no legitimation *per subsequens matrimonium*; *Munro v. Munro*, 16th Nov. 1837, 16 S. 18. This judgment, however, was reversed by the House of Lords, on the ground that the father had not lost his Scotch domicile; 1 Rob. 492. In another case, a Scotchman and a Scotchwoman contracted, in Scotland, an intimacy, in consequence of which issue was afterwards born in England, whither the father, followed by the woman, went on military service, and where, after his regiment was disbanded, he

continued to reside for a period of years. There it was held,—one judge alone of the thirteen dissenting,—that a subsequent marriage contracted with this woman, in England, legitimated the issue to the effect of entitling them to take Scotch heritage, under an entail, as lawful heirs-male of the body; *Macdowall v. Lady Dalhousie*, 16th Nov. 1837, 16 S. 6. This judgment was affirmed in the House of Lords; 1 Rob. 495. The general rule, deducible from another recent case, is, that the domicile of the husband is the domicile of the wife. In the case in which that rule was settled, a domiciled Scotchman had brought an action of divorce against his wife, who was actually resident abroad, on the ground of adultery committed abroad; and there the House of Lords held, affirming the judgment of the Court of Session,—1. That the domicile of the husband was the domicile of the wife; and that the action was competently executed in the Scotch courts, a previous contract of separation between the parties being held revocable, and virtually revoked, by the execution of the summons of divorce; 2. That the wife was sufficiently cited by an edictal citation and personal notice, without leaving a copy of the summons for her at her husband's dwelling-place in Scotland; and, 3. That the marriage, although contracted in England, according to the rites of the English Church, and therefore indissoluble by the courts of that country, might be dissolved by the Scotch courts on the ground of adultery committed abroad; *Warrender v. Warrender*, 28th June and 5th July 1834, 12 S. 847 and 855; *House of Lords*, 27th Aug. 1835; 2 S. and M.L. 154. But the rule that the domicile of the husband is that of the wife, does not hold where the husband, a foreigner, has come to Scotland, and resided there for forty days, merely with a view of constituting a domicile, and of making his wife, whose actual domicile is abroad, subject to the jurisdiction of the Scottish courts for adultery committed abroad; *Ringer*, 15th Jan. 1840, 2 D. p. 307. Residence for forty days still, however, was held to confer jurisdiction in an action of divorce by a husband against a wife, where Scotland was the *forum originis* of both parties, the *locus contractus* and the *locus delicti*; *Forrester*, 18th July 1844, 6 D. 1358. In an undefended case, where a Scotchman, after contracting a marriage in Scotland with a Scotchwoman, had committed adultery in Scotland, and had afterwards gone abroad, leaving his wife and a child in Scotland, without letting her know whither he had gone, it was held by the Court, on considering an *ex parte* argument, which the Lord Ordinary had ordered on the point, that the absent husband

was competently cited in an action of divorce at the instance of the wife by an edictal citation; and that although the husband had been absent from Scotland for upwards of ten years prior to the raising of the action, yet the jurisdiction of the Court in such a suit at the instance of the wife was not excluded; *Buchanan v. Downie*, 18th Nov. 1837, *Fac. Coll.*, and authorities there cited. See *Legitimation*.

**Dominant Tenement**; is the name given to the tenement or subject in favour of which a servitude exists or is constituted. The tenement over which the servitude extends is denominated the servient tenement. *More's Notes to Stair*, p. cxxxi.; *Bell's Princ.* § 980, *et seq.* See *Servitude*.

**Domainium Directum and Dominium Utile.** In the language of the feudal law, the interest vested in the superior is called the *domainium directum*, or superiority, as being the higher or paramount right. The vassal's interest, as contradistinguished from the superiority, is termed the *domainium utile*, or the property, as comprehending the more profitable and useful enjoyment of the subject and its fruits. Much controversy has prevailed amongst feudallists as to the philosophical correctness of those terms; but practically there exists no doubt as to their import. See *Stair*, B. ii. tit. 3, § 7; *Bank. B.* ii. tit. 3, § 2; *Ersk. B.* ii. tit. 3, § 10; *Bell's Com.* vol. i. p. 670, 5th edit.; *Bell's Princ.* § 676, *et seq.*; *Ross's Lect.* vol. ii. p. 147, *et seq.* With regard to the nature and extent of the respective rights of the superior and the vassal, see *Superiority. Vassal. Feudal System. Property*.

**Dominus litis**; is the person to whom a suit belongs, who derives the benefit of a favourable, and is liable to the effects of an adverse, judgment. One may be *dominus litis* although his name be not in the suit as either pursuer or defender. Thus, a father was subjected in the expenses of a process which had been awarded against his son, in respect that, although not himself the party, he had undertaken to defend his son, and had not allowed him a sufficient aliment; *Stevens*, 21st Nov. 1823, 2 S. 507. And in *Corsan*, Feb. 8, 1828, 6 S. 505, one who got another to present a bill of suspension in his own name, was found liable in expenses, as being the *verus dominus litis*. See *Mandatory*.

**Donatary.** A donatary is the donee or receiver of a gift or donation. In practice, the term is applied exclusively to the person to whom the Crown makes a gift, as of escheat, *ultimus hæres*, or the like. *Hunter's Landlord and Tenant*; *Ross's Lect.* i. 208. See *Escheat. Gift*.

**Donation**; is the free gift of anything

which the giver lies under no antecedent legal obligation to bestow—a definition which comprehends remuneratory gifts, because they cannot be enforced by law, although in some respects they differ from pure donations. The law recognises several kinds of donation; as,—(1.) *Pure donations.* (2.) *Donations mortis causa.* (3.) *Donations inter virum et uxorem.* (4.) *Donations propter nuptias.*

1. *Pure donations* proceed from the mere liberality of the giver. Where the subject of the gift either cannot be, or is not meant to be, immediately delivered, the proper evidence of the donation is a written deed,—a solemnity which is of course indispensable in the case of a donation of heritage,—and the warrandice implied is said by our institutional writers to be warrandice from *future* facts and deeds only of the donor; although a contrary opinion is maintained in the *Annotations on Stair*, published some years ago, and ascribed to Lord Elchies. See *Annotations*, p. 136. Acceptance by the donee is not required to complete the donation. The Roman law allowed *beneficium competentis* to every one who had laid himself under a gratuitous obligation; that is, he was allowed to retain as much as was necessary for his own subsistence, if, before fulfilling the obligation, he was reduced to indigence. But the law of Scotland does not recognise this doctrine, except in the case of donations or provisions by fathers and grandfathers to their children or grandchildren. (See *Beneficium Competentis*.) Another implied condition of a donation by the Roman law was, that where one who had no children made a gift of the whole, or the greater part, of his estate, the donation became void if the donor afterwards came to have children; the presumption of the law being, that had he expected children of his own he would have preferred them to any other person. As to the extent to which this doctrine has been adopted in the law of Scotland, see *Condition, si sine liberis decesserit*. Donations, even when completed by delivery, were, by the Roman law, revocable on account of ingratitude on the part of the donee; and if the same doctrine prevail in the law of Scotland, it is a ground of revocation, which, following the principle of the Roman law, must be personal to the donor, and not descendible to his heirs; for the presumption is, that if the donor has died without revoking the donation, he has forgiven the injury; *Stair*, B. i. tit. 8, § 2; *Ersk. B.* iii. tit. 3, § 88, *et seq.*; *Bank. B.* i. tit. 9, § 1, *et seq.* Remuneratory donations differ from pure donations so far, that they cannot be revoked; because, although the donor was under no legal obligation to make the gift, yet he was bound in gratitude to do

so—a consideration which gives to such a donation the character of the discharge of a debt; and hence, without an express power of revocation, a donation of this kind is irrevocable; *Ersk. ib.* § 91. No deed is presumed in law to be a donation, if it admit of another construction; for one is never presumed to do that which is to be attended with loss instead of gain to himself, unless there be facts and circumstances in his conduct which leave no doubt as to his intention to make a gift. *In dubio*, the law holds the transaction to be onerous. Thus, a debtor is not presumed to make a gift to his creditor while his debt remains unpaid. But aliment supplied, without an agreement for board, to a person of full age, and capable of contracting, is presumed to have been given *animo donandi*, unless the entertainer be one who makes a livelihood by the board of strangers. Aliment, however, given to minors, and others incapable of contracting, is not accounted a donation, unless the minor has a father or curators, with whom a contract for his maintenance might have been made, or where, from the near relationship of the alimenter, there is room for the presumption that the aliment was given *ex pietate*; *Galt*, 19th Jan. 1830, 8 *S. and D.* 332, and authorities there cited. Where the minor has a separate estate, it is held that even his father has a claim for the expense of alimentering him; and the same rule seems to apply, with greater force, to the case where such a minor has been alimentered by a more distant relation, or by a stranger. An eldest son who is debtor to his brothers and sisters for their provisions, and who has maintained them in his family, is not held to have done so gratuitously, but will be entitled to a reasonable allowance for their board; see *Stair*, B. i. tit. 8, § 2; *Bank. B.* i. tit. 9, § 20; *Ersk. B.* iii. tit. 3, § 92. See also *Debitor non præsuntitur donare*.

2. *Donations mortis causa*. A donation *mortis causa* is a deed whereby one, in contemplation of death, gives anything to another, or grants a right in favour, revocable at the grantor's pleasure. The characteristic of such donations is, that the donor prefers the donee to his heir, but prefers himself to both; and such rights not being effectual during the grantor's life, his creditors are preferable to the grantee. But where they become good by the grantor's death, they will receive effect against his heir or executor, in the same manner as other deeds delivered at the date. But unless conceived in favour of the grantee and his heirs, they become void if he predecease the grantor; *Boston*, 13th Feb. 1781, *Mor.* p. 8099. Donations are rather presumed to be absolute than *mortis causa*; hence, although

made in contemplation of death, yet, if they be irrevocable and delivered, they are held to be simple gifts. Thus, a gratuitous bond payable at the grantor's death, delivered and irrevocable, is not a donation *mortis causa*, but an absolute right; *Bank. B.* i. tit. 9, § 18, *et seq.* By the Roman law, when a gift was made in contemplation of death, the subject was understood to be given to the donee, under the implied condition that it was to be returned to the donor, either on his revocation, or on the predecease of the donee. This sort of donation *mortis causa* is unknown in the law of Scotland. That which most resembles it is a gratuitous bond or assignment, revocable by the grantor, and to take effect at his death. Such bonds being of the nature of legacies, the grantee will be postponed to the onerous creditors of the grantor; at the same time, in a question with legatees, such a bond will constitute a debt, and will therefore be preferable to proper legacies. A disposition of heritage, *mortis causa*—that is, a disposition made *intuitu mortis*, and on the recital of the grantor's desire to settle all disputes in regard to his succession, after his decease—is not necessarily a deathbed deed; for, if it disposes the heritage by words of *de præsenti* conveyance, although it contain a reservation of the grantor's liferent, and a clause dispensing with delivery, and remain undelivered, yet, if it be otherwise a formal and regular deed, it will receive full effect, unless it can be set aside on the ground that the grantor was actually on deathbed at the time of its execution. No deed, even although gratuitous, is revocable after delivery, if a power of revocation be not reserved. *Ersk. B.* iii. tit. 3, § 91; *Bell's Illust.* § 1691; *Thomson on Bills*, 18; *Kames' Equity*, 177; *Jurid. Styles*, 2d edit., vol. ii. p. 429. See also *Legacy. Disposition and Settlement. Deathbed. Delivery*.

3. *Donations inter virum et uxorem*. All deeds importing donations, whether granted by the husband to the wife, or by the wife to the husband, during the subsistence of the marriage, are revocable by the donor at any time during his or her life—*ne conjuges mutuo amore se spolient*. Although the deed should be granted nominally, or in trust to another, yet if in effect it convey a right gratuitously from one spouse to the other, it is subject to revocation; *plus enim valet quod agitur, quam quod simulate concipitur*. See *Jardine v. Currie*, June 17, 1830, 8 *S.* 939. But mutual remuneratory grants between the spouses are not revocable, where there is any reasonable proportion between the two; *Hepburn*, 6th June 1814; *House of Lords, Dow*, ii. 342. Neither are postnuptial grants, made in consequence of a natural obligation, revocable.

Thus, where there has been no antenuptial contract of marriage, the husband may provide for his wife, in the event of her survival; and, in so far as the provision is rational, and suitable to his circumstances at the time, it will be effectual. It will be revocable, however, *quoad excessum*. The same rule would probably be applied to the case of a similar provision by the wife, in favour of the husband. But where there has been an antenuptial contract, all postnuptial deeds increasing or diminishing the provision in the former contract, are revocable, in so far as they do not proceed on onerous considerations. All voluntary contracts of separation, by which the wife is provided with an alimentary allowance, were reprobated by our older law, as being contrary to the adherence implied in marriage; but, according to more recent authorities, the provisions made in such contracts are effectual as to the time past, although revocable at any time by either the husband or the wife; *Ersk. B. i. tit. 6, § 29, et seq.*; *Ivory's edition, notes 161 to 166*. See *Marriage*. Donations *inter virum et uxorem* may be revoked by the donor, not only in express terms, but also tacitly by a subsequent conveyance of the subject of the donation to another, or even by the subsequent contraction of debt. Where the donation is constituted by writing, it ought to be revoked also by writing; and such revocations may be signed *etiam in articulo mortis*, and without the knowledge of the other spouse. Revocation is not presumed from a posterior general disposition by the donor, in favour of a stranger; for the general clause in such a disposition does not include any right of which the grantor has previously divested himself; *Handyside, 7th Feb. 1699, Mor. p. 11349*. In like manner, the mere contraction of debt raises no presumption of revocation. Posterior creditors, indeed, when the donor has no separate fund for their payment, may found upon the faculty of revocation competent to their debtor, which the law will transfer to them, if he do not revoke voluntarily; but his representatives, where there is no insolvency, cannot found upon posterior contractions as a tacit revocation. Although a donation between husband and wife is valid, if not revoked, yet the donee, who holds it under the tacit condition that it may be revoked, cannot alienate or burden the subject of the donation, to the prejudice of the donor's right of revocation, which it has been stated will operate even against the donee's creditors or singular successors,—*resoluto enim jure dantis, resolvitur jus accipientis*. But if the donor die without revoking, his or her representative cannot revoke, and the right of the donee becomes absolute,—*morte dantis donatio confir-*

*matur. Stair, B. i. tit. 4, § 18; Bank. B. i. tit. 5, § 96; Ersk. B. i. tit. 6, § 29, et seq.; Bell's Princ. § 1616, et seq.; Illust. ib.; Jurid. Styles, 2d edit. vol. ii. p. 233; Kames' Equity, 108.*

4. *Donations propter nuptias*. In the Roman law, *donationes propter nuptias* are described as that sum or subject, given by the husband in security as the *dos* or tocher, which he was bound to restore to the wife on the dissolution of the marriage; and as the *dos* returned to the wife, so the *donatio propter nuptias* returned to the husband; *sicut dos ad mulierem, sic et donatio propter nuptias redit ad virum*. The law of Scotland differs essentially from the Roman law on this subject; but when donations *propter nuptias* are mentioned by our authorities, they must be understood to mean the provisions granted by the husband to the wife, in consideration of the tocher, given by her or her friends; *Balfour's Prac. p. 101; Bank. B. i. tit. 5, § 6; Ersk. B. i. tit. 6, § 46*. See *Contract of Marriage*.

**Doom**; a judicial sentence; in which sense the term was used in the more ancient law of Scotland, both as to civil and criminal causes. The falsing of dooms was an expression formerly used to signify protesting against the sentence, and taking an appeal to a higher tribunal. In the case of a capital conviction in the Court of Justiciary, the doom or sentence was in use to be pronounced by the public executioner, or *doomster* as he was called—a barbarous practice, which was abolished by Act of Adjournal, 16th March 1773, and the sentence ordained to be pronounced in future by the presiding judge. *Hume, ii. 472*; also *p. 3, et seq.*; *Ersk. B. iv. tit. 2, § 39*. See *Falsing of Dooms*.

**Doomsday Book**. See *Domesday Book*.

**Doomster**. The public executioner was formerly called the doomster or dempster, in consequence of the practice mentioned in the preceding article.

**Door, Chalking of**. See *Chalking of Door*; and in addition to the authorities there cited, see *Stair, B. ii. tit. 9, § 40; Ersk. B. ii. tit. 6, § 47; Bank. B. ii. tit. 9, § 52*.

**Doors, Letters of Open**. See *Open Doors*.

**Doquet**. The word doquet is an old English term, signifying a brief or summary of a large writing; and all attestations or declarations annexed to written instruments are called doquets, particularly when done by notaries. The notarial doquet is the most ancient example of fixed style in Europe; and it was formerly common to all solemn instruments. In Scotland, however, it was almost exclusively appropriated to the instrument of *sasine*. It consisted of a Latin attestation, holograph of the notary, annexed to the notarial instrument prepared by him, on the ee-



cession of the infestment being taken. The doquet set forth the name of the notary, and the authority under which he had been appointed a notary-public. It then stated that he was personally present along with the witnesses; that he saw, knew, heard, and noted the circumstances mentioned in the instrument of sasine; and that he prepared the instrument, and had authenticated it by his sign, name, and surname; and, by express statute, the doquet must mention the number of "leaves" of which the instrument consists; 1686, c. 17, and A. S. 17th Jan. 1756. In addition to his subscription, the notary was formerly in use to add his *signum*, which was a flourish of penmanship, called a *paraph* or a *reel*; but this went into disuse; and, by the subsequent practice, the notary merely subscribed each page of the instrument, adding the letters N. P. to his name; and, on the last page, opposite to the doquet, he added to his subscription the *motto* which he had assumed on his admission as a notary. Any omission in the essentials of the doquet is fatal to the instrument to which it is annexed. In registering instruments of sasine, the practice was to transcribe the entire doquet into the record; but in registering instruments of sasine in tenements within burgh, under the statute 1681, c. 11, a diversity of practice prevailed as to the registration of the doquet, as to which no precise rule is prescribed by that statute. To remedy this omission, it was enacted by 10 Geo. IV., c. 19, that an abbreviated or incomplete registration of the doquet, or even a total omission of it in the record, should not affect the validity of instruments recorded prior to 14th May 1829; but that thereafter the doquets of all instruments of sasine within burgh, shall be recorded at length in the burgh register of sasines; otherwise such sasines shall not bear faith in judgment in prejudice of a third party with a perfect right to such tenements; without prejudice, however, to the using of the instruments against the makers thereof, their heirs and successors. The act contains a declaration, that it shall not affect any action in relation to the former practice, depending at its date. The notarial doquet to instruments of sasine was superseded by 8 and 9 Vict., c. 35, § 5. See on the subject of this article, *Ross's Lect.* ii. 187; *Bell on the Purchaser's Title*, p. 217; *Bell's Princ.* § 771; *Bell's Illust.* § 872; *Thomson on Bills*, 461; *Menzies' Lect.* p. 554. See also *Sasine. Notary-Public.*

**Dos**; in the Roman law, was the dowry or tocher brought by the wife to the husband on the occasion of the marriage. By that law, the *dos* returned to the wife on the dissolution of the marriage; but, during its subsistence, the rents or profits of the *dos* went to the hus-

band, *ad sustinenda onera matrimonii*. The *donatio propter nuptias* was a counter remuneratory donation made by the husband to the wife, as a security for the return of the *dos*; *Stair*, B. iii. tit. 4, § 22; *Bank. B. i. tit. 5, § 6*; *Skene, h. t.* See *Marriage. Donation.*

**Double Bonds.** One of the English law expedients, devised for evading the prohibitions, anciently in force against taking interest for money, was for the borrower to grant a bond for double the sum advanced. Those bonds were sometimes qualified by a separate stipulation, that, if the debtor paid a certain sum to the lender, at a particular time, the debt should be discharged; but, if not, that the whole sum in the bond should become due as damages. The bonds thus taken are called *double bonds*. It does not appear that this was ever a prevailing form of security in Scotland; but similar devices were well known; for the prohibitions against taking interest were as rigid in the one country as in the other. See *Ross's Lect.* vol. i., p. 19, *et seq.* See also *Interest.*

**Double Distress.** Where arrestments have been used by two or more creditors, in order to attach the funds of their debtor in the hands of a third party, such arrestments constitute what is called *double distress*; and entitle the arrestee to call the arresters and the common debtor in an action of multiplepointing, to dispute their respective rights to the fund *in medio*, so that the arrestee may pay in safety, and under judicial authority. This action is called an action of *double* or of *multiple* pointing; because pointing was a term which anciently denoted any distress or diligence. *Stair*, B. iv. tit. 16, § 3, *et seq.*; *Bank. B. iv. tit. 24, § 32*; *Ersk. B. iv. tit. 3, § 23.* See *Multiplepointing.*

**Double Securities.** A creditor who holds two securities for the same debt, is said to hold double securities. Thus, the debtor may give security for the full debt over two separate estates, each of which may be made liable for the whole debt; and, in the event of insolvency, the creditor will rank upon each estate for the whole debt, to the effect, however, of drawing ultimately no more than twenty shillings in the pound on the debt due; *Bell's Com.* ii. 520, *et seq.* Questions of considerable difficulty arise on bankruptcy in the ranking of double securities; as to which see *Ranking.* See also *Catholic Creditor.*

**Doubles of Summonses.** A full copy, technically called a *double*, of every summons, as far as the *will*, must, in the ordinary case, be delivered to, or left for, each defender when the summons is executed. Where, however, more defenders than one are called, it is sufficient if each be served with a copy of that part of the summons which concerns himself.

If the defender be forth of Scotland, a copy must be left for him by the messenger, at the office of the keeper of Edictal Citations. See *Citation*. The following summonses are excepted from the general rule:—Adjudication, Mails and Duties, Ranking and Sale, Exhibition *ad deliberandum*, Choosing of Curators, Transumpt, Wakening, Multiplepointing, Pointing of the Ground, and Furthcoming; all of which may be executed, by leaving short copies without doubles, whether the defenders be forth of Scotland or not; except that a full double must be served on the heritor, in a summons of pointing the ground, and on the common debtor in a furthcoming. See *A. S. 15th Feb. 1723, 1st Jan. 1726, and 19th Feb. 1742; Jurid. Styles, 2d edit. vol. iii. p. 7973; 13 and 14 Vict., c. 36, § 22.*

**Dovecot.** By the statute 1617, c. 19, it is enacted, that no person shall be entitled to build a dovecot or pigeon-house, either in town or country, unless he have lands or teinds belonging to him worth the yearly rent of ten chalders of victual, adjacent to the dovecot, or at least lying within two miles of it. It is also declared, that it shall not be lawful for the person having such qualification to build more than one dovecot within the "bounds foresaid." This statute has been held to impose no restraint on proprietors possessed of a greater rent (*e.g.*, sixty chalders), provided they build only one dovecot within the limits of that ground which yields ten chalders of yearly rent; *Brodie, 3d July 1752. See Kirk. Rep. Mor. p. 3602.* The statute does not extend to dovecots already built; and the legal presumption is, that the dovecot challenged was built before the passing of the act, unless the contrary be proved. If an estate with a dovecot on it is acquired from a person who was legally qualified to build one, the purchaser is entitled to the benefit of the dovecot, although he may not have the legal qualification; but, if it become ruinous he is not entitled to rebuild it; *Ersk. B. ii. tit. 6, § 7; Bank. B. ii. tit. 3, § 167; Stair, B. ii. tit. 3, § 78; Bell's Princ. § 978; Ross's Lect. ii. 173.* Dovecot breakers, and stealers of pigeons therefrom, are declared guilty of theft; and, in addition to repairing the damages, they are punishable by fine or imprisonment. If they have not effects sufficient to pay the fine and damages, they are to be imprisoned or set in the stocks for the first and second offence; and for the third, according to the rigour of the old statutes, they may be capitally punished, even by an inferior court; 1474, c. 61; 1579, c. 84; *Hume, vol. i. p. 80; Ersk. B. i. tit. 4, § 4.* By 1661, c. 38, justices of the peace are directed to execute the acts against breakers of dovecots, &c.; but they cannot judge in

complaints for shooting or killing pigeons; *Murray, 19th Jan. 1797, Mor. p. 7628*; in which case also it was held that the statute 2 Geo. III., c. 29, for the protection of pigeons, does not extend to Scotland. See *Pigeons.*

**Dowager**; a widow endowed; applied to the widows of princes and persons of rank.

**Dowager Queen**; the widow of the King, who, as such, enjoys most of the privileges belonging to the Queen Consort. But it is not high treason to conspire her death, or to violate her chastity, because the succession to the Crown is not thereby endangered. But no man can marry her without a special license from the Sovereign, under pain of forfeiting his lands and goods. *Tomlins' Dict. h. t. See Queen.*

**Dower**; is an English term, signifying the portion which a widow has of the lands of her deceased husband, for the maintenance of herself and the education of her children. *Tomlins, h. t.*

**Dowry**; is a term sometimes used to signify the *dos* or marriage-portion brought by a wife to the husband. See *Dos.*

**Draft.** In mercantile language, the term draft is usually applied to an order or bill drawn by a creditor on his debtor, ordering him to pay the contents either to the drawer himself, or to a third party, and sent to the drawee for acceptance. Acceptance completes the transfer of the debt from the drawer to the payee or porteur. If acceptance be refused, the presentment of the draft for acceptance is held to be equivalent to the intimation of an assignation, and the proper evidence of the completed transfer is the protest for non-acceptance. Drafts of this kind made within sixty days of bankruptcy, in satisfaction or security of prior debts, are reducible under the act 1696, c. 5; *Bell's Com. ii. 20 and 211; Thomson on Bills.* As to the due negotiation of drafts, see *Bill of Exchange.*

All drafts or orders for the payment of money to the bearer on demand must be impressed with a penny stamp, or have an adhesive draft or receipt penny stamp upon them; and when an adhesive stamp is used, the drawer must cancel the stamp by writing on it his name or initials; 16 and 17 *Vict.*, c. 59, and 17 and 18 *Vict.*, c. 83. The exemption from such stamps of drafts on bankers transacting business within fifteen miles from the place where the draft is issued, is taken away by 21 *Vict.*, c. 20, 1858.

By 21 and 22 *Vict.*, c. 79, 1858, it is enacted, that where a cheque or draft on a banker, payable to bearer or to order on demand, shall be issued, *crossed* with the name of a banker, or with two transverse lines, with the words "*and company,*" and any ab-

briefing thereof; such *crossing* shall be deemed a material part of the cheque or draft; and the banker upon whom the draft or cheque is drawn shall not pay it to any other than the banker with whose name it is crossed; and if it is crossed without a banker's name, to any other than a banker, the lawful holder of a cheque uncrossed or crossed with the words "and company," or any abbreviation thereof, may cross it with the name of a banker; and a banker is not responsible for paying a cheque which does not plainly appear to have been crossed, unless he shall have acted *mala fide*, or been guilty of negligence in so paying it.

**Drawee of a Bill;** the person on whom a bill of exchange is drawn. See *Bill of Exchange*.

**Drawer of a Bill.** The drawer is the proper creditor in an inland bill between two parties; and, on the failure of the acceptor, the drawer (unless the contrary has been expressly stipulated), is bound to indemnify the holder of the bill. The claim of the drawer who has been obliged to pay against the acceptor or the drawee who has failed to pay or to accept, is of the nature of damages, and will extend to the principal sum in the draft, with interest, expenses, exchange, and re-exchange, provided the drawee has improperly refused to accept: and to the principal sum, with interest and expenses, where the drawee, after having accepted, has failed to pay; *Bell's Com.* i. 405. The sums contained in bills of exchange, in case of non-acceptance, bear interest from the date of the refusal to accept; and, in case of acceptance and non-payment, from the day of payment; 1681, c. 20; *Bell's Princ.* § 311; *Bell's Illust.* § 311; *Thomson on Bills.* See *Bill of Exchange*.

**Drawn Teind;** was the *ipsa corpora* of the tithe drawn by the titular after the crop was reaped, and before it was removed from the ground. As the proprietor of the crop was liable to heavy penalties if he removed it before the drawing took place, this mode of levying the teind was attended with great hardship, and sometimes, from the titular's delay, with the total loss of the crop. The evil was attempted to be remedied by several enactments, the object of which was to authorize the proprietor of the crop to fix a day for drawing the tithe; and if the titular failed to attend, the proprietor himself was then entitled to make the separation between the stock and teind, and to carry home his share of the crop, leaving the teind sheaves stacked on the ground; 1606, c. 8; 1612, c. 5; 1617, c. 9. The rules for the valuation of teinds, introduced in 1633, have, however, more effectually obviated the inconveniences of the former system. *Stair*, B. ii.

tit. 8, § 22; *Bell's Princ.* §§ 1152, 1157. See *Teinds*; *Connell on Tithes*, i. 125, 160, 256.

**Drilling.** Unlawful drilling, or training to arms, as preparatory to a treasonable rising against the Government, was carried to such an extent in the year 1819, that the Legislature was compelled to interfere; and by the statute 60 Geo. III., c. 1, it is enacted that every person present or assisting at any meeting for training or drilling, or for practising military exercise, assembled without authority from the King, or the lieutenant, or two justices of the peace for the county, may be transported for seven years, or imprisoned, not exceeding two years. Justices of the peace, and all other inferior judges and magistrates, and peace officers, may disperse such meetings, and apprehend those concerned, and deal with them as in cases of bailable offences. Prosecutions under this statute must be raised within six months after the offence; and actions against judges and others for things done by them in pursuance of the act, must be brought within six months. See the statutes 60 Geo. III., c. 1; 1 Geo. IV., c. 1; 6 Geo. IV., c. 47; 7 Will. IV. and 1 Vict., c. 5; *Alison's Princ.* 595. See also *Treason. Sedition*.

**Driving, Careless.** Various legislative provisions have been made with the view of guarding against the accidents likely to arise from carelessness in the driving and management of stage-coaches and similar vehicles. Thus, if the driver of any such coach stop at any place where assistance can be procured, and quit his horses, or the box, before a proper person comes to hold the horses, or if such person quit actual hold of the horses before the driver return to his box, such driver or person, on conviction by confession, view of a justice or magistrate, or oath of one credible witness before any justice or other magistrate of the place, forfeits not more than L.5, nor less than 10s., for each offence. Or, if the driver or guard, by negligence or misconduct, endanger the safety of the passengers or their property, on conviction by similar evidence, he forfeits not more than L.10, nor less than L.5, for every offence, besides repairing the damage; and in case of non-payment, he may be committed to the jail or house of correction for not more than six, or less than three months, at the discretion of the judge. If the coachman permit any other person to drive without consent of a proprietor, or against the consent of the passengers, or quit the box without reasonable occasion, or for longer time than is necessary (although the reins be in the hands of the person on the box), or if, by furious driving, or any negligence or misconduct, he overturn the carriage, or endanger the persons or property of

the passengers, or the property of the owners, for every such offence he forfeits not more than L.10, nor less than L.5. Drivers of stage-coaches, who occasion injury to passengers by furious driving or wilful misconduct, may be punished criminally by fine or imprisonment. See 50 *Geo. III.*, c. 48; 1 *Geo. IV.*, c. 4. Hackney-coaches not plying for hire as stage-coaches, are excepted from these statutes; but offences of the kind here mentioned seem to be punishable at common law. Justices of the peace may convict for the ordinary statutory penalties; but in aggravated cases, the Court of Justiciary is the proper Court. Where personal injury has been sustained by passengers, or where property has been lost or injured, through the misconduct or negligence of drivers, the provisions of the statutes do not affect the injured party's claim for damages against the coach proprietors, under their common law responsibility for the servants or others employed by them; *Bell's Com.* i. 462, *et seq.* Where a person loses his life by an accident arising from negligence or furious driving, the person in fault is held to be guilty of culpable homicide. Under the Road Act, 1 and 2 Will. IV., c. 43, the driver of a vehicle is liable in a penalty not exceeding L.5, besides damages, for riding in the cart, &c., without double reins; for leaving the cart travelling on the road without some person to guide the beast; for allowing a dog to go at large, not chained to the vehicle; for not keeping to the left or near side of the road, on meeting or being overtaken by any other carriage or rider; or for wilfully preventing any other person from passing him or his vehicle. Drivers or owners are liable in a penalty not exceeding 40s. if one driver has the management of more than two carts, &c.; if the last of two carts has more than one horse, and both carts are under the charge of one person; or if the horse of the hindmost cart is not attached by the rein to the back of the foremost cart, and following in the same line not more than six feet behind. Owners are liable in 40s. if the driver is below fourteen years of age. *Barclay's Law of Highway*, 73, *et seq.*; *Hume*, i. 192; *Bell's Sup.* 70, 76; *Bell's Princ.* §§ 168, 2031; *Alison's Princ.* 116; *Prac.* 625. See *Homicide*. See also *Public Carriages. Damages*.

**Droit D'Aubaine.** By the old custom of France, the king was entitled, under the Droit D'Aubaine, to claim the moveable estate of all foreigners who died within his dominions, and that notwithstanding a testamentary settlement. But where a person went to France as a traveller, merchant, or public minister, with no intention of fixing his domicile there, the Droit D'Aubaine was

excluded; and the Swiss, Savoyards, Scotch, and Portuguese were exempted. This ancient privilege was finally abolished in 1819. See *Ersk. B. iii.* tit. 10, § 10; and *Encyc. Brit. voce Aubaine*.

**Drove Road;** is the name given to a servitude road used for the passage of sheep or cattle to annual fairs or cattle markets. Such roads do not possess any of the characteristics of highways or public roads, but in the ordinary case consist merely of a particular tract, or course, along which the cattle are in use to be driven. The privilege of using a road of this description is a servitude which may be acquired by prescription; *Porteous*, 17th June 1773; *Mor.* p. 14512. See, on this subject, the case of the *Marquis of Breadalbane v. M'Gregor, House of Lords*, 14th July 1850; 7 *Bell's App.* p. 43. *Servitude. Road*.

**Drunkness.** The offence of notorious and excessive drinking, under several statutes of the Scots Parliaments, was punishable by fine or imprisonment, or by corporal pains. See, in particular, the statutes 1436, c. 144; 1617, c. 20; 1661, c. 19; 1672, c. 22; 1693, c. 40; 1696, c. 31; and by 1661, c. 38, the execution of the statutes against drunkenness is committed to justices of the peace. Those statutes, however, have fallen into desuetude; and the mere indecency of getting drunk does not now, in the general case, subject the offender to any punishment, although it frequently leads to the commission of greater crimes; *Hume*, i. 465. But in the Edinburgh Police Act, and in the General Police Act for Towns (13 and 14 Vict., c. 33, § 97), penalties are enacted against drunkenness accompanied by riotous or indecent behaviour in the streets; and, in particular circumstances, mere drunkenness is still punishable; *Bell's Notes to Hume*, p. 165. Persons in a state of complete drunkenness, as being incapable of legal consent, cannot enter into a contract or obligation; but a lesser degree of intoxication will be no sufficient ground for reducing the contract, unless fraud is proved upon the part of the obligee. Drunkenness, as a ground of nullity, is not pleadable by way of exception; *Stair*, B. i. tit. 10, § 13, and B. iv. tit. 20, § 49; *Bank.* B. i. tit 9, § 66; *Ersk. B. iii.* tit. 1, § 16. Where a person is charged with the commission of a crime, he will not, in the ordinary case, be allowed to plead intoxication as a defence; *Hume*, i. 45. See also *More's Notes*, p. xiv. lix.; *Bell's Com.* (5th edit.) i. 297; *Bell's Princ.* § 14; *Illust. ib.*; *Blair's Justice of Peace*, h. t.; *Tait's Justice of Peace*, h. t.

**Dry Multure;** is a yearly sum of money, or quantity of corn paid to a mill, whether those liable in the payment grind their grain at the mill or not; *Bell's Princ.* § 1018;

*Brown's Synop.* pp. 1526, 2545; *Hunter's Landlord and Tenant*, p. 62. See *Thirlage*.

**Duces Tecum**; in English law is a writ commanding a person to appear in a court of law, and to bring with him writings, evidences, or other things in his custody, which may be required in *modum probationis*. The Scotch law diligence against havers of writings is somewhat analogous to the English writ, *duces tecum*. *Tomlins, h. t.* See *Diligence. Haver*.

**Duelling**; is the act of fighting in single combat upon a previous challenge given by one party, and accepted by the other. Where, in consequence of such appointment, a meeting takes place, and death ensues, it is accounted murder by the law of Scotland, however fair the duel may have been; and principals and seconds are equally exposed to the criminal charge; but there is no modern instance of a capital conviction on such a charge, where there has been nothing dishonourable in the conduct of the accused. By 1600, c. 12, the offence of fighting a duel without the king's permission, even although death did not follow, was declared a capital crime; and by 1696, c. 35, any person concerned in giving or accepting a challenge to fight, or engaged therein, although no fighting ensued, was punishable by banishment and escheat of moveables. But both of those statutes were repealed by the statute 59 Geo. III., c. 70. *Hume, i.* 230, 247, 442, *et seq.*; *Ersk. B. iv. tit. 4, § 49*; *Tait's Justice of Peace, h. t.*; *Alison's Princ.* 53; *Steele, 75*. See *Homicide. Challenge*.

**Duellum**; "duorum bellum vel plurimum," single battle or combat. *Skene, h. t.* See *Championships*.

**Duke**. In Great Britain the title of Duke is the next dignity to that of Prince of Wales. The first English Duke was Edward the Black Prince, who was created Duke of Cornwall in the year 1337. *Tomlins' Dict. h. t.*

**Dumb**. See *Deaf and Dumb*.

**Dung**. In the Roman law, dunghills were held to be accessories of the soil, except in the case where the usual practice of the farm, or the established intention of the proprietor, was to sell the dung separately. By the law of Scotland, in questions between landlord and tenant, dunghills are held to be moveable; but in questions of succession, arising during the currency of the lease, or on the death of a proprietor in the natural possession of his land, they might perhaps be regarded as heritable *destinatione*, where the evident intention of the proprietor was that the dung should be laid upon the land. See *Bell's Com. vol. ii. p. 3*; *Bell's Princ. §§ 1261-1475*; *Bell's Illust. § 1261*; *Bell on Leases, i. 327, 4th edit.*; *Roxburgh, Bligh's Appeal Cases, ii. 156*; *Hunter's Landlord and Tenant, i.*

pp. 263, 771. See also *Heritable and Moveable*.

**Duplicate**; in its most usual acceptation, signifies a copy or transcript of a deed, or other writing, made to provide against accidents, or for other reasons. In the case of mutual contracts, such as leases, contracts of marriage, copartnership, and the like, duplicates of the deed are frequently prepared, each of which is signed by all the contracting parties; and, where this is done, the parties are bound if one of the duplicates be regularly executed, although the others should be defective in the necessary solemnities; *Cub-bison, 3d July 1716, Mor. p. 16988*; *Hunter's Landlord and Tenant, pp. 312, 315*; *Tait on Evidence, 3d edit. p. 111*; *Dickson on Evidence, §§ 135, 886, 904*.

**Duplicates**. This is a pleading formerly in use in inferior courts. The procedure in Sheriff Courts is now regulated by the act 16 and 17 Vict., c. 80, 1853. See *Record. Condescendence*.

**Duress**; in English law, the plea of a man who has obliged himself to pay or perform, or who has committed a misdemeanour, that he was constrained to do so, and therefore ought to be free from the consequences. There is both *duress of imprisonment* and *duress per minas*. *Tomlins' Dict. h. t.*

**Dusty-Foot**. In England there is a court called a *Pie-Powder-Court*, held in fairs, to do justice between buyers and sellers, and to redress disorders committed in the fair; and there are traces of a similar court in Scotland, although it has long been out of use. Writers differ about the etymology of the word; but, according to Lord Kames, courts of *Pie-Powder* are so called, because fairs are generally composed of pedlars or wayfaring persons, who in France bear the name of *Pied Poudretz*, and in Scotland of *Dusty-Foot*. See *Regiam Majestatem, Burrow Laws, c. 134, 140*; *Kames' Stat. Law, note 5, p. 412*. See also *Tomlins' Dict. voce Court*.

**Dwelling-House**. In England, a man's dwelling-house is a sanctuary against the personal execution of the law, with these exceptions:—*1st*, It affords no protection to a person charged with a crime; *2d*, Crown debtors are not protected in their own houses; *3d*, Even in the case of ordinary debts, if the sheriff or bailiffs succeed in getting admission to the house without violence, they may take the debtor out of it; *4th*, After repeated *capias* and outlawry, the sheriff, in virtue of a writ, called a *capias ullaatum*, may break into the house and seize the person against whom the writ is directed; and, *5th*, A *capias* may be issued from the Court of Queen's Bench, or of Chancery, for compelling a man to find sureties to keep the peace; and, *fictione juris*, this

process is sometimes used to effect execution on common debts. In Scotland, also, a man's house is a sanctuary to him against imprisonment on an act of warding, which contains no warrant for breaking open doors. But it is no protection against the execution of a criminal warrant, nor against letters of caption, which contain a warrant to apprehend the debtor as a rebel, against whom the whole executive power may be directed; and the caption accordingly contains an express warrant to break open doors in search of the debtor. See *Ross's Lect.* vol. i. p. 335, *et seq.*; *Bell's Com.* (5th edit.) ii. 570; *Hunter's Landlord and Tenant*. See also *Caption*. As to the question, what is to be considered a man's dwelling-house, with reference to the crime of hamesucken, see *Hamesucken*; and with regard to the mode of citing a party at his dwelling-house in a civil or criminal process, see *Citation*. *Execution. Criminal Prosecution. Domicile.*

**Dying Declaration.** See *Declaration*.

**Dyvour, or Dyour;** according to Skene, is a bankrupt of "bairman; who being involved and drowned in debts, and not able to pay or satisfy the same, for eschewing of prison, and other pains, makes cession and assignation of all his goods and gear in favours of his creditors, and does his devour and duty to them, proclaiming himself bairman, and indigent, and becoming debt-bound to them of all he has." By Act of Sederunt, 17th May 1606, it is ordained that a pillory be erected near the market-cross of Edinburgh, with a seat upon it, upon which all dyvours are to be exposed once on a market-day; and, before their liberation from jail, they are required to provide themselves with a hat or bonnet of yellow colour, to be worn by them while sitting on

the pillory, and constantly thereafter, while they continue dyvours, under the pain of three months' imprisonment, if they be found at any time without it. By Acts of Sederunt, 26th Feb. 1669, and 23d Jan. 1673, the habit of a dyvour is appointed to be a coat or upper garment, half yellow and half brown, with a party-coloured cap or hood, to be worn on the head; and formerly all decreets of *cessio bonorum* required to bear a clause expressly ordaining the bankrupt to wear this habit; any of his creditors being entitled to imprison him if he were found without it. The Act of Sederunt 18th July 1688 contains a more minute description of the habit, and declares, that the Lords will not hereafter dispense with it, unless in the case of innocent misfortunes liquidly libelled and proved. And, finally, by the statute 1696, c. 5, the Lords of Session are prohibited to dispense with the dyvour's habit, unless, in the process of *cessio bonorum*, the bankrupt's failure through misfortune be libelled, sustained, and proved. In awarding the benefit of the *cessio bonorum*, it was the practice, until the passing of the *cessio* act, 6 and 7 Will. IV., c. 56, to dispense with the habit; and by that statute (§ 18) it is abolished, and the statute 1696, c. 5, repealed. There were two cases, however, of comparatively recent date, in which, where the bankrupt's losses had arisen from dealing in smuggled goods, the court granted the benefit of the *cessio*, but refused to dispense with the habit. *Drysdale*, 20th Feb. 1752, *Mor.* p. 11781; *Dick*, 17th Nov. 1775, *Mor.* p. 11791. See *Stair*, B. iv. tit. 52, § 34; *More's Notes*, p. ccccxxxvii.; *Ersk.* B. iv. tit. 3, § 27; *Bell's Com.* ii. 582; *Shand's Practise*, pp. 812, 822; *Skene, h. t.* See also *Cessio Bonorum*.

## E

**Earl, or Comes.** This title of nobility, according to English authorities, was known amongst the Saxons, and is the most ancient in the English peerage. Formerly, both in England and Scotland, an Earl or Count appears to have been the governor of a county or province, over which he had the chief jurisdiction. The office was at first held only for life; but William the Conqueror rendered it feudal and hereditary in England, and endowed it with certain fees exigible from the suitors in the Earl's court. Deputies for the earls were afterwards appointed, who were called *Viccomites* or *Sheriffs*; and the earldom itself came to be looked upon not as an office, but as a territorial dignity, which passed along with the land to which it was attached. The dignity of earl, however, like all other titles of honour, is now merely per-

sonal, and independent of any territorial property. It is the next dignity to that of marquis, and immediately superior to that of viscount; and as those who were anciently created earls were of the blood royal, the Sovereign, in all formal writings, addresses an earl as "cousin." *Ersk.* B. i. tit. 4, § 1; *Wight on Elections*, p. 53; *Tomlin's Dict. h. t.* See *Dignities*.

**Earnest, Arrhæ, or Arles;** is a small sum of money, or part of a larger quantity of any other commodity, given as a corroboration, symbol, or token of the completion of a bargain. Doubts, founded upon some texts of the Roman law, were at one time entertained, whether the giving of earnest did not imply a power to either party to resile on forfeiting the earnest; but in the law of Scotland it has been long settled, that earnest is to be held

merely as evidence of the completion of the contract; and that the party who resiles, besides losing the earnest he has paid, may be compelled to perform his obligation. Where the earnest given bears a considerable proportion to the whole price or consideration, it will be imputed as part of it; but as, in the ordinary case, the earnest is trifling in value, it is presumed to be what is called *dead earnest*, and not taken into account in the reckoning. Earnest is in no case essential to the completion of the bargain; and although, in the case of a sale, earnest perfects the contract, and vests the property in the purchaser, yet it does not affect the seller's right to demand the full price before delivery, if credit has not been given, or to stop the goods *in transitu*, in the case of insolvency. Nor does it affect any of the other rights vested in the seller prior to delivery. *Stair*, B. i. tit. 14, § 3; *More's Notes*, p. xcv.; *Brodie's Supp.* p. 853; *Ersk.* B. iii. tit. 3, § 5; *Bank.* B. i. tit. 19, § 20; *Bell's Princ.* § 173; *Mackenzie*, B. iii. tit. 3, § 1; *Tait's Justice of Peace*, pp. 327, 346; *Hutch. Justice of Peace*, vol. ii. p. 159, 2d edit.; *Hunter's Landlord and Tenant*, p. 277; *Brown on Sale*, p. 11, *et seq.* See *Sale. Delivery.* In hiring domestic servants, it is usual to give earnest or arles; but this is not necessary to the validity of the agreement; for if it have been actually completed by legal consent, it is binding without arles; and where arles have been given, neither party can resile on forfeiting the arles, unless with the consent of the other party. 2 *Fraser's Pers. & Dom. Rel.* 376.

**Basement**; the English law term equivalent to the Scotch term *Servitude*. It is defined to be a service or convenience which one neighbour has of another, by charter or prescription, without profit; as a way through his land, a sink, or the like. *Tomlins' Dict. h. t.*

**East India Company**; is the name given to a company of merchants incorporated and recognised by sundry acts of Parliament, and who at one time enjoyed almost the exclusive trade, and a large share in the administration of the government of the British possessions in India. The countries originally comprehended within the exclusive charter of the Company, are described in the stat. 9 and 10 Will. III., c. 44, as the "countries, islands, ports, cities, &c., of Asia, Africa, and America, or any of them, beyond the Cape of Good Hope to the Straits of Magellan, where any trade or traffic of merchandize is, or may be used or had." It is foreign to the object of this work to attempt any analysis of the numerous legislative enactments connected with the rights and privileges of this establishment; but, whether it be regarded in a political or in a commercial aspect, as it is a

subject of much general interest, it may not be improper to refer to the article "East India Company" in *Tomlins' Law Dictionary*, where an historical account of the origin of the Company, and a systematic arrangement and enumeration of the statutes relating to it, will be found. By 21 and 22 Vict., c. 106, the government of India, and of all territories in possession of the East India Company, and the whole powers and rights of the East India Company in relation thereto, are transferred to and vested in the Crown.

**Easter**; is the day on which our Saviour's Resurrection is commemorated. Easter-day is always the first Sunday after the full moon, which happens upon or next after the 21st day of March; and, if the full moon happen upon a Sunday, Easter-day is the Sunday after. It is not observed as a festival in the Church of Scotland.

**Eaves-Drop.** A proprietor may build, if he pleases, to the confines of his property, provided the eaves-drop from his building does not fall on the adjoining property. It is enough, however, that the eaves-drop actually falls within the builder's property; and the conterminous proprietor has no right to complain, although the water, following the natural inclination of the ground, should afterwards run into his property. The Roman law required a proprietor who had no servitude *stillicidii*, to place his building two feet and a-half within his march. In Scotland there is no express statute on the subject; but by custom, nine inches at the least seem to be necessary for the eaves-drop; *Garrichs*, 7th March 1769, *Mor.* p. 13178; *Stair*, B. ii. tit. 7, § 7; *Bank.* B. ii. tit. 7, § 13; *Ersk.* B. ii. tit. 9, § 9. See *Stillicidia*.

**Eaves-Droppers**; persons who listen under the windows or eaves of a house, to disturb the public peace by framing slanderous or mischievous tales. In England, such persons are punishable by fine, and may be compelled to find surety for their good behaviour; and, as this is an offence against the public peace, the English statutes relating to it seem to be extended to Scotland under the general clause in the stat. 6 Anne, c. 6; but whether that be the case or not, a nuisance of this description would be reached by the common law of Scotland, both directly and indirectly. See *Blackstone*, vol. iv. p. 169; *Tait's Just. of Peace*, p. 382.

**Ecclesiastical Constitution.** See *Church of Scotland. Church Judicatories*.

**Edict Nautæ, Canpones, Stabularii.** See *Nautæ, &c.*

**Edict in a Confirmation.** A writ in the form of a precept by the commissary of the bounds (now the sheriff as commissary, or the sheriff of Edinburgh, where the parties are

forth of the kingdom), ordaining the next of kin of a deceased party, and all others having interest, to be cited edictally, to hear executors decerned and confirmed to the defunct. This writ, until recently, was in use to be applied for by persons desiring to be decerned executor. It was executed by a messenger-at-arms, or by an officer of court, on a market-day, at the head burgh of the county where the deceased had his domicile, and at the parish-church door on a Sunday, at the dismissal of the congregation. If the deceased was absent from Scotland, *animo remanendi*, the edict was executed in the same manner at the market-cross of Edinburgh, as the *commune forum*, and at the door of the parish-church of St Giles; i.e., the High Church of Edinburgh. The *inducæ* were in all cases nine days; and it was unnecessary to serve the edict on any one personally, except in the case of a confirmation *ad omnia vel male apprehensata*, where the executor already confirmed was personally cited on the edict. On the expiration of the *inducæ*, the edict might be called in court; and, if no competitor appeared, the mover of the edict was decerned executor. If there was a competition, the claimants fell to be preferred according to the legal order, without the necessity of any new edict, whether the mover of the edict should be the person ultimately preferred or not. Since the article Confirmation was printed, the procedure has been changed. By 21 and 22 Vict., c. 56, the practice of raising edicts is abolished, and parties must now proceed by petition. *Stair*, B. iii. tit. 8, § 54; *Ersk.* B. iii. tit. 9, § 31; *Bell's Com.* ii. 87; *Jurid. Styles*, vol. ii. p. 500, *et seq.*, 3d edit. See also *Confirmation. Executor.*

**Edictal Citation or Intimation.** An edictal citation is a citation which was formerly published at the market-cross of Edinburgh, and the pier and shore of Leith, or at the head burgh of the county where the party so cited has his residence. In civil causes this form of citation was necessary, where the party cited, although amenable to the courts of this country, was out of Scotland; and, in that case, the citation required to be given by a messenger-at-arms, who made proclamation at the market-cross of Edinburgh and the pier and shore of Leith, and left copies of citation for the defender, at those places respectively; *Ersk.* B. i. tit. 2, § 18. But the practice on this point was altered by the judiciary act 6 Geo. IV. c. 120, whereby it was enacted, that after 11th November 1825, the then subsisting forms of edictal citation, charge, publication, citation, and service at the market-cross of Edinburgh, pier and shore of Leith, as against persons forth of Scotland, should cease and be discontinued, and in lieu

thereof, such edictal citations, charges, publications, citations, and services, as against persons forth of Scotland, should be done and performed by delivery of copies at the record-office of the keeper of the records of the Court of Session. An abstract of the copy so delivered, specifying the time of service, the nature of the writ, the names and designations of the parties, and the day against which he is called to give obedience, or to make appearance, is then to be registered in a book kept for the purpose; and the keeper is further enjoined to keep three separate registers, one for citations on summonses and orders of service against parties forth of Scotland; another for citations by virtue of letters of supplement to persons forth of Scotland, to appear before any of the inferior courts; and a third for all charges, intimations, and publications to persons forth of Scotland, given by virtue of letters other than summonses passing the Signet. These abstracts, in so far as they comprehend citations by virtue of summonses, precepts, warrants of court, and letters of supplement, are directed to be periodically printed by the keeper of the record at the end of each successive period of fourteen days, from and after 11th November 1825; and the record is to be at all times open for inspection, the copies left being preserved for three years, and the keeper being remunerated for his trouble from the fee fund; 6 *Geo. IV.*, c. 120, §§ 51, 52; *A. G.* 24th Dec. 1838, and 13 and 14 *Vict.*, c. 36, § 22. See *Citation. Curatory. Minor.* In criminal prosecutions, if the accused is not found personally, in addition to leaving a copy of the indictment or criminal letters at his dwelling-place, he must be edictally cited at the market-cross of the head burgh of the county where he resides, and a copy left there for him; 1555, c. 33; and in order that such edictal citation may be the more public, the Act 1587, c. 85, requires that it shall be given between the hours of eight A.M. and twelve o'clock noon, "in presence of famous witnesses specially designed." If the accused have no fixed domicile, and cannot be found personally, the Court of Justiciary will grant a warrant for citing him edictally at the head burgh of the shire, or shires, where he has chiefly resorted; and if he be out of Scotland, special authority will, in like manner, be given for citing him edictally, at the market-cross of Edinburgh, and the pier and shore of Leith, on *inducæ* of sixty days, the ordinary *inducæ* in all criminal cases being fifteen days; *Hume*, ii. 255, *et seq.*; *Alison's Prac.* 333. See *Criminal Prosecution. Execution. Inducæ.* On the same principle on which edictal citations are founded, our practice permits edictal executions of diligences and intimations of various kinds. Thus, where



the parties are abroad, a warrant may be obtained for the edictal execution of hornings, inhibitions, arrestments, and other diligences. So also, edictal intimations of assignments, premonitions, and requisitions, in the case of redeemable rights and the like, are authorized; letters of supplement issuing under authority of the Court of Session, being the warrant to the messenger and notary, the former of whom makes the intimation, and takes instruments in the hands of the latter, the execution being signed by both. By 54 Geo. III., c. 137, § 3, edictal executions of arrestments, in order to interpell an arrestee who is out of Scotland, must be intimated to his known agent in Scotland, the object of the enactment being, to protect debtors residing abroad, who have paid *bona fide*; *Syme*, 7th Dec. 1824, 3 S. & D. 372. But, unless by express consent of parties, all these edictal citations and intimations must be given, or made, in virtue of the royal warrant contained either in the summons, or obtained by presenting a bill at the Bill-Chamber. *Stair*, B. i. tit. 18, § 4; *Ross's Lect.* vol. i. pp. 202, 293, 479, *et seq.*; *Shand's Prac.* p. 243. See also *Bills of Signet Letters. Citation. Execution.*

**Edinburgh**, the capital of Scotland, and the seat of all the Scottish supreme courts of justice. The market-cross of Edinburgh, and the pier and shore of Leith, are held, *fictione juris*, to be the *communis patria*, and the Court of Session is the *commune forum* of all Scotchmen resident abroad, and amenable to the courts of this country; *Stair*, B. i. tit. 18, § 4; *Erst.* B. i. tit. 2, § 18; *Brown's Synop. h. i.* and pp. 390, 575, 1933, 2306; *Ross's Lect.* i. 202, 293; ii. 359, 364. See *Edictal Citation*. Various acts of the Scotch Parliament were passed for regulating the markets, police, &c., of Edinburgh, most of which have been superseded by more recent police statutes. The act 1698, c. 8, contains many useful regulations concerning the manner of building in this city, and prohibits any new house to be built higher than five storeys above the causeway (*i. e.*, the causeway of the front street). This statute was held to be in force, with respect to property within the old town of Edinburgh, in the case of *Buchan*, 5th August 1760, *Mor.* p. 13173; and more recently as to buildings in the suburbs, not within the jurisdiction of the Dean of Guild; *Procurator-fiscal of Edinburgh*, 20th June 1789, *Mor.* p. 13187. The present police acts for Edinburgh are 11th and 12th Vict., c. 113, and 17th and 18th Vict., c. 118. The extent of the municipality and the administration of its affairs are regulated by the 19th and 20 Vict., c. 32, called the "Edinburgh Municipality Extension Act, 1856." With regard to what has been sometimes called the new town law of Edinburgh,

or the restraints on the use of property imposed by a building plan exhibited to feuars, see *Property. Servitude*. See also *Sprott, Dow's App. Cases*, iv. 290; and *Gordon*, vi. 87.

Edinburgh returns two members to the British Parliament. See *Reform Act*.

**Effectual Adjudication.** An adjudication is completed as a feudal right, in competition with other feudal rights, by a charter of adjudication and sasine, or by infeftment on the warrant in the decree of adjudication. But, in questions with other adjudgers whose rights are not feudalized, and in reference to the *pari passu* ranking, the statute 54 Geo. III., c. 137, § 11, in order to fix more clearly what diligence is necessary to make an adjudication effectual, enacts, "That the presenting a signature in Exchequer when the holding is of the Crown,—or the executing a general charge of horning against superiors at the market-cross of Edinburgh, and pier and shore of Leith, when the holding is of a subject, and recording an abstract of the said signature, or the said charge, in the Register of Abbreviates of Adjudications,—shall be held in all time coming as the proper diligence for the purpose aforesaid." This act was repealed by the act 19 and 20 Vict., c. 79, 1856; but the act 19 and 20 Vict., c. 91, § 6, enacts, that the lodging of a draft charter and note in the office of Presenter of Signatures, when the proceeding is of the Crown, or the executing a charge of horning against superiors when the holding is of a subject; and, secondly, a copy of such note, and an abstract of such draft charter or such charge in the Register of Abbreviates of Adjudications,—shall be held as the proper diligence for making an adjudication effectual. In burgage subjects, the general charge and recording in the Register of Abbreviates are sufficient; and, by 1661, c. 62, all adjudications led prior to the first effectual one, or within year and day after it, are to be ranked *pari passu*. As to the mode of reckoning the year and day, see *Computation of time*. The first effectual adjudication, being thus the criterion of the *pari passu* preference, is held not merely as a private diligence belonging to the user, but as a general diligence in which all the adjudicating creditors of the debtor have an interest; nor, relatively to the other adjudications, will it lose its legal character of the *first effectual adjudication*, although the debt on which it proceeds may have been paid off, and the adjudication thus extinguished as an individual diligence. *Bell's Com.* i. 718. See also *Adjudication. Charge by Adjudgers*.

**Effairs, or Effeiring.** This word occurs frequently in Scotch law language, and signifies, *corresponding to, or relating to*. The interest *effeiring* to a particular sum, is the

interest corresponding to the sum. "*In form as effirs*," means, in such form as in law belongs to the thing. Some etymological speculations about the term will be found in *Ross's Lect.* vol. i., p. 52.

**Egyptians.** The Egyptians or Gypsies, a distinct race, who sprung from the East, spread over all Europe, and became, from their vagrant and dissolute habits an intolerable nuisance, have been the object of severe regulations in most of the kingdoms of Europe. In Scotland, they are taken notice of in all the statutes for the punishment of rogues and vagabonds; and, by 1661, c. 38, justices of the peace are empowered to execute the laws against them. By an order of the Privy Council in June 1603, confirmed by the statute 1609, c. 13, the whole race was ordained to quit Scotland, under the pain of death if they returned; and even the offence of being *habit and repute* an Egyptian is, by that statute, declared capital. Under the statute several convictions took place; but the progress of civilization has mitigated the severity of the law; and the mere fact of being an Egyptian, unless coupled with some other charge, such as of theft, or of idle and disorderly conduct, will not be considered as a legitimate ground of prosecution or of punishment. See *Hume*, i. 471, *et seq.*; *Ersk.* B. iv. tit. 4, § 64; *Boyd's Justice*, 123.

**Eik to a Reversion.** The reverser in a wadset right is the borrower, who, under his right of reversion, is entitled to redeem the wadset; that is, to have the land restored to him on repaying the sum advanced by the wadsetter. An eik, or addition, to a reversion, is a deed granted by the reverser, acknowledging the receipt of a farther sum borrowed from the wadsetter, and declaring that the wadset shall not be redeemable until repayment of the additional loan, as well as the original one. These *eiks*, although not specially mentioned in the statutes 1469, c. 28, and 1617, c. 16, yet, being additions adjoined to the reversion, must be governed by the rules applicable to the reversion itself, of which they make a part, and are therefore *real rights* effectual against singular successors, if registered according to the directions of the statute 1617, c. 16. *Stair*, B. ii. tit. 10, § 4; *Ersk.* B. ii. tit. 8, § 10; *Bank*. B. ii. tit. 10, § 21; *Jurid. Styles*, 3d edit. vol. i., p. 591; *Ross's Lect.* ii. 339. See *Wadset*.

**Eik to a Confirmation or Testament;** is an addition to the inventory made up by an executor in his confirmation. When, subsequently to the expeding of a confirmation, any additional effects belonging to the deceased have been discovered, the party who has confirmed may, under authority of the commissary, *eik* those effects to the confirmation.

This is done by lodging with the commissary-clerk a note of the additions to be made, whereupon the executor receives an extract, which, according to the former practice, enumerated the articles comprehended in the eik; although a reference, in the extract, to the inventory as recorded in the Commissary-court books, seems now to be sufficient—the extract stating merely the *summa* in that inventory. See *A. S.* 21st Feb. 1824. By the stat. 4 Geo. IV., c. 98, § 3, it is enacted, that after the 1st Jan. 1824, every person requiring confirmation shall confirm the whole moveable estate of the deceased, known at the time, to which such person shall make oath; "provided always, that it shall and may be lawful to eik to such confirmation any part of such estate that may afterwards be discovered, provided the whole of such estate so discovered be added upon oath, as aforesaid," excepting special assignments, which remain as under the act 1690, c. 26. Where the executor confirmed appears to have fraudulently omitted, or undervalued, any effects belonging to the deceased, any creditor, or other person interested, may apply to the commissary to be confirmed executor *ad omnia vel male apprehentiata*. *Ersk.* B. iii. tit. 9, § 36, *et seq.*; *Bank*. B. iii. tit. 8, § 61; *Jurid. Styles*, ii. 497, *et seq.* 2d edit. See *Confirmation. Executor.*

**Ejection and Intrusion.** Ejection is the violent taking possession of lands or houses, by illegally expelling the present possessor; and intrusion is the entry to possession, and the violent detention of the subject, without the consent of the parties interested, or other legal warrant. These delinquencies as to heritage are analogous to *spuilzie* of moveables; and they give rise to a penal action of *ejection and intrusion*, for recovering the possession, with the violent profits and damages, according to the pursuer's oath *in litem*. This action can be insisted in by such persons only as were, either by themselves or by their servants or cottars, in possession of the subjects from which they were ejected. Hence, where tenants have been illegally expelled, and the natural occupation seized by an intruder, the tenants are the proper pursuers; and without their consent or concurrence, the landlord cannot insist in the penal action. But, in such a case, even without the tenant's consent, the landlord may pursue the intruder to remove without warning, and to pay the ordinary rent, and any damage which the landlord may have suffered through the illegal act. A tenant who, after the expiration of his lease, and after having been legally warned to remove, continues to possess without the landlord's consent, will be held as a violent possessor, and will be subject to an action of ejection and intrusion, in the same

manner as if he had been a stranger. The defender in an action of ejection and intrusion, if he plead any defence not instantly verified, must find caution for the violent profits; 1594, c. 217; *A. S. 11th July 1839*, § 34. As to the penal consequences or violent profits, this action prescribes in three years after the forcible entry or intrusion, 1579, c. 81; but the injured party may, even after the expiration of the three years, pursue the offender to remove, without warning, and to pay the ordinary rent and damages. *Skair*, B. i. tit. 9, § 25, *et seq.*, and B. iv. tit. 28; *More's Notes*, p. cccxxxiii; *Bank*, B. i. tit. 10, § 145; *Ersk.* B. iv. tit. 1, § 15; *Jurid. Styles*, 2d edit. vol. iii., pp. 129, 654; *Hunter's Landlord and Tenant*, ii. 192, *et seq.* See *Violent Profits*.

**Ejection, Letters of.** Letters of ejection are letters under the royal signet, authorizing and commanding the sheriff to eject a tenant, or other possessor of land, who has been decreed to remove, and who has disobeyed a charge to remove, proceeding on letters of horning on the decree. Where the decree of removing is pronounced by a sheriff, he may grant a precept of ejection, directed to his own officers, without the necessity of a previous charge of horning. These letters or precepts of ejection are executed by throwing out of the house some part of the defender's household furniture, and extinguishing his fire. Anciently, where the execution of letters of ejection was forcibly opposed, the Scotch Privy Council was in use to grant *letters of fire and sword*, authorizing the sheriff to call for the assistance of the county to dispossess the party. But by the present practice, where the execution of any decree or other lawful diligence is opposed by a force which the civil magistrate and his officers are unable to overcome, they may apply for military aid to enforce the execution *manu militari*; *Ersk.* B. iv. tit. 3, § 17; *Bank*, B. ii. tit. 9, § 74, and B. iv. tit. 41, § 17. In ejecting tenants on the expiration of a lease, the landlord may proceed either under the statute 1555, c. 39, or under the Act of Sederunt, 14th Dec. 1756. Under the statute, after the legal warning, decree of removing may be obtained either in the Court of Session or before the sheriff. If the decree be taken in the Court of Session, letters of horning must be raised on it; and if the tenant disobey the charge, letters of ejection may follow. If the decree of removing be pronounced by the sheriff, no letters of horning are necessary; and the ejection may proceed at once on the sheriff's precept of ejection; *Bell on Leases*, ii. 66, 4th edit. The rule prescribed by the Act of Sederunt 1756 is, that where the lease contains an obligation to remove without warning, the landlord may charge the tenant forty days before Whit-

sunday, on letters of horning raised on the lease, to remove at the stipulated term; and, on producing such horning duly executed to the sheriff, he is authorized, within six days after the term of removal, to eject the tenant. Where there is no obligation to remove in the lease, the landlord, under the Act of Sederunt, may raise an action of removing before the sheriff; and if that action be called in court forty days before Whitsunday, it is held equivalent to a warning under the statute 1555; and on a decree of removing in that action, a precept of ejection may be obtained, under which the tenant may be ejected within forty-eight hours after the term of removal. The same summary ejection may take place, where the decree of removing proceeds on any of the grounds of irritancy of the lease, mentioned in the Act of Sederunt 1756. See the forms of ejection fully explained in *Bell on Leases*, App. No. 3; *Darling's Prac.* p. 334, *et seq.*; *Ross's Lect.* ii. 510, 535, *et seq.*; *Hunter's Landlord and Tenant*, 36, ii. *et seq.*; *Jurid. Styles*, iii. 686, 771, 992; *Watson's Stat. Law*, h. t. See also *Removing*, and the Act 16 and 17 Vict., c. 80, 1855, § 29, *et seq.*, enacting new procedure in actions of removing.

**Ejectment**; an English law term, signifying an action at law, by which a person ousted and removed from the possession of an estate for years, may recover that possession; and which action is now used as the general mode of trying disputed titles to lands and tenements in England. See *Tomlins' Dict. h. t.*; *Ross's Lect.* ii. 55, 3.

**Elder.** Elders are the lay members of church courts under the Presbyterian system of church government. In every kirk-session there must be at least two elders. The qualifications for the eldership are, that the elder shall be a man of good and exemplary moral character, and that he shall have attained the age of twenty-one years at least. He must be a communicant, and inhabitant of the parish, residing there for at least six weeks annually; or an heritor in the parish, liable in stipend and other parochial burdens; or the apparent heir of such an heritor. Where one is proposed as an elder who resides only occasionally in the parish, a certificate must be produced, under the hand of the minister and kirk-session of the parish where he generally resides, that he is of unblemished character, and regular in his attendance on religious ordinances. Elders are chosen by the kirk-session, and approved of by the congregation. When the choice or election has been agreed on in the kirk-session, the name of the proposed elder is read from the pulpit, in a paper called an edict, appointing a day, at the distance of not less than ten days, for the ordination. If no good objection be stated

to the appointment, the elder is then ordained before the congregation. On his ordination, he is required to declare his belief in the Scriptures of the Old and New Testament; his assent to the Confession of Faith; his conviction that the Presbyterian government and discipline are in accordance with the Word of God; to promise to conform to these standards, and to follow no divisive courses, directly or indirectly, to their prejudice; and, finally, he is required to accept the office of the eldership, and to engage to perform its duties. He is then set apart (as it is expressed) for the office, by prayer, accompanied with an exhortation to himself, and an address from the pulpit to the congregation. After this ceremony, he becomes a member of the kirk-session, in which he has an equal vote with the minister of the parish, and may be chosen representative elder of the kirk-session in the presbytery, or in any other church judicatory. When a parish is entirely without elders, the minister applies to the presbytery of the bounds, to appoint a kirk-session for his parish; or the presbytery proceeds of itself to do so. A meeting is held of the heads of families; fit individuals are selected; their edict is appointed to be served; the presbytery meets again for their ordination; and the forms, as above described, are observed. See *Kirk-Session. Church Judicatories*. The original design of the institution of the eldership appears to have been, to supply the minister of the parish with a parochial council, to assist him in exercising ecclesiastical discipline, and to advise and cooperate with him in matters affecting the interests of religion. Hence, an elder who discharges the religious duties of his office with fidelity, ought to take a close inspection of the moral and religious conduct of the parishioners, and to assist the clergyman in visiting and catechising the parish; he is also required to serve at the communion table. An elder removing from one parish to another may be admitted *ad eundem*, in the kirk-session of the parish to which he removes, without being re-ordained. And where an elder does not reside within the parish, and does not return to it within twelve months to discharge his duties, it is competent to the kirk-session to declare him no longer a member of the session; which finding is intimated by letter. Every kirk-session is represented in the presbytery of the bounds, and in the provincial synod, by one of its elders. The representative is elected every half-year, within two months after the sitting of the synod; and a new election takes place within a month after death or demission. Each presbytery is represented in the General Assembly by a certain number of elders, varying

from one to four, according to the number of ministerial charges in the presbytery. These representatives are elected at least forty days before the meeting of Assembly. Elders, when members of church courts, have a title to reason and vote on all matters under discussion, in the same manner with the clergy themselves. The office of elder is gratuitous. See, on the subject of this article, *Cook's Styles, &c., in Church Courts*, p. 4; *Acts of Assembly*, 1842, Sess. 5, Act 10; *Hill's Theological Institutes*, p. 174, *et seq.*, and 212, *et seq.*; *Burns on the Poor*, pp. 1-47. See also *Poor Laws*; *Gillan's Acts of Assembly*, 177, *et seq.*; *Hill's Prac.* 4, *et seq.* See *Kirk-Session. Church Judicatories*.

**Election Laws.** It has been thought right to comprehend, under this general title, a short account of the provisions and regulations relating to the representation of the nobility and commons of Scotland in the British Parliament, although a considerable portion of the article has been rendered merely historical by the passing of the Reform Act, as it contains a summary of the former election law of Scotland.

The ancient Parliament of Scotland consisted of the higher clergy and the barons; the latter title including not only the nobility, but every man who held territorial property as the immediate vassal of the Sovereign. It was not until towards the end of the fourteenth century (1372) that members from the royal burghs obtained places in that assembly. At that time the duty of attendance in Parliament was felt to be burdensome; and the acts 1427, c. 102, and 1587, c. 113, and several other old statutes, introduced a system of representation, chiefly as a relief to the lesser barons. Afterwards, when religious dissensions, and the increasing importance of the Commons as a political body, rendered a seat in Parliament more an object of ambition, it became necessary to improve the representative system by various legislative enactments. See the statutes 1661, c. 35, and 1681, c. 21. But while the representation of the Commons was in this state of improvement, the Scottish Parliament lost one of its branches, on the final abolition of prelacy by the act 1689, c. 3. The whole estates of Parliament sat in one house, and voted together as one deliberative body; consequently, the vote of every individual member was of equal weight; for the question seems to have been determined by a majority of the individual votes of the aggregate assembly, and not by the votes of the different estates, as distinct and independent bodies. See *Mackenzie's Obs. on the Stats.* p. 424. Hence it has been remarked as a result of this peculiarity in the constitution of the Scottish Parliaments, that the aids and subsidies granted to Government did not, as in England, origi-

nate with the Commons, but were conferred by the simultaneous act of the whole three estates. Another peculiarity of the Scottish Parliament was, the institution called the Lords of the Articles. This was a select committee, composed of a certain number taken from each of the estates of Parliament, and nominated in a separate meeting of the several estates, at the commencement of every Parliament; 1663, c. 1. The Lords of the Articles so chosen, were empowered to arrange and digest the subjects for deliberation, and even to reject altogether such matters as did not appear to them proper to be brought under the consideration of Parliament. This institution was not only made subservient to the undue increase of the influence of the Sovereign, to whom, in effect, it gave the advantage of a negative before debate; but, in other respects, the Lords of the Articles usurped the duties, and encroached largely on the privileges of Parliament; and, accordingly, this is stated as the first in the list of grievances represented by the estates of the kingdom to King William in 1689. By the act 1690, c. 3, this obnoxious committee was abolished. See *Articles, Lords of*. At the union of the kingdoms of England and Scotland (1st May 1707), the Scottish Parliament was incorporated with the Parliament of England, the united Parliament being styled the Parliament of Great Britain. The Scottish nobility, instead of having hereditary seats, as in the Scottish Parliament, are now represented in the British House of Lords by sixteen of their number; and in the House of Commons, while England continued, as before the Union, to be represented by 513 members (now, by the Reform Act, 500), the number fixed by the act of Union for Scotland is forty-five (by the Reform Act, fifty-three), of whom thirty represent the counties, and fifteen (by the Reform Act, twenty-three) the royal burghs; *Act 1707, c. 7, art. 22*. See *Reform Act*. The rules according to which these representatives of the nobility are still elected, and by which, until 1832, the representation of the Commons were elected, form the proper subject of the present article. The subject will be explained in the following order:—

1. *Of the Election of the Peers of Scotland.*
2. *Of the Election of Commissioners for Shires.*
3. *Of the Election of Representatives for the Royal Burghs.*

#### I. OF THE ELECTION OF THE PEERS OF SCOTLAND.

The sixteen representative peers must be elected from the Scottish peerage. The heirs and successors to the dignities and honours of the ancient Scottish nobility, are declared to

be the electors; 1707, c. 8. It follows, that no British peer, created since the Union, has a title to vote, or to be elected; and, in the case of the Duke of Queensberry, which occurred immediately after the Union, it was resolved in the House of Lords (21st Jan. 1709), that a Scottish nobleman who was, subsequently to the Union, created a British peer, had no right to vote in the election of the representative peers. Very soon afterwards (18th Dec. 1711), in the case of the Duke of Hamilton, the House of Lords determined that a Scottish nobleman, who had been created a British peer after the Union, was not entitled to sit in the British House of Lords. Hence, it followed that a Scottish peer, in those circumstances, was deprived, not only of all right to sit in the House of Lords, but even of a voice in the election of the representative peers. This result led the Scottish peers, at the election in 1733, to alter the rule which had been formerly established; and on that occasion the Dukes of Hamilton and Queensberry, although both British peers, were allowed to vote in the election of the sixteen representative peers: they did so, however, under protest that they did not thereby compromise their rights as British peers. At last, in 1782, the right which a Scottish peer, who had been created a British peer subsequently to the Union, had to sit in the House of Lords, was brought to trial in the House of Lords by the Duke of Hamilton, when the former precedent was disregarded, and it was held, that a Scottish peer, on whom a British peerage had been conferred, was entitled, in virtue of such peerage, to a seat in the House of Lords. But, subsequently to this, the House of Lords ordered the resolution of 21st January 1709 to be communicated to the Lord Clerk-Register, with an injunction to him to conform thereto; that is, to reject the votes of Scottish peers who, since the Union, had been created British peers; *Resolution of the House of Lords, 18th May 1787*. At a more recent election, however (1790), the Duke of Queensberry and the Earl of Abercorn, both of them Scottish peers, created British peers since the Union, tendered their votes, which were rejected by the clerks, in obedience to the resolution of the House of Lords; but that procedure having been brought before the House of Lords, it was resolved (6th June, 1793), that the votes of the Duke of Queensberry and of the Earl of Abercorn ought to have been received; and, although this resolution was never officially communicated to the Lord Clerk-Register, the practice ever since has been to receive, without objection, the votes of Scottish peers holding British peerages, created since the Union; so that now they can vote at elections

and also sit in the House of Lords. A Scottish peer who, at the time of the Union, was also an English peer, was never denied the privilege of voting for the representative peers of Scotland. When a new Parliament is summoned, the peers of Scotland are called by proclamation to meet and elect their representatives. This proclamation must be made at Edinburgh, and at the head burghs of the other counties in Scotland, ten days at least before the time appointed for the election. An execution, bearing that the proclamation has been made at the market-cross of Edinburgh, is produced at the meeting for election; but no evidence of the publication at the county towns is required. The palace of Holyroodhouse is the place of election; and the meeting for election is attended by the Lord Clerk-Register, or by two of the principal clerks of Session, acting under his commission. After prayers by one of the royal chaplains, the proclamation and execution are read, and the roll of peers is called. The names of the peers present, and of the proxies, and the signed lists of absent peers, are inserted in the minutes. The oaths are then administered to the peers present, by the officiating clerks, and the evidence that absent peers who have sent lists or proxies, have taken the oaths, is examined, after which the votes are collected from the peers present and from the signed lists, and the names of the sixteen peers who have the majority are declared. In case of an equality of votes there is no casting vote, and the returning officer merely states the fact, leaving the House of Lords to give directions in the matter. A list of the names of the peers elected, written upon parchment, and authenticated by the subscription of the officiating clerks, is read to the meeting, and afterwards transmitted to Chancery, under a cover addressed to the clerk of the Crown. Previous to taking the votes, the titles in the roll, as existing at the time of the Union, are called over, when those who are present answer "*here*." By 14 and 15 Vict., c. 87, § 4, titles of peerages, in right of which no vote has been given for fifty years, are not to be called, if the House of Lords shall so direct; and by 10 and 11 Vict., c. 52, titles of peerages, in right of which no vote has been received since the year 1800, are not called. The roll is again called, for taking the separate votes, proxies, and signed lists. It is at this stage of the proceedings that any peer who deems himself aggrieved, as to the precedence allotted to his title, may have his protest recorded. The complaint may be, either that his own place in the roll is, generally, too low, or that some individual peer is ranked too high. Many of the older peerages are very irregularly arranged in the

list; some, such as Crawford, Errol, Rothes, Morton, and Buchan enjoying the place due to the original creation, notwithstanding repeated and sweeping alterations having been made in the line of succession; while others, for example, Mar, Sutherland, and Caithness, are placed on the roll, according to what those skilled in peerage law represent as an arbitrary and unwarranted arrangement.

No peer under age can vote; and at one time a Roman Catholic could neither vote nor be elected; 1708, c. 8; but now, by 10 Geo. IV. c. 7, §§ 5, 7, and 8, Roman Catholic peers may vote and be elected. See *Roman Catholic*. It will afford a good objection to the vote of a peer, if, within a year preceding the election he has been twice present at divine service in any Episcopal meeting, the clergyman of which has not taken the oaths to Government, and does not pray for the Sovereign by name, and for the Royal Family, in the form prescribed in the liturgy of the Church of England; 19 Geo. II., c. 38, § 26. The peers present must qualify themselves for the election by taking the oaths of allegiance and abjuration. Those peers who have sent proxies or signed lists must have taken and subscribed those oaths before a sheriff-depute or substitute sitting in court; or in the Court of Chancery, Queen's Bench, Common Pleas, or Exchequer, in England or Ireland; or before the lieutenant of any county, or any member of Privy Council in Great Britain or Ireland; or before any judge of a county court in England, or any British ambassador or minister at a foreign court, or the secretary of any embassy or legation, or before the governor, lieutenant-governor, or officer administering the government of any of Her Majesty's colonies or possessions abroad, or any of Her Majesty's judges therein; and this must be certified by a certificate attached to the oaths, and produced along with the proxy or signed list at the meeting; 15 and 16 Vict., c. 35, § 2. No one is entitled to act as proxy for an absent peer, except a peer, who is himself entitled to vote at the election; and the same peer cannot act as proxy for more than two peers. The authority to act by proxy for another must be signed by the Scotch title only of the peer who grants it; and it must have been so subscribed in presence of witnesses, who also sign their names as witnesses. See 6 Anne, c. 23, §§ 4, 5, 6. At the meeting for election, no business whatsoever unconnected with the election of the representatives can be legally introduced. The peers at that meeting have no right to decide upon a disputed title; and therefore where any vote is tendered by a person not duly qualified, or where a vote has been improperly rejected, any peer present who is dis-

satisfied must, if he mean to try the question, enter a protest against the reception or rejection of the vote; which protest may be the foundation of a petition to the House of Lords, complaining of the return. Those protests must be received by the returning officer, who is also bound to give extracts, or copies of them, to such peers as demand them; but in the certificate no notice is taken of such protests. The same forms are observed, where, from death, or any other cause, it becomes necessary, during the existence of a Parliament, to supply vacancies in the representative peerage. The court of review, in all questions connected with the representation of the peerage of Scotland, is the House of Lords. See the *Statutes* 1707, c. 8; 6 *Anne*, c. 23; 10 and 11 *Vict.*, c. 52; 14 and 15 *Vict.*, c. 87; 15 and 16 *Vict.*, c. 35; *Wight on Elections*, pp. 113–129; *Bell's Election Law*, pp. 3–25; and *Robertson's Peerage of Scotland*, *passim*.

## II. THE ELECTION OF COMMISSIONERS FOR SHIRES (ACCORDING TO THE OLD LAW).

1. *Qualification*.—The act 1681, c. 21, in order so far to fix the qualification of the persons entitled to elect, or to be elected, commissioners of the shire, provided that the elector should be “publicly infeft in property or superiority, and in possession of a forty-shilling land of old extent holden of the king or prince, distinct from the feu-duties in feu-lands; or, where the said old extent appears not, shall be infeft in lands liable in public burdens for His Majesty's supplies for L.400 (Scotch) of valued rent, whether kirk lands now holden of the king, or other lands holding feu, ward, or blench, of His Majesty, as king or prince of Scotland.” And the statute 16 Geo. II., c. 11, § 8, provided that no person should be entitled to vote, or to be put on the roll of electors for Scotland, “in respect of the old extent of his lands holden of the king or prince, unless such old extent is proved by a retour of the lands, of a date prior to the 16th September 1681; and that no division of the old extent made since the aforesaid 16th September 1681, or to be made in time coming, by retour or any other way, is, or shall be sustained as sufficient evidence of the old extent.” According to the construction which was put upon those statutes, two or more retours of different parts of the same lands, prior to 1681, amounting together to forty shillings of old extent, were sufficient for the statutory qualification; *Malcolm*, 23d Jan. 1776, *Mor.* p. 8592. That clause in the act 1681, c. 21, which requires the old extent to be “distinct from the feu-duties,” was held to mean, that the estate, independently of the

feu-duty, must amount to a forty-shilling land of old extent; *M'Ara*, 24th June 1747, *Mor.* p. 8576; *Wight on Elections*, p. 179; *Bell's Election Law*, p. 55.

Where there was not a retour showing that the freehold was a forty-shilling land of old extent, the statutes required as the only other alternative, that the land should be holden of the king or prince, and rated in the valuation books of the county at L.400 Scots of valued rent, which was in all cases a sufficient qualification, whatever might have been the old extent of the lands. The most important questions connected with a qualification of the latter description related to the splitting of valuations, and to the different kinds of property on which valuation might be put. As to the first point, the commissioners of supply were empowered, on the application of those concerned, to split every *cumulo* valuation, and proportion the valuation according to the real rent of the respective parcels included in it; and it afforded no objection to this proceeding, that thereby the land-tax would be subdivided into too many fractions; *Wight on Elections*, p. 183, *et seq.*; *Bell's Election Law*, p. 196, *et seq.* Although, generally speaking, *territorial property* was the basis of qualification, yet that expression was interpreted with some latitude, and was held to comprehend a variety of subjects, which, although less or more attached to land, yet might be considered as falling more properly under the denomination of *heritable estate* than of *land* strictly so called. Thus mills, where they had been valued, might have made part of a *cumulo* valuation, wherever they had ascribed multures; where that was not the case, and where, in effect, they were mere machines for performing a part of agricultural labour, it was doubtful how far they could be considered as forming any part of a *cumulo* valuation. In like manner, fishings might have formed the basis of a qualification, whether they were salmon fishings or other fishings, such as oyster fishings, or even white fishings in the sea; *Duff*, 7th August 1773, *Mor.* p. 8656. Feu-duties also might have been the foundation of a qualification; and in splitting a *cumulo* of feu-duties, payable at the general valuation, a portion of the *cumulo* was appropriated to the feu-duties due to the superior. Teinds likewise might have afforded a qualification, when in the hands of the proprietor of the lands out of which they were due. Whether or not a third party, who had acquired right to the teinds payable out of another person's lands, could claim on such property, was an undecided question. But heritable offices, although feudalized and retoured, were not admitted as the foundation of a qualification; *Wight*, pp. 199–203; *Bell's*

*Election Law*, pp. 47–67. The valuation in the cess-books was proved by a certificate under the hands of two of the commissioners of supply for the county, and of the clerk of supply. The property which afforded the qualification must have been held immediately of the king or prince. But it was not enough that the vassal held of the king, *supplendo vices* of the immediate superior who had refused to give an entry; for the immediate superior retained right to all the casualties, and, consequently, remained superior, although, *pro hac vice*, the king supplied the defect occasioned by the superior's delay or refusal to enter his vassal; *Mackenzie's Observations on the Statutes*, p. 467.

The person claiming to be admitted on the roll of freeholders required not only to have been infest in his freehold, but his sasine must have been recorded; or, if he had completed his title by confirmation, the charter of confirmation must have been expedite a year before his enrolment could take place; 12 *Anne*, c. 6, § 1; 16 *Geo. II.*, c. 11, § 10. In reckoning the year, the maxim, *Dies inceptus pro completo habetur*, applied, and the claimant might have been enrolled, although some hours were awaiting to complete the year; *Telfers*, Jan. 1781, *Mor.* p. 8793. In cases of that kind, the date of the entry of the sasine in the minute-book was held to be the date of the registration; and the certificate of the keeper of the record, as of that date, could not be redargued by parole evidence that there was actually an interval between the entry in the minute-book and the transcription into the record. See *Bell's Election Law*, pp. 262, 274, and *statutes and cases there cited*. The rule, that the voter required to be infest before his name could be put on the roll of freeholders was subject to exceptions—1st, In the case of a husband claiming right to vote during his wife's life, in virtue of her infestment, where it was not a mere life interest acquired by singular titles; 2dly, In the case of a widower claiming to vote on property having a freehold qualification, of which he enjoyed the life interest under the courtesy (see *Courtesy*); and, 3dly, In the case of an apparent heir in possession under the infestment of his predecessor. See *stats.* 1681, c. 21; 12 *Anne*, c. 6, § 5; 16 *Geo. II.*, c. 11, § 10; *Wight*, pp. 238–246; *Bell's Election Law*, pp. 128–147. To complete the qualification it was farther requisite that the freeholder claiming enrolment should be in possession of the subject of his freehold, either naturally, by labouring the ground, or civilly, by drawing the rent or feu-duty, or other *reddendum*, or by taking the necessary steps for enforcing them. Hence, in creating a vote on a mere right of superiority, a separation between the

property and the superiority was made, before the superiority was conveyed to the intended voter. To accomplish this the Crown vassal might have granted a feu-right to a third person, and then conveyed what remained in himself (*i. e.*, the superiority of the feu) to the intended voter. After this, the third person re-disposed the feu to the original Crown vassal, who thus became the intended voter's vassal in the feu; consequently leaving nothing in the voter but a mere superiority. Or the same object might have been attained by the Crown vassal disposing both property and superiority to the intended voter, who, having completed his title as vassal to the Crown, in the whole subject, granted a feu-right to the former Crown vassal. But, in the latter case, the disposition to the voter must have borne that he was under an obligation to grant the feu-right, otherwise he could not have been in circumstances to take the trust oath; *Forrester*, 9th Jan. 1755, *Mor.* p. 8755. Though the superiority and property of lands thus often came to be vested in different persons, and although, colloquially, they are distinguished by those names, or the former called the *dominium directum*, and the latter the *dominium utile*, yet as, according to strict feudal notions, the latter is only regarded as a burden on the former, and not as a separate independent right, it has been generally held that the proper mode of conveying the mere superiority is, to dispose the lands themselves, and to except the previously granted feu-right from the obligation of warranty. It has been held, however, by the First Division of the Court (although contrary to the opinion of Lord President Hope), that a mere conveyance of the "*dominium directum*" is an effectual conveyance of the superiority, and hence, that it was sufficient to confer a title to vote; *Lord Archibald Hamilton*, 23d Feb. 1819, *Fac. Coll.* But the soundness of that judgment (which was to have been brought under review had the case not been compromised) has been doubted; and the question having afterwards occurred in the Second Division, the Court waived the determination of it, the case having been decided against the dispositive on a separate ground; *M'Queen v. Nairne*, 23d Jan. 1823, 2 *S. & D.* 637. By the case of Gardner against Trinity-House of Leith, however (Feb. 9, 1841, 3 *D.* 534), it is settled that infestment in the superiority of the lands is a good title to the *dominium directum*. See *Menzies' Lect.* p. 639.

As a test of the freeholder's possession, and as a protection against nominal and fictitious voters, the statute 7 *Geo. II.*, c. 16, § 2, prescribed the form of an oath, commonly called the oath of trust and possession, which every freeholder claiming to vote at an election, or



in adjusting the rolls of electors, might have been required to take and subscribe, on the motion of any freeholder formerly enrolled. The oath was in these terms: "I, A. B. do, in the presence of God, declare and swear that the lands and estate of \_\_\_\_\_, for which I claim a right to vote in the election of a member to serve in Parliament for this county or stewardry, are actually in my possession, and do really and truly belong to me, and is my own proper estate, and is not conveyed to me in trust, or for or in behalf of any other person whatsoever; and that neither I, nor any person, to my knowledge, in my name, or on my account, or by my allowance, hath given, or intends to give, any promise, obligation, bond, back-bond, or other security whatsoever, other than appears from the tenor and contents of the title upon which I now claim a right to vote, directly or indirectly, for redispensing or reconveying the said lands and estate in any manner of way whatsoever, or for making the rents and profits thereof forthcoming to the use or benefit of the person from whom I have acquired the said estate, or any other person whatsoever; and that my title to the said lands and estate is not nominal or fictitious, created or reserved in me, in order to enable me to vote for a member to serve in Parliament, but that the same is a true and real estate in me for my own use and benefit, and for the use of no other person whatsoever; and that is the truth, as I shall answer to God." Any freeholder who refused to take and subscribe this oath was not allowed to vote; and his name was directed to be forthwith erased out of the roll of freeholders. Persons convicted of taking the oath falsely incurred the pains of perjury; 7 *Geo. II.*, c. 16, § 3. As, however, a bare superiority of the requisite extent or valuation afforded a qualification to vote, it was enough to entitle a freeholder with safety to take the oath, that he was in receipt, and was the only person in receipt, of all that could be drawn from the estate which constituted the qualification, however illusory or trifling in value it might have been. In like manner, in reference to the terms of this oath, the possession of a life-renter was held to be the possession of the fee; and the possession of an adjudger or adjudgers, before the expiration of the legal, was understood to be possession by the proprietor; *Wight*, p. 257; *Bell's Election Law*, p. 149, *et seq.*

No infestment taken upon any redeemable right whatsoever, except proper wadsets, adjudications, or appraisings, allowed by the act 1681, c. 21, entitled the person so infested to vote or to be elected; 12 *Anne*, c. 6, § 3. The provision of the act 1681, as to wadsetters, was, that proper wadsetters having

lands of the requisite holding, extent, or valuation, should have right to vote; which right "shall not be questionable upon pretence of any order of redemption, payment, and satisfaction, unless a decree of declarator or voluntary redemption, renunciation, or resignation, be produced." Proper wadsetters were justly admitted to vote, because, prior to the period of redemption, they had the full enjoyment of the lands or estate precisely as if they had been absolute proprietors; whereas, on the other hand, improper wadsetters were excluded, because, being bound to account for the surplus rents of the subject, after payment of the interest,—or, in other words, to impute the surplus in extinction of the principal sum due to them by the reverser,—they could not, even before the term of redemption, be considered as proprietors. It was decided, however, that even a proper wadset of superiority, of the requisite valuation, redeemable in five years, did not afford a freehold qualification. The reason which weighed with the majority of the Court in that case was, that this was a mere temporary and fictitious right, given in order to create a vote for a particular election, and not a true wadset, or pledging of land for the loan of money, which alone was contemplated by the act 1681; *Scott*, 15th Jan. 1820, *Fac. Coll.* See also *Wight*, p. 240, *et seq.*; *Bell's Election Law*, p. 94, *et seq.* With regard to adjudgers, the provision of the act 1681 was, that they should have no vote during the legal; and that, "after the expiry thereof, the appriser or adjudger first infested shall only have vote, and no other appriser or adjudger coming *in pari passu*, till their shares be divided, that the extent or valuation thereof may appear; and that, during the legal, the heritor having right to the reversion shall have vote;" which right to vote, proceeding upon an adjudication of which the legal has expired, was declared, as in the case of proper wadsets, not to be questionable on the ground of payment, or satisfaction of the debt on which the diligence proceeded, unless a decree of declarator of redemption, or a voluntary renunciation or resignation should be produced. The reason of this enactment is obvious; for, until the legal expire, the right is redeemable at any time on payment of the debt, and might therefore be said to be dependent on the debtor's will; but after the expiration of the legal the right of redemption is foreclosed, and the legal transfer to the adjudger becomes absolute. It seems to be doubtful, however, whether, even after the expiration of the legal, the adjudger's title to vote could have been considered as unobjectionable, before he had obtained a decree of declarator of expiry of the legal; and, at any rate, it was settled that no adjudger,

although the legal had expired, could be enrolled unless he was in possession of the subject. *Wight*, p. 237, *et seq.*; *Bell's Election Law*, p. 147, *et seq.*

By the special constitution of the shire of Sutherland, not only the immediate vassals of the king or prince, but those also who held of the Earl of Sutherland, and of other subjects-superior, had been in use to vote in the election of commissioners of the shire; and, by 16 Geo. II., c. 11, §§ 19, 20, and 21, it was enacted, that after the 1st September 1745, no person should be eligible as commissioner for that shire, or have right to vote at the election, unless he had been infest and in possession of lands liable to his Majesty's supplies, and other public burdens, at the rate of L.200 Scots, valued rent; that the same lands should not afford double qualifications; that, where the land was held of the king or prince, the vassal of the king or prince only should be entitled to vote, and not the vassal or sub-vassal to such Crown vassal. But if the king's vassal was a peer, or other person or body politic, who by law could elect or be elected, the proprietor of the land (that is, the person having the *dominium utile*), and not any of his superiors, should be entitled to vote; and no after alienation of the superiority of such lands in favour of a person capable to be a member, or to vote, should deprive the proprietor of his right of electing or of being elected, or entitle the purchaser of such superiority to elect or to be elected; and, *lastly*, It was enacted that land of the valuation foresaid, holden in part of the Crown, and in part of a peer, or other person or body politic, incapable to elect or to be elected, should in that county be a sufficient qualification to the proprietor of such lands. See *Sutherland, County of*.

Generally speaking, none could be elected but such as could elect. But where the person elected during the existence of the Parliament to which he was returned lost his qualification, or was actually struck off the roll of freeholders, he might nevertheless have continued to sit as member, until the dissolution of that Parliament; *Wight*, p. 289. The following persons could neither elect nor be elected:—1st, Fatuous persons or lunatics under tutory or guardianship. 2d, Minors; 1681, c. 21, and 1707, c. 8. 3d, Until 1829, Papists and persons refusing to subscribe the formula in the act 1700, c. 3. 4th, Persons who, within a year preceding the election, had been twice present at divine service in an Episcopal meeting where the king and royal family were not prayed for as in the liturgy of the Church of England; 19 Geo. II., c. 38, § 26. 5th, The eldest sons of Scottish peers; *Lord Daer's Case*, 26th March 1793, *Parl.*

*Cases*. They were eligible, however, for any county or burgh in England; and the disqualification, even in Scotland, did not extend to the eldest sons of British peers; *Wight*, pp. 270 and 290; *Bell's Elec. Law*, p. 343, *et seq.* 6th, Aliens; and even when naturalized by Act of Parliament (except when the act of naturalization followed on intermarriage with the royal family), the act must contain a clause, declaring that the naturalized alien shall not be enabled to sit in either House of Parliament; 1 Geo. I., stat. 2, c. 4. See *Alien*. 7th, All persons concerned in the management or collection of any duties or taxes due to Government, except commissioners of the land-tax, or persons acting under them. This incapacity continued for twelve calendar months after the person ceased to hold the appointment; 22 Geo. III., c. 41. But although such persons were disqualified to vote in the election of a member of Parliament, they were not prevented from acting as freeholders in any other respect; *Wight*, p. 278. 8th, Persons guilty of wilful and corrupt perjury; as also, any person who asked or received a reward of any kind whatsoever for giving or withholding his vote, besides being subjected to other penalties, was for ever disabled to vote in the election of a member of Parliament; 7 Will. III., c. 4; 2 Geo. II., c. 24.

2. *Of the roll of electors*.—A roll of the electors in each county was first ordered to be made up by the act 1681, c. 21; and the manner of continuing and revising those rolls in the different counties annually, at the Michaelmas head-court, or at meetings for election, was more fully prescribed by the statute 16 Geo. II., c. 11. The qualification necessary to entitle a person to have been put upon this roll, has been already adverted to; and no freeholder, whose name had not been regularly enrolled, could legally vote in the election of a commissioner for the shire. In some counties, it appears that the directions of the act 1681, in regard to the rolls of freeholders, had been disregarded; and it was therefore enacted, by 16 Geo. II., c. 11, § 2, that those freeholders who stood upon the roll then last made up, whether at the Michaelmas head-court or at the last election meeting, should be the constituent members of the next Michaelmas or election meeting, to revise the rolls. The statute also contained provisions for purifying the rolls as they stood at that time, by summary complaint to the Court of Session; and, to prevent future irregularities in the time of holding the Michaelmas head-court, it was directed (§ 18) that every sheriff should, at least fourteen days before Michaelmas then next, appoint a precise day for holding that court in his county in the year 1743:

and that, on the anniversary of the day so fixed, the Michaelmas head-court in that county should be held in all time coming. The claim of enrolment sets forth the name of the claimant's lands, his titles thereto, and the dates thereof, with the old extent or valuation upon which his qualification rested; 16 *Geo. II.*, c. 11, § 7. (See *Claim of Enrolment*.) A copy of the claim required to be left with the sheriff-clerk two calendar months at least before the Michaelmas head-court; and he was required to indorse on it the date of his receiving it, and give out copies of it when required, on payment of the fee of an ordinary extract of the same length; 16 *Geo. II.*, c. 11, § 7. It was not necessary that the copy of the claim lodged with the sheriff-clerk, nor even the principal claim, should have been signed by the claimant; nor, indeed, the claimant to appear personally at the meeting of freeholders (any other freeholder might have appeared for him); and, when the claimant was in Scotland, the possession of his title-deeds was held as a sufficient mandate. Where he was abroad, a special mandate seems to have been requisite; *Wight*, p. 154; *Bell's Elec. Law*, p. 40. In like manner, any objection which was to be stated to a freeholder's remaining on the roll, on account of an alteration of circumstances, required to be left in writing with the sheriff-clerk two calendar months, at least, before the Michaelmas meeting; and, in the same manner as in the case of the claim, the sheriff-clerk indorsed on the objection the date of receiving it, and gave copies of it on the same terms. Neither the name nor the subscription of the objector was required; and such objections, as well as the claim of enrolment, required to be supported at the meeting by one of the freeholders, otherwise they might be disregarded; for it was no part of the duty of the sheriff-clerk to bring them under the notice of the freeholders; *Wight*, p. 154, *et seq.*; *Bell's Elec. Law*, p. 40. But, although claims of enrolment, or objections to freeholders standing on the roll, required to be lodged in this way two months before the Michaelmas head-court, yet such claims or objections might have been brought forward without any such previous notice, at any meeting for the election of a member of Parliament; and, accordingly, the claim was commonly addressed to the freeholders "at their next Michaelmas head-court, or at any meeting for electing a representative in Parliament, which may be held antecedent thereto." Claims or objections might be made at the election meeting *de plano*, and disposed of without lodging them with the sheriff-clerk; and the claimant, if duly qualified, was enrolled; or, if the objection was well-founded, the freeholder objected

to was struck off the roll, at such meeting, before the election of the representative was proceeded with; *Wight*, p. 152.

A Michaelmas or election meeting of freeholders had no right to review the proceedings of a former meeting; but a claimant whose claim had been rejected by a former meeting, might have presented a new claim, and a subsequent meeting might have added his name to the roll. But where a meeting had improperly rejected a claim, or delayed the consideration of it, or had struck the name of a freeholder off the roll without sufficient reason, an appeal lay to the Court of Session. This appeal was brought before that Court in the form of a petition and complaint at the instance of the party who had been refused admission, or whose name had been struck off. It was served upon the person whose objection had prevailed; and it must have been presented to the Court actually sitting in judgment (*Speirs*, 21st Feb. 1823, 2 *S. & D.* 237), or to the Lord Ordinary on the Bills in time of vacation, within four calendar months after the meeting whose proceedings were complained of. In like manner, if a person had been enrolled whose title was thought liable to objection, a similar petition and complaint might have been presented, within the same time after the enrolment, by any freeholder standing upon the roll. The respondent required to answer the complaint within fifteen days; and the case enjoyed the privilege of a summary discussion; 16 *Geo. II.*, c. 11; 30 *Geo. III.*, c. 17, § 4.

Where no such complaint was brought within four months after the name of a person had been added to the roll, or where it had been brought and dismissed by the Court, such person could not have been struck off the roll without a change of circumstances. A change of circumstances sufficient for this purpose must have been such a change as would have afforded, of itself, a sufficient ground for rejecting the claim, if made for the first time upon such a qualification. 1st, On the principle already explained in treating of the voter's qualification, a conveyance of the property or *dominium utile*, while the superiority continued in the freeholder, did not, in this sense, amount to a change of circumstances. 2d, Even a conveyance of part of the superiority of the estate on which the freeholder stood enrolled would not have warranted the meeting to strike him off, provided he could show that he had retained a sufficient qualification. 3d, A straightening of marches afforded no ground for striking the freeholder concerned in it off the roll; but, in the case of an excambion of a part of the freehold which required new title-deeds, evidence must have been brought that the

retained property afforded a qualification. 4th, The execution of a new family settlement, under which a new Crown charter was taken out, was not necessarily an alteration of circumstances sufficient to invalidate the qualification of the maker. 5th, Even a disposition of the freehold estate, containing a double manner of holding, was not considered a fatal alteration, provided there was an express obligation on the donee to refrain from making the right public by confirmation, or from executing the procuratory of resignation; *Bell's Elec. Law*, p. 111; *Wilkie*, 20th Nov. 1821, *Shaw's Cases*. But a conveyance of the estate to trustees, who were infet with powers of sale for behoof of creditors, entitled the meeting to strike the name of the trust off the roll. See *Wight*, p. 279, *et seq.*; *Bell's Elec. Law*, p. 392, *et seq.*

*Procedure at the Election of a Commissioner.*

—When a new parliament is summoned, the Lord Chancellor sends his warrant to the clerk of the Crown, to issue writs for the election of members; which writs were directed to be forthwith transmitted to the sheriffs-depute, or their substitutes; the principal or high sheriff being expressly prohibited to officiate. When a vacancy is to be supplied during the existence of a parliament, the warrant to the clerk of the Crown is given by the Speaker of the House of Commons. Within six free days after receiving the writ, the sheriff was required to fix and intimate the time and place of election. Publication of the notice was made at the head burgh of the shire on a market-day, and in each parish-church in the county (or, if there were no service in the church, at the church door), on the Sunday immediately after the publication at the head burgh; the day of election appointed by the sheriff not being sooner than six free days, nor later than fifteen days, after the day of publication at the parish churches. In Orkney and Shetland, it was sufficient if the publication was made at the town of Kirkwall, and the twelve parish churches of the island of Pomona, or the mainland of Orkney only. By express statute, all public notices of the time and place of elections, required to be made within the hours of eight o'clock in the morning and four o'clock afternoon, from the 25th October to the 25th March inclusive, and between eight o'clock morning and six o'clock afternoon, from 25th March to 25th October inclusive, otherwise the notices were to be deemed invalid. The sheriff, on receiving the writ, indorsed on it the date of receiving it; and the precept, or warrant for the intimations, was signed by the sheriff-depute or substitute himself. The statutes as to the writs and intimations were, 6 Anne, c. 6; 12

Anne, stat. 1, c. 15; 16 Geo. II. c. 11; 10 Geo. III., c. 41; 33 Geo. III., c. 64; 35 Geo. III., c. 65. See also *Wight*, p. 302, *et seq.*; *Bell on Election Law*, p. 453, *et seq.* The freeholders being assembled in the court-room on the day appointed, between twelve noon and two o'clock afternoon, the sheriff produced the writ, and read it, or caused it to be read by the sheriff-clerk; and at the same time he produced the executions at the market-cross and parish churches. If there was any informality in the publication of the writ, the course, where it was practicable, was for the sheriff to appoint another day for the election, and to issue a new precept for the intimations. If the publication had been regular, the business commenced by the reading of the statute 2 Geo. II., c. 24, for the more effectually preventing bribery and corruption, and section 38 of the statute 16 Geo. II., c. 11. The sheriff-clerk then produced the book in which the roll of freeholders and the minutes of their proceedings were inserted, together with copies of the oaths of allegiance and abjuration, and of the trust-oath; and here the official duty of the sheriff ended; *Wight*, p. 306; *Bell's Election Law*, p. 455, *et seq.* The freeholders whose names stood on the roll formed the constituent members of the election meeting, and their first business was, to make choice of a preses and clerk. This was done by the person who last represented the county in Parliament, or, in his absence, by the sheriff-clerk calling over the roll, and taking the votes for those who were to fill both offices; and, in case of an equality, the casting vote was given in the following order:—1st, To the last representative of the county in Parliament; 2d, In his absence, to the representative of the county in a preceding Parliament; 3d, To the freeholder who last presided at a meeting for election; 4th, To the freeholder present who last presided at a Michaelmas head-court; and, in absence of all those, to the freeholder present whose name stood highest on the roll; 16 Geo. II., c. 11, § 13. The preses and clerk being appointed, a minute was prepared, stating the fact; and this minute was signed by the last representative of the county, or, in his absence, by the sheriff-clerk, and delivered to the clerk of the meeting; after which the freeholders proceeded to take and subscribe the oaths of allegiance and abjuration, and to sign the oath of assurance; or those oaths might have been put previously to the election of the preses and clerk. If any of the freeholders present required it, the trust-oath might also be put to any freeholder, before he gave his vote for the preses and clerk; 37 Geo. III., c. 138. The clerk elected took the oaths of allegiance and *de fidei*, and subscribed

the assurance, and the oath that he had received no bribe for making a return, and that he would return the person duly chosen. Quakers, in place of their oaths, were permitted to declare the substance of them on their solemn affirmation; *Bell's Election Law*, p. 456, *et seq.*; *Wight*, p. 314, *et seq.* The next procedure of the election meeting was, to clear the roll of the names of those who had died since the former meeting. After that the objections to those who stood on the roll were disposed of; and then the new claims of enrolment which had been presented were taken into consideration. The questions arising on all of those points were determined by the votes of the majority; and, where there was an equality of votes, the preses, in addition to his vote as a freeholder, had a casting vote. A signed copy or extract of the roll thus made up, whether at an election or Michaelmas meeting, was then delivered to the sheriff-clerk, to be recorded in the sheriff's books; and thus far the procedure was the same at a Michaelmas head-court and at a meeting for election; *Wight*, p. 316; *Bell's Election Law*, p. 457, *et seq.* After the roll had been rectified, the preses of the meeting called it over, and took the votes of the freeholders present and enrolled, for the representative of the county; and, in case of an equality of votes, the preses, on this, as on every other question before the meeting, had a casting vote. The candidate having the majority of votes was declared to be duly elected, upon which instruments were taken in the hands of the clerk, and minutes of the whole procedure were prepared by the clerk of the meeting, and signed by the preses and clerk. The clerk, immediately after the election, made a return to the sheriff of the person chosen representative, alongst with which he produced to the sheriff a copy of the roll of freeholders made up at the last Michaelmas or election meeting, extracted and signed by the sheriff-clerk, and at the same time showed him the original minutes of the election of preses and clerk duly signed; and the sheriff, after annexing the return to the writ, transmitted them both to the Crown-office in Chancery; 6 *Anne*, c. 6, § 5; 16 *Geo. II.*, c. 11, §§ 16, 17. The clerk of the meeting also delivered to the sheriff-clerk, *gratis*, a signed copy of the roll and minutes of election, to be inserted by him in the books kept for that purpose; 16 *Geo. II.*, c. 11, § 11. The clerk of the Crown, on receiving the writ and return, and within six days after they came into his hands, was bound to enter them, without alteration, in a book kept in his office; which book was open to all and sundry, for payment of a reasonable fee; 7 and 8 *Will. III.*, c. 7; 12 *Anne*, stat. 1, c. 15. The duties

which were thus performed by the sheriff-clerk, by the preses and clerk of the meeting, by the sheriff, and by the clerk to the Crown, having been all exceedingly important in forwarding the return of the representative to Parliament,—the performance of them was required under heavy penalties. Thus, the member who presided in the election of preses and clerk was enjoined to call the roll regularly, under a penalty of L.300. The minute of the nomination of preses and clerk must have been fairly made up, and delivered to the clerk of the meeting, under a penalty of L.100. The clerk of the meeting for election was bound to make a faithful return to the sheriff, under a penalty of L.500; and the clerk of the Crown performed his prescribed duty also under a penalty of L.500. See the statutes 6 *Anne*, c. 6; 12 *Anne*, stat. 1, c. 15; 2 *Geo. II.*, c. 24; 7 *Geo. II.*, c. 16; 16 *Geo. II.*, c. 11; 37 *Geo. III.*, c. 138. And the same statutes contained sundry other provisions, fortified by penalties, calculated to enforce the faithful performance of their duty, on all the persons concerned in making up the rolls of electors, and in returning the representatives to Parliament; such as prohibitions against a separation of the minority of a meeting from the majority—against double elections of preses and clerk, and similar proceedings,—the object of all these enactments having been to guard, as far as possible, against the manœuvres usually resorted to on such occasions, and to secure to all parties the fair exercise of their legal rights. The limits of this work do not admit of a minute detail of those various statutory regulations; the leading statute was 16 *Geo. II.*, c. 11; and the provisions of all the statutes, with ample references, will be found digested in the treatises of Mr *Wight* and of Mr *Bell*. See *Wight*, p. 318, *et seq.*; and *Bell's Election Law*, p. 455, *et seq.*

In closing the subject of meetings of freeholders, it may be observed, that no *quorum* was required to make a meeting. One freeholder might constitute a court, and go through the business, either of a Michaelmas or election meeting. Nor was there any method of compelling freeholders to meet at all, either at a Michaelmas head-court, or at a meeting for election; *Wight*, p. 156, 157. The proceedings at the meeting for election were subject to the review of the House of Commons, upon a petition complaining of the return, the merits of which were tried by an election committee. See *Committee*.

### III. OF THE ELECTION OF REPRESENTATIVES FOR ROYAL BURGHS (UNDER THE OLD SYSTEM).

By the act 1707, c. 8, ratified by the treaty

of Union, art. 22, it was provided, that fifteen of the forty-five representatives for Scotland should be chosen by the royal burghs. Of these Edinburgh elected one, and the remaining sixty-five royal burghs were divided into fourteen districts, each of which returned a representative to Parliament. This was done by each royal burgh in the district choosing a delegate to meet with the delegates from the other burghs of the district, and those delegates, when so met, elected the representative to Parliament. The act 1707, c. 8, declared that, at this meeting of delegates, the delegate from the eldest burgh on the roll of the district should preside at the first meeting for election, and that the delegates from the other burghs in the respective districts should preside afterwards by turns, in the order in which the burghs were at that time called in the rolls of the Parliament of Scotland; and in this order, accordingly, the delegates in their respective districts continued to preside in rotation ever since, until the system was changed by the Reform Act of 1832.\* This right to preside remained in the same burgh during the entire Parliament, that burgh being what is called the *returning burgh*, in such elections as might become necessary for supplying vacancies occurring prior to the dissolution of that Parliament; 6 *Anne*, c. 6, § 5. The right of electing the representatives of the royal burghs was vested in the magistrates and town-council of the different burghs. The magistrates and town-council of Edinburgh, therefore, elected the representative for Edinburgh, and the magistrates and council of each of the other royal burghs chose the delegate, who was to attend the meeting of delegates to elect the member for the district. As it was thus in the magistrates and council that the elective franchise for the burgh representatives of Scotland was ultimately vested, both Mr Wight and Mr Bell, in their works on Election Law, treat at some length of the former mode of electing town-councillors and magistrates. For the purposes of the present article, however, it is sufficient to observe generally, that the magistrates and council of royal burghs in Scotland

\* List of the Royal Burghs, divided into districts, and in the order of their precedence:—

1. Tain, Dingwall, Dornoch, Wick, Kirkwall.
2. Inverness, Nairn, Forres, Fortrose.
3. Elgin, Banff, Cullen, Kintore, Inverury.
4. Aberdeen, Montrose, Brechin, Aberbrothock, Inverberrie.
5. Perth, Dundee, St Andrews, Cupar, Forfar.
6. Anstruther Easter, Pittenweem, Crail, Anstruther Wester, Kilrenny.
7. Dysart, Kirkcaldy, Burntisland, Kinghorn.
8. Stirling, Inverkeithing, Dunfermline, Culross, Queensferry.
9. Glasgow, Dumbarton, Renfrew, Rutherglen.
10. Haddington, Jedburgh, Dunbar, North-Berwick, Lauder.
11. Linlithgow, Selkirk, Lanark, Peebles.
12. Dumfries, Kircudbright, Annan, Lochmaben, Sanquhar.
13. Wigtown, Whithorn, New Galloway, Stranraer.
14. Ayr, Irvine, Rothesay, Inverary, Campbeltown.

were annually chosen from the burgesses, under a system of considerable antiquity, the prominent feature of which was, that the existing magistrates elected their successors. The constitutions or *setts*, as they were called, of the different burghs differed from each other in some minor particulars; but, upon the whole, the system was nearly the same in all; and, in order to preserve uniformity in the proceedings of each, the *setts* of all the burghs were, by order of the convention of royal burghs, recorded in the books of the convention at the time of the Union. Since that time many legislative provisions, intended to secure the purity of the election of the magistrates and council of the burghs, have been made; and when any of those regulations were infringed, redress might have been obtained, and the legal penalty imposed, in the Court of Session, on a summary complaint presented and moved in Court within two calendar months after the annual election of the magistrates; *Henderson*, 3d July 1821, 1 *S. & D.* 99. See also *Wight*, 330–360; *Bell's Election Law*, p. 474–494. For the present mode of electing the magistrates and council of royal burghs, see *Burgh-Royal*.

The sheriff, to whom, as in the case of the commissioners for the shires, a writ was issued, indorsed on it the date of receiving it; and, within four days, he was required to make out a precept to each royal burgh within his jurisdiction, commanding them to elect a commissioner or delegate to meet the other delegates at the presiding burgh of the district, on the 30th day after the *teste* of the writ, or, if that were a Sunday, on the day following, for the purpose of choosing a burgher to serve in Parliament; and those precepts were, under a penalty of L.100, delivered to the chief magistrate of each of the burghs within four days afterwards. The magistrate, on receiving the sheriff's precept, indorsed on it the date of receiving it, and, under the like penalty of L.100, within two days called a meeting of the town-council, by giving notice to each magistrate and councillor then resident in the burgh, personally, or at his dwelling-place; and the council being assembled in consequence of this notice, appointed a day for the election of a delegate, it being necessary that two free days should intervene between the meeting of the council and the day so appointed by them for electing the delegate; 6 *Anne*, c. 6, § 5; 7 *Geo. II.*, c. 16, § 5; 16 *Geo. II.*, c. 11, § 40, *et seq.* At the election of the delegate, the statute 2 *Geo. II.*, c. 24, was read. The magistrates and councillors then took the oaths to Government, and certain oaths for guarding against bribery and corruption; and proceeded to choose the delegate by a majority of votes. Any person might have been elected

delegate; and the clerk of the burgh was directed to draw up a commission in favour of the person chosen, and to authenticate it with the common seal of the burgh. A penalty of L.500 was imposed, and six months' imprisonment, and perpetual disability to hold the office of clerk, were inflicted on the clerk if he failed in his duty; 2 *Geo. II.*, c. 24; 16 *Geo. II.*, c. 11, § 25, *et seq.* On the thirtieth day after the *teste* of the writ, or, if that were a Sunday, on the day following, the delegates from the different burghs met in the town-house of the presiding burgh, between the hours of eleven and twelve forenoon; and, after production of the precepts, and reading the statute 2 *Geo. II.*, c. 24, the delegate for the presiding burgh administered the oaths to Government, and against bribery, to the clerk of the presiding burgh, as clerk of the meeting. The commissions to the delegates from the different burghs in the district were then read; and, if any objection was made, it entered the minutes of the election along with the answers, &c. The delegates then took the oaths to Government, and against bribery; and thereafter elected the representatives, the election being by a majority of votes—the delegate from the presiding burgh having a vote as delegate, and also a casting vote in case of an equality. In case of the absence or refusal to vote, of the delegate from the presiding burgh, the casting vote was given to the delegate from the burgh which last presided, and, failing him, by absence or refusal, to the delegate from the preceding one, and so on; 1707, c. 8; 16 *Geo. II.*, c. 11, § 28. When the election of magistrates for the burgh which ought to have been the presiding burgh had been reduced, and not revived at the date of the election, the next burgh entitled to preside in turn was the presiding burgh, and the election took place there precisely as if it had been the presiding burgh by regular rotation; nor was that burgh, on its restoration, entitled to preside, until the other burghs in the district had in their turn successively presided, and the right had devolved upon it again in the ordinary course of rotation; 12 *Geo. III.*, c. 81. Minutes of the procedure at the election were prepared, and signed by the preses and clerk. The clerk returned the person elected to the sheriff, under a penalty of L.500, and the punishment of six months' imprisonment and perpetual incapacity for the office of clerk to the burgh; and the sheriff subjoined the return to the writ, and transmitted both to the clerk of the Crown, in the manner already explained in treating of the election of commissioners for shires; *Wight*, p. 378. See also, on the form of burgh elections, *Wight*, p. 361, *et seq.*; *Bell's Election Law*, p. 509, *et seq.*

The form of electing the member for the city of Edinburgh differed from that in which the election was made by delegates, only in this, that instead of electing a delegate, the magistrates and town-council of Edinburgh elected a representative to Parliament by a majority of the whole council of thirty-three; 6 *Anne*, c. 6, § 5; *Wight*, p. 378, *et seq.*; *Bell's Elec. Law*, p. 495, *et seq.* By immemorial custom, the Lord Provost of Edinburgh enjoys a casting vote in cases of equality, in the ordinary decisions of the council; but his right to such a vote does not appear ever to have been tried in any election case.

As to the qualifications of the representatives of the burghs, although it was at one time understood that the member must have been a burghess of at least one of the burghs in the district, it was afterwards settled that such a qualification was not necessary, and that any person, whether a burghess or not, within the district, might be elected representative of Edinburgh, or of any district of burghs; *Bell's Elec. Law*, p. 516. But, although not a burghess of any burgh within the district for which he is returned, it appears from the terms of the statutes, that the representative must have been "a burghess" somewhere. See 6 *Anne*, c. 6; 16 *Geo. II.*, c. 11, § 26, *et seq.*

In addition to the statutory regulations already explained, it may be mentioned, that bribery on the part of a Candidate, whenever it could be proved, vacated his election; and that every point where the temptation might be supposed to have been strongest, was, and still is, guarded by oaths and penalties; 7 *Will. III.*, c. 4; 49 *Geo. III.*, c. 118. To avoid the risk of any undue influence on the part of Government from the presence of a military force, it is also enacted, that all soldiers quartered in any city, burgh, &c., in which an election, whether of a peer or of a commoner, is to take place, must be removed to the distance of two miles one day at least before the day appointed for the election; and that they shall not approach nearer until the day after the election is over. This statute does not extend to the city of Westminster or borough of Southwark, in respect to his Majesty's guards, nor to any place where the King or Royal Family reside at the time, in respect to such troops as attend as guards, nor to any castle or fortified place where a garrison is usually kept, in respect to such garrison; 8 *Geo. II.*, c. 30. With regard to the laws for the trial of controverted elections, see 7 and 8 *Vict.*, c. 103; 11 and 12 *Vict.*, c. 18 and c. 98. As to the laws relating to bribery and corrupt practices at elections, see 17 and 18 *Vict.*, c. 102; 19 and 20 *Vict.*, c. 84; 21 and 22 *Vict.*, c. 88. As to the

qualifications of members of Parliament, see 21 and 22 *Vict.*, c. 26. For the present parliamentary election law, see *Reform Act*. See also *Parliament. Registration*.

**Election.** In the law of England one is said to have an election when it is optional to him to make his choice of two or more alternatives; but having made his election, he is bound by it, and cannot act inconsistently with his own determination. So also, in the law of Scotland, where a party has an election, and has made it, he must abide by it. He cannot *approve* and *reprobate* according to the Scotch law expression; that is, he cannot take the benefit conferred, and reject or evade the corresponding burden or privation. *Tomlins. h. t.* See *Approbate and Reprobate*.

**Election Committee.** See *Committee*. 11 and 12 *Vict.*, c. 98.

**Election of Magistrates.** See *Magistrate. Town-Council. Royal Burgh*. 15 and 16 *Vict.*, c. 32 and c. 35.

**Elegit**; is an English law term, signifying a writ of execution directed to the Sheriff, commanding him to make delivery to the creditor of a moiety of the debtor's land, and all his goods, beasts of the plough excepted. This writ may be sued out against a party who has moveable effects sufficient to satisfy the debt; and, under it, the creditor who is called a tenant by *elegit*, holds possession of the moiety of the land so delivered to him, until his debt and damages are paid. This form is analogous to the ancient apprising of the Scotch law. *Ross's Lect.* vol. i. p. 431; *Tomlins' Dict. h. t.*; *Kames' Equity*, 286. See also *Adjudication*.

**Ellenborough's (Lord) Act**; 9 *Geo. IV.*, c. 31; see also 10 *Geo. IV.*, c. 38, and 7 *Will. IV.*, and 1 *Vict.*, c. 85.

**Emancipation**; is a term borrowed from the Roman law; and, in the law of Scotland, applied to the liberation of a child from the *patria potestas*, or paternal authority. See *Forisfiliation. Patria Potestas. Adoption*.

**Embargo or Imbargo**; is a detention or arrest of ships or merchandise by public authority. An embargo is usually imposed on the breaking out of a war, or on the occasion of some difference with the state to which the shipping or merchandise so detained belongs. The term is also applied to the detention of ships for the service of the state, on some pressing emergency, on which occasion it has been held not to be inconsistent with the law of nations to make use of all vessels found in the ports of the state which resorts to this expedient. See *Park on Insurance*, c. 4. The Sovereign may lay an embargo on ships, or employ the ships of subjects in time of danger for the service and defence of the country; but a warrant to stay a single ship

on a private account is no legal embargo. In time of war embargos on the shipping in the ports of Great Britain may be imposed by royal proclamation; but it is doubtful whether the same power can be legally exercised in time of peace. An embargo has not the effect of putting an end to the contract of affreightment; the freight is due in the same manner as it is where the ship is detained by contrary winds; and the master and crew are consequently entitled to their wages during the detention. See *Tomlins' Dict. voce Imbargo*; *Brodie's Supp. to Stair*, 976; *Bell's Com.* i. 517, *et seq.*, and 573.

**Embassy.** See *Ambassador*.

**Embezzlement**; is the fraudulent appropriation of the property of another by the person to whom it is entrusted. At common law this offence is not held to amount to theft, but is punishable arbitrarily as malversation or breach of trust. It has been found necessary, however, for the protection of several branches of trade and manufactures, to enact special statutes for the prevention and punishment of embezzlement and similar frauds; 17 *Geo. III.*, c. 56; 2 *Fraser's Pers. Dom. Rel.*, p. 511; *Hume*, i. 60; *Hutcheson's Just. of Peace*, B. iii. c. 7, where an enumeration of the statutes will be found; *Brodie's Supp. to Stair*, 1005; *Bell's Com.* i. p. 564; ii. p. 182. See also *Fraud. Swindling. Theft. Breach of Trust*.

**Emblements**; in English law, the profits of sown land. In a larger acceptation, any products springing naturally from the ground, as grass, fruit, &c. *Tomlins' Dict. h. t.*

**Embracery**; is an English law term, signifying an attempt unduly to bias a jury by promises, persuasions, or bribes. The punishment for the person committing this offence is fine and imprisonment. If a juror accept a bribe, he is punishable by a year's imprisonment, forfeiture of tenfold the value of the bribe, and perpetual infamy. *Tomlins' Dict. h. t.*

**Emigration.** Various statutes have within the last fifty years been passed upon this subject, with the view of securing the proper treatment of emigrants, and of facilitating emigration. The recent acts are 14 and 15 *Vict.*, c. 91, and 12 and 13 *Vict.*, c. 33. The earlier statutes will be found enumerated in *Tait's Just. of Peace*, p. 91.

**Emphyteusis**; was a right known in the Roman law, of the nature of a perpetual location of land, granted for payment of a yearly hire or rent, called *canon emphyteuticus*. The *emphyteuta* or tenant was not at liberty to sell without making the first offer to the *dominus*; but he was entitled to the full profits of the subject, which he might also impignorate for his debt without the consent of the *dominus*.



The right of the *emphyteuta* descended to his heirs. The close resemblance in principle between the *emphyteusis* and the grant in feu-farm has led Craig and other authors to apply the term *emphyteusis* to the feu-right. *Stair*, B. ii. tit. 3, § 34; *Bank. B. ii. tit. 3, § 53*; *Ersk. B. ii. tit. 4, § 6*; *Mackenzie, B. ii. tit. 4, § 6*; *Ross's Lect. vol. ii. p. 394, et seq.*

**Emptio, Venditio.** See *Sale*.

**Emulatio Vicini.** A proprietor is entitled to make every lawful use of his property, however detrimental to his neighbour, provided the offensive or injurious act be not done *in æmulationem vicini*. But no man is entitled, without profit or benefit to himself, to exercise his right of property wantonly to his neighbour's prejudice. *Ersk. B. ii. tit. 1, § 2*; *Bell's Princ. § 964*; *Illust. § 962*; *Kames' Princ. of Equity (1825), 36, 89*; *Hutcheson's Just. of Peace, vol. ii. p. 96*. See *Property*.

**Enach**; an amends or satisfaction for a crime, fault, or trespass. *Skene, h. t.*

**Enchesone**; the cause, occasion, or reason wherefore anything is done; as when it is said that the vassal is in the keeping of his overlord by encheson of warde. *Skene, h. t.*

**Endowment.** In English law endowment means the bestowing or settling of *dower* upon a woman. The same term is also sometimes applied to the settling of a provision upon a clergyman, or building a church or chapel, and setting apart tithes for his maintenance. *Tomlins' Dict. h. t.* See *Churches*.

**Eneya**; a French word for the first, chief, and principal part of the heritage. *Jus ænicæ* also means the law of primogeniture. *Skene, h. t.*

**English Debt.** It is not unfrequently a matter of some difficulty with a creditor in Scotland to know what steps he ought to take for the recovery of a debt due to him in England; or how he is to claim on an English bankrupt estate; or to oppose the liberation of a debtor under the insolvent debtors' act. The following practical directions may prove useful:—Payment of what in England is called a simple contract debt, may be enforced by a Scotch creditor against his English debtor, by action to be commenced in England, by what is there technically called either *bailable* or *serviceable* process. The creditor ought to send written authority to the attorney employed by him to sue. The particulars of the debt, and a description of the character in which the creditor sues, whether in his own right, or as executor, trustee, &c., should also be forwarded to the attorney. If the debt arise upon a bill of exchange, promissory-note, or other written document, it ought to be transmitted. If the sum due exceed £20, the debtor may be arrested; the creditor first making affidavit,

setting forth the nature and amount of the debt. This affidavit must be sworn before a commissioner in Scotland, authorized, under 3 and 4 Will. IV., c. 42, to take affidavits, or before a judge in Scotland; and in the latter case, the signature of the judge and authority to take the affidavit must be verified by the affidavit of some one resident in England. On this a judge of one of the courts at Westminster will make an order to hold the defendant to bail. Where, again, the object is to prove the debt, under a commission of bankruptcy, the creditor in Scotland must forward to his agent an affidavit, setting forth fully the nature of the debt, accompanied by the securities, if any, held by the creditor, and a copy of the account, if any, between the parties. And, finally, if the creditor wish to oppose a debtor who is seeking the benefit of the acts passed for the relief of insolvent debtors, he must give notice of his intended opposition; in which case he is at liberty, either personally or by counsel, to oppose the debtor's discharge. The preceding directions, for which the compiler is indebted to an eminent English solicitor, will be sufficient to enable a party in Scotland, or his agent, to take the requisite preliminary steps; and as to the various forms of action and relative procedure, the following authorities may be consulted:—*Archbold's Practice of the Common Law Courts, by Thomas Chitty*; *Starkie on Evidence*; *Roscoe's Digest of the Law of Evidence*; *Archbold's Practice in Bankruptcy*; *Montague and Ayrson on Bankruptcy*; *Chitty's Practice*. See *Affidavit*.

**Engraving.** The property of engravings and prints is secured to the inventors by laws similar to those enacted for the protection of literary property; 8 *Geo. II.*, c. 13; 7 *Geo. III.*, c. 38; 17 *Geo. III.*, c. 57; 6 and 7 *Will. IV.*, c. 59. These acts extend to lithographic and other prints; 15 *Vict.*, c. 12, § 14. The makers of new models and casts of busts, &c., are in like manner vested with the sole right of property in them; 38 *Geo. III.*, c. 71; 7 and 8 *Vict.*, c. 12; 9 and 10 *Vict.*, c. 58; *Bell's Com. i. p. 123*; *Bell's Princ. § 1361*; *Illust. ib.* See *Literary Property*. For the protection of bankers and banking companies, the offence of engraving, making, using, or possessing plates for bank-notes, intended to be fraudulently circulated, is, under special statutes, punishable by imprisonment or transportation beyond seas; 41 *Geo. III.*, c. 57; 45 *Geo. III.*, c. 89; both of which statutes extend to Scotland; 1 *Hume, i. 141*. See *Forgery*.

**Engrosser.** An engrosser or regrater, is a person who buys corn, victual, flesh, fish, or other vivres, in a fair or market, and sells them again either in the same fair or in any

other fair within four miles thereof; or who, by buying, contract, or promise, gets into his hand the corn growing in the field. Under the Act 1592, c. 150, this offence is made punishable by fine and escheat of moveables; but there are no recent examples of prosecutions under this statute. *Hume*, i. 503. See *Forestalling*. *Regrating*.

**Enlisting**; is the act of entering voluntarily into the military service of the State. All persons enlisted for the land service of Great Britain must go, within ninety-six hours (Sundays not being counted), and not sooner than twenty-four hours after enlistment, along with an officer or soldier of the recruiting party, before a justice of the peace, or the chief magistrate of the place of enlistment, not being an officer of the army; and on that occasion the person enlisted is entitled to declare his dissent to the enlistment, and, on his returning the enlistment money, and paying twenty shillings for charges, and defraying any other expense he may have occasioned, he will be forthwith discharged. If he fail, within twenty-four hours after declaring his dissent, to return and pay the money, he is to be held as enlisted; and, in that case, or if he voluntarily enlists, the magistrate must then read, or cause to be read, to the recruit, the 3d and 4th articles of the second section, and the 1st article of the 6th section of the articles of war; and thereafter administer the oath of fidelity, and certain other oaths contained in the mutiny act. The magistrate certifies the enlisting and swearing, and the other particulars required by the mutiny act; and if the recruit refuse to take the oath of fidelity, the officer may detain him till he take it. In case the recruiting party has left the place, or if, from any other cause, an officer or soldier of the party cannot be found, the recruit may go by himself before the magistrate, within four days after enlistment, and before taking the oaths, and declare his dissent, and deposit the money in the hands of the magistrate. Persons receiving enlisting money, and absconding, or refusing to go before the magistrate, are held duly enlisted. If apprentices enlist, and state to the magistrate that they are not such, they may be punished by the judge ordinary for fraud, and, on expiration of their indentures, are liable to serve in the army. If they are bound for four years, their masters, in Scotland, may recover them under certain conditions detailed in the mutiny act. If the master consent to the enlistment, he is entitled to part of the bounty. (See *Apprentice*.) Servants enlisting before the expiration of the term of their engagements are, under the mutiny act, but not at common law, held to be validly enlisted, and are entitled to wages

up to the date of their enlistment. Such are the usual provisions of the mutiny act on this subject; but, as that act is renewed annually, variations may occur; so that it is proper, on all occasions, to consult the existing act; *Hutch. Justice of Peace*, B. v. c. 3; *Tail's Justice of Peace*, p. 362. See also *Soldiers*. By 9 Geo. II., c. 30, and 29 Geo. II., c. 17, it is declared a capital felony for any British subject to enlist as a soldier with any foreign state without Her Majesty's leave; or for any person to procure a British subject to enlist, or to retain or hire him with intent to make him list, or procure him to embark or go beyond seas to be so enlisted; and this whether enlistment money has been paid or not; *Hume*, i. 551. By 1 Vict., c. 29, the enlistment of foreigners into the British service is permitted, provided that, in any regiment, battalion, or corps, their number shall not exceed the proportion of one to fifty, of natural-born subjects.

**Enmity to Panel**; in criminal process, is one of the grounds for rejecting a witness. To establish this ground, he must be proved to have been hostile in act and deed to the panel; or, at least a sufficient cause of capital enmity between them must be proved. The person injured is not disqualified, even though there may have been animosities between him and the panel previous to the act, though, in this case, he is not entitled to implicit belief. Mere expressions of enmity, however violent, do not disqualify, but may affect the credibility of the witness. If the witness avows enmity in his examination *in initialibus*, he will be excluded, unless the enmity is not such as to induce him to swear falsely. Enmity to the panel is likewise a valid objection to a juror; and it will be sufficient that the animosity has been evinced by words; since there is not the same reason for overlooking such expressions in the case of a juror as in that of a witness, the loss of whose evidence often cannot be supplied. *Hume*, ii. 357, *et seq.*; *Alison's Prac.* 80, 285, 478; *Steele*, 18; *Dickson on Evid.*, p. 879. In civil cases enmity in a witness is also a disqualification. See *Evidence*.

**Enrolment, Claim of**. See *Claim*.

**Entail**. In its most comprehensive sense, an entail or tailzie is any deed by which the legal course of succession is cut off, and an arbitrary one substituted. But the term, in its more ordinary acceptation, is applied to a deed framed in terms of the statute 1685, c. 22, and intended to secure the descent of an heritable estate to the series of heirs or substitutes called to the succession by the maker of the tailzie. This subject is fully treated of under the article *Tailzie*. See also *Destination*. *Substitution*.

**Entry of an Heir.** In feudal law, this term is applied to the entry of the heir of the vassal with the superior. On the death of the vassal, the property, or *dominium utile*, according to feudal principles, returns to the superior, by whom it must be again given out to the heir of the vassal before he can complete a feudal title as heir to his predecessor. It is not, however, optional to the superior to refuse an entry; on the contrary, he is bound to grant a warrant for infefting the heir in the *dominium utile* to which he has succeeded. The person whom the superior is obliged so to enter is the heir pointed out by the original investiture, that is, by the charter, in virtue of which the *dominium utile* is held of the superior. The charter is usually conceived in favour of the vassal and his heirs whomsoever; and in that case, the legal destination is followed, and the heir-at-law is the person whom the superior is bound to enter. Where, again, a special destination is contained in the charter, it is the heir of that destination whom the superior is bound to receive as his vassal. In either case, the proper legal evidence of the heir's title to receive an entry is a service as heir to his predecessor in the particular character pointed out by the investiture; although the superior, if he chooses, may proceed on his private knowledge of the heir's propinquity, and give a precept for infefting him without requiring a service. See *Clare Constat*. The heir's entry is completed by infeftment proceeding on the superior's precept; and the consideration or fee to which the superior is entitled for this transmission of the property is called the casualty of *relief*. Its amount is regulated by the *reddendo* clause in the original charter; and it is almost invariably fixed at a double of the feu-duty; that is, the heir, on receiving from the superior the warrant of infeftment, pays him a sum equal to one year's feu-duty as *relief-duty*. See *Relief*. As to the form by which heirs in burgage property are entered, see *Cognition and Sasine*. See the subject of this article, and the respective rights of superior and vassal, more fully treated of under the following articles:—*Superior and Vassal*. *Charter*. *Clare Constat*. *Charge against Superiors*. *Heir Service*. *Infeftment*. As to the entry of an heir *cum beneficio inventarii*, see *Beneficium Inventarii*. For the changes introduced in the completion of titles under the Act 21 and 22 Vict., cap. 76, see the article *Titles to Land*.

**Entry of a Purchaser.** The entry of the purchaser of an heritable subject, like the entry of an heir, is completed by infeftment, either proceeding on the warrant of the seller's superior, or recognised and confirmed by him. But as this subject has been fully considered in other articles, it is unnecessary

here to do more than merely to refer to them. See *Disposition*. *Composition*. *Base Right*. *Public Right*. *Confirmation*. *Resignation*. *Consolidation*. *Infeftment*. For the recent changes in completing titles, see the article *Titles to Land*.

**Episcopacy**; that form of church government in which diocesan bishops are established, as distinct from, and superior to, priests and presbyters. *Encyc. Brit.*

**Episcopalian.** In Scotland, persons professing the religion of the Church of England are called Episcopalists or Episcopalianists, in contradistinction to Presbyterians, and the members of other religious persuasions, whose form of church government does not recognise the authority of bishops. The Toleration Act, 10 Anne, c. 7, authorizes Episcopalianists to meet for divine worship according to the liturgy of the Church of England; and, by the same statute, clergymen of that persuasion are permitted to perform the ceremony of marriage in Scotland, and to administer the sacraments. But political considerations rendered it necessary to put the toleration thus granted, under such regulations as might prevent danger to the State; and, accordingly, the statute 10 Anne, c. 7, and the more recent statutes, 19 Geo. II., c. 38, and 32 Geo. III., c. 63, contain sundry provisions for preserving the purity of this form of worship, and for securing the ministry of pastors well affected to the Government. The leading statutory provisions on this subject are,—1st, That the pastor must have received holy orders from a Protestant bishop of the Church of England or Ireland, and have subscribed, before officiating, the oaths of allegiance and abjuration, and the assurance, along with the thirty-nine articles of the Church of England. 2dly, The congregations or assemblies for worship must meet with doors unfastened—any meeting where five or more persons besides the household (if the meeting be in a private house) assemble to hear divine service performed by a pastor of this communion, being deemed an Episcopal meeting-house within the meaning of the statutes. 3dly, The statutes require the clergyman to pray for the king by name, and for the royal family, in the form prescribed by the liturgy of the Church of England. The statutory penalties are, fine, imprisonment, or transportation; but the political necessity which dictated many of those enactments having ceased, the details of the several statutes are now of less importance. Episcopacy, as the national religion in Scotland, was finally abolished by the Act 1689, c. 3. See *Hume*, i. 571; *Hutch. Justice of Peace*, B. iii. c. 15. See also *Nonconformity*.

**Equipollent**; is a term sometimes used in legal phraseology to signify equivalent, or

similar in effect. Thus, for example, where statute or express paction has prescribed a particular form or ceremony to be observed, equipollents, as they are termed, are, in the ordinary case, inadmissible; that is, acts tantamount in effect will not be accounted legal compliance with the prescribed form.

**Equity.** Equity, in its more enlarged acceptance, has been correctly termed the soul and spirit of all law—positive law being construed by it, and rational law made by it. But, in a more limited sense, and (although somewhat incorrectly) as contrasted with *law*, equity is defined to be the correction of that wherein the law, by reason of its universality, is deficient. In the latter sense, it is said to be the province of equity to extend the words of the law to cases similar in principle, although not within the letter of the law, or to qualify the rigour of the law where a literal construction of it might lead to unforeseen and inequitable consequences. But although, generally speaking, a distinction such as this has been, to a certain extent, recognised between pure law and equity, nothing can be more erroneous than the idea, sometimes entertained, that equity is administered at the discretion of the judge, according to the particular circumstances of each case, without regard to rules or precedents. On the contrary, wherever the dispensation of justice has made any progress, equity, whether it be administered in a court specially constituted for the purpose, or dispensed, along with law, in the supreme civil court, must, in order to attain the ends of justice, be governed in its application by an inflexible regard to legal principle, as well as to judicial precedents; otherwise, as has been justly observed, "it would be above all law, either common or statute, and be a most arbitrary legislator in every particular case." The distinction between law and equity, as administered in separate courts, seems to be peculiar to England; and although there can be little doubt that the equitable jurisdiction of the Court of Chancery in that country was originally of the nature of a legislative correction of the rules of law, emanating from the Sovereign as the fountain of justice, yet, it is obvious that such a tribunal is not suited to a period when the principles of legislation and the art of administering justice come to be better understood. Hence, it may almost be said, that the ancient distinction between law and equity as administered in England no longer exists; but that justice, whether under the name of law or equity, is dispensed, not according to arbitrary or fluctuating rules depending upon the conscience or discretion of any individual, but under an artificial system of great perfection, in which the principles of rational

and enlightened jurisprudence are brought into full and efficient operation, in a manner eminently calculated to give stability and permanence to the law of England. In Scotland, the Court of Session, as the supreme civil court of the country, combines in itself all the functions of the English courts, both of law and equity. The doctrine of the Scotch institutional writers is, that the Court of Session is a court of equity as well as of law, abating the rigour of the law, and giving aid where no remedy could be had in a court of pure law. This equitable power is, in Scotland, called the *nobile officium* of the Court, a term derived from the Roman law. The *nobile officium*, or *judicium nobile* of the Roman law, was the power vested in the prætor, in virtue of which he exercised a species of legislative control over the law; and, in like manner, the *nobile officium* of the Court of Session seems originally to have encroached considerably on what may be considered as more properly the province of the Legislature. But now, the equitable jurisdiction of the Court of Session is governed by well-defined principles, and with all the regard usually had in Scotland to precedents. The examples of the exercise of this jurisdiction most frequently given, are those cases in which the Court interposes to modify exorbitant conventional penalties, or to permit legal or conventional irritancies to be purged at the bar, or the like; or where, in the exercise of its paternal authority, the Court interferes in extraordinary circumstances, by interdict or otherwise, for the protection of the property or rights of individuals. Hence, Scotch authorities have defined equity to be, the favourable modification of the law, whether it be that to which the parties limit themselves in their covenants, or the general law of the nation. At the same time, every one interested in preserving the purity of the law, must deprecate any approach to an union of the legislative and judicial functions; and, as a protection against such a danger, it is of much importance to avoid the too hasty adoption of what have been termed "*principles of equity*," which, however well fitted they may be for the consideration of the Legislature, generally do more harm than good, when permitted to influence the determinations of a court of justice. See, on the subject of this article, *Stair*, B. iv. tit. 3, § 1, *et seq.*; *Bank*, B. iv. tit. 7, § 22, *et seq.*, and B. iv. tit. 45, § 149, *et seq.*; *Ersk.* B. i. tit. 3, § 28; *Ross's Lect.* vol. i. p. 360, *et seq.*; *Blackstone*, vol. i. pp. 61 and 91, and vol. iii. p. 426, *et seq.*; where an exposure will be found of the errors into which Lord Kames has fallen in his "*Principles of Equity*." See also *Law*.

**Equivalent.** At the union of the king-

doms of England and Scotland, it was provided by article 15 of the treaty of Union, that Scotland should have an equivalent, or compensation in money, for such parts of the public debt of England contracted before the Union, as the taxes levied in Scotland should be applied to extinguish; and, for that purpose, commissioners were appointed under statute to examine and state the debts, and to dispose of the equivalent. See *Articles of Union*, art. 15; also the *Scotch Acts 1707*, caps. 15 and 16; *Statutes 1 Geo. I.*, c. 26; 3 *Geo. I.*, c. 13; 5 *Geo. I.*, c. 19. The Act of Sederunt 21st June 1707, regulates the manner of intimating assignations by those pretending right to the equivalent, and of laying arrestments in the hands of the Commissioners. By 13 and 14 Vict., c. 63, the annuity (£10,000) payable to the "Equivalent Company" is redeemed.

**Erasures.** Deeds or other formal writings erased in *substantialibus* are not deemed probative; and such defects are not suppliable by parole evidence. Various legal questions having arisen as to the effect of erasures in instruments of sasine, and of resignation *ad remanentiam*, the stat. 6 and 7 Will. IV., c. 33, in order to increase the security afforded by the public records of deeds and instruments concerning land-rights in Scotland, enacted, that instruments of sasine or of resignation *ad remanentiam*, should not be challengeable, on the ground that any part of these instruments is written on an erasure; unless it should be averred and proved that such erasure was made for the purpose of fraud; or unless the record thereof is not conformable to the instrument as presented for registration. The statute does not affect judgments pronounced before 12th May 1835. Neither does it extend to instruments of sasine, or of resignation and sasine *propriis manibus*. Nor does it affect the validity of feudal titles of property or titles in security, which have been completed in order to remedy or supply defects arising from erasures in instruments of sasine. *Bell's Com.* i. p. 675; *Bell's Princ.* § 344; *Illust.* § 344, 827; *Ross's Lect.* i. 145; *Thomson on Bills.* See *Deed. Testing Clause. Duplicate.*

**Erectare essonia ab aliquo facta;** to reckon, esteem, or judge essonzies, or accusations made by any person. *Skene, h. t.*

**Erection, Lords of.** Those of the nobility, or others of the laity, to whom, after the Reformation, the king, *jure coronæ*, made grants of the lands or tithes which had formerly belonged to the Popish ecclesiastical establishment, were called Lords of Erection, and sometimes Titulars of the Tithes; because, under their grants, they had the same rights to the erected benefices, both lands and tithes,

which were formerly vested in the monasteries or other religious houses. Those grants were made under the burden of providing competent stipends to the reformed clergy, an obligation which, prior to the dates of the decrees-arbitral by Charles I. in 1629, was much neglected by the grantees. See *Stair*, B. ii. tit. 8, § 35; *Ersk. B. ii. tit. 10, § 18*; *Connell on Tithes*; *Bell's Princ.* § 1147.

**Erection of a Barony.** Lands cannot be erected into a barony except by the sovereign; nor, after the erection, can the privilege of barony be communicated by any base or subaltern infefment to be held of the baron; because no feudal erection importing a dignity (as baronies formerly did) can be conferred but by the Crown, or enjoyed but by those holding immediately of the Crown. Hence, a barony cannot be conveyed so as to confer the privileges, unless by disposing it to be held of the Crown. When lands are to be erected into a barony, a petition must be presented to the Lords of the Treasury, which is remitted for consideration to the Barons of Exchequer in Scotland; and, if they approve of it, the signature is superscribed by the King (or Queen.) In the Crown charter of the barony, after the description of the lands, it is declared, that his or her Majesty creates, unites, erects, and incorporates the lands, &c. into one whole and free barony, to be called by such a name. This charter confers on the lands, thus united and erected, all the privileges of barony, and had the effect not only of uniting them when discontinuous, but one sasine taken upon the barony was sufficient for all the subjects comprehended in it, however distinct they may be, such as lands, patronages, and the like, which could not be accomplished by a simple charter of union without a special dispensation. The alienation of a part of the barony does not prejudice the right of barony as to the remainder; but the part disposed has not the privilege without a new erection. *Stair*, B. ii. tit. 3, § 45, and tit. 4, § 18; *More's Notes*, xcii.; *Bank. B. ii. tit. 3, § 86*; *Ersk. B. ii. tit. 3, § 46*, and tit. 4, § 18; *Jurid. Styles*, i. 469. See also *Baron. Barony. Union.*

**Error in Essentials.** An error in any essential point vitiates a contract; because those who err as to the substance of their agreement have not interposed that consent on which the validity of all contracts depends. This rule applies whether the error regard the person of one or other of the contracting parties, or the subject-matter of the contract; but if the error be in accidental qualities merely, the contract is valid. *Error calculi* may always be rectified, because it must be presumed that the parties never intended to consent to an error of this description. *Stair*,

B. i. tit. 10, § 13, and B. iv. tit. 40, § 24; *More's Notes*, xiv.; *Bank. B. i.* tit. 23, § 63; *Ersk. B. iii.* tit. 1, § 16; *Bell's Com. i.* 294, *et seq.*, 5th edit.; *Bell's Princ.* §§ 11, 534, 879; *Illust. ib.*; *Bell on Purchaser's Title*, 2d edit. p. 171; *Brown on Sale*, p. 153, *et seq.*; *Hunter's Landlord and Tenant*, p. 552; *Kames' Equity*, 92, 179, 296.

**Error, Summons of.** Where one was served heir to a deceased person while a nearer heir existed, the erroneous service was formerly in use to be set aside by a process, commencing with what was called a summons of error; in which the pursuer, on the ground that he was a nearer heir than the person wrongfully served, craved that the service, and all following on it, might be reduced, and the inquest who served found to have erred. The summons was drawn in Latin. Of old, the reduction of services was proceeded in by an assize of error, or grand inquest of landed gentlemen, on a precept out of Chancery; the object of the proceeding being, not only to set aside the service, but to have the former inquest punished under the act 1471, c. 47, as *temere jurantes super assisam*. Such was also the practice as to inquests in criminal causes; but assizes of error, having been included in the list of grievances presented to William III. by the states of the kingdom in 1689, have not been used since the Revolution. And now, instead of a summons of error, an erroneous service is set aside in an ordinary action of reduction in the Court of Session. *Mackenzie's Inst. B. iv.* tit. 1., § 8; *Stair, B. iii.* tit. 5, § 43; *Bank. B. iii.* tit. 5, § 92, *et seq.*; *Acts of the Estates of Scotland*, c. 18. See also *Service of Heirs*.

**Error, Clerical.** See *Clerical Error*.

**Error, Writ of.** A writ of error is an English law term, signifying a commission to the judges of a supreme court, by which they are authorized to examine the record upon which a judgment was given in an inferior court; and, on such examination, to affirm or reverse the same according to law. *Tomlins' Dict. h. t.*

**Escape;** is a secret or a violent evasion out of lawful custody or confinement. See *Breaking of Prison*. Those who aid or assist persons committed for capital crimes, in escaping, or attempting to escape, though they succeed not, are guilty of felony, and punishable by transportation for seven years. If the prisoner be committed for a minor offence, or for debt, those aiding him in his escape, or in attempting to escape, besides being civilly liable for the debt, where the imprisonment is for debt, are guilty of a misdemeanour, and punishable by fine. The prosecution must be commenced within a year after the offence; 16 *Geo. II.*, c. 31. The offence

of assisting a prisoner of war to escape, either out of prison or from the limits to which he is confined by his parole, is punishable arbitrarily at common law; and, by statute, the punishment is made transportation for life, or for fourteen or seven years. The crime is committed although the prisoner, after his escape, may have been prevented, by arrest, or otherwise, from leaving the country; 52 *Geo. III.*, c. 156; *Hume*, i. 519, note 3. A messenger-at-arms, who, through negligence or collusion, allows a debtor to escape after he has, or might have, taken him into custody, will be liable for the debt in the caption, provided the escape has not been effected by means of violence or resistance sufficient to overpower the messenger and his assistants. *Bank, B. i.* tit. 10, § 196, *et seq.*; *Ersk. B. iv.* tit. 3, § 14; *Stair, B. iv.* tit. 48, § 20, *et seq.*; *More's Notes*, p. cxxi. cccxxii.; *Bell's Com. vol. ii.* pp. 545, 546, 5th edit. See also *Prison. Prisoner*.

**Escheat;** from the French word *eschoir*, to fall, signifies any forfeiture or confiscation whereby a man's estate, heritable or moveable, or any part thereof, falls from him. Single escheat is the forfeiture to the Crown of one's moveable estate, incurred not only on conviction of certain crimes, but which, until 1748, followed upon denunciation for non-payment or non-performance of a civil debt or obligation. Liferent escheat is the forfeiture to the superior of the annual profits of the vassal's lands during his life, or while he remains unrelaxed, which, in like manner, formerly fell when a denounced debtor had remained year and day at the horn, unrelaxed. A total forfeiture to the Crown of all one's property, heritable and moveable, is a penalty which, in Scotland, is peculiar to the crime of high treason. By the statute 20 *Geo. II.*, c. 50, the casualties of single and liferent escheat, incurred by horning and denunciation for civil debts, were abolished from and after the 25th March 1748. But both single and liferent escheats are still incurred in the case of crimes. Thus single escheat is one article of the statutory pains of deforcement, bigamy, perjury, and some other offences. It also falls upon denunciation following on a sentence of fugitation or outlawry; and, if the rebel remain a year in this condition, the liferent escheat falls to his superior—not, however, as a punishment for the crime with which he is charged, but on account of his contumacy and rebellion, in failing to appear and underlie the law. Single escheat also follows every sentence for a capital crime; and in case, after sentence, the convict should make his escape, there seems to be ground for holding that, until he surrender himself to justice, his liferent escheat will accrue to his superior. See,

on the subject of this article, *Mackenzie's Inst.* B. ii. tit. 5, § 23, *et seq.*; *Stair*, B. iii. tit. 2, § 15; *More's Notes*, p. cccxi.; *Bank.* B. iii. tit. iii. § 2, *et seq.*; *Ersk.* B. ii. tit. 5, § 53, *et seq.*; *Hume*, vol. i. p. 538, and vol. ii. pp. 262, 464, 473; *Bell's Princ.* § 729, *et seq.*; *Illust.* ib.; *Bell on Leases*, 4th edit. vol. i. p. 29; *Ross's Lect.* i. 274; *Jurid. Styles*, 2d edit. vol. ii. p. 338; vol. iii. pp. 194-6; *Kames' Stat. Law Abridg. h. t.* See also *Denunciation. Fugitation.*

**Espousals.** Espousals, or *sponsalia*, are a contract or mutual and solemn engagement between a man and a woman to marry each other. By the law of Scotland all promises of marriage, whether private or contained in written contracts, may be resiled from, provided a *copula* has not followed on the promise; for in that case the marriage is complete. But the party resiling from such an engagement, without just cause, will be liable to the other in damages for breach of promise, to the extent not only of any pecuniary loss which may have been sustained, but *in solatium* of his or her injured feelings. *Stair*, B. i. tit. 4, § 6; *Bank.* B. i. tit. 5, § 2; *Ersk.* B. i. tit. 6, § 3; *Hogg against Gow*, 27th May 1812, *Fac. Coll.* See *Marriage*.

**Equire**; a title of dignity next in degree to that of knight. This addition is now conferred by courtesy, without regard to any particular qualification, or authority for using it.

**Essonium**; an essoinzie or excusation. *Stene, h. t.*

**Essonzie**; an old law term met with in the *Regiam Majestatem*, and the earlier statutes of the Scotch Parliaments, signifying an excuse, by reason of sickness or other sufficient cause, for the non-appearance of a party in an action or court to which he is cited, or where he is bound to attend. The term has a similar import in the law of England. See *Tomlins' Dict. voce Essoingn.*

**Estate.** The term estate, in its most ordinary acceptation, signifies a person's land estate; but it is also frequently applied to moveables. Thus, a man's personal estate comprehends both his moveable effects and the personal debts due to him. *Bank.* B. ii. tit. iii. p. 597.

**Estates of the Kingdom.** The ancient Parliament of Scotland consisted of the King and the three Estates of the Kingdom, viz.,—1st, The archbishops and bishops, and, before the Reformation, all abbots and mitred priors; 2d, The barons, comprehending all the nobility as well as the commissioners for shires and stewartries; and, 3d, The commissioners from the royal burghs. All the three Estates assembled in one house, forming one aggregate meeting, by a majority of the votes of which, in ordinary cases, all matters, whether legislative or judicial, were determined.

Through ignorance or inadvertence the three Estates of the realm are frequently spoken of as consisting of King, Lords, and Commons. This is a mistake. The three Estates are—the Lords temporal, the Lords spiritual, and the Commons. *Mackenzie's Inst.* B. i. tit. 3, § 3; *Bank.* B. iv. tit. 1, § 2; *Ersk.* B. i. tit. 3, § 2, *et seq.* See *Parliament. Convention of Estates. Election Law*.

**Estoppel**; in English law, an impediment or bar to a right of action, arising from a man's own act. *Tomlins' Dict. h. t.*

**Estoverium**; sustentation, nourishment. A vassal in ward was entitled to an estoverium from his superior, proportioned to the quantity of the heritage. *Skene, h. t.*

**Estrays**; valuable animals, not wild, found straying without a known owner. The finder of such animals must forthwith acquaint the sheriff, that he may have them proclaimed at the market-cross of the county town, and at the parish-church; and, if the owner do not claim them within year and day after such notice, they are held to be dereliquished, and fall to the Crown, or the donatary of the Crown. *Bank.* B. i. tit. 8, § 2, *et seq.*; *Ersk.* B. ii. tit. 1, § 12. See *Dereliction. Strays. Waifs*.

**Estreat**; is an English law term, signifying the true extract, copy or note of some original writing or record, and especially of fines, amerciaments, &c., entered on the rolls of a court, to be levied by the officers of the law. *Tomlins' Dict. h. t.*

**Eve et Treve**; slaves or servants, whose father, gudesire, grandsire, and forbears, have been servants to any man and his predecessors. *Skene, h. t.*

**Eves Droppers.** See *Eaves Droppers*.

**Eviction**; is the dispossessing one of property, whether in land or in moveables, in virtue of a preferable legal title in the person of him by whom the eviction is made. The dispossessed party will be entitled to institute an action against his author, the extent of the pursuer's claim in which action will be regulated by the nature of the warrandice given. Where the warrandice has been absolute, which is the implied warrandice in all onerous contracts, he from whom the property has been evicted will have a claim against his author, or his author's representatives, to the full extent of the value of the evicted property as at the period of eviction, and for all loss or damage which he may have sustained through the defective title. *Stair*, B. ii. tit. 3, § 46; *More's Notes*, p. xci.; *Mackenzie*, B. ii. tit. 3, § 12; *Bank.* B. ii. tit. 3, § 120, *et seq.*; *Ersk.* B. ii. tit. 3, § 25, *et seq.*; *Bell's Com.* i. 645; ii. 279; *Bell's Princ.* §§ 121, 126; *Bell on Purchaser's Title*, 2d edit. p. 56; *Kames' Equity*, 116, 183; *Hunter's Landlord and Tenant*, ii. 261. See *Warrandice*.

**Evidence**; is the proof, either written or parole, which the parties in a civil or criminal cause, may legally adduce in support of the facts and circumstances on which their respective pleas or defences depend. In this article the subject will be considered under the following arrangement:—

1. *Evidence by writ.*
2. *Evidence by oath.*
3. *The order in which evidence is to be received; with some general rules as to evidence.*

### I. OF EVIDENCE BY WRIT.

The evidence afforded by writing is accounted the highest description of legal proof. It may be considered under the following heads:—1. Of a formal deed; 2. Of notarial instruments, and the executions of officers of the law; 3. Of acts of court, extracts from judicial records, &c.; 4. Of public instruments and documents not by officers of the law; 5. Of merchants' books; 6. Of writings in *re mercatoria*.

1. *Of a formal deed.*—A formal deed, signed and authenticated according to the rules prescribed by the law of Scotland, affords complete legal evidence of the contract, obligation, or other transaction which it sets forth. Such a deed is held in law to be a higher species of evidence than parole testimony; and, for that reason, it is the only evidence admitted to prove the constitution or transmission of a right to heritable property; nor will parole evidence be received to qualify the terms or conditions of the written deed. When the authenticity or validity of a formal deed is disputed on any ground not apparent *ex facie* of the instrument, the challenge must be made in the form of a regular action of reduction; and, until decree is obtained in that action, setting aside the deed, the evidence it affords remains unimpeachable. The legal rules for the authentication of deeds, so as to render them fully probative—the effect given to holograph writings—to deeds subscribed by initials, or by notaries for the parties—to writings in *re mercatoria*—or to deeds defaced or vitiated, or otherwise defective in the statutory or consuetudinary formalities—and the consequence of *rei interventus* or homologation, as validating informal writings—are explained under the following articles:—*Deed. Writ. Holograph Deed. Testing Clause. Privileged Deeds. Rei Interventus. Homologation. Erasures.*

2. *Of notarial instruments, and the executions of officers of the law.*—A notarial instrument is a written attestation, under the hand of a notary, of a fact or of facts falling within his observation. In some cases such an instrument is an indispensable solemnity. Thus, the fact of infestment having been given in

heritable property, cannot be proved otherwise than by a notarial instrument of sasine. In like manner, instruments of resignation, of requisition, of consignation, of intimation of assignments, of protests on bills of exchange, and the like, are deemed fully probative; and, although all such instruments may be set aside by reason of informality, or improven in an action of reduction on the ground of falsehood, yet parole evidence will not be admitted by way of exception to disprove the facts set forth in them, of which they are the proper and only legal evidence. Notarial instruments, however, cannot be effectually founded on as legal evidence of anything more than the mere act which the law requires to be so proved. Thus, an instrument of sasine will not be received as evidence of the charter on which it proceeds; nor will a notarial instrument, where it is not essential as a solemnity, relieve the party producing it from the necessity of legally proving the fact asserted on it, or prevent the opposite party from disproving it, either by written or by parole evidence. By consent of the opposite party, notarial copies of deeds or other writings are sometimes admitted as evidence; but such copies are not sufficient if objected to. See as to the evidence afforded by notarial instruments, *Stair*, B. iv. tit. 42, § 9; B. ii. tit. 3, § 16; and B. iv. tit. 2, § 8; *Bank*. B. iv. tit. 27, § 3, *et seq.*; and B. iv. tit. 5, § 6; *Ersk.* B. iv. tit. 2, § 5, *et seq.*; *Tait on Evidence*, pp. 21–41, and p. 214. See also *Notary-Public, and authorities there cited.*

Executions by messengers-at-arms, or other officers of the law, are attestations under their hands that they have given the citations, or executed the diligences conformably to their warrants; and wherever the execution is by law essential, it affords evidence which cannot be redargued except by improbation in an action of reduction. But even where such executions are essential solemnities, they will not, more than notarial instruments, be received as evidence of extrinsic facts which have no relation to the solemnities of the execution. *Bank*. B. iv. tit. 6, § 9, *et seq.*; *Ersk.* B. iv. tit. 2, § 5; *Tait on Evidence*, pp. 4–21, and *authorities there cited.* See also *Execution. Messenger-at-arms.*

3. *Of acts of court extracts from judicial records, &c.*—All acts and deeds under the hands of clerks of court, and keepers of public records, are, generally speaking, held to be probative. Extracts of judicial proceedings from the records of a court, the warrants of which are in the custody of the Court, are admitted to prove what was done in court, or alleged by the parties, but not to prove the truth of those allegations; and the decrees and the judicial acts of the courts of a foreign



country are, *ex comitate*, admitted to be proved by exemplifications or extracts, probative according to the law of that country. On the same principle, judicial transumps, whether made under authority of the supreme or of an inferior court, are probative in all ordinary cases. See *Transumpt*. An extract of the deed, authenticated by the proper officer, whether it be in the record of the supreme or that of an inferior court, is as good evidence as the deed itself. Such, for example, is the case (except in improbations) with respect to private deeds having a clause of registration. But where there is no such clause, and where the deed is merely recorded as a probative writ, the principal deed being returned to the party at whose desire it was recorded, the general rule is, that the extract of such a deed is not admissible as evidence, the party being in possession of the principal deed, which he may produce. Even this rule, however, is subject to several exceptions. Thus, charters by subjects, dispositions, bonds, contracts, tacks, and, in general, all other probative writs, although not having a clause of registration, are, by special statute, allowed to be registered as probative writs, and an extract under the hand of the keeper of the record, declared to make faith in all cases except that of improbation; 1698, c. 4. Public instruments appointed to be registered for publication are also excepted; and although the principals are returned to the parties, extracts from the record of sasines, reversions, or regresses, and the like, are declared to be probative in all cases, except where the writ so recorded is sought to be improved; 1617, c. 16; 1669, c. 3. The same exception extends to the register of inhibitions and interdictions; 1581, c. 119, No. 1; to summonses to interrupt the prescription of real rights; 1696, c. 19; and to the register of hornings and relaxations; 1579, c. 75. Extracts under the hands of the proper officers in Chancery, of charters of lands held of the Crown, re-tours of services, &c., which are recorded in Chancery, are probative except in improbations; 49 *Geo. III.*, c. 42, § 16. In reduction-improbation, although an extract of a deed or instrument under the hand of the proper officer, or even a specification by the defender of the register in which it is recorded, will stop the certification, yet it is ultimately incumbent on either the defender or the pursuer to obtain a warrant for the production of the principal deed from the record, and that whether the deed has been recorded merely as a probative writ, or in virtue of a clause of registration. Where the registration has been made in the books of an inferior court, the Court of Session will grant a warrant to transmit the principal writing

to the clerk of the process. See *Stair*, B. iv. tit. 42, § 10; *Bank*. B. iv. tit. 4, § 21; *Ersk.* B. ii. tit. 3, § 43, and B. iv. tit. 1, § 53; *Tait on Evidence*, pp. 184–197, and 200, and authorities there cited.

4. *Of public instruments and documents not by officers of the law.*—Entries in public records, not judicial, where certified by the proper officers, are, in the ordinary case, admitted as evidence. Such are entries in the journals of the Houses of Lords and Commons—in bank books—in parish registers of deaths, baptisms, or marriages—in prison books—in corporation books—and the like. Public acts of Parliament are presumed to be known to all; and the statute book, printed by the Queen's printer, may be judicially referred to. Private acts of Parliament, neither printed in the statute book, nor declared public acts, nor specially directed to be printed by the Queen's printer, and to be admitted as evidence by all judges, must be proved by examined copies from the parliamentary rolls; but, to obviate that inconvenience, a special clause is usually inserted in every private act, declaring it public to that extent. Royal proclamations, the articles of war, and the like, as printed by the Queen's printer, or in the *Gazette*, are held to be probative, without production of the proclamations themselves; and in the same way addresses from the people to the Crown may be proved. But gazettes are not evidence of private titles or interests, such as presentations to clergymen, or grants by the Sovereign to individuals. *Tait*, 50, *et seq.*, 201.

Histories are admitted to prove ancient facts, such as propinquity of blood, *primogeniture*, &c., if authentic and uncontradicted by other histories of equal authority. *Stair*, B. iv. tit. 42, § 16; *Ersk.* B. iv. tit. 2, § 7.

5. *Of merchants' books.*—In general, a merchant's books will be held as good evidence against himself; and where they appear to have been regularly and accurately kept, they will afford what is called a *semiplena probatio* in his favour, or that degree of evidence by which, in matters admitting of parole proof, a fact may be legally proved by one witness, and the oath of the party himself in supplement. *Ersk.* B. iv. tit. 2, § 4; *Bank*. B. iv. tit. 27, § 6; *Bell's Com.* i. 330; *Tait*, 122; *Hall, Dow's App. Cases*, ii. 376; *Smith*, ib. 538; *Dunbar, Bligh*, ii. 351. See *Book Debts*.

6. *Of writings in re mercatoria.*—Under this description are included orders for goods, mandates, procurations, guarantees, offers, and acceptances to sell or buy, or transport merchandise; fitted accounts between merchants, and, in general, all letters, engagements, receipts, acknowledgments, and the like, which

the various exigencies of trade may require, as to all of which the law, from favour to trade, has relaxed the rigour of the ordinary rules of authentication. Hence, such writings are probative, although not holograph, and although they want the name and designation of the writer, and are not subscribed before witnesses, a privilege which is not extended to missives or to settlements of accounts unconnected with mercantile transactions. In like manner, mercantile writs, such as bills of exchange or promissory-notes, checks upon bankers, and the like, whether arising out of mercantile transactions or not, are valid, although neither holograph nor tested. In connection with this head it may be observed, that receipts and discharges granted to tenants for rent, however large the sum, are probative, although neither holograph nor tested; and, in practice, although perhaps incorrectly, it is usual to grant similar receipts for termly payments of interest, annuities, and the like. The privilege is said to be extended to tenants on account of their ignorance of business. *Ersk. B. iii. tit. 2, §§ 23-24; Bell's Com. i. 330; Tait, 112, et seq., and cases and authorities there cited. See also Privileged Deeds.*

## II. OF EVIDENCE BY OATH.

Evidence by oath formerly consisted,—1st, Of the oaths of persons unconnected with the parties in the cause, and having no disqualifying interest in the decision; and, 2d, Of the oath of party.

1. *Of the Oaths of Witnesses.*—The testimony of witnesses is called parole proof; and on this branch of the subject it is proper to inquire,—1st, Who can be received as witnesses? 2d, In what manner their testimony is taken? 3d, In what cases, and to what points this species of evidence is admitted? and, 4th, to say something of the nature and effect of circumstantial and presumptive proof.

1. *Who can be received as witnesses.*—The general rule formerly was, that all persons of legal age and of sane mind, who believed in God and a future state of rewards and punishments, whether Christians or not, and who were not liable to any objection on the grounds of relationship, enmity, infamy, or of interest in the issue of the cause, might bear testimony. For recent changes in the law of evidence, see *Infra*. The following enumeration comprehends the objections which formerly might be stated to the admissibility of a witness:—(1.) *From age or sex.*—Persons under fourteen years of age, as being incapable of understanding the moral obligation of an oath, are, in the ordinary case, inadmissible. Exceptions to this rule have been sometimes admitted, where

the individual seemed to understand the nature of an oath, and was above twelve years of age; and, in criminal cases, children even under that age have been sometimes examined, but not upon oath; the weight to be attached to the declarations of such witnesses being left to the jury. By our more ancient practice, women were inadmissible as witnesses; but the practice in that respect has changed, and, both in civil and criminal cases, female witnesses are admissible. A female, however, cannot be an instrumental witness to the subscription of a deed or other written instrument; *Stair, B. iv. tit. 43, § 7-9; Bank. B. iv. tit. 30, § 5; Ersk. B. iv. tit. 2, § 22-27; Tait, 84-342; Hume, ii. 329-330.* (2.) *From mental incapacity.*—All persons deprived of reason, whether idiots or furious persons, are inadmissible. But the testimony of a person subject to occasional fits of derangement will be admitted, *cum nota*, as to occurrences during a lucid interval, provided no fit of derangement have intervened between the fact sworn to and his deposition; *Hume, vol. ii. p. 329; Stair, B. iv. tit. 43, § 7; Bank. B. iv. tit. 30, § 5; Tait, 342.* See *Idiot*. (3.) *From infamy.*—The testimony of infamous persons, *infamis juris*,—i. e., by being convicted of crimes inferring infamy, was formerly inadmissible, and unless a pardon had been granted, infamy was a perpetual disqualification; *Black, 22d Dec. 1815, Fac. Coll.* But now, where the party convicted has endured the punishment (unless the crime has been perjury or subornation of perjury), he is not inadmissible by reason of his conviction, but may be a competent witness in any court or proceeding, civil or criminal; *1 Will. IV., c. 37, § 9.* And moral infamy, or bad moral character, is no disqualification. The evidence of such witnesses, however will be received *cum nota*; *Ersk. B. iv. tit. 2, § 23; Stair, B. iv. tit. 43, § 7; Bank. B. iv. tit. 30, § 4.* See *Infamy*. (4.) *From relationship, connection, legal confidence or dependence.*—Formerly, all who stood within those degrees of relationship to the party, which, in the case of a judge, would authorize a declination, were incompetent witnesses for their kinsman, although they might be received against him. See *Declination*. Husband and wife, however, were in no case allowed to bear testimony, even against each other, except in criminal prosecutions for crimes committed by the one against the other; and it would rather seem that the evidence of children against their parents, and of parents against their children, was inadmissible, unless in the case of domestic crimes or occult facts (see *Domestic Crimes*)—the principle of the law of Scotland being, that unless the ends of justice absolutely required it, a witness was never to be placed in a situation where he might be

tempted to commit perjury. Natural children were not, in law, recognised as the children of their reputed father; but an objection to their testimony, on the ground of actual relationship to the party adducer, was good; *Ersk. B. iv. tit. 2, § 24; Bank. B. iv. tit. 30, § 9-11; Hume, vol. ii. p. 337; Tait, 362. See Relationship.* Tutors and curators were formerly inadmissible as witnesses in favour of their wards, where they had an interest to prove acts and deeds done by themselves, or where they had taken an active part in the process in which they are proposed to be adduced. Formerly, agents could not be witnesses for their clients in the causes in which they were employed; although they might be witnesses for the same party in other causes. *See Partial Counsel.* They are still incompetent witnesses against their clients to prove confidential communications; and, on the same principle, as well as on account of the object of the communication, a clergyman to whom a prisoner has confessed a crime, in order to obtain spiritual consolation, cannot be called as a witness to disclose what has been so communicated to him; but similar confessions to other confidential persons, such as surgeons or physicians, or intimate friends, may be proved by the testimony of such persons. *See Confidentiality.* Attorneys or trustees who had not given partial counsel, and who had no personal interest in the action, were admissible for their constituent. The testimony of domestic servants and of tenants at will, in favour of their master or landlord, was formerly rejected on account of their supposed dependence; but such persons are now admissible witnesses. Artificers or labourers hired by the day or week, are competent witnesses for their employers; *Ersk. B. iv. tit. 2, §§ 24, 25; Bank. B. iv. tit. 30, §§ 12, 13, 21; Stair, B. iv. tit. 43, § 9; Hume, vol. ii. pp. 324, 331, 338; Tait, 366, et seq. (5.) From partial counsel, or being ultroneous.*—Witnesses who had given partial counsel,—*i.e.*, who had instigated the plea, or advised with the party or his agents as to the method of conducting it, or been present at consultations, were objectionable. The recent practice in this respect was not, however, so rigid as the older practice was, the course being rather to admit the witness *cum nota*. Ultroneous witnesses, —*i.e.*, witnesses who offer their testimony without being regularly cited,—were formerly inadmissible; but this objection afterwards only affected their credibility; and, at any rate, it was competent to remove the objection, by giving the witness a citation at any time before he was sworn, even after he had come into court to be examined; *Tait, 369.* And in criminal trials, it was declared, by statute, to be no longer competent to state any

objection to a witness on the ground of his having been irregularly cited, or having appeared without citation, provided his designation is correct in the list of witnesses served on the panel; *9 Geo. IV., c. 29, § 10; Alison's Prac. 394.* See also *Stair, B. iv. tit. 43, § 9; Bank. B. iv. tit. 30, § 7; Ersk. B. iv. tit. 2, § 28; Hume, vol. ii. p. 339; Tait, 368, et seq., and cases there cited. See Partial Counsel. (6.) From interest.*—Formerly a person having any present interest in the issue of the cause, or whose character might be affected by his testimony, was inadmissible as a witness. Magistrates and other officers of royal burghs could not be witnesses in causes concerning the common good of the burgh; but members of council were admitted *cum nota*. Private burgesses, except where they had a patrimonial interest, were admissible. In criminal cases, a *socius criminis* is admissible as a witness against those concerned along with him in the commission of the offence; commonly, however, with a reservation as to his credibility; and the mere act of calling such a person as a witness liberates him from all future prosecution on account of his accession to that offence; *Ersk. B. iv. tit. 2, § 25; Bank. B. iv. tit. 30, § 6; Tait, 349, et seq.; Hume, ii. 351-354. See Interest, and authorities there cited. (7.) From enmity.*—Enmity to the party against whom the witness is adduced will disqualify; but the enmity must be substantial, arising from injury done or attempted, and not inferred from mere expressions of ill-will. Where, however, expressions inferring enmity are proved, although they will not disqualify, they will be admitted to influence the credibility of the witness; *Hume, vol. ii. pp. 345-351; Stair, B. iv. tit. 43, § 7; Bank. B. iv. tit. 30, § 6; Tait, 370. See Enmity. (8.) From bribery, and instructing how to depone.*—A witness, otherwise unobjectionable, will be disqualified if the party adducing him has given, or promised or offered him, a reward or bribe for his testimony; or if he has tutored or instructed him as to what he is to swear; and this disqualification will operate, *in odium corruptentis*, even where the bribe has been refused and the instructions disregarded. Although, therefore, a party is fully entitled, before citing a witness, to question him as to his knowledge of the facts in dispute, yet care should be taken to avoid anything which may bias or embarrass the witness in giving his testimony. Hence, although not an absolute disqualification, it is dangerous to take down, in presence of the proposed witness, a written statement of what he can say; and if he subscribe statements of this kind, it may even amount to a total disqualification. Where a witness, as sometimes happens, has emitted a deposi-

tion which has been committed to writing, or where he has subscribed any written account whatever of the transaction concerning which he is again to be examined as a witness; before deposing of new he may require that his former deposition or declaration shall be cancelled, although, even if it were not cancelled, it never could be used against him, or appealed to as discrediting his subsequent testimony. It may disqualify the witness altogether if, before his re-examination, his previous written statement or deposition be shown to him; *Ersk. B. iv. tit. 2, § 28; Bank. B. iv. tit. 30, § 7; Hume, vol. ii. pp. 363-367; Stair, B. iv. tit. 43, § 9; Tait, 379, and authorities there cited.* (9.) *From indignence.*—Witnesses who were not worth the king's un-law, as it was termed,—that is, L.10 Scots (16s. 8d.),—were, by our former practice, inadmissible; *Stair, B. iv. tit. 43, § 9; Hume, vol. ii. p. 355.* (10.) *From irregular citation, misnomer, &c.*—It was at one time an objection to the examination of a witness on the particular trial, that he had been irregularly cited; but that objection has been so far removed, in the manner above explained. There never was any fixed *inducia* for the citation of witnesses; *Hume, ii. 356-357; 55 Geo. III., c. 42, § 16.* Several of the disqualifications here enumerated, particularly those founded on relationship, agency, dependence, and the like, were sometimes disregarded in cases of occult or private facts, where there was a *penuria testium*, especially in the case of occult or domestic crimes, the witnesses thus admitted being received *cum nota*—*i. e.*, with a certain degree of suspicion of their credibility; *Stair, B. iv. tit. 43, § 8; Ersk. B. iv. tit. 2, § 26; Bank. B. iv. tit. 30, § 15.* See also *Domestic Crimes*. Objections to the admissibility of a witness ought to be stated before he deposes; and they are usually proved by the examination of the witness himself *in initialibus*. But they may also be proved by other unexceptionable witnesses, either instantly adduced, or (if reprobaters have been protested for) examined afterwards in a process of reprobator, of which process, however, there is no recent example. See *Reprobator*. With regard to the disqualifications of witnesses, there was a distinction between those objections which concerned the *admissibility* and those which went to the *credibility* only of the witness. Under the latter class of objections were included all circumstances likely more or less to bias or influence the witness, which, although they might not amount to absolute disqualifications, yet might relevantly be brought into view to the effect of admitting the full application of the maxim, *Testimonia ponderanda non numeranda sunt*; and it may be observed generally, that the

inclination of modern practice was, to allow all objections to go rather to the credibility than to the admissibility of witnesses. *Stair, B. iv. tit. 43, § 9; Ersk. B. iv. tit. 2, § 26; Bank. B. iv. tit. 30, § 18; Tait, 398.*

*Qualifications of the former law.*—Recent legislation has introduced some changes in the law of evidence. By the act 3 and 4 Vict., c. 19, 1845, it is no objection to the admissibility of any witness, that he or she is the father, or mother, or son, or daughter, or brother, or sister (by consanguinity or affinity), or uncle, or aunt, or nephew, or niece (by consanguinity), of any party adducing such witness; and it is incompetent for any witness to decline to give evidence on the ground of any such relationship. It is now no longer necessary to examine a witness *in initialibus*, although it is competent to do so. The presence of a witness in Court during all or any part of the proceedings is now an imperative ground of disqualification; but it is competent for the Court, in its discretion, to admit such witness, where it shall appear that his presence was not the consequence of culpable negligence or criminal intent, and that he has not been unduly instructed or influenced by what took place during his presence in Court, or that injustice will not be done by his examination. The party against whom a witness is adduced and sworn *in causa* is entitled to examine such witness not in cross merely, but also *in causa*.

By the 15 and 16 Vict., c. 27, 1852, no person adduced as a witness is excluded from giving evidence by reason of having been convicted of, or having suffered punishment for crime, or by reason of interest, or by reason of agency, or of partial counsel, or by reason of having appeared without citation, or by reason of having been recognised subsequently to the date of citation; but such witness may be examined on any point tending to affect his credibility. A witness may be examined as to whether he has, on any specified occasion, made a statement on any matter pertinent to the issue tried different from the evidence given by him at the trial; and evidence may be adduced to prove that the witness has made a different statement on the occasion specified. It is now competent for the judge, or other person taking the proof, on the motion of either party, to permit a witness to be recalled who may have already been examined.

By the act 16 and 17 Vict., c. 20, 1853, any party to an action, or the husband or wife of any such party, may be examined as a witness whether they are individually named in the record or proceeding or not. But the husband or wife of any person who, on any criminal proceeding, is charged with the com-

mission of an indictable offence, or any offence punishable on summary conviction, is incompetent to give evidence for or against himself or herself, his wife or her husband, except in so far as it was formerly competent to do so; nor is any person compellable to answer a question tending to criminate himself; nor is a husband or wife competent to give evidence against each other, of any matter communicated to them during the marriage. All actions in consequence of adultery, or for dissolving any marriage, or for breach of promise of marriage, or action of declarator of marriage, nullity of marriage, putting to silence, legitimacy or bastardy, or action of adherence or separation, are excluded from the operation of the statute. The adducing a party as a witness by the adverse party has not the effect of a reference to the oath of the party so adduced; but if a party calls and examines the adverse party as a witness, he is not entitled to refer the cause, or any part of it, to his adversary's oath. In all other respects the right of reference to oath remains as before, and the authority and practice of the courts remains unaltered and unaffected.

2. *In what manner evidence is taken.*—Parole evidence in the Court of Session was, until lately, with few exceptions, taken by a commissioner under a warrant from the Court or from the Lord Ordinary. When evidence is so taken, the witnesses are compelled to appear to give their testimony, by letters of diligence issuing under warrant of the Court; and in virtue of which, in case of contumacy, the witness may be imprisoned. See *Diligence*. On his appearance before the commissioner, and the counsel and agents for the parties, the witness is sworn in these terms to tell the truth: "I swear by Almighty God, and as I shall answer to God at the Great Day of Judgment, that I will tell the truth, the whole truth, and nothing but the truth, in so far as I know and shall be asked in this cause." Formerly the commissioner then asked the witness whether he was acquainted with the parties in the cause—whether he bore any malice or ill-will to the party against whom he was called—or had received any reward, or promise of reward, for his evidence—or had been instructed as to what he was to say. If he answered these questions satisfactorily, he was then examined in the cause by the counsel or agent of the party by whom he was adduced, subject to the cross questions of the other party after his examination in chief is concluded. If the opposite party had any disqualifying objection to the witness, it was stated at this stage of the proceedings, and supported either by the examination of the witness himself *in initialibus*, or

by other witnesses. The witness under examination is bound to answer all pertinent interrogatories, the answers to which do not tend to criminate himself, or to involve him in any criminal charge inferring infamy; but he is not entitled to decline answering a question merely because the answer may infer against him fraud or damage. The import of the witness's testimony, as nearly as possible in his own words, is taken down in writing; and the deposition, after being read over to the witness, to enable him to correct any inaccuracy in taking it down, is signed by the witness, the commissioner, and the clerk. When the proof is completed, the report of the evidence, authenticated by the subscription of the commissioner and clerk, is transmitted to the clerk of the process and reported to the judge, who is to decide on its legal effect. The duties of commissioners in taking proofs, under authority of the Court of Session, are pointed out by the acts of Sederunt 11th March 1800, and 22d June 1809. In the inferior courts, parole evidence was taken either on commission, granted in the ordinary case to the clerk of the Court, or before the inferior judge himself; but by the act 16 and 17 Vict., c. 80, 1853, § 10, the sheriff is directed to take a note of the evidence with his own hand, and proof by commission is disallowed. The testimony of the witnesses is committed to writing, except in the case of proceedings before justices of the peace or sheriffs, or under the small debt acts, or before justices or other magistrates vested with the power of summary conviction and punishment for minor delinquencies, without the intervention of a jury. In the Court of Justiciary, the testimony of the witnesses examined before the jury was formerly committed to writing by the clerk of Court; but by the statutes 21 Geo. II., c. 19, and 23 Geo. III., c. 45, this practice was abolished, reserving power to the Court to resort to the former practice when they see cause, and now no such record of the testimony of the witnesses is preserved. In criminal cases, witnesses, whether resident in Scotland, in England, or in Ireland, may be compelled to attend and give evidence, under letters of second diligence issued in Scotland, and indorsable in the courts of Westminster and certain other courts; 54 Geo. III., c. 186; *Hume*, ii. 362, 368. In civil causes, until 1816, parole evidence was almost invariably taken by a commissioner. But the introduction of jury trial in civil causes, under the statutes 55 Geo. III., c. 42, and 59 Geo. III., c. 35, made a very important change on the former practice; and although neither of those statutes deprives the Court of Session of the power of granting commissions for taking evidence, yet, in prac-

tice, that course is seldom followed. See *Jury Trial*.

When a proposed witness is so far advanced in age, or where his health is so precarious, as to render it probable that his evidence might be lost by delay, or where he is about to leave the country, as soon as a process has been raised, a warrant may be obtained for his examination. The Court is even in use to authorise such an examination before the case has come into Court. Formerly, authority to this effect could not be obtained during vacation or recess; but by *A. S. 11th July 1828, § 117*, it is declared competent to the Lord Ordinary on the Bills, in time of vacation or recess, on an application duly intimated, forty-eight hours before, to the known agent of the opposite party, and on production of a process depending before a Lord Ordinary, or other judicial procedure, to grant commission and diligence for taking the examination of witnesses, whose evidence, owing to great age (not under seventy years), or to severe indisposition, or to their intending to go abroad, and remain abroad for a considerable time, is in danger of being lost. Such examinations are sealed up by the commissioner, and lie *in reletis*, subject to the future orders of Court. They are limited to matters of fact to be set forth in a condescendence for the applicant, with or without answers. The applicant must state, and, if required, show, to the satisfaction of the Lord Ordinary, that he was unavoidably prevented from making the application to the Lord Ordinary in the cause, or to the Court during session. These depositions will not be received as evidence at the trial, or otherwise, unless it be satisfactorily proved that the witnesses cannot be adduced in consequence of death, sickness, or continued absence from the country. *Mr More's Notes on Stair*, p. cccxcv.; *Darling's Prac.* i. 228; *Macfarlane's Jury Prac.* 88, 186; *Tait*, 412-7; *Maclaurin's Form of Process*, 185. See *Commission to take a Proof*.

3. *On what points parole proof is admitted.*—Contracts in regard to land (except leases for one year), or the borrowing of money, or contracts where it is *pars contractus*, that they shall be reduced to writing, cannot be established by parole evidence. But contracts of sale, barter, and location of moveables, and, in general, all contracts with known prestations in regard to moveable subjects, however valuable, may be proved by witnesses, except contracts for the transference of ships, or of goods in a bonded warehouse, in the actual possession of the owner, and for the conveyance of a copyright, which, by special statutes, require writing; *54 Geo. III.*, c. 156; *6 Geo. IV.*, c. 37; and *6 Geo. IV.*, c. 112. Sub-

missions and transactions, or compromises with regard to moveables, are not, in the ordinary case, proveable by witnesses. Verbal submissions and decrees-arbitral, however, in matters of small importance, have been admitted to be proved by parole testimony. See *Arbitration*. Marriage, that is, the exchange of mutual consent *de presenti*, or cohabitation, or habit and repute, may be proved by witnesses. But a promise of marriage, if a *copula* has not followed, can, like other promises, be, in the ordinary case, proved only by writ, or by oath of party. Nuncupative legacies to the extent of L.100 Scots (L.8, 6s. 8d. sterling), or onerous verbal agreements to the same amount, may also be proved by witnesses; but this description of evidence is inadmissible to prove gratuitous promises, however small the sum. The fact that a conveyance of heritable property, or of rights of a personal nature, such as assignations of debts due by bond and the like, was made in trust, is, by express statute, proveable by writ or oath of party, and not otherwise; 1696, c. 25. But the statute has been held not to apply to trust in the *spes corpora* of moveables. Fraud is proveable by evidence *prout de jura*. *Ersk. B. iv. tit. 2, § 20*, and *B. i. tit. 6, § 5*; *Stair, B. iv. tit. 43, § 4*; *Bank. B. i. tit. 18, § 12*, and *B. iv. tit. 27, § 10*, and *tit. 30, § 1*; *Tait*, 295, *et seq.*; *Dickson on Evidence*.

Parole evidence will not be admitted to extinguish or qualify an obligation constituted by writing. Thus, the payment of the whole, or of any part of the contents of a bond for borrowed money, is not proveable by witnesses, except where the payment to the creditor has been made by the hands of another; *e. g.*, where the debtor's tenant has made the payment on account of his landlord, the oath of the tenant will be admitted to prove payment of the debt. In like manner, implement of a written obligation to perform special facts,—*e. g.*, to deliver a quantity of grain, to build a bridge, a ship, or the like,—may be proved by witnesses. So also consignation of money in the hands of a clerk of Court is proveable by witnesses. Payments of debts under L.100 Scots, or, if the whole debt be more, a payment not exceeding that sum, may be proved in the same manner; but in whatever way the debt may be constituted, its extinction beyond L.100 Scots can be proved by writ or oath of party only, and not by witnesses; *A. S., 8th June 1597*. A payment exceeding L.100 Scots, however, may be proved by parole evidence, where the payment is made *unico contextu* with the bargain, as in the case of purchases in public market, paid for on the spot, or even after an interval, where the payment is made on delivery of the article. Erskine seems to consider parole evidence admissible to prove

the creditor's renunciation of, or consent to pass from, an obligation not constituted by writing; but, except to the extent of L.100 Scots, this doctrine seems questionable. See *Ersk. B. iii. tit. 4, § 8*; and *Tait on Evidence*, p. 253; and on the subject of parole evidence generally, see *Stair, B. iv. tit. 43, § 4*; *Bank. B. iv. tit. 27, § 10*; *Ersk. B. iv. tit. 2, § 21*; *Tait, 336, et seq.*; *Bell's Com. i. 318, 622, 5th edit.*; *Hunter's Landlord and Tenant, 281-7*; *Macfarlane's Jury Prac. 196*; *Bell on Leases, 4th edit. i. 282-3*; *M'Adam, Dow's Appeal Cases, i. 185*. See also *Payment. Discharge. Dickson on Evidence*.

4. *Of the nature and effect of circumstantial and presumptive evidence.*—Circumstantial evidence, or indirect proof, may be resorted to in certain cases where direct proof cannot be obtained; but where other facts are proved or admitted, having relation to the fact sought to be established, and from which the existence of that fact may be inferred, the conviction produced by this description of evidence is sometimes even stronger than that arising from the most direct testimony; for the facts and circumstances sworn to may be so connected, and, at the same time, may contribute so effectually to establish the fact inferred from them, as to remove all suspicion of collusion amongst the witnesses, which is not always the case where direct testimony is adduced. So great, indeed, is the force of circumstantial evidence, that payment, performance, or discharge, of formal written obligations, has been frequently held to be proved by facts and circumstances, without any direct proof of the extinction of the obligation; and, upon the same principle, although circumstantial evidence will not be received to qualify an express clause or stipulation in a deed, yet such evidence has in some instances been admitted to overcome the legal inference arising *ex facie* of a formal deed. Thus, in a question between two co-obligants in a bond, facts and circumstances have been admitted to prove, that, notwithstanding the terms of the bond, one of the co-obligants was only a cautioner for the other; *Smollet, 21st Feb. 1793, Mor. p. 12,354*. For a further illustration of the weight attached to this species of evidence, see *Stair, B. iv. tit. 45*; *Ersk. B. iv. tit. 2, § 34*; *Hume, vol. ii. p. 370-372*; *Tait, 434, et seq.* See also *Circumstantial Evidence*.

In connection with circumstantial evidence, it may be observed, that the law of Scotland recognises certain presumptions founded on general conclusions, established by practice or statute, or deducible from the ordinary inferences of common sense. Of these there are,—1st, The *præsumptio juris et de jure*,—i. e., a presumption of the fact, against which no evidence can be received; and hence such a

presumption may be more correctly characterized as a legal doctrine, resting on an unchallengeable assumption of fact. Such is the presumption that a pupil is incapable of managing his affairs, which presumption cannot be redargued by proof, however strong, of his ability. The presumed incapacity on which the law of deathbed is founded, and the presumed fraud, which the act 1696, c. 5, is intended to guard against, are presumptions of the same kind. See *Deathbed. Bankrupt. 2d*, The *præsumptio juris*, which is an assumption that the fact is so, but which may be overcome by contrary proof or stronger presumption. Such are the presumptions that the possessor of moveables is their proprietor—that the child born of a marriage is legitimate—in criminal law, the presumption of innocence until guilt be proved; and the like. Lastly, The *præsumptio hominis vel judicis*, which is no more than an inference or bias arising from the particular circumstances of the case, and the ordinary conduct of mankind, such as the trite presumption that a man will not voluntarily do a deed to injure himself; all which presumptions of course must yield to positive proof, or stronger presumptions the other way; *Stair, B. iv. tit. 45, § 9, et seq.*; *Bank. B. iv. tit. 34*; *Ersk. B. iv. tit. 2, § 35, et seq.*; *Tait, 447, 497*. See also *Presumptions. Prescription*.

II. *Of the oath of party.*—The oath of party may be taken either upon a reference by the opposite party, or by order of the judge; and, with these exceptions, it was formerly a general rule of law, that no person could be admitted to give evidence in his own favour.

1. *Oath on reference of opposite party.*—Where the opposite party refers the fact at issue to his adversary's oath, and the oath so given is explicit, it is decisive of the cause. This arises, not from the superior weight attached to this species of evidence, but is founded on the judicial contract between the parties, whereby the referrer is held to have bound himself to allow the cause to be decided on the evidence of his antagonist. So binding, indeed, is this contract held to be, that no evidence whatever is admissible to impugn the testimony of the party to whom the reference is made. Even direct proof that he has sworn himself, although it might serve to convict him in a criminal prosecution for perjury, will not affect the decision of the civil action, which must be determined by the import of his oath. But in such a case, the private party who made the reference might, with the requisite concurrence of the public prosecutor, insist in a criminal prosecution for the pains of law, with the damages and expenses he has suffered by the perjury; *Hume, i. 367*; *Stair, B. iv. tit. 44*; *Bank. B.*

iv. tit. 32; *Ersk. B. iv. tit. 2, § 9, et seq.*; *Tait, 217, et seq.*

Where the oath of the party is not precise or decisive, or where it contains matters foreign to the point at issue, questions of great nicety arise as to what are called *intrinsic* and *extrinsic* qualities in the oath. It cannot be expected that such a subject (which, indeed, is more matter of law and interpretation than of evidence) should be treated here much in detail; but, in general, it may be observed, that where the qualification cannot be separated from the fact sworn to, it will be held as an intrinsic quality. Thus, if the fact that a party promised to pay a certain sum of money be referred to his oath, and he swear that he made the promise conditionally, and that the condition has not been purified, the condition cannot be separated from the promise, and will therefore be accounted an intrinsic quality in the oath. Where, on the other hand, the fact of the existence of a debt is referred to the oath of a party, and he swears that the debt is due, but that he has a counter claim which extinguishes it by compensation, the counter claim so stated will be held an extrinsic quality; because compensation, although a valid defence, must be established otherwise than by the oath of the party who pleads it; hence, it cannot be admitted to qualify an oath which distinctly admits the existence of the debt. The decision of questions of this kind, however, necessarily depends upon the true meaning and extent of the reference, which must be ascertained by an accurate discrimination of the facts which the party referring intends, or is bound by this mode of procedure to peril, on the good faith of his adversary. See the subject fully treated, *Ersk. B. iv. tit. 2, §§ 11-14*; *Stair, B. iv. tit. 44, § 14*; *Bank. B. iv. tit. 32, § 16*; *Tait, 240*.

Reference to oath of party is not admissible to supply the want of public instruments required as solemnities, such as instruments of sasine, of requisition, and the like. In like manner, where matters are entire, the want of writing in transactions concerning the titles to heritable subjects, including leases exceeding one year's endurance, cannot be supplied by oath of party. Writing is also indispensable, and not to be supplied by oath of party, in the nomination of an executor; but verbal legacies to any amount are good, if admitted by the party liable to pay them, and may be proved by reference to his oath, although not by witnesses, if they exceed L.100 Scots; *Ersk. B. iii. tit. 9, § 7*. Where there are manifest errors or inaccuracies in a deed, its contents may be overruled or controlled by oath of party; but it seems more doubtful whether a cause or obligation can, on such

evidence, be added to a finished written agreement; *Tait, 225, and cases there cited*. In almost all cases, however, in which writing is essential to bind the parties, they will be bound without it, if there have been a *rei interventus*, or performance, total or partial, by either party, on the faith of the contract; and after such a *rei interventus*, the contract, if denied, may be proved by oath of party, and in some cases even by witnesses. Thus, a *rei interventus* has been held sufficient to supply the want of writing, both in leases exceeding a year, and in sales of heritage—in the constitution of servitudes—in submissions concerning heritage—in cautionary obligations—in agreements where writing was *pars contractus*—and the like; not, however, in sales of ships, even although the price had been paid, and possession given—writing being in that case a statutory requisite; *Tait, 227*; *Stair, B. iv. tit. 44, § 5*; *Ersk. B. iv. tit. 2, § 9*.

In criminal prosecutions, a party cannot be required to swear upon a reference to his oath in any matter in which his confession of guilt would infer infamy or personal punishment. By express statute, however, such a reference is competent in a trial for usury; 1600, c. 7; and in all criminal prosecutions concluding for fine only, or restricted to that by the prosecutor, the defender may be required to swear on a reference to his oath. In criminal cases it seems to be incompetent for the accused to refer the truth of the charge generally to the oath of the prosecutor, public or private, this being a species of *contract* on the panel's side hardly reconcilable with the principles of criminal jurisprudence; *Hume, i. 368, and ii. 325 and 387*. In civil actions reference to oath is excluded in all cases of an infamous nature, such as theft, swindling, and the like, and even in cases which, although not infamous, may, if prosecuted criminally, involve the party in personal punishment. *Stair, B. iv. tit. 44, § 5*; *Bank. B. iv. tit. 32, § 4*; *Ersk. B. iv. tit. 2, § 9, and tit. 4, § 94*; *Tait, 233*.

The reference to oath is a bar to any new process upon the same interest and cause of action, but will not affect third parties who have not sanctioned it. To this rule there is an exception in the case of arrestments; for the arrestee may refer his defence against the arrester, to the oath of the common debtor; and by that oath the arrester will be bound; *Ersk. B. iii. tit. 6, § 16*. The oath of a bankrupt, upon reference by an alleged debtor to his estate, rather appears at one time to have been thought admissible against the estate, where there was no objection on the ground of relationship to the party referring, or other suspicious circumstances; *Bell's Com. ii. 484*.



So also where a creditor of the estate proposed to refer the debt to the oath of the bankrupt, the competency of the reference seems at one time to have depended on the question, whether or not the bankrupt had an interest in the issue, the distinction between the oath of a witness and the oath of party being, it was stated, that interest in the witness formed the ground of exclusion; whereas, in reference to oath, interest was the ground on which it rested. Hence it was thought, that if the fact in dispute be proveable by parole evidence, the party might refer to the bankrupt's oath, if he had an interest, and might have the benefit of his evidence as a witness, if his interest be at an end. See, on this subject, *Mein*, 11th July 1829, 7 S. & D. 902, and authorities there cited. It seems now, however, to be held, that reference to the oath of a bankrupt is incompetent, on the ground that, by the sequestration, he is divested in favour of his creditors, and is no longer a party. See the case of *Adam v. MacLachlan*, Jan. 29, 1847, 9 D. 566. The admission of one co-obligant or co-creditor, on a reference to his oath, does not bind the others; nor will the other co-obligants or co-creditors be bound by the deposition, in a reference made to oath by one of their number. But the rule appears to be different as between principal and cautioner; for the cautionary obligation, being merely accessory, must stand or fall with the principal obligation, and, consequently, may be affected either by the oath on reference, or by the reference to oath, made by the principal debtor; *Tait*, 258. The oaths on reference of guardians, trustees, and managers for others, or the references to oath made by them in matters within their administration, bind their constituents; e.g., the oaths or references of guardians for minors bind their wards; the oaths of wives *proposita rebus domesticis*, or of children in *familia*, to prove necessary furnishings, bind the husband or father; the oaths of magistrates, although *functi officio*, to prove contracts made by them while in office, bind the corporation; and the like; *Ersk. B. iv. tit. 2, § 10*; *Bank. B. iv. tit. 32, § 3*; *Tait*, 264. The assignee, until intimation of the assignation, will be bound by the cedent's oath; but, after intimation, the cedent's oath is inadmissible to prove compensation, payment, or any other direct defence against the debt; except—1st, Where the assignation has been gratuitous, or in trust for the cedent; 2d, Even where the assignation is onerous, if it have been made after the subject of it has become litigious by an action (not a mere citation), at the instance of the debtor against the cedent, on the same grounds on which the debtor afterwards disputes the assignee's claim; 3d, If the assignee have followed out diligence

commenced in name of the cedent; 4th, If compensation against the cedent have been proved *scripto*, and the assignee pleads recompensation in the person of the cedent, the cedent's oath is admissible against the assignee to elide the plea of recompensation—upon the principle that the ground of recompensation is still in the person of the cedent unassigned; *Ersk. B. iii. tit. 5, §§ 9, 10*; *Stair, B. iii. tit. 1, § 18*; *Bank. B. iii. tit. 1, § 25*. A reference to oath by the public prosecutor in a criminal process, with a negative oath by the accused, will not defeat the private party's civil claim for damages; nor, on the other hand, will a similar reference by the private party in a civil action compromise the right of the public prosecutor to insist against the defender *ad vindictam publicam*; *Tait*, 272. See farther, on the subject of this section, *Stair, B. iv. tit. 44, § 8*; *Bank. B. iv. tit. 32, §§ 5 and 6*; *Ersk. B. iv. tit. 2, § 10*.

Where a reference to oath is proposed, the usual course is, for the party referring to put into process a minute of reference, which is seen, and, if necessary, answered, or objected to, by the opposite party; and the terms of the reference being finally adjusted and approved of by the judge, the deposition is taken by the judge or by a commissioner, in the ordinary manner, and the cause decided according to its import. Reference to oath, where otherwise competent, may be made at any time before extract, and, according to some authorities, even after extract, if offered in a suspension. It has also been decided, that such a reference is admissible after a verdict in the Jury Court against the party referring, on account of his failure to prove his case; *Clark*, 20th Nov. 1819, *Fac. Coll.* Hitherto, however, it has not been expressly settled whether or not a reference to oath can be competently made where the party referred to has already proved his case by witnesses; *Tait*, 235.

2. *Oaths required by the judge.*—The oaths of this description are the oath in supplement and the oath *in litem*. The oath in supplement is admitted to supply deficiencies in legal evidence, where the party whose oath is allowed has brought what is called a *semiplena probatio*. The ordinary cases in which such an oath is admissible are those in which the oath of a merchant, in supplement to regularly kept books, is admitted to prove furnishings made by him; or where, in questions of filiation, the oath of the mother of an illegitimate child is admitted to establish the paternity, provided she has been enabled, by other evidence, to prove such intimacy or familiarity between herself and the putative father, as raises not a suspicion merely, but a reasonable belief that illicit intercourse must

have taken place within the requisite time. As, however, oaths in supplement do not rest on any implied contract between the litigants, they may be redargued by contrary proof afterwards discovered, or the cause may be brought under review of a superior Court, on the ground that the oath ought not to have been allowed; *Ersk. B. iv. tit. 2, § 14; Tait, 273. See Semiplena Probatio.*

The oath *in litem*, is the oath of the pursuer of an action as to the amount of the loss or damage which he has sustained through the defender; and it is admitted only in two classes of cases: 1st, Where there is full proof that the defender has been engaged in some illegal act, as spuilzie, or the like; and, 2dly, In the case of losses which a party is entitled to recover under the edict *Nautæ, caupones, stabularii*. In either case the oath *in litem* is conclusive as to the quantities lost; but, in so far as regards the price or value put on the articles, it is subject to modification by the Court. *Ersk. B. iv. tit. 2, § 18, and B. iii. tit. 1, § 29; Stair, B. iv. tit. 44, § 4; Bank. B. i. tit. 10, § 133, and tit. 16, § 1; B. iv. tit. 32, § 11; Tait, 279, et seq.*

Where a party has been required to give his oath, either on reference or by the judge, the requisition is made under the certification that, in default of his appearing to make oath, or on his declining to swear, he shall be held as confessed; that is, his failure to appear, or his silence, will be deemed equivalent to an acknowledgment, on oath, that the fact, as stated by the other party, is correct. For this purpose, however, it is necessary that the party who is to swear shall have been regularly cited either *apud acta* (*i. e.*, by the judge notifying the day to him in Court), or by a messenger-at-arms. See *Citation*. If the party appear and swear *non memini* to a fact, so recent that he cannot be supposed to have forgotten it, that will be held equivalent to a refusal to swear, and he will be held as confessed. *Ersk. B. iv. tit. 2, § 14; Tait, 287 and 240.*

The law sanctions or requires several judicial or voluntary oaths, affidavits, and declarations of parties. 1st, The oath of calumny, as known in our older practice, was a declaration upon oath by a party, on the requisition of his adversary, of his belief in the truth of the averments on which his plea rested. See *Calumny, Oath of*. 2d, The bankrupt statute requires from the bankrupt and those connected with his affairs, and from the creditors, sundry affidavits, oaths of verity and credulity, and other declarations upon oath, as to which, and all similar statutory oaths or affidavits, it may be observed, that, except against the deponents themselves, they are not legal evidence. The examinations upon

oath of the bankrupt and others as to the state of his affairs, are in law regarded as mere inquisitorial investigations of the nature of a precognition; and it is only in the event of the death of the parties by whom they are made, that such depositions will be admitted even as adminicles of evidence. The affidavits and oaths of verity and credulity by creditors, again, can be viewed as nothing better than the solemn attestation of a party in his own favour, not as legal evidence where the claim is disputed; *Bell's Com. ii. 399, 485. 3d*, Neither party can insist for a judicial examination of his adversary as matter of right, it being entirely in the discretion of the judge to admit it or not; and the declaration of a party on such an examination, although good evidence against himself, can, as against his opponent, be received as no more than the deliberate statement of a party. Such examinations are altogether incompetent,—1st, Where a reference to oath is intended, or is the only mode of proof competent in the circumstances of the case; 2d, Where writing is indispensable; and, 3d, Where the facts, in regard to which the party is proposed to be judicially examined, are such as would infer personal punishment or infamy against him, if prosecuted criminally; *Gordon, 22d December 1809, Fac. Coll.; Tait, 291, et seq.* 4th, In criminal prosecutions the voluntary declarations emitted by the accused in the course of a precognition, or before the libel has been served upon him, may be founded upon at his trial, and, taken along with the other evidence adduced, may contribute to his conviction. See *Declaration*. Lastly, The admissions or confessions made by a party, either on a judicial examination or voluntarily in court, or even extrajudicially, if seriously made, may supersede the necessity of resorting to other evidence, all such admissions or confessions being good evidence against the party making them. From this rule are excepted admissions or concessions made in the course of extrajudicial communications for a settlement of the case; for it is presumed that a party is willing to make large concessions in order to avoid a law-suit; besides, were such communications to be taken advantage of, it might prove a serious obstacle to compromises. *Ersk. B. iv. tit. 2, § 33; Stair, B. iv. tit. 45, §§ 5-8; Bank. B. iv. tit. 33, §§ 18, 19; Tait, 293.*

### III. OF THE ORDER IN WHICH EVIDENCE IS TO BE RECEIVED; WITH SOME GENERAL RULES AS TO EVIDENCE.

The best evidence, and that to which a party ought first to resort in support of his plea, is a written deed. Where that does

not exist, parole proof, where otherwise admissible, may be resorted to; and failing both of these, the party may, where such a mode of proof is competent, refer the point at issue to the oath of his opponent.

The following rules applicable to the subject of evidence generally may be of service:—

I. Neither judges nor juries can legally proceed upon their own private knowledge concerning matters of fact at issue before them; but are bound to decide solely according to the legal evidence judicially adduced. *Hume*, ii. 310.

II. The best evidence to be had in the circumstances must be adduced. Thus, it is incompetent to prove the contents of a written document otherwise than by the document itself, if it be in existence; except in the case of extracts from public or judicial records, as already explained. And, on the same principle, *hearsay evidence*, generally speaking, is inadmissible; that is, where a fact or facts pertinent to the issue, and in the knowledge of a competent witness, are proposed to be proved, not by that witness himself, but by the evidence of one who heard him state them. To this rule there are exceptions,—1. In a criminal prosecution, the dying declaration of the injured party as to the mortal injury, uttered in the prospect of death, is allowed to be proved by hearsay on a trial for his murder. 2. Even in civil cases hearsay evidence is admitted where the statements of a competent witness, in relation to the matter at issue, are offered to be proved after his death, or after he has become insane. 3. It is stated by some authorities, that hearsay is admitted in evidence where it forms part of the transaction which is the subject of inquiry. But where the transaction in question concerns words spoken (as in the case of defamation), and those words are attempted to be proved by a witness who was present and heard them, that plainly is not *hearsay*, as technically understood. See *Hearsay*. *Tait*, 430; *Phillips on Evidence*, p. 278, 4th edit.; *Hume*, ii. 391; *Murray's Jury Court Reports*, vol. i. pp. 95 and 424.

III. By the law of Scotland, no fact can be legally proved, and, in criminal cases, no conviction can follow, on the unsupported testimony of a single witness, however unimpeachable his credit may be. But where one witness swears distinctly to a fact, the want of a second witness to the same specific fact may be supplied by a witness to corroborative circumstances; and in cases of circumstantial evidence, two witnesses are not required to prove each circumstance of the same transaction. Nor, where a specific offence is charged, is it necessary to prove each reiterated act by two witnesses, unless where the acts have no

connection with, or relation to each other. Thus, if in a prosecution for defamation, one witness swear that he heard the defender utter the slander, and another swear that he heard him use expressions of a similar import on a different occasion, that will amount to legal proof; *Landles*, 18th July 1816, *Murray's Jury Court Reports*, i. 79. But, if successive acts of uttering forged notes to different persons and in different places be charged, two witnesses to each act are requisite; *Hume*, ii. 371–372; *Tait*, 437. Several exceptions to the general rule of the common law are introduced by special statutes, authorising conviction on the oath of one credible witness, as in the case of certain offences against the laws of Customs and Excise, the game laws, and the like; *Bank. B. iv. tit. 30, § 2*. See *Game*.

IV. It is a trite rule in evidence, that a party cannot be required to prove a negative; but when evidence is adduced in support of the affirmative, such evidence may be rebutted by opposite proof, which is not properly proving a negative, but merely proving a proposition inconsistent with that which is affirmed; *Hutch. Justice of Peace*, B. i. c. 6, p. 277.

V. Every member of the community, if legally capable, is bound to give evidence when required by competent authority; and peers as well as commoners, when examined as witnesses, must be sworn to tell the truth. Quakers and other sectarians, on account of religious scruples, are, by special statutes, allowed to make a solemn affirmation instead of an oath; and these affirmations are declared to have the effect of an oath, in all places, and for all purposes whatsoever, where an oath is required, either at common law or by statute; 22 *Geo. II.*, c. 46, § 34; 3 and 4 *Will. IV.*, c. 49, and c. 82; 1 and 2 *Vict.*, c. 77, 1838; *Tait*, 288 and 422.

VI. Witnesses must be examined apart from each other; and examined must have no communication with unexamined witnesses, lest the latter should be biased by hearing what the others have deposed. Neither, generally speaking, are unexamined witnesses permitted to be present in Court, or before the commissioner, while the case is going on, or while objections to their admissibility, or to the competency of the questions proposed to be put to them, are under discussion; *Stair*, B. iv. tit. 43, § 18; *Tait*, 420.

VII. Witnesses are entitled to the expenses of travelling to and from the place to which they are cited to give evidence, and of their stay while they are detained. The Act of Sederunt, 21st Dec. 1763, fixes, on a very moderate scale, the rates of such allowances to witnesses in cases before the Court of Session, and authorises the expenses to be levied

by summary warrant against the agent of the party adducing them; and although a witness may not be entitled to enforce payment of more than the rates so fixed, yet in practice, a sum sufficient to defray the reasonable expenses incurred by the witnesses is allowed, without regard to the rates of the Act of Seiderunt. But where a witness, by disobeying the first citation, renders letters of second diligence necessary, he forfeits the allowance for expenses; *Ersk. B. iv. tit. 2, § 30; Tait, 417.* In criminal cases, in like manner, witnesses are entitled to a reasonable sum for travelling expenses, although they may be compelled to come from any part of Great Britain or Ireland to bear testimony on a criminal trial, without any previous tender of expenses; *54 Geo. III., c. 186.* Their expenses are paid by the parties who adduce them; and, in case of refusal or delay, payment may be enforced by letters of horning against the adducers; and there are examples on record of such hornings being issued, even against the Crown lawyers; *Hume, ii. 368, note.* Witnesses do not appear to be entitled to any remuneration for loss of time, although persons in the working classes are usually allowed wages at the ordinary rate of their trade; and it is said to be the practice in England to make allowances for loss of time to medical men and attorneys, in addition to their travelling expenses; *Phillips on Evidence, i. 4.*

*Lastly*, A proof *prout de jure*, means a proof by all the legal means of probation,—i.e., by writing, by witnesses, and by oath of party; although, in practice, the phrase is usually employed to signify a proof of facts and circumstances by witnesses, in support of an averment, in contradistinction to a proof limited to writ or oath of party; *Bank. B. iv. tit. 27, § 1; Ersk. B. iv. tit. 2, § 1; Dunbar, Bligh's App. Cases, ii. 350. See Prout de Jure.*

**Evidents**; a word used by conveyancers as synonymous with *writs* or *title-deeds*, by which property is proved. See *Balfour's Practicks anent Chartouris and Evidentis, p. 187, et seq.*

**Ewest**; nearest. The word is used in this sense in our older statutes. Thus the act 1572, c. 48, in regard to manes and glebes, provides, that the manes "maist ewest to the kirk" shall pertain to the minister or reder, "together with four acres of land of the glebe at least lyand contigue, or maist ewest to said manse, gif there be sa meikle." See *Glebe.*

**Ex Officio**; is a term applied to acts done by a functionary in *virtue of his office*, and not at the suit, or on the employment, of any other party. An *ex officio* information, in the law of England, is an information (analogous to a Scotch indictment) filed by the Attorney-

General *ex proprio motu*, and without the intervention of any judicial authority. See *Tomlins' Dict. h. t.*

**Ex Parte.** In judicial proceedings a step is said to be taken *ex parte*, when the adverse party, either by neglect or refusal to appear, has not been heard, or has not stated his reasons why what is asked should not be granted. See *Absence. Default.*

**Ex Post Facto**; is a term used in law to signify something done in order to affect some right or demand, which had been brought into question *before* the *ex post facto* act or deed was done. An *ex post facto* law, is a law which operates retrospectively; as, for example, which imposes a penalty on an act or deed done *before* the law was enacted, and which act or deed, when done, was not penal or prohibited. This is an extraordinary remedy resorted to in extreme cases, and which seems to be justifiable only where the law so made, is directed against some unquestionable moral wrong, which, from the infrequency of its occurrence, or from its enormity, may not have been hitherto made the object of legislation. *Vide Tomlins', h. t.*

**Ex Deliberatione Dominorum Concilii.** These words are annexed to all signet letters which pass the Royal Signet for Scotland, on bills presented at the Bill Chamber of the Court of Session; such as privileged summonses, letters of suspension, supplement, and the like, letters of horning on decrees of inferior judges, letters of caption and other diligences requiring bills. The words are subjoined to the signet letter immediately above the subscription of the writer to the Signet. See *Bills of Signet Letters. Bill Chamber.* See also *Stair, B. iv. tit. 3, §§ 4 and 32; Bank. B. iv. tit. 27, § 9.*

**Exaction**; as understood in the law of England, is a wrong done by an officer or one in pretended authority, by taking a fee or reward which the law does not allow him. As contradistinguished from *extortion*, it is said to be an *exaction* when the officer wrests a fee or reward where none is due; whereas it is *extortion*, when, something being due, the officer extorts more than he is entitled to. *Tomlins' Dict. h. t.*

**Examination of a Prisoner.** See *Declaration. Criminal Prosecution.*

**Examination, Judicial.** See *Declaration.*

**Examination of a Witness.** See *Evidence.*

**Examination of a Bankrupt.** See *Bankrupt. 19 and 20 Vict., c. 79, §§ 87-95.*

**Examined Copies.** In the phraseology of the English law, an examined copy of a deed, writing, or record, is a copy or extract of the deed or entry in the record, examined and certified by the proper officer. The term is nearly synonymous with the Scotch law term

*Extract.* As to the effect of such examined copies or extracts, and of notarial copies when produced as evidence, see the article *Evidence*, *supra*, p. 367.

**Excambion**; is the legal name of the contract whereby one piece of land is exchanged for another. The deeds by which the contract is completed ought to bear, that the lands are excambed and disposed in excambion. The *implied* warrantice of this contract is *real warrantice*, in virtue of which, either party, in case of eviction of the land which he has received in excambion, may recover possession of the land which he gave in exchange. This right to recur to the original property in case of eviction, is competent to the original excambor and his heirs and singular successors, against the party with whom he contracted and his heirs and singular successors, even although the singular successor may have acquired his right prior to the eviction. The original title of the party claiming under this warrantice is proved by the recital in the contract of excambion, it being presumed that when the exchange was made, he delivered the title-deeds of the portion excambed to the other party, unless the contrary appear. In order to constitute this sort of warrantice, the deeds must expressly bear that the lands are mutually given in excambion. Heirs possessing under deeds of entail have a statutory privilege, under 10 Geo. III., c. 51 (called the *Montgomery Act*), of exchanging or making excambions of certain portions of the entailed lands. This privilege was conferred by that statute, not only to benefit the heirs of entail, but also to promote the general improvement of the country. But no more than thirty acres of arable land, or one hundred acres of ground unfit for the plough, can be so exchanged. In order to carry such an arrangement into effect, the heir of entail proposing to make the excambion must apply to the sheriff or steward of the county where the entailed estate lies, who appoints two or more skilful persons to adjust the value of the lands to be exchanged. Upon their settling the marches, and reporting upon oath that the exchange will be just and equal, the sheriff authorises the exchange to be made by a contract of excambion, which is effectual on being executed, and afterwards recorded in the sheriff-court books of the county in which the estate is situated, within three months after the execution of the deed. The land given in exchange to the entailed estate is thenceforth held as part thereof, and that given from it held as free of the fetters of the entail; 10 Geo. III., c. 51, § 27. By the recent statute, 6 and 7 Will. IV., c. 42, this power has been greatly extended. It is

thereby enacted, that notwithstanding the prohibitory, irritant, and resolute clauses in any entail, it shall be lawful for the respective heirs of entail in possession, without consent of any other heir, to make excambion of any portion of the entailed estate for an equivalent in lands, estates, or heritages lying contiguous to the same, or to some other part of the entailed estate, or being convenient to be holden with the same, whether belonging to himself in fee-simple or to any other person, and that although the heritages to be given and taken in exchange consist of different descriptions of heritable property. Notice of the intention to make such excambion must be given (three months previous to the application to the Court of Session after mentioned) to the five heirs or substitutes of entail, or to the whole, if their number be less than five, next in the order of succession to the heir so applying. When any of these five heirs is under age, or under any other disability, the notice must be given to his curator or other administrator; and if three or more be under such disability, the notice must also be given to the two heirs, next in succession after such five heirs, who are under no disability. When any of the said heirs is forth of the kingdom, notice must be given to his known agent or factor. After such notice, for the purpose of ascertaining and adjusting the value of the lands, &c., proposed to be exchanged, an application must be made by summary petition to one or other division of the Court of Session, setting forth the objects and expected advantages of, and praying for, such excambion. The said Court, after proof made to them of notice having been given as above, and hearing any party having a title and interest to be heard, appoint two or more skilful persons to inspect and adjust the value and settle the marches of the lands, &c., to be exchanged. Upon receiving their report, and being satisfied of the respective value of the lands, &c., and the expediency of the exchange, the Court authorises the excambion. The contract of excambion is then executed at the sight, and with the approbation of the Court, and recorded in the Sheriff-court books of each of the shires in which the lands are situated, and also within three months in the Register of Tailzies. The expenses incurred by any party having a title or interest, appearing as aforesaid, are borne either by such party, or by the heir of entail applying for the excambion, as the Court may think just. Such excambions cannot be made of the principal mansion-house or offices, or the garden, park, home farm or policy, of any entailed estate, nor of more than one-fourth in value of the entailed heritages; and if a fourth part has, under authority of the act, been

excambed, no further excambion is competent to any heir of entail. The land given in exchange to the entailed estate is thenceforth held as part thereof, subject to all the prohibitory, irritant, and resolutive clauses, and that given from it held as free of the fetters of the entail. No debt contracted by any heir of entail during the execution and registration of the contract of excambion, affects the lands contained in the contract, and thereby added to the estate. Any excess of value on either side, not exceeding L.200, is paid to the proprietor to whom the lands of similar value are awarded. But if any party to an excambion gives or receives any consideration other than the lands to be exchanged, or aforesaid excess not exceeding L.200, the excambion is null and void. Where any part of an entailed estate is under more than one deed of entail, descendible to the same series of heirs, such deeds of entail are, in reference to the application for excambion under this act, to be construed as one deed of entail. The act 10 Geo. III., c. 51, continues in force, except in so far as repealed by any of the provisions of the late act. Excambions under the act 6 and 7 Will. IV., c. 42, may be carried through under the forms of the Entail Amendment Act 11 and 12 Vict., c. 36, 1848. See, on the subject of this article, *Ersk. B. ii. tit. 3, § 28; Stair, B. i. tit. 14, § 1; Bank, B. i. tit. 19, § 4; Bell's Com. vol. i. p. 693, 5th edit.; Bell's Princ. § 1772; Bell on Purchaser's Title, 2d edit. p. 130; Bell on Leases, 4th edit., vol. i. p. 296; Hunter's Landlord and Tenant, p. 508.*

**Exception;** is a term borrowed from the Roman law, and used in the law of Scotland as synonymous with *Defences*. According to *Stair*, "Exceptions are so termed by the Roman law from the *formulæ* of actions in that law and the edicts of the prætors, which, if they did bear conditions not to hold in such cases, these conditions were thence called exceptions;" *Stair, B. iv. tit. 40, § 14*. In *Spottiswood's Annotations on Hope's Minor Practicks*, there is the following note on the word *Exception*:—"This word is from the law of the Romans; and in their language *excipere* signifies to defend, and so an exception is called a defence; or it may be said to be taken from the style or *formula* of the summons, which was in use to be given with a *nisi*, unless *si non*, if the other party do not *extra quamsi*, without the defender do this or that, &c. And the Emperor Justinian, in the title of his Institutes, which treats of exceptions, at the beginning says, "*That exceptions are devised to defend, and are introduced for the sake of those against whom the action is raised; because,*" continues, he "*it often happens that, though*

*the pursuit be according to law, yet it is unjust against him who is called to it.*" A defender, who comes prepared for his defence, either denies that the pursuer has right and title in law to pursue, or, though he finds the action competent, yet propounds something that either removes it wholly or diminishes the claim; and this, in a proper sense, and not the infiction or total denial, is an exception. But, generally speaking, everything which one alleges for defending himself, and for eliding the action, is called an exception;" *Hope's Minor Practicks, by Spottiswood, tit. 1 of the Form of Process, p. 29, note*. In the more correct acceptance of the term *exception*, therefore, it is not applicable to a *defence*, which denies the relevancy of the libel as laid; or which resolves into an objection to the citation of the party, and the like; since, strictly speaking, an exception must assume that the libel is relevant, but allege that the defender is not liable in the conclusion, in respect of the exception which he pleads. This distinction, however, has not hitherto been much attended to in our practice. See *Defences*. It is a question of some practical importance whether the defence against an action is pleadable by way of exception, or whether it must not be made good by a separate action. This difficulty arises in cases where the demand rests on a deed *ex facie* valid and regular, but which is reducible on the head of deathbed, or of fraud, force, or fear, or the like ground. It seems to be settled, that *ex facie* nullities, whether at common law or founded on statute, are pleadable by way of exception. But the exceptions of fraud, force, or fear, if the deed alleged to have been thus legally obtained relate to heritage, cannot be pleaded by way of exception. The defender in such a case must reduce the deed to which he objects. The same is the rule as to deathbed deeds—deathbed being pleadable, not by way of exception, but by reduction; although by our older practice the rule seems to have been different in petitory and declaratory actions at least. See *Calderwood* against *Schaw*, 14th Nov. 1668, *Mor. p. 12,607*, and *p. 2737; Stair, B. iii. tit. iv. § 31*. According to one authority the distinction between allegations propounded by way of exception, and those which must be established by way of action, is founded in "the circumstances of the process; as when, in defending the right, quarrelled *incidenter*, other persons not called to the principal action are concerned, or the process will, if that allegiance be instantly received, expatiate into another form or kind of action, of higher and more weighty consequence than the principal process, or that this will be retarded, the question being only a *prejudicium* or preparatory, and which, though

sustained, will not determine the principal cause." *Spottiswood's Notes on Hope's Minor Practicks*, pp. 29-30. See also *Stair*, B. iv. tit. 40, § 16, *et seq.*; *Kames' Equity*, 297; *Thomson on Bills*, 280.

**Exceptions, Bill of.** In England, if the counsel for either party, at the hearing or determining of a cause, apprehend that the judge, either in his directions or decisions, mistakes the law, they may require him to seal a *bill of exceptions*, stating the point wherein he is supposed to err; which bill is of the nature of an appeal to the next superior Court; *Blackst.* vol. iii. p. 372. And when jury trial in civil causes was extended to Scotland by the statute 55 Geo. III., c. 42, it having been deemed proper to adopt sundry English law terms and forms in preference to those which our own law supplied, amongst others, *bills of exceptions* were introduced, as to which the following provisions were made in section 7 of the statute:—"It shall be competent to the counsel for any party, at the trial of any issue or issues, to except to the opinion and direction of the judge or judges before whom the same shall be tried, either as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial." The ground of exception required to be first stated verbally to the Jury Court, and then reduced into writing, according to a form prescribed in the *App. to the Acts of Sederunt*, 9th December and 3d July 1823, and signed by the judge or judges of the Jury Court. But notwithstanding such exception the trial was to proceed, and the jury to return their verdict; and after the trial, the judge who presided was forthwith to present the bill of exceptions, with the order or interlocutor directing the issue, and the verdict of the jury indorsed thereon, to the Division of the Court of Session by which the issue or issues had been directed; "which shall thereupon order the said exception to be heard in presence on or before the fourth sederunt-day thereafter." If the Court of Session allowed the exception, another jury was directed to be summoned for the trial of the issue; if the exception was disallowed, the verdict indorsed on the bill was declared final and conclusive; the party, however, against whom any interlocutor was pronounced on the matter of the exception, was entitled to appeal to the House of Lords against that interlocutor; the appellant attaching a copy of the exception to the petition of appeal; and provided that such appeal was presented to the House of Lords within fourteen days after the interlocutor was pronounced if Parliament was then sitting, and, if not, then within eight days after the commencement of the next session of Parliament. These ap-

peals had, under this statute, a precedence, being appointed to be heard on or before the fourth cause day after the time limited for laying the printed appeal cases upon the table of the House of Lords; 55 Geo. III., c. 42, § 7. In the more recent statute, 49 Geo. III., c. 35, § 16, it was provided that, in all cases in which general verdicts were found by the jury, the motion for setting aside the verdict and granting a new trial should be made in the Jury Court, in presence of two at least of the Jury Court judges, and not in the Court of Session; and the order granting or refusing such new trial by the Jury Court was not subject to review by petition, representation, appeal to the House of Lords, or otherwise, unless the motion for setting aside the verdict was founded on misdirection of the judge at the trial, in matter of law, or on the undue admission or rejection of evidence; in which cases (§ 17), "it shall be competent to the party against whom judgment is given by the Jury Court, to tender a bill of exceptions to such judgment, in the same manner as at a trial; and the proceedings on such bill of exceptions shall be conformable in all respects to the provisions of the act 55 Geo. III., c. 42: Provided, nevertheless, that the interlocutor to be pronounced on such motion shall be final, and shall not be subject to review by petition, representation, appeal to the House of Lords, or otherwise." The procedure on bills of exceptions is now regulated by A. S. 16th February 1841, entitled "An Act of Sederunt, regulating proceedings in jury causes." By this act of sederunt, which was passed after the union of jury trial in civil causes with the jurisdiction of the Court of Session, and which repeals all former acts of sederunt on the subject, it is provided (sect. 32) "That where the counsel for either party shall except to points of law laid down by the presiding judge in the course of a trial, or in his charge to the jury, the counsel tendering such exception shall deliver in a note thereof to the judge at the time the exception is taken; and the same, if it shall state correctly what was decided, or directed, or omitted by the judge to be directed, shall be certified by the judge at the time, by subscribing his name to such note; and a note of all such exceptions taken in the course of the trial, or to the charge of the judge, shall be finally settled and certified as aforesaid before the jury is enclosed to consider their verdict." This note forms the basis of the bill of exceptions, which is afterwards prepared and adjusted; and, by section 38 of the same act of sederunt, it is enacted "That it shall not be competent to proceed in any bill of exceptions, unless each bill shall be lodged within six days after the commencement of

the next session, or of the meeting of the Court after the Christmas recess, if the cause has been tried after the end of the session at the sittings in March or July, or during the Christmas recess, or upon circuit, or within ten days if the case has been tried during the session, or immediately before the sitting down of the session, or if the exception has been taken on a motion for a new trial, except leave has been obtained from the Court to prolong the period for presenting the bill." The exception must be to the law laid down by the judge, including his judgment on the admission or rejection of evidence; his refusal to adopt a direction in point of law, suggested from the bar, or the like. Where, in the course of his charge, the judge makes any mistake in point of fact, the practice is for the counsel who thinks he has erred to interrupt him and to set him right. The bill of exceptions sets forth so far the procedure at the trial; and as both parties are entitled to see that this is correctly done, the practice is to communicate the proof-prints of the bill to the opposite agent; and, in the ordinary case, the bill is ultimately adjusted at a meeting of the counsel, with the judge who tried the cause. Considerable discussion has arisen concerning the proper limits and contents of bills of exceptions; as to which, all that can be said in a work such as the present is, that the whole matter must be presented in such a form as to admit of its being judged of by the Court. See various forms of bills of exceptions in *Macfarlane's Jury Practice*, App. p. 352, *et seq.*; and see Lord Chief-Justice Tindall's answer to certain queries put by the Dean of Faculty on this subject, 15 *S. & D. App.* 1312. A judge who presided at a trial may sign a bill of exceptions after he has resigned the judicial office; *Smith*, 27th Jan. 1835, 13 *S. & D.* 323. By 7 Will. IV., c. 14, it is enacted, that in all cases in which any bill of exceptions is brought before the Court of Session, or carried by appeal to the House of Lords, it shall not be competent to the Court of Session or to the House of Lords, in pronouncing judgment on such bill of exceptions, to make any order, or to pronounce any judgment, ordering a new trial, unless the said Court or House of Lords are of opinion that the exception is to be allowed. And when the Court or House of Lords are of opinion that the law directed at the trial, or the determination to receive or reject evidence excepted to, is correct, they are to make an order that the bill of exceptions shall be disallowed, and that the verdict found by the jury shall be carried into effect, by a judgment pronounced thereon, for the party in whose favour the said verdict was found. By the Court of Session Act 13

and 14 Vict., c. 36, § 45, it is provided, "That a bill of exceptions shall not be allowed in any cause before the Court of Session, upon the ground of the undue admission of evidence; if, in the opinion of the Court, the exclusion of such evidence could not have led to a different verdict than that actually pronounced; and it shall not be imperative on the Court to sustain a bill of exceptions on the ground of the undue rejection of documentary evidence, when it shall appear from the documents themselves that they ought not to have affected the result, at which the jury by their verdict have arrived. But see *Cameron v. Cameron's Trustees*, Dec. 21, 1850, 13 *D.* 412. It has been held by the House of Lords,—(1.) That, in preparing the formal bill of exceptions, it is irregular for the judge to make any alteration upon the exceptions, as they appear by the note tendered by the party, and signed by the judge himself at the trial; but, (2.) That if such alteration be made, the Court cannot adjudicate upon any other exceptions than those set forth in the formal bill; *Earl of Glasgow v. Hurlet Alum Co.*, June 26, 1850, 7 *Bell* 100; *Jurid. Styles*, iii. p. 920; *Macfarlane's Jury Prac.* 236, 271, *et seq.* See *Appeal. Jury Trial. New Trial.*

**Exceptio Non Numeratæ Pecuniæ.** This was one of the Roman law exceptions, founded on the *obligatio literarum* of the Romans. The *obligatio literarum* was constituted by a writing, the granter of which acknowledged receipt from the creditor of a certain sum of money. But as the obligation was sometimes granted before the money was advanced, *spe numeratæ pecuniæ* by the Roman law, the obligation, until the lapse of two years after its date and delivery, did not prove the receipt of the money; and the debtor against whom, within that time, a demand for re-payment was made, might plead the *exceptio non numeratæ pecuniæ*; that is, that the money of which re-payment was demanded, was truly never advanced. This exception was sufficient to elide the demand, unless the creditor proved that he had advanced the money. In the older form of the Scotch bond for borrowed money, the debtor was made to renounce "the exception of not numerated money," from a groundless apprehension that the Roman law exception might be pleadable. It does not appear, however, to have been at any time recognised in the law of Scotland. This renunciation, therefore, is only one among many proofs of that over-anxiety in conveyancers, whereby points, otherwise free from all doubt, have been sometimes brought into question. See, as to this exception, *Ersk. B.* iii. tit. 2, § 5; *Stair*, B. i. tit. 10, § 11.

**Exceptio Rei Judicatæ;** is an exception pleadable by a party who has formerly had



the matter in controversy judicially determined by a competent tribunal, in a question with the same parties, or with parties in the same interest, and proceeding on the same *medium concludendi*, or cause of action. Where a party has been condemned by a sentence of a competent foreign court, which sentence has received full execution, he cannot lawfully raise an action in this country in order to obtain what may be, in effect, a reversal of the foreign decree. The *exceptio rei judicatæ* might be successfully pleaded against such an action; for the defender may legally found on the sentence recovered by him in the foreign Court, as a defence against a new action, on the same grounds in this country; to admit which would be virtually to confer on the Courts of this country a right to review the sentences of foreign Courts. *Ersk. B. iv. tit. 3. § 4; Stair, B. iv. tit. 40, § 16; Kames' Equity, 516. See Res Judicata, and authorities there cited.*

**Exchange, Bill of.** See *Bill of Exchange.*

**Exchange and Re-Exchange.** *Exchange* has been defined to be, the difference in the value of money at a place where a bill is drawn, and the place where it is payable; or rather, as the *premium* or *discount* (as it may happen) paid or received as the price or value of a draft, drawn in one country and payable in another. The term seems to have originated in the circumstance of such bills or drafts on foreign countries being drawn in a country where one species or denomination of coin is the current money, and payable or *exchangeable* in another country for money of the denomination current in that country. *Exchange*, however, may now be said to be a term almost exclusively applicable to the premium or discount paid in one country for a draft payable in another—that premium or discount varying, of course, with the supply of, or the demand for, such drafts. *Re-exchange* is due where a draft or bill, procured as above, is not accepted or not paid by the drawee; in which case the holder of the dishonoured draft or bill is entitled to re-draw upon the original drawer, and to add to his re-draft the premium, discount, or cost, attending the transaction, and arising from the dishonour of the original bill or draft. The holder of the dishonoured draft is entitled to raise money to its full amount, at the drawer's expense, in whatever currency, or at whatever rate of exchange it was made payable; and if the re-draft cannot be sold but at a discount, the holder of the dishonoured draft may add to his re-draft a sum sufficient to cover that discount. The sum thus added to the amount of the original draft is termed *re-exchange*. The same rules which regulate exchange and re-exchange in the case of foreign bills of ex-

change are applicable to inland bills; for the course of exchange between two places in the same country rests upon principles precisely similar. See *Bell's Com. i. p. 405.* See this subject concisely and distinctly treated in *Thomson's Law of Bills of Exchange. p. 593, et seq.* See also *Glen on Bills, pp. 9–16, 2d edit.; Stair, B. i. tit. 11, § 7, et seq.; Bell's Princ. § 342. See Bill of Exchange. Draft. Drawer of a Bill.*

**Exchequer, Court of.** The Scotch Court of Exchequer, prior to the Union, was the king's revenue court, and consisted of the treasurer, the treasurer-depute, and as many lords of Exchequer as the King chose to appoint. The ministerial part of the treasurer's office was, to receive casualties due to the king, either as sovereign or as feudal superior; with which office, about a century before the Union, was united the office of comptroller, whose duty it was to levy the rents of Crown lands, burgh rents and customs, and to examine the treasurer's accounts. By article 19 of the treaty of Union, it was provided, that the Scotch Court of Exchequer was to continue until a new Revenue Court should be established in Scotland by Parliament; and, by 6 Anne, c. 26, the Court of Exchequer was established on the footing on which it continued till the recent changes. The judges of the then new Court were, by that statute, declared to be the High Treasurer of Great Britain, with a Chief Baron and four Barons, who must have been either serjeants-at-law, or English barristers, or Scotch advocates of five years' standing. All barristers might plead before this Court who were entitled to practise in the Courts of Westminster or in the Court of Session; and the privileges belonging to members of the College of Justice were communicated to the barons and other members of the Court, "excepting only that they might be pursued in justice before the Lords of Session for causes not competent to the Court of Exchequer." This Court had, under the statute by which it was established, a private jurisdiction as to the duties of customs, excise, or other revenues appertaining to the King or Prince of Scotland; and as to all honours and estates which might accrue to the Crown, in which matters they were to judge according to the forms of proceeding used in the English Court of Exchequer; but under the limitation, *1st*, That no debt due to the Crown should affect the Crown debtor's real estate in Scotland, in any other manner than as such estate might be affected by the law of Scotland; and, *2dly*, That the validity of the Crown's title to any honours, lands, or casualties in Scotland, should be tried as formerly by the Court of Session. The barons were also vested with the powers which be-

longed to the ancient Scotch Court of Exchequer, whereby it was their province to pass the accounts of sheriffs, and other officers who have the execution of writs issuing from, or returnable to, the Court of Exchequer, and to receive resignations of lands, and to pass signatures of charters, tutories, or other gifts of casualties, &c., as the Scotch Exchequer formerly did. But this power in the Scotch Exchequer was always limited; for when a signature imported a conveyance of more than was conferred by the Crown vassal's former charter, besides being passed by the barons, it must have been subscribed by the King himself. If such a signature had passed, of course, in Exchequer, it would not have been effectual to the grantee *quoad* the new right. Gifts of escheat, and some other gifts of minor importance, might pass in Exchequer without a special warrant; but remissions of crimes and gifts of forfeiture on conviction of high treason, required the King's sign-manual as their warrant. And, in general, although all such signatures, gifts, &c., must have passed in Exchequer, it was the Court of Session only that could competently judge of their preference after they were completed; *Ersk. B. i. tit. 3, § 30, et seq.* See also *Bank. B. iv. tit. 11*, and *Bell's Com. ii. 41*, and *i. 106*, 5th edit., and a work printed, but unpublished, entitled, *An Historical View of the Forms and Powers of the Court of Exchequer in Scotland*, by Baron Sir John Clerk, Bart. and Baron Scrope, 4to, 1820; *Stair, B. iv. tit. 1, § 29*; *More's Notes, p. cccclxx*. By the statute 6 Anne, c. 26, § 12, it was declared competent for parties affected by the judgments of the Court of Exchequer in Scotland, and who, by law, were entitled to "maintain a writ or writs of error thereupon, to sue and prosecute, out of the Court of Chancery in England, a writ or writs of error to be made in usual manner upon any such judgment returnable in the Parliament of Great Britain;" and, in the prosecution of such writs of error, the same course was to be followed which is adopted in similar appeals from English courts. But appeals of any kind from the Court of Exchequer in Scotland to the House of Lords were of very rare occurrence; and the judgment appealed from must have been pronounced in a cause in which the judges acted as such, *ex officio*, and not ministerially as commissioners under an act of Parliament. There is no example of an appeal from the proceedings of the Barons in the exercise of their powers in receiving resignations, passing signatures, making gifts, and the like. See, on this subject, *Form of Procedure in the House of Lords upon Appeals from Scotland*, pp. 97-100, 8vo, 1821.

The Court of Exchequer has of late been

made the subject of various legislative enactments. By 2 Will. IV., c. 54, it was provided, that successors should not be appointed to such of the barons as should retire or die, and that, after the retirement or death of the last remaining baron, the duties of the Court should be discharged by a judge of the Court of Session, with an addition to his salary of not more than L.600. By 3 Will. IV., c. 13, all the powers and duties of the Court of Exchequer bearing in any way upon the direction of the revenue, are transferred to the Commissioners of the Treasury; and the said Commissioners are authorised to regulate the powers and duties of the offices of King's Remembrancer, &c., and to call upon the Barons of Exchequer to execute conveyances of property vested in them by the recited acts relative to the Court of Exchequer. The legal jurisdiction of the Court of Exchequer is excepted from the operation of the act, and it is declared, that all debts, duties, revenues, fines, penalties, and forfeitures, shall continue to be sued for as heretofore. By 4 Will. IV., c. 16, the office of Recorder of the Great Roll, or Clerk of the Pipe, was abolished. See *Clerk of the Pipe*. By 5 and 6 Will. IV., c. 46, continued by 6 and 7 Will. IV., c. 73, and made perpetual by 1 Vict., c. 65, provisions were made for the Lord Ordinary on the Bills performing the duties during the last remaining baron's indisposition, or during the indisposition of the judge of session, who, upon his death, should be appointed to the office. The Lord Ordinary on the Bills having continued to perform these duties after the death of the last remaining baron, and previous to the appointment by his late Majesty, of one of the judges to perform the duties, his acts are, by 1 Vict., c. 65, declared valid; and it is provided for the future, that it shall be competent to the Lord Ordinary on the Bills, after the death of the judge so appointed, or of any judge to be thereafter appointed, and previous to the appointment of his successor, to perform the duties in like manner as during the indisposition or unavoidable absence of the judge so appointed. The same act vests in the Treasury the rights of the Court of Exchequer relatively to appointments or offices in the said Court, and makes perpetual the above-recited act 5 and 6 Will. IV., c. 46.

The Court of Exchequer is now merged in the Court of Session by the act 19 and 20 Vict., c. 56 (1856). By that act one of the Lords Ordinary is appointed Lord Ordinary in Exchequer causes, and the procedure in such causes is regulated.

**Exchequer, Court of, in England.** The English Court of Exchequer is a supreme Court of record, but the lowest in rank of the

four courts which sit in Westminster Hall, viz.,—the Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer. This court is said to derive its name from the chequered cloth, resembling a chess-board, which covers the table of the court, and on which cloth, when certain of the accounts are made up, the sums are marked and scored with counters. The Judges of the Court of Exchequer are the Chief Baron, and four *puisne* Barons. The court consists of two divisions, the *Receipt* of the Exchequer, which manages the royal revenue, and the *Court or judicial* part of it. It was formerly subdivided into a Court of Equity and a Court of Common Law, but by 5 Vict., c. 5, its equity jurisdiction was transferred to the Court of Chancery.

**Exchequer Bills**; form the principal part of the unfunded public debt of Great Britain. Those bills, which were first issued in the reign of William III., are issued, under authority of Parliament, for sums varying from L.1000 to L.100. They bear interest, and may be transferred from hand to hand without any formal transfer; and the holders may also receive their amount periodically from Government, at par, with the interest due on them, with an option to exchange them for new bills, to which the same advantages are extended. The interest borne by Exchequer bills has fluctuated since they were first issued. Originally the interest seems to have been 5*d.* per L.100 per diem, or L.7, 12*s.* 1*d.* per annum: latterly it has varied from 2½*d.* to 2*d.*, and even to 1½*d.* per L.100 per diem, being about, or a fraction under, L.3 per annum. Tomlins, h. t.

**Exchequer Horning.** Execution was awarded on the decrees or judgments of the Scotch Court of Exchequer relating to the customs or excise, or other revenue matters falling under its cognizance, according to the forms used in the English Court of Exchequer. But the diligences of horning and caption, agreeably to the former law and practice of Scotland, may still be resorted to under authority of the Court of Exchequer, for enforcing payment of the land-tax for feu-duties specified in the *reddendo* of Crown charters, or the like. Such diligences are subscribed by a writer to the Signet, and pass the Signet in the usual form. The horning is obtained upon a bill presented in Exchequer, which is the warrant for signeting the letters. These letters bear in the end, "*Ex Deliberatione Baronum Scaccarii.*" By 43 Geo. III., c. 150, § 44, diligence by horning may issue from Exchequer against collectors of revenue in certain circumstances; and, generally, it may be observed, that the writ of extent contains a *capias* on which horning

may be issued, and caption may follow." Under the act 19 and 20 Vict., c. 56, constituting the Court of Session the Court of Exchequer, and regulating the procedure in Exchequer causes, Exchequer decrees are put in execution by the sheriffs; *sec.* 29, *et seq.* See *Juridical Styles of Signet Letters*, vol. iii. p. 733, 2d edit.; *Bell's Com.* ii. 604, 5th edit.; *Bell's Princ.* § 1343; *Illust.* ib.

**Excise**; is an inland duty levied under authority of Parliament, and paid sometimes on the consumption of the commodity, and frequently upon the retail sale. Excise is now extended to a great variety of articles, such as spirits, cider, perry, malt liquors brewed for sale, malt, hops, tea, coffee, tobacco, paper, licences to auctioneers, spirit-dealers, &c. Indeed this imposition extends to so many commodities, that it may be correctly denominated *general* in its application; and, by the articles of Union (6, 7, 8, and 18), the law, with regard to excise and customs, was made the same in England and Scotland. The duties thus collected compose an important branch of the revenue of the kingdom. Their collection is managed under a system which has been the subject of innumerable legislative enactments, the great object of which, generally speaking, is to secure economy in the collection of this branch of the revenue, and to prevent frauds and evasions on the part of those from whom the duties are exigible. Frauds against the excise laws are, under the special statutes imposing the duties, as well as under the general consolidating statutes, cognisable by justices of the peace; and the Supreme Court in revenue matters in Scotland was formerly the Court of Exchequer, but its powers in this respect are now transferred to the Commissioners of the Treasury. See *Exchequer*. The officers engaged in the collection of these duties are Commissioners, who have a general board at London. The Commissioners have under them collectors, controllers, supervisors, and gaugers, and the other necessary officers for the prevention of frauds on the part of those by whom the duties are payable, as well as of those by whom the duties are collected; and the system of superintendence and supervision is so vigilant, and the cheques and correctives of inaccuracy, fraud, or negligence, are so well arranged, that the strictest discipline is preserved from the one extreme to the other of this great establishment. The collections are managed in such a manner, that the proceeds of the different duties are transmitted to Government at very short intervals after their collection. Excise was first imposed by the rebellious Parliament of 1643. See the various statutes connected with this subject,

digested and abridged in *Huie's Abridgment of the Excise Laws*. See also *Tait's Justice of Peace, voce Excise and Customs*; *Bell's Com.* vol. ii. pp. 21 and 51; *Blair's Justice of Peace, h. t.*

**Exclusive Privilege.** This term is used in a limited acceptation to signify the rights and franchises of the nature of monopolies, formerly enjoyed by the incorporated trades of a royal burgh; in virtue of which the craftsmen or members of those incorporations were entitled to prevent *unfreemen*, or tradesmen not members of the incorporation, from exercising the same trade within the limits of the burgh. Strictly speaking, all corporations formed without an act of Parliament, or the Sovereign's patent, are unlawful; and it has been repeatedly held that voluntary associations of tradesmen have no *persona standi in judicio* to enforce regulations made by themselves. But it was maintained, that the magistrates of a royal burgh necessarily possess an inherent and implied power of creating, by *seal of cause*, subordinate incorporations of the different trades within burgh, and thus conferring exclusive privileges. Lord Kames, on the contrary, held that it was *ultra vires* of the magistrates to erect corporations; and he shows that, in one instance, where the town of Edinburgh attempted to erect a corporation, it was thought necessary to get the act of council confirmed by the Sovereign, and ratified in the Scotch Parliament. It has been decided, however, that mere prescription, without the possession of a charter, or even of a seal of cause, was sufficient to confer the exclusive privileges of an incorporated trade; the presumption being, that the particular trade had originally possessed a seal of cause or charter; *Skirving*, 19th Jan. 1803, *Fac. Coll. Mor.* p. 10921. See also *Kames' Elucidations*, art. 7. By 9 and 10 Vict., c. 17 (1846) the exclusive privileges of trades in burghs are abolished. As to the exclusive privilege granted to authors, see *Literary Property. Engraving*.

**Excommunication**; ecclesiastical censure, whereby the person against whom it was directed was excluded from the communion of the church. By the ancient law of Scotland, excommunicated persons could not enjoy feudal rights, and were disqualified for holding, either directly or indirectly, the lands which they had formerly possessed, and were besides subjected to punishment in their persons. See sundry statutes imposing those and similar penalties, abridged in *Kames' Stat. Law, h. t.* But by 1690, c. 28, and 10 Anne, c. 7, all civil pains or penalties consequent on excommunication are removed; and the statute 10 Anne farther prohibits any civil judge to lend his aid for obliging any one to appear

in a church court when summoned in a process for excommunication; or for compelling the excommunicated person to obey such sentence when pronounced. The lesser excommunication, or suspension from the privileges of the church, which is directed against persons under scandal, is the highest censure which kirk-sessions usually inflict. The greater excommunication requires the sanction of the presbytery. Neither has any civil effects, and the presbytery on being satisfied of repentance, will relieve the persons of the sentence; *Ersk. B. ii. tit. 3, § 16*; *Hume*, vol. i. p. 565; *Swinton's Abridg. h. t.*; *Hutch. Justice of Peace*, vol. i. p. 88, *et seq.*, 2d edit.; *Ross's Lect. i. 90, 248*; *Hill's Church Prac. 21*. See  *cursing, Letters of. Desertion. Divorce.*

**Exculpation, Letters of**; are a warrant granted at the suit of the panel or defender in a criminal prosecution, for citing and compelling the attendance of witnesses in proof either of his defence against the libel, or of his objections against any of the jury or witnesses, or in support of whatever else may tend to his exculpation. These letters are issued as a matter of course on application at the Justiciary Office, or, in the case of Sheriff Court libels, to the Clerk of Court; but as a condition of receiving the benefit of letters of exculpation, it is incumbent on the panel (although in practice this is not always attended to), to serve a copy of the letters, and a list of the witnesses, on the prosecutor; 1672, c. 16. If there are any special defences, a written statement of these, along with all articles to be founded on, and the list of witnesses, must be lodged in the hands of the Clerk of Court the day before the trial; 20 *Geo. II.*, c. 43, § 41; *Act of Adj.*, Mar. 17, 1827, §§ 13, 14 (2 *Alison*, p. 42); *Harper*; 1 *Broun's R.* 441. As to proof in exculpation, see *Alison's Prac.* 615, *et seq.*, and on the subject of this article generally, see *Stair*, B. iv. tit. 14, § 17; *Hume*, ii. 383; *Ersk. B. iv. tit. 4, § 90*; *Dickson on Ev.* 943; 1 and 2 *Vid.*, c. 119, § 24.

**Executed and Executory**; in English law, are terms expressive of the different stages in a contract. A thing is *executory* with regard to which a contract exists, binding on the possessor to transfer it to some one else: a thing is *executed*, when the property is already transferred. Thus, an executory estate is one created by deed or fine, but which must afterwards be *executed* by entry, livery, writ, &c. In the question of *condictio indebiti*, this distinction is of importance. When the payment has been only executory,—i. e., when the grantor has only bound himself to deliver a certain thing,—he may be freed from his obligation, by proving that he was under an error in law, with regard to the consideration of it;

but when the payment has been executed, error in law is no ground for repetition. *Tomlins' Dict. h. t.*

**Execution, by a Messenger-at-Arms or other Officer of the Law.** An execution is an attestation, under the hand of the messenger or other officer, that he has given the citation, or executed the diligence, in terms of his warrant for so doing. Executions must be subscribed by the executors and witnesses, otherwise they are null; and where the execution consists of more pages than one, each page, or at least each leaf, ought to be signed by the executor and witnesses; although an accidental omission to sign a page may not be fatal. The witnesses cannot validly subscribe by initials; and they, as well as the officer, must subscribe each page, or at least each leaf; for they are witnesses to the fact attested, not to the subscription of the officer, whom, therefore, it is not necessary that they should see subscribe. And, correctly, the execution ought to bear that the witnesses were witnesses to the premises, or, at least, the fact that they were witnesses must follow by direct implication from what is stated in the execution. In executions of inhibitions, interdictions, hornings and arrestments, the witnesses, besides subscribing, must be designed; 1681, c. 5. In other executions, their designation is not required, although their subscription is; 1686, c. 4. But it is usual and proper to design the witnesses in all executions. No witness ought to be taken who might not competently be a witness to the subscription of a private deed. Executions ought to mention the letters which are their warrant; and executions of summonses must also expressly name and design the pursuers and defenders, otherwise they will not be sustained; 1672, c. 6, and *A. S., 8th July 1831*. Where, however, the execution is indorsed upon the summons, and not written on a separate sheet from that on which the summons is written, a reference to the parties, as *within named and designed*, appears to be sufficient. But even in that case, the safer practice is to mention the names. See, on this subject, *Dunbar*, 20th Feb. 1755, *Mor. 3746*; *Watt*, 10th Feb. 1827, *5 S. & D. 334*; *Stewart*, 12th Jan. 1831, *9 S. & D. 260*; *Creightons*, 16th Nov. 1832, *11 S. & D. 30*; *Collier*, 3d June 1834, *12 S. & D. 674*; *Globe Insurance Co.*, Dec. 10, 1842, *5 D. 294*. It is not indispensable to design the parties in executions of diligence; the rule being limited to the case of summonses. In the execution, the messenger or other officer must detail what he did, in order that it may appear that he proceeded lawfully; and it seems to be now settled, that if the execution should omit to state any essential step which was actually taken, that omission cannot be

competently supplied by the parole evidence of the witnesses who were present and saw it performed.

In addition to the requisites above mentioned, certain executions, with their warrants, must be registered, under the sanction of nullity. Thus hornings, with the executions of charge and of denunciation, must be registered within fifteen days after denunciation, otherwise a caption cannot be obtained; 1579, c. 75. (See *Denunciation*.) In like manner, inhibitions and interdictions, with the executions of their publication, must be registered within forty days after publication, under sanction of nullity; 1581, c. 119. (See *Inhibition. Interdiction*.) So also, executions of summonses to interrupt prescription of real rights must, with their executions, be registered within sixty days after the date of the execution and instrument of interruption, otherwise they are ineffectual against singular successors; 1696, c. 19. Blank executions,—*i. e.*, executions which persons, relying on the faith of the executor, are prevailed on to sign, as witnesses along with him, blank or unfilled up,—are declared to be void and null to all intents and purposes; and the lieges are prohibited to fill up such blank executions. The penalty to the executor is deprivation and perpetual incapacity to hold the office of a messenger; and to the witnesses, infamy; *A. S. 28th June 1704*.

Two witnesses were formerly required to executions, but one is now sufficient, except in cases of pointing, in which cases two witnesses are still necessary; 1 & 2 *Vict.*, c. 114, § 32; 9 & 10 *Vict.*, c. 67, § 1; 1 & 2 *Vict.*, c. 119, § 23. By the statute 1592, c. 141, it is enacted, that "all copies of summonds and letters, quhilkis sall be delivered to ony party, be subscribed by the officiar executor thereof." It is to be observed, however, that the word *summons*, as here used, is held to signify merely the citation, and that it is sufficient that the citation has been subscribed; *Izatt v. Robertson*, 25th January 1840, *2 D. 476*. It is not requisite that the citation be signed by the witness; *Beattie v. Lee*, 14th Feb. 1823, *2 Sh. 220* (N. E. 194); *Shand's Prac.* 249. By 1693, c. 12, it is enacted, but only under the sanction of deprivation and tinsel of office to the messenger, that "all copies of summons, charges, inhibitions, arrestments, or other letters whatsoever, given to the party, shall bear at length, and not in figures, the day and date of the delivery thereof, as also the names and designations of the witnesses in such sort as the execution and indorsation did and doth bear the same." According to *Stair* (iv. 38, § 12), the word *indorsation* is merely another name for *execution*. As to the executions of citations and of

charges, see the articles *Charge, Citation, Edictal Citation, Execution of Sentences and Decrees.*

There are numerous recent illustrations of the accuracy and punctuality required in the executions, especially of diligence. See the cases of *Glen*, Nov. 19, 1841, 4 *D.* 36; *Craig*, Nov. 23, 1841, 4 *D.* 54; *Clason*, Feb. 15, 1842, 4 *D.* 743; *Scott*, June 27, 1844, 6 *D.* 1221, *App.* 5 *Bell*, 126; *Burleigh*, July 20, 1848, 10 *D.* 1517; *Hanna*, March 2, 1849, 11 *D.* 941; *Henderson*, Feb. 28, 1852, 24 *Jur.* 285, 1 *Stuart* 527.

Much information as to the solemnities requisite in the executions of warrants of imprisonment is to be found in the report of the case of *Scott*, January 18, 1855, 17 *D.* 292.

Where an execution is *ex facie* regular and complete, it cannot be contradicted by way of exception, or set aside by the production of the copy citation or charge; and objections inferring falsehood in the writ, are not entertained except in an action of reduction imprisonment; *Barbour*, 22d June 1838, 16 *Sh.* 1184; *Balfour*, 2d February 1839, 1 *D.* 458. Amended executions have, in certain circumstances, been sustained; as where an execution bore that a citation had been given on the 25th March, instead of on the 26th; and it appears to have been held that this was competent, although the amended execution was not lodged until after the summons had been called in court, and objection had been taken to the execution; *Henderson*, 23d May 1848, 10 *D.* 1035. But see also *Allan*, 26th May 1848, *ib.* 1060. The form of executions of charge is provided for by 1 and 2 *Vict.*, c. 114, sched. 2; and that of summonses by A. S., 8th July 1831, § 1, sched. 5. The fact of execution is to be distinguished from the officer's attestation or writ, called an execution; but that writ is the only competent evidence of the fact of execution. See *Stair*, iv. 38, § 12; and *Henderson*, 23d May 1848, *ut sup.* Warrants must be executed by a proper and competent officer. All writs issued in the name of the Sovereign may be executed by messengers-at-arms, and, in civil matters, by them only. As to criminal warrants, see *Execution of the Libel*. Signet letters can only be executed by messengers; but in special circumstances, as where there happened to be no messenger within reach of the place where the service was to be made, special authority has been granted by the Court of Session to sheriff-officers to execute its warrants; *Cooper*, 1854, 16 *D.* 1104. It is sufficient, however, that the person intrusted with the execution of a writ shall have been at the time habit and repute qualified; *Ersk.* i. 4, § 33; and iv. 2, § 6; *Stair*, iv. 42, § 12. But after public intimation in the newspapers of a messenger's deprivation, all executions

by him are null. Executions must proceed on competent authority, and must be conform to their warrants. As a general rule, warrants are only authoritative within the jurisdiction of the court from which they are issued; but by recent statutes provision is made for the execution of sheriffs' warrants, *extra territorium*; 1 and 2 *Vict.*, c. 114; and 1 and 2 *Vict.*, c. 119.

See, on the subject of this article generally, *Darling on Messengers*; *Gillespie on Sheriff Officers*; *Menzies' Lectures*, p. 285, *et seq.*; *Dickson on Evidence*, p. 609; *Ersk.* B. iii. tit. 2, § 17; *Stair*, B. iii. tit. 3, § 2, *et seq.*; B. iv. tit. 38; *Kames' Equity*, 280-9, 389; *Ross's Lect.* i. 300, 478; ii. 534; *Jurid. Styles*, iii. 5, 381-971; *Kames' Stat. Law Abridg.* h. t.; *Tait on Evidence*, 4; *Shand's Prac.* 228; *M'Glashan's Sheriff Prac.* 181-358; *Alexander's Abridg. of A. S.* 45, 49, 54. See also this *Dictionary*, voce *Evidence*, *supra*; also *Citation. Charge on Letters of Horning. Edictal Citation. Domicile.* As to the execution of deeds, see *Deeds. Writ. Testing Clause.*

**Execution of the Libel.** Under the articles *Criminal Prosecution* and *Edictal Citation*, some account will be found of the mode of serving the indictment, or the criminal letters on the accused. Under the present article, therefore, it is only necessary to observe, that the messenger or macer, by whom the libel has been served, must verify the fact by a written execution under his own hand, and the hands of witnesses specially designed (1587, c. 85), in whose presence the service must have been made. In the ordinary case, and unless where, from there being two indictments against the same person, or otherwise, there be room for ambiguity, it will be sufficient that the execution mention the date of the libel, and the names of the prosecutor and panel, without taking notice of the crime laid to his charge. The manner of citing panels, when within Scotland, is regulated chiefly by the statutes 1555, c. 33, 1587, c. 85, and 1672, c. 16; and, in connection with that subject, it may here be observed, that it has been the practice of late years for the messenger or macer who executes the libel, to number at the top, in his own hand, and to sign at the bottom, every page of the copy left for the panel; *Hume*, ii. 236-254. An execution must also be returned, by the officer who has cited the witnesses, attesting that he has done so; and the same form is required to prove the citation of the jurymen; which, however, is, by uniform custom, valid without witnesses, and under the hand of the officer alone; *Hume*, ii. 300; *Bell's Notes*, 222; and 1 and 2 *Vict.*, c. 119, §§ 24-6; 16 and 17 *Vict.*, c. 80, § 33; *Alison's Prac.* 310-39.

By 11 and 12 Vict., c. 79, all writs and warrants, including indictments and criminal letters, may be served or executed by sheriff-officers of the county within which such execution is to be made. See on the subject of this article, the articles *Citation*. *Dwelling-House*.

**Execution of Sentences and Decrees.** The executive power of the State is vested in the Sovereign; and, by the law of Scotland, all execution of decrees and sentences, whether civil or criminal, proceeds either directly in the name of the Sovereign, in virtue of letters or writs of execution, under the Royal Signet, or on the authority of judges or magistrates, to whom a certain portion of executive power is delegated by the Sovereign. Inferior judges are vested not only with jurisdiction to a limited extent, but with power so far to execute their own sentences; subject, generally speaking, to appeal to the Supreme Courts. But the chief *executorials* (as they are termed by our institutional writers), or the means of obtaining civil execution against the person or estate of the debtor, are letters or writs in the Sovereign's name, passing under the Signet for Scotland. Personal diligence, or execution in civil causes, was formerly warranted almost exclusively by letters of horning and caption; the act of warding of magistrates of royal burghs, and the statutory power of justices of the peace, under the Small Debt Acts, to authorise imprisonment, being the only exceptions; and civil execution against heritable or moveable property, was, as it still is, warranted by the diligences of poiding, arrestment, confirmation as executor creditor, and adjudication. The nature of those several diligences is explained under separate articles.

By the Personal Diligence Act, 1 and 2 Vict., c. 114, improvements have been made in the form of diligence against the persons of debtors, and the law as to arrestment and poiding has been amended. Under that act, all extracts of decrees, "on which execution may competently proceed," now contain warrants to charge, under the pain of poiding and imprisonment, and to arrest and poid. Upon the extract, it is made lawful to arrest, and to charge the debtor or obligant to pay or perform, within the days of charge. Upon the expiration of the days of charge without payment or performance, poiding may follow; and the execution of charge being registered within year and day, such registration has the same effect as if the debtor or obligant had been denounced rebel in virtue of letters of horning. Thereupon, a certificate of registration being written upon the extract and execution (if it be apart), application may be made for warrant

to imprison, and, "if there be no lawful cause to the contrary," the Bill Chamber Clerk, or, in cases of sheriff-court decrees, the Sheriff Clerk, "shall write on the extract this deliverance" *Fiat ut petitur*, "and shall date and subscribe the same." The extract and deliverance are then a warrant to imprison. Reference is made to the Act for the forms, and for the particular procedure in the case of decrees of the Supreme Court, and of the Sheriff Courts respectively. The provisions of the Act apply to decrees of the Court of Teinds and Court of Justiciary, as well as of the Court of Session; but the provisions for carrying a charge into execution by *imprisonment* do not apply to the case of decrees which are not in use to be enforced by caption and imprisonment, as,—(1.) Decrees of removing, which are enforced by letters of ejection; (2.) Decrees of adherence, which are enforced by decree of divorce; (3.) Decrees against superiors to enter vassals and declarators of tinsel of superiority, on which no farther execution is competent beyond horning and execution thereof; and on the expiry of the recorded charge, the vassals complete their rights in another way than by caption. The hornings in all these cases grant warrant to charge "under pain of rebellion and putting to the horn," and not under the pain specified in the Personal Diligence Act. It may be observed, generally, that the Personal Diligence Act provides only for that description of diligence which can be completed by *incarceration*. Diligence executed under the provisions of this act has the same effect as if it had been executed by virtue of letters of horning or of caption, or as if arrestments and poidings had been executed under the forms theretofore in use.

In criminal cases, the sentence is carried into execution either by the magistrates of the burgh, or by the sheriff of the county, according as the sentence is to receive execution within the territory, comprehended in the jurisdiction of the one or of the other. The warrant for the execution is the sentence of the court or judge by whom the criminal was tried; that being sufficient without the special intervention of the Royal authority, which is never interposed between the sentence and the execution, except for the purpose of pardoning the convict, or delaying the day of his execution, or mitigating the rigour of his punishment; and, in executing the sentence, the terms of the judgment must be precisely and literally adhered to. Formerly, under 11 Geo. I., c. 26, a sentence importing capital punishment, pronounced in Edinburgh, or in any place southward of the Firth or River of Forth, could not be put to execution within less than thirty days

from its date; and if pronounced to the northward of the firth, within less than forty days. But now (from and after 1st August 1831), the day of execution of a capital sentence, southward of the Firth of Forth, must not be less than fifteen nor more than twenty-one days after the date of the sentence; and northward of the firth, not less than twenty or more than twenty-seven days; 1 *Will. IV.*, c. 37, § 2. See articles *Criminal Prosecution. Fine. Imprisonment. Transportation. Capital Punishment.* See also *Hume*, ii. 445-475.

**Executor.** See *Doomster.*

**Executor.** An executor is the legal administrator of the moveable estate of a deceased person, for behoof of all concerned therein; or, more correctly, perhaps, he may be said to be a judicial trustee for the collection and distribution of the defunct's moveable estate and effects amongst those interested, according to the rules of law. The office of executor is conferred either by the written nomination of the defunct, or, failing that, by decree of the Commissary; the executor, in the former case, being called an *executor-nominate*, and, in the latter, an *executor-dative*. In either case, the executor must complete his title to administer, by a judicial proceeding, called a *confirmation*, without which he has no *jus exigendi*; nor are the debtors to the defunct in safety to pay to him. See *Confirmation*. Persons applying to the Commissary for confirmation as executors, are preferred to the office in a certain order; the executor-nominate, whether a relation to the defunct or not, being invariably preferred in the first place; failing such nominee, universal disponees are preferred; then the next of kin; all in the same degree being entitled, if they please, to be conjoined in the office; then the relict; then creditors in liquid grounds of debt; and, lastly, a special legatee. Under the recent Moveable Succession Act, 18 Vict., c. 23, although surviving next of kin have still, in their order, exclusive right to the office, the children or descendants of next of kin predeceasing, are entitled to confirmation when no next of kin compete. According to the above order, the Commissary will proceed in conferring the office; the parties claiming it respectively proving their title to be confirmed in the particular character in which they claim. The office of executor being, in effect, a trust, the executor, before being confirmed, is required to find caution for the faithful discharge of his trust; except in the case of an executor-nominate, who, under the statute 4 Geo. IV., c. 98, § 2, is exempted from the necessity of finding caution. But, in all other cases, the same statute provides, that the Court, in granting confirmation, shall

fix the amount of the sum for which caution is to be found by the person or persons confirmed; the caution not exceeding the amount confirmed. The executor confirming is also required, under certain penalties, to exhibit, upon oath, in the Commissary Court, a full inventory of the whole estate and effects to be recorded—the principal object of the statutes being to prevent evasion of the duties payable to Government. The statutes regulating this subject are the 44 Geo. III., c. 95, 48 Geo. III., c. 149, and 55 Geo. III., c. 184. See *Inventory*. By 4 Geo. IV., c. 98, certain other important alterations on the law with regard to executors were made. 1st, By § 1, it was enacted, that, “in all cases of intestate succession, where any person or persons who, at the period of the death of the intestate, being next of kin, shall die before confirmation be expedite, the right of such next of kin shall transmit to his or her representatives, so that confirmation may and shall be granted to such representatives, in the same manner as confirmations might have been granted to such next of kin immediately upon the death of such intestate.” 2dly, Every person requiring confirmation is, by section 3, bound, upon oath, to confirm the whole moveable estate of the defunct known at the time; it being lawful to oik to such confirmation any part of the estate which may afterwards be discovered; the whole of such estate so discovered being in like manner added upon oath—saving the provision of the act 1690, c. 26, with regard to special assignments, which remain as fixed by that statute. 3dly, It was provided (§ 4), that in the case of confirmation by executors-creditors, the confirmation may be limited to the amount of the debt and sum confirmed, to which the creditor shall make oath; provided that notice of every application for confirmation by an executor-creditor shall be inserted in the *Edinburgh Gazette* at least once immediately after such application; in evidence whereof, a copy of the *Gazette*, containing the advertisement, must be produced in court before confirmation.

In the case where the executor is an executor-nominate or a residuary legatee, or one of the next of kin, who *de jure* are entitled to certain proportions of the executry, it may be observed, that although such executors, when confirmed, are trustees for all concerned, yet the creditors of such executors have an interest in their debtor's reversionary right to the executry, of which, at common law, those creditors might have been deprived by the executors refusing to confirm. To remedy this, it was provided by the act 1695, c. 41, “That, in the case of a moveable estate left by a defunct and falling to his nearest of kin,



who lies out and doth not confirm, *the creditors of the nearest of kin* may either require the procurator-fiscal to confirm and assign to them, under the peril and pain of his being liable for the debt if he refuse, or they may obtain themselves decerned executors-dative to the defunct as if they were creditors to him: With this provision always, that the creditors of the defunct doing diligence to affect the said moveable estate, within year and day of their debtor's decease, shall always be preferred to the diligence of the said nearest of kin." In reference to this provision, it may be observed,—1st, That if the executor have confirmed, and if the funds with which, in that character, he has introritted, can be distinguished and separated from his own funds, the defunct's creditors have a preference over the funds of their debtor in the executor's hands, even after the expiration of the year; and, 2dly, If, on the other hand, the executor have not confirmed, his creditors may apply to the procurator-fiscal, in the manner, and to the effect pointed out in the statute, or may be themselves decerned executors-dative to the defunct, as if they had been *his* creditors; subject to the above preference in favour of the actual creditors of the deceased. This preference, however, is a preference which was fully recognised at common law, independently of the statute, the object of which, indeed, rather appears to have been, in certain circumstances, to limit the endurance of the preference to one year; *Bell's Com.* ii. 81, *et seq.*; *Ersk.* B. iii. tit. 9, §§ 35, 46. When two or more persons have been confirmed executors, they hold the office *pro indiviso*, and must concur in suing the defunct's debtors; and, if one of such executors refuse his concurrence, he may be excluded from the office at the suit of the co-executors. But, after the debt has been established in the executors by decree, each executor may, by himself, recover his own share, which the debtor is in safety to pay him. A debtor to the executor, however, ought not to make payment of any part of his debt to an executor-creditor, without the concurrence of the other executors confirmed; because the right of an executor-creditor to receive payment depends on the justice of his alleged debt; and if, on investigation, it prove not to have been legally due, the debtor who pays him may be compelled to pay a second time to the other executors. Generally speaking, indeed, it is prudent in a debtor to the executory to decline paying to one executor, where there are more than one confirmed, unless the other executors are parties, or consenting to the payment. All the co-executors having thus an equal right to the debts due to the de-

funct, it follows that they are only liable *pro rata* for the debts due by him, unless it appear that the executor sued, has by himself actually introritted with as much of the executory as will cover the debt sued for; *Ersk.* B. iii. tit. 9, § 40. An executor being, as already explained, a trustee for all concerned, does not, by his confirmation, incur a universal responsibility for the debts of the defunct. On the contrary, he is only liable to the value of the inventory in the confirmation, *non ultra vires inventarii*. But he is liable in diligence for making the inventory effectual. See *Diligence*. A year after confirmation is usually allowed for this purpose (1503, c. 76); and a decree and registered horning is accounted sufficient diligence against debtors to the executory. In like manner, an executor-creditor, who confirms more than the precise amount of his debt, is liable in diligence for the recovery of what he confirms; *A. S. 14th Nov.* 1679. Executors, it is thought, are liable in interest on the sums belonging to the executory recovered by them, although the contrary is laid down by Erskine, who states that they are not accountable for the interest they receive, since they lend the money at their own risk; *Ersk.* B. iii. tit. 9, § 41; *Bank.* B. iii. tit. 8, § 57. An executor has always been held bound to communicate to all having interest in the executory, the benefit of *cases* got in transacting the debts acquired by him after confirmation; *Ersk.* *ibid.* § 42.

It is a general rule, that an executor should pay no debt of the defunct's without the authority of a decree; and even where a decree is produced, that he should pay no debt within the six months immediately following the defunct's decease. But from this rule, there is an exception in favour of what are called privileged debts; such are,—1. Deathbed and funeral charges. 2. A year's rent of the house in which the deceased resided at the time of his death; and his servants' wages for the year or term current at his death, according as the wages are payable yearly or termly. 3. Where the defunct has been an office-bearer in a friendly society, a statutory preference over his effects, for payment of sums due by him to such societies, is provided by 18 and 19 Vict., c. 63, § 23; such debts being directed to be paid "before any of the other debts are paid or satisfied." 4. The expense of confirmation and management comes off the total of the executory, and, like privileged debts, is preferable; *Ersk.* B. iii. tit. 9, § 46. Those privileged debts may be paid by the executor without a decree, and without waiting the expiration of the six months. The executor might also at one time have retained

the executory funds, without judicial authority, in payment of debts due to himself by the defunct; and, in like manner, he might, unless legally interpellated, have paid such debts as the defunct acknowledged to be due in his testament. But, since the date of the Act of Sederunt, 28th Feb. 1662, this has not been held admissible to the prejudice of the *pari passu* ranking of creditors claiming within the six months. But, if no claim be made within the six months, the executor, after the lapse of that period, may, unless interpellated, both retain in payment of debts due by the defunct to him, and pay the residue *primo vententi*. Even when a decree is produced to the executor, he cannot competently make payment to the party producing it, to the prejudice of creditors whose debts the defunct admits to be due in his testament; for the acknowledgment of the debts by the defunct in his last will, which it is the duty of the executor to execute, is accounted a sufficient interpellation to protect the interests of testamentary creditors without the necessity of any step on their part; *Ersk. B. iii. tit. 9, § 43, et seq.; Stair, B. iii. tit. 8, § 72*. It follows from the nature of the executor's office, that he is accountable to the parties interested, for the due collection and distribution of the executory. If, therefore, he fail in the performance of his duty, he is liable, *qua* executor, and to the extent of the inventory, to a personal action at the instance of any of the parties beneficially interested; decree in which action will authorise personal diligence against him, and will also entitle the creditor to attach, by poinding or arrestment, the funds unrecovered in the hands of the defunct's debtors. Or, if the executor has taken bonds from such debtors in his own name, the executory creditors may attach the sums in those bonds, and they will be preferable over those sums to the executor's own creditors. And where the executory funds and the individual funds of the executor have been so mingled that they cannot be identified, diligence may proceed against the person and the individual estate of the executor; failing which, recourse may be had on the cautioner in the confirmation; *Bell's Com. ii. 81, 5th edit.* So, also, if there be omissions in the inventory made up by the executor in the confirmation, or if the articles in that inventory be undervalued, any creditor of the defunct may bring an action against the executor for the value of the subject omitted, if the executor's intromission with that subject can be proved. Or the creditor may apply to the Commissary Court to be himself confirmed executor *ad omnia vel male apprehiata*, to which application the executor already confirmed must be made a party;

and the only effect of such a proceeding, generally speaking, is to obtain the omitted or undervalued effects added to the inventory at their true value; *Bell's Com. ubi cit. p. 81; Ersk. B. iii. tit. 9, § 36, et seq.; Jurid. Styles, ii. 498*.

The share of the executory to which formerly an executor-nominate was himself entitled, varied according to circumstances: 1st, Where a stranger was nominated to the office by the defunct, he was, by the act 1617, c. 14, allowed to retain to himself one-third part of the dead's part, after deducting debts. The eldest son or heir in heritage, when named executor by his father, as being a stranger *quoad* the moveable succession, where there were younger children and an heritable succession, was entitled to retain a third under this statute. The widow, in like manner, when nominated executrix, was accounted a stranger, not being one of the next of kin, and she also was entitled, *qua* executrix, to the third of the dead's part. It followed, that if the dead's part was exhausted by legacies, the executor-nominate, where he was a stranger and not a legatee, was entitled to no remuneration whatever for his trouble. 2d, Where the defunct bequeathed a legacy to a stranger executor-nominate, the legacy was, in terms of the last-mentioned statute, imputed *pro tanto* of the executor's third; and, if the legacy exceeded the third of the dead's part, it was declared that the executor should be entitled to his legacy, but to no part of the third. 3d, If the executor-nominate, as one of the next of kin, was entitled to a share of the moveable succession, he could claim no allowance for his trouble as executor, unless his interest in the succession was less than a third, in which case he might have retained as much of the dead's part, as, when added to his legal share, made up a third. 4th, Executors-dative were not, under the statute 1617, c. 14, nor at common law, entitled to any remuneration for trouble, nor to anything more than reimbursement of the actual expenses they incur. *Lastly*, Where a stranger is named by the defunct, not only executor, but universal legator or legatee, the whole free residue of the executory goes to him, to the prejudice of the next of kin, who, in such circumstances, have no interest (unless as legatees) in the dead's part; *Ersk. B. iii. tit. 9, § 26; Stair, B. iii. tit. 8, § 53; Bank. B. iii. tit. 8, § 4; Mackenzie's Obs. on Stats. pp. 350, 351. See Dead's Part.* By the act 18 and 19 Vict., c. 23, 1855, executors-nominate are, as such, no longer entitled to retain a third, or any portion, of the dead's part.

The office of executor, like other trusts, is personal, and not descendible to heirs. Hence, where two or more have been confirmed executors, on the death of one of them, the office

accrues to the survivors or survivor, and falls entirely on the death of the whole. In the latter case, the Commissary was formerly in use to appoint an executor-dative *quoad non executis*, who was accountable, not to the next of kin of the deceased executors, but to the next of kin of the defunct, the unexecuted part of the testament being held to be still *in bonis* of him. The part executed, and the responsibilities therewith connected, were, of course, transmitted to the next of kin of the deceased executors in the ordinary course of succession. But, for upwards of a century and a half, the confirmation has, in every case, been held to have the effect of an assignation or procuratory *in rem suam*, whereby the full right to the subjects confirmed, and, consequently, the right to execute the testament, in so far as unexecuted, is transmitted to the representatives of the deceased executors; *Ersk. B. iii. tit. 9, § 38*. It was formerly the practice for executors who desired to have their accounts settled, and to be discharged of their trust, to raise actions before the Commissary Court, concluding for decree of exoneration. This form of action is gone into desuetude; and, according to the present practice, no formal exoneration is considered necessary; but when an executor is sued by creditors or others interested, and entitled to call him to account, he may competently plead, by way of exception against such action, that the inventory in the confirmation is exhausted by lawful payments, not by mere decrees ordaining him to make payment. If there be any debts mentioned in the inventory as due to the defunct, which have not been received by the executor, he will be exonerated as to those, by producing decrees and registered hornings against the debtors, and by granting assignations thereof to the defunct's creditors who are insisting in the action against the executor, so as to enable them, if they please, to sue the defunct's debtors for payment; *Stair, B. iii. tit. 8, § 75, et seq.; More's Notes, p. ccliv. et seq.; Ersk. B. iii. tit. 9, § 47*. See generally, on the subject of the present article, *Stair, B. iii. tit. 8; Mackenzie, B. iii. tit. 9; Ersk. B. iii. tit. 9; Kames' Stat. Law Abridg. voce Executor; Kames' Elucid, art. 16; Graham, Dow's App. Cases, ii. 24; Bell's Com. ii. 81, et seq.; Bell's Princ. § 1869, 1888, et seq.; Ross's Lect. i. 55-76; The Institutes of an executor without confirmation, see in this Dictionary the article *Vitiosus Intromission*. As to questions of relief between heir and executor, see *Discussion; Heir and Executor*; and, in connection with the subject of the article, see *Jus Relictæ. Legitim. Dead's Part. Testament. Legacy*. See also *Executors*.*

*Confirmation of Executors under the Recent Act.*—By the act 21 and 22 Vict., cap. 56 (1858), the law relating to confirmation of executors is amended. The practice of raising edicts of executry for the decerniture of executors is abolished, and it is now no longer competent for a party to obtain himself decerned executor in virtue of such an edict. A person desirous of being decerned executor or disponee, next of kin, creditor, or in any other competent character, or of having some other person possessed of such character decerned executor, must present a petition to the Commissary for the appointment of an executor as nearly as may be in the form given in the schedule annexed to the act. Where the deceased died domiciled in Scotland, the petition may be presented to the Commissary of the county in which he was domiciled; and where he died domiciled furth of Scotland, or without any fixed or known domicile, the petition must be presented to the Commissary of Edinburgh. In place of publishing the petition at the kirk door and market-place, as was the practice in regard to edicts, it must be intimated by the Commissary-Clerk affixing a full copy of the petition on the door of the Commissary Court-House, on some conspicuous place of the court, and of the office of the Commissary-Clerk, in such manner as the Commissary may direct, and by the keeper of the record of Edictal Citations at Edinburgh inserting, in a book kept by him for that purpose, the names and designations of the petitioners, and of the deceased, and the place and date of his death, and the character in which the petitioner seeks to be decerned executor. On the expiration of nine days after certification of intimation and publication, the petition may be called in court, and an executor decerned, or other procedure take place, according to the forms in use, in case of edicts of executry, and with the like force and effect. A decree-dative may be extracted three days after it has been pronounced; but the law as to executors finding caution, remains as formerly; only bonds of caution may be partly printed and partly written. The course of procedure in use before the act in regard to confirmations of executors-nominate remains unaltered. Inventories of personal estates of deceased persons and relative testamentary writings may be given up and recorded in, and confirmation may be granted and issued by, any Commissary Court to which it is competent to apply under the act for the appointment of an executor-dative. The inventory of the personal estate of any person who has died domiciled in Scotland may include any personal estate of the deceased situated in England or Ireland,

or in both; but the person applying for confirmation must satisfy the Commissary that the deceased died domiciled in Scotland; and the Commissary must find by his interlocutor that he died so domiciled; and such interlocutor is conclusive evidence of the fact of domicile. The value of the personal estate situated in England or Ireland must be separately stated in the inventory, and the inventory must be impressed with a stamp corresponding to the entire value of the estate in the inventory, wherever situated. Oaths and affirmations in inventories may be taken either before the Commissary or his depute, or the Commissary-Clerk or his depute, or before any commissioner appointed by the Commissary, or before any magistrate or justice of the peace within the United Kingdom or the colonies, or before any British consul. A confirmation to a party who has died domiciled in Scotland, and which includes personal estates situated in England or Ireland, on being produced in the principal Court of Probate in England, or in the Court of Probate in Dublin, and duly sealed, has the same force and effect in England or in Ireland, as if a probate or letters of administration had been granted by these courts. In the same manner, any probate or letters of administration granted in England or Ireland, to the executors of a person therein stated to have died, domiciled there, on being produced in the Commissary Court of the county of Edinburgh, and indorsed by the Commissary-Clerk with the certificate in the form prescribed by the statute, has the same operation in Scotland as if it had been granted by the Commissary Court. In order to secure the payment of the full and proper stamp duties, Probates or letters of administration are considered to be granted for the whole of the personal estate of the deceased in the United Kingdom, and in the same manner the inventory exhibited in the Commissary Court, before obtaining confirmation, must include the whole of the personal estate of the deceased in the United Kingdom, and the value thereof. On applying for probate or letters of administration, the affidavit required must specify the fact that the deceased was domiciled in England or Ireland, according to the deponent's belief; and such affidavit is sufficient to authorise the fact of domicile to be so stated in or upon the probate or letters of administration; but such statement, and the interlocutor of the Commissary finding that the deceased was domiciled in Scotland, is evidence only for the purposes of the act.

**Executor-Creditor.** Where the executor-nominate, and the other executors legally entitled to expedite confirmation, have declined

confirming, any creditor of the deceased holding a liquid ground of debt may obtain himself confirmed *executor-creditor*, to the effect of administering as much of the estate as may be sufficient to pay his debt; *A. S. 14th Nov. 1679*. The creditor's right, or, more correctly speaking, this *diligence*, is completed by the confirmation—the mere decree-dative of the Commissary, which precedes the confirmation, not being sufficient to complete the right. And where other creditors are in circumstances to do so, they may apply to the Commissary, and be confirmed along with the first; or another creditor may himself confirm executor-creditor also, and summon the first to communicate a share of the fund which he has confirmed; *Bell's Com. ii. 81*. Where, again, the debt of the creditor of the defunct is not constituted, the act 1695, c. 41, provides, that it shall be lawful for the creditor, who has a depending cause or claim against the defunct, at the time of his death, "to charge the defunct's nearest of kin to confirm executor to him within twenty days after the charge given; which charge, so executed, shall be a passive title against the person charged, as if he were a vitious intronmitter, unless he renounce; and then the charger may proceed to have his debt constitute, and the *hæreditus jacens* of moveables declared liable by a decree *cognitionis causu*; upon the obtaining whereof, he may be decreed executor-dative to the defunct, and so affect his moveables in common form;" *Ersk. B. iii. tit. 9, § 34, et seq.*; *Bell's Com. ii. 81*. In order to secure an equitable distribution of the funds of a defunct, it was provided, by 1654, c. 16 and 18, enacted during the Usurpation, "that hereafter there be no executor-creditor decreed and confirmed to any defunct until half a year be passed after the defunct's decease; and that no decree for payment be extracted against any executor for six months after the defunct's death; and that all creditors who shall use diligence against the executor, within the said six months, shall come *in pari passu* with others who have decrees ready to extract." This enactment was repealed at the Restoration, but substantially re-enacted by the declaratory Act of Sederunt, 28th Feb. 1662; whereby it was provided, "that all creditors of defunct persons using legal diligence at any time within half a year of the defunct's death, by citation of the executors and intronmitters with the defunct's goods, or by obtaining themselves decreed and confirmed executors-creditors, or by citing of any other executors-creditors confirmed, the said creditors using any such diligence before the expiry of half a year, as said is, shall come *in pari passu* with any other creditors who

have used more timely diligence." The posterior creditors, before taking benefit by the inventory confirmed, being bound to pay a proportional part of the expense incurred by the executor-creditor first decerned and confirmed; and it being lawful for such posterior creditor or creditors to obtain themselves conjoined with the first in the office of executors-creditors. The distinction between the *pari passu* preference thus introduced, and that of adjudication within year and day of the first effectual one, is that, in the case of adjudications, the participation of creditors adjudging, after the expiration of the year and day, in the benefit of the first adjudication, is absolutely excluded; whereas, claims upon the executry may be made, notwithstanding the expiration of the six months, so as to give the claimant a share of the fund, *if it be still undivided*; *Bell's Com.* vol. ii. 81. See also *Bank. B. iii. tit. 8, § 81, et seq.*; *Ersk. B. iii. tit. 9, § 45, et seq.*; *Bell's Princ.* § 1895; *Stair, B. iii. tit. 8, § 63*; *More's Notes*, cclxxxix. cclxl.

**Executors.** This term is sometimes applied designative to the next of kin of a defunct who are entitled to his moveable succession *ab intestato*. In this acceptation, the executors, or *heredes in mobilibus*, are the whole next of kin of the defunct—*i. e.*, all the nearest in degree of blood; for, although an only child is both heir and executor to his or her father, yet, if there be two or more children, or, failing children, if there be two or more equally near in degree, they succeed *ab intestato* to equal portions of the moveable estate, without regard to primogeniture, and with no preference of males to females, except where a person dies, leaving both heritage and moveables. In that case, where one of the next of kin (*e. g.*, the eldest son) is heir to the heritage, he is not entitled to any share of the moveable succession, unless he choose to exercise the privilege of collation. Heiresses-portioners who succeed *ab intestato* to equal portions, *pro indiviso*, of the heritable estate, are all equally entitled, as next of kin, to shares in the moveable succession. Hence, although the eldest sister should take the heritable estate *destinatione* of her father, or under an entail, she is not thereby deprived of her share of the moveables which she may claim without collation. See *Collation*. The *jus representationis* had no place in moveable succession. Thus, the defunct's surviving children were formerly his next of kin or executors, to the exclusion of a grandchild by a son or daughter who had predeceased the defunct. In like manner, if one died without issue, leaving two sisters, and a nephew or niece by a third sister, deceased, the two surviving sisters succeeded to

the whole moveable estate, to the exclusion of the child of the sister who predeceased her father. This is now altered by the act 18 and 19 Vict., c. 23, 1855. It is of importance to attend to a distinction in the case of full and half blood. In the line of ascendants and descendants, all are said to be full blood; that is, all the defunct's lawful children, though by different mothers, are, with respect to their father's moveable succession, his next of kin. But in the collateral line the rule is different; for in that succession children by the same father and mother, or brothers and sisters german, and their issue, are accounted nearer in degree than their brothers and sisters by the half blood. Hence, it is a rule in moveable as well as heritable succession, that the full blood excludes the half blood in the same line of succession. Thus, if the deceased leave a sister-consanguinean,—*i. e.*, by the father's side,—and a nephew by a sister-german who has predeceased the defunct, the nephew will succeed to his uncle's moveable estate, to the entire exclusion of the sister by the half blood. Failing descendants both by the full and by the half blood, ascendants succeed; for it is a rule that the father and his brothers, and other kindred in the ascending line, never succeed *ab intestato*, while any of the father's children or their issue exist. Where the father succeeds as his child's next of kin, he succeeds to the entire exclusion of the mother, who formerly was in no case accounted as of kin, to the effect of succeeding *ab intestato* to her children, even although the property should have come originally from her. And, upon the same principle, all persons related through the mother, including brothers and sisters uterine, are excluded. See *Stair, B. iii. tit. 8, § 32*; *Bank. B. iii. tit. 4, § 16, et seq.*; *Ersk. B. iii. tit. 9, §§ 2, 3*. Where the defunct has not nominated an executor or administrator of his moveable estate, nor disposed it in favour of a general disponee, the whole next of kin or executors are entitled to the administration *pro indiviso*, and may obtain confirmation accordingly. The authorities cited under the article *Executor* may be consulted as to this article also. See *Executor. Confirmation*.

**Executry**; is the general name given to the whole moveable estate and effects of a defunct (with the exception only of heirship moveables), and is the proper subject of the executor's administration. It includes not only what belongs to the executor by his office, or succession, but all that belongs to the defunct's relict, children, or nearest of kin, legatees, and creditors. *Stair, B. iii. tit. 8, § 1*; *Ersk. B. iii. tit. 9, § 1*; *Bell's Com. i. 141*; *Sandford on Heritable Succession, i. 43*;

See *Goods in Communion. Jus Relictæ. Legitim. Dead's Part.*

**Exercitor.** An exercitor is the person to whom the profits of a ship or trading vessel belong, whether he be the actual owner or merely the freighter. According to Erskine, the word is derived from *exercere*, to employ—an exercitor being one who employs the ship in the way of trade on his own account. An exercitor is liable for all repairs, provisions, or furnishings, of whatever kind, necessary for the ship or crew, and ordered by the master, or by the person in the actual charge of the ship. This obligation is founded on an implied mandate, which the exercitor is presumed to have granted in favour of the master, to the effect of procuring whatever may be needful for the successful prosecution of the voyage. Hence, the master may, in that character, competently bind the exercitor for such furnishings, even although the master may be himself incapable of contracting a binding obligation on his own account; for any one may be appointed master, "without distinction of age, sex, or condition; even pupils, and women clothed with husbands;" *Ersk. infra cit.* But although the contractions of a shipmaster, who is not *sui juris*, thus bind his constituents, yet, in the ordinary case, the master as well as the exercitor is personally bound to the furnisher; for a shipmaster is not accounted a mere administrator for the owners. Whoever is in the actual command of the vessel is deemed to be *præpositus, præsumptione juris et de jure*, without any commission from the exercitor, and even although he should be acting as master without the exercitor's knowledge, and contrary to his orders. The exercitor is also liable for the necessary furnishings, whether the master has purchased them with his own money, or has borrowed money for the purpose. It is to be observed, however, that a shipmaster's obligations for borrowed money bind the exercitor, only where the advance has been made in a foreign port; while contractions for ordinary and necessary furnishings bind the exercitor, although made to the master in a home port; *Lindsay and Allan*, 18th June, 1800; *Fac. Coll., Mor. App. voce Mandate*, No. 2. And as the master can in no case bind the exercitor in matters not falling within the trust committed to him as master, it is proper that bonds for money advanced for the use of the vessel should expressly mention the cause for which the money is borrowed. The furnisher or lender, in order to make good his claim against the exercitor, is not bound to prove that the furnishings or advances of money have been properly applied by the master; but he must be able to show that the furnishings or the

repairs, for which the advances were made, were ordinary, necessary, and proper. If there be more than one exercitor, they are all liable, *singuli in solidum*, for the master's contractions, without regard to their respective shares in the vessel—the exercitor who pays being entitled to relief, *pro rata*, from the others. Where the exercitors manage the ship themselves, without appointing a master, and without devolving the ostensible and exclusive management on any one of their own number, each is accounted master, *quoad* his own share; and his contract binds himself alone. The shipmaster's contracts concerning the cargo do not bind the exercitor, unless the master's commission contain an express authority to that effect—the management of the cargo, and of the contracts therewith connected, being usually intrusted to a supercargo. The exercitors, as well as the master, are included under the edict, *Nautæ, cauponæ, stabularii*—not, however, *in solidum*, but *pro rata*, according to their interests in the vessel; and that whether the exercitors be owners or mere freighters. And, by the statutes 7 Geo. II., c. 15, and 26 Geo. III., c. 86, the owners of ships (provided they had no knowledge of, or participation in, the fraud or negligence), are declared to be no further liable for embezzlement, negligence, or fraud, on the part of the master or crew, than to the amount of the value of the ship, and the freight due on the voyage in the course of which the embezzlement took place; *Ersk. B. iii. tit. 1, § 29; Bank. B. i. tit. 18, § 30. Exercitory obligations*, as they are termed, being properly maritime, were formerly cognisable, judicially, in the Admiralty Court, in the first instance; *Stair, B. i. tit. 12, § 18*. See generally, on the subject of this article, *More's Notes*, p. lxxiii.; *Ersk. B. iii. tit. 3, § 43, et seq.; Bank. B. i. tit. 18, § 24; Bell's Com. i. 477, et seq.; Bell's Princ. § 451; Brown's Synop. h. t.; Abbot, 34.*

**Exhibition.** This term is applied to an action for compelling production or delivery of writings, and may be resorted to either for the recovery of writings which belong to the pursuer, or it may be raised at the instance of an apparent heir, to force production of writings and title-deeds relative to his predecessor's estate, in order to enable the heir to deliberate as to the propriety of entering heir, and thereby incurring a responsibility for his predecessor's debts and obligations.

1. *Exhibition and delivery by a proprietor of the writs called for.*—This is an ordinary petitory and principal action, whereby the owner of a writing requires the defender to produce it, and to deliver it to him. Being a real action, it may be insisted in against any

holder of the document required—the pursuer being bound to specify the manner in which the defender became possessed of the document; and also to prove (which he may do by witnesses) that the defender had the writ in his possession at the date of the citation, or since. After that has been established, it is incumbent on the defender either to produce the writing, or to prove that he warrantably parted with it, or fairly lost possession of it; and, if the pursuer be not satisfied with the defender's statement, he may compel him to answer, upon oath, all pertinent interrogatories in relation to his having the writing, or putting it away, or as to his knowledge or suspicion concerning the person or persons who may have got possession of it; *A. S. 22d Feb. 1688. Stair, B. iv. tit. 33, § 1, and B. i. tit. 7, § 14; More's Notes, p. li.; Bank. B. i. tit. 8, § 41, et seq.; Ersk. B. iv. tit. 1, § 52; Tail on Evidence, p. 315; Jurid. Styles, 2d edit. vol. iii. p. 45, 656; Bell's Com. ii. 72.*

**2. Exhibition ad deliberandum by an apparent heir.**—This action has more the character of an accessory action than the preceding has, and may be pursued against third parties as well as relations, by every heir who may competently be charged to enter heir to a deceased person. The right to insist in the action is one of the privileges of an apparent heir; and he may raise it either within the *tempus deliberandi*, or after its expiration, and at any time before his entry as heir. In the action the apparent heir is entitled to call for exhibition of all deeds granted to or by his predecessor, whether the deeds have been perfected by sasine or not, to the effect that he may thereby be enabled to deliberate whether or not it will be prudent for him to take up the succession which has opened to him. Any deed of the predecessor, by which the heir is excluded from the succession, will afford a good defence against the action. Hence an irredeemable disposition, or a deed of entail, by which the ancestor has been divested and the heir excluded, will be a sufficient defence to the disponent against exhibiting the writings relative to such disposition or deed of entail; and that whether sasine has followed on the deed or not. In like manner, if the apparent heir have been charged to enter heir by a creditor of the defunct, and have renounced, the heir cannot legally insist in an exhibition *ad deliberandum* against the creditor on whose charge he has renounced; but that renunciation will be no bar to an action of exhibition *ad deliberandum* against any other creditor of the defunct. Although the heir, before his entry, may require exhibition of writings *ad deliberandum*, he cannot, until his actual entry as heir, compel delivery of the title-deeds or other

documents belonging to his ancestor, in the hands of third parties; neither can he enforce payment of the debts proved by such documents to be due to the ancestor. *Ersk. B. iii. tit. 8, § 56, et seq.; Stair, B. iv. tit. 33; Bank. B. iii. tit. 4, § 66, and tit. 5, § 7; Bell's Princ. § 1688; Illust. ib.; Jurid. Styles, 2d edit. vol. iii. p. 266.* See also *Apparent Heir*.

3. An exhibition *ad probandum*, was another accessory action formerly in use. This was an action competent to the party to a suit, when he wished to prove a fact pertinent to the cause, by the production of writings belonging to, or in the custody of, third parties—technically called *Havers*. But, in practice, this action has been long superseded by *incident diligences*, granted in the course of the principal action against the *haver* of the writing. *Ersk. B. iv. tit. 1, § 52; Stair, B. iv. tit. 33, § 2, and tit. 41, § 5, et seq.; More's Notes, p. cccxv.; Dickson on Evidence, 669.* See *Diligence. Haver. Incident Diligence*.

**Exhibition** the benefactions settled for the maintenance of scholars in the English Universities, not depending on the foundation, are called *Exhibitions*. In this sense, the term is analogous with the Scotch term *bursary*. An exhibition was the name formerly given to an allowance of meat and drink, such as was customary among the religious appropriators of churches, who usually made it to the depending vicar. *Tomlins' Dict. h. t.* See *Bursary. Altarages*.

**Exhumation.** This term is sometimes applied to the offence of disinterring a dead body. See *Dead Body*.

**Exile.** See *Transportation*.

**Exitus**; the issues or profits of anything. *Exitus terræ*, the rents, fruits, and profits of the land. *Exitus justitiarix*, the profit of the justice aire. *Exitus curix*, the issues and commodity of a court, as americiaments, and the like. *Skene, h. t.; Stair, B. ii. tit. 3, § 64.*

**Exoneration**; a discharge; or it signifies the act of being legally disburdened of, or liberated from, the performance of a duty or obligation. Conclusions for exoneration are generally inserted in actions of multiplepoinding at the instance of trustees, executors, and others. See 3 *Jurid. Styles, 2d edit. p. 313, et seq.* Petitions for exoneration and discharge of purchasers and factors in rankings and sales are also, in certain circumstances, competent; 3 *Jurid. Styles, 861–864.* Petitions for the discharge of judicial factors, tutors, and others, under the Pupil's Protection Act, are regulated by 12 and 13 Vict., c. 51, § 34; and 20 and 21 Vict., c. 56, § 4. See *Discharge. Multiplepoinding. Shand's Prac. pp. 582–583, 595.*

**Expediting Letters.** This expression is said to be derived from the French verb

*expedier*, which signifies to make out the principal copies of letters, judgments, and other juridical writs. In the phraseology of the Scotch law, to *expede letters*, means to write out the principal writ, and get it signeted, sealed, or otherwise completed. Thus, after a bill of suspension or of advocacy had been passed by the Lord Ordinary on the Bills, the act of writing out the letters of suspension or of advocacy, and of obtaining them signeted, was termed *expediting the letters*—the passed bill being the warrant for so doing. In like manner, the act of passing a royal charter through the seals was formerly termed *expediting a charter*, although now the technical expression is, *passing a charter*. See *Ross's Lect.* vol. i. p. 236. See *Suspension. Advocation.*

**Expenses, or Costs of Suit.** In judicial procedure, this term is applied to the charges exigible from a party to a process, as court-dues, fees to counsel and agents, and other expenses incurred in the prosecution of the action. It is almost the invariable practice for the pursuer, or, generally speaking, for the party making any claim judicially, not only to demand payment or performance of the obligation, or declarator or reduction of the right which is in question, but also to conclude for the expenses of the process which he has found it necessary to institute. Expenses may be given, however, without being specially concluded for. They are not, properly speaking, part of the subject-matter of an action; *Hopkirk*, 21 Dec. 1855, 18 D. 300. In like manner, it is the practice for the defender or respondent to demand the expense attending his defence; and the Court (except where special statute or rules of court regulate the matter otherwise) are in use to exercise a discretionary power on this point. Regularly, the question of expenses ought to be determined in the decree which settles the point of law; for the expenses are not demandable in a new action. By 6 Geo. IV., c. 120, § 17, it is directed, "that in pronouncing judgment on the merits of a cause, the Lord Ordinary shall also determine the matter of expenses, so far as not already settled, either giving or refusing the same in whole or in part; and every interlocutor of the Lord Ordinary shall be final in the Outer-House." It frequently happens, however, that decrees are allowed to be extracted, which contain a reservation of the question of expenses, the process to that extent remaining in dependence. In the case of decrees in absence, the stat. 1 and 2 Geo. IV., c. 38, § 33, provides, that it shall not be lawful to extract any decree for the random sum of expenses concluded for in the summons; but that, in all cases of decrees in absence, an account of expenses shall be lodged in process, and taxed by the Auditor; and that a report

thereon by the Auditor shall be a sufficient warrant to the extractor to fill up the amount of the expenses to be awarded against the defender, without the necessity of bringing the Auditor's report before the Lord Ordinary, unless by his own direction or that of the Auditor, or on the motion of any party interested. See *Decree*. Where, in a litigated cause, expenses have been found due to either party by the Court of Session or by a Lord Ordinary, the practice is, for the Court or Lord Ordinary to make a remit to the Auditor of Court to tax the account of expenses. The account, together with a copy of the interlocutor finding expenses due, prefixed thereto, is lodged with the Auditor, who thereafter fixes a time for the taxation, and a copy of the account, together with the Auditor's warrant for taxing, is served on the agent for the party or parties found liable in expenses, that he may attend at the time so fixed. The agent for the party found entitled to expenses attends at the same time, and produces the process, or such part of it as may be necessary for the taxation of the account, together with the drafts or copies of papers, and other vouchers of his account, to the Auditor. After the account is taxed, the agent is entitled to get back the process, in order to return the same to the clerk, except in those cases where it may be necessary for the Auditor to retain it for further examination, in which case, a receipt is given by the Auditor or his clerk, for the process; *A. S. 11th July 1828*, § 69. The Auditor is empowered to hear the agents for the parties, but not in writing, on their objections. The Auditor returns a short report on the account, specifying the taxed amount; and, if no objection be made, the Court or Lord Ordinary before whom the process depends, approves of the report and determines for the amount. In case either party means to object to the Auditor's report, he must immediately lodge with the clerk of the process a short note of his objections without argument, a copy of which must be transmitted to the agent on the other side, and the Court or Lord Ordinary may either direct the objections to be answered *viva voce*, or in writing; the expense of the discussion being laid on the objector if he fail in making good his objection, and the interlocutor thereon being final; *A. S. 6th Feb. 1806*. The expense of the judicial discussion is always laid on the party objecting, where his objections are repelled; but not necessarily, if the objection has been stated by him to the Auditor, and reported by the Auditor to the Court, for determination. An intimation of an appeal to the House of Lords, is not enough to stop decree being pronounced for expenses; but where the appeal has been actually presented, and service of an



order thereon has taken place, a motion for expenses is incompetent. On petition to the Court, however, interim execution pending appeal, is granted as to expenses, the party finding caution to repeat, if the judgment be reversed; *Cochrane*, 12 D. 302. If the agent who has conducted the cause wish it, the decree for the expenses will be allowed to issue and be extracted in his name. Expenses belong to the agent, and the party found liable in them, cannot prevent his getting such decree, by pleading a counter claim against his client; *Miller*, 22d June 1848, 10 D. 1384. The taxation of the expenses, where either party is found liable to pay them, is, of course, a taxation as between party and party, not as between agent and client; for, although a party who is found liable in his adversary's expenses, is, under such an award, bound to pay the regulated expenses of a judicial discussion, conducted in the ordinary manner, he lies under no obligation to pay all the expenses which an anxious or capricious litigant may have incurred in the conduct of his cause; *A. S. 19th Dec. 1835*. But, although such expenses are not included under an award of the expenses of process, it is equally clear that the litigant is bound to pay his own agent for all the unnecessary, and, very often, useless expense *bona fide* occasioned by the litigant's own over-anxiety, and at his express desire. Hence arises the distinction which has been recognised between a taxation of costs as between party and party, and as between agent and client. Independently, however, of such capricious and extraordinary costs, it necessarily happens, that, in almost every case, the agent for one or other of the parties (and, where no expenses are found due to either party, the agent for each party) has an account to claim from his own employer. The Act of Sederunt accordingly provides in like manner for the taxation of accounts as between agent and client, by authorising a summary application to be made by the party to the Lord Ordinary before whom the cause depends, or has formerly depended, to get the account claimed by his agent remitted to the Auditor to be taxed according to the existing regulations; the report, in that case also, being returned to the Lord Ordinary, and disposed of as above, and the sum so ascertained forming the proper charge by the agent against his client. So also, when an agent or his representative raises an action against his employer for payment of a professional account, the Lord Ordinary may, and usually does in the first place, remit the account claimed to the Auditor to be taxed; and no decree, either in absence or after hearing parties, can be pronounced in such a case until a report has been made by the Auditor; *A. S.*

6th Feb. 1806. Expenses awarded in jury causes are also appointed to be taxed and reported upon by the Auditor of the Court of Session; *59 Geo. III.*, c. 35, § 33. By *A. S. 29th Nov. 1825*, § 39, it was necessary to lodge two accounts, the one containing the expenses incurred in the Court of Session, and the other the expenses incurred in the Jury Court. But since the incorporation of the two Courts, one account only is lodged. The auditing in jury causes is regulated on the same principles as in other Court of Session cases. There are necessarily, however, certain things peculiar to jury causes. Where the country agent is competent to take precognitions, and has been all along engaged in the case, an Edinburgh agent undertaking that duty will only be allowed to charge the opposite party at the rate at which the country agent would have charged. But, in general, the Court is disposed to allow the Edinburgh agent's charges for going personally to the country. A charge for two precognitions, one by an Edinburgh, and another by a country agent, is not good against the opposite party. The agent has the option of charging for a precognition, either according to the actual time occupied, or the usual drawing fees of a memorial or pleading, according to the length of the precognition. As to expenses of printing documents for jury trials, see *A. S. 8th July 1850*. The amount of fees paid to counsel is never interfered with, if *bona fide* paid and within reasonable bounds. In all cases where memorials are laid before counsel, the fee paid therewith, together with the date of payments, must be marked on the back in large legible characters (in words), and the paper must afterwards be got back from counsel, indorsed with his signature or initials, and produced to the Auditor. Where fees are paid to counsel without a memorial, a certificate under the hand of the counsel or his clerk, must, if required, be produced, that such fees were paid of the dates stated in the account. A party, after he has been found entitled to expenses, is not allowed to pay or state higher or additional fees to counsel, not actually paid at the time. But this rule does not apply either to cases on the poor's roll, or to such as have been conducted gratuitously by the agent and counsel, on account of the poverty of the party; *A. S. 19th Dec. 1835*. In general, the fees of two counsel only can be allowed against the losing party. The magnitude, however, of the case, or other special circumstances, may relax this rule. The personal charges of an unprofessional party are not allowed. The expression, *expenses of the trial*, in the interlocutor, includes the whole expenses of the process preparatory to, as well as at the trial. Where it is ne-

cessary or proper to employ a country agent in conducting a cause in the Court of Session, reasonable charges may be allowed for his trouble, &c., provided that double charges are not thereby incurred for doing the same business; *A. S. 19th Dec. 1835*. After a case has been decided in the Inner-House without mention of expenses, it is thought incompetent to claim expenses from the Lord Ordinary; *Campbell and Company*, 21st May 1803, *Mor. App. Expenses*, No. 3; *Wyllie*, 5th Feb. 1820, *Fac. Coll.* But see also, as to claiming them in the Inner-House subsequently, *Gillies*, 1843, 5. D. 1086; *Mathew*, 1844, 6 D. 1135; *Kerr*, 1835, 14 Sh. 180, *Affd.* 15 July 1837, 2 Sh. & M'L. 895. Where an interlocutor of a Lord Ordinary not mentioning expenses has been reclaimed against by the defender, and the interlocutor has been adhered to, without mention of expenses, and the interlocutor allowed to become final, no expenses can be awarded to the pursuer; *Flethers of Canongate*, 7th July 1809, *Fac. Coll.* A Lord Ordinary can in no case give the expense of any part of a process finally decided in the Inner-House, without an express remit for that purpose; *Falconer*, 4th March 1815, *Fac. Coll.* See also, *Wilson*, 12th Nov. 1814. But it is competent to apply to the Lord Ordinary for the expenses incurred in the proceedings in a cause before him, although the Court, in adhering to the Lord Ordinary's interlocutor, have awarded to the respondent the expense of supporting it; *Goddie*, 23d Jan. 1816, *Fac. Coll.* And where an interlocutor of a Lord Ordinary, finding expenses due generally, has been adhered to in the Inner-House, without any mention being made of expenses, it carries the expenses incurred in the Inner-House; *Hill*, 21st May 1824, *S. & D.* Where, however, the Lord Ordinary has said nothing about expenses, and his interlocutor is adhered to, the Court cannot give the respondent more than the expense of supporting the interlocutor; *Bowie*, 5th Dec. 1816, *Fac. Coll.* In an action on a mutual contract, stamped during the dependence of the action at the pursuer's expense, if the pursuer prevail and is found entitled to expenses, the expense of stamping, including penalty and solicitor's fee, must be borne by the parties equally; *Stewart*, 12th Feb. 1817, *Fac. Coll.* A decree for expenses in favour of a party who has been admitted to the benefit of the poor's roll, in order to prosecute the action, includes the expense of getting upon the roll; *Cameron*, 25th June 1814, *Fac. Coll.*; *Rankine*, 31st May 1821, *S. & D.* Where a judicial remit was made by the Court of Session, to an accountant or other professional person to report, it was

formerly understood in practice, that the agents who conducted the remit, as well as the parties, were personally liable to the accountant for his fee; *Milne v. Maclean*, 31st May 1825, 4 S. & D. 45. But, by A. S. 19th Dec. 1835, it is declared that no agent is, without special agreement, to be held personally responsible to an accountant, engineer, or other reporter, to whom a remit is made, where the agent has authority to bind the party. The Lord Ordinary in the Outer-House, or the Court, in the event of bills of suspension of decrees of inferior Courts being passed, may find the suspender entitled to the expenses he has incurred in the inferior Court, as well as in the Court of Session; 6 *Geo. IV.*, c. 120, § 46; *A. S. 11th July 1828*, § 8. These expenses cannot be given in the Bill-Chamber, but only after the letters have been expedite, or after authority has been obtained to discuss the reasons on the bill. A general finding of expenses in favour of the suspender does not carry his expenses in the inferior Court. In a suspension, the Court cannot remit to the inferior Court to decide the question as to the expenses in the Court of Session. As to the respondent's expenses, see *Advocation*. When the Court remits a case to the Sheriff, with instructions to repel the dilatory defences, it is competent to give power to the Sheriff to decide all questions of expenses relative to said defences. Where expenses have been found due and modified, the agent who has conducted the process for the party who has been found entitled to expenses, may require the Court or the Lord Ordinary to pronounce decree for the expenses in his name against the adverse party. And where an interlocutor has been pronounced finding expenses due, or which, by necessary implication, carries expenses, the right of the agent to claim those expenses, and to have decree in his own name for them, cannot be defeated by a compromise of the law-suit; *Hamilton*, 17th June 1813, *Fac. Coll.*; *Bell's Com.* ii. 39, and cases there cited. As to the agent's preference for his expenses over the fund recovered, or in competition with the creditors of the party, see *Hypothec. Lien*. As to the liability of attorneys or mandatories for expenses, see *Defender*. In jury causes, it is competent to award the expenses of discussing questions of law and relevancy at the time they are disposed of; but this is not usual. When a party prevails on any incidental point, he ought always to get the expenses connected with it at once. When a new trial has been granted, the previous expenses are either awarded as a condition, or *simpliciter* refused, or reserved till the issue of the second trial. Cases illustrative of these different points will be found analysed in *Macfarlane's Jury Prac.* p. 283. The general

rule is, that a new trial will be granted without payment of previous expenses, where the first verdict is set aside, through an error in law on the part of the presiding judge as to the admission or rejection of evidence, or in his charge to the jury; or in respect of the jury having disregarded the law given to them by the judge. But where the new trial is granted on any ground, except an error in law on the judge's part, that renders it essential to the justice of the case that it should be tried again, the expenses of the first trial are sometimes allowed, but there is no absolute rule on the subject; *Dargie*, 19 D. 878. At the termination of the cause, the question of expenses can only be taken up in the Division of the Court to which the case belongs, on a motion duly lodged and intimated, which is usually done when application is made to have the verdict applied. In general, the party obtaining the verdict is entitled to his expenses; but this rule is, in special circumstances, subject to exceptions. To get expenses, it is not necessary that a party should succeed to the full extent of his claims. It is enough that he has substantially succeeded in the point at issue. Questions of expenses are for the discretion of the Court in consideration of the circumstances of each case, and no absolute rules can be laid down on the subject. It may be observed, however, that a losing party, although he may have been successful on one point, will not get expenses on that point unless it involved a question of character, and was attended with additional expense. *Johnston*, 18 D. 1234. When the action has been brought for defamation, or violation of personal liberty, and no retractation or apology has been offered, the pursuer, if he obtain a verdict, though only for nominal damages, is entitled to expenses; *Arrol v. King*, 18 D. 98. But see also, *Mason v. Tait*, 13 D. 1282; and *Ewing*, 14 D. 314, 3050. But where the loss alleged is definite and specific, a verdict for a party with nominal damages does not carry expenses. Expenses may be modified in consideration of circumstances. Where a party is successful only on some of several issues, but upon the whole gets damages, he is entitled to his expenses, under deduction of the portion applicable to the issues which he has lost, and that portion he must sometimes pay to the other party; *A. S.* 19th Dec. 1835. Where the loss has been definite, and where the defender has tendered a sum by way of reparation, along with the expenses of process, up to the date of the tender, he will be liable in expenses, if the jury award more than that sum, but he will be entitled to expenses if they give less. Although this rule does not apply to actions for defamation, and others of that description, where a pub-

lic investigation is necessary, yet, in one case, the defender got expenses, in respect of a tender of L.50, the jury finding for the pursuer only one shilling of damages. See *Tender*. With regard to the expense of appeals to the House of Lords, from judgments of the Court of Session, the following points seem to be fixed:—1st, Where expenses have been awarded by the House of Lords, upon a final discussion of the appeal, the Court of Session is in use to grant decrees for those expenses in a summary manner. But the Court will not do so where the appeal has been withdrawn with permission of the House, on payment of costs. In that case, the remedy against the party who attempts to re-sile, is to repudiate the arrangement, and apply to the House of Lords for a discussion of the appeal; for, until the condition of the withdrawal is complied with, the appeal is still in dependence; *Brown*, 20th July 1784; *Mor.* p. 4042. 2d, Where a judgment of the Court of Session is reversed on appeal, and the case remitted to the Court of Session to apply the judgment, without an instruction to give the appellant the expenses of the previous litigation, they cannot afterwards be awarded; *Pringle*, 6th March 1799, *Mor. App. Expenses*, No. I; *Geddes*, 16th Feb. 1816, *Fac. Coll.*; *Wilson*, 18th June 1818, *Fac. Coll.*; *Colquhoun*, 17 D. 245.

By sundry statutes and acts of sederunt regulating procedure before the Court of Session, the Court, or the Lord Ordinary, is empowered to repon parties on payment of the whole, or of a portion of the expenses previously incurred. Generally speaking, a party may be reponed against any proceeding to his prejudice, which has taken place in his absence, or even against judgments *in foro*, where, by accident or inadvertence, he has allowed an interlocutor against him (not otherwise final) to become final. See *Reponing*. Other statutes and rules of Court have rendered it imperative on the Court, in certain cases, to award the expenses against the unsuccessful party. Thus, the bankrupt statute, 54 Geo. III., c. 137, § 28, provided, that the unsuccessful competitor for a trusteeship should pay the expense of the competition; and, although there is now no express enactment on that subject, the principle applies to competitions for the office of common agent, and to unsuccessful objections to the Auditor's reports. See *A. S.* 11th July 1794, § 4; 6th Feb. 1806; and 19th Dec. 1835. *Common Agent*. In several British statutes, some of which extend to Scotland, the successful party is entitled to double or treble costs. In such cases the rule is, that the costs given by the Court *de incremento*, as it is termed, are to be doubled or trebled, as well as those given by

the jury. But double or treble costs do not mean, according to their literal import, *twice* or *thrice* the amount of single costs. For where a statute gives *double* costs, they are to be calculated thus: *first*, the common costs, and then *half* the common costs. If treble costs, *first* the common costs; *secondly*, half of these; and then half of the latter. See *Tomlins' Dict. voce Costs*.

Trustees on bankrupt estates, litigating unsuccessfully, and also other trustees, if they litigate unnecessarily and improperly, will be found personally liable in expenses. *Torbet*, 1849, 11 D. 694; *Hill*, 1852, 1 *Stuart*, 494; *Morrison*, 1848, 11 D. 297; *Clyde's Trustees*, 1840, 2 D. 554; *Smith*, 1838, 16 *Sh.* 1223.

As to the expenses in which an unsuccessful pursuer is to be held liable where there are several defenders, see the cases of *Edinburgh and Glasgow Railway Company*, 1858, 20 D. 677; *Leslie*, 1858, *ib.* p. 787. In jury causes, there is no absolute rule requiring payment of expenses as a condition of a new trial; *Dargie*, 1857, 19 D. 878. In some cases an action may proceed as to the matter of expenses when no practical question as to the merits remains; but where he *pendente lite* settles the dispute in such a way as to divest him of all title to sue, he cannot in general be allowed to go on in order to get decree for expenses; *Dobie*, 1856, 18 D. 1043. As to joint and several liability of defenders for expenses, see cases of *Mackenzie and Logan*, 1852, 15 D. 61, 94. As to certain items of expense in jury causes, see *A. S.*, 16th Feb. 1841, § 45; 10th July 1844; 18th July 1850. As to expenses prior to litigation, which are not carried by a decree for expenses, see *Prison Board*, 1852, 14 D. 737.

Under recent acts costs may now be given both for and against the Crown; 18 and 19 *Vict.*, c. 90; 19 and 20 *Vict.*, c. 56, § 24. An arbiter has power to award expenses though no mention of them be made in the submission; *Ferrier*, 5 D. 456, *App.*; 4 *Bell*, 161. As to expenses in advocations and suspensions, see these articles. In advocations decree for expenses in the Supreme Court carries those in the Inferior Court as well; *Sinclair*, 1855, 17 D. 784; but see also, *Boswell*, 1848, 10 D. 808. In actions by a husband against a wife for divorce or separation, the former is generally bound to furnish the latter with the means of defending herself; and in actions by the wife against the husband, she will also get from the Court, if she has established a *prima facie* case, decree against the husband for such sums as may be necessary to carry on the action. *Fraser's Rel.* i. 380; *Shand's Prac.* 429.

The principles above explained apply to the expenses in inferior courts, as well as in the Court of Session. In actions which are brought in an incompetent court, or in an

incompetent form, or in which parties are called who ought not to have been cited as defenders, expenses will be awarded against the pursuer. And, in inferior courts, the rate of charges is fixed by the regulations of the court before which the action depends; *Sinclair*, 16th June 1825. In one case, the question was raised, but not decided, whether such charges could be sustained, where the inferior court rate of charges was higher than that fixed in the Court of Session; *Cunninghame*, 9th March 1822, 1 *S. & D.* 395. In some counties, it is the practice for the Auditor (in conformity with the rule in the Supreme Court, introduced by A. S. 19th Dec. 1835), in taxing accounts as between party and party, to disallow, of his own accord, all charges for pleadings, &c., in which the claimant of the account has been unsuccessful; although he may have ultimately obtained decree in his favour on the whole subject-matter of the process. In other counties, the sheriff, in finding expenses due, finds that they are subject to modification in respect of such unsuccessful pleadings. The auditor thereupon taxes the whole item of the accounts, agreeably to the scale of regulations, and the sheriff thereafter applies the modification, upon the Auditor's report being laid before him. The parties, on being heard before the Auditor, usually get the portions of his report, to which they respectively object, marked as appealed from. The case is then put to the roll, and parties' agents are heard *viva voce* before the sheriff upon their appeals. *Avizandum* is thereupon made, and the sheriff, on considering the Auditor's report, and the *viva voce* objections and answers of parties, modifies the account to the amount which he may consider right, and pronounces decree for the sum so modified. See *MacLaurin's Sheriff-Court Prac.* ii. 398, *et seq.*

In criminal prosecutions, if statutory, no costs can be given unless sanctioned by the statute. By 9 *Geo. IV.*, c. 29, § 23, no fees or expenses of any description are exigible by the clerks or other officers of a criminal court from any person on whom a criminal libel shall have been served, "unless the same shall form part of the sentence of the Court." This seems to imply that expenses may form part of a sentence, and expenses have been awarded against procurators-fiscal where the charge was dismissed as irrelevant, and as not amounting to a crime; *Prentice*, 1 *Broun*, 561. As to awarding expenses against a panel pursued only by the public prosecutor, see 2 *Hume* 493, *Note* 1; and on the subject of expenses in criminal cases generally, 2 *Hume*, 69, 128, 134, *Note* 1., 376, 382; 2 *Alison*, 39, 113, 355, 676. See, on the subject of this article generally, *Stair*, B.

iv. tit. 3, § 2; *More's Notes*, p. cxc.; *Ersk. B. iv. tit. 3, § 18, et seq.*; *Bell's Com.* i. 649; *Brown's Synop. h. t.*, and p. 2168; *M'Glashan's Sheriff Courts*, 337, *et seq.*; *Shand's Prac. 1026, et seq.*; *Shaw's Digest, h. t.* See *Hypothec. Lien. Retention.*

**Exposing Children.** The offence of exposing and deserting an infant child, if accompanied with circumstances proving an intention to destroy, and followed by death in consequence of the exposure, amounts to the crime of murder. Whether this be the case where there is no evidence of an intention to destroy, but the child dies by an accident connected with the exposure, may be more questionable; but on principle, the reckless exposure of an infant child to the risk of death, followed by death, seems to be nothing less. Even although the child does not perish, its desertion and exposure to any considerable risk is a crime punishable arbitrarily, according to the circumstances of the case, and which has been punished with whipping, imprisonment, or banishment. A charge of "wickedly, wilfully, and feloniously, exposing an infant child, in a situation of danger to its life, by the mother of such child," has been sustained as relevant. *Gibson*, 1845; 2 *Brown*, 366; *Hume*, i. 295; *Alison's Princ.* 162. See *Child-Murder.*

**Expiry of the Legal**; is the expiration of the period within which the subject of an adjudication may be redeemed, on payment of the debt adjudged for. Before the debtor can be foreclosed, and his right of redemption cut off, there must be either,—(1.) decree in an action of declarator of expiry of the legal, at the instance of the adjudger or adjudgers, against the debtor; or, (2.) possession on charter and sasine for forty years. *Jurid. Styles*, 2d edit. vol. iii. p. 407; *Shand's Prac.* p. 715. See *Adjudication. Legal.*

**Expromissor.** According to the distinction of the Roman law, an *expromissor* was one who undertook the debt of another, by substituting himself as principal debtor, in room of the former obligant; who, in so far as concerned the creditor, was liberated from his obligation. An *adpromissor* or *fidejussor*, on the other hand, was more properly a cautioner, inasmuch as he merely acceded to, or bound himself in terms of the obligation of, the principal debtor, who also remained bound to the creditor. *Stair*, B. i. tit. 17, § 3; *Bank. B. i. tit. 23, § 25*; *Ersk. B. iii. tit. 4, § 22.* See *Cautionary.*

**Extent**; is the name given to the ancient *causus* or general valuation put upon all the lands in Scotland, for the purpose of regulating the proportion of public subsidies or taxes exigible from them, as well as for ascertaining the amount of the casualties due to the supe-

rior. The precise period at which a valuation of this kind was first made, has not been clearly ascertained, although it has long been the subject of inquiry and controversy amongst lawyers and antiquaries. It appears, however, that, so early as the year 1474, the old extent or valuation had been deemed inadequate; and, accordingly, the statute 1474, c. 56, ordains that, in the retours made to Chancery, the inquest shall state "what the land was of avail of the auld, and the very avail it was worth, and gives the day of the serving of the said brieve." Under that statute, according to the generally received theory, the practice for some time prevailed of adducing evidence before the inquest, of the real rent or value of the lands at the time, which, as well as the old extent, or more ancient valuation, was accordingly stated in the retour. But after lands had been once so valued, it is said that, on the occasion of future retours, a new valuation was not made, but that the amount of the new, as well as of the old extent, was taken from the former retour; and that, even where no evidence of the present value had been adduced, a practice was introduced of stating in the retour the present value at a quadruple, quintuple, or sextuple of the old extent, according to the custom of retouring lands in the particular shire; *Hop's Minor Practicks*, p. 194, edit. 1734. In this manner, the new and the old extent are supposed to have been ascertained—the new extent being the valuation thus fixed, and the old extent consisting, as has been generally understood, of a valuation made in the reign of Alexander III., or, at any rate, at some time prior to 1474; *Ersk. B. ii. tit. 5, § 33*; *Skene, voce Extent*; *Kames' Law Tracts, Tract XIV.* Neither of these valuations extended to church lands, the share of the subsidies applicable to them being levied from the beneficiaries, according to the value of their benefices, as settled by Bagimont's Roll; *Ersk. B. iii. tit. 5, § 34.* See *Bagimont's Roll.* During the Usurpation a more equitable rule of assessment was introduced, and the rates laid upon each county precisely fixed. After the Restoration, very nearly the same system was continued—statutory commissioners being appointed to apportion the general sum laid upon each county, upon the different lands in the county, according to their respective real rents. See *the Act of Convention, 23d Jan. 1667.* The rent fixed by those valuations is commonly called the *valued rent*; according to which, the land-tax, and most of the other public and parochial assessments, have been since imposed. It was likewise the rule, under the old election law, for regulating freehold qualifications where the old extent did not appear; 1681, c. 21. See

article *Election Laws*. Erskine's account of old and new extent is abridged from *Lord Kames' Historical Law Tracts, Tract XIV.*; and the same authority has been followed by more recent writers, Lord Kames having been indebted for the materials of his theory to Mr John Davidson, a very learned member of the society of writers to the signet. But see the subject of extents largely and learnedly treated, and Lord Kames' views modified and corrected, in the case, *Cranston v. Gibson*, 18th May 1818, *Fac. Coll.*,—one of the papers in which case, written by Mr Thomson, deputy-clerk register, and extending to 280 quarto pages, was stated from the Bench to contain a very learned treatise on the old extent. See also *Skene, voce Extent*; *Balfour's Practick's*, p. 430; *Craig, de Feudis*, lib. ii. dieg. 17, § 36; *Stair*, B. iii. tit. 5, § 38; *Mackenzie's Inst.* B. ii. tit. 5, § 18; *Hope's Minor Practicks*, tit. iv. § 14; *Bank*, B. iii. tit. 5, § 32; *Kames' Law Tracts, Tract XIV.*; *Kames' Stat. Law Abridg. h. t.*; *Ersk.* B. iii. tit. 5, § 31, *et seq.*; *Hailes' Annals*, vol. i. p. 202; *Wight on Elections*, p. 160, *et seq.*; *Bell's Election Law*, p. 154, *et seq.*; *Bell's Princ.* § 1830.

**Extent, Crown's.** An extent, in the acceptation of the English law, is a writ of execution or commission to the Sheriff for the valuing of lands and tenements; and sometimes the act of the Sheriff or other commissioner upon this writ; *Tomlins' Dict. h. t.* By the treaty of Union between Scotland and England, the revenue laws of the two countries were assimilated; and the Crown's preference and the English execution by extent (so far at least as concerns moveable property), was introduced in revenue matters, under the exception, and in the manner explained under the articles *Crown Debts* and *Exchequer*. The process of extent, thus introduced, was a speedy remedy given to the Crown for recovering money due to the public. Originally, in England, this execution was confined to land; but by statute 33 Henry VIII., c. 39, it is authorized to be given to the Crown for attaching the body, lands, goods, and debts of the Crown debtor, for the recovery of all sorts of debts due to the Crown. Where the Crown debt is due by bond, either in the English or Scotch form, a writ of extent may issue on production of the bond with an affidavit, and without any preliminary step. If the debt be by simple contract, it must be made, what is termed in the law of England, *matter of record*, before a writ of extent can issue. In the case of a partnership debt, the extent may issue against the several copartners; but for the debt of an individual partner, the Crown can take no more than his interest in the company goods, after payment of the company debts. The application in

Exchequer, for a writ of extent, is accompanied by an affidavit stating the amount of the debt, and that there is danger of its being lost to the Crown unless the extent be issued. The *fiat* or warrant for a writ of extent may be obtained at any time, either during term or vacation, on application to the Judge in Exchequer, by whom the *fiat* is signed—the date of the *fiat* being the date of the testing of the writ. The writ is tested by the Judge, and sealed with the Exchequer seal. The writ of extent directs the Sheriff to take the person of the Crown debtor, and to take and appraise his effects and debts. In Scotland, the moveable estate only of the debtor could be taken; and the general rules were,—1st, That all goods and effects, the absolute property of the Crown debtor at the *teste* of the writ, might be taken, into whose hands soever they might have come since that time; and, 2d, That money might be seized, and all debts due to the Crown debtor, or assigned by him since the *teste* of the writ. But *bona fide* cash payments made since the *teste* were not affected. The Sheriff, in execution of the writ, was not authorized to sell or convert the effects into money, until the *venditioni exponas* had issued; and after the goods had been sold, under that authority, to the amount of the Crown debt, the proceeds were returned to Exchequer for the use of the Crown, under deduction of poundage and extra allowance, which the Sheriff was entitled to claim on a motion in Exchequer. An extent in the *second degree*, as it was termed, was the process by which, on the insolvency of a Crown debtor, the debts due to him by *his debtors* were made effectual to the Crown. This process was issued from Exchequer on an affidavit of the Crown debtor's insolvency, on which affidavit a *fiat* was granted for a writ of extent against the debtor of the Crown debtor; and the same process might be repeated in the third, and even in the fourth degree. Such an extent was called an *extent in chief* in the second, third, or fourth degree; and it differed from an *extent in aid*, inasmuch as it was sued out by the Crown as the *real plaintiff*, for the direct recovery of the Crown debt, whereas an extent in aid was sued out only *nominally* by the Crown, but really by a *Crown debtor*, for the recovery of a debt due to himself, and for his own benefit. AN EXTENT IN AID proceeded on the fact, or fiction, that the Crown debtor was *less able* to pay under the Crown's extent against himself, than he would have been if he could have recovered the debts due by another to him. Hence, this extent was said to be obtained *in aid* of a previous extent, at the Crown's instance, against the applicant for an extent in aid; and the writ accordingly issued, not against the Crown debtor, but

against the debtor to the Crown debtor. For a history of the abuses of extents in aid, see *Bell's Com.* vol. ii. p. 47, 5th edit. These abuses were at last attempted to be remedied by the statute 57 Geo. III., c. 117, proceeding on the preamble,—“That extents in aid have, in many cases, been issued for the levying and recovery of larger sums of money than were due to his Majesty by the debtors, on whose behalf such extents were issued.” And also, “That extents in aid have been issued at the instance and for the benefit of persons indebted to his Majesty by simple contract only.” To remedy which evils, it was enacted,—1st, That the amount of the debt due, or claimed to be due, by the principal debtor to the Crown, should be stated in the *fiat*. 2d, That, where the sum found due to the Crown debtor should be equal to, or exceed the Crown debt, as stated in the *fiat*, the amount of the debt in the *fiat* should be indorsed on the writ of extent in aid, and should be deemed the authority as to the amount to be levied. 3d, That, where the debt due to the Crown debtor should be less than the debt due to the Crown, as stated in the *fiat*, the amount of the debt due to the Crown should be indorsed on the writ, as the authority for the amount to be levied, the money so levied being paid over to the Crown, in satisfaction *pro tanto* of the Crown debt. 4th, That where, in consequence of the necessity otherwise of splitting the debt, more than the sum indorsed was necessarily levied, the overplus should be paid into the Court of Exchequer, together with the amount of the sum indorsed; and that the Court, on summary application, might make an order for the return, or for the proper disposal of such surplus. 5th, That the Crown debtor should not, by the extent in aid, be prejudiced of other means of recovering his debt. As to the second evil, the statute declared that no extents in aid should be given to debtors by simple contract, for debts arising to the Crown in the course of trade, saving, however, the rights of debtors who had become so by simple contract in the collection or receipt of money arising from his Majesty's revenue for his use. Any Crown debtor, against whom an extent in chief might issue, was entitled to have an extent in aid. So also cautioners or sureties to the Crown for debts due by accountants or receivers for the Crown—collectors of taxes who have actually received money belonging to the Crown—bankers, or other depositaries of money arising from duties or taxes, or deposited officially by the receiver-general—persons bound as distributors of stamps, who have forfeited their bonds—traders dealing in exciseable commodities, and liable to account at stated periods for the

accruing duties—farmers of duties, and the like Crown debtors—were entitled to the benefit of this writ. But it was not enough that one should be indebted to the Crown for duties as an individual; otherwise any one might have obtained an extent in aid. The principle on which an extent in aid was issued was, that, without it, the Crown debtor would be insolvent towards the Crown,—i. e., unable to discharge the debt he owed the Crown. But the fact, whether or not the Crown debtor were actually insolvent, was not very scrupulously inquired into, both on account of the difficulties attending such an investigation, and also on grounds of expediency—the public interest requiring that facilities should be given for the recovery of Crown debts. The affidavit for an extent in aid stated,—1st, The debt due to the Crown by the Crown debtor. 2d, The debt due to the Crown debtor by the person against whom the writ was to issue; and that it was *bona fide* due, and not in trust. 3d, That the debt due to the Crown debtor was in danger of being lost by the defendant's insolvency; and, 4th, That the Crown debtor was thereby less able to pay the Crown the debt due by him. On this affidavit, an extent *pro forma* was issued against the Crown debtor, which, with the affidavit and relative grounds of debt, were the warrant for a *fiat*, authorising an extent in aid to issue against the debtor to the Crown debtor; on which extent execution followed in the manner above explained. The foregoing account of extents in chief and in aid is abridged from *Bell's Com.* vol. ii. p. 41, *et seq.*, 5th edit.; which work may be consulted for a fuller account of those writs, accompanied by references to authorities. *Kames' Stat. Law Abridg. h. t.*; *Bell's Princ. § 2374, et seq.*, and authorities there cited; *Swint. Abridg. voce Exchequer.*

By the recent Court of Exchequer Act (19 and 20 Vict., cap. 56) the forms of procedure against Crown debtors have been remodelled, and to a considerable extent assimilated, to the procedure in other cases. Reference is made to the act for its provisions. By these, the Crown's writ of extent, although not expressly abolished, appears to be superseded. See particularly the provisions as to procedure on affidavit of danger (§ 16) and the form and execution of extract decrees (§ 28, *et seq.*).

**Extortion.** Extortion, in its most general acceptation, is any oppression under colour of right. Hence, in the law of England, the term is usually applied to the abuse of public justice which consists in the unlawful taking, by a public officer, under colour of his office, of any money or valuable thing from a person where none is legally due; or were less than the sum demanded is due; or where the sum

demand has not yet become due. The distinction between bribery and extortion is said to be, that the former consists of the *offering* or *accepting* of a present, unduly to influence the conduct of the party to whom it is offered, or by whom it is accepted; whereas, the latter consists in demanding a fee or present, by colour of office; *Tomlins' Dict. h. t.* See also *Exaction. Bribery.* But, in the phraseology of the law of Scotland, the term extortion is also applied to the offence or delict of compelling one by force or fear to execute a deed, or to perform an act, or to contract an obligation, which, of his own inclination, he would not have done. Such force or fear excludes that liberty of action which is requisite to constitute legal consent; for, according to the expression of the Roman law, *Quamvis si liber esset, noluisset, tamen coactus voluit.* Acts and deeds thus extorted may, by the law of Scotland, be set aside by an action of reduction before the Court of Session; in which action, if the party alleging extortion prove his allegation, he will be relieved from the consequences of the act or deed, even against third parties; *Wightman, 1787; Mor. 1521*; and the offender, besides, may be subjected in damages. Extortion, as well as fraud, when stated as the ground for reducing a deed, may be proved by evidence *prout de jure.* *Stair, B. i. tit. 9, § 8, and B. iv. tit. 40, § 25; Moré's Notes, p. lviii.; Bank. B. i. tit. 10, § 50, et seq.; Ersk. B. iv. tit. 1, § 26; Bell's Com. i. 295, and ii. 450.* See also *Delict. Evidence.* As to the amount of force or fear requisite to constitute extortion, see *Force and Fear; Dict. Vis et Metus; Priestnell v. Hutchison, 19 D. 495.*

**Extract.** The term extract, in the law of Scotland, signifies either the proper written evidence, or warrant on which diligence or execution on a judicial decree may issue; or it signifies a copy, authenticated by the proper officer, of a deed, writing, or other entry, the principal of which, either is in a public record, or a transcript of which, taken from the principal, has been preserved in a public record. I. The extract of a decree is a written instrument signed by the proper officer, containing a recital of the claim and procedure in an action, and concluding with the judicial sentence or award, and a warrant for diligence in execution, the form of which is regulated by 1 and 2 Vict., c. 114; or, in the case of Exchequer decrees, by 19 and 20 Vict., cap. 56. See *Execution of Decrees.* The extract must be signed on every page by the extractor or other officer whose duty it is to give extracts; nor can it be validly attested by any other person, not even by the judge who pronounced it. The officer who makes the extract being a public functionary, the extract will be sufficiently authenticated by his sub-

scription (without witnesses) to every page, the number of pages of which it consists being mentioned on the last page. But it is not necessary that the extract should be written by the extractor, nor indeed the writer be named or designed. If the extractor gives out an erroneous extract, he may rectify the mistake by a second extract; *Tait on Evidence, p. 182, et seq.* The long extracts of decrees of the Court of Session, and of some of the inferior courts formerly in use, in which the whole record of the case was transcribed *verbatim*, were abolished, and abridged forms of extracts directed to be substituted. See 50 *Geo. III., c. 112; 1 and 2 Geo. IV., c. 39, § 7; 4 Geo. IV., c. 97.* And, by 1 and 2 *Geo. IV., c. 38, § 17,* the signature of the extractor by whom the decree in the Court of Session is extracted, is declared a sufficient authentication, without requiring the subscription of a principal clerk of Session, as was formerly the practice. See *Decree.* II. Extracts of deeds or writings, or entries, registered in judicial or public records, are certified copies of the deeds or entries, whether they be deeds by public officers, as notarial instruments, or executions by messengers, or the deeds, obligations, or contracts of private parties, or the entries in registers of births, deaths, or the like. Such extracts are in like manner authenticated by the subscription of the keeper of the record, or other officer duly authorised. Where the deed has been recorded, in virtue of a clause of registration, consenting to execution, an extract or decree of registration which is a mere transcript of the deed, with a decree of the Court interponed *fictioe juris*, in terms of the consent, is issued, on the demand of the party ordaining implement of the obligation, which extract is, like the extract of a judicial decree, signed by the extractor, and may be the warrant for diligence to enforce payment or performance in terms of the obligation contained in the deed. See *Decree of Registration.* As to the evidence afforded by extracts, whether from judicial or other records, see *Evidence, supra, p. 367; Dickson on Evidence, pp. 625-635.* On the subject of the present article generally, see *Stair, B. ii. tit. 3, § 24, and B. iv. tit. 1, § 45; Moré's Notes, p. v. and cclxxxi.; Bank. B. iv. tit. 36, § 1; and B. ii. tit. 3, § 44; Ersk. B. iv. tit. 2, § 6; Shand's Prac. p. 381; MacLaurin's Sheriff-Court Prac. 428, et seq.; M'Glaskin's do., 358, et seq.; Ross's Lect. ii. 208; Alexander's Abridg. of A. S.; Tait on Evidence, p. 184, et seq.*

**Extractor;** is the official person by whom the extract of a decree or other judicial proceeding is prepared and authenticated. This, generally speaking, is the duty of the clerk of court. The stat. 50 *Geo. III., c. 92,* by which



the abridged forms of extracts of the decrees of the Court of Session were introduced, directs that the extracts shall be prepared by the six assistants of the principal clerks of Session, each extract being authenticated, as formerly, by the signature of one of the principal clerks. But, by the statute 1 and 2 Geo. IV., c. 38, § 17, extracts of the decrees of the Court of Session from and after the 20th June 1821, were directed to be prepared by one or other of four extractors to be nominated by the principal clerks of Session, who were responsible for the due discharge of the official duty of the extractors. The extractors thus appointed were under the superintendence and control of the principal clerks, and removable at their pleasure. The salary of each extractor was L.250 *per annum*, and he was entitled to no other fee or emolument, except the ordinary charge for copying. By this statute it was also provided, that the signature of a principal clerk of Session should be no longer necessary to authenticate an extract, but that each extract should be legally authenticated by the signature of the extractor by whom it was prepared. Duplicates of decreets for the record, and abbreviates of decreets of adjudication, were in like manner to be authenticated by the signature of the extractors respectively, by whom the decreets should be prepared and signed—the signature of the Lord Ordinary to an abbreviate of adjudication, required under the Act of Regulations, June 1696, and the signature of a principal clerk required by the Act of Sederunt, 26th Nov. 1793, to authenticate the abbreviate of an adjudication under the bankrupt statute, being no longer necessary.

By 1 & 2 Vict., c. 118, §§ 18, 19, the office of extractor was placed upon a new footing; and under that act there is now one principal extractor, with an assistant nominated by him, and such engrossing clerks as may be necessary. The principal and assistant extractors are paid entirely by salary, the principal L.500, and the assistant L.300 *per annum*. The clerks are paid by their writings. The junior principal clerk of Session has a superintendence of the office, and reports each Session to the Court on the subject.

The Act of Sederunt, 6th July 1748, ordains extractors to take the oaths to Government; 4th Jan. 1751, prohibits them from acting as agents in processes; and 23d Feb. 1687, extends the privileges of the College of Justice “to four extractors in each of the three clerk’s offices of the Session.”

**Extrajudicial**; not judicial, or not transacted under judicial cognisance or superintendence. The term is usually applied in contradistinction to *judicial*, to something said or done in the course of a process, or before an action has been brought into court, but

which is not intended to form any part of the record, or of the judicial pleadings or admissions of the parties, such as communings or correspondence, having in view a private settlement of the matter in dispute, or the like. Extrajudicial concessions or admissions made by a party in the course of communications for a compromise, or in order to avoid a lawsuit, cannot be competently founded upon, or proved against him judicially, where the object of the negotiation has failed; *Smythe*, 20th May 1809, *Fac. Coll.* It was formerly incompetent to prove an extrajudicial statement by a witness, different from his judicial statement, in order to discredit him; but this rule is now abolished 15 *Vict.*, c. 17, § 3. The witness himself, however, must be first interrogated on the point. *Dickson on Evid.*, pp. 66, 90; *Stair*, B. iv. tit. 44, § 7. See also *Evidence*.

**Extraordinary Actions.** The Act of Sederunt, 11th July 1828, § 103, under the head Extraordinary Actions, enumerates processes of adjudication, count and reckoning, ranking and sale, sale of a pupil’s heritage, division of commony, division of runrig lands, division among heirs-portioners, choosing of curators, pointing of the ground, and the like; and declares, with regard to them, that it shall be in the power of the Court, or the Lord Ordinary, to require of parties to proceed according to the forms applicable in ordinary actions, in so far as in each particular instance it shall appear fit and expedient to apply these; but, excepting in so far as compliance with these shall be specially required, such actions shall proceed according to the forms in use in such actions before the passing of the Judicature Act, 6 Geo. IV., c. 120, except in regard to the power and mode of review of any interlocutor pronounced therein. *Shand’s Prac.* p. 345.

The procedure in the Court of Session is now regulated by the 13 & 14 *Vict.*, c. 36; which applies to all actions before that Court. For the peculiarities of the enumerated actions, reference is made to those articles respectively.

**Extraordinary Lords of Session.** After the original institution of the College of Justice in 1537, it continued to be the practice of the Scottish Kings, in addition to the fifteen ordinary Lords of Session, or Senators of the College of Justice, to nominate other Lords of the King’s Council, as extraordinary Lords of Session. The number of those extraordinary Lords was limited, by the stat. 1537, c. 40, to “three or four;” but the Kings, greatly to the prejudice of the administration of justice, frequently nominated seven or eight. This abuse, together with the power of appointing extraordinary Lords of Session, was put an end to by the stat. 10 Geo. I.,

whereby it is enacted, that whenever the places of the four extraordinary Lords of Session, or any of them, shall become vacant, the same shall not be supplied; and if any presentation or nomination shall at any time be made, the same is declared void and null; 10 *Geo. I.*, c. 18; *Kames' Stat. Law Abridg. h. t.*; *Prof. More's Notes on Stair*, p. cccxvi.; *Ersk. B. i. tit. 3, § 16*. See *College of Justice*.

**Extrinsic.** This term when applied to evidence generally signifies evidence beyond that afforded by the deed or document under consideration, and many questions arise as to the admissibility of such evidence to contradict, modify, or explain writings. See *Dickson on Evidence*, pp. 93, 109, 114, 130, 545, 551. The general rule is, that it is in-

competent to contradict or modify the terms of formal writings, unless fraud be alleged and proponed in competent form; but, in certain circumstances, as where there is ambiguity in the writing, such evidence is admitted in explanation. The expression is also applied to qualifications of judicial statements, or admissions by parties, particularly in oaths of reference. Questions as to *extrinsic* and *intrinsic* qualities, in oaths on reference, are frequently attended with great nicety, and must be always, to a certain extent, questions of construction. See the article *Evidence*, *supra*, p. 342. See also *Dickson on Evid.* pp. 818, 752; *Ersk. B. iv. tit. 2, §§ 11-14*; *Stair, B. iv. tit. 44, § 14*; *Bank, B. iv. tit. 32, § 16*; *Tait on Evidence*, pp. 244-264; *Bell's Com. i. p. 333*; *Thomson on Bills*, 652.

## F

**Facile.** A person is said to be of a facile disposition, when, although not a fit subject for cognition as an idiot, he is easily imposed upon, and liable to be induced to do deeds to his own prejudice. And the Court of Session, either *ex officio*, when in the course of an action they discover a party to be of that disposition, or on the application of his heir or next of kin, will interdict him; thereby preventing him from granting deeds, unless with the consent of the interdictors whom they appoint. A person, who is conscious of such an infirmity, may also voluntarily place himself under interdiction. See *Interdiction*. A facile disposition, though it may authorise the interference of the Court, is not of itself a ground of reduction of any transaction into which a facile person may have entered; nor has interdiction any retrospect. As a ground of reduction, facility is quite distinct from incapacity. The issue applicable to the latter ground is simply, whether the deed is not the deed of the grantor? where the former is alleged, the issue is, whether the grantor at the date of the deed was facile and easily imposed upon, and whether the deed was impetrated by fraud and circumvention to his lesion; and the names of the alleged impetrators must be condescended on; *Baird*, 1858, 20 *D. 1220*. In order, therefore, to support a reduction of the deed of a facile person, there must be evidence of circumvention and of imposition in the transaction, as well as of facility in the party, and lesion. But, "where lesion in the deed, and facility in the grantor concur, the most slender circumstances of fraud or circumvention are sufficient to set it aside." *Ersk. B. iv. tit. 1, § 27*; see also *B. 1, tit. 7, § 53, et seq.*; *Stair, B. 1 tit. 9, § 8*; *More's Notes*, p. liv.; *Bank, i. 191*; *Bell's Com. i. 141*; *Kames' Equity*,

67; *Bell's Princ. §§ 2113 and 2123*. See *Extortion. Fraud. Interdiction. Circumvention. Lesion. Idiot. Imbecility*.

**Facto.** See *De Facto*.

**Factor**; a person employed to do business for another for hire. Factory, which, in modern times, has almost entirely superseded the *Mandate* of the Roman law, differs from that contract in not being gratuitous. Factory is either express or implied; special or general. The factor, unless he can plead the excuse of illness or some inevitable accident, is liable in damages for not performing his engagement. He must account to his principal for his administration, and pay over to him all that he may have received in his name. In remitting money the factor must follow his principal's directions, or take the risk. In absence of express directions he must remit through a chartered bank, or a banker in good credit, or follow the mercantile or local usage. If he pay the money into a bank on his own account, it perishes to him on the banker's failure; and he becomes liable for the money if he put his own name as drawer or indorser on the bill by which it is sent. An agent or factor is not entitled to delegate his powers; although he may employ a third party in any ministerial capacity which he cannot fulfil himself. If, therefore, without permission, he delegate his power, he is liable for the competency and solvency of the delegate. But if he has received permission to delegate, he is only liable by his own fault or fraud in the choice. A factor binds his employer to any engagement which he contracts, within his powers. Where these powers are expressly limited, the limits are absolute, both as regards the right which the factor has to demand from the principal relief of his

obligations, and as regards the right of third parties to call upon the principal for implement. But, in the latter case, the limits will have no effect, if they are expressed in a private stipulation between the principal and agent, or if the commission is of such a nature that it is not usual for parties dealing with the factor to examine the extent of his powers. The powers, too, of the factor in relation both to his employer and the public, are frequently extended or restricted by the usage of trade. Power is implied to perform any act necessary for the accomplishment of the engagement; and a factor at a distance, and in difficult circumstances, is entitled to exercise a sound discretion. Third parties are entitled to deal with the factor as with a principal. But they can claim no lien or right of retention for a general balance against the principal. The risk of the goods, &c., in the factor's possession, is, by the general rule with the employer, unless fault (*culpa levis*) be established against the factor. Factory is recalled by revocation if done *tempestive*, though that may not be sufficient to reach third parties, unless accompanied by notice. It also falls by the death of the principal; but transactions already begun may go on, and those done in ignorance of the death are effectual. A factor may renounce, provided things are entire. Revocation is implied by the employer's appointing a new agent to do the same act. The mandate subsists notwithstanding the mandant's supervening insanity. Where goods are consigned generally for sale, a mandate is implied, empowering the consignee to sell them at his discretion, as to price and time; and if the consignee have made, or got, advances on the goods, his mandate to sell is held to subsist, and to be assignable, till he is reimbursed. A mandate is implied by the principal's acquiescence in the factor's acts. Factors, duly empowered, may grant leases, which bind the constituents in the same manner as if granted by the constituents themselves. But factors with common powers cannot grant rental rights; nor can they pursue removing without express powers; *Bell's Com.* i. 476; *Princ.* § 216; *Illust. ib.*; *Hunter's Landlord and Tenant*, i. 167; ii. 19, 428; *Menzies*, § 457; *Story on Agency*, p. 35, *et seq.*; *Smith's Merc. Law*, p. 121, *et seq.*; *Russell on Factors and Brokers*. See *Mandate. Principal and Agent*, and *authorities there cited. Agent*. As to Judicial Factors, see that article.

**Factories.** From views of humanity, the acts 3 and 4 Will. IV., c. 103, amended by 4 Will. IV., c. 1; 7 Vict., c. 15, 1844; 13 and 14 Vict., c. 54, 1850; 16 and 17 Vict., c. 104; and 19 and 20 Vict., c. 38, were passed to regulate the hours of labour of children,

and young persons and females employed in mills and factories.

**Factum Præstandum.** An obligation *ad factum præstandum*, is an obligation to perform an act. The rule of the civil law is, that on the debtor's refusing to implement his bargain, the creditor is only entitled to sue for damages, on the maxim, *Nemo cogi potest præcise ad factum, sed in id tantum quod interest*. The law of Scotland is not quite fixed upon this point, some authorities adhering to the Roman law doctrine; while Stair, B. i. tit. 17, § 16, holds, that in equity, the creditor should have the alternative of compelling performance; and Mr Bell (*Com.* i. 335) says, that the specific implement of bonds *ad facta præstanda*, may be enforced by the personal diligence of imprisonment. There are several decisions establishing the principle, that servants refusing to work, may be imprisoned on a summary warrant. But now, the grounds of expediency on which this rule is founded, are sufficiently answered by 4 Geo. IV., c. 34, § 3, which visits such refusal with penal consequences. In certain circumstances, where a party fails or refuses to perform an act to which he is bound, the want of his voluntary act may be judicially supplied. Thus, when a party under an obligation to convey land, refuses to grant a voluntary title, the want of it may be supplied by adjudication in implement. See *Adjudication in Implement*. When performance becomes impossible, damages are substituted, on the maxim, *Locum facti impræstabilis subit damnum et interesse*; with this modification, that, in some cases, if performance has been delayed with the fraudulent intent of making it impossible, personal execution by caption will proceed. Joint obligants for the performance of a fact are bound *singuli in solidum*; but *pro rata* only, when damages are substituted for an imprestable fact. See *Solidum et pro rata*. Cautioners *ad factum præstandum* can in no instance be sued till the principal debtor has been discussed. A debtor *ad factum præstandum* is denied the benefit of the act of grace, the privilege of sanctuary, and the *cessio bonorum*; *Stair*, B. i. tit. 17, § 16; *Ersk.* B. iii. tit. 3, § 62; *Bell's Com.* i. 335; ii. 555, 572; *Bell's Princ.* §§ 29, 58, 190, 569, and *authorities there cited*; *Illust. ib.*; *Ross's Lect.*, i. 236, 294; *Kames' Equity*, 214.

**Faculty.** In the language of the law, a faculty means a power which a person is at liberty to exercise; hence it follows that a faculty does not fall under the negative prescription, since it is of the very essence of the right that it may be exercised at any time. Faculties may be adjudged: thus, an heir's right to reduce his ancestor's deed on the head of deathbed,—a minor's right to reduce a deed

on the head of minority and lesion,—a faculty to burden lands,—a power to recall an annuity,—may all be adjudged. But it has been held that the right to pursue a declarator of irritancy against the heir of entail in possession cannot. *Shand's Prac.* 664, and authorities there cited; *Ersk.* B. ii. tit. 12, § 6; iii. tit. 7, § 10; *Stair*, B. ii. tit. 6, § 10; *More's Notes*, p. xciii.; *Kames' Equity*, 451; *S. D.* xii. 413.

**Faculty**; in the law of England, is used for a privilege, or special dispensation, granted to a man by favour and indulgence, to do that which, by law, he ought not to do. For the granting of these, there is an especial court under the Archbishop of Canterbury, called the *Court of the Faculties*, the chief officer of which is called the *Master of the Faculties*. *Tomlins' Dict. h. t.*

**Faculty of Advocates.** See *Advocate*.

**Faculty to Burden.** A faculty to burden is a power reserved in the disposition of an heritable subject, to burden the disponee with a certain sum of money. This refers either to a real or to a personal burden. Where it is personal, the disponee only is burdened; and the lands can be burdened with the debt only by diligence against the disponee as proprietor. Where the faculty is that of constituting a real burden, it is only by an heritable bond and infestment that the faculty can be exercised. *Stair*, B. ii. tit. 3, § 54; *More's Notes*, p. xciii.; *Bell's Com.* vol. i. pp. 40–42; ii. 190, 5th edit.; *Bell's Princ.* § 924; *Illust. ib.*; *Bank.* vol. i. pp. 579, 127, et seq.; vol. ii. 13, 20, et seq.; *Jurid. Styles*, 2d edit. vol. ii. p. 417; *Ross' L. C.* vol. iii. p. 38. See *Burdens*.

**Fairs and Markets.** The right of fairs and markets is vested in the Crown. No person or burgh, therefore, can claim a fair or market without a grant from the Crown or prescription equivalent to a grant. The toll or custom leviable by the owner is regulated by act of Parliament, or usage, without which no power to levy can exist. Dues cannot be levied upon goods until they have been sold, unless by immemorial custom. The monopolies of burghs are occasionally relaxed in favour of fairs and markets; and it was at one time the rule, that while attending them, neither person nor property could be arrested for previous debt, although cattle may be distrained in a pasture on the way. *Forestalling, i.e.*—buying merchandise while on the way,—and *regrating*, or reselling victuals in the same market, or within four miles thereof, are forbidden by special statute. *Bell's Princ.* § 664; *Illust. ib.*; *Tomlins, h. t.*; *Ersk.* B. i. tit. 4, § 29; *Bank*, B. i. tit. 19, §§ 12 and 15; *Kames' Stat. Law, h. t.* See *Market. Forestalling. Regrating.*

**Falcidia portio**; in the Roman Law, was

a fourth part of the free goods of the testator, secured to all heirs, whether *sui* or *extranei*, against legacies. The testator could effectually prohibit the heir from taking the benefit of the *falcidia*, in which respect it differed from the natural portion of children. *Stair*, B. iii. tit. 8, §§ 12, 13; *Bank.* B. iii. tit. 8, § 30.

**Fallow.** Where an outgoing tenant has left fallow which he was not bound by his lease to leave, and as to which the lease contains no other stipulation, it has been said that he has a claim against the landlord for its value. *Bell's Princ.* § 1263; *Illust. ib.*; *Hunter's Landlord and Tenant*, ii. 473; *Bell on Leases*, i. 341.

The only case which is referred to in support of this doctrine (*Purves*, Dec. 3, 1822, 2 *S.* 59) is very imperfectly reported, and appears from the Session papers to have contained specialties. The doctrine, in its full extent, seems contrary to principle, as it would entitle an outgoing tenant to leave his whole farm in fallow, and to claim an allowance for so doing. The more consistent rule is thought to be that where the lease contains no stipulations on the subject, the tenant must regulate his conduct by the provisions, if any, as to cropping and labouring; and where there are no such provisions, by the rules of good husbandry, without depending on any such claim. Where there is a stipulation in the lease as to fallow being left without any stipulation as to remuneration, the presumption seems to be that the tenant was to have no claim for it. Obligations cannot be introduced into a lease by implication or extrinsic evidence. *Alexander v. Gillon*, 22d Jan. 1847, 9 *D.* 524.

**Falsa demonstratio**; is an erroneous description of a subject or person in a writing. Its effect depends almost entirely upon the specialties of the case; but, generally, if the description is taxative, *i.e.*—if it is to be looked on as a condition—its falsity vitiates the conveyance; if, however, it is only exegetical or expository, *falsa demonstratio non obest nec vitiat cum constat de corpore*. See *Brown's Synop. h. t.* *Scottish Missionary Society*, 1858, 20 *D.* 634.

**Falseness**; is defined to be a fraudulent imitation, or suppression of truth, to the prejudice of another; *Ersk.* B. iv. tit. 4, § 66. Of this crime, forgery, which is the adhibiting a false name to a writing, is the most important branch. *Bank.* vol. i. p. 296, et seq.; *Shand's Prac.* pp. 257, 289, 318; *Hume*, i. 137, et seq.; *Bell's Sup.* p. 49. See *Forgery. Swindling*. Falseness cannot be proposed against messengers' executions, and the like writs, without a reduction improbatum. See *Execution. Fraud*.

**False Imprisonment**; in English law, a

trespass committed against a person, by arresting and imprisoning or detaining him without just cause, and contrary to law. *Tomlins' Dict. h. t.* The corresponding Scotch law term is *Wrongous Imprisonment*, which see.

**False Personation.** Falsely assuming the name or character of an officer, soldier, seaman, &c., in order to receive his wages, is, by 5 Geo. IV., c. 107, § 5, declared felony, punishable with transportation for life or for years, or by imprisonment with or without hard labour. By 11 Geo. IV. and 1 Will. IV., c. 66, § 7, a similar punishment is provided for the offence of falsely personating a shareholder in some fund, for the purpose of drawing the dividends, &c. *Tomlins' Dict. h. t.* These acts do not extend to Scotland.

**False Swearing.** In proceedings under the Bankruptcy Act (19 and 20 Vict., c. 79) any person guilty of wilful falsehood in any oath is, by sec. 178, liable to a prosecution, either at the instance of the Lord Advocate, or at the instance of the trustee, with his concurrence; provided, that in the latter case the prosecution shall be authorized by a majority of creditors, at a meeting called for the purpose; and such person, upon conviction, besides the awarded punishment, forfeits to the trustee for behoof of the creditors, his whole right, claim, and interest in or upon the sequestration. As to the former law on the subject of false swearing in sequestrations, see *Shand's Prac.* p. 1039; 2 *Bell's Com.* 343, 389. As to falsehood on oath generally, see *Perjury*.

**False Weights.** By the act 1607, c. 2, the users of false weights are declared to be punishable by the confiscation of moveables. *Bank. vol. i.* pp. 295, 213. See *Weights and Measures*.

**Falsing of Dooms;** reduction of decreets. *Skene, h. t.* See *Doom. Sok.*

**Fama Clamosa;** in the ecclesiastical law of Scotland, is a prevailing report, imputing immoral deportment to a clergyman, probationer, or elder of the church. No process is commenced by the presbytery against a minister, unless a complaint has been given in, or unless the *fama clamosa* against him is so great, that the presbytery, for their own vindication, see themselves necessitated to begin the process without any particular accuser. When there is such a *fama clamosa*, the presbytery first inquires into the rise, occasion, broachers, and grounds thereof, and if it appear, after this inquiry, that there ought to be a process against a minister, and if no private party come forward to institute it, they resolve to serve him with a libel. A libel cannot be sustained which rests only on hearsay. *Hill's Church. Prac.* 49, and autho-

rities there cited; *Cook's Styles*; *Wood on Libels*, p. 2. See also *Minister. Deposition*.

**Familia;** in English law, signifies all the servants belonging to one master; also a portion of land sufficient to maintain one family. *Tomlins' Dict. h. t.*

**Familie Eriscundæ Actio;** in the Roman law, was an action competent to any one of co-heirs for the division of what fell to them by succession. It has no place in heritable succession by the Scotch law. *Stair, B. i. tit. 7, § 15*; *Bank. B. i. tit. 8, § 36*; *Brown's Synop.* p. 2334.

**Fang.** A thief taken with the fang (or in the manner), is one apprehended while carrying off, "in hand having, or upon back bearing," the stolen goods. *Ersk. B. i. tit. 4, § 4*; *Bank. B. iv. tit. 16, § 4*; *Hume, i.* 102.

**Farandman;** a stranger or pilgrim. *Skene, h. t.*

**Farding-Deal, or farundel of land;** is, in England, the fourth part of an acre. *Tomlins' Dict. h. t.*

**Fare;** the money paid for being carried by land or water; formerly, the passage itself. *Tomlins' Dict. h. t.*

**Farm Servants.** The wages of farm servants are a privileged debt. *Hunter's Landlord and Tenant*, ii. 393; *Fraser's Pers. Rel.* ii. 436, 385; *Baird on M. and S.*; *Bell on Leases*, i. 411; *Bell's Princ.* §§ 1241, 1407; *Illust.* § 1407. See *Privileged Debt. Wages*.

**Father.** A father is the administrator-in-law to his children, and, as such, the manager, and, as it were, the tutor of his children while in popularity, and their curator during minority. This power of management extends over the whole property and estate of the child, whether flowing from the father or from a stranger, with the following exceptions:—1. Where the property descending from a stranger has been put under other management; 2. Where the child has a claim against the father, a curator *ad litem* will be given to him by the judge; and, 3. The father's right of administration is at an end, by the marriage of his daughter during her minority. The father, as administrator, is not bound to make up tutorial inventories. *Ersk. B. i. tit. 6, § 54, et seq.*; *Stair, B. i. tit. 5, § 12, et seq.*; *B. iv. tit. 39, § 14*; *More's Notes*, p. xxxi.; *Bell's Princ.* §§ 1980, 2122, 2068, *et seq.*, *Fraser's P. and D. R.* ii. 26; *Sandford on Heritable Succession*, i. 5, 240. See *Curatory*.

**Fatuous.** A fatuous person, or an idiot, is one who, from a total defect of judgment, is incapable of managing his affairs. He is described as having an uniform stupidity and inattention in his manner, and childishness in his speech. An idiot cannot act in the affairs of life; and he is by the law put under the protection of a curator. Where an idiot

discovers any marks of judgment, he is said to be capable, without curators, to execute a testament, which is revocable; but he cannot competently bind himself irrevocably, nor can he enter into a marriage. With regard to the title to sue and defend, fatuous and furious persons when cognosed, seem situated like pupils or minors. If a tutor has been appointed by gift from the Exchequer, the action proceeds in the joint names of the idiot and tutor. If the fatuous person has not been cognosed, or if the action is against his tutor or curator, it may be raised in name of the fatuous person, and a tutor *ad litem* will be appointed when the case comes into Court. Where one has been put under curatory by the Court of Session, the action proceeds in his own name, with consent of the factor or curator; and an action against such a factor or curator is incompetent, unless the fatuous person is called as a principal defender. *Shand's Prac.* 151, 993, and authorities there cited; *M'Glashan's Sheriff Process*, 98; *Ersk. B. i. tit. 7, § 48*; *Bell's Com.* i. 136. See also *Brieve. Curatory. Idiot. Fraser's Rel.* ii. 263.

**Fault**; in quality of a commodity agreed for, may be the ground of rejection, if the commodity have been sold unseen, and turn out inferior to what was represented. Even if the buyer saw the goods, a *latent* fault may entitle him to reject them, and should they perish in consequence of it, he will be relieved from payment, or entitled to repetition of the price. But if the fault or deficiency of a commodity seen by the buyer is manifest, the rule is, *Caveat emptor*, and the buyer's eye is his merchant. The challenge of a fault must be made immediately, or without unnecessary delay. *Bell's Com.* 5th edit. i. 439; *Bell's Princ.* § 95, *et seq.*

**Feal and Divot**; a rural servitude, importing a right in the proprietor of the dominant tenement to cut and remove turf for fences, or for thatching or covering houses, or the like purposes, within the dominant lands. And of the same description is the servitude of *fuel*, which is a similar right to cut, winnow, and carry away peats from the servient moss or peat land, for fuel to the inhabitants of the dominant lands. These servitudes will not be extended further than to the uses of the actual occupants of the dominant tenement, and will not extend even to extraordinary uses, such as to burn limestone for *sale*, or to carry on the trade of brewing or distilling for *sale*. The servitudes of *feal*, *divot*, and *fuel*, are distinct from the servitude of *pasturage*, and are not included under it. They may be constituted either by express grant, or by use or possession following on the usual clause of *parts and pertinents*. *Stair, B. ii. tit. 7, §*

13; *Ersk. B. ii. tit. 9, § 17*; *Bank. B. ii. tit. 7, § 31*; *Bell's Princ.* § 1014; *Illust. ib.*

**Fealty**; in English law, an oath taken on the admittance of any tenant, to be true to the lord of whom he holds his land. By this oath the tenant holds in the freest manner, since all who have fee hold by fealty at the least. *Tomlins' Dict. h. t.*

**Fear**. See *Force and Fear*.

**Feciales**; an order of priests among the Romans, consisting of twenty persons, appointed to proclaim war, to negotiate peace, &c. The *jus feciale* was all that the Romans had corresponding to the modern international law. *Ency. Brit.*

**Fee**. 1. This term is used to express an estate of succession, in contradistinction to *liferent*, as "fee and *liferent*." See *next article*.

2. The interest held by the *feuar* is termed the fee. According to *Erskine*, this term sometimes denotes "the subject itself granted to the vassal. Thus, it is said that a vassal falls from his fee, or that a fee opens to the superior. But it is more properly used to express the right resulting from the feudal contract; and in this acceptation it may be defined a gratuitous right to the property of lands, made under the conditions of fealty and military service, to be performed to the grantor by the grantee, the radical rights of the lands still remaining in the grantor." Thus the right acquired by a *feu-vassal* under his charter is denominated his fee. *Ersk. B. ii. tit. 3, § 7*.

3. The honorary due to a physician for his attendance is also termed a fee, and is presumed to be paid from time to time, unless this be contrary to the practice of the place (*Flint*, June 17, 1795; *Mor.* 11422), or unless the contrary can be proved, and the attendance while the patient is on deathbed, that is, for sixty days preceding his death, is not presumed to have been paid. The honorary due to a lawyer may be pursued for, though not in the name of hire, but as the reward of services which can receive no proper estimation. *Ersk. B. iii. tit. 3, § 32*, and *B. iii. tit. 7, § 17*.

4. *Fee or wages*.—A servant who is hired for a term is entitled to wages, though unable to work during part of that term. Should he die during the currency of that term, his representatives are entitled to his wages down to the day of his death. If the master die, or, without good reason, turn off a servant before the term, the servant is entitled to full wages and to maintenance to the term; and should the servant desert his service, he not only forfeits his claim to wages and maintenance, but is liable also in damages to his master. *Ersk. B. iii. tit. 3, § 16*. See also *Privileged Debt. Executor. Wages*.

**Fee and Liferent**. A conveyance to a

parent in life-ferent, and to his children unborn or unnamed in fee, imports a right of fee in the parent, and a *spes successionis* merely in the children. *Frog's Creditors v. his Children*, 25th Nov. 1735, *M.* 4262; *Lindsay v. Dott*, 9th Dec. 1807, *M. App., Fiar*, No. 1; *Dewar v. M'Kinnon*, 5th May 1825, 1 *W. & S.* 161; *Gordon v. M'Intosh*, 17th April 1845; 4 *Bell's App.* 105. A conveyance to a parent in life-ferent, for his life-ferent use alienarily, or under restrictive words of similar signification, and to his children *nascituri* in fee, imports a right of life-ferent in the parent, and also an interim fiduciary fee in him for behoof of the children; *Newlands v. Newlands' Creditors*, 26th April 1798, *M.* 4289; *Allardice v. Allardice*, 5th March 1795; *Bell's Cases*, 156. Where a father being infest, conveys to himself in life-ferent, for his life-ferent use alienarily, and to his children in fee, and upon this conveyance takes infestment in life-ferent only, and in the instrument of sasine no mention is made of the children in fee, the lands remain attachable by the father's creditors; *Falconer v. Wright*, 22d Jan. 1824, 2 *S.* 433; *Howlditch v. Spalding*, 9th June 1847, 9 *D.* 1204. A conveyance to trustees for behoof of a parent in life-ferent, and his children *nascituri* in fee, imports a fee in the children, and a life-ferent merely in the parent; *Seton v. Seton's Creditors*, 6th March 1793, *M.* 4219; *Ross v. King*, 22d June 1847, 9 *D.* 1327. A conveyance by a parent to himself in life-ferent, and to his child *nominatim* in fee, imports a fee in the child; *M'Intosh v. M'Intosh*, 28th Jan. 1812, *Fac. Coll.* When a parent conveys to himself in life-ferent, and to his child *nominatim* in fee, or takes a conveyance from another in these terms, but reserves to himself power to alienate and burden, the substantial fee is in the father, and that in the child is nominal merely; but if the reserved power to alienate is not exercised, the child takes as disponee, and does not require to be served heir to his father; *Cumming v. His Majesty's Advocate*, 10th Feb. 1756, *M.* 4268 and 15854; *Baillie v. Clark*, 23d Feb. 1809, *Fac. Coll.* A conveyance to a husband and wife, in conjunct fee and life-ferent, for the wife's life-ferent use alienarily, and to the child *nominatim* in fee, imports a right of fee in the father, and on his decease the child must serve to him as heir of provision; *Wilson v. Glen*, 14th Dec. 1819, *Fac. Coll.* A conveyance to a husband and wife, and the longest liver, in conjunct fee and life-ferent, and to the heirs of the marriage in fee, imports a right of fee in the husband; *Madden v. Currie's Trustees*, 22d Feb. 1842. A conveyance to a husband and wife in conjunct life-ferent, during all the days of their life-ferent, and to the survivor, and their heirs and assignees in fee, imports a right of fee in the sur-

vivor; *M'Gregor v. Forrester*, 13th April 1835; *Shaw Maclean*, 441; *Ferguson v. M'George*, 22d July 1739, *M.* 4202; *Burroues v. M'Farguhar's Trustees*, 6th July 1842, 4 *D.* 1484. A conveyance by a husband or wife to both the spouses, and the longest liver in life-ferent, and to the children of the marriage in fee, does not import a right of fee in the survivor of the spouses, but leaves the fee untransferred; *Mackellar v. Marquis*, 4th Dec. 1840, 3 *D.* 172. A conveyance by a husband or wife to both the spouses, in conjunct fee and life-ferent, for their life-ferent use alienarily, and to the heirs of the marriage in fee, whom failing, to the heirs whatsoever of either or both of the spouses, leaves the fee untransferred in the event of there being no heirs of the marriage, and gives a *spes successionis* merely to the heirs whatsoever of the spouses; *Wilson v. Reid*, 4th Dec. 1827, 6 *S.* 198. In the case of *Myles v. Colman*, 12th Feb. 1857, a conveyance of property by a wife was "in favour of herself and her husband, and the longest liver of them two in conjunct fee and life-ferent, and to the child or children procreate, or to be procreate betwixt them, which failing, to the said longest liver of them two, and the said longest liver, her, or his heirs and assignees whomsoever in fee, heritably and irredeemably." There were children of the marriage, and the husband, after surviving the wife, was sequestrated. In a competition between the children and the trustee, in the sequestration it was held that the fee of the wife's estate did not vest in the husband but in the wife herself, and was therefore not carried by the sequestration. The proper construction of the destination was held to be merely a life-ferent in the surviving husband, and to leave the right of fee in the wife. This, it was thought, was the fair construction of the destination, considering that the property belonged to the wife herself. The wife being the granter of the deed, the legal presumption was held to be, that she did not intend, by the destination in the deed, to divest herself of her right of ownership, and that the contrary could not be held, unless the words of the destination would not admit of any other construction. The judgment in this case is in accordance with the judgment in the case of *Mackellar v. Marquis, supra*; although that case does not appear to have been founded on.

See, on the subject of this article, *Ersk.* B. iii. tit. 8, § 34, *et seq.*; *Bell's Princ.* § 1712; *Conjunct Rights*; *Ross's L. C.* vol. iii. p. 602, *et seq.*

**Fee-Fund**; the name applied to the dues of Court payable on the tabling of summonte-the extracting of decrees, &c., out asied in the clerks and other officers of the *Alle Ages*, paid. In 50 Geo. III., c. 112, *awoce Feudal*

thereto annexed, will be found a table of the fees exigible in the various proceedings. The same act authorises the Lord President to appoint a collector of the fees, holding his office *ad vitam aut culpam*. He is entitled to a commission of 4 per cent. on his receipts, until they amount to L.11,000, and of 2 per cent. on all sums beyond that amount; but should his commission fall short of L.600, he may retain that sum for his salary, including the expense of a clerk; 1 and 2 *Geo. IV.*, c. 38, § 29. The salaries of certain of the officers of Court are paid quarterly out of the fee-fund; and it is directed, that if the fund shall at any time be insufficient for their payment, the deficiency shall be supplied out of the moneys provided by the acts 7 and 10 of Anne, for keeping up the Courts of Session, Justiciary, and Exchequer. No fee-fund is exigible in Admiralty or Consistorial cases, or in any of the proceedings in *cessio*, or in causes in what is called the Jury Roll. *Shand's Prac.*, 269, 424, 825, 118; *Macfarlane's Jury Prac.* 17. By 1 and 2 *Vict.*, c. 118, § 23, certain alterations and modifications have been made upon the fee-fund and the dues leviable. The collector is now appointed by the Crown, at a salary not exceeding L.400 per annum.

**Fee-simple.** In English law, a tenant in *fee-simple*, is he who has lands or tenements to hold to him and his heirs for ever. *Tomlins' Dict. h. t.*

**Felo de se;** in English law, one who becomes a felon by committing suicide, in his sound mind. *Tomlins, h. t.* See *Suicide*.

**Feloniam;** signifies not only the falsehood or the contumacy of the vassal toward his overlord, or of the overlord toward his vassal, but also all and whatsoever capital crime, or any other fault or trespass. *Skene, h. t.*

**Felony;** in English law, a term applied to all crimes punished by forfeiture either of the fee or of the goods and chattels of the criminal. To this punishment that of death may or may not be superadded, according to the degree of guilt. But the idea of felony has long been closely connected with that of capital punishment, and the term has been applied to all capital crimes below treason; although, originally, treason itself was considered felony, and although there may both be felony not capital, and capital crimes not felonies. Until of late, when a new offence was made felony by statute, the law implied the punishment of death by hanging; and in like manner, an offence declared capital became felony, though the express term was not employed. and a. since the recent restrictions of capital constitution, it would appear that the con- or possess-between felony and the punishment parts and ps severed, a great many felonies,

formerly capital, being now punished with transportation. The word felony occurs in Scotch law but very rarely. A man attainted of treason or felony, is rendered ineligible as a member of Parliament, and loses his elective franchise. *Tomlins, h. t.; Bank. B. i. tit. 10, § 18; Kames' Stat. Law, h. t.; Swint. Abridg. h. t.; Chambers' Election Law, h. t.; Hume, ii. 239, note 3.*

**Feme Covert;** in English law, a married woman. *Tomlins' Dict. h. t.*

**Fences.** On the entry of the tenant, the landlord, independently of any stipulation in the lease, is bound to put the fences on the farm in due repair; and the tenant on his part must maintain them, and leave them in the state in which he received them. The landlord is not, however, entitled to increase the burden on the tenant, by erecting new fences not stipulated for, unless they be march fences, which, under the statute, contiguous proprietors may compel him to erect—a liability which the tenant is presumed to be aware of when he enters. With regard to fences erected spontaneously by the tenant, it has been held that if, being entitled to remove them, he allows them to remain, he must put them in repair; but if he is not entitled to remove them, neither is he bound to repair them; *Bell's Princ.*, § 1253; *Illust. ib.; Bell on Leases, i. 243; Hunter's Landlord and Tenant.* In England, by 7 and 8 *Geo. IV.*, c. 29, §§ 23, 40, 44, the destruction of fences is declared to be punishable summarily with a fine of not more than L.5, and in the case of a deer-park fence, with a fine of not more than L.20.

**Ffeodum;** commonly signifies the heritable fee and property of any thing; also the fee, wages, or stipend, given to a servant for his service. *Skene, h. t.*

**Ffeoffment;** in English law, is the gift or grant, with livery and seisin, of any corporeal hereditament to another in fee, to him and his heirs for ever; the grantor being termed the *feoffor*, the receiver the *feoffee*. Littleton says, that the difference between a feoffer and a donor is, that the former gives in fee-simple, the latter in fee-tail. *Tomlins' Dict. h. t.; Bank. i. 598, et seq.*

**Fferocosta;** an Italian word, a kind of ship or little boat. *Skene, h. t.*

**Fferdingmanus;** a Dutch word, a treasurer, penni-master, or thesaurar. *Skene, h. t.*

**Fferis;** in Roman law, were holidays. In the Scotch law, *feriat-times* are those seasons in which it is not lawful for courts to be held, execution to proceed, or any judicial step to be taken. *Bank. B. iv. tit. 42, § 2.* See *Sunday*.

**Fferial Days;** an English law term, signifying working days—*i. e.*, all the days of the week except Sunday. *Tomlins' Dict. h. t.*



**Ferries**; are *inter regalia*, and belong to the Crown, for the public benefit, unless where they have been given out by a royal gift, in which case the grant lays the grantee under an obligation to keep sufficient boats on the ferry for the use of travellers. Public ferries are under the management of the trustees of the roads connected with them, or are regulated by the justices of peace, or by special acts of Parliament. The donatory of a private ferry is empowered to levy fair and reasonable rates; the amount of which, unless when fixed in the grant, is regulated by the justices of peace. Although the grant does not exclude neighbouring heritors from having a boat to transport themselves and their families, and servants, yet no rival ferry will be allowed to interfere with the right. The right of ferry is not permitted to interfere with the general navigation; or to supersede the right of any subject of Great Britain to navigate, in the course of the passage, as a part of the sea, provided it be not done for the sake of avoiding the regular ferry. It is said that the ferry is in respect of the landing place, and not of the water, and that in every ferry the land on both sides ought originally to have been in the same person, otherwise he could not have granted the ferry; but this is now mere matter of antiquity. In leases of ferries there is no hypothec; but where there is a sublease, the lessor has a preference over the sub-rents. For the form of a lease of ferries, see *Hunter's Landlord and Tenant, App. No. 16*. See also *Ersk. B. ii. tit. 6, § 17*; *Bell's Princ. § 651, et seq.*; *Illust. ib.*; *Hutch. Justice of Peace, ii. 379, 448, 483*; *Tait's do. vocibus Highways, Soldiers*; *Blair's do. voce Highways*; *Hunter's L. & T. i. 331, 441*; *Blackstone, iii. 228*. By 8 and 9 Vict., c. 45, certain rules are laid down for the regulation of ferries. It has been recently decided by the whole court that a charter of barony, with a clause of parts and pertinents, is a sufficient title, when followed by the requisite position, to constitute by prescription a right of ferry on a navigable river without special grants. *Duke of Montrose v. Macintyre*, March 10, 1848, 10 D. 896.

**Feu**; in Latin *feudum*, was used to denote the feudal-holding, where the service was purely military; but the term has been used in Scotland in contradistinction to wardholding, the military tenure of this country, to signify that holding where the vassal, in place of military service, makes a return in grain or in money—a species of holding which is coeval with feudality; for, even in the purest ages of the military system, innumerable instances are to be found of grants of land in the feudal form, where the vassal

annually delivered victual, or performed agricultural services to his superior. Hence, this species of right was scarcely to be distinguished from the lease; and, in this country, the rental-right and the feu-right, before writing was common in the constitution of such rights, must have been undistinguishable, farther than by the period of their endurance. See *Ersk. B. ii. tit. 3, § 7*; *Jurid. Styles*. See also *Charter. Holding. Superior and Vassal. Entry*.

**Feu-Contract**. The contract of feu regulates the giving out of land in feu, between the superior and vassal. It contains a narrative; a dispositive clause; an obligation on the superior to invest, expressing the terms of the holding; a clause of warrandice; an obligation on the superior to make the title-deeds forthcoming to the vassal; and an assignation to the rents. These clauses bind the superior. Then there is a *reddendo* or obligation on the vassal to pay the feu-duties, and an obligation to relieve the superior of the public burdens after the vassal's entry. Whatever other obligations the vassal may come under are inserted in this part of the deed; and there is also a clause obliging the parties to perform mutually. This is followed by a clause of registration, precept of sasine, and a testing clause. The difference between the feu-contract and the feu-charter is that, by the contract, the vassal obliges himself personally, and, in virtue of the clause of registration, may be compelled by direct diligence to implement his obligation; whereas, in the feu-charter, although the vassal is equally liable, the means of compelling performance is not so direct: it is through the medium of an action and decree that diligence can be obtained. Hence, the feu-contract is the preferable form in all transactions where machinery is to be erected or manufactures established, in which the interest of the superior requires to be guarded by personal obligations, admitting of prompt enforcement. *Jurid. Styles*. See *Charter*.

The Feu-Contract, like other titles to land, is simplified by the act 21 and 22 Vict., c. 76, 1858. See *Titles to Land*.

**Feudal System**. In the conveyancing of Scotland, the forms of the feudal law have been preserved; and our titles to heritable property are framed in accordance with strict feudal principles. Hence, our lawyers and antiquaries have indulged in much historical speculation as to the origin of what has been called the feudal system. Such disquisitions would be out of place in a practical work such as the present; but the subject is interesting, and will be found fully treated in the following works:—*Hallam's Middle Ages*, vol. i. p. 200, *et seq.*; *Encyc. Brit. voce Feudal*

*Law, and writers there cited; Robertson's Charles V.* vol. i.; *Kames' British Antiquities; Craig de Feudis; Ross's Lect.* vol. ii. p. 23, *et seq.*

**Feudum ex Camera aut Cavena;** in feudal law, was an annual sum of money or supply of corn, wine, and oil, paid out of the lord's possessions to a soldier or other well-deserving person. It resembled a pension. *Stair*, B. ii. tit. 5, § 16; *Craig*, lib. i. dieg. 10, § 11.

**Feu-Duty;** the *reddendo* or annual return from the vassal to the superior in feu-holding. The feu-duty is truly a rent in cattle, grain, money, or services, generally agricultural; varying in amount from an adequate to a merely elusory rent. If payable in kind, the feu-duty may be demanded in kind, unless otherwise stipulated; and the vassal is bound to bring it to the superior if within the barony. The superior cannot compel the feuar to grow the stipulated grain, but he may demand in kind whatever other grain is grown, although more valuable. If the feu-duty be payable in produce no longer to be found on the land, the obligation is not thereby at an end, unless "such as is produced in the land" be expressly stipulated. In alternative payments, the vassal has the election, unless it be otherwise expressed. Interest is not due upon arrears of feu-duty, unless expressly stipulated in the contract; *Napier*, 31st May 1831, 9 S. & D. 655. Feu-duties are heritable, although the arrears are moveable. Feu-duties are *debita fundi*; and, in addition to his personal action, an action for poiding the ground lies at the superior's instance. He has also, as his means of compelling payment of the feu-duties, a real right in the lands, and a consequent preference over purchasers and creditors; a hypothec over the crop for the last or current feu-duty; and an action of declarator of irritancy of the feu, *ob non solutum canonem*. *More's Notes on Stair*, cxxxix.; *Ersk.* B. ii. tit. 5, § 2; *Bell's Com.* i. 23-7, 683; *Bell's Princ.* § 694, 1479-94; *Illust.* ib. See *Hypothec. Heritable and Moveable. Irritancy of the Feu. Superior. Vassal. Poiding of Ground.*

Where a vassal conveys his feu to another party, who is entered by the superior as vassal in his place, he ceases to be liable for the feu-duty, but he remains liable so long as his disponee is not entered. Where, however, a separate obligation for payment of the feu-duty is granted by a vassal, he and his heirs continue liable for the feu-duty in all time coming, notwithstanding the feu may have been conveyed to another, and the disponee entered with the superior. This continuing liability by the original vassal arises from a separate obligation having been granted, and it is construed, and has effect given to

it, like any other obligation. The obligation, therefore, remains in force until discharged by the superior or creditor in the obligation. See the case of *King's College of Aberdeen v. Lady James Hay*, March 11, 1852, 14 D. 675; but reversed in the House of Lords, Aug. 11, 1854; 1 *Macquenn*, 526.

**Fiar;** as contrasted with liferenter, is the person in whom the property of an estate is vested, burdened with the right of liferent. The fiar cannot interfere with the liferenter's possession, unless for the necessary preservation of his own right, as to prevent waste, on cause shown. He may work coal, lime, minerals, &c., which are excepted from the liferent. But he must reserve enough for the liferenter's use, and he must not hurt the amenity of the liferenter's possession; yet, if there be a going coal-pit, however disagreeable the effects may be, the liferenter is not entitled to stop it. The fiar is liable for surface damage. He cannot cut the ornamental timber, though he may make the necessary thinnings, not hurting the amenity. (See *Timber*.) Under the Reform Act, the liferenter, and not the fiar, has the right to vote on those subjects to which the right of voting is for the first time attached by the Act. In rights reserved by that Act, the fiar must concur with the liferenter in applying to poll; and his vote is taken apart, and not reckoned where the liferenter has voted. *Ersk.* B. ii. tit. 9, § 39; *Stair*, B. iii. tit. 5, § 51, *et seq.*; *More's Notes*, p. cxxiii. *et seq.*; *Bell's Princ.* 3d edit. § 1061, *et seq.*, 2198, and authorities there cited; *Bank. vol.* i. p. 575; *Bell's Com.* 5th edit. i. 63; *Jurid. Styles*, 2d edit. vol. iii. p. 620; *Ross's Lect.* ii. 249; *Chambers' Elect. Law, h. t.* See *Liferent. Conjunct Rights. Fee and Liferent.*

**FIARS;** are the prices of grain in the different counties, fixed by the sheriffs respectively, in the month of February, with the assistance of juries. The form of striking the fiars is prescribed by the acts of sederunt, Dec. 21, 1723, and Feb. 29, 1728. A jury must be called, and evidence laid before them of the prices of the different grains raised in the county; and the prices fixed by the opinion of the jury, and sanctioned by the judge, are termed the *fiars* of that year in which they are struck, and regulate the prices of all grain stipulated to be sold at the fiar prices; nor will an error in striking them afford a ground of suspension; *Town of Aberdeen*, August 5, 1760, *Mor.* 4415. The fiar prices also regulate the price in contracts concerning grain to be delivered, the produce of the county, and where no price has been otherwise agreed upon between the parties.

By 5 and 6 Will. IV., c. 63, § 16, it is enacted, that the fiar prices of all grain in

every county shall be struck by the imperial quarter, and that any sheriff-clerk, clerk of a market, or other person, offending against this provision, shall forfeit a sum not exceeding L.5. See *Weights and Measures*. In cases of necessity the Lords of Council and Session still interpose their authority to regulate the striking of the fiars by act of sederunt. See *A. S. 9th March 1850*. But the Court will not interfere unnecessarily. *Howden*, 1851, 13 *D.* 522; *Ersk. B. i. tit. 4, § 6*, and *B. iii. tit. 3, § 4*; *Hunter's Landlord and Tenant*, ii. 282; *Bell on Leases*, ii. 187; *Connell on Tithes*, i. 431; *Paterson's Account of the Fiars*.

**Fictio Juris**; is a legal assumption that a thing is true, which is either not true, or which is as probably false as true. Thus, an heir is held to be the same person with the ancestor, to the effect of making the heir liable for the debts of the ancestor. But the Scotch law has seldom recourse to fictions. *Ersk. B. iv. tit. 2, § 38*; *Stair, B. ii. tit. 45, § 15*; *Bank. vol. iii. p. 669, § 9*.

**Fideicommissa**; or trusts, in the Roman law, were either universal or singular. A universal fideicommiss (called also *hæreditas fideicommissaria*, or trust inheritance) consisted in the appointment of an heir, with directions *verbis precativis*, that he should restore the inheritance to a third person mentioned, the heir being called *fiduciarius*, and the third person *fideicommissarius*. As the *fideicommissarius* was sometimes directed to pass the inheritance to a second, he to a third, and so on, some authors have traced a resemblance between *fideicommissa universalia* and entails in the Scotch law. The singular fideicommiss was simply a trust-legacy, differing from the common legacy in nothing but the form and the words employed. See *Trust. Bank. B. ii. tit. 3, § 135*; *Stair, B. iii. tit. 8, § 12*; *Kames' Equity*, 322. In German civil law, the *fideicommiss* is intimately connected with the law of inheritance among the nobility, being the regulation according to which the whole, or part of a family property, is enjoyed by a certain member of the family, on the condition of leaving it unimpaired to the person pointed out by the particular family arrangement; either to the first-born male, when it is called *majorat*, or to the last-born male, when it is called *minorat*, or to the oldest member of the family, without regard to direct descent, when it is called *seniorat*. The family property is by this means rendered inalienable, but it may nevertheless be mortgaged.

**Fidejussor**. See *Expromissor. Cautionary*.

**Fidelity**; homage made to superiors and overlords. *Skene, h. t.* See *Homagium*.

**Fieri Facias**; in English law, a writ that

lies where a person has recovered judgment for debt or damages, by which the sheriff is commanded to levy the debt and damages on the defendant's goods and chattels. *Tomlins, h. t.*; 3 *Step. Com.* 657.

**Filiation**; the filiation of a child means the determination of his paternity. The general rule as to children born in wedlock is, *Pater est quem nuptiæ demonstrant*; but this presumption may be defeated by proving the husband's impotency, or his continued absence from his wife during the period between the eleventh solar and the sixth lunar month preceding the birth. With regard to natural children, a *copula* at the distance of more than ten months does not filiate, affording only a *semiplena probatio*, which may, however, be completed by the oath of the mother. *Ersk. B. i. tit. 6, § 50*; *Stair, B. iv. tit. 45, § 20*; *More's Notes*, p. xxxiv.; *Bank. B. i. tit. 2, § 3*; *B. ii. tit. 5, § 105*. See *Marriage. Bastard. Parent and Child. Semiplena Probatio*.

Actions of filiation, and for aliment of natural children, are generally raised in the sheriff court, but it is competent to bring them in the Court of Session. *Shand's Prac.* p. 782.

**Final Judgment**. The term final judgment is applied in its most extensive signification to a judgment which exhausts the merits of a cause, and is not subject to any review whatever. But it is more frequently used in contradistinction to the expression, *interlocutory judgment*. Thus, in an inferior court, in reference to the competency of advocacy, a "final judgment" is a judgment whereby the whole merits of the cause are exhausted, although no finding or decerniture has been pronounced as to expenses; *A. S. 11th July 1828, § 1*; *1 and 2 Vict., c. 86, § 1*. In order to warrant an appeal to the Circuit Court in a civil cause (where that mode of review is otherwise competent), the final judgment must not only dispose of the merits, but the expenses, when found due, must also have been modified and decerned for; *A. S. 12th Nov. 1825; Maclaurin's Form of Process*, 559. And to warrant an appeal from a judgment of the Court of Session to the House of Lords, as against a final judgment, the judgment must be one which exhausts the whole merits of the cause, also disposing of the question of expenses; and which, if not appealed against, would put an end to the difference between the parties; *48 Geo. III., c. 157, § 15*; *6 Geo. IV., c. 120, § 21*; *Smith on Appeals*, 17; *Paton's App. Pr.* pp. 2, 9.

By 16 and 17 *Vict., c. 80, § 22*, appeals to the Circuit Court are almost entirely done away, and all Sheriff-court judgments in causes the value of which does not exceed L.25, are final,

and are not subject to review. Under the same statute, § 24, it is competent in any cause exceeding L.25 in value, to bring under review of the Court of Session any interlocutor of a sheriff sisting process, or giving *interim decree*, or disposing of the whole merits of the cause, but no other; and when any such interlocutor is brought under review, it is competent for the Court also to review all the previous interlocutors pronounced in the cause. See *Advocation. Appeal. Appeal to Circuit Court. Interlocutory Judgment.*

**Fine**; is the pecuniary penalty for an offence, usually imposed by statute, and awarded against the offender by the judge who tries him. Generally speaking, there is a certain latitude left to the Court to regulate the amount of the fine, according to the circumstances of the case. The payment of a fine may be enforced by imprisonment. See *Tait's Justice of Peace*, p. 313; *Blair's do.*, p. 272; *Tomlins' Dict. h. t.* As to the form and requisites of sentences of this nature, see *Paley on Convictions*, 287; and as to the disposition of fines, p. 266. See also *Hume v. Meek*, 1846; *Arkley's Rep.* p. 88.

**Fine of Lands**; in English law, was an amicable composition of a suit, either actual, or fictitious, enrolled in the records of the court where the suit was commenced, which transferred, settled, and limited the lands in question, by declaring them the property of one of the parties. It was frequently employed to assure a right in lands, as it barred the claims of strangers, who, having a present interest in the estate, and lying under no legal impediment to interposing their claim, neglected to do so during five years after the proclamation of the fine. This was one of the modes of transference which required no livery or sasine, the acknowledgment in a court of record being considered sufficient. *Tomlins' Dict. h. t.* This mode of conveyance has been abolished by 3 and 4 Will. IV., c. 74.

**Finis**; finance, or composition made with thieves, called also theft-bote. *Finis curiæ*, composition given in court to the King. *Skene, h. t.* See *Theft-bote. Fine.*

**Finium Regundorum Actio**; in the Roman law, was an action for the distinction and clearing of the marches of contiguous grounds. It was almost precisely analogous to the action of molestation in the Scotch law. *Stair, B. i. tit. 7, § 15*; *B. iv. tit. 27, § 2.*

**Fire, Loss by.** Agricultural subjects damaged or destroyed by fire through the negligence of the lessee, must be restored by him. But if the fire be accidental, neither the landlord nor the tenant is bound, independently of stipulation, to repair the loss, even although, under his lease, the tenant

should be taken bound to keep the houses "in tenantable and habitable repair." Fire is, in our law, considered an inevitable accident; and the persons contemplated in the edict, *Nautæ, caupones*, are not held responsible for loss occasioned by it. It is different in the English law. The insurance of agricultural subjects against fire is, by statute, exempted from the payment of the stamp-duties; 3 and 4 Will. IV., c. 23. *Hunter's Landlord and Tenant*; *Bell on Leases*, i. 240, *et seq.*; *Ersk. B. iii. tit. 1, § 29, Ivory's note*; *Bell's Com. i. 470, 562, et seq.*; *Bayne, Dow's Appeal Cases*, iii. 233. See *Innkeepers. Nautæ, Caupones. Insurance.*

**Fire and Sword.** Letters of fire and sword were the means anciently resorted to when tenants retained their possession, contrary to the order of the judge and the diligence of the law. Those letters issued from the Scotch Privy Council, and were directed to the sheriff of the county, authorising him to call the assistance of the county to dispossess the tenant. By the present practice, in case of forcible resistance to legal execution, it may, if necessary, be enforced *manu militari.* *Ersk. B. iv. tit. 3, § 17*; *Stair, B. iv. tit. 38, § 27*; also *iv. tit. 47, 40*; *Ross's Lect. i. 274.*

**Fire-Arms.** The wilful, malicious, and unlawful use of fire-arms is punishable under 10 Geo. IV., c. 38, extending what is called the Ellenborough Act to Scotland. *Bell's Sup. p. 66.* See also 7 Will. IV., and 1 Vict., c. 88; and case of *Duncan*, 1845; 2 *Brown*, 455.

**Fire-Raising.** To constitute the crime of fire-raising, there must have been actual burning, but it matters not how small the portion of the subject consumed has been. Ignition of furniture alone, not considered fixtures of the building, makes the culprit liable to the charge of an attempt at fire-raising; *Fleming*, 1848; *Arkley*, 519. It is immaterial whether the incendiary had the intent to consume the subject destroyed, or merely another subject which communicated the fire, or whether the burning was his ultimate aim, or only the means of furthering another crime. Fire-raising is capital, where the property burned is houses, corn, coal-heughs, or woods and underwoods; the word houses comprehending all classes of buildings, except mere hovels or temporary places of shelter. The burning of a man's own house, not so situated as to endanger the property of others, is not indictable, unless it has been done to defraud the insurers, of which crime it is doubted whether the punishment be capital. See the case of *Beck*, 1845; 2 *Brown*, 469. But fire communicated from a person's own to a neighbouring proprietor's te-

nement, will make the offence capital. The burning of ships to defraud insurers is capital. The destruction of other property by fire may be punished with anything short of death; and the attempt at fire-raising, as also threats and solicitations, are punishable arbitrarily. The sudden breaking out of fire in an uninhabited house, or the finding of combustibles strewed about in such a way as to excite or accelerate combustion, form strong presumptions of wilful fire-raising; but the latter should be received with caution. Having ill-will at, or having been heard to utter threats against, the sufferer; preparing combustibles, and carrying them in the direction of the house; insuring the premises or their furniture at a high value; insuring in several offices at the same time, and claiming from more than one, will all form presumptions against the prisoner; 1525, c. 10; 1526, c. 10; 1540, c. 33; 1592, c. 148; 1 Geo I., c. 48; 29 Geo. III., c. 46; 43 Geo. III., c. 113; *Hume*, i. 126, *et seq.*; *Alison's Princ.* 429; *Burnett*, 568; *Steele*, 124. As to wicked, culpable, and reckless fire-raising, as distinguished from wilful fire-raising, see *Macbean*, 1847, *Arkeley*, 262. The statutes 7 Will., IV. and 1 Vict., c. 89, and 7 and 8 Vict., c. 62, do not extend to Scotland. See *Arson*.

**Firmarius**; a mail-payer, a mailer, or mill-man. *Firma* signifies the duty which a tenant pays to the landlord, whether it be silver-mail, victual, or other duty. *Skene*, h. t.

**Firm of a Company**; is the social name applied to an avowed partnership. It is either proper or descriptive. A *proper* or *personal* firm is a firm designated by the names of one or more of the partners, as *Hare & Co.*, *Bell*, *Rannie*, & *Co.* A descriptive firm has reference to some such circumstance as the place where the company is established, or the transactions in which it is engaged, as the *Portisoy Distillery Co.*, the *Muirkirk Iron Co.*

A mercantile company, carrying on business under a proper firm, by which they grant obligations, may sue and be sued under the company name without the name of any individual partner. See *Forsyth v. Hare and Co.*, 18th Nov. 1834, 13 S. 42. The same rule applies to the case of such a company doing diligence; *Wilson v. Ewing*, 20th Jan. 1836, 14 S. 262. A different rule applies to the case of a company with a descriptive firm. See *Culcreuch Cotton Co. v. Mathie*, 27th Nov. 1822, 2 S. 47; *Kerr v. Clyde Shipping Co.*, 8th June 1839, 1 D. 901. Neither can the manager of such a company sue in name of the company; *Robertson v. Anderson*, 4th June 1841, 3 D. 986. In the case of the *London and Glasgow Shipping Co. v. M'Corkle*, 19th June 1841, 3 D. 1045, the company sued in name of the company, and of a party

*nominatim* "agent therefor, and one of the partners thereof," but the instance was held to be insufficient. The Court, however, intimated an opinion that the company might sue and be sued under its descriptive firm, along with three individual partners named. In the previous case of the *Sea Insurance Co. of Scotland v. Gavin*, 17th Feb. 1827, 5 S. 375, the summons was directed against the company, and against the manager, who was a partner, and against three other partners, by whom the policy, which was the subject of the action, had been subscribed, and the summons was sustained. A similar judgment was pronounced in the House of Lords in the case of *Pollock's Trustees v. The Commercial Banking Co. of Scotland*, where the summons was directed against the company, and several of the individual partners *nominatim*, 28th July 1828, 3 W. & S. 365. A decree obtained against a company warrants diligence proceeding against all the partners of the company although not named in the decree; *Thomson v. Little and Co.*, 2d July 1812, *F. C.*; and *Knox v. Martin*, 12th November 1847, 10 D. 50. The same rule was applied to diligence on a bond signed by the individual partners of a descriptive company, by which they obliged not only themselves, but also the company, and all other persons who might become partners thereof; *Maclean v. Rose*, 9th Dec. 1836, 15 Sh. 236.

A mercantile company cannot prosecute criminally in name of its firm. By 7 Geo. IV., c. 67, joint stock banking companies may, on fulfilling certain conditions, sue and be sued in name of their manager or other principal officer. See *Bank*. On the subject of this article, see *More's Notes to Stair*, ci.; *Bell's Com.* ii. 627, *et seq.*; *Bell's Princ.* § 357; *Illust. ib.*; *Shand's Prac.*; *Thomson on Bills*, 234, 554. See *Society. Joint Stock Companies*.

**Fisheries**. For the regulations as to British white herring fisheries, see 14 and 15 Vict., c. 26.

**Fishes**; become the property of him who catches them, with the exception of those which belong to the Crown, *jure coronæ*, and which seems to be confined to whales of a large size. Salmon-fishing is *inter regalia*; but although it requires a royal grant to entitle a man to fish for salmon, yet the salmon, when taken by one who has no such grant, do not belong to his Majesty, but to the person who takes them. *Ersk.* B. ii. tit. 1, § 10. See *Whales*.

**Fishings**. The most important is salmon-fishing, which belongs to the Crown, and may or may not be given out with the lands. Where it is given in express words, the right is constituted from the first; but even the

general expression of fishings, when joined with forty years' possession of a salmon-fishing, constitutes a right to that species of fishing. Where the right has not been given out expressly, nor acquired by prescription, it may, notwithstanding that the lands on each side of the river have been given out, be conveyed to a third party; and as the right of salmon-fishing implies a power of drawing the nets on the banks, that power will, under the grant, be conferred on the disponee from the Crown. See *Ersk. B. ii. tit. 6, § 15*; *Bell's Princ. §§ 671, 754, 1112*; *Illust. ib.*; *Hunter's Landlord and Tenant, i. 269*; *Hutch. Just. of Peace, vol. ii. p. 561, et seq.*; *Tait's Just. of Peace, h. t.* As to rules for preservation of salmon, see *7 and 8 Vict., c. 95* (in the Tweed, *20 and 21 Vict., c. 148*); and of trout, *8 and 9 Vict., c. 26*. See *Cruives*; and for a more detailed account of the law as to *Salmon-fishing*, see that article, and *Stake-Nets*. Other fishings, as white-fishings in the sea, or trout-fishings in rivers, may be conferred by a grant from the Crown, though a charter of the lands on the bank of a river, followed by the possession of a trout-fishing for the years of prescription, will secure the proprietor against the effect of a special grant; *Carmichael, 20th Nov. 1787*. See *Ersk. B. ii. tit. 6, § 6*; *Stair, B. ii. tit. 3, § 69, et seq.*; *More's Notes, cci.*; *Bank. vol. i. p. 574, 111*; *Ross's Lect. ii. 172, 196*.

As to *trout-fishing*, see that article; as to mussel and oyster fishings, see the *Act 3 and 4 Vict., c. 74, 10 and 11 Vict., c. 22*, and these articles; and as to limpets and shell-fish, see the case of *Hall, 14th Jan. 1852, 14 D. 324*.

**Fiak**; is the Crown's revenue. This term is usually applied by Scotch law-writers to the moveable estate of a person denounced rebel, which was, by our older practice, forfeited to the Crown. *Ersk. B. ii. tit. 2, § 10*; *Bank. vol. i. pp. 263, 83*; *vol. ii. pp. 305, 46*. See *Escheat*.

**Fixtures**; are articles of a personal nature attached to land or other heritable subjects, and acceding thereto on the principle, *Inadificatum (vel plantatum) solo solocedit*. Whatever is requisite to render the premises entire and complete, or whatever appears intended for perpetual use in connection with them, is a fixture, but whatever is separable, and intended to be separated, is not a fixture. The determination of this point in reference to any moveable connected with any heritable subject leads to the decision of the two questions,—1. Whether the moveable subject may be removed by the lessee, who voluntarily constructed it; and, 2. Whether or not, by its connection with the heritable subject, the moveable also becomes heritable. With reference to the first of these, the doctrine of accession has been very much relaxed in favour of the

lessee's claim to have certain articles considered moveable; with reference to the second, the strictness with which the rule is enforced, varies according as the question arises between the heir and the executors; the heritable and the personal creditors; or the fiar and the liferenter's executors—the law inclining much more readily to consider a subject as heritable in the first of these cases than in the other two. But, in the whole of them, it seems to hold as a general rule, that whatever it is impossible to remove without injuring the heritable subject, or impairing the use for which it was intended, is a fixture, and becomes heritable by accession. The most important subjects of this class are constructions for agricultural purposes, and fixed machinery of all sorts. With regard to fences, see the article *Fences*. Houses erected by the lessee, which are in general classed with fences, differ in this, that he may not remove them. The built part of a thrashing-mill is considered heritable, the machinery moveable; but when the lessee receives a sum of money to build a thrashing-mill, the machinery becomes the property of the lessor. Trevises, racks, and mangers, put up in a building not used as a stable, may be removed; but it appears that this would not be the case were they put up in a stable. In questions between the heir and the executor, the buckets, chains, and other accessory instruments for working coal, are considered heritable; but in questions between lessor and lessee it is held that they may be removed. A brewer's copper cauldron is a moveable, and may be removed. There has been some doubt as to whether the machinery of a cotton-mill is to be included in an heritable security over the mill; but it is certain that it may be removed. Large vessels in a manufactory, which require to be taken to pieces before removal, are included in an heritable security, but may be removed by the lessee. In an action of count and reckoning arising out of the dissolution of a copartnership of cotton-spinners, the bell of a spinning manufactory was found to be a fixture; it is probable, however, that, in a question between landlord and tenant, it would be considered removable. The doctrine of fixtures has been much more frequently discussed in England than in Scotland, perhaps from greater attention being bestowed in the former country in arranging contracts of temporary occupation. The same interests, however, are concerned, and the law has the same inclination; relaxing the rule of accession much more readily in questions between lessor and lessee than between heritable and personal claimants. Whatever has been constructed by the tenant for trade or manufacture, may be removed by him, if it can be done without

material injury to the subject to which it is attached,—as vessels, utensils, furnaces, vats, machinery, steam-engines, &c. It is not, however, so clearly established that the tenant may remove more substantial and permanent additions, as lime-kilns, windmills, and other buildings actually let down into the earth; but he may in general prevent the accession of buildings, by erecting them on rollers, pillars, stilts, or plates of wood laid on brick-work. An urban tenant may remove whatever articles he has fixed up for ornament or domestic use, as hangings, wainscot, stoves, &c. Things affixed for purposes purely agricultural are not removable. But such as are of a mixed nature—*i. e.*, such as have some relation to trade—are removable, although they may be the means of obtaining the profits of the land, as cider-mills, machinery in mines, &c. A gardener cannot take down hot-houses or other horticultural erections. Tenants must remove their fixtures before the expiration of their tenancy, for they cannot insist on their claim after the term, unless they have continued in possession. Of course, all these rules may be varied by special covenant. *Bell's Princ.*, §§ 743, 1473; *Illust.*, *ib.*; *Bell's Com.*, i. 752, *et seq.*; ii. 2; *Tomlins, h. t.*; *Hunter's Landlord and Tenant*, i. 288, *et seq.*, and authorities there cited; *Arkwright v. Billinge*, 3d Dec. 1819; *Niven v. Pitcairn*, 6th March 1823; *Roxburgh, Bligh's App. Cases*, ii. 156; *Dixon v. Fisher*, 6th March 1843, 5 D. 775; *House of Lords*, 4 Bell, 286. See *Heritable and Moveable. Fences.*

**Flotsam**; in English law, is where a ship is sunk or cast away, and the goods are floating upon the sea. Where the owners are not known, flotsam goes to the Crown; where they are known, they have a year and day to claim their goods. *Tomlins, h. t.*

**Flumen**; in the Roman law, signifies running water of any sort; but, in the servitude of stillicide, the term is specially applied to water gathered in a spout. *Ersk. B. ii. tit. 9, § 9*; *Stair, B. ii. tit. 7, § 7*. See *Stillicide.*

**Fodder and Straw.** A tenant must consume upon the farm the straw produced by it, and he is not entitled, even in the absence of prohibitory stipulation, to sell any part of the straw or fodder grown upon his lands, except the hay and straw of his outgoing crop; a rule applicable to assignees and sub-lessees as well as to the principal lessee. The tenant of two neighbouring farms, belonging to different proprietors, must not consume the green crop or fodder of the one upon the other. Yet in a case where, by special agreement, a lessee was entitled to manage two farms by means of the steading of one of them, this rule was held to apply only where there are proper means of manufacturing the

grain, and consuming the fodder upon the farm. In absence of special stipulation, the outgoing tenant, who cedes possession of the houses and grass at the term of Whitsunday, retains the arable land, until he has cut down and carried off the corn, straw, and fodder, of that year's crop, which is called his away-going crop; although, in some counties, fodder used for making dung is considered steel-bow, and given to the incoming tenant. These matters, however, are generally settled by stipulation in the lease. *Ersk. B. ii. tit. 6, § 39*, and *Notes by Mr Ivory*; *Bell's Princ.* § 1261; *Illust. ib.*; *Bell on Leases*, i. 327; *Hunter's Landlord and Tenant. See Steelbow. Dung.*

**Fœnus Naticum**; that rate of interest, proportioned to the risk, which a person lending money on a ship, or on bottomry, as it is termed, is entitled to demand. *Ersk. B. iv. tit. 4, § 76*; *Stair, B. i. tit. 15, § 6*.

**Fœtus.** The destruction of an unborn infant, though an indictable offence, is not homicide. *Hume, i. 186*; *Steele, 70, note.*

**Fœtus of Cattle.** The young of cattle, as foals, calves, &c., are an accessory of the mother, and belong to the owner of the mother by natural accession. *Ersk. B. ii. tit. 1, § 14*. See *Accession.*

**Force and Fear.** Force and fear are grounds for the reduction of a contract; but it is not every degree of fear that will be sustained as sufficient. It is a fear which may shake a mind of ordinary firmness and resolution which constitutes a sufficient ground of reduction. But the degree is in every case relative to the situation and disposition of the contracting party; since comparatively little violence is required to force the consent of a person of weaker age, sex, or condition. Among the instruments of force and fear which have been held to annul engagement, are threats and terror of death; or pain to one's self or child. The reverential fear arising from the authority of parents, of husbands, or of magistrates; or that proceeding from the execution of lawful diligence, is not admitted as a ground of reduction; unless where legal diligence is held out as the means of extorting a deed from the debtor, unconnected with the debt on which the diligence proceeds. But even where the obligation relates to the debt on which the diligence proceeds, if the diligence be erroneous, the obligation is reducible; *Henderson*, 20th Feb. 1782, *Mor.* 14349. Mere vexation and inconvenience, as the threat of a lawsuit, is not sufficient to vitiate the consent thereby obtained. It has been doubted whether a deed obtained by force is null *ab initio*, or only reducible. *Stair (B. i. tit. 9, § 8)* says, that the plea of force and fear is competent, "either by way of action, or sometimes by exception." But

it may be questioned whether it can be pleaded by way of exception to the action of a *bona fide* onerous assignee. In *Wightman v. Graham*, 6th Dec. 1787, *Mor.* 1521, it was held, that the exception of violence, arising from legal concussion, in extorting a bill of exchange, would be available even against a *bona fide* onerous indorsee; but it has been said of this case that it requires reconsideration. Indeed, upon this point, text writers seem in danger of falling into a controversy. By one, the effect of compulsion is declared to be equally subversive of consent with error in *essentialibus*, and to be a "good objection against third parties" (*Bell's Com.* i. 297); and, in another part of the same work, it is said, "Restitution will therefore be given, not only against the buyer, but even against purchasers from him, where the seller is incapable of full and legal consent; or where the sale has proceeded from such *fear and compulsion* as in law annuls and makes it void;" *Ib.* 241. Another author takes a distinction between the act of taking goods by violence, and the act of compelling a party to sell his goods. In the former case, he holds that the violence *inurit labem realem*, so as to entitle the owner to recover the goods even from a *bona fide* purchaser. In the latter case he holds, upon the maxim *Voluntas coacta est voluntas*, that although the contract is clearly voidable, it is not *ipso jure* void, and that the property is, in the first instance, transferred so as to enable the wrong-doer to give a good title to a *bona fide* purchaser. See *Brown on Sale*, 397, and the authorities there cited, in support of the doctrine. For the form of the summons of reduction on the head of force, see *Jurid. Styles*, iii. 214; and on the subject of this article generally, see *Ersk.* B. iv. tit. 1, § 26; *Stair*, B. i. tit. 9, § 8, and tit. 17, § 14; *Moré's Notes*, lviii.; *Bank.* i. 311; *Bell's Com.* i. 295, 241; *Brown on Sale*, 395, *et seq.*; *Bell's Princ.* § 12; *Illust. ib.*; *Thomson on Bills.* See *Extortion*.

**Forcible Entry**; in English law, an offence against the public peace, committed by violently taking or keeping possession of lands and tenements without the authority of law, so that the legal proprietor is excluded. *Tomlins, h. t.* The corresponding Scotch law terms are *Ejection and Intrusion*, which see.

**Forcibly Defending.** See *Defending forcibly*.

**Forehand Rent.** Rent is said to be *forehand* when it is made payable before the crop of which it is the rent has been reaped. After the period when it is due and exigible, *forehand rent* is *in bonis* of the lessor, and passes to his executor, not his heirs. *Bell's Princ.* §§ 1230, 1499; *Illust.* § 1499; *Hunter's Landlord and Tenant*, ii. 308, 424; i. 433. See *Terms, Legal and Conventional*.

**Foreign.** Persons resident out of Scotland may be cited to the courts of this country in civil actions where they have an estate, either heritable or moveable, in Scotland. 1. Where the foreigner has an heritable estate, he may be cited edictally as a native (see *Edictal Citation*), because it is presumed that he employs an attorney in this country to attend to his interest, and appear in all actions that may affect that estate. Where he has only a personal estate in Scotland, his effects must first be attached by an arrestment *jurisdictionis fundandæ causa*, and then an action must be raised on which he may be cited edictally. See *Arrestment jurisdictionis fundandæ causa. Abroad.* The Court of Session is the *commune forum* of all foreigners; and hence, although an inferior court has sufficient jurisdiction to attach the funds of a foreigner within the territory or jurisdiction of the inferior judge, *jurisdictionis fundandæ causa*, yet the action itself must be pursued before the Supreme Court. A Scotchman forth of Scotland, *animo remanendi*, is, in this question, in the same situation as a foreigner, for it is now settled that the *forum originis* gives no jurisdiction *per se*. Proceedings in Scotland cannot be stopped because analogous proceedings could not be carried on in another country. Thus, an English creditor, who has imprisoned his debtor in England, may attach his property in Scotland, although, by the law of England, a creditor cannot both incarcerate his debtor and attach his effects. But wherever a debt is discharged by the law of one country, it must be discharged in every other. Foreign or English law is in this country matter of evidence, and the only competent mode of proving such law, is to adduce a barrister or other person skilled in the law of the particular country, or to produce his written opinion on an adjusted case. See *Dickson on Evidence*, p. 989. It has frequently been a question with regard to debts contracted in a foreign country, and sued for in Scotland, whether the *lex loci contractus*, or the *lex fori*, is to determine the rules of evidence, obligation, and dissolution. The principle of decision in all such cases has been very clearly announced and illustrated by LORD BROUGHAM, in moving the judgment, in the House of Lords, in *Don v. Lipman*, 26th May 1837; 2 *Sh. and M'L.* 682. A distinction is taken between the contract and the remedy. Whatever relates to the nature of the obligation, *ad valorem contractus*, is governed by the *lex loci contractus*: whatever relates to the remedy, by suits, to compel performance, or by action for a breach, *ad decisionem litis*, is governed by the law of the country to whose courts the application is made for performance, or for damages.



Thus, in an action before a Scotch court, the pursuer can claim higher interest than 5 per cent. upon a debt contracted in a country where higher interest is exigible. In *Campbell*, 15th Feb. 1809, *Fac. Coll.*, 8 per cent. interest was found due upon a bond granted in India, without any distinction being made between the time before the parties came to be resident in Scotland and after. In *Graham*, 19th Feb. 1820, 2 *Dow*, 17, and 2 *Bligh*, 127, the House of Lords found the same principle to apply; but held, in addition, that after the debtors were found liable for the principal sum in the bond, by a decree in this country, the debt became a British debt, and could thenceforward carry only British interest at 5 per cent., to be calculated on the aggregate sums. See also, *Wilkinson*, 28th June 1821; *Palmer and Co's Assignees*, 24th Jan. 1835; *Bell's Illust.* § 32, Nos. 6, 7, 8, and 17. Under the second head of questions arising upon the remedy, are ranked the rules of evidence, and law of prescription and limitation. When an action is brought in Scotland upon an obligation contracted in a foreign country, the law of Scotland and the right of action fall under the Scotch prescription, however entire the obligation might be, were it founded on in the courts of the country where it was entered into. Such is the principle as established in the case of *Don*. It may be mentioned, however, that previous to the reversal in that case, there had been many conflicting decisions of the Court of Session, on the question, whether the doctrine of limitation relates to the contract or the remedy. These will be found cited and commented upon in the speech of LORD BROUGHAM above referred to. (See *Dickson on Evidence*, pp. 293, 526, 218, &c.) See, in addition, *Thomson*, 16th July 1708, *Mor.* 4504; *Randal*, 13th July 1768, *Mor.* 4520; *Brown's Sup.* v. 541; *Kerr*, 20th Feb. 1771, *Mor.* 4522; *Barett*, 4th Feb. 1772, *Mor.* 4524; *York Buildings Co.*, 14th Feb. 1792, *Mor.* 4528; *Bell's Svo. Cases*, 364; *Campbell*, *Dow's Rep.* vi. 116; *Gibson*, 9 *S. & D.* 525; *Grubb*, 13 *S. & D.* 603; *Robertson*, 1843, 6 *D.* 17. By 1 *Vict.*, c. 29, it is enacted, that foreigners bearing her Majesty's commission, may be promoted to the rank of general officers, and that foreigners may enlist in Her Majesty's service, provided that in any regiment, battalion, or corps, their number shall not exceed the proportion of one to fifty of natural-born subjects. As to the citation of persons abroad, see *Edictal Citation*.

For compelling the attendance of witnesses in England and Ireland, see the acts 6 and 7 *Vict.*, c. 82 (1843), and 17 and 18 *Vict.*, c. 34 (1854). A recent statute (19 and 20 *Vict.*, c. 113) provides for taking

evidence in this country in relation to matters pending before foreign tribunals. As to foreign and international copyright, see 15 *Vict.*, c. 12, and statutes there referred to. See on the subject of this article generally, *Stair*, B. i. tit. 1, § 16; B. iii. tit. 8, §§ 35 and 55; *More's Notes*, p. i. *et seq.*; *Ersk.* B. i. tit. 2, § 18; *Notes by Mr Ivory*, B. iii. tit. 2, § 39; *Bell's Com.* ii. 68, 168, 563, 587, 681; *Bell's Princ.* § 2226, and authorities there cited; *Jurid. Styles*, 2d edit. vol. ii. pp. 2, 224, 535; iii. 4, 23, 705; *Kames' Equity*, 482; *Shand's Prac.*; *Macfarlane's Jury Prac.* 207; *Maclaurin's Sheriff Prac.* 11, 72; *Story's Conflict of Laws*; *Burges' Commentaries*. See *Citation. Abroad. Arrestment. Domicile. Defender. Alien.*

**Forensis**; an unfree man who dwells not within burgh; an out-dwelling man, called therefore *rure manens*, who, dwelling alandward, has no privilege or immunity within burgh. *Skene, h. t.*

**Forestalling**, or *Regrating*; is the crime of purchasing goods coming to market, with a view to sell them again, and so to raise the price on the consumer. A person purchasing articles on the way to market, for his own use, is guilty of no crime. The essence of the crime seems formerly to have been thought to consist in interposing between the raiser of the article and the consumer. Thus, the Act 1592, c. 148, declares it criminal for a person to get into his possession the growing corn on the field, by sale, contract, or promise. Prosecutions for this offence are now unknown. *Hume*, i. 510; *Ersk.* B. iv. tit. 4, § 38; *Bank*. vol. i. pp. 412, 414; *Tait's Justice of Peace, h. t.*; *Kames' Stat. Law Abridg. h. t.* See also the English stat. 7 and 8 *Geo. IV.*, c. 38. See *Engrosser. Fairs and Markets.*

**Forestarius**; a forester or keeper of woods, to whom, by reason of his office, pertains the bark and the hewn branches. *Foresta* is a large wood, without dyke or closure, which has no water, wherein are included wild beasts, and where some have liberty of hunting. *Skene, h. t.*

**Forestry**. Lands granted by the Crown with a right of forestry carried all the privileges of a royal forest, which were very oppressive to the country, and, accordingly, the practice of making such grants was reprobated by the Court of Session in 1680; since which time, grants of forestry have fallen into disuse. *Ersk.* B. ii. tit. 6, § 14; *Stair*, B. ii. tit. 3, § 67, *et seq.*; *Bank*. vol. i. p. 573, 100; *Bell's Princ.* §§ 670, 753; *Illust.* § 670; *Brown's Synop. h. t.*; *Watson's Stat. Law, h. t.* See *Deer*.

**Forethought Felony**; is murder committed in consequence of a previous design, which anciently was distinguished from murder

committed on a sudden. But the Act 1661, c. 22, takes away all distinction, and punishes both equally; at the same time it declares that casual homicide, or homicide in self-defence, shall not be punished capitally. *Ersk. B. iv. tit. 4, § 40; Hume, ii. 239, Note 3, 241. See Chaud Melle.*

**Forfeiture**; is the loss of property consequent either upon the contravention of some condition on which the property is held, or upon the commission of a crime to which forfeiture has been annexed by law as the penalty. Thus, forfeiture is either civil or criminal.

1. *Civil forfeiture*.—Forfeiture may arise in civil cases either from statutory regulation—from the rules of common law—or by private agreement. Thus, the Act 1597, c. 246, provides, that all feu-vassals failing to pay their feu-duties for two years “haill and together,” shall lose their right, in the same manner as if an irritant clause had been inserted in the right. This irritancy must be declared by an action; and in that action the vassal, by paying up the feu-duty, will escape the forfeiture. The forfeitures at common law arise from the relation of superior and vassal. A vassal who disclaims his superior forfeits his feu, though, as this rule is now received, a very slender excuse will save the vassal from the penalty. In the same way, purpresture is another feudal delinquency, which draws after it a forfeiture of the feu. The offence consists in encroaching on the streets, highways, or other commonities belonging to the Sovereign or to the superior. But this, like the preceding forfeiture, will be purged on very slender grounds; and, in truth, neither of them is known in modern practice. The conventional forfeitures are, for example, where a vassal becomes bound in his original right to certain conditions, as that he shall not sell without first offering the feu to the superior, under the condition of forfeiture. If this be guarded by an irritant and resolutive clause, it will be effectual even against third parties; or a forfeiture may arise from neglecting the conditions of an entail guarded by irritant and resolutive clauses. But by some lawyers it has been thought that the conditions under which property is conveyed, will not affect a purchaser, unless they be guarded in the original right by irritant and resolutive clauses, and unless the condition has entered the register of sasines. See *Irritant and Resolutive. Conditions. Destination. Clause of Pre-emption. Clause de non alienando.*

In the case of *Corporation of Tailors of Aberdeen v. Coutts*, it was held that conditions in a feudal grant, if they entered the investiture of the vassal, may be enforced against

a singular successor, although neither declared a real burden nor protected by an irritancy. In the opinion returned by the Court to the House of Lords the law was thus stated:—“To constitute a real burden, or condition, either in feudal or burgage rights, which is effectual against singular successors, words must be used in the conveyance which clearly express, or plainly imply, that the subject itself is to be affected, and not the grantor and his heirs alone; and those words must be inserted in the sasine which follows on the conveyance, and of consequence appears upon the record. In the next place, the burden or condition must not be contrary to law, or inconsistent with the nature of this species of property; it must not be useless or vexatious; it must not be contrary to public policy, for example, by tending to impede the commerce of land, or create a monopoly. The superior, or the party in whose favour it is concerned, must have an interest to enforce it. Lastly, if it consists in the payment of a sum of money, the amount of the sum must be distinctly specified. If these requisites concur, it is not essential that any *voces signata* or technical form of words should be employed. There is no need of a declaration that the obligation is real, that it is *debitum fundi*, that it shall be inserted in all the future infeftments, or that it shall attach to singular successors. It is sufficient if the intention of the parties be clear, reference being had to the nature of the grant, which is often of great importance in ascertaining its import. Neither is it necessary that the obligation should be fenced with an irritant clause, and far less with irritant and resolutive clauses, which last are peculiar to a strict entail; a settlement depending upon a different principle altogether. On strict feudal principles obligations in feudal grants are effectual as conditions of the grant, without a compliance with which the superior is not bound to give an entry to the vassal.” This case was decided 20th Dec. 1834, 13 S. 226. On appeal it was remitted 23d May 1837, 2 S. and M<sup>c</sup>L. 609; and the judgment thereafter affirmed 13th Aug. 1840, 1 Rob. 296. See also 3 Ross’s L. C. 269.

2. *Forfeiture for Crimes*.—A forfeiture of moveables follows upon the sentence of death being pronounced. It follows also on conviction of perjury, of bigamy, of deforcement, of breach of arrestment, and of usury. Formerly, too, a forfeiture of moveables, or the falling of the single escheat, as it was called, took place where a debtor was denounced rebel, on letters of horning, for not payment of a debt, and remained unrelaxed for the period of a year; but this last species of for-

feiture was abrogated by the act abolishing wardholding. The forfeiture of heritage, following on a conviction for high treason, according to the laws of England, now takes place in Scotland also, in consequence of the extension of the Treason Laws of England to this country. See *Escheat. Denunciation*. By the law of England, a person convicted of treason forfeits to the Crown his whole property, heritable and moveable, as well as his honours and dignities; and the consequent corruption of blood deprives him of all right of succession, and prevents his descendants from taking any succession through him. See *Corruption of Blood*. The Court will not give judgment on a pleading lodged under a forfeited title; *Shand's Prac.* i. 170. This forfeiture may affect,—1. Claimants under a title, preferable to that of the attainted person; 2. His heirs-at-law; his creditors and singular successors; and, 4. Heirs of entail.

1. *Claimants under a preferable title*.—By the act 1584, c. 2, it was enacted, that all heritage, which had been possessed by the attainted person for the space of five years before the attainder, should be held to be the absolute property of the attainted person; but the severity of this short prescription was mitigated by the act 1690, c. 33, whereby forfeited estates were subjected to all real actions and claims, though not raised within the five years.

2. *The heir-at-law of the attainted person*.—The heirs-at-law are not only deprived, by the attainder, of all that their ancestor possessed, but they are deprived even of the privilege of taking other successions, which they can claim only through him. There seems to be an exception in the case of dignities and honours. See the case of the *Duke of Athole*, noticed by *Ersk.* B. iv. tit. 4, § 26.

3. *The creditors and singular successors of the attainted person*.—Creditors originally had no security in Scotland; and, on the attainder, the whole estate fell to the Crown. This was thought so unjust as to require the interposition of the Legislature; and, by the act 1690, c. 33, the rights of creditors were preserved entire; but, after the Union, it became a question, whether this statute, or the articles of Union, by which the law of England was made the rule, should be held to regulate those rights; when it was at last determined that the matter was to be regulated by the law of England. By that law, debts, heritably secured on the estate, are not affected by the attainder; but personal debts cannot be made the grounds of attaching the estate; in consequence of which, special statutes were passed after the Rebellions 1715 and 1745, extending the rule, as to heritable debts, to all the lawful creditors of the forfeited person.

4. *Heirs of Entail*.—In the

case of an heir of entail, the forfeiture, on conviction of high treason, extends to the descendants of the forfeited person, and deprives them of the right of succession, so as to give possession to the substitute, not a descendant of the body of the forfeited person; *Fac. Coll.* vol. i. No. 3. See *Hume*, i. 546, 551; ii. 482; *Stair*, B. iii. tit. 3, § 28, *et seq.*; *More's Notes*, p. cccxi.; *Bank*, vol. ii. p. 249, § 1; p. 261, § 46; *Swint. Abridg. h. t.*; *Kames' Stat. Law Abridg. h. t.*; *Ross's Lect.* i. 208, 255, 392; *Gibson, Dow's Appeal Cases*, ii. 314.

**Forgery**; is the crime of imitating the subscription of another, adhibiting it to a deed, and putting that deed to use, by acting under it, or receiving property in virtue of it, by founding on it in judgment as a title to sue, or to defend, or by making it over to another. The proof of forgery is either direct or indirect.

1. The direct proof of forgery consists in the examination of the writer of the deed, and of the instrumentary witnesses—that is, the witnesses who sign the deed and attest the subscription. The subscription of witnesses is an attestation to which the law gives effect, so as on their death to hold their subscriptions as evidence of the regularity of the deed. Even where a witness does not recollect, weight is given to his subscription; so that, to cut down the effect of a deed regularly attested, the instrumentary witnesses must be brought to swear to circumstances sufficient to invalidate the evidence afforded by their subscriptions—a proof which the law does not reject.

2. The indirect mode of proof is by an investigation of all those circumstances, which may infer that the person, by whom a deed is said to have been subscribed, actually did not subscribe it—e. g., an error in the date, an *alibi*, the stamp, the contexture, or date even of the paper, a *comparatio literarum*, or comparison of the handwriting. The comparison of the handwriting is made with genuine subscriptions of the same date with the one alleged to be a forgery; and, where the real subscriptions differ from the one founded on, the forgery may be pronounced upon with a considerable degree of certainty. See *Comparatio Literarum. Handwriting*. The indirect mode of proof is not resorted to where the direct mode is practicable. Formerly, though the punishment was not expressly laid down by statute, all gross cases of forgery were capital at common law; and, in cases of less moment, an arbitrary punishment was inflicted. But the punishment of death was first much restricted by 1 Will. IV., c. 66, and 2 and 3 Will. IV., c. 123; and at length, by 1 Vict., c. 84, totally abolished in cases of forgery,—transportation for life, or for a term of years, being substituted. By 5 and 6 Will. IV., c. 73, it is

enacted, that persons committed to trial for any forgery, the punishment of which was before capital, but had been changed by preceding statutes to transportation for life, shall not be entitled to bail, unless the High Court, or Circuit Court of Justiciary shall, on the application of the accused, consider it consistent with the ends of justice to grant him the privilege of bail. Forgery is one of the crimes in which the Court of Session has a criminal jurisdiction. Such a criminal prosecution for forgery may originate by a petition and complaint at a private party's instance, with concurrence of the Lord Advocate, or with the Lord Advocate alone. The complaint is in substance an indictment, and must have attached to it a list of witnesses, and be served on the panel like an indictment, on an *inducia* of fifteen days. As the party cannot be punished unless he appear, the Court, on the pursuer's application, grants warrant to incarcerate the defender. If, however, forgery is not directly charged, but merely facts stated, from which the inference is drawn, warrant is given to bring the defender before the Court for examination. After the process is in Court, but before going to proof, the defender has usually been examined in presence of the Court. Parties are then heard, and judgment pronounced on the relevancy of the libel and defences, and the proof is taken. The Court hears any relevant defence, at however late a stage it be brought forward. If the panel is found guilty, the writs are reduced, and generally torn in the presence of the Court. The offender may also be punished to any extent short of death; but formerly, when the Court found the forgery deserving of capital punishment, they merely reduced the deeds, found the panel guilty, and remitted him to the Court of Justiciary. The criminal jurisdiction of the Court of Session in cases of forgery is now, however, more a matter of historical curiosity than of practical utility; since, for upwards of fifty years, the trial in all cases of forgery, whether the evidence be direct or circumstantial, has taken place before the Court of Justiciary. Some interesting information on the subject will be found in *Alison's Princ.* 423, *et seq.* According to the same authority, it rather seems to be competent to the sheriff to try for this offence; *Ibid.* 425. In the action of reduction-improbation in the Court of Session, where fraud, forgery, and falsehood are usually libelled on, the concurrence of the Lord Advocate is necessary, even although the question is tried merely *ad civilem effectum*. As to forgery of Bank of England notes, see 16 Vict., c. 2. See *Hume*, i. 133, *et seq.*; *Bell's Sup.* p. 49; *Ersk.* B. iv. tit. 4, § 67, *et seq.*; *Bank.* vol. i. p. 295, §

213; p. 415, § 16, *et seq.*; *Watson's Stat. Law, voce Bank-note Bill*; *Thomson on Bills*; *Swint. Abridg. h. t.*; *Shand's Prac.* 34, 36, 218, 223, 289, 497, 642, 1035; *Macfarlane's Jury Prac.* 225; *S. & D.* xiii. 1170. See *Engraving, Coining. Abiding by. Concourse.*

Forgery may be committed by the adhibition of a mark or cross; *Macmillan*, Jan. 24, 1859. As to the legal effect of payment on a forged document, see the cases of *Orr and Barber, H. L.*, August 7, 1854; *Earl of Galway*, 19 D. 865, 20 D. 230.

**Foris Factum**; an unlaw, otherwise called an *amerciamentum*. *Skene, h. t.*

**Foris Familiari**, *foris familiarit*; put forth of his father's house, or made free, and delivered forth of the fatherly power. The son is said to be *foris familiarit* by the father, when, with his own consent and good will, he receives from his father any lands, and is put in possession thereof before his father's decease, and is content and satisfied therewith; so that he nor his heirs may not claim or crave any more of his father's heritage. *Skene, h. t.*

**Forisfamiliation**; is the separation of a child from the family of his father. Where a child receives a separate stock from the father, the profits of which become his own, he is said to be forisfamiliated, even although he should remain in family with the father. The same is the case where the child marries, or lives in a separate family with the consent of the father. Forisfamiliation is also used to signify either an onerous or gratuitous renunciation of the *legitim* by a child. While children remain in family with their father, he has the entire management of them, and is entitled to all the profits of their labour or industry. *Ersk.* B. i. tit. 6, § 53; and B. iii. tit. 9, § 23; *Stair*, B. i. tit. 5, § 13, and B. iii. tit. 8, § 45; *Bank.* vol. i. p. 154, 8, *et seq.*; *Bell's Princ.* §§ 1585, 1630; *Brown's Synop. h. t.* *Dunlop on the Poor Law.* See *Legitim*.

**Forms of Court.** See *Process*.

**Fornication**; is the act of incontinency in unmarried persons. The stat. 1567, c. 13, provides for the punishment of this indecency; but the statute is in desuetude. *Hume*, i. 464; *Bank.* vol. i. p. 121, 54. See *Disorderly House*.

**Fortalice.** A fortalice, as a place of strength, was formerly considered as belonging to the King, or, in other words, it was accounted public property, from its connection with the public safety; and therefore, anciently, a fortalice was not carried by a charter, without an express grant of the fortalice; now it goes as part and pertinent of the ground. *Ersk.* B. ii. tit. 6, § 17; *Stair*, B. ii. tit. 3, § 66; *Bank.* vol. i. p. 567, 91; *Bell's Princ.* §§ 743, 752, and authorities there cited; *Ross's Lect.* ii. 166, 196.

**Fortalitiun**; a fortalice or castle which has a battlement or barmekin, or a fowais about it. *Skene, h. t.*

**Forthcoming**; is the action by which an arrestment is made available to the arrester. The arrestment secures the goods or debts in the hands of the creditor or holder: the forthcoming is an action in which the arrestee and common debtor are called before the judge to hear sentence given, ordering the debt to be paid, or effects delivered up to the arresting creditor. This is the form when the arrester proceeds to make his claim effectual. Where the arrestee is desirous of ascertaining to whom he ought to pay, or where second arresters wish to ascertain their rights, this is accomplished by a process of multiplepoinding. The summons in an action of forthcoming is privileged, and (before bills for summonses were abolished by 13 and 14 Vict., c. 36, § 18) they passed on a bill, the *inducia* being in that case six days, against defenders within Scotland. If the defenders were in Orkney, Shetland, or forth of Scotland, no bill was required; and in the former case, the *inducia* were forty, in the latter, sixty days. Even where the defenders were within Scotland, the summons might pass without a bill, the *inducia* being then the ordinary *inducia* of twenty-seven days.

In the action of forthcoming, in which the arrestee and the common debtor must be called, it is necessary to prove both the debt arrested, and the debt on which the arrestment proceeds: the former is a question between the arrester and the arrestee. Where the debt has been constituted by writing, the written obligation may be recovered from the common debtor by a diligence; or, where there is no proof, it may be referred to the oath of the arrestee. The debt, again, due by the common debtor to the arrester must be proved; but that is a point in which the arrestee has no interest, and which is competent to the common debtor alone, who is therefore always made a party to the action. Where the arrestment has been loosed on caution, the cautioner, as well as the arrestee and common debtor, must be made parties to the action. Where the funds have been paid away by the arrestee after the loosing, it is sufficient that he be called for his interest, without directing any petitory conclusions against him. A forthcoming may be raised, notwithstanding the death of the arrester, arrestee, or common debtor. The representative of the arrester must, of course, make up a proper title to the debt; and if the arrestee also be dead, the forthcoming will be raised against his representative. Where the arrestee dies during the dependence of the forthcoming, the

action must be transferred against his representative before decree can be obtained. Where the common debtor dies before the claim is constituted by decree, or otherwise, it must be constituted against his representatives before the forthcoming is raised. But if decree be recovered against the common debtor himself, there is no necessity for transferring against his representatives. Where the common debtor dies during the dependence of the action of forthcoming, the process cannot proceed till the representative is called as common debtor; but, in such a case, it is not necessary to charge the apparent heir to enter. Another creditor, obtaining confirmation as executor-creditor before decree of forthcoming is pronounced, will be preferred. Even after decree of forthcoming has been obtained, the arrester may proceed with other diligence for the recovery of his debt. In the forthcoming may be recovered, both the principal sum arrested, and the interest due from the date of arrestment, provided arrestment was used both for principal and interest. Arrestment on a depending action entitles the arrester in the forthcoming to claim all expenses laid out in the action, on the dependence of which the arrestment was used. The expenses of the process of forthcoming are not covered by the arrestment. But where the ground of debt on which arrestment proceeded contains a penalty, the sum recovered under the forthcoming will only extinguish as much of the principal and annualrents as comes to the arrester, after deduction of his expense. And if the arrester have a separate security over property of the common debtor, and have been paid his principal and interest, in virtue of his arrestment, he will not be compelled to assign that separate security to another creditor of the common debtor until he be paid his expenses. The cautioner in the loosing cannot object to the expense of raising and executing the arrestment being comprehended in the forthcoming. The decree of forthcoming is held to be a legal assignation in favour of the arrestee; and where the subject arrested consists in goods or effects, the decree ordering them to be sold for behoof of the arrester gives him a complete legal title, which cannot be defeated by the poinding of co-creditors. See *Arrestment. Multiplepoinding. Death*. See also *Ersk. B. iv. tit. 6, § 15, et seq.*; *Bell's Com. ii. pp. 66, et seq., 70, 301*; *Stair, B. iii. tit. 1, § 36, et seq.*; also *B. iv. tit. 50, § 26, et seq.*; *More's Notes, p. clxxxix.*; *Kames' Equity, 389*; *Jurid. Styles, 2d edit. vol. ii. p. 407*; *iii. pp. 9, 48, 277, 651*; *Shand's Prac. 570, 230*; *Brown's Synop.*; *Shaw's Digest*; *Bell's Princ. §*

2367, and authorities there cited; *Bank*. vol. i. p. 218, et seq.; vol. ii. p. 199, et seq.; *M'Glashan's Sheriff-Court*, Pr. 37, 382; *S. & D.* 687.

**Fortchoct Felony**; felony committed wittingly and willingly, after deliberation and set purpose. *Skene*, h. t. See *Forethought Felony*.

**Fortune-Teller**. Vagabonds may, by the act 1579, c. 74, be imprisoned and brought to trial; and under the description of vagabonds in this act, are comprehended all who go about pretending to foretell fortunes. The statutory punishment is scourging and burning on the ear. *Ersk.* B. iv. tit. 4, § 39; *Hume*, i. 170 and 474; 9 *Geo.* II., c. 5.

**Forum Competens**; means a court, to the jurisdiction of which a party is amenable. Under this head, in digests and dictionaries, such as *Morison's* and *Lord Kames'*, are usually classed questions as to the competency of a Court's jurisdiction over parties furth of the kingdom, who have never had a domicile in this country, or who have lost it; questions as to arrestment *jurisdictionis fundandæ causa*,—the jurisdiction over executors, factors, &c., appointed by the Court,—the district within which a testament must be confirmed,—the Court competent to discuss the validity of presentations, &c. For these questions, reference is made to the following articles in this Dictionary:—*Arrestment jurisdictionis fundandæ causa*. *Domicile*. *Confirmation*. *Jurisdiction*. *Foreign*. *Abroad*. *Absent*. *Citation*. See also *Kames' Dict.* h. t.; *Morison's Dict.* h. t.; *Kames' Stat. Law Abridg.* h. t.; *Mor's Notes to Stair*, p. xii.; *Tait's Justice of Peace*, h. t.

**Fossa**; a pit or fowsie, as *furca* is a gallows. King Malcolm gave power to the barons to have a pit wherein women condemned for theft should be drowned, and a gallows whereon men should be hanged. *Skene*, h. t. See *Furca*.

**Foxes**; may be pursued and destroyed as vermin even upon the property of others; with no other liability than for the damage actually done in the pursuit. But fox-hunting for sport, without leave, is punishable as a trespass. *Blair's Justice Manual*, p. 87; *Colquhoun v. Buchanan and others*, 6th August 1785, *M.* 4997; *Marquis of Tweedale v. Dalrymple and others*, 3d March 1778, *M.* 4992.

**Franchise**; in English law is used as synonymous with liberty, and is defined to be a royal privilege, or branch of the prerogative of the Crown, subsisting in the hands of a subject. It must be held by a grant from the Crown, or by prescription, which presupposes a grant. The kinds of franchise are almost infinite. It may mean an exemption from ordinary jurisdiction, an immunity from

tribute or toll, the privilege of being incorporated, and subsisting as a body-politic, the elective franchise, and the like. *Tomlins' Dict.* h. t.

**Frank**, or *livre*; a French coin, worth 10<sup>1</sup>/<sub>2</sub>d. English money. *Tomlins' Dict.* h. t.

**Franking**; the privilege of dispatching and receiving letters through the General Post-Office, possessed by members of both Houses of Parliament, and by certain government functionaries; but this privilege is now abolished.

**Fraud**. Where fraud enters into a contract, it destroys that consent which is requisite to render an agreement binding in law. Where, through the fraud of the one party, there is an error in *essentialibus* of the contract, consent cannot be said to have been given, and the contract is void *ab initio*, even in questions with the fraudulent party's *bona fide* onerous singular successors. See *Error in essentialibus*. But, even where such error does not exist, fraud giving rise to the engagement—*dolus dans causam contractui*—may be pleaded as a ground of reduction, or as a personal exception to an action for implement; though it will have no effect in questions with *bona fide* onerous assignees. Fraud incident to a contract—*dolus incidens*—only gives a claim for damages. Where the fraud is not that of the party contracting, but of a third party, the remedy can only be sought at the hands of that third party. Fraud may be either by false representation; concealment of material circumstances; underhand dealing; or by taking advantage of intoxication or imbecility. In mercantile dealings there is some allowance for those petty frauds, or rather misrepresentations, which the parties make use of to over-reach one another; and there has been a distinction taken between *dolus malus*, or that gross fraud for which there is no excuse, and *dolus bonus*, or those artifices which it is well understood that merchants practise in order to enhance the value of what they sell. Neither is concealment of circumstances known to one of the parties necessarily a ground for reduction, or even for an action of damages. Merchants are often at great expense and trouble in acquiring early information, and it is just that they should be allowed to turn it to account. But if the obliger relies on the obligee for his information, as in insurance contracts, there is no excuse for concealment or fraud, however trifling, and the contract will be void if such fraud has been practised.

In the case of the *Earl of Chesterfield v. Janssen*, 2 *Vesey senior*, 154, LORD HARDWICK enumerated four species of fraud, and observed,—“This Court has an undoubted

jurisdiction to relieve against every species of fraud. 1. Fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case. 2. It may be apparent, from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other, which are unequitable and unconscionable bargains, and of such even the common law has taken notice. 3. A kind of fraud is which may be presumed from the circumstance and condition of the parties contracting. This goes farther than the rule of law, which is, that it must be *proved*, not *presumed*; but it is wisely established in this Court to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do, is equally against conscience, as to take advantage of his ignorance. A person equally unable to judge for himself in one as the other. 4. A fourth kind of fraud may be collected or inferred in the consideration of this Court, from the nature and circumstances of the transaction as being an imposition and deceit on the other persons not parties to the fraudulent agreement. It may sound odd, that an agreement may be infected by being a deceit on others not parties; but such there are; against such there has been relief. Of this kind have been marriage-broccage contracts. Neither of the parties herein being deceived, but they tend necessarily to the deceit on one party to the marriage, or of the parent, or of the friend. So in a clandestine private agreement to return part of the portion of the wife, or provision stipulated for the husband, to the parent or guardian. In most of these cases it is done with their eyes open, and knowing what they do, but if there is fraud therein, the Court holds it infected thereby, and relieves."

A Court of Equity will give relief in cases of fraud where a Court of Law will not. In *Fullagar v. Clarke*, 18 *Vesey*, 481, LORD ELDON observed: "This Court will, as it ought in many cases, order an instrument to be delivered up, as unduly obtained, that a jury would not be justified in impeaching by the ordinary rules of law, which require fraud to be proved; and are not satisfied, though it may be strongly presumed, as Lord Hardwicke said in the case of *Lord Chesterfield v. Janssen*, and Lord Kenyon intimated in other cases. This jurisdiction may be exercised upon such a point where a Court of Law could not enter into the question, as a Court of Equity is bound to do."

It is not every concealment, even of facts material to the interest of a party, which will

entitle him to redress. In *Fox v. Mackreth*, 2 *Bro. Ch. R.* 420, LORD THURLOW, *C.*, observed: "I do not agree with those who say that where an advantage has been taken in a contract, which a man of delicacy would not have taken, it must be set aside. Suppose, for instance, that A knowing there to be a mine on the estate of B, of which he knew B was ignorant, should enter into a contract to purchase the estate of B for the price of the estate, without considering the mine, could the Court set it aside? Why not, since B was not apprised of the mine, and A was? Because A., as the buyer, was not obliged, from the nature of the contract, to make the discovery. It is therefore essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but it must arise from some obligation in the party to work the discovery. The Court will not correct a contract merely, because a man of nice honour would not have entered into it; it must fall within some definition of fraud. The rule must be drawn so as not to affect the general transactions of mankind."

A general rule is, that he who bargains in a matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence; and this rule applies equally to all persons standing in confidential relations to each other. If no such proof is established, Courts of Equity treat the case as one of constructive fraud. There are many cases of persons standing in regard to each other in confidential relations, in which the above rule applies. Among these may be enumerated the cases which arise from the relation of landlord and tenant, of partner and partner, of principal and surety, and various others, where mutual agencies, rights and duties, are created between the parties by their own voluntary acts, or by operation of law. The doctrine may be generally stated to be, that wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage. In all cases where there exists some peculiar relation of a fiduciary character between parties, the law, in order to prevent undue advantage from the confidence which the relation naturally creates, requires the utmost degree of good faith (*uberrima fides*) in all transactions between the parties. If there is any misrepresentation, or any concealment of a material fact, or any just suspicion of artifice or undue influence, Courts of Equity will interpose, and pronounce the transaction void, and, as far as possible, restore the parties to their

original rights. *Story's Equity Jurisprudence*, §§ 218, 311, and 323.

This principal of law was applied to the case of the managing partner of a firm in *Maddeford v. Austwick*, 1 *Sim. R.* 89, where an agreement was set aside by which a partner who superintended exclusively the accounts of the concern, agreed to purchase his copartner's share of the business, for a sum which he knew from accounts in his possession, but which he concealed from his copartner, was an inadequate consideration. SIR JOHN LEACH, V. C., observed,—“That the public books of account belonging to the company, to which all parties had access, were of an intricate nature, and required considerable experience and attention to understand and make them out, is proved by the book-keeper *Chase*. That the plaintiff is not conversant with accounts is proved by the same *Mr Chase*, and also by *Mr Wright*. The precise nature of all these public books has not been explained to the Court, but it is clear that they did not contain any statement of an account between the plaintiff and the defendant. At the time the agreement was entered into between the plaintiff and the defendant, the defendant had in his possession a private book, which did contain a statement of the accounts between the plaintiff and the defendant, made out by the defendant, whereby it appears that the L.1000, which the defendant agreed to pay to the plaintiff, in addition to the monies which he had drawn from the concern, would have been nearly, but not quite, a fair consideration, if no profits had been made from the concern of the mint; but that, taking the mint profits into the account, which the defendant was unquestionably bound to divide with the plaintiff, it would be many hundred pounds less than the plaintiff would be entitled to receive. The defendant being the partner, whose business it was to keep the accounts of the concern, could not, in fairness, deal with the plaintiff, for his share of the profits of the concern, without putting him into possession of all the information which he himself had with respect to the state of the accounts between them. The defendant knew, from the account in his possession, that the L.1000 was not an adequate consideration for the plaintiff's share of the profits, and he cannot be permitted in a Court of Equity to maintain advantage which he has gained over the plaintiff's ignorance; and the plaintiff for that reason appears to me to be entitled to avoid the agreement of 1817. The supposed account of the profits of the concern formed the basis of the plaintiff's calculation of profits for the ensuing three years; and being misled in that respect, he is entitled to avoid the whole

agreement, and to have an account of the profits of the concern up to the dissolution in 1821.”

Fraud is proveable by evidence *prout de jure*. As to the circumstances which infer fraud, see the following cases:—*Hamilton*, 1842, 5 *D.* 280, *H. L.* 1845; 4 *Bell*, 67; *Falconer*, 1843, 5 *D.* 866; *M'Lellan*, 1843, 5 *D.* 1032; *Railton*, 1844, 6 *D.* 536, 1348; *H. L. (Rev.)*; 3 *Bell*, 56, 7 *D.* 748, 8 *D.* 747; *Watt*, 8 *D.* 529; *Kirkpatrick*, 7 *Bell's App.* 186; *Forth Marine Insurance Co.* 10 *D.* 689; 6 *Bell's App.* 541; *Graham*, 1850, 12 *D.* 907; *National Exchange Co.*, 12 *D.* 950; *Aff. H. L.* 18 *D.* 6; *Collins*, 13 *D.* 349; *Leshie's Reps.* 14 *D.* 213; *McCowan*, 15 *D.* 494; *Clunie*, 16 *D.* 883; *National Exchange Co. v. Robertson*, 16 *D.* 1083; *Priestnell*, 19 *D.* 495; *Tulloch's Executors*, 20 *D.* 1045. As to the specification with which fraud must be averred, see the cases of *Smith*, 16 *D.* 372; *Shedden*, June 24th, 331; 1 *M'Queen (H. L.)*, c. 535; *Baird*, 20 *D.* 1220.

On the subject of this article generally, see *Bell's Princ.* § 13, and a numerous list of authorities there cited; *Illust. ib.*; *Ersk. B. iii.* tit. 1, § 17; *B. iv.* tit. 4, § 79; *Bell's Com. i.* 240, et seq., 277, &c.; ii. 244, note 2; *Hume, i.* 168; *Bell's sup.*; *Stair, B. i.* tit. 9, § 9, et seq. *B. iv.* tit. 40, 21, et seq.; *More's Notes*, p. lix.; *Brown on Sale*, 395, et seq., 405, et seq.; *Bank. vol. i.* p. 259, et seq.; *Thomson on Bills*, 93, 310, 613, 672; *Dickson on Evidence*, p. 341; *Jurid. Styles*, 2d edit. vol. iii. p. 211; *Kames' Equity*; *Bayne, Dow's Appeal Cases*, v. 151; *Macneil, Bligh*, ii. 228. See *Circumvention. Deceit. Bankrupt. Conjoint and Confidential. Collusion.*

**Fraud, Criminal.** Fraud, considered as a crime, is punishable arbitrarily at common law. It is usually, but not always, charged as “falsehood, fraud, and wilful imposition,” which, in popular language, is termed *swindling*. See *Swindling*, and case of *Murray*, 2 *Feb.* 1852; *J. Shaw*, 552. As to the circumstances which infer fraud, and the necessity of sufficient specification, see *Hume*, i. 173, and *Bell's Sup.*; *Alison*, i. 362, et seq.; *Hall*, July 25, 1849, *Sh.* 254; where it was held not to be necessary to allege the assumption of any false character; and also the cases of *Wilson*, 1853 and 1854, 1 *Irv.* pp. 300 and 375; *Hood*, 1853, 1 *Irv.* 236; *Taylor*, 1853, 1 *Irv.* 230; *Smith*, 1852, 1 *Irv.* 125; *Kronacher*, 1852, 1 *Irv.* 65; *Duncan*, 1850, *Sh.* 334; *Chisholm*, 1849, *Sh.* 241; *Bannatyne*, 1847, *Ark.* 361; *Macgregor*, 1846, *Ark.* 49; *Millar*, 1843, 1 *Br.* 529; *Maitland*, 1842, 1 *Br.* 57. Attempt to commit fraud is held irrelevant. *Shepherd*, 1842, 1 *Br.* 325.

**Fraudulent Bankruptcy;** is the wilful cheating of creditors by an insolvent person, or one who conducts himself as such. The



acts 1621, c. 18, and 1696, c. 5, denounce certain punishments against fraudulent bankrupts; and the Sequestration Act, 54 Geo. III., c. 137, § 33, declared, with respect to any bankrupt sequestered under it—"That if he shall wilfully fail to exhibit a fair state of his affairs, or to make oath, as appointed by the act, to the fairness or fulness of his disclosure of his means and funds, or to make a complete surrender of his effects and estate, or if he shall take the above oath falsely, he shall be considered as a fraudulent bankrupt, and punished accordingly, with infamy and other pains." This act, and the subsequent act 2 and 3 Vict., c. 41, are now repealed by the "Bankruptcy (Scotland) Act, 1856" (19 and 20 Vict., c. 79, § 2); the provisions of which, on the subject of fraudulent conduct and falsehood, are contained in sections 97, 162, and 178. Under the first of these clauses, "If it shall appear to a majority of the creditors in number and value assembled, at any meeting after the examination of the bankrupt, that he has not made a full and fair surrender of his estate, or that he has disposed of or concealed any part of his funds, to the prejudice of his creditors, or that his bankruptcy has been fraudulent, they may authorise the trustee to proceed against him, in terms of law, at the expense of the estate." By section 162, the accountant in bankruptcy is authorised to give information to the Lord Advocate in the event of his having grounds to suspect fraudulent conduct by the bankrupt, or malversation on the part of the trustee, &c.; and the Lord Advocate is directed, on such information, to take such proceedings as he may think proper. Section 178 provides for falsehood in any oath. See *False Swearing*. The point upon which the proof of fraudulent bankruptcy generally turns, is, that the accused was accessory to the diminution, by alienation, abstraction, or concealment, of the funds divisible among his creditors, with a fraudulent intent, and in the knowledge that the legal rights of the creditors were thereby infringed. The embezzlement may have been carried into effect, either in contemplation of, or after sequestration; and, in either case, the proof of fraud depends upon the accompanying circumstances. The punishment of this offence is arbitrary, varying from imprisonment to transportation. Infamy and ineligibility for office are always added. The Court of Session has a criminal jurisdiction in cases of fraudulent bankruptcy. The prosecution in that Court commences with a petition and complaint which must have the concurrence of the Lord Advocate; which concurrence cannot be granted after the case comes into Court. As in forgery, this complaint is in substance

an indictment, and must contain a list of witnesses. The complaint prays for a warrant to incarcerate the bankrupt, or, if already in jail, to detain him there. The petition and complaint is presented to the Court, who pronounce an interlocutor ordering service thereof, and, where necessary, granting warrant for apprehending the accused. If answers are put in, a remit is made to the junior Lord Ordinary, who hears the parties, and prepares the cause, either by a remit to an accountant, or by ordering condescendence and answers, or by directing issues to be adjusted for trial. The accountant's report, or the condescendence and answers, are printed and reported, and counsel is heard, if the parties require it; after which judgment is pronounced as accords, or further proof, or a jury trial, ordered. The Court is empowered, by the act 1696, to inflict any punishment short of death. It was at one time questioned whether the Court of Justiciary was competent to try this offence; but all doubt on that point was removed by 7 and 8 Geo. IV., c. 20, whereby it is made lawful to prosecute persons accused of fraudulent bankruptcy before the High Court, or any of the Circuit Courts of Justiciary, by indictment or criminal letters; the punishment being the same with that competent to be awarded by the Court of Session. By the same statute it is made lawful for the trustee, under a sequestration, or any creditor ranked, with concurrence of the Lord Advocate, to prosecute before the High Court of Justiciary, or the Circuits; but without prejudice to the right of the public prosecutor to insist in all such prosecutions. In the Court of Justiciary the prosecution is by indictment; and there are recent instances of prosecutions for fraudulent bankruptcy both in the Court of Session and in the Court of Justiciary. See *Macalister*, 21st Feb. 1822, 1 S. and D., 339; *Carter*, 20th July 1831, *Justiciary*, noted *Alison's Princ.* 569; *Hume*, i. 509; *Bell's Sup.* 128, 147; *Alison*, 567; *Steele*, 176; *Shand's Prac.* p. 1038; *Maclaurin's Sheriff-Court Process.* 36. In *Jurid. Styles*, vol. iii., at p. 198, will be found the style of a *Summons of declarator of fraudulent bankruptcy*; and at p. 841, the style of a *Petition for the punishment of a fraudulent bankrupt*. See *Bankrupt. Criminal Prosecution*.

**Fraudulent Violation or Neglect of Duty** by a teller or accountant of a bank, for the purpose of concealing or facilitating embezzlement by a bank-agent is a relevant charge. *Reid and Gentles* (Stirling), 23d Sept. 1857, 2 Irv. 704.

**Free Bench.** See *Bench*.

**Freehold**; in English law, is a land, tenement, or office which a man holds in fee-

simple, fee-tail, or for life. Freehold is either in deed or in law; the first is the actual possession, the second is the right before entry. *Tomlins' Dict. h. t.; Step. Com.*

**Freeholder**: is a person holding of the Crown or Prince, though the title is, in modern language, applied to such as, before the passing of the Reform Act, were entitled to elect or be elected members of Parliament, and who must have held lands extending to a forty shilling land of old extent, or to L400 Scots of valued rent. See *Election Laws*. Anciently every freeholder was bound to attend at the Michaelmas head-court. In default of his attendance a fine was imposed by the sheriff; but that penalty was taken away by the act abolishing heritable jurisdictions; and freeholders are now bound to attendance only when summoned to attend as jurymen, or for some other lawful purpose. *Ersk. B. i. tit. 4, § 5; Stair, B. ii. tit. 3, § 63; More's Notes, p. xlii.; Bell's Com. i. 23; Bell's Princ. § 2198; Watson's Stat. Law, voce Parliament; Jurid. Styles, 2d edit. vol. i. p. 153. See Reform Act.*

**Freight of a Ship**. The freight is the price paid for the use of a ship to transport goods from one port to another. It is generally settled in writing by a contract of charter-party, in which the course of the voyage and the number of days the ship is to remain at a port or ports on her voyage, are prescribed; and where the vessel is detained a greater number of days than has been provided for, the amount of the charge for each extra day is fixed. The freight is not due until the whole voyage is finished, by unloading the cargo, and discharging the ship at the last port. The goods and merchandise are under a hypothec for the freight; as the freight is to the mariners for their wages. See *Charter-Party. Demurrage*. Besides the freight, the shipowner has a claim for the expense of pilots, or on the loss of masts, anchors, &c., which is termed average. See *Average. Abbot on Shipping, 171, 307; Brodie's Supp. to Stair, 918, 982, et seq.; Bell's Com. i. 190, 538, et seq.; ii. 99, et seq.; Bell's Princ. § 407, 420, et seq., 1399, 1423, and authorities there cited; Bell's Illust. 405, et seq., 420, et seq.; Bank. vol. i. p. 398, 21; Brown's Synop. pp. 1253, 2259; Jurid. Styles, ii. 533, et seq., App. 21; Kames' Equity, 215. See *Freightment. Insurance.**

**Friebergh**; a cautioner. *Skene, h. t.*

**Friendly Societies**; have been the subject of various statutes, which were last consolidated and amended by 18 and 19 Vict., c. 63. By that act, all the previous statutes relative to friendly societies, as set forth in a schedule, are repealed, subject to a proviso that subsisting societies established under any of the

previous statutes are to continue to subsist, and their rules to remain in force, but the enrolment of such rules is to be transferred from the rolls of the sessions of the peace to the registrar appointed under the act. The contracts of such subsisting societies are not to be affected by the repeal; and these subsisting societies, so long as they do not effect assurances beyond L.200, or annuities beyond L.30 per annum, are to enjoy all the exemptions and privileges conferred on societies established under the new act, §§ 1-5. For the purposes of the act registrars are to be appointed; the registrar for Scotland to be an advocate of seven years standing; §§ 6-8.

By section 9, it is declared to be lawful for any number of persons to form a friendly society, under the provisions of the act, for the purpose of raising, by voluntary subscription of the members thereof, a fund for any of the following objects:—1. For insuring a sum of money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the wife or child of a member; 2. For the relief or maintenance of the members, their husbands, wives, children, brothers or sisters, nephews or nieces, in old age, sickness, or widowhood, or the endowment of members, or nominees of members, at any age; 3. For any purpose which shall be authorized by one of Her Majesty's principal Secretaries of State, or in Scotland by the Lord Advocate, as a purpose to which the powers and facilities of the act ought to be extended: Provided that no member shall subscribe or contract for an annuity exceeding L.30 per annum, or a sum payable on death, or any other contingency, exceeding L.200.

The provisions of the act as to rules are contained in §§ 25-30, and are to the following effect:—Persons intending to establish a Friendly Society are to make rules for the regulation, government, and management thereof, setting forth,—1. The name and place of meeting of the society. 2. The objects of the society, the purposes to which its funds are to be applicable, the conditions of membership, and the fines and forfeitures to be imposed. 3. The manner of making, altering, amending, and rescinding rules. 4. A provision for the appointment and removal of a committee of management, trustees, treasurer, &c. 5. A provision for the investment of funds and audit of accounts. 6. The manner in which disputes in the society are to be settled. Two copies of the rules subscribed by three members and the secretary are to be transmitted to the registrar, who, on finding that they are in conformity with law, and with the provisions of the act, is to give a certificate, in terms of a schedule, and is to

return one of the copies to the society, and to keep the other as directed by one of the Secretaries of State. The rules may be altered and added to in terms of the original regulation to that effect, but the alterations must be certified in like manner by the registrar. By § 10, no money is to be paid for the funeral expenses of any child under ten years of age, except on production of a copy of the entry in the register of deaths, signed by the registrar for the district, and either containing a statement that the cause of death has been certified by a qualified medical practitioner, or accompanied by a proper certificate of the probable cause of death; and not more than L.6 is to be paid on the account of the funeral expenses of a child under five, nor more than L.10 in the case of a child between five and ten years of age. Friendly societies may be dissolved of consent in the manner provided by § 13; and they may unite or be amalgamated with other societies under § 14. An exemption from stamp-duties is conferred on societies under the act by § 37. A friendly society has a preference over all the other creditors of its office-bearer, for sums due by them (§ 23), and is entitled, in actions for balances due by the treasurer, to recover full costs, taxed as between agent and client (§ 22). The property of such societies is vested in trustees appointed under the act, in whose names, as trustees, all suits by or against the society proceed without discontinuance or abatement on death or removal of individual trustees (§§ 17-19). For the provisions of the act as to management of such societies, and for the other provisions of the act generally, reference must be made to the statute itself. See, as to previous acts and decisions thereupon, *Barclay's Justice of Peace* (1855), *h. t.* See also *Ivory's Ersk. i. 7, § 64, and Notes*; *Shand's Prac.* pp. 185, 969; *Bakers of Paisley*, 6th Dec. 1836, 15 *S. & D.* 200; *Caitness Friendly Soc.* 6th Dec. 1834, 13 *S. & D.* 135; *Manson*, 5th June 1840, 2 *D.* 1015; *Boyes*, 12th Nov. 1834, 13 *S. & D.* p. 1; *Mason Lodge of Dundee*, 22d May 1830, 8 *S. & D.* 786; *Howie*, 18th May 1836, 14 *S. & D.* 752; *Robertson*, 18th Jan. 1842, 4 *D.* 398. See *Mason Lodges*.

**Frivolous and Vexatious.** By the act regulating the trial of election petitions (11 and 12 Vict., c. 98, §§ 89, 90, 92), it is provided, that when an election committee reports to the House that a petition, or that opposition to a petition, or that an objection to a voter, has been frivolous and vexatious, the party presenting such petition, or making such opposition or objection, shall be liable in full costs to be ascertained under § 94. See *Chambers' Election Law, h. t.*

**Fructus Pendentes**; are fruits not yet

separated from the subject which produced them. Natural fruits pass, upon the death of the proprietor, to his heir, or upon a sale of lands to the purchaser. All *fructus pendentes* at the termination of *bona fides*, with the exception of corn sown by the *bona fide* possessor, go to the proprietor. *Ersk. B. ii. tit. 1, §§ 14 and 26*; *Kames' Equity*, 370. See *Fruits*.

**Fructus Percepti**; are fruits separated from the subject which produced them. They become the property of the *bona fide* perceptor. *Ersk. B. ii. tit. 1, § 25*; *Kames' Equity*, 370. See *Fruits. Bona Fides*.

**Fruits**; as part of the soil, belong to the proprietor of the soil. This is the general rule. Hence, on the death of a proprietor, the fruits go to the heir, or to a purchaser, along with the lands; but there is an exception of such fruits as are raised by annual industry. In this view, trees or planting, even natural grass or fruit not yet plucked from the tree, belong to the proprietor, that is, to the heir or to the purchaser; but wheat, barley, &c., which are reared by annual culture, belong to the person, or his executors, by whom the crop was sown, so as to exclude either an heir or a purchaser. With regard to a purchaser, however, in place of regulating his interest by abstract rules of this kind, the payment of the price, the period of the currency of the interest, or the views of the parties in the sale, will affect the question as to the property of the fruit. *Stair, B. i. tit. 7, § 12*; *Ersk. B. ii. tit. 2, § 4*; *Bell's Com. ii. 2, 27, 29*; *Bell's Princ.* §§ 1044, 1473; *Illust. ib.*; *Bell on Leases*, i. 421, 430; *Bank. vol. i. pp. 213, 474, § 78*. See *Bona Fides. Grass*.

**Fuel.** See *Feal and Divot*.

**Fugitation.** Where a person accused of a crime does not obey the citation to answer in the criminal prosecution brought against him, the Court pronounces sentence of fugitation against him, by which all his moveable property falls as escheat to the Crown. It has been held that sentence is *de jure* recalled by the public prosecutor arraigning the panel at the bar. *Miller*, 1850; *J. Shaw*, 288. See also the case of *Ritchie v. Alcock*, 1857, 2 *Irv.* 615; *Hume*, ii. 257, *et seq.*; *Bell's Sup.* 228-230. See *Criminal Prosecution. Dist. Denunciation. Escheat*.

**Funds, Public.** See *Stock*.

**Fungibles**; are moveable goods and effects, which perish in the use, and which may be estimated by weight, number, or measure, as grain or coin. In this sense, jewels, or paintings, or other works of art and taste, are not fungibles, their value differing in each individual without possessing any common standard. *Ersk. B. iii. tit. 1, § 18*; *Bell's Com. i. 255, note*, 258; *Stair. B. i. tit.*

10, § 12, and tit. 11, § 1; also B. ii. tit. 1, § 33; *Bell's Princ.* 137, and note.

**Funeral Expenses.** The funeral expense is a privileged debt, which must be paid, along with others of the same class, preferably to other debts. Under these expenses are included the expense necessary for the suitable performance of the funeral, and for mournings for the widow, and for such of the children of the deceased as are present at the funeral. *Ersk.* B. iii. tit. 9, § 43; *Stair*, B. iii. tit. 8, § 72; *More's Notes*, pp. xxv. et seq.; cccvi. et seq.; *Bell's Com.* ii. 156; *Brown's Synop. h. t.*, also pp. 624, 1771; *Kames' Stat. Law Abridg. h. t.*; *Bell's Princ.* 1241, 1406, 1572, and authorities there cited; *Illust.* § 1406, 1572. See *Executor. Privileged Debt.*

**Furca et Fossa**; the pit and gallows. In ancient privileges granted by the Crown, it signified a jurisdiction over felons, to punish the men by hanging and the women by drowning. *Tomlins' Dict. h. t.* See *Fossa.*

**Furche**; a fork. Anciently, when any person was served and retoured nearest and lawful heir to any of his predecessors, the King directed precepts to the superior to infest him. If the first and second were disregarded, he directed a third, called the *furche*, or forked, because alternative, in which the King commanded the superior to give saine, and certified that if he did not, he would command the sheriff to give the same. Similar to this was the third precept on the allowance of an appraising. *Ersk.* B. ii. tit. 12, § 25; *Skene, h. t.*

**Furiosity**; or madness, by which the judgment is prevented from being applied to the ordinary purposes of life, is one of the grounds on which a curator may be appointed to manage the affairs of the person labouring under that infirmity. The condition of the party must be ascertained by the verdict of a jury; and, where that course is followed, the legal curator is the next male agnate of twenty-five years of age. *Stair*, B. i. tit. 10, § 13, and B. iv. tit. 3, § 7; *Ersk.* B. i. tit. 7, § 43; *Bank.* vol. i. p. 165, et seq.; *Bell's Princ.* § 2106, and authorities there cited; *Jurid. Styles*, 2d edit. vol. iii. p. 238; *Shand's Prac.* 997; *Pupil's Protection Act*, 12 and 13 Vict., c. 51. §§ 25-6; *Lunacy Act*, 20 and 21 Vict., c. 71. See *Curatory. Brieve. Idiocy. Insanity. Lunacy.*

**Furlong**; a lineal or superficial measure; the eighth part of a mile or of an acre. *Tomlins' Dict. h. t.*

**Furlough.** Non-commissioned officers or privates may, on the plea of sickness or other necessary cause, apply to any officer within the district not below a captain in rank, or, in the absence of such, to a justice of peace,

who may grant them an extension of their furlough, certifying the same, and the cause of it, to the commanding-officer, if known, or if not, to the agent of the regiment. Such extension never to exceed a month, unless with the approval of the commanding officer of the district. *Hutch. Justice of Peace*, iii. 26; *Tait's Justice of Peace*, p. 367; *Blair's Justice of Peace*, p. 322.

**Furniture.** Household furniture is comprehended under the *invecta et illata*, over which the landlord's hypothec for rent extends. Even hired furniture is included, but not such as is merely deposited in the house, or lent to the tenant without a rent. The question, whether or not the household furniture of an agricultural tenant is under the hypothec, is still open, but the inclination rather seems to be that it is. A sale of furniture *retenta possessione*, is not available against the hypothec, but, by 19 and 20 Vict., c. 60, is good against ordinary creditors. Furniture may be liferented; and it is often provided in marriage-contracts, that the wife shall have the furniture in liferent; but as, during the subsistence of the marriage, her claim is only personal, it cannot be preferable to that of her husband's creditors. The liferent of furniture gives the full use of it, *salva substantia*. Giving the liferent of the furniture of a house is only demonstrative, and the furniture may be carried thence. Where, however, as in *Cochran* (Aug. 7, 1775, *M.* 8280), it is combined with a mansion-house, it is held only as an accessory to the possession of the house. In *Jurid. Styles*, vol. ii., at p. 224, will be found the form of a contract, restricting the provision to the wife for household furniture, in case of children of a second marriage; and at p. 465, the forms of a provision to the widow of the fee of the household furniture, and of the liferent of the furniture. See also *Ersk.* B. ii. tit. 6, §§ 57 and 64; B. iii. tit. 6, § 6, and notes by *Mr Ivory*; *Bell's Com.* i. 130; ii. 30, et seq.; *Bell's Princ.* § 1043, 1275, 1946; *Illust. ib.*; *Bell on Leases*, i. 384, et seq.; *Hunter's Landlord and Tenant*, ii. 352, 358, 361. See *Hypothec. Liferent.*

**Future Debt**: is a debt not yet due. Neither debts depending on the event of a law-suit, nor conditional debts, are considered as future debts; for the decree ascertaining the debt in the one case, and the purifying of the condition in the other, have each of them a retrospect, and render the debt effectual from the first. *Ersk.* B. iii. tit. 6, § 9; *Bell's Com.* i. 315; ii. 67, 144, 321, 409, 427, and 6th Ed. p. 1161, et seq.; *Bell's Princ.* § 45, et seq. 2413, and authorities there cited; *Thomson on Bills*, 743. See *Contingent Debts.*

## G

**Gable.** A mutual gable, although partly built on the adjoining subject, is the property of the party who builds it; and he is entitled to prevent the owner of the adjoining subject from making use of it, until he has paid the half of the expense of building it. The right of the builder is a real right. In the case of *Brown v. Wallace*, June 21, 1808, *Mor. App. Personal and Real*, No. 4, it was observed by the Court:—"The ground on which a mutual gable stands is common, mutual, and indivisible, and therefore there is no room for the maxim *inædificatum cedit solo*. The gable, in fact, is the property of the builder till paid for. Until then he has a right to prevent the adjoining proprietor from using it, or adjoining to it any building. The right to a mutual gable being a real right, a singular successor, in virtue of his right to the tenement, is entitled to claim a share of the expense of erecting the mutual gable from the adjoining proprietor, without any special mention of such claim in the conveyance of the tenement. In *Hunter v. Luke*, June 2, 1846, 8. D. 787, the LORD PRESIDENT observed:—"The right to claim one half of the mutual gable was a right which attached heritably to the subject conveyed. It did not require to be specially conveyed, or made the subject of an assignation. He who builds the wall is entitled to get back the half of the expense when his neighbour comes to build; but if he conveys away the house with the wall, this right passes with it." LORD MACKENZIE observed:—"It is the common understanding in all houses, that where parties get a portion of ground for building, and are bound to erect a mutual gable, and one of them builds it, he is entitled to prevent the other from touching it, till he has been paid his half. The right of exclusion is real, it has nothing to do with personality. This was held in the case of *Wallace*. His power of exclusion is very strong—for he can exclude from the whole of the other house. The right is somewhat anomalous, but it is very substantial." LORD FULLERTON observed:—"The right to a gable wall is indivisible. When a party sells it what separate right can he retain to make the subject a separate disposal? Supposing no adjoining house built, what remains in the seller? Nothing. Then, if the next house is built, who is entitled to claim the price of the mutual gable except he who can give the right of it?" LORD JEFFREY observed:—"The proprietor of the house is the sole proprietor of the common gable until the party to divide it with him comes into existence. He is sole

proprietor, with a kind of conventional servitude, provided in favour of the party who comes to build on the adjoining stance, to have right to one half, on paying the party who built it, or the party to whom he may have conveyed it. His whole right to the gable was necessarily conveyed by a conveyance of the tenement as it stood. The case of *Law v. Monteith*, Nov. 30, 1855, 18 D. 125, was to the same effect. In that case it was also held that the right to claim half of the expense of building a mutual gable was a right inherent in the subject, and existed as a ground of liability against the adjoining feuar from the time the mutual gable was erected; but that the term of payment did not arrive till the gable was appropriated. LORD PRESIDENT observed:—"The nature of the property in a mutual gable imports an obligation to pay upon the party who uses it. The presumption is, that no payment has been made for the use, till that use is taken, and there being no contract to the contrary here, the liability follows. The understanding of law is,—that if a party takes advantage of a mutual gable, he takes it on the condition of paying for it." LORD CURRIEHILL observed:—"I think it is quite a legal view, established by the decisions, that although the owner of an unbuilt stance must pay for a mutual gable, the term of payment does not arise till use is made of it by building on the adjoining ground."

A case of some nicety, however, may arise, where an adjoining feuar has paid one half of the expense of a mutual gable to the party who built it, but never appropriated the gable by building against it, and where the party who built the gable sells the house, of which the mutual gable is a part. In such a case, would the purchaser be entitled to demand from the adjoining feuar one half of the expense of the mutual gable when he came to appropriate it, leaving him to claim repetition of the sum formerly paid from the original builder of the gable? The claim of the purchaser would be founded on this—that he bought the house as it stood, and that the house being his property, he is entitled to prevent the adjoining feuar from making use of the gable, which is part of his house, until he is paid one half of the expense of erecting the gable. It would rather appear that the purchaser's claim is well founded. In the recent case of the *Earl of Moray v. Aytoun*, Nov. 30, 1858, 21 D. 33, this point was raised, but not determined, the case having been decided by a majority of the Court on a separate ground. LORD COWAN, however, observed:—"The conveyance of the house carried to the

dispositive right to the gable as an inherent part of the erected tenement, qualified by the condition that, as a mutual wall, it could be possessed, so soon as the adjoining house was erected, only as *pro indiviso* property. So long as the adjoining house was not built, the sole real right in and to the wall remained with the proprietor of the erected tenement. I do not see how this can be disputed. From this it seems to me a corollary, that when the adjoining feu was built on, and the right in the wall became *pro indiviso*, the party who till then had the sole and undoubted right was the party entitled to receive the payment which the other party was bound to make. But it is urged that the claim of the builder of the mutual gable having been satisfied by the payment to him by the adjoining feu, he had no right in him which he could convey to the party to whom he subsequently sold the house. In my mind the conclusive answer is, that the right to payment of half the expense of the mutual gable was inherent in the right to the gable itself, and emerged whenever the adjoining feu was built on, and the wall became *pro indiviso* property."

**Galenas**; a kind of amends, assythment, or satisfaction for slaughter. *Skene, h. t.*

**Game**. Under this title are comprehended wild beasts and fowls, which are the object of the chase or of hunting. Rabbits, however, are not game; and a tenant may kill them for the protection of his crop; *Moncreiff v. Arnot*, Feb. 13, 1828, 6 S. 530. The property of game is acquired by occupation alone; for while it is free, and in a state of nature, it can belong to none. But game originally wild may be deprived of their natural liberty, and thus become the property of the person who has brought them under his power. The right of hunting or of killing game is regulated by various laws (see *Game Laws*); but, independently of those laws, the property of game belongs to the person who shall first kill or apprehend it; and those laws, even although enforced by penalties, do not deprive the person of the property of the game, unless where such deprivation is part of the penalty annexed to the offence. *Ersk. B. ii. tit. 1, § 10*, and *B. ii. tit. 6, § 6*; and *Tait's Justice of Peace*, p. 131; *Irvine on Game Laws*.

**Gamekeeper**. If a person grants deputation as gamekeeper to a servant of his own, or of another, and if for such servant he has already been charged with the duty payable for servants, L.1, 7s. 6d. is the sum exigible for the gamekeeper's certificate; but if the master is not charged with the servant's duty, on account of such servant, L.4, 0s. 10d. is payable. The certificate becomes void on recall of the deputation; but it may be

transferred by the master making a second deputation; in which case the clerk to the commissioners for the district is required to renew the former certificate for the remainder of the year, without any duty or fee, by indorsing on such certificate the name and place of abode of the person to whom the new deputation has been granted, and declaring the same to be a renewed certificate. *Irvine on Game Laws*.

**Game Laws**. The game laws are a system of positive regulations introduced and confirmed by several statutes, the provisions of which ascertain and establish certain qualifications to kill game, and impose penalties as well on such qualified persons, for irregularities in killing game, as on unqualified persons, for hunting or killing game at all. In *Pollock*, 5th June 1828, S. & D. vi. 913, the Bench recognised it as the law of Scotland, that the right of killing game, considered as a real right, is an incident of landed property. A proprietor may, and generally does, possess it on his own estate, or he may possess it on the estate of another person by virtue of a servitude, his own estate being the dominant tenement; but it never appears disjoined from the ownership of land, as a separate tenement constituted by infestment or tack. It is often exercised by delegation, but in that case it is merely a personal privilege. The old qualification was, the possession of a ploughgate of land within Scotland; and this still subsists; so that, one who is not himself qualified, may not kill game beyond the estate of a qualified proprietor who gives him authority. In addition to this qualification, any one intending to use means for taking or killing game, must previously pay a certain annual tax or licence duty. This duty is L.4, 0s. 10d. The taking out the licence does not supersede the necessity for the above qualification; and the possessor of both is not entitled to pursue game upon other ground than his own, or that of one who gives him authority. The most recent statutes upon the subject of the game laws, are 13 Geo. III., c. 54; 9 Geo. IV., c. 69; 2 and 3 Will. IV., c. 68; 7 and 8 Vict., c. 29; 11 and 12 Vict., c. 30. By the first of these it is enacted, that an unqualified person having in his possession at any season, without leave of a qualified individual, any hares, heathfowl, muirfowl, partridges, pheasants, quails, snipes, or ptarmigan, shall forfeit L.1 for a first, and L.2 for any subsequent offence. Whoever takes, kills, uses, or has in his possession, game-birds during close time, forfeits L.5 for each bird; but pheasants taken in lawful time, and kept afterwards in a mew or breeding-place, are excepted. For muirfowl or ptarmigan, the close time is from

10th December to 12th August; for heath-fowl, from 10th December to 20th August; for partridges, from 1st February to 1st September; for pheasants, from 1st February to 1st October. The buying and selling of game is now lawful, to the extent, that a qualified person may buy and sell, and an unqualified may buy from, and sell to a qualified person. A tenant cannot hinder his landlord, or those having his leave, from shooting or hunting over his farm, at least if they do not go through standing corn, or where injury may be anticipated; but he has a claim against such persons for actual damage done. Foxes may be pursued as vermin, even upon the grounds of others. See *Foxes*. By 1707, c. 13, which appears to be still unrepealed, although new regulations have been enacted, poachers forfeit, for each offence, L.20 Scots, besides their dogs, guns, and nets, to the apprehenders; but these cannot be seized *brevis manu*: they must be awarded by a judge. Trespasses by persons unlawfully pursuing game by day, are the subject of 2 and 3 Will. IV., c. 68. By day is meant the period from the beginning of the last hour before sunrise to the end of the first hour after sunset. The trespasser is liable in a penalty of not more than L.2 and expenses. There is no distinction made between inclosed and uninclosed ground. Blackening the face for the purpose of poaching, or being one of a company of five, so engaged, subjects the offender to a penalty of not above L.5 and expenses. The trespasser may be required to quit the lands, and to tell his Christian name, surname, and place of abode, by the person entitled to kill game on the land, or the occupier of the land, or a gamekeeper or servant of either, or any authorized person, under a penalty of L.5 and expenses. Any of the above parties may, on the offender's refusal to quit the land, or tell his name, apprehend and carry him before a justice of peace. An offender may be tried summarily before a single justice; and the owner or occupier of the lands, or the procurator-fiscal, may prosecute. These rules do not apply to any person pursuing with hounds any deer, hare, or fox started on other land where he was entitled to hunt or course. If the trespasser have game in his possession upon any land, any of the above authorized persons may demand the game from the trespasser, and on his not immediately delivering it up, may seize it for the use of the person entitled to the game there. The trespasser committing an assault on any one acting in compliance with this statute, subjects himself to an additional penalty of not more than L.5, on conviction before two justices. The Mutiny Acts contain a penalty of L.5 on each

officer, and 20s. to be paid by the commanding officer for each soldier, who, without leave of the lord of the manor, shall take or destroy any hare, coney, pheasant, partridge, or pigeon, or any other sort of fowl, poultry, or fish, or game within the kingdom of Great Britain. These fines may be recovered for the use of the poor of the parish, by complaint before the justices of the peace; and the officer who shall not pay the fines found due, within two days from the time a demand is made by the constable, shall lose his commission. The acts 9 Geo. IV., c. 69, and 7 and 8 Vict., c. 29, relate to the prevention of persons going armed by night for the destruction of game. For the punishment of trespasses committed during the night, see *Night-Poaching*. The prosecutor as well as the defender may appeal to the Court of Justiciary, under the Act 13 Geo. III., c. 54; *Gray v. Bonnar*, Jan. 23, 1816, 19 *F. C. App.* 1.

The act 11 and 12 Vict., c. 30, enables all persons having at present a right to kill hares in Scotland, to do so by themselves, or by persons having written authority from them, without taking out a game certificate. Deer were considered *inter regalia*, and could be hunted only by the king, or those having a grant of forestry; and deer-stalkers, who were at one time punishable with death and the confiscation of moveables, are, by 1587, c. 59, ratified by 1597, c. 270, declared to incur the punishment of theft. On the subject of this article generally, see *Irvine on the Game Laws*; 6 and 7 Will. IV., c. 65, § 8; *Craig*, B. ii. dieg. 8, § 13; *Stair*, B. ii. tit. 3, § 68 and 76; *Ersk. B. ii. tit. 6*, § 6, and notes by *Ivory*; *Bank. i.* 593; ii. 571; *Bell's Princ.* § 948; *Illust. ib.*; *Bell on Leases*, i. 434; ii. 395; *Hunter's Landlord and Tenant*, i. 324; ii. 185, 208, 319, 370; *Hutch. Just. of Peace*, ii. 546; *Tait's Just. of Peace*, h. t.; *Blair's Just. of Peace*, h. t.; *Tomlins' Dict. h. t.*; *Watson's Stat. Law*, h. t.; *Kelly (Court of Justiciary)*, June 27, 1780; *Marquis of Tweeddale*, March 3, 1778, *M.* 4992; *Lord Breadalbane*, June 16, 1790, *M.* 4999; *Ronaldson*, Nov. 1804, *M.* 15,270; *Colquhoun*, Aug. 6, 1785, *M.* 4997; *Brown's Synop. h. t.*; *Shaw's Digest*, h. t. and p. 282; *S. & D.* xi. 147. See *Muirburn*.

**Gaming and Betting.** By 1621, c. 14, playing in taverns is prohibited under a pecuniary penalty for the first offence, and a loss of licence for the second. Playing in private houses is also forbidden if the master do not play; and if any one, in the course of twenty-four hours, win more than 100 merks, the surplus goes to the poor of the parish, a provision which, in 1775, was held not to be in desuetude. By 9 Anne, c. 14, all notes, bonds, and other securities for the payment of

a gaming debt (including money lent at the time to play withal), were void, and mortgages of land made upon the same consideration, reverted to the heir of the mortgagor. This nullity was, by the English law, considered a *vitium reale*, and was effectual, not only against the winner, but even against a *bona fide* onerous indorsee or assignee; and in Scotland, after some fluctuation, the same rule was adopted. But an indorser discounting the bill and obtaining money for it, could not plead such a defence. In England, an injunction might be obtained in Chancery to prevent bills for gaming debts being indorsed to third parties. Now, however, by 5 and 6 Will. IV., c. 41, all statutes which declare bills, notes, and other securities made, drawn, given, or executed for gaming or usurious debts, null and void, are so far repealed, and it is provided that such documents shall be deemed and taken to have been made, drawn, &c., for an illegal consideration. The previous statutes are to be read as if they had so provided; and if any person who has made, drawn, or given such a note, bill, or other document, shall pay the contents, or any part thereof, to an indorsee, holder, or assignee, such money is to be deemed to have been paid to the person to whom the document was originally granted, and is to be deemed and taken to be a debt due by such last-named person to the person who shall have so paid the money, and is to be recoverable by action at law. The effect of this statute is to render such documents effectual to a *bona fide* onerous indorsee or holder. See the case of *Don v. Richardson*, June 16, 1858, 20 D. 1138, and opinion of English counsel therein.

By 9 Anne, c. 14, any one who has lost L.10 at a sitting may, within three months, sue for it and costs from the winner. The punishment of cheating at cards is forfeiture of five times the value of what was won, to any who shall sue for it; infamy, and the corporal punishment inflicted on wilful perjury. It has been matter of question, whether or not this, and several other English statutes regarding gaming, extend to Scotland. In England, bets or wagers were once, by common law, legal contracts; and they may still be recovered in a court of justice, unless made on unlawful games. But all wagers having a dangerous or immoral tendency, as wagers between two electors, on the result of an election, or wagers on the duration of a man's life, are *pacta illicita*. In Scotland, bets are considered *sponsiones ludicæ*; and no action can be maintained for the recovery of sums won in that way; but injuries resulting from such transactions may be the foundation of an action of damages. A person

suspected, on good grounds, of gaining his livelihood by gaming, may be apprehended and brought before any two justices of the peace, when, unless he can show that gambling is *not* the principal means of his subsistence, he may be ordained to find security for his good behaviour for twelve months, and his bond of caution will be forfeited if he is found, during the twelve months, to have played for more than L.1 at a sitting. The General Police Act, 13 and 14 Vict., c. 33, § 209, provides, with respect to the punishment of chain-droppers and swindlers, that all persons of that or any similar description, "who shall be found in possession of implements or articles for practising games of hazard, or who shall exhibit such implements or articles, in order to induce or entice, or who shall induce or entice any person to play at any game of hazard, or who, by fraudulent act and device, shall cozen and cheat, or attempt to cozen and cheat, any person," may be convicted before the sheriff or magistrate, and punished with imprisonment not exceeding thirty days; and also shall, at the same time, be sentenced to restore the money or property obtained, and failing restoration, to further imprisonment not exceeding thirty days. 9 Anne, c. 14; 18 Geo. II., c. 34; 58 Geo. III., c. 70; 3 Geo. IV., c. 114; *Bell's Com.* i. 299, *et seq.*; *Bell's Princ.* § 36 and § 329, and authorities there cited; *Bell's Illust.* ib.; *Stair*, B. i. tit. 10, § 3, and note by *Brodie*; *Tait's Justice of Peace*, h. t.; *Blair's do.* h. t.; *Bank*, i. p. 204, *et seq.*; *Christian's note to Blackstone*, vol. iv. p. 173; *Dunlop's Parochial Law*, p. 222, *et seq.*; *Kames' Equity*, 354; *Thomson on Bills*, 130, 141.

See also, on the subject of this article, the case of *Foulds v. Thomson*, 10th June 1857, 19 D. 803, where it was decided that speculative transactions in stocks did not amount to gaming or wagering, either at common law or in the sense of the act 7 and 8 Vict., c. 109, § 18; and the case of *Pollock*, 5th Feb. 1848, 10 D. 646, where a multiplepointing was held competent, at the instance of the stake-holder at a coursing meeting, to try which of two parties, the one being the owner and the other the namer of a dog which had won, was entitled to the prize. The act 16 and 17 Vict., c. 119, for the suppression of betting-houses, does not extend to Scotland. See *Pactum illicitum*. *Lottery*. *Wager*.

**Garba Sagittarum.** a sheaf of arrows, containing twenty-four. *Skene*, h. t.

**Garbales Decimæ.** *Garba* signifies a sheaf or handful of corn; and the term *decimæ garbales* means the tithes of corn. They were also termed *decimæ rectoriæ*, from *rector*, a parson; or parsonage tithes. These tithes extend, by the practice of this country, to the



tithes of wheat, barley, oats, pease, &c., and are exigible from all the lands in Scotland. In this respect they differ from the lesser or vicarage tithes, which are due only where they have been in use to be paid. *Ersk. B. ii. tit. 10, § 13. See Teinds.*

**Garcifer:** *garçon*; from the French, a mill-servant,—a mill-knave. *Skene, h. t.*

**Gargiatores;** in ancient law language, those who marked with the mark of their office the cloth, bread, or barrels before they were sold, or who tried and examined all weights and measures. *Skene, h. t.*

**Gavelkind.** In Kent, and certain other counties in England, lands and tenements are, by immemorial custom, held in gavelkind; that is to say, all the male issue inherit equally. *Tomlins, h. t.; Bank. vol. ii. p. 317; Stair, B. iii. tit. 4, § 22.*

**Gazette.** Royal proclamations, and the like, printed in the Gazette, are probative, without production of the proclamations. But gazettes are not evidence of private titles or interests, such as presentations or grants to individuals. As to the question, whether publication in the Gazette is a sufficient notice of dissolution of partnership, to free the partners from debts afterwards contracted in name of the company, it has been decided that it is not alone sufficient against such as were formerly in the habit of dealing with the house. With regard to parties dealing with the company for the first time, there is a difference between the English and Scotch law. In the former, it is doubted whether notice in the Gazette is sufficient, in all cases, even against strangers. While, in the latter, it is held that persons contracting for the first time with a company are bound to inquire into its existing condition, and notice, even in a provincial newspaper, is sufficient. But all reasonable means ought to be taken to publish the dissolution. *Bell's Princ. § 383; Tait on Evidence, p. 50; Thomson on Bills, 249.* Under the bankrupt act and some other statutes, certain notices required by the statutes are directed to be given by publication in the Gazette. See *Sequestration. Trustee.* See also *Evidence.*

**General Assembly.** The General Assembly of the Church of Scotland is the highest ecclesiastical court. For an account of its constitution and powers, see *Church Jurisdictions. Commissioner. Overture.*

**General Charge.** See *Charge to enter Heir.*

**General Special Charge.** See *Charge.*

**General Discharge.** See *Discharge.*

**General Disposition and Settlement.** See *Disposition and Settlement and Titles to Land.*

**General Jury Book;** a book kept by the sheriff, containing the names of all persons

within the county liable to serve as jurors. On a notice or requisition from the clerk of the court where the trial is to take place, the sheriff makes up a list of jurors from the general jury book, taken in the order in which they stand, containing, as nearly as possible, a third of special jurors, and if not, the deficiency is supplied from the *Special Jury Book.* 6 *Geo. IV., c. 22, §§ 3, 7, 8 and 9; Steele, 4.* See *Special Jury Book.* See also *Jury.*

**General Letters of Horning.** These were letters formerly in use, running in the King's name, directed at the instance of the bishop, and charging all concerned with the executry of a deceased person to confirm; and in case of their failing to confirm, the bishop appointed his own fiscal to be executor, who, as such, had right to the whole of the dead's part; but this was put an end to by the act 1690, c. 26, which prohibited those general letters. *Ersk. B. iii. tit. 9, § 33; Stair, B. iii. tit. 3, § 11, also B. iv. tit. 3, § 25, and tit. 47, § 4; More's Notes, p. cccxi.; Bell's Com. ii. 169; Bank. vol. iii. pp. 4, 10; Brown's Synop. h. t. See Executor. Confirmation.*

**General Service.** This form of service is intended to vest the heir with such heritable rights belonging to the ancestor as do not require sasine, or to which the ancestor had merely personal rights (e. g., unexecuted procuratories of resignation or precepts of sasine). *Ersk. B. iii. tit. 8, § 63; Bell's Princ. § 781, 1848; Jurid. Styles, 4th edit. vol. i.* See *Services. Entry.*

**General Verdict;** an announcement of the general result at which the jury have arrived, expressed by the word "guilty" or "not guilty," or "not proven," without disclosure of the grounds of their conclusion. A general verdict is final as to the prisoner's guilt or innocence. *Hume, ii. 439; Alison's Prac. 644; Steele, 211.* In civil causes, where the verdict is in general terms for the pursuer or for the defender, it has been termed a general verdict, in contradistinction to a *special verdict*, where special facts are found by the jury, leaving their legal effect for the future determination of the Court. See *Verdict. Special Verdict.*

**German.** Those born or descended of the same father or mother, are said to be connected in full blood, or german. *Bell's Princ. § 1651; Illust. ib. Succession. Half-Blood.*

**Gestio pro Hærede.** See *Behaviour as Heir.*

**Gift;** is synonymous with donation; see *Donation;* but the term, in Scotch law, is sometimes applied in particular to royal gifts—e. g., gifts of non-entry, escheat, bastardy, forfeiture, *ultimus hæres*, all of which are royal grants proceeding on signatures, and passing the Privy Seal, Quarter Seal, or

Great Seal, according as they convey rights of greater or less consequence. Thus, all gifts of casualties of superiority pass under the Privy Seal; gifts of bastardy, of forfeiture, or of *ultimus hæres*, pass the Quarter Seal, where the lands hold of a subject superior; but where they hold of the Crown, the gift passes the Great Seal. According to the present practice, the first step taken by a party soliciting such a gift is to present an application to the Lords of the Treasury, stating the circumstances under which he applies. A remit is then made by the Lords of the Treasury to the Officers of Exchequer in Scotland; and the applicant must give notice of his application in certain newspapers appointed by those officers. At the end of a twelvemonth the application is taken into consideration, and a gift made or refused according to the report of the Exchequer officers. If the gift be made, it is chargeable with a stamp-duty of £30 (55 *Geo. III.*, c. 184, schedule, *voce Grant*); in addition to which, there are certain fees exigible by the officers of Exchequer. *Brown's Synop. h. t. See Donatory. Escheat. Exchequer. Bastardy.*

**Gilda**; a society and company of merchants. In the old British laws, "*gilder* signifies the order of society of religious men, or of craftsmen." *Skene, h. t.*

**Girth and Sanctuary**; was an asylum given to murderers, where the murder was committed without any previous design, and in *chaud melle*, or heat of passion. At the Reformation, the privilege of sanctuary in criminal matters was abolished, and the protection of girth and sanctuary could, of course, be no longer claimed. *Hume, i. 235; Ersk. B. iv. tit. 4, § 40; Bank. vol. iii. p. 14, l. 1; Ross's Lect. i. 331. See also Chaud Melle.*

**Girtholl**; girth, sanctuary, asylum. *Skene, h. t.*

**Gleaning**. It is said that, by the law of England, the poor may enter and glean upon another's ground after harvest; but in Scotland, it has been established by repeated decisions, that the poor possess no such right, at least while the sheaves remain on the ground, and that the farmer may exclude them. *Hutch. Just. of Peace, ii. 47; Dunlop's Parish Law, 223.*

**Gleba**; a glebe given and granted to kirkmen, ministers of the Evangel. *Skene, h. t.*

**Glebe**; the portion of land to which, generally speaking, every parish minister in Scotland is entitled, in addition to his stipend. From this rule are excepted the ministers in royal burghs proper, who cannot claim a glebe, unless there be a landward district annexed; and, even in that case, where there are two ministers, it is only the first who has the claim. In the case of disjunction of a

parish also, the decree sometimes provides that the minister of the portion disjoined and erected into a new parish, shall not be entitled to a manse or glebe. By 5 *Geo. IV.*, c. 72, provision is made for payment out of the public revenue of an allowance or additional stipend, in lieu of manse and glebe, to such ministers, whose stipends do not exceed £200, as may not be entitled thereto. Where there are arable lands, the glebe must consist of four acres; where there is no arable land, the minister is entitled to sixteen souns of grass next adjacent to the church,—a soun of land being as much as will pasture ten sheep or one cow. But this matter may be affected by local custom. It was formerly the rule, that the glebe should be designed out of church-lands; but the act 1644, c. 31, authorized the designation of temporal lands, where there were no church-lands; and by 1649, c. 45, it was enacted, that where glebes were inconveniently distant from the manses, they might be changed, and new glebes designed within a quarter of a mile of the manse, "villages and incorporate aikers" being the only lands excepted. These acts having been passed during the Usurpation, were afterwards rescinded; but the act 1663, c. 21, though it does not specially renew their provisions, has been held in a general way to revive them; and it has always been assumed, that where there are no church-lands, temporal lands should be designed. The question, however, whether temporal lands can be designed even in a parish where there are church-lands, is not settled by any recent decision; but Sir John Connell (*Parishes*, 370) states, that, in the designation of arable glebes, the distinction between temporal and church-lands has of late been wholly disregarded. See *Kingsbarns, ut infra*, and also 10th June 1794, *Bell's Cases, and Mor. 5140; Laidlaw, 2d Dec. 1800, Mor. App. voce Glebe, No. III.* The revising statute, 1663, continues to exempt "incorporate acres in village or town, where the heritor hath houses and gardens, he always giving other lands nearest the kirk." It has been held that lands are liable to be designed for a glebe as church-lands, although the superiority of them only had belonged to the church for a long period before the Reformation; and when, at the time of designing a glebe, there are lands in a parish held of the Crown in right of a priory, others held by the Crown in right of a bishop, and others held by a university in right of a priory, the first are primarily liable, the bishop's lands in the second place, and the others only *ultimo loco*, whatever may have been the description of the lands at the Reformation, or at the date of the act 1593; *Minister of Kingsbarns, 11th June 1799, Mor.*

*App. voce Glebe*, No. 11. In this question, temple lands—i.e., lands which formerly belonged to the knights-templars—are not held to be church lands; *Bank. B. ii. tit. 8, § 22*. The glebe must be taken as near the manse, and as commodious for the minister as possible,—a provision intended for the benefit of the heritors as well as of the minister, so that the latter is not entitled to pick and choose remote lands merely on account of the superiority of the soil. Where there is no manse, vicinity to the church is taken as the criterion. Where a glebe has once been designed, and possessed as such, a new designation will not be allowed on the ground of inconvenience of situation, inferior quality of soil, or deficiency in extent. In this last case, however, as much may be designed as will make up the deficiency. By the rescinded statute, 1644, c. 31, it was provided, that where a glebe has become unprofitable by inundation or other extraordinary accident, a new one might be designed. This provision has not been specially revived, but it is believed that such a course would be adopted were the destruction complete. The heritor whose lands are designed as a glebe, has recourse against the other heritors of the parish. But his claim does not form a *debitum fundi*; it lies against the heritors for the time only, and their heirs. The presbytery possess the power of designing a glebe, and giving warrant for letters charging the heritor from whose property the glebe is designed, to carry the designation of the presbytery into execution. After designation by the presbytery, if the possessors of the lands, designed for manse or glebe, do not yield possession to the minister, he may, on producing the designation at the Bill-Chamber, obtain warrant for letters of horning to charge the possessors to remove; and disobedience to this charge may be followed by caption; 1572, c. 48; *Bank. B. ii. tit. 8, § 120*. By 1572, c. 48, it is enacted, that a glebe cannot be alienated by the incumbent. But as the act limits the prohibition to such alienations as may be detrimental to the incumbent's successor, it has been doubted whether the incumbent might not feu. Cases have occurred, however, in which the Court have refused to sanction feus, even where the feuduty offered was quadruple of the rent in tillage. Upon the transportation of a church to a new site, the Court have authorized a sale or excambion of the glebe. Excambions of glebes must be sanctioned by the presbytery. The minerals of a glebe are worked at sight of the heritors and presbytery, and the proceeds are placed under their management for behoof of the incumbent for the time. Trees growing on the glebe have been

thought to belong to the minister; *Heritors of Keith and Humbie*, Feb. 16, 1791. See, on the subject of this article, *Ersk. B. ii. tit. 10, § 59, et seq.*; *Stair, B. ii. tit. 3, § 4 and § 40*; *tit. 8, § 7*; *More's Notes*, pp. clxxii. and cxcii.; *Bank. vol. ii. pp. 46, 119, et seq.*; pp. 78, 217, *et seq.*; *Bell's Princ. § 1172, et seq.*; *Illust. ib.*; *Hill's Church Prac. 141*; *Connell on Parishes, 337*; *Brown's Synop. h. t.*; also, pp. 1526, 1544, 2078, 2339; *Hutch. Justice of Peace*, vol. ii. p. 410, *et seq.*, 2d edit.; *Shaw's Digest*, p. 122, § 53; *Dunlop's Parochial Law*, pp. 75, 231; *Hunter's Landlord and Tenant*, i. 116, *et seq.*; *Connell on Parishes*, p. 166, *et seq.*; *Jurid. Styles*, 2d edit. vol. iii. pp. 511, 698, 933; *Watson's Stat. Law, h. t.*; *Anderson, Dow's App. Cases*, ii. 433; *Kames' Equity*, 112; *S. & D. xiii. 787, 978*. See *Dilapidation of Benefices. Grass of Minister.*

**God, Offence Against.** Although every crime is an offence against God, the offence to which this expression is specially applied in criminal law, is that of blasphemy. This crime is described in the act 1661, c. 21, which distinguishes between railing at and cursing God, and denying God, or any of the persons of the blessed Trinity. The former of those offences, or that of railing at and cursing God, is declared punishable with death. The latter, or the denying of God, is punishable with death, only where the criminal obstinately continues therein; and his obstinacy is, by the act 1695, c. 11, explained to be his being for the third time convicted of this crime. *Ersk. B. iv. tit. 4, § 16*; *Hume, i. 559*. See *Blasphemy. Cursing*.

**Gold Mines.** By an unprinted act (1592), gold mines may be demanded in feu from the Crown, by the proprietor of the ground in which the mines are, on payment of one-tenth part of the produce, not deducting charges. And should mines be found and not wrought by the proprietor of the ground, the Sovereign is then at liberty to work them or set them in feu to others. *Ersk. B. ii. tit. 6, § 16*; *Stair, B. ii. tit. 3, § 60*, *Bank. vol. i. pp. 573, 109*; *Bell's Princ. § 1669*.

**Gold Plate.** See *Silver Plate*.

**Good Friday;** the Friday in holy or passion week, observed by the Christian Church (with certain exceptions, including Presbyterians) as a fast. On that day an election cannot proceed, nor a poll be held, nor a return be declared, in England, Scotland, or Ireland. *Chambers' Election Law, h. t.*; *Rogers' Law of El., 262*.

**Goods in Communion;** are the moveable subjects belonging in common to husband and wife. They comprehend all the moveable property belonging to either of the parties, except such effects as have been given to the wife, expressly excluding the *jus mariti*, and

the wife's paraphernalia, as to which there is an implied exclusion of the *jus mariti*. A personal bond, bearing interest, does not fall under this description of goods; 1661, c. 32. The husband, during the subsistence of the marriage, has the uncontrolled administration of the goods in communion. Formerly if the marriage was dissolved within year and day without a living child, the common stock returned to the husband and wife, or their representatives, in the proportions in which it was contributed. This is now altered by the Act 18 and 19 Vict., c. 23, § 7 (1855), and the rights of the spouses are the same as if the marriage had subsisted for year and day.

On the dissolution of the marriage by the death of the wife, the goods in communion where there was no child, formerly suffered division into two equal parts, one of which was at the wife's disposal, or failing her disposal of it, it went to her next of kin, and the other half belonged to the husband. In the case where there were children, and the marriage was dissolved by the predecease of the wife, one-third part of the goods in communion went to her children, by the last or any preceding marriage, as her next of kin, and the other two-thirds remained with the father, *legitim* being a claim which does not arise until his death. The children, if not under age, were entitled to their mother's share immediately on the dissolution of the marriage, but as to such of the children of the last marriage as were minors, their father, as their administrator, had the management of their proportion of their mother's share of the goods in communion. The law, however, is now altered by the Act 18 and 19 Vict., c. 23, § 6, which enacts that the representatives of a wife who predeceases her husband, shall have no right to any share of the goods in communion, and that no bequest by her shall affect these goods.

When the marriage is dissolved by the predecease of the husband, and there are no children, the goods in communion suffer a bipartite division; one division, termed the *jus relicta*, going to the wife; and the other, called the *dead's part*, going to the legatees or the executors of the husband. When there are children, and the husband predeceases, a tripartite division takes place. One division goes to the wife, another to the children, and the third also to the children as their father's executors, or to his legatees, in the event of his leaving a settlement. See the Act 18 and 19 Vict., c. 23 (1855). See *Legitim. Jus Relictæ. Marriage. Confirmation. Executor.*

**Goodwill**; the custom of any trade or business. It may be the subject of contract. In England the specific performance of an agreement to sell the goodwill of a trade has been

decreed; but it has been doubted whether, when a goodwill forms the *principal* part of a contract, performance will be decreed. *Bell's Princ.* § 91; *Tomlins' Dict. h. t.*

**Government.** By this term is meant the constitution of the country, as vested in the Sovereign and Parliament. Its great powers are the legislative and the executive—the former making the laws which the people are to obey, and by which their rights and privileges are to be regulated—the latter enforcing those laws, making peace, or declaring war, and performing the other great executive functions of the state. The legislative power of the British Government is placed in the Sovereign and the three estates of Parliament—viz., the lords spiritual, the lords temporal, and the representatives of the people in the Commons House of Parliament. See *Parliament. Election Law. Reform Act.*

**Government Stock.** See *Stock.*

**Grace, Act of.** See *Act of Grace. Alimnt.*

**Grace, Days of.** See *Days of Grace. Bill of Exchange.*

**Grandfather.** Is the second in the line of ascendants; and, where the father fails, he is bound to support his indigent grandchildren; but he is not bound to support his grandchildren by his daughter, unless the father and paternal grandfather of such children be unable; in which case the burden will fall on the maternal grandfather. *Ersk. B. i. tit. 6, § 56; More's Notes to Stair, p. xxix.* See also *Ascendants. Executors. Alimnt. Succession.*

**Grandchildren**; have a claim for alimnt while they are unable to maintain themselves, and where their father is unable to alimnt them, against their paternal grandfather; and, where he also is unable, against their maternal grandfather, in the manner explained in the preceding article. *Ersk. ibid.*

**Grand Jury**; in England, the jury of twenty-four good and lawful men, which finds bills of indictment before justices of peace, and gaol-delivery, or of *Oyer and Terminer*, &c. Their duty is only to hear witnesses for the Crown; and to find a bill on probable evidence; *Tomlins' Dict. h. t.* There is no such institution in Scotland, the duties of the grand jury being there discharged by the Lord Advocate, except in cases of treason, when, the English and Scotch treason laws being the same, a true bill must be found precisely as in the English practice. See *Oyer and Terminer. Treason. Advocate, Lord. Criminal Prosecution. Ignoramus. 4 Step. Com. 422.*

**Grant.** Technically speaking, the term *grant* is not applied to a deed by which either lands or moveables are conveyed. Our deeds of conveyance are charters, by which lands are originally conveyed—or charters by pro-

grass, by which the superior continues the right to the heirs or creditors of the vassal, or the purchasers from him—or dispositions, by which the vassal himself transfers his property to those to whom he has occasion to convey it. The term *disposition* is used even in the conveyance of moveables, where writing is required. But the term *grant*, though not employed to denote the deed of conveyance, is used in original rights of land, and in gratuitous conveyances, as a term of conveyance. Thus, in granting a feu-right, the superior uses the expressions, I GIVE, GRANT, AND DISPOSE. In a settlement, the grantor employs the same words; whereas, in a sale, the expressions are, I SELL, ALIENATE, AND DISPOSE. These are words of style; and the distinction between give, grant, and dispoise, and sell, alienate, and dispoise, has been thought to mark the difference between onerous and gratuitous deeds. *Ersk. B. ii. tit. 3, § 22; Stair, B. ii. tit. 7, § 6; Bank. vol. ii. pp. 259, 39; Bell's Com. i. 22, et seq., also Adenda, No. ii. v.; Jurid. Styles, 4th edit. vol. i. p. 1. See Titles to Land.*

**Grant:** in English law, a conveyance in writing of incorporeal things which cannot pass by word only, as of reversions, advowsons in gross, tithes, rents, services, common in gross, &c. The term is, in a wider acceptation, used for a gift of whatever kind. *Tomlins' Dict. h. t. See Deed Poll.*

**Grass.** Grass, whether natural or industrial, is considered a pertinent of the soil, and passes to purchasers. In questions between heir and executor, natural grass is held to be heritable, and even when it has been sown down with corn, the executor is not entitled to the crop of hay produced in the succeeding year, but merely to the first year's pasturage after cutting down the white crop. But, it would appear that, in questions as to a way-going crop, hay sown in a penult year of the lease, and yielding the first crop in the year of removal, is to be classed along with the crops of arable land; *Keith, 3d Dec. 1825, 4 S. & D. 267.* In grass farms, the landlord's hypothec extends over the grass-mail, if the fields are let out to pasture, but not over the cattle of others grazing there; nor over grass cut for sale. The doctrine of tacit relocation has no application to grass fields let from year to year, and the tenant is not entitled, without a new bargain, to possess for a day after the stipulated term of removal has arrived. *Bell's Com. ii. pp. 29, 104; Bell's Princ. § 1233; Illust. § 1262; Bell on Leases, 4th edit. vol. i. p. 398.*

**Grass, of Ministers.** By the act 1663, c. 21, the minister of a parish has right (over and above his glebe), to grass for a horse and two cows. This grass should be taken out of

the nearest church lands; and, where there are no church-lands in the parish, it has been made a question whether the grass can be demanded. But where the church-lands are either at a distance, or not grass-lands, the minister is entitled to L.20 Scots as an equivalent; and this equivalent is paid to him by the heritor of the nearest church-lands, who has his recourse for proportional relief against the heritors of the other church-lands in the parish. Grass may be designed, although the glebe contains more than four arable acres or sixteen souns of pasture. *Ersk. B. ii. tit. 10, § 62; More's Notes to Stair, p. clxxiii.; Bell's Princ. § 1172; Illust. ib.; Hill's Church Prac. 143; Dunlop's Parish Law, pp. 109, 89. See Glebe.*

**Grassum;** an anticipation of rent in a gross or *slump* sum, or a fine paid in consideration of a lease for a term of years. In questions with singular successors there is no limitation of the power to take grassums, only the rent must not be thereby diminished so as to be altogether elusory. The same rule applies in the case of lands under entail, when there is no prohibition to alienate, or against diminution of the rental. When, however, there is a prohibition to alienate, the general rule seems to be, that the heir in possession must administer the estate *secundum bonum et æquum*, taking no more of the annually accruing rents and profits than he leaves to descend to his successors. Hence, grassums, as being, in effect, anticipations of the future rents, to the prejudice of succeeding heirs, are held to be struck at by a prohibition against alienation. If there be a prohibition to alienate, but with an express power to grant leases on condition of not diminishing the rental, the rental under the last lease is implied, and it has been thought that a grassum may be taken. But a prohibition to let leases below the just rent for the time constitutes a bar to the taking of grassums. *Stair, B. iv. tit. 9, § 20; More's Notes, clxxv.; Ersk. B. iii. tit. 8, § 29, note by Ivory; Bell's Princ. § 1228, 1752; Bell's Com. i. 72; Bank. vol. ii. p. 104; Hunter's Landlord and Tenant.*

It may be doubted, if in any case the heir in possession is entitled to take a grassum. It is rather thought that the heir in possession is bound to act fairly in regard to the substitute heir, and not to let at the minimum rent allowed by the entail, where that rent is far below the true value of the land, and where the difference between the real value and the rent stipulated is paid in the form of a grassum. The case of *Elgin v. Wellwood*, 13th June 1821, 2 *Shaw, App. 44*, is thought to be an authority for an opposite view, but it may be questioned whether the

point was properly adjudicated upon in that case as both parties to that action were interested in having the lease sustained. *Bell on Leases*, i. 126, 141, 229, 290; *Ross's Lect.* ii. 494; *Queensberry Leases, Bligh App. Cases*, i. 447. See *Tailzie. Diminution of Rental.*

**Gratuitous Cause.** Where a deed is granted from favour, or as a gift or donation to the receiver, it is said to be granted gratuitously. See *Consideration. Donation.*

**Gratuitous Deed.** A gratuitous deed is one which has been granted without any value being given for it; and although a person may dispose of his own property as he pleases, yet the law does not permit a person to dispose of his property to the prejudice of his creditors, or of those to whom he is under legal obligations, or, in certain cases, even to the prejudice of his own rights. In regard to donations, by which the rights of creditors may be affected, the statute 1621, c. 18, has provided, that all alienations granted after the contracting of lawful debts, in favour of conjunct or confident persons, without true, just, and necessary causes, shall be void and null. But whatever may be inferred from the words of the statute, practice has so explained them, that a donation, even to the nearest relation, is not voidable at the instance of a prior creditor, provided the grantor was solvent at the time of making the donation, though he should afterwards have failed, and been unable to pay his debts. In like manner, where a gratuitous right in favour of a conjunct and confident person, has been transferred by him, for value, to a third party, who is ignorant of the fraud, it will not be challengeable in the person of the *bona fide* onerous holder. See *Conjunct and Confident. Collusion. Bankrupt.*

Where the deed is gratuitous, and constitutes an obligation to be afterwards implemented, if the grantor shall, before implement, fall into poverty, he may, at least where the deed is in favour of children or grandchildren, retain sufficient for his own subsistence. But our law does not seem in this particular to follow the Roman law, by extending the rule to cases where the donation is made to strangers. See *Beneficium Competentiæ. Donation.* The warrandice of gratuitous deeds extends only to future donations; and merely warrants the right as it stands to the donee, to be free of farther or greater burdens than those with which it is charged at the time of making the donation. *Ersk. B. ii. tit. 3, § 25; Bell's Com. i. 92, 314; ii. 182, 185, 191, 197; Bell's Princ. §§ 64 and 2410; Illust. § 64; Shaw's Digest, p. 314, § 71; Ross's Lect. ii. 494; Jurid. Styles, 4th edit. vol. i. p. 109.*

A simple substitution of an heir was always defeasible by a gratuitous deed; but

formerly where a person held an estate under a deed which prohibited him from alienating the lands, or burdening them with debt, or altering the order of succession, although such deed did not amount to a strict entail under the Act 1685, yet he could not by a gratuitous deed affect the rights of the heirs who were entitled to reduce such gratuitous deed. This, however, is not now the law, for, by the act 11 and 12 Vict., c. 36, § 43 (1848), no entail is effectual which does not contain the three cardinal prohibitions against altering the order of succession, contracting debts and sales, duly fenced with irritant and resolute clauses. By the same act, § 39, irritant and resolute clauses are implied in the warrant to record the entail in the register of entails; and, by the Titles to Land Act, § 18 (1858), the three cardinal prohibitions against alienation, contracting debt, and altering the order of succession, are implied in such warrant of registration.

**Grave-Digger.** See *Church Officers.*

**Grave-Stones.** The heritors have the right to grant or refuse permission to place tombstones over the graves in the parish church-yard, and to determine the manner in which they shall be placed, as upright or flat; and it is thought, that if necessary, the heritors may cause such grave-stones to be removed. *Dunlop's Parochial Law*, p. 2. See *Church-Yards. Burying-Place.* As to the admissibility of tombstones in evidence in questions of pedigree, see *Dickson on Evid.* 591, 2.

**Great Avisandum.** In the judicial procedure of the Court of Session *great avisandum* is *avisandum* from a Judge in the Outer-House to the Judges in the Inner-House. See *Avisandum.*

**Great Seal.** Upon the Union of Scotland and England, a Great Seal for the United Kingdom became necessary for public acts and instruments. But this Great Seal not being appropriate for those private grants which had formerly passed the Great Seal of Scotland, by Article 24 of the treaty of Union, a Great Seal, for the purpose of sealing private grants in Scotland, was ordered to be made, and declared to have the same effect with the ancient Great Seal of Scotland. *Ersk. B. ii. tit. 5, § 86; Tomlin's Dict. h. t.; Stair, B. iv. tit. 35, § 11; Jurid. Styles, 4th edit. vol. i. p. 343. See Seals.*

**Ground-Annual;** a kind of estate, intermediate between that of the superior and that of the vassal, of the nature of a perpetual annuity. It is of two kinds; the one arising out of church property, as affected by the Reformation; the other originating in the great demand in modern times for building-ground in towns. At the Reformation, the church property was parcelled out in lord-

ships erected by the Crown; and to restrain such erections for the future, several acts of annexation were passed. See *Annexation*. In the beginning of the seventeenth century, the Lords of Erection resigned their superiorities to the Crown, with the exception of the feu-duties, which the Crown had power to redeem on payment of a certain consideration. The consideration never having been paid, the power of redemption was renounced, and the feu-duty thus perpetually payable to the successor of a Lord of Erection is called a ground-annual. It has been usually conveyed by resignation and infestment only. The other kind of ground-annual has originated thus: Where sub-feus are prohibited, those who speculate in building-ground, by taking land in feu, with the intention of again disposing of small portions to builders, stipulate for an annualrent from the builder, rather than a price payable at once. This is accomplished by the creation of a ground-annual. The disposition is granted to be held public, in compliance with the condition of the feu-charter; but the subject is charged with an annual payment to the disposer, and his heirs and assignees; and either a burden or annuity is reserved, which is declared a real burden; or a bond and disposition, in security of the annuity, is granted by the purchaser, on which infestment is taken. *Ersk. B. ii. tit. 3, § 52; Bell's Com. i. 30, Addenda III.; Bell's Princ. § 884; Illust. ib.; Ross's Lect. ii. 326, 392; Shaw's Digest, 530; Skene, voce Annual. See Annual. Top-annual.*

When the original donee to the lands over which a ground-annual is constituted, conveys the lands to another, he is not released from payment of the ground-annual, but continues liable to the creditor in the ground-annual. *Small v. Miller, Feb. 3, 1849, 11 D. 495; as reversed in the House of Lords, 17th March, 1853, 1 Macquenn, 345.*

**Grounds and Warrants.** In an action of reduction, the grounds of debt on which a decree proceeds may be called for, even after the lapse of the long prescription. The warrants of a decree, whether extant or not, cannot be called for after twenty years; but within that time, it has been held that the defender must produce them, although in *publica custodia*. Among warrants are included the various steps of process which remain in the clerk's hands, and also letters of general and special charge. *Stair, B. iv. tit. 20, § 21; More, h. t.; Brown's Synop. h. t.; Shand's Prac. 635, 719.*

**Growing Corn;** is poindable, but the poinding is not completed till the corn is cut down and measured. The landlord, in virtue of his hypothec, has a preference over creditors

poinding growing corn. A symbolical delivery of growing corn has been held good to exclude creditors. *Bell's Com. i. 176; Hunter's Landlord and Tenant, p. 815; Ersk. B. iii. tit. 6, § 22; Ross's Lect. i. 441, 481. See Grana crescentia.*

**Guarantee, Mercantile.** A guarantee is an obligation, formerly in writing, but which might be proved by parole, with *rei interventus*, by which one engages himself for another in some particular transaction, or prospectively in a course of dealing. It is either continuous or limited. A guarantee is continuous if one engages for another to a certain amount in any dealing. It is limited when restricted to a particular transaction, person, or time. Such engagements and their limitations are *strictissimi juris*. There is some difficulty in distinguishing between a guarantee and a mere letter of recommendation. When a recommendation is not spontaneous, but given in reply to inquiries, the presumption is against its being a guarantee, unless the giver is aware that the person so recommended is unworthy of credit, in which case he is liable for the loss which he has fraudulently occasioned by his recommendation. A recommendation, even when spontaneously given, is not held to be a guarantee, unless it refers to a particular transaction, and contains assurance of safety in entering into it. *Brodie's Supp. to Stair, 921, et seq.; Ersk. B. iii. tit. 3, § 61, note by Ivory; Bell's Princ. § 282, et seq. 340; Illust. ib.; Bell's Com. i. 370, et seq.; Grant, Dow's App. Cases, vi. 252; Thomson on Bills, 278, 429, 506.*

By the "Mercantile Law Amendment Act, 1856," 19 and 20 Vict., c. 60, § 6, it is enacted, that from the passing of the act, "all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings, of any person made or granted to the effect, or for the purpose of enabling such person to obtain credit, &c., "shall be in writing, and shall be subscribed by the person undertaking such guarantee," &c.; "or by some person duly authorized by him or them, otherwise the same shall have no effect." By § 7, guarantees to or for a company or firm, are to cease with a change in the partners or firm. By § 5, sellers of goods, if ignorant of any defect at the time of the sale, are not to be held to have warranted their quality or sufficiency unless they shall have given an express warranty, or unless the goods shall have been sold for a specified and particular purpose. The term "goods" is held to apply to animals; *Young v. Giffen, 4th Dec. 1858, 21 D. 87. See Cautionary.*

**Guardian**; one who has the charge or custody of any person or thing; but, generally, one who has the custody and education of such persons as are not of sufficient discretion to guide themselves and their own affairs, as children and idiots. *Tomlins' Dict.*, also *Wharton's Dict.*, h. t. See *Tutor. Curator. Minor. Judicial Factor.*

**Guild**; a fraternity or company, so called;

because each member was bound *gildare*—i. e., to pay something towards the charge and support of the company. *Tomlins' Dict.* h. t. See *Gilda. Dean of Guild.*

**Gypsies.** See *Egyptians.*

**Gyjarum**; in old law language, a hand-axe. By the *Leg. Forest.* all possessing forty shilling land were enjoined to provide themselves with a *gyjarum.* *Skene, h. t.*

## H

**Habeas Corpus Act.** In England, the act 31 Car. II., c. 2, which generally goes under the name of the *Habeas Corpus Act*, and which provides a remedy for illegal imprisonment, has been considered, politically, of such importance as to be reckoned a second *Magna Charta.* There are various writs of *habeas corpus.* Thus, the *habeas corpus ad respondendum*, is issued when a man has a cause of action against one who is confined by the process of some inferior court, in order to remove the prisoner, and charge him with this new action in the court above; the writ *ad satisfaciendum*, when the plaintiff is desirous to bring up a prisoner who has had judgment pronounced against him, to some superior court, to charge him with the process of execution; the writs *ad prosequendum, testificandum, deliberandum*, when it is necessary to remove a prisoner in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction in which the fact was committed; the writ *ad faciendum et recipiendum*, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court. But the writ which proves the efficacious safeguard of the liberty of the subject, is that of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with a specification of the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*; to do, submit to, and receive, whatever the judge or court awarding such writs shall adjudge. By the common law, this, which is a high prerogative writ, issues out of the Court of Queen's Bench, both in term time and during the vacation, by a *fiat* from the Chief-Justice or any other of the judges, and runs into all parts of the British dominions except Scotland. *Tomlins' Dict.* h. t. The Scotch act corresponding to the English *habeas corpus act*, is 1701, c. 6. See *Wrongous Imprisonment.*

**Habit and Repute.** This expression is applied, in the law of Scotland, to whatever

is held and reputed, or generally received as matter of fact. The legal effect of habit and repute is sometimes very serious. Thus, marriage may be constituted by *habit and repute*; where the parties cohabit, and are at the same time held and reputed as man and wife; 1503, c. 77; *Ersk. B. i. tit. 6, § 6.* So also, habit and repute is an aggravation of a special act of theft, which, by the law of Scotland, may have the effect of rendering the offence a capital felony, if the person committing it be habit and repute a thief—i. e., one who notoriously makes or helps his livelihood by thieving. It would appear, that in order to constitute habit and repute, in criminal law, the panel must have borne the character for at least six months. The course of time necessary to establish the character of habit and repute a thief, is not interrupted by imprisonment, where the party has previously acquired that character. *Walkinshaw, 1844, 2 Br. 190; Alison's Princ. 296; Steele, 123; Hume, i. 90; Stair, B. iii. tit. 3, § 35; B. iv. tit. 45, § 4; Bank. vol. i. p. 661; vol. ii. p. 502, 327, 629; Bell's Princ. § 1519.* See also *Execution, Messenger.*

**Habitation**; in the Roman law, was a personal servitude, or usufruct of a house, limited to the extent, that it could be used in no other way than as a dwelling-house. This right could be conveyed by sale, and the house might be let. *Stair, B. ii. tit. 6, § 1; Bank. i. 657.*

**Hackney Coachmen**: are not responsible under the edict *Nautæ, caupones*, unless when employed as carriers and paid for carriage. Hackney coachmen, in Edinburgh, cannot ply without a licence from the magistrates, who are likewise empowered to pass such regulations as they think fit for ascertaining their fares, &c.; and they are amenable to the magistrates in case of overcharges or other misconduct. *Bell's Princ. § 236; Illust. ib.; Bell's Com. i. 468; Thomson's Police Acts, p. 109; 11 and 12 Vict., c. 113, § 232, et seq.; 13 and 14 Vict., c. 33, § 105, et seq.*

**Hæreditas Jacens.** An estate is said to be *in hæreditate jacente*, when, after the an-



cestor's death, no title to it has been made up in the person of his heir. When a creditor of the ancestor desired to attach such an estate, in payment or in security of his debt, he, formerly, charged the heir to enter first in general, and then in special, in the manner explained under the article *Charge*. If the heir entered, of course he lay under the same obligation to pay the debt that his ancestor did. If he failed to appear and to renounce in answer to the charge, or in the relative action, the creditor was entitled to decree and execution against his person and estate, as if he had been actually served and entered heir. But, if the heir answered the general charge to enter, by renouncing the succession, he could not properly be charged to enter in special to the estate which he renounced; neither could his person nor his own estate be taken in execution for the debt of the ancestor whose succession he had so renounced. The creditor, however, was allowed to summon the heir *pro forma* in an action for proving the debt due by the defunct, in which action decree was obtained, not against the heir, who was assailed in respect of his renunciation, but against the *hereditas jacens* of the deceased, which was thereby subjected to the creditors' diligence. The decree in this action was called a decree *cognitionis causa*. *Ersk. B. ii. tit. 12, § 12, et seq.*, and § 47, *et seq.*; *Bell's Com. i. 713, et seq.* See also *Charge. Adjudication. Cognitionis Causa. Beneficium Inventarii.*

By 10 and 11 Vict., c. 48, § 16 (1847), general and special, and general special charges are abolished, and the citation on, and execution of, a summons of constitution is made equivalent to a general charge; and a citation on, and execution of, an action of adjudication, following on a decree of constitution, is made equivalent to a special or a general special charge, as the circumstances of the case may require. By the Titles to Land Act, 21 and 22 Vict., c. 76, § 27 (1858), it is not necessary to raise a separate summons of constitution, and a separate summons of adjudication, against an apparent heir, on account of his ancestor's debt or obligation, for the purpose of attaching the ancestor's heritable estate, but both actions may be combined in one summons, and the decree of adjudication has the legal operation and effect of a conveyance from the ancestor of the lands adjudged in favour of the adjudger. See *Titles to Land*.

**Haimhaldare**; in old law language, to repeat and seek restitution of proper goods and gear, and bring the same home again. *Skene, h. t.*

**Haimsuken**; "is when any person violently, without licence, and contrair the King's

peace, enters within a man's house, or seeks him at the same, or assails his house." *Skene, h. t.*

**Half-Blood**. The connexion by half-blood is of two kinds, consanguinean and uterine. Consanguinean relations are such as are descended from the same father, but not from the same mother. Uterine relations are such as are descended from the same mother, but not from the same father. In collateral succession, the half-blood consanguinean succeeds *after* the full blood—*e. g.*, if a man die, leaving a son and daughter by his first marriage, and a son by a second marriage; and if the son of the first marriage take up the succession and die without issue, being survived by his full sister and half-brother consanguinean, his sister by the full-blood will succeed as *her brother's* heir-at-law. Observe, however, that if the eldest son of the first marriage had predeceased his father, the son of the second marriage would have succeeded as *his father's* heir-at-law, to the exclusion of the daughter of the first marriage. The half-blood uterine was, formerly, excluded; neither was there any relationship recognised between the consanguinean and the uterine, or succession *ab intestato* of the one to the other. In English law, half-blood is no impediment to descents of fee-simple lands of the Crown, or to dignities, or to descent of estates-tail; but in other cases it is an impediment. Administration, in England, is grantable to the half-blood of the deceased, as well as to the whole blood; and half-blood comes in for a share of an intestate's personal estate, equally with the whole blood, being next of kin, in equal degree. *Ersk. B. iii. tit. 8, § 8*; *Bell's Princ. § 1652, 1665, and authorities there cited*; *Illust. § 1664*; *Tomlins' Dict. h. t.* See *Heir. Succession. Uterine*.

By the Act 18 and 19 Vict., c. 23, 1855, brothers and sisters uterine succeed to one-half of an intestate moveable estate on the failure of the father and mother, and the brothers and sisters german, and their issue.

**Half-Pay**. As a condition of obtaining the benefit of the process of *cessio bonorum*, half-pay officers who have an income more than sufficient for their bare subsistence, must assign part of their half-pay to their creditors. *Shand's Prac. p. 819.* See *Cessio Bonorum*.

**Hamesucken**; is the offence of feloniously beating or assaulting a person in his own house or dwelling-place. In this sense, the house must be the place where the person resides. A shop, whether adjoining to the house or not, is not reckoned a man's house. Hamesucken is not committed anywhere but within the dwelling-house; an assault, therefore, made in the precincts, or in the courtyard or offices, is not hamesucken. A hired

apartment in a lodging-house will be held, *quoad hoc*, to constitute a man's house, even although the assault be committed by the owner of the house; but an inn, or a friend's house, at which a person occasionally resides, is not in this sense a man's house. Neither is a playhouse, to this effect, accounted the dwelling-place of an actor. See *Comedian*. A ship, which is the proper residence of the master or crew, is considered as a dwelling-place. Aiming a blow, or offering to strike, though no blow be actually given, has been held to infer the crime of hamesucken. The premeditated design of committing personal violence in the house, is essential to the crime; and no outrage will amount to it which a person suffers in his own house, in consequence of a quarrel taken up at the moment. In cases of inferior atrocity, hamesucken is punished arbitrarily; but when the injury is of an aggravated nature, the punishment is death. *Hume*, i. 312; *Alison's Princ.* 199; *Steele*, 108.

**Hanaper Office**; an office in the Court of Chancery of England. Writs relating to the subject were formerly kept in a hamper, those relating to the Crown in a little bag, and hence the respective offices still continue to be called the *Hanaper* and the *Petty-bag* office. *Tomlins' Dict. h. t.*

**Handwriting**. The strongest direct proof of a certain individual having executed a writing, is his own acknowledgment, where he is a competent witness; or, where he is disqualified, the evidence of others who saw the writing executed. The best indirect evidence is that of persons who are acquainted with the handwriting of the individual, and declare their belief that the writing is his. Proof of this kind, when the knowledge of the party's handwriting is acquired by correspondence only, though it may in certain cases be more satisfactory than when the knowledge is acquired by having seen him write, is not *per se* sufficient, in criminal cases. The weakest proof of all is the comparison of the writing with the acknowledged genuine writing of the party. For this purpose, the writings are sometimes submitted to those who are to judge of the evidence; sometimes to engravers and others skilled in writing; but this latter mode is now rather discountenanced, though still competent. *Comparatio literarum* is not of itself sufficient even in criminal cases. *Dickson on Evidence*, pp. 399, 473; *Macfarlane's Jury Practice*, p. 225. See *Evidence. Comparatio Literarum. Holograph Writings*.

**Hara Porcorum**; a "swine's cruife." *Skene, h. t.*

**Harbours**. See *Ports and Harbours*.

**Hares**. By 1707, c. 13, the shooting of

hares was prohibited under a penalty of L.20 Scots, *toties quoties*; but this penalty seems never to have been exacted of any but unqualified persons, although the act is equally levelled at qualified persons. The act was repealed by Geo. III., c. 94, and there is now no distinction between hares and other game as to the right of shooting. The act 11 and 12 Vict., c. 31, enables all persons having a right to kill hares in Scotland to do so either themselves or by persons authorized by them, without taking out a game certificate. *Irvine on the Game Laws; Ness's Game Laws*, 18, 96; *Hutch. Justice of Peace*, ii. 563. See *Game Laws*.

**Hasp and Staple**; is the form of entering an heir in a burgage subject. The same practice prevails in some burghs of regality, and appears to be connected with very ancient forms. The baillie, the town-clerk, and the claimant, appear on the premises, when the claimant alleges his title, and proves it by witnesses; on which the baillie declares him to be heir, and makes him take hold of the hasp and staple of the door as a symbol of possession, and then enter the house and bolt himself in. On his coming out, the transaction is noted and registered. *Stair*, B. ii. tit. 3, § 19, and B. iii. tit. 5, § 27; *Bank.* vol. ii. p. 354; *Bell's Princ.* § 845; *Sandford on Heritable Succession*, vol. ii. p. 7. See *Cognition and Sasine. Burgage-Holding*.

A bill is now in parliament to simplify the forms of titles to lands held under burgage tenure, similar to the one passed in regard to titles to other lands. See *Titles to Land*.

**Hat-Money**; or primage; is a small sum of money paid along with the freight, to the master of a ship for his care. It is entirely regulated by usage. *Bell's Com.* i. 567; *Bell's Princ.* § 420; *Brodie's Supp. to Stair*, 1001.

**Haver**; the holder of a deed or writing, called on to produce it judicially, in *modus probationis*, or for inspection, in the course of a process. The form of process in use for the purpose of compelling production is an application for letters of incident diligence. See *Incident Diligence*. The person cited as a haver, must either exhibit, upon oath, the writing called for, or depone that he has it not, and has not had it since he was cited as a haver, and that he has not fraudulently put it away, and has no knowledge or suspicion where it is. The user of the diligence, if dissatisfied with the haver's deposition in general terms, may, under the act of Sederunt, 22d Feb. 1688, put special and pertinent interrogatories, which the haver is bound to answer. If the writing be in the haver's possession, he is bound to produce it, whether, in his opinion, it be pertinent to the cause or not; but, if he have it not, no questions can

competently be put in *modum probationis*, under an incident diligence, as to the haver's recollection of the contents or import of the writing; far less is it competent to put any question which may bring out an answer connected with the merits of the cause. The production of the writing called for, and, failing that, the means of recovering it, or tracing it into the hands of others, are the only legitimate purposes of an incident diligence against havers. A diligence of this kind may be used not only against third parties, but also against the principal defender in the cause, who may be thus compelled to exhibit such writings as may verify the pursuer's plea—the pursuer being under a reciprocal obligation, when required, to produce all writings in his hands called for by the defender in support of his defence. In either case, however, the writing which the party requires from his adversary must be particularly specified and described; for no party is bound to make an unreserved production of all the writings in his possession, on a general requisition by the opposite party. The maxim, *Nemo tenetur edere instrumenta contra se*, applies to such a case, and is at the same time qualified by the general doctrine above stated. *Ersk. B. iv. tit. 1, § 52; Stair, B. iv. tit. 33, § 2, and tit. 41, § 5, et seq.; More's Notes, p. cccxv.; Bank. B. iv. tit. 24, § 59; Tait on Ev., p. 175, 178-181. Shand's Prac. 370, et seq.; Dickson on Ev. 671, 680, 943; 13 and 14 Vict., c. 36, § 25.* Documents may also be recovered by parties having right thereto by an action of exhibition and delivery against the haver. See *Exhibition and Exhibition ad probandum*. See also *Diligence. Commission. Incident Diligence.*

For compelling the attendance of havers and witnesses in England and Ireland, see the acts 6 and 7 *Vict.*, c. 82 (1843), and 17 and 18 *Vict.*, c. 34 (1854).

**Hawbert**; a term, in old law language, for the tenure of ward and relief, so called, *quasi "feodum hauberticum,"* or "*feodum loriatum*," because it was given upon condition that the vassal, possessor thereof, should come to the host and army with jack and arms. *Stene, h. i.*

**Hawks**. In England, the stealing of a hawk, or concealing it after proclamation made by the sheriff, was, by certain ancient statutes, declared to be felony with clergy. An action of trover and conversion lay for a hawk reclaimed. *Tomlins' Dict. h. i.*

**Head-Borough**. Each shire has a head-borough, where the sheriff-court is held, and jurisdiction exercised, and letters of inhibition, interdiction, &c., published and registered. Where the shire is divided into lesser districts or wards, each district has a head-borough of its own. *Ersk. B. i. tit. 4, § 5.*

**Head-Courts**. There were formerly three head-courts in the year, at which all the freeholders, who owed suit and presence, in default of attendance were fined. Where the freeholder owed suit only, his personal presence was dispensed with, provided he sent a proxy. Those head-courts were afterwards reduced to one, called the Michaelmas head-court; and, at last, by the act 20 *Geo. II.*, c. 43, abolishing heritable jurisdictions, the fines on account of non-attendance at head-courts were abolished. *Ersk. B. i. tit. 4, § 5. See Election Laws.*

**Health, Bill of**. See *Bill of Health*.

**Hearing in Presence**. In the judicial procedure of the Court of Session, a hearing in presence is a formal hearing of counsel, before the whole thirteen Judges. This course is followed only in cases of great difficulty and importance. See 6 *Geo. IV.*, c. 120, § 20, 23; *Shand's Prac.* 966. Where the Judges of either Division are equally divided in opinion in any cause, a hearing may take place before the Judges of the Division before which the cause depends, with the addition of three of the Judges of the other Division, and the judgment is pronounced according to the opinion of the majority of the Judges present. See 13 and 14 *Vict.*, c. 36. See also *Consultation of Judges*.

**Hearsay Evidence**; evidence repeated at second-hand, by one who heard the actual witness relate, or admit, what he knew of the transaction or fact in question. Such evidence is, in the ordinary case, inadmissible, but may be received in the following cases: 1. When the person from whom the account was received, and who would himself have been a competent witness, is dead. In cases of assault, even when the assaulted person has not died, the account given by him to a third party, of the injury, if given shortly after receiving it, may be adduced to confirm what he has previously sworn to before the jury. 2. When what the witness heard was substantially part of the fact or transaction, or of the *res gestæ* which the witness himself heard and saw; but this, obviously, is not properly *hearsay* evidence, but evidence in chief. 3. It is sometimes competent to corroborate the testimony of a witness, by proving what he said, *de recenti*, in regard to a fact as to which he is called to give evidence. Thus, in cases of rape, it seems competent to invalidate the injured female's testimony in this way; but in ordinary cases the rule is different, although a witness may *himself* be questioned, as to previous contradictory accounts which he has given. There are several other cases in which *hearsay* is received: these will be found enumerated in *Alison's Prac.* 111. In all cases of deponing to conversa-

tions, the witness must give the whole words, if he can recollect them; if not, the substance. He is not allowed to give his own impressions of the result, unconnected with either the words or substance. *Hume*, ii. 406, *et seq.*; *Burnett*, 600; *Alison's Princ.* 225; *Prac.* 510; *Syme*, 121; *Shaw*, 237; *Trials for Treason in Scotland*, ii. 71, 226, 518; *Steele*, 30; *Dickson on Ev.* 57, *et seq.* See *Evidence*.

**Heath.** In England, by 7 and 8 Geo. IV., c. 30, § 17, the malicious burning of heath is made felony. *Tomlins' Dict. h. t.* For the period during which the burning of heath is forbidden in Scotland, see *Muirburn*.

**Heir.** The term heir does not mean merely the heir-at-law; it means also the heir by destination; neither does it mean the heir in heritage only; it is likewise applied to the person who succeeds to the moveable estate. In short, it is a flexible term, which is to be understood according to the circumstances in which it is used. By the law of Scotland, however, it is not competent, merely by *nominating* a party to be the testator's heir, to confer on him any right of succession. In order to displace the legal heir in any particular subject or estate, the testator must convey that estate or subject to the party, other than the heir therein, whom he wishes to favour; and he may also call to the succession a series of strangers. But, in all such cases, it is with reference to the conveyance of the property that parties other than the heirs-at-law succeed, and not as being named heirs, the brocard of the Scotch law being, that "it belongs to God and not to man to make an heir." See *Destination. Disposition. Settlement. Testament. Executors.*

The subject will be considered under the following arrangements:—

1. *Of the heir-at-law.*
2. *Of the heir by destination.*
3. *Of the title of the heir.*
4. *Of the rights of an heir.*
5. *Of the burdens affecting the heir.*

1. *Of the heir-at-law.*—The heir-at-law is the person who succeeds to the property of a person deceased, including moveables as well as heritage. The succession of heritage and of moveables is regulated by different rules. Heritage, which includes land, and all property connected with land, goes to males in preference to females; and, where there are more than one male in the same degree of relationship to the deceased, the succession goes to the eldest male; the others receive the moveables equally amongst them, and are termed the nearest of kin, or executors of the deceased. Where there are more than one female in the same degree of relationship to the deceased, or the descendants of such

female, according to the *jus representationis*, the heritage does not go to the eldest female, as happens in the case of males, but it goes to all the females in the same degree of relationship, and their issue, equally, who are termed heirs-portioners. But there is a certain order in which the heirs succeed. The succession opens first in favour of descendants, that is, of sons and daughters in the above-mentioned order; failing them, it goes to collaterals, that is, to brothers and sisters; whom failing, it goes to ascendants, that is, to the father; then collaterally to his brothers and sisters; then to the grandfather, and so on as far as relationship can be traced; but no succession passes through the mother. In these questions, full-blood is always preferred to half-blood; and there is a right of representation in heritable succession by which the son succeeds to that heritable property to which his father or mother would have had right had either been alive. Thus, the son of an eldest son, in competition with his uncles, the younger brothers of his father, will be preferred to them on the estate which would have fallen to his father, the eldest son, had he been alive. See *Succession. Executors. Collation. Half-blood.* The heir above described is termed heir-at-law, because he succeeds according to the disposition of the law; he is also termed heir-of-line, because he succeeds according to certain recognised lines of propinquity; he is called heir-general, because he represents the deceased generally; and he is called heir-whomsoever; and whichever of those expressions is used, the person so succeeding is the person who would, by the disposition of the law itself, have succeeded. What has been stated above relates to the succession of heritage which has come to the predecessor, by descent from his predecessor; for where heritable property has been purchased by the immediate predecessor, it is termed conquest, and goes to the heir of conquest, who, in all competitions amongst brothers or uncles, or their descendants, is not the next immediate younger brother or uncle, but the immediate elder brother or uncle. See *Conquest.* The moveable succession goes to the relation nearest in degree of blood to the defunct; and, where there are more than one equally near, the succession goes to all those relations equally, whether male or female.

Formerly there was no right of representation in moveable succession; but this is now altered by the act 18 and 19 Vict., c. 23 (1855). Those succeeding are termed next of kin, or heirs in moveables. See *Executors.*

2. *Of the heir by destination.*—The heir by destination is the person who is called to succeed, failing the person to whom an estate is

disposed. In calling a series of heirs, sometimes general terms are used, as to A. B., and the heirs-male of his body; at other times, the heirs-male or sons of A. B. are called *nominatim*, and in their order. The former method is more concise; and, if the conveyancer be fully acquainted with the legal import of the terms he makes use of, it is the best manner of expressing the destination; but the other will probably give more satisfaction to the grantor, if he be unacquainted with the meaning of the general terms employed. See the different forms of expressing destinations explained under the article *Destination*.

3. *Of the title of the heir.*—This has reference to the form by which an heir completes a title in his own person to the estate which has previously been vested in the person of his ancestor. This form varies according to circumstances. Thus, where the ancestor has been infert, a special service is required; and that service must be followed by infertment in favour of the heir. Where, again, the ancestor was not infert, a general service is sufficient; and this service, without any farther step, carries to the heir all that was in the person of the ancestor. In the case of lands held of a subject-superior, the heir may be entered without a service, on a precept of *clare constat*, which is a warrant for infertting the heir in the lands as heir to the ancestor. In the same way, burgage subjects may be carried to an heir by the form of *hasp and staple*; and there is still another method equivalent to a service, by which the heir may complete a title; he may grant a trust-bond to a confidential friend, and that friend may charge the heir to enter and adjudge the lands. (See *Adjudication on Trust-bond*.) On this subject see *Services. Clare constat. Hasp and Staple. Entry of an Heir. Titles to Land*. An heir, when he is uncertain of the situation of his ancestor's affairs, may, within a year, enter *cum beneficio inventarii*. See *Service. Beneficium Inventarii*.

By 10 and 11 Vict., c. 47, § 23 (1847), a decree of special service infers only a limited passive representation of the deceased, and the person obtaining the decree is liable for the deceased's debts and deeds only to the extent or value of the lands and other heritages comprehended by the decree, and no farther. By the same act, § 25, a general service may be obtained by the heir stating in his petition that he desires the effect of the decree of service to be limited to the lands or other heritages belonging to the deceased, which are contained in a specification annexed to the petition. A copy of the specification is embodied in the extract of the decree, and the heir so served is liable for the

deceased's debts and deeds only to the extent or value of the lands or other heritages contained in the specification.

4. *Of the rights of an heir.*—After an heir has completed his title, every right possessed by his predecessor is vested in him. But, even before completing his title, an apparent heir (as he is called in the law of Scotland) can pursue for, receive and discharge the rents due from the estate of his ancestor; and those rents, on his death, descend to his executor. He can defend the tenant in his possession; but he cannot remove him, by prosecuting an action of removing against him, before he has completed his title. The heir-apparent has a right to reduce all death-bed deeds done by the ancestor to his prejudice. He may pursue a liferenter for an aliment; he may institute an action of sale for behoof of creditors. The apparent heir has, farther, a right of deliberating as to the propriety of taking up the succession which has opened to him; and, for this purpose, a year and day after the death of the ancestor was formerly allowed him. During that period he could not be compelled to enter; and, the better to enable him to deliberate, he might judicially enforce exhibition of his ancestor's title-deeds. See *Apparent Heir. Annus deliberandi. Aliment. Death-bed. Exhibition. Executor*.

By the Titles to Land Act 21 and 22 Vict., c. 76, § 27 (1858), diligence against an apparent heir may now be insisted in at any time after the lapse of six months from the date of his becoming apparent heir.

The onerous debts and deeds of an apparent heir, who has been three years in possession on his right of apparenity, but who has not completed titles to his predecessor's lands, may be made effectual against the lands and estate so possessed on apparenity, in the person of a succeeding heir who has made up titles to the apparent heir's predecessor, passing by the apparent heir; 1695, c. 24. See *Apparent Heir*.

5. *Of the burdens affecting the heir.*—Heirs are all liable for the debts of their ancestor; but they are liable in a certain order. Thus, the heir of line is primarily liable in the debts of the ancestor—next to him is the heir of conquest—then follows the heir-male—next to these is the heir by destination—and, last of all, the heir under a marriage-contract. It is in this order that those heirs must be discussed. See *Discussion*. Where a disponent burdens a disposition with the payment of his debts generally, this is held to be a provision in favour of his creditors, which does not prevent the donee from claiming relief from the heir of the disponent. In order to render the donee liable, a declaration to that effect, in very precise terms, is re-

quired. *Stair*, B. iii. tit. 5; *More's Notes* p. cccix. et seq.; *Bank*. vol. ii. p. 322, et seq.; *Ersk.* B. iii. tit. 8, § 47; *Bell's Princ.* § 1637, et seq. *Illust.* 1695; *Bell's Com.* i. 83, et seq., 143, 659, et seq., 709, et seq.; *Hunter's Landlord and Tenant*; *Shand's Prac.*; *Sandford on Heritable Succession*, vol. ii. p. 68, et seq.; *Jurid. Styles*; *Kames' Equity*; *Ross's Lect.* i. 56, 73, 497; ii. 507; *Crawford, Bligh's Appeal Cases*, ii. 667.

**Heir and Executor.** The heir is entitled to all the heritage, and the executor to all the moveables of the deceased, with the exception of heirship moveables. But, where the heir and executors are equally near in kin to the ancestor, it is competent to the heir to insist that the whole estate, heritable and moveable, shall be massed in *cumulo*, and distributed share and share alike amongst the whole next of kin. (See *Collation*.) In the division of the rents of land between an heir and executor, the executor has right to the rents due at the death of the ancestor, the heir to what was not at that time due; and a rule has been received in practice for regulating what part of the rents are, and what part are not held to be due. Thus, the terms of Whitsunday and Martinmas are held as the legal terms by which these interests are regulated, whatever the conventional terms of payment may be. If, therefore, the landlord has survived Whitsunday, his executor has right to one-half of that year's rent; if, again, he survive Martinmas, he has right to the whole of that year's rent. But a different rule is adopted where the lands have been in the natural possession of the proprietor; for there, whatever has been sown by the proprietor must be reaped by the executor; and where the ground has been prepared but not sown, the expense of labour is a claim competent to the executor. In the case of a tenant, the rights of his heir and executor are regulated by the same rules: but the executor pays a proportion of the rent corresponding to the part of the farm under crop. The heirs and executors of liferenters have their rights ascertained by the same rules. The interest of heritable bonds is, in like manner, divided between the heir and executors of the creditor, according to the rules observed in regard to the rents of lands. But the interest arising on a personal bond is due *de die in diem*. Hence, the executors of the liferenter of a personal bond draw the interest down to the day of the death of the liferenter. *Ersk.* B. ii. tit. 9, § 64, et seq., and *Bell on Leases*, vol. i. p. 475, et seq.; *Bank*. vol. i. p. 218; *Bell's Com.* i. 752; ii. 8; *Sandford on Herit. Success.* vol. ii. p. 240; *Brown's Synop. h. t.*; *Shaw's Digest*, pp. 536, 588, et seq.; *Hunter's Landlord and Tenant*. See also *Discussion. Executory. Terms Legal and Conventional*.

In the case of *Bridges v. Fordyce*, March 7, 1844, 6 D. 968, and affirmed in the House of Lords, 23d February 1847, 6 Bell, p. 1; the Apportionment Act, 4 and 5 Will. IV., c. 22, was held to apply to Scotland. The second branch of this statute proceeds on the following preamble:—"And whereas by law, rents, annuities, and other payments due at fixed or stated periods, are not apportionable, unless express provision be made for the purpose, from which it often happens that persons and their representatives whose income is wholly or principally derived from these sources, by the determination thereof before the period of payment arrives, are deprived of means to satisfy just demands; and other evils arise from such rents, annuities, and other payments not being apportionable, which evils require remedy." The remedy introduced is expressed as follows:—"Be it enacted that from and after the passing of this act, all rents, service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power, and which lease shall have been granted after the passing of this Act; and all rents, charge, and other rents, annuities, &c., and all other payments of every description, &c., made payable or coming due at fixed periods, under any instrument that shall be executed after the passing of this Act, or being a will or testamentary instrument that shall come into operation after the passing of this Act, shall be apportioned so, and in such manner, that on the death of any person interested in such rents, annuities, &c., or other payments as aforesaid, or in the estate, fund, office, or benefice, from or in respect of which the same shall be issuing or derived, or on the determination, by any other means whatsoever, of the interest of any such term, he or she, and his or her executors, administrators, or assignees, shall be entitled to a proportion of such rents, annuities, &c., and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, as the case may be, including the day of the death of such person, or of the determination of his or her interest, all charges on such rents being deducted."

The statute farther declares that the entire rents shall be received and recovered by the person or persons who, if this Act had not passed, would have been entitled to such entire rents, and such portion shall be recovered from such person or persons by the parties entitled to the same under this Act, in any action or suit at law, or in equity.

The case of *Campbell v. Campbell*, July 18, 1849, 11 D. 1426, was the case of a grass farm, the entry to which was at Whitsunday old style, 26th May, and the first rent payable

at the term of Martinmas after entry, and the second at Whitsunday following, and so on half yearly. It was held that notwithstanding the speciality that the entry was at Whitsunday old style, the rent was due at the legal terms of Whitsunday and Martinmas, 15th May and 11th November, and that the first rent, payable conventionally at Martinmas after entry, was legally due at the preceding Whitsunday, and that the second rent, conventionally payable at Whitsunday next after entry, was legally due at the preceding term of Martinmas, and so with regard to the subsequent rents. In this case the proprietor had died on 18th of May 1846, being three days posterior to the legal term, and eight days prior to the term of Whitsunday old style. In a competition between his heir and executor, it was held, *first*, that the executor was at common law entitled to the rent legally due at Whitsunday 1846, but conventionally payable at Martinmas thereafter, and to all the antecedent rents. It was held, *second*, that under the provisions of the Apportionment Act, he was entitled to a proportion of the rent legally due at Martinmas 1846, but conventionally payable at Whitsunday 1847, corresponding to the ancestor's three days' survivance of the legal term of Whitsunday 1846.

The case of *Blaikie v. Farquharson*, July 18, 1849, 11 D. 1456, was the case of an arable farm, the entry to which was at the term of Martinmas 1838, the rent payable half yearly; the first half year's rent at Martinmas 1839, and the second at Whitsunday following, both payments being for crop 1839, and so on thereafter. The landlord died on 14th May 1841. In a competition between his heir and executor, it was held, *first*, that the executor was at common law entitled to the rent payable at Whitsunday 1841, being the last half of the rent for crop 1840. It was held, *second*, that under the Apportionment Act he was entitled to the half year's rent payable at Martinmas 1841, minus the proportion of it effeiring to one day being the rent applicable to the period from Martinmas 1840 to 14th May 1841, when the landlord died. The estate in this case was held under a strict entail.

In both these cases the estates were entailed. In the English case of *Browne v. Amyot*, 3 Hare, 173, it was decided that the apportionment statute applies only to cases in which the interest of the person interested in the rents, &c., is terminated by his death, or by the death of another person; but did not apply to the case of a tenant in fee, or provide for the apportionment of rent between the real and personal representative of such, whose interest is not terminated at his death. The case *Baillie v. Macdonald Lockhart* (unre-

ported), was not argued in the Court below in consequence of the judgments in the preceding cases of *Campbell and Blaikie*, but was appealed to the House of Lords for the purpose of having it determined whether the statute was applicable to entailed estates; and it was determined that it did apply. LORD CRANWORTH, C., observed:—"I have no doubt that the statute applies to a tenant in tail. The evil prior to the statute was that if the tenant in tail died indebted, and the rents were nearly accruing due, all these accruing rents would go to the successor. To remedy that evil the statute was passed. I cannot doubt, upon the construction of the statute, that the question here is really not a question of feudal law, but a question of the meaning of the Legislature. There is nothing determined in this case but the applicability of the statute." 2 *Macqueen*, 258, 27 *Jur.* 367. See also the cases of *Beer v. Beer*, 1852, 12 *Scott's New Rep.* 60; *Locke v. De Burgh*, 20 L. J. *Chanc.* 384; *Knight v. Boughton*, 12 *Bev.* 312; *Markby*, 1839, 4 *Mylne and Craig, Chan. ca.* 484.

**Heir-Female.** See *Destination*.

**Heirs and Bairns.** The expression "*heirs and bairns*," or "*heirs and children*," of a marriage, in the destination of an heritable estate in a contract of marriage, carries the estate to the heir-at-law, and not to all the children of the marriage, share and share alike; whereas, the expression "*bairns of the marriage*," or "*children of the marriage*," omitting the word "*heirs*," carries the property to all the children of the marriage equally. *Bell's Princ.* § 1963, *et seq.* See *Destination*. *Bairns of a Marriage*.

**Heirship Moveables;** are the moveables to which the heir in heritage is entitled, in order that he may not succeed to a house and land completely dismantled. They consist of the best of certain kinds of moveable goods belonging to the heir's predecessor, such as, furniture, horses, cows, oxen, farming utensils, &c., but not including fungibles. Where articles go in pairs or dozens, it is the best pair or dozen, or best yoke. Under this are comprehended the family seal of arms, the ornaments of the seat in church. See a full list of heirship moveables given in *Hope's Minor Prac.* p. 538, edit. 1734. Heirship moveables are due only to the heir of a baron or of a burghess. In this sense, a person infest in lands, or even in an annualrent of lands, is held to be a baron; but he must have been infest, and the burghess must be an actual trading burghess in a royal burgh, not merely an honorary one. It is the heir of line only who has a right to claim heirship moveables, and of this right he cannot be deprived by any testamentary or death-bed deed

of the ancestor's. When there are heirs-portioners, it is the eldest heir-portioner only who is entitled to heirship moveables; *Ersk.* B. iii. tit. 8, §§ 13, 17, *et seq.* The title to heirship moveables requires no service to complete it; possession is sufficient. But, if the heir die without attaining possession, heirship moveables, on his death, do not descend to his executors, but to the heir of the first deceased. *Ersk.* ib. § 77; *Stair*, B. iii. tit. 5, § 7, *et seq.*; *More's Notes*, p. cccxxx.; *Bank.* vol. ii. pp. 292, 328; *Bell's Princ.* § 1903; *Brown's Synop. h. t.* and pp. 1177, 2053; *Sandford on Herit. Success.* i. 17, 36, *et seq.*; *Hunter's Landlord and Tenant.*

**Heirs-Portioners.** Failing the male issue and their issue, the succession opens in favour of the female issue. The heritage does not go to the eldest female alone, but to all the females in the same degree of relationship, who inherit equally and *pro indiviso* as heirs-portioners. In this succession the *jus representationis* prevails. Thus, if the deceased be survived by two daughters, and by a grandson or granddaughters by a deceased daughter, the grandson, as his mother's heir-at-law, will succeed to *her share* of the ancestor's heritage, to the exclusion of his sisters; or if the deceased daughter has been survived by daughters only, they will succeed as heiresses-portioners to their mother's share of their grandfather's succession. The eldest heir-portioner by legal succession, but not by provision, has right to the mansion-house of an estate in the country, as a *præcipuum*, without compensation to her sisters. She is also entitled to such peerages, dignities, and titles of honour, as are not otherwise limited. The eldest has also right to subjects indivisible, such as superiorities, a house in town, or a small villa in the country; but for such subjects she must give compensation to her sisters. On the death of the second of three sisters, the succession of conquest does not go as on the death of a middle brother, but to the heirs of both sisters, as heirs-portioners. *Stair*, B. iii. tit. 5, § 11; *More's Notes*, cxx. cccxxix.; *Ersk.* B. iii. tit. 8, § 13; *Sandford on Herit. Success.* i. 3 to 33; *Bell's Princ.* § 1659; *Illust.* ib. and § 1670. See *Brieve of Division. Collation. Executors.*

**Herald;** is an officer serving under the lyon king at arms. The king at arms, with the heralds and pursuivants in their robes, proclaim peace and war, or make other royal proclamations. *Ersk.* B. i. tit. 4, § 32. See *Lyon King at Arms.*

**Hereditament;** in English law, all such immovable things, whether corporeal or incorporeal, as a man may have to him and his heirs by way of inheritance, and which, if they are not otherwise devised, descend to the

next heir, and not to the executor, as chattels do. *Tomlins' Dict. h. t.*

**Heresy;** among Protestants, a false opinion repugnant to some point of Scriptural doctrine, and either absolutely essential to the Christian faith, or at least of high importance. *Tomlins' Dict. h. t.*

**Herezeld;** was the best horse, ox, or cow, belonging to a tenant, which, on his death, was due to the landlord. See *Skene, h. t.* This exaction has been long unknown in practice, although, in charters by progress from superiors, the word is occasionally met with; and sometimes, in striking a composition, the value of the herezeld is stated against the vassal in money at a low conversion. *Stair*, B. ii. tit. 3, § 80; *Bank.* vol. i. p. 596; vol. ii. p. 116; *Brown's Synop. h. t.*; *Ross's Lect.* ii. 175; *Hunter's Landlord and Tenant.*

**Heriot;** the English law term corresponding to the Scotch word herezeld. It signified originally a tribute given to the lord of a manor, for his better preparation for war; and is now taken for the best beast, whether it be horse, ox, or cow, which the tenant dies possessed of, due and payable to the lord of the manor. In some manors, it is the best goods, piece of plate, &c. *Tomlins' Dict. h. t.*

**Heritable and Moveable.** In the Roman law, things were divided into corporeal and incorporeal; and the former class was subdivided into moveable and immovable. But this classification has, in the law of Scotland, given place to the distinction between heritable and moveable rights, a distinction resting more on the legal rights of the heir and of the executor, than on the nature of the subjects themselves. Generally all rights in, or connected with, land, are heritable. Whatever moves itself, or can be moved, without injury to itself, or the subject with which it is connected; and whatever is not united to land, is moveable. But these general rules are subject to exceptions and modifications. Things, in themselves moveable, may become heritable by succession. Whatever has been by art annexed to land, or other heritable subject, so that it cannot be removed without injury or change of nature, is heritable, by accession. See *Fixtures. Mills. Machinery.* Whatever is by growth connected with the soil is heritable, under certain exceptions. See *Grass. Hay.* Things, in their nature heritable, may become moveable by being made part of a moveable *universitas.* Thus, a share of heritable subjects forming part of the stock of a trading company is moveable. Things become heritable by destination, by being made to descend to the heir, or otherwise. Thus materials prepared for completing any part of a house are heritable. Books and furniture may be made heritable in succession. Des-



tion, although it rules succession, operates no change on subjects, in respect to diligence. Debts secured upon land are heritable. But simple personal debts and engagements, shares of companies, public or private, bank stock, and government stock, are moveable. Arrears of heritable debts, of rents and feu-duties, of the interest of heritable bonds, &c., are moveable. Personal bonds were formerly heritable after the term of payment was past; they were made moveable by 1661, c. 32, but continue heritable as to the fisk, and *jus relictæ*, and the other rights of husband and wife. Rights in their nature moveable, but having a tract of future time, are heritable. Titles of honour and offices continuing after the holder's death are heritable. Securities, whether by heritable bond or disposition in security, or by real burden, or by adjudication, are heritable, though infestment has not been taken. Bonds having a clause of infestment, though not completed by sasine, are heritable; but if the infestment be suspended till the arrival of a day, or the purification of a condition, the debt is moveable. Securities taken by a tutor, or by a factor *loco tutoris*, are never heritable. The nature of moveable rights is changed by a supervening heritable security; but heritable rights do not become moveable by supervening moveable securities; on the contrary, they communicate to those supervening securities the nature of the original or heritable right. Where lands or heritable securities are conveyed in security of personal debts, those debts become heritable. A distinction is taken between those cases in which a trust is granted for the security of creditors, and the trustee is infest, and those in which the trust has been granted for the sole and immediate purpose of paying the debts by a sale. In the former case the succession of the creditors is rendered heritable, in the latter it remains unchanged. Excluding executors in a personal bond makes the bond heritable. Sums directed to be laid out by trustees on heritable subjects, are heritable. A trust and instruction to sell heritable subjects, and convert them into money, makes an heritable debt moveable; and hence the claim against the trustees, at the instance of the parties beneficially interested in the proceeds of the trust-estate, is moveable, and may be arrested. A charge of horning on an heritable debt makes it moveable; but registration, in order to a charge, has not that effect. *Stair*, B. ii. tit. 3, *et seq.*, and B. iii. tit. 1, § 25; *More's Notes*, p. cxxxviii.; *Ersk.* B. ii. tit. 2, § 2; *Bell's Com.* ii. 1, *et seq.*; *Bank*. vol. i. p. 514; *Vol. ii.* 198, *et seq.*; *Bell's Princ.* § 1470; *Illust. ib.* *Sandford on Heritable Succession*, vol. ii. p. 206, *et seq.*; *Shaw's Digest*, p. 227, *et seq.*; *Brown's Synop. h. t.*;

*Ross's Lect.* i. 41, 76. See also *Bond. Arrestment.*

**Heritable Bond**; is a bond for a sum of money, to which is joined, for the creditor's farther security, a conveyance of land or of heritage, to be held by the creditor in security of the debt. *Ross's Lect.* i. 76; ii. 324; *Bell's Princ.* § 910; *Illust. ib.* See the title *Bond.* See also *Burdens.*

**Heritable Securities.** There are various ways in which heritable estates may be made the means of security to creditors. The creditor may either lead an adjudication against the land, or it may be secured exclusively for his benefit by inhibition, or a burden may be created entitling the creditor to appropriate the rents and uses of the land until the debts shall be paid. Real securities may be created or dissolved without touching the radical right to the estate or the progress of titles; and they are discharged by the extinction of the debt, without any feudal form of reconveyance. Heritable securities are either constituted by infestment in favour of the creditors, or they depend on the force of a condition qualifying the right of property. Of the first class are wadset; infestment of annual-rent; heritable bond; disposition in security, and absolute disposition with back-bond. Of the second class are reserved burdens and faculties to burden. *Elchies' Notes on Stair*, p. 136; *Stair*, B. iii. tit. 4, § 33; tit. 5, §§ 6 and 25. See also *Ersk.* B. ii. tit. 8; *Stair*, B. iv. tit. 25, § 24; *More's Notes*, cex.; *Bell's Com.* i. 674; ii. 205; *Bell's Princ.* § 896; *Illust.* § 901. See *Burdens.*

Although heritable securities may still be constituted under the old forms, bonds and dispositions in security may now be granted in the form of schedule A, annexed to the act 10 and 11 Vict., c. 50, 1847; and the recording of securities granted in that form in the Register of Sasines is as effectual as if they had contained all the usual clauses, and as if sasine had been taken thereon and the instrument of sasine duly recorded. Such bonds and dispositions in security may be registered at any time during the lifetime of the grantee, but if not so registered, these shall be a sufficient warrant of sasine in favour of the party having right to them by service, adjudication, or otherwise; infestment being passed upon them according to the form prescribed by the act 8 and 9 Vict., c. 35, 1845. See *Infestment.* A sale carried through in terms of the act is as valid and effectual to the purchaser as if it had been made by the granter of the security himself, and that whether the granter shall have died before or after the sale, and without the necessity of confirmation by him or his heirs, and notwithstanding that the party who is the debtor in the security

and in right of the lands, may at the time of the sale be in pupillarity or minority, or subject to any legal incapacity. The creditor or purchaser, however, is also entitled to demand from the grantor of the security, and his heirs, any deeds which may at common law be necessary for rendering the same effectual, or otherwise completing in due form the purchaser's title. A creditor selling under his security is bound to count and reckon for the surplus of the price which may remain, after deducting the debt secured, with the interest due thereon and penalties incurred, and the whole expenses attending the sale; and after paying all previous incumbrances, and the expenses of discharging them, he must consign such surplus in one or other of the chartered banks, or in a branch of any such bank, in the joint names of the seller and purchaser, for behoof of the party or parties having the best right to it, and the particular bank into which the consignment is to be made must be specified in the articles of roup. Upon a sale being carried through in terms of the act, and upon consignment of the surplus of the price, the disposition by the creditor to the purchaser has the effect of completely disencumbering the lands sold of all securities and diligences posterior to the security of the creditor selling, as well as of the security and diligence of that creditor himself.

Heritable securities may be transferred by an assignation or other deed of conveyance, according to the form in the schedule No. I., annexed to the Act 8 and 9 Vict., c. 31, 1845; and on such assignation or conveyance being recorded in the Proper Register of Sasines, the security will be transferred to the assignee as effectually as if it had been disposed and assigned, and infestment passed upon it according to the old form. Where the assignation or conveyance of the security is contained in a deed of conveyance, granted for farther purposes and objects, or conveying other properties, such as a marriage contract, deed of trust or settlement, it is not necessary to record the whole of the deed, but it is sufficient to expedite and record a notarial instrument, setting forth generally the nature of the deed of conveyance, and containing at length the part of the deed which relates to security conveyed. Upon the death of any creditor fully vested in right of an heritable security, the heir may complete his title to it by writ of acknowledgment, to be granted in his favour by the person duly infest of whom the security is held, according to the form set forth in the schedule No. II., annexed to the said act; and on such writ being duly registered, the heir becomes vested with the full right of the creditor in the security. Credi-

tors adjudging an heritable security from the creditor in the security, or his heir, may complete their title to it by duly recording the abbreviate of the adjudication in the Proper Register of Sasines, such recording having the same effect as if the adjudger had been entered and infest on a charter of adjudication. The heir duly served of any creditor, also was duly vested in an heritable security; or the general disponee of such creditor may complete his title to the security without the intervention of the superior, by expediting and recording an instrument under the hands of a notary public, according to the form set forth in the schedule No. III., annexed to the said act; and on such instrument being recorded in the Proper Register of Sasines, such heir or disponee becomes vested in the full right of the creditor in the security, in the same manner and to the same effect as the creditor himself was. Assignations or conveyances of heritable securities may be recorded at any time, and in competition, are preferable according to the date of registration. An heritable security may be effectually renounced and discharged in whole or in part, by a discharge executed according to the form set forth in the schedule No. IV., annexed to the said act, and recorded in the Proper Register of Sasines. The act farther declares, that nothing declared in it shall prevent the transmission or extinction of securities in the forms in use at the passing of the act; and the subsequent statute, 10 and 11 Vict., c. 50, 1847, declares that nothing declared in it shall prevent the constitution of heritable securities in the forms in use, or which might be competently used at the passing of that act. The same act farther declares, that all the provisions and enactments contained in the previous act 8 and 9 Vict., c. 31, shall apply to the transmission and extinction of heritable securities constituted in terms of the subsequent act, with this proviso, that where reference is directed by the prior act to be made to the instrument of sasine on any bond and disposition in security, it shall be sufficient, in the case of a bond and disposition in security granted under authority of the subsequent act, to make reference to the date of recording such bond and disposition in security itself in the Register of Sasines. The constitution and transmission of heritable securities is also affected by the Titles to Land Act. See *Titles to Land*.

**Heritable Jurisdictions;** were grants of criminal jurisdiction bestowed on great families, with a view to the more easy and expeditious administration of justice. These jurisdictions, with other powers possessed by landed proprietors, were abolished after the Rebellion 1745, by the act 20 Geo. II., c. 43,

and compensations given to those who suffered patrimonially by the operation of that statute. *Ersk. B. i. tit. 2, § 11, et seq.*

**Heritor**; in its original acceptation, signified the proprietor of an heritable subject; but, in connection with parochial law, the term is confined to such proprietors of lands or houses as are liable in payment of public burdens. In the case, *Earl of Strathmore*, Feb. 26, 1762, *M. 13,128*, in a question as to the right to vote as an heritor in the election of a schoolmaster, it was found, that those feuars only are entitled to vote who pay cess, whether separately or in a *cumulo* valuation. It has likewise been found that heritors, who, by their title-deeds, are liable in payment of cess and parish burdens, have a title to vote, whether their lands stand separately valued on the cess-roll or not, and although they be neither entered in the cess-roll, nor in the books of the collector of cess, as paying cess. The liferenter has the right of voting in preference to the fiar. Heritors may vote by proxy. The management of the poor is now regulated by the Poor Law Amendment Act, 8 and 9 Vict., c. 83 (1845). See *Poor. Ersk. B. ii. tit. 10, § 57; Bell's Princ. § 1136; Dunlop's Parochial Law.*

**Hermaphrodite**. In the English law, a person partaking of both sexes may give, grant, or inherit as either man or woman; *Tomlins' Dict. h. t.* Forbes, in his Institute, divides the sexes into male, female, and "hermaphrodite—*i.e.*, both male and female, which is esteemed to be of that sex which is most prevailing in the person." *Forbes, Inst. B. i. c. 1.*

**Heranship**; the crime (formerly prevalent in this country) of carrying off cattle by force. It is described as "the masterful driving off of cattle from a proprietor's grounds." *Hume, i. 107.*

**Hide**; an old English land measure, the extent of which is not quite certain, being, according to some, 100, according to others, 120 acres. Coke says that it contains no determinate number of acres. Eight hides made a knight's fee. *Tomlins' Dict. h. t.*

**Highways**; are *inter regalia*, being vested in the Crown for the benefit of the people. The arrangement and police of turnpike roads have been the subject of a number of statutes, local and general. At first they were, by various statutes (1669, c. 16; 1670, c. 9; 1686, c. 8; and 11 Geo. III., c. 53), placed under the direction of the commissioners of supply, and justices of the peace of the county. But afterwards, in almost every county, acts of Parliament were passed for regulating the roads, and giving power to trustees to arrange the statute labour, to levy tolls, and to borrow money on the produce of them. To remedy the abuses which prevailed in the obtaining

and administering of these local acts, the General Road Acts, 4 Geo. IV., c. 49, and 1 and 2 Will. IV., c. 43 (1831), were passed. Their object is to reduce to an uniform system the management of all the highways, with a reservation of whatever may be peculiarly necessary in certain localities. There are therefore still local acts relative to almost every county in Scotland, adapted to the peculiar circumstances of the district. But the general act repeals all the old acts of the seventeenth century, and such recent acts as are of the nature of general laws; and the rules now established are declared to extend to all local acts now in force, or to be enacted, relative to roads in Scotland. The subjects which the act embraces, are the qualifications and powers of trustees; regulations for driving of vehicles; the exaction of tolls; the erection of toll-bars, &c.; the penalties for evasion of tolls; the cutting of ditches and drains; encroachments upon, or obstruction of the highway; compensation to proprietors; the making of footpaths; the pruning of hedges, and the like. A highway must be at least twenty feet broad, without including the ditch on either side; and powers are conferred on the trustees for widening all turnpike roads to that extent, and for taking ground for that purpose without paying for it, but reserving the owner's claim of damages for fences removed or injured. They are also empowered to widen roads to forty feet, on giving compensation for the ground taken above twenty feet. Each local act is to be read as if the general act were incorporated in it. This does not apply to pontage acts. All regulations in local acts, not inconsistent with the rules of the general act, are effectual. The trustees are not entitled to compel the public to use the road, by shutting up a parish road; and where any unwarranted obstruction has been occasioned *de recenti* by trustees or others, it may be removed *brevis manu*. The statutory jurisdiction under the general road act is vested in the justices of peace and quarter sessions, exclusive of the review of the Court of Session. An excellent digest of the law of the road will be found in Sheriff Barclay's work on that subject (1836). See also *Ersk. B. ii. tit. 6, § 17; B. i. tit. 4, § 14; Stair, B. ii. tit. 1, § 7, and tit. 7, § 10; Bank. vol. i. p. 679, and vol. ii. p. 150; Bell's Princ. § 659; Illust. ib.; Blair's Justice of Peace, h. t.; Kames' Stat. Law Abridg. h. t.; Barclay's Law of Highways. See Statute Labour. Parish Roads. Church Road.*

**Hilda Terræ**; *hida terræ*; a "pleuch of land." *Skene, h. t.*

**Hinc Inde**; a technical expression used in Scotch legal phraseology, to signify on either side, or on this side and the other, as con-

nected with a particular process, account, or transaction. Thus, the claims of parties *hinc inde*, signifies their reciprocal claims against each other, as at a particular time, or in a particular process or suit.

**Histories**; how far evidence. See *Evidence. Dickson on Evid.* 590.

**Holdings.** The holding is a term used in feudal law to signify the tenure or nature of the right given by the superior to the vassal. It expresses the services due to the superior, and ascertains, by a single word, as by the word *feu*, or *bleuch*, the state of the connection between the superior and vassal. When it is said that a person holds feu, it is equivalent to saying that he holds his lands for payment of a sum of money yearly, or for a yearly payment in grain; and *bleuch* means a mere elusory duty, as a penny Scots. There are, besides, certain rights incident to all holdings, which are explained under other articles. Two species of holdings formerly known are now extinct—viz., wardholding and mortification. Wardholding was the military tenure of this country. The ward and marriage of the heir, which were two of its casualties, were of the most oppressive nature. See *Ward. Marriage. Avail.* And recognition, by which the feu fell back to the superior on the vassal's giving out more than one-half of the feu, was an impediment in the transmission of land holding ward, which, previous to the abolition of wardholding, occasioned the most serious inconvenience. Wardholding was abolished by the 20 Geo. II., c. 50. And where the lands held in ward of the Crown or of the Prince, they were converted into *bleuch*-holdings; when they held of a subject-superior, they were converted into feu-holding, and rules were laid down for fixing the feu-duties to be paid. This statute was one of the results of the Rebellion of 1745, and was meant to lessen the influence of superiors with their vassals. Mortification, which is the other species of holding that has fallen into disuse, was the tenure by which churches or religious societies held land for charitable purposes, or for prayers and masses for the souls of the dead. This tenure fell at the Reformation; and where lands are now destined for a charitable purpose, they are given out to be held either in feu or in *bleuch*, according to circumstances. The modern holdings therefore are either feu or *bleuch*. The feu-holdings are those which hold of the Crown or of a subject-superior, in consequence of original feu-rights; or they are rights which formerly held ward of a subject, and are now converted into feu, under the Act 20 Geo. II., c. 50. The *bleuch*-holdings, again, are either originally *bleuch*, and are held either of the Crown or of a subject-superior; or they were formerly

wardholdings held of the Crown or Prince, and converted into *bleuch*-holdings under the statute. It is obvious that original *bleuch*-holdings will now seldom be created by a subject-superior; because, in such a transaction, the granter of the right can have no object in interposing himself between the vassal and his own superior; and thus rendering it necessary for his heirs and disponees to complete a title without deriving any emolument from the sub-vassalage. The feu-holding has a *reddendo*, as it is called, or rent in money or in grain, payable yearly, at terms specified; and, besides this fixed duty, there are certain casualties, as non-entry, relief, escheat, disclamation and purpresture. See *Casualties*. The *bleuch*-holding has the same casualties, and its fixed duties (as already observed) are an elusory annual duty, as a penny money, a hawk, a rose, *nomine alba firmæ*. When the words *si petatur tantum*, are added, it is held to be discharged, if not demanded within the year; and where those words are not added, still, if the duty be of yearly growth, it ought to be demanded within the year; *Ersk. B. ii. tit. 4, § 1, et seq.* The only other holding is *burgage*, which relates to property within burgh. See *Burgage. Bank.* vol. i. p. 529, *et seq.*; *Bell's Com.* i. 680, *et seq.*; *Bell's Princ.* § 680; *Illust. ib.*; *Bell on the Purchaser's Title*, p. 36, *et seq.*; *Ross's Lect.* ii. 106, *et seq.*; *Menzies' Lect.* p. 531. As to the distinction between base and public holdings or rights, see *Base Rights. Confirmation. Consolidation. Disposition. Charter. Superiority. Tenure, and authorities there cited.*

**Holiday.** See *Sunday. Arrest.*

**Holograph Deed.** A holograph deed is a deed written with the granter's own hand, which, on account of the difficulty with which the forgery of such a document can be accomplished, is held to be valid in law without witnesses. Where it is mentioned in the deed to have been written by the granter, the presumption is, that the deed is truly holograph, though the contrary may be proved; but where the deed does not bear to have been written by the granter, still it may be proved to have been of his handwriting, either by a comparison of the handwriting, or by the evidence of those who saw it written. A holograph deed without witnesses does not prove the date that may be given to it; where witnesses attest the deed, it will prove its date, because the evidence of witnesses may be resorted to, to check any error in the date. Holograph missive letters, and holograph bonds and subscriptions in count books, if not sued on within twenty years, prescribe, unless the pursuer offer to prove, by the defender's oath, the verity of such writings; 1669, c. 9. *Ersk. B. iii. tit. 2, § 22*; *Stair, B. ii. tit. 12, § 35*, and *B. iv. tit. 42, § 6*; *More's Notes*, p.

clix.; *Bank.* vol. i. p. 333; vol. ii. p. 172; *Bell's Com.* i. 324, 329; *Bell's Princ.* §§ 20, 590, *et seq.*; *Illust. ib.*; *Dickson on Ev.* 397, *et seq.*; *Menzies' Lect.* p. 132; *Tait's Law of Evidence.* See *Deed. Evidence.*

**Holyroodhouse.** See *Sanctuary. Abbey.*

**Homagium**; a band of manrent, when any person promises to serve another in sik sort, that he shall be friend to all his friends, and foe to all his faes, against all deadly. The following curious style may be quoted from *Skene, de Significatione Verborum*:—"I become your man, my liege King, in land, lith, life, and limb, wardlie honour, homage, fealtie and lawzie, against all that live and die; your counsell conceiland that ze schaw me; the best counsell schawand, gif ye charge me; your skaith and dishonour not to hear and see, bot I sall let it all my gudlie power and warn you their of; swa help me God." *Skene, h. t.*

**Homicide**; is the killing of any human creature. It may be *justifiable*, as committed under some unavoidable necessity; or *excusable*, as where a person engaged in a lawful act is, without intention, the occasion of another's death; or it may be *culpable*; and of this there are several kinds; as where, although accidental, it has proceeded from carelessness, or where it proceeds from an unlawful act, or where it is done with an intention to do harm, though the intention does not amount to that of killing the person; or where the person intends to kill, but commits the act on a sudden, from resentment excited by real and great injuries, but without any previous malice or hatred to the deceased; and, last of all, where the homicide is committed from malice and forethought, which amounts to the crime of murder. *Hume, vol. i. p. 189, et seq.*; *Bell's Sup.*; *Alison's Princ.* 145; *Steele, 70.* See *Murder. Chaud Melle.*

**Homine Reflegiando**; in English law, a writ to bail a man out of prison. *Tomlins' Dict. h. t.*

**Homologation**; is a technical expression, signifying an act by which a person approves of a deed; the effect of such approbatory act being to render that deed, though itself defective, binding upon the person by whom it is homologated. All deeds, informal or defective, may be homologated; that is, all deeds exposed to the statutory nullities arising from the regulations established for the regular execution of deeds, or deeds granted by a person capable of consent, though the deed be defective at the time from the want of the consent of those whose concurrence the law requires, in order to give validity to the deed; as, for example, a deed by a married woman without the consent of her husband, or by a minor without the consent of his curators. And in general any irregular or informal deed

may be homologated by the parties after they are capable by themselves of executing a deed; that is, by the woman after the death of her husband, or by the minor after attaining majority, or by the party entitled, but for the homologation, to found on the irregularity. Homologation is to be inferred only from an act which clearly and expressly implies a knowledge and approbation of the deed. Thus, the paying of interest, or the performing of any obligation come under in the deed, will be accounted homologation; but an act which does not infer a knowledge of the contents of the deed, even the subscribing as a witness, if there be no other proof of the person's knowledge of the contents, will not infer homologation; unless the person so signing as witness is connected in such a way with the principal parties to the deed, that his approval must be presumed. Thus, a brother was, by signing as witness, found to have homologated his sister's marriage-contract, to the effect of preventing him from reducing a bond therein assigned. The effect of homologation on the person homologating is to render the deed as effectual against him and his heirs as if it had been a formal and regular deed from the first; but against third parties, who do not represent the person homologating, the deed is exposed to all the objections originally competent against it. *Ersk. B. iii. tit. 3, § 47, et seq.*; *Stair, B. i. tit. 10, § 11*; *B. iv. tit. 40, § 29*; *More, p. lxxvii.*; *Sandford on Heritable Succession, i. 150*; *Tait's Law of Evidence, p. 131, et seq.*; *Dickson on Evid., 441, et seq.*; *Bell's Com. i. 98, 144, et seq.*; *ii. 499, et seq.*; *Bell's Princ. § 27*; *Illust. ib.*; *Bank. i. p. 341*; *Hamilton, Bligh's Appeal Cases, ii. 197*; *Thomson on Bills, 52, 199, 204.*

**Honorarium.** The word *honorary*, in the Roman law, was applied to a fee not paid as a remuneration for labour, for which the labourer could exact a recompense; but rather as a species of *present*, made as an acknowledgment for trouble gratuitously taken; and, in an acceptation nearly similar, the word has been adopted in our law. In this sense, the fee paid to a law-agent, a physician, or a surgeon, is not an honorary, since any of them may maintain action for its recovery. But the fee of a counsel or barrister is properly an honorary, because he cannot sue his client for payment. It is true that it has been decided, that where a law-agent has received money from the client to fee counsel, and has not paid the fees, the counsel may sue the agent for the money. The same rule, however, would apply to the case of any mere donation transmitted by the hands of a third party, and not duly delivered to the donee. According to one authority, the word *honorary* signifies a fee paid in return for the exercise

of the mental faculties, in contradistinction to hire in contract of *locatio operis*. But this distinction is not well grounded. In the special case, where a Scotch advocate agrees, for a certain sum to go to London to attend an appeal to the House of Lords, he becomes a proper *locator operis*, and might maintain an action for the stipulated sum. As a general rule, the fees of physicians (except during the deathbed sickness), and of lawyers are presumed to have been paid. *More's Notes on Stair*, cxxiv.; *Bell's Com.* ii. 157; *Bell's Princ.* § 568; *Illust.* ib.; *Keay v. A. B.*, 7th March 1837, 15 S. & D. 748. See also *Jurist*, ix. 353.

**Honour**; *Acceptance for.* See *Acceptance*.

**Honour**; in English law, a noble sort of seignorie, on which other inferior honours or lordships depend. *Tomlins' Dict. h. t.*

**Honours.** Honours, or titles of dignity, descend to the series of heirs pointed out by the grant. They require no service, but vest *jure sanguinis*, and by the mere force of the grant. See *Dignities*.

**Horning, Letters of**; are letters running in the Sovereign's name, and passing the Signet. They are directed to messengers-at-arms, as sheriffs in that part, who are ordered to charge the person against whom the letters are directed, to pay or to perform in terms of the will of the letters, which must be consistent with the warrant on which the letters proceed. The warrant on which letters of horning proceed is either a decree of the Court of Session, or the decree of the magistrates of burghs, sheriffs, stewards, admirals, commissaries, or the commission of tithes, and, in some cases, on the decrees of justices of the peace. Decrees of registration also may be the warrant of letters of horning. See *Decree of Registration*. But where the decree, which is the warrant of the letters, is the decree of an inferior court, a bill must be presented to the Bill-Chamber of the Court of Session, stating the nature of the decree, and the terms of the decerniture, and praying warrant for letters of horning and pointing. This warrant is obtained of course; so that, properly speaking, letters of horning and pointing pass on the warrants of the Court of Session only. By special statute, letters of horning are authorised to pass on bills of exchange, the protest on which has been recorded in any competent court. See the nature of the warrants for letters of horning more fully explained under the articles, *Bills of Signet Letters*. *Bill-Chamber. Diligence*. See also *Exchequer Horning. Decree conform*. The letters of horning narrate the ground of debt, and the terms of the decree by which the judge orders payment or performance; and in the Will, the officers are ordered to command and charge the debtor to pay or

perform in terms of the warrant stated in the recital, within a certain number of days. Hornings on decrees proceed on a charge of fifteen days, excepting when the debtors reside in Orkney or Zetland, in which case the days of charge are forty. On obligations, where the clause of registration specifies the number of days, the number specified will regulate this matter; or, should no number be mentioned, the days of charge must be fifteen; and the days of charge on letters of horning on registered protests on bills of exchange are six; 1681, c. 20, and 1696, c. 36. See *Bill of Exchange. Charge on Letters of Horning*. In virtue of the will of the letters, the debtors are charged to pay or perform, under the pain of rebellion, and of being put to the horn. The letters also contain a warrant for pointing the effects of the debtor, and applying them in payment of the debt, and for arresting his funds and effects. These letters must be expedie by a writer to the Signet; and before a charge can be given on them, they must be impressed with the Signet. For the further procedure in enforcing obedience to the letters, see *Pointing. Denunciation. Caption. Imprisonment. Stair*, B. ii. tit. 3, § 22, and tit. 4, § 60; B. iv. tit. 47, § 7; *Ersk.* B. iv. tit. 3, § 9; *Bell's Com.* i. 7; ii. 169, *et seq.*, 543, *et seq.*; *Bell's Princ.* § 2396, *et seq.*; *Bank.* vol. ii. p. 643; vol. iii. p. 2, *et seq.*; *Thomson on Bills*, p. 576, *et seq.*; *Jurid. Styles*, 2d edit. vol. iii. pp. 567, *et seq.*, 600, *note, et seq.*, to 734, 985, *et seq.*; *Kames' Equity*, 398; *Ross's Lect.* i. 237, *et seq.*; *Alexander's Abridg. of A. S.* 23, 146-8.

Letters of horning and caption were until recently the only form of enforcing civil decrees by imprisonment, except in the case of small debt decrees. Although they may still be used, they are now superseded by the forms of enforcing decrees provided by 1 and 2 Vict., c. 114. See *Execution of Decrees. M'Glashan's Sheriff-Court Prac.*, 152.

**Horses.** By the law of England the warranty requires to be express; but in Scotland, where a horse was sold at a full value, there was formerly implied warrandice that he was sound. This difference in the laws of the two countries has been removed by the Mercantile Amendment Act, 19 and 20 Vict., c. 60 (1856), which enacts that a seller shall not be held to warrant goods, unless he shall have given an express warranty of the quality or sufficiency of the goods sold, or unless the goods have been expressly sold for a special and particular purpose, in which case the seller is considered without an express warranty to warrant that the goods are fit for the purpose for which they were sold. Under the term "goods" animals are comprehend-  
ed; *Young v. Giffen*, Dec. 4, 1858, 21 D. 87.

It is often a question of difficulty what constitutes unsoundness. A warranty seems, however, to comprehend all constitutional diseases, and all accidental injuries affecting the life of the horse; all diseases and accidents inducing lameness or throwing the horse prematurely out of work; all defects or bad habits, indicating a disease amounting to unsoundness. There is much difference of opinion whether the warranty is contravened by faults of a slighter nature, or temporary in their continuance. Bad corns have been held unsoundness; also running thrush; roaring, when it proceeds from organic defect, but not when it has been occasioned by neglect in the bringing up. Under a warranty that a horse was free from fault, the Court found the buyer entitled to repetition of the price, it being proved that the horse was a crib-biter and wind-sucker; but, in an English court, it was held that crib-biting is not included in a general warranty. It has been held in England, that a seller's general warranty was not contravened, on its turning out that the horse's age was greater than that set down in the pedigree, it being shown that the seller received that pedigree when he bought the horse, and that he had no other means of ascertaining its age. Faults in temper, steadiness, courage, utility, &c., which, however important, do not amount to unsoundness, must be guarded against by express stipulation; and it is a question of evidence, whether such engagement has been undertaken, and how far it has been complied with. The express stipulation rules the decision. A horse, in which a defect, struck at by the seller's engagement, has been discovered, must be returned immediately, or as soon as the fault is discovered; but effect will be given to a stipulation limiting the time within which, if objected to, the horse must be returned. *Brown on Sale*, 286-90; *Bell's Princ.* § 129; *Illust. ib.* The duty on horses is regulated by the act 16 and 17 Vict., c. 90, 1853. See *Warrantice*.

**Horse-Racing.** See 13 *Geo. II.*, c. 19; 18 *Geo. II.*, c. 34, § 2; 3 and 4 *Vict.*, c. 5; 8 and 9 *Vict.*, c. 109.

**Houghing of Cattle.** This offence is, by 1606, c. 5, punishable as theft, and with death; *Hume*, i. 121.

**Hounds.** See *Dogs*.

**House of Commons.** See *Commons, House of*.

**Houses.** The act 1663, c. 6, provides, that ruinous houses within burgh, which have been uninhabited for the space of three years, may be rebuilt; and, with this view, the magistrates are directed to warn the proprietors to rebuild, within a year; and if the proprietors fail to comply, the houses are to

be valued and to be put up to sale, and the price which they bring, after deducting expenses, is directed to be given to the proprietors. If no purchasers appear, the magistrates may rebuild them, on consigning the appraised value for the use of the proprietors. The case of liferenters of lands within burgh, who decline to repair the houses liferented by them, is provided for by the act 1594, c. 226, which declares, that the magistrates "sall, at the instance of the heritours of the landes within the samin, upon citation of the partie, take summar cognition of the estaite of the landes, houses, or tenements within the burgh, be ane condigne inquest of the nichtboures thereof; and gif the samin be found aulde, decayed and ruinous in ruife, sclaites, dures, windowes, fluring, loftis, timmer-work and walles, or onie of them, and ane land biggit of aulde, and throw long time decayed, in sik sort that it be already unhabitable, or that within short time may become unhabitable, in that case to decerne that the conjunct fiar or liferenter sall repair the said landes and tenements in the partes thereof decayed, as sall be found be the said inquest, within the space of zeire and day nixt after they be required thereto be the heritours; and failzing thereof, declares that it sall be frie to the said heritour to enter to the possession of the same, to have the setting, raising, using, and disposing thereupon in all time cumming, as gif there war no liferent or conjunct fee standing thairof: Providing alwaies, that sufficient security in the burgh quhair the landes or tenementes lyes, be tane for termlic payment to the conjunct fiars or liferenters thierof, enduring their lifetime, of sic mail and dewtie as the samine presentlie gives the time of the said cognition, or might reasonably give on that estaite, in case it be not presentlie set, deducand alwaies the annuales and uther burding lyand their-upon, and this to be extended to all burnt and waist lands, and against all conjunct fiars present and to cum within burgh." *Bell's Com.* i. 750; *Ross's Lect.* ii. 497, 505. See *Jedge and Warrant. Edinburgh.* For the law as to agricultural houses, see *Fences. Fixtures. Meliorations.* Also *Bayne, Dow's App. Cases*, iii. 233.

**Housebreaking;** is the worst aggravation of theft. It is committed, if the natural security of the house has been overcome, although it may not have been broken or forced open; but it is not committed when the thief enters in consequence of some of the securities being removed; as, if he should enter by an open window, so close to the ground that he did not require to climb or to receive external assistance, or by a door standing on the latch. Where the entry is effected by

concert or connivance with a servant or other person within, the crime is housebreaking in all concerned. Every dwelling-house, however mean and fragile, and every shut and fast building, though not a dwelling-house, as a counting-house, a dairy, a stable, a school-house, &c., is protected by the law against housebreaking. Housebreaking, with intent to steal, is an indictable offence. Theft by housebreaking is capital; but the punishment is now often mitigated. *Hume*, i. 98, *et seq.*; *Alison's Princ.* 282; *Burnett*, 136; *Steele*, 120. See *Theft*.

Housebreaking, with intent to break into and steal from an adjoining house, is a relevant charge, apart from actual theft. *Thomson*, 1845, 2 Br. 389; See also *Forbes*, 1845, 2 Br. 461. Raising the sash of a window, left partially open for air, and thereby effecting a sufficient entrance to enable the party with a stick to move articles of dress within, has been held to amount to theft, aggravated by housebreaking; *O'Neil*, 1845, 2 Br. 394. Entrance by false keys, or even by the true key entrusted to the party for a special and different purpose, amounts to housebreaking. *Duncan*, 1849; *J. Shaw*, 225; *Farquharson*, 1854, *Irv.* 512. See also the following recent cases as to housebreaking. *Ross*, 1842, 1 Br. 294; *Rose*, 1842; 1 Br. 437; *Mackenzie*, 1845, 2 Br. 669.

**House-Rents**; suffer a triennial prescription by the act 1579, c. 83. Under this act, house-rents, after three years, prescribe, and each year's rent runs a separate course of prescription. A demand, therefore, for house-rents is restricted to the three years immediately preceding the citation. *Ersk.* B. iii. tit. 7, § 17; *Stair*, B. ii. tit. 12, § 30; *More's Notes*, p. cclxxiv., *Bank.* vol. ii. p. 103. See *Prescription*.

**Hue and Cry**; in English law, is the procedure taken by a person robbed or otherwise injured, to pursue and get possession of the culprit's person. At common law, a private person who has been robbed, or who knows that a felony has been committed, is bound to raise hue and cry under pain of fine and imprisonment. The regular mode of raising hue and cry is, for the party to go to the constable of the next town and declare the fact, and describe the offender and the way he is gone, on which the constable raises the town and searches for the offender. If he does not find him, he sends the like notice to the constables of the neighbouring towns. *Tomlins' Dict.* h. t.

**Huesium**; *Hoyestum*; from the French, a cry formerly used in proclamations, inviting the attention of the people. *Skene*, h. t. See *Oyess*.

**Hundred**; in England, a part or division

of a shire. Anciently the hundred was liable to make compensation in cases of robbery, maiming cattle, burning stacks, destroying trees, &c.; but this responsibility is now, by 7 and 8 Geo. IV., c. 31, restricted to damage occasioned to certain kinds of property by riotous and tumultuous assemblages. *Tomlins' Dict.*, h. t.

**Hunting.** See *Game Laws*.

**Husband.** The relationship formed by marriage gives to the husband certain rights. The property which forms the goods in communion, and which consists of moveables only, is under the administration of the husband. A personal bond bearing interest, is not included under the goods in communion. But the yearly interest of personal bonds, or even the interest of heritable bonds, or rents of land, form part of the goods in communion; and in virtue of this right, the husband is entitled not only to sell and dispose of the goods in communion, but they are subject to attachment for his debts; and should those goods not be recovered, or even known to have existed during the marriage, yet they may be recovered by the husband or by his heirs. This right of administration is called the *jus mariti*; but it may be renounced, as to a special subject, by the husband in an antenuptial contract of marriage; or it may be excluded by a stranger, in regard to an estate conveyed by him to the wife. See *Contract of Marriage. Jus Mariti*. From this right of administration are excluded paraphernal goods, under which are included the wife's body clothes and ornaments, and presents made before or on the marriage-day; but donations during the subsistence of the marriage may be resumed by the husband, and therefore are not excluded from his control. See *Donatio inter virum et uxorem*. It is a necessary consequence of this right in the estate and effects of the wife, that the husband should be liable for the debts of the wife; for all those at least which, had they been due to, instead of by, her, would have fallen to him under his *jus mariti*. But he is liable only as her administrator; and if the marriage be dissolved by her death, it is against her estate and her representatives that her creditors must proceed to recover their debts, excepting in so far as the estate and effects of the husband have been completely attached by legal diligence for the wife's debts during the existence of the marriage. The imprisonment of the husband for the proper debt of the wife will not be continued after her death. There is only one circumstance, besides that of an effectual legal attachment of the husband's estate, which can continue the obligation against him, and that is his being *lucratus*, or a gainer by the marriage; but a



reasonable tocher is not, in this case, held to be a gain sufficient to subject him to this burden. The whole moveable property of the wife during the marriage is under the management and at the disposal of the husband, not only her moveable estate, as already explained, but the interest of bonds due to her and the rents of her heritable estate; and he has farther a control over her person; she acts by his consent; he becomes her curator; and no suit can be carried on at her instance, nor can she be sued without his being made a party to the action. But this curatory differs from common curatory in this, that the husband may receive donations from the wife; and a deed by a husband and wife is not reducible on the head of lesion, as a deed by a minor and his curator is. See *Curatory*. Husbands are, by the Reform Act, as they were by the old law, entitled to vote in the election of a member of Parliament, in respect of property belonging to their wives, or possessed after the death of their wives, by the right of courtesy; 2 *Will. IV.*, c. 65, §§ 6 and 11; *Chambers' Election Law*, h. t.; *Connell on Election Laws*, 152, 187. See *Reform Act*. The husband may recover the person of his wife from all that pretend to withhold her from him. She is not liable to personal diligence, unless for enforcing the performance of acts within her power, and which she is personally bound to perform. See *Ersk. B. i. tit. 6, § 13, et seq.*; *Stair, B. i. tit. 4*; *More's Notes*, p. xiii. *et seq.*; *Bank. vol. i. p. 124, et seq.*, 127, 261; *Thomson on Bills*, 206; *Kames' Stat. Law Abridg. h. t.*; *Bell's Com. i. 56, et seq.*, 632, *et seq.*; *Bell's Princ.* 3d edit. §§ 948, 1224, *et seq.* For a farther explanation of the rights created by marriage, see the articles, *Wife. Marriage. Goods in Communion. Jus Mariti. Jus Relictæ. Terce. Courtesy. Contract of Marriage. Legitim*; also *Fraser's Rel.*

**Husbandland**; contains commonly six acres of sok and syith land—*i.e.*, of such land as may be tilled with a plough or may be mowed with a scythe. *Skene, h. t.*

**Hypothec**; is a security established by law in favour of a creditor over a subject belonging to his debtor, while the subject continues in the debtor's possession. The Roman law recognised many hypothecs over moveables; but the law of Scotland, having regard to the inexpediency of such liens in a commercial and trading country, admits of but few hypothecs. Hypothec may be considered as either *Hypothec for Rents*, or *Maritime Hypothec*.

**Hypothec for rents**.—The landlord's hypothec over the crop and stocking of his tenant is a tacit legal hypothec, existing independently of any special agreement or stipulation between the landlord and tenant. It gives a

security to the landlord over the crop of each year for the rent of that year, and over the cattle and stocking on the farm for the current year's rent; which last may be made effectual at any time within three months after the last conventional term of payment of the rent. 1. *Hypothec over the crop*.—The rule in regard to the crop is, that each crop, so long as extant, and the property of the tenant, is hypothecated to the landlord for the rent of that year of which it is the crop, although the landlord should delay to exercise his right for years. But the crop of the current year cannot be hypothecated for the rent of the preceding year; although all the corn on the farm at that time may be retained as a security to the landlord for the rent of the current crop. This right of hypothec is necessarily attended with a right of retention, since, without this right, it would be of little value. Previous to the term of payment of the rent, the landlord is entitled to demand from a pouncing creditor either consignment of the rent, or caution that it shall be paid. After the term of payment, he can insist for no more than that enough of the crop be left to answer his right of hypothec. He is entitled *de recenti* to vindicate the corn grown on the farm, even against *bona fide* purchasers, unless sold in bulk in public market. See the case of the *Earl of Dalhousie v. Dunlop & Co.*, Feb. 27, 1828, 6 *S. 626*; *Affirmed in the House of Lords*, Dec. 7, 1830, 4 *W & S*, 420. There is no such right of vindication against the purchasers of stocking. 2. *The cattle and stocking on the farm*.—The cattle differ from the crop in this respect, that they stand hypothecated for the current year's rent only; and as some time after the term of the payment of the rent must be allowed for rendering this right effectual, practice has allowed three months after the last conventional term of payment for that purpose. Where the cattle have been carried off within that period, the landlord must bring his action against the poulder before the expiration of the three months, in order to preserve his right of hypothec. It is proper to observe, however, that this right of hypothec over cattle is general over the whole, and does not prevent the sale of one or more of a stock for a fair price, unless the landlord has attached the cattle by a sequestration, which has the effect of giving the landlord a lien over each of them. But although the sale of the cattle is not prohibited prior to a sequestration of the stocking, the landlord's right of hypothec over the cattle is sufficient, without sequestration, to prevent a creditor from pouncing them during the currency of the period for which the hypothec remains, that is, until the expiration of the three months after the last con-

ventional term of payment. Where lands are subset, the right of hypothec will be affected by the situation of the subtenant. If there has been a power given to subset, or if the landlord has known of the subset, a payment by the subtenant, at the proper term of payment, to the principal tenant, will free the crop from the claim of the landlord, provided the subtenant has not been legally interpellated by the landlord from making payment. Unless, however, the subtenant stand in this favourable situation, there is a great chance that he may be forced to pay over again; that is, that his crop may stand hypothecated for the rent due by the principal tenant; *Ersk. B. ii. tit. 6, § 56, et seq.* See also *Bell on Leases*, vol. i. p. 360, *et seq.* 3. *Hypothec on the invecta et illata.*—This is an hypothec competent over furniture, for house-rents, and over the goods in shops, and the instruments of manufacture necessary for the different branches of business carried on in mills, warehouses, &c. This hypothec is necessarily general, and must be made special by a sequestration. All purchases in a shop may be safely paid for by the purchaser, without any risk of a claim of restitution, or of the purchaser's being made liable to pay the price a second time; *Ersk. ib. § 64; Bell on Leases*, vol. i. p. 387, in note. It is still an open question, whether the landlord's hypothec extends over an agricultural tenant's furniture. A cautioner for rent may, on paying the rent to the landlord, insist for an assignation to the hypothec. But the landlord will not lose his recourse on the cautioner by neglecting to enforce his hypothec. The landlord is not entitled to a preference over the superior claiming his feu-duties, nor over farm-servants' wages, nor over funeral expenses, nor over the Crown. See *Crown Debts. Privileged Debts.*

2. *Maritime hypothec.*—The seamen have a tacit hypothec, in security of their wages, over the freight due to the owners of the ship. They have also a hypothec over the ship itself, or rather a lien or *jus retinendi et insistendi* in relation to it, in virtue of which, although the seaman may lose his personal action if the owners earn no freight, he will have his claim against the ship to her last plank. The shipowner has a tacit hypothec over the cargo for the freight of that cargo. And there is likewise a hypothec to freighters, which gives security over the ship to the owners of the goods, for loss by improper interruption of the voyage; or for damage done by improper stowage, &c. There is no hypothec for the price of a ship; but the repairers of a ship have an hypothec over the ship for the repairs. This, however, has latterly been confined to such repairs as have been made in a foreign

port; July 29, 1788, *Hamilton; Affirmed on Appeal; Ersk. B. iii. tit. 1, § 34.* See also *Bond of Bottomry. Bond of Respondentia.*

3. *Agent's Hypothec.*—The right which a law-agent has to retain his employer's writs and title-deeds, in security of his professional account, is sometimes, although incorrectly, called a right of hypothec. It is more properly a mere right of retention, or general lien, depending upon the possession of the writs retained. This right does not entitle the agent to retain, in security of advances unconnected with the particular employment in which he has been engaged. But, even as so limited, the right has been carried so far as, in the opinion of some lawyers, unduly to encroach on real rights constituted in favour of parties who have trusted to the records. A country agent's right of hypothec on his employer's title-deeds, covers the account of the Edinburgh agent employed by him for his client; *Walker v. Phin*, 8th June 1831, 9 S. & D. 691. In another case, the creditors of an ancestor, holding heritable bonds with powers of sale, and a law-agent holding the title-deeds hypothecated, having offered to the trustee on the bankrupt estate of the heir (who had made up no title), to give him either full inspection of the title-deeds, or actual delivery of them, on payment or caution for their debts, were found not bound to deliver them up on any other condition; *Dobie v. Scales*, May 19, 1831, 9 S. & D. 609. This right of retention does not stop prescription of the debt in security of which it is exercised. See, on this subject, *Bell's Com. ii. 35, et seq.* A right more properly of the nature of hypothec, is the preference which a law-agent enjoys for the costs of suit, over the costs recovered by his client from the adverse party. This is a right which does not depend on the agent's possession of the document of debt, or of the decree. This preference does not extend over the principal debt decreed for in a decree in favour of the client, as to which the agent is in no better situation than an ordinary creditor. See, on hypothec generally, *Stair, B. i. tit. 13, and B. iv. tit. 25; More's Notes*, p. lxxx. *et seq.; Brodie's Supp. 953; Bank. vol. i. p. 386, et seq.; Bell's Com. ii. 25, et seq.; 39, et seq.; i. 513, 525, et seq.; Bell's Princ. § 1233, et seq.; 701, 1385, et seq.; Illust. § 1388, et seq.; 698, 1233, 1275; Bell on Leases, i. 360, et seq.; Hunter's Landlord and Tenant.* An unsuccessful party cannot plead compensation against a decree for expenses to the prejudice of the agent of the successful party, *Millar v. Glass*, June 22, 1848, 10 D. 1384; *Bain v. Wotherspoon*, Dec. 12, 1850, 13 D. 305; *Ross's Lect. i. 460; ii. 420.* See *Expenses. Lien. Retention. Pledge.*

An agent is not entitled to an hypothec over titles of an heritable property belonging to his client, for business accounts as against a prior creditor holding a bond over the property, if the titles did not come into his possession until after the agency had closed, and not in the course of his employment as agent, *Renny v. Myles*, Feb. 8, 1847, 9 D. 619. LORD MACKENZIE observed: "A right of hypothec is against the general principles of our law. It is a special rule of law against the general rule of law. I sustain the right as far as it has gone in practice. It has gone a great way already, and I am unable to go farther. I know of no case where delivery was made after the business was ended. It would come to a violation of another principle, if we were but to allow this. No man can be allowed to give a preference to one creditor over another, at his own will and pleasure. Retaining his titles, his agent comes and says, 'You have it

in your power to give me a preference, I have it not at present, but you may give it me, and I pray you to do it.' Does our law admit a proceeding of that sort, by which a debtor can pick and choose among his creditors at his pleasure. I cannot sanction anything so unusual, without seeing it supported by clear practice indeed." LORD FULLERTON,—"It has been found that the lien or pledge is available in favour of agents, even against heritable creditors. That was going far, but it is fixed by repeated decisions. It is also fixed, that the lien is available even in regard to parts of the accounts due before the title-deeds were put into the agent's hands. But then, there was no question about the fact of the agent being agent at the time when the deposit was made." See also the case of *Murdoch v. Menzies*, 15th Dec. 1841, 4 D. 257, and the case of *Gray v. Wardrop's Trustees*, May 21, 1851, 13 D. 963.

## I

**Idiota.** An idiot, or fatuous person, is one "entirely deprived of the faculty of reason, having an uniform stupidity and inattention in his manner, and a childishness in his speech, which distinguishes him from other men." This state is to be ascertained by the verdict of an inquest, on a brievé directed to the judge-ordinary of the bounds within which the person resides. There are two heads in this brievé; the first relates to the state of the person—the second to the nearest male agnate. On the first head, it is not only necessary to inquire into the state of the person at the time of the inquest, but how long he has been in that state; for the act 1475, c. 66, provides that no alienation made by the person after the time fixed on by the inquest as the commencement of the distemper shall be valid. In this inquest it is necessary to produce the person to the jury, that they may judge of his condition; the date of the commencement, as well as the endurance of the disease, will be proved by the evidence of witnesses examined before the jury. Under the second head of the brievé, the jury is required to ascertain who is the nearest male agnate, of twenty-five years of age. The powers of the curator to an idiot are the same as those of tutors to pupils; and the curatorship expires either by the death of the person cognosed, or by his recovering; the latter event being ascertained by a declaratory judgment of the Court. The brievés for cognosing an idiot or a furious person are nearly similar. They differ in the description of the circumstances into which the jury are to inquire. The question for the

inquest in the brievé of idiocy is thus expressed, *Si sit incompos mentis, fatuus et naturaliter idiota*. The brievé of furiosity is expressed in these terms: *Si sit incompos mentis, prodigus, et furiosus, viz. qui nec tempus, nec modum impensarum habet, sed bona dilacerando profundit*. Where there is any doubt as to the proper character of the infirmity, brievés of both kinds may be taken out, and claims given in to the jury on both, so as to enable the jury to adapt their verdict to the one or to the other, according to circumstances; and the brievé to which the verdict applies will be the only one retoured to Chancery. See *Kilkerran, Idiocy and Furiosity*, No. 1, and *Ersk. B. 1, tit. 7, § 48, et seq.* See also Mr Ludovic Colquhoun's report of the case of *Yoolow*, 28th Jan. 1837, for an exceedingly interesting disquisition on the different degrees of mental infirmity, in reference to that case; the report of which also illustrates the mode in which the judicial inquiry is conducted, according to the present practice of the law of Scotland. See *Brievé. Curatory*. As a state of idiocy unfits the person for entering into transactions, a proof, even after his death, that the grantor of a deed was an idiot at the time of granting it, will be sufficient for reducing that deed; and, according to Bankton, restitution, on the ground of idiocy, is competent to idiots against their curators within four years after their convalescence, in the same way that it is to minors; *Bank. B. i. tit. 7, § 106*. Idiots and furious persons, who have no lucid intervals, are inadmissible as witnesses in criminal cases. But the evidence of a person who has perio-

dical fits of insanity, with long lucid intervals, may be received *cum nota*, as to any matter which occurred when he was in health; provided no fit of derangement have intervened; *Hume*, ii. 340. Insane persons are not liable to criminal prosecution, if their insanity amount to a total alienation of reason. It is also a sufficient excuse that the panel labours under an illusion which misleads his judgment in the particular case, though he may be aware of the distinction between right and wrong in general. Where there is a mixture of guilt and derangement in the commission of the crime, the course which *Hume* recommends is, that the jury should convict, with a recommendation to mercy. The plea of insanity is more readily received in crimes of a violent nature, than in such as require art and perseverance. The *onus probandi* lies upon the panel; and the insanity must have existed at the time, but need not be proved to have existed either before or after. If, however, there is no direct evidence applicable to the period, the situation of the panel, before and after committing the act, and the general nature of his malady, will form the grounds of determination. Where insanity is found proven by the jury, the prisoner, except in cases of delirium or other temporary bodily disease, is ordered to be confined until his friends find caution to keep him safely during the remainder of his life. If the prisoner is insane when brought to trial, the trial may be delayed till he is so far restored to reason as to be able to give information for his defence; *Hume*, i. 37, *et seq.*; *Steele*, 67; *Alison's Princ.* 645. In England, an idiot is one who has had no understanding from his nativity, and is by the law presumed likely never to attain any. A lunatic is one who has had understanding, but by disease, grief or accident, has lost the use of his reason. Indeed, a lunatic is properly one who has lucid intervals. But the general term, *non compos mentis*, as contradistinguished from idiot, comprises lunatics, persons under phrenzies, those who lose their intellects by disease, and those who become deaf, dumb, and blind. The Sovereign is guardian both of idiots and of persons *non compos*; standing, however, with regard to the latter, in the relation of a mere trustee, since their recovery is never despaired of. By the common law, there is a writ *de idiota inquirendo*, to inquire whether a man be an idiot or not, which must be tried by a jury of twelve men. If he is found *novus idiota*, the profits of his lands and the custody of his person may be granted by the Crown to a subject. A person is proved *non compos mentis*, in a similar manner. The Lord Chancellor, upon petition or information, grants a commission to inquire into his state of mind; and if he be found

*non compos*, commits the care of his person, with a suitable allowance for his maintenance, to one who is called his committee; *Tomlins' Dict. h. t.*; *Stair*, B. i. tit. 10, § 15; *More's Notes*, pp. xiv., clxxxviii., cexv.; *Bank* vol. i. pp. 166, 205, 352; ii. 248; iii. 47; *Bell's Com.* i. 132-6-7; ii. 166, 174, 567; *Bell's Princ.* § 2107, *et seq.*; *Kames' Stat. Law Abridg. h. t.*; *Brown on Sale*, p. 161; *Thomson on Bills*, p. 198; *Tait's Justice of Peace, h. t.*; *Dunlop's Parish Law*, pp. 184-5, 198, 203, 218, 349; *M'Adam, Dow's Appeal Cases*, i. 148; *Towart, Dow. v. 231*. See *Brieve of Idiocy and Folly. Curatory. Imbecility. Insanity.*

**Id Tantum Possumus quod de Jure Possumus**; a maxim applied by *Stair* to conditions in contracts impossible, because illegal. *Stair*, B. i. tit. 3, § 7; *Bank*. i. 63. See *Condition*.

**Ignoramus**. In the criminal law of England, *ignoramus* was the word formerly written on a bill of indictment, by the grand jury impanelled on the inquisition of criminal causes, when they rejected the evidence for the prosecution as too weak or defective to make good the presentment against a person, so as to put him on his trial. The words now are, *Not a true bill*, or *Not found*, and such a deliverance stays proceedings, and the prisoner is liberated without further answer. *Ersk.* B. iv. tit. 4, § 84; *Tomlins' Dict. h. t.*

**Ignorantia Juris**. No person is entitled to plead ignorance of the law, though he may plead ignorance of the fact. Thus, by law a mandate falls on the death of the mandant; but should the mandatory, ignorant of the mandant's death, continue to act under the mandate, his acts will be effectual. On the other hand, should he continue to act after coming to the knowledge of his constituent's death, his acts would be invalid, though, under an error in law, he should *bona fide* believe that he was still legally entitled to act under the mandate. In this sense, a person may plead ignorance of the fact, but he will not be permitted to plead ignorance of the law. The distinction between ignorance of fact and of law is of much importance in questions as to *condictio indebiti*. See *Ersk.* B. iii. tit. 3, § 41; *Stair*, B. ii. tit. 1, § 24; B. iv. tit. 1, § 50; tit. 45, § 17; *More's Notes*, p. xlix.; *Bank*. vol. i. pp. 215, 469; *Brown's Synop.* p. 950. See *Condictio indebiti*.

**Illegal Contracts**. See *Pactum illicitum*. **Illegibility**; in a material part of a deed has often proved fatal to it. Thus a bond, in a material part of which half a line was obliterated and unintelligible, was annulled; and another was found not to be probative, the condition of which was partly scored and partly illegible. *Ross's Lect.* i. 146.

**Illegitimate Children.** See *Bastard*.

**Imbargo.** See *Embargo*.

**Imbecility.** Under this title in the *Dictionary of Decisions* are classed questions as to the validity of deeds granted by persons of weak intellect, or in such a state of mind or body, from the occurrence of some accident or overwhelming event, that they cannot be considered *compotes mentis*. Natural imbecility approaches to fatuity, but has not necessarily the same effect, a distinction being taken between an absolute idiot and a person who has some sparks of reason. The latter, it is said, may, without the consent of curators, execute deeds of lesser moment. In some cases the Court have, on the application of the friends of the party, for the appointment of a curator, remitted to the Lord Ordinary, to ascertain the state of the fact; and have granted or refused the application accordingly. This was done in one instance where there appeared in the party a singularity of behaviour, and a total neglect of his affairs; and in another, where the interposition was craved in behalf of a gentleman who, from great age and severe indisposition, had been reduced to a state of nearly total imbecility. In a subsequent case the appointment of a curator was resisted, in the name of the party said to be imbecile; and it was argued that he could not be deprived of his right to conduct his own affairs, unless regularly cognosed by a jury. The Court, however, having remitted to the sheriff to receive evidence, and being satisfied on his report, and after hearing in presence, of the necessity of a curator, sustained their appointment. And it is now settled, that in cases of imbecility and partial incapacity, which require protection, but in which no remedy by cognition and curatory can be obtained, the power of interposing, by appointing a judicial factor or *curator bonis*, is vested in the Supreme Court. See, however, the case of *Lockhart*, 17th July 1857, 19 D. 1075, where contrary medical certificates were produced. Where the imbecility of one who grants a deed amounts to little more than a weak and facile disposition, coincident fraud in the grantee is necessary to annul the deed. (See *Facility*.) But where the imbecility approaches more nearly to fatuity, the obligation, if of great importance, may be dissolved without the necessity of proving fraud. A man has been found to have sufficient understanding to make a testament, because that is revocable at pleasure; but he was judged incapable of signing a deed, disabling himself from making a second testament, as such a deed would strip him of all power over his effects. And the marriage of a person, not altogether void of reason, was reduced on the head of imbecility, the tie made by marriage

being indissoluble. The Court, however, has gone a great length in supporting the obligation except where there was some suspicion of fraud, and where the contract was obviously such a one as a person of sound judgment would not have entered into. With regard to imbecility, induced by accident or otherwise, very severe disease, or *lectus ægritudinis*, has been held a ground of reduction; it having been repeatedly found relevant to reduce a deed or discharge subscribed by a woman, that it was offered to be proved to have been presented to her in childbirth pains. *Æstus amoris* in a bridegroom may be "pretended" as a ground to reduce grants in favour of a wife or her friends, but not in favour of parties unconcerned in the treaty of marriage. *Luctus* or grief is no defence. Imbecility is not necessarily an objection prorable to a witness's testimony, except where it would be plainly indecent and unreasonable to expose such an unfortunate person to the useless test of an examination. The degree of intelligence necessary to make such a person a credible witness, depends in a great measure on the nature and circumstances respecting which he is tendered to give evidence. *Ersk. B. i. tit. 7, § 48, notes, and 240 (Ivory); Bell's Princ. § 14, 2113; Kames' Equity, 66; Tait on Evidence, 343. See Idiots. Insanity. Facility. Interdiction.*

**Immemorial;** beyond the memory of existing men. When a custom has been proved as far back as the memory of man, the same custom is presumed beyond memory. Thus, where the rate of the culture is not specified in the deed of thirlage, the quantity due may be established by mere possession for forty years. According to *Stair*,—"forty years is equivalent and always equiparate to immemorial possession." But possession for a much shorter period may be considered immemorial. Thus, in a constitution of thirlage, possession being proved for twenty-eight years backward, and nobody being found of age to prove further back, anterior possession was presumed, to complete prescription. Immemorial practice in a burgh, of levying particular duties, upon a preceding title in writing, to tolls and customs in general, was found relevant to support the exaction. So also, where there was doubt as to the comprehensiveness of the words of the grant, immemorial possession and practice were found relevant to support the exaction, as well as the mode of levying the duties. *Stair, B. ii. tit. 7, § 2; B. iv. tit. 27, § 9; Ersk. B. ii. tit. 9, § 30; Brown's Synop. pp. 308, 1594-5.*

**Immoral Contracts.** See *Pactum illicitum*.

**Impeachment;** an accusation and prosecution for treason and other high crimes and

misdeameours. The House of Lords has an original jurisdiction in criminal matters, exercised over either Peers or Commoners, upon impeachment by a member of the Lower House. Articles are exhibited on behalf of the Commons, who appoint managers to make good their charge. These articles are carried to the Lords; and if they find the accused guilty, no pardon under the Great Seal can be pleaded to such an impeachment. *Ersk. B. i. tit. 3, § 8; 12 Will. III., c. 2.*

**Impignoration.** See *Pledge*.

**Implied Condition.** See *Condition. Legacy*.

**Implied Discharge and Renunciation.**

The granting of a receipt for a single year's rent or feu-duty, without any reservation of arrears, raises a presumption that no arrear is due. But the presumption rises much higher when the creditor has, for three successive years or terms, granted receipts for rents or feu-duties, without reservation of arrears; these discharges, when written, applying each to a whole term's or year's rent, and granted all by the same person, being held equivalent to a discharge of arrears. Provided they have been granted by the same person, it is of no consequence although they have been granted to different persons. The presumption may be elided by reference to the debtor's oath, or stronger presumptions that the arrears are due. With regard to the discharge of a cautioner implied by the creditor's negligence, or his granting a discharge to the debtor or a co-cautioner, see *Cautioner*. See also *Bell's Com. i. 359*. The accepting of or acquiescence in a tack, or other inferior right, has been found to imply a renunciation of any claim to a higher right. Taking a right to a second tack from a third party, does not imply a passing from the former, unless the posterior tack had a greater duty or shorter endurance; and the tacksman paid the greater duty, or declared expressly that he stood by the latter tack. But accepting a second tack from the granter of the first, bearing a different commencement and duty, was found to import a passing from the former. An irritant clause is, in the general case, held to be purged by him who seeks declarator of irritancy, having acted subsequently to the contravention, as if the irritancy had not been incurred. The granting of a bond for a sum of money, in satisfaction of all which the grantee could ask or name, was found to annul a previous bond for a smaller sum. The question, whether conventional provisions imply a discharge of legal provisions, must depend much upon the circumstances of the case, and frequently on the presumed intention of the granter to supersede or only to increase the legal provision.

*More's Notes on Stair, p. cxxiii.; Brown's Synop. h. t.; Dickson on Evid. 229, 332. See Discharge. Apocha trium annorum.*

**Implied Warrandice.** Formerly under the implied warrandice of the contract of sale, the buyer, on discovering that the commodity purchased had a latent defect of such a nature that had he been made acquainted with it, he would not have become a purchaser, might have returned the article, and brought an action against the seller for repetition of the price. This action required to be raised *de recenti*, as otherwise the presumption was that the purchaser was satisfied with his bargain. By the law of England the purchaser had not this remedy unless the seller had given express warrandice. And by the Mercantile Law Amendment Act (19 & 20 Vict., c. 60, § 5) the law of Scotland has been assimilated to that of England in this respect. *Brown on Sale, p. 285; Ersk. B. ii. tit. 3, §§ 25, 28; B. iii. tit. 3, § 9; Bell's Com. i. 438; Bell's Princ. § 1469; Ilust. ib.; Hunter's Landlord and Tenant, ii. 259; Ross's Lect. i. 218; ii. 235. See Actio redhibitoria. Warrandice.*

**Imposition.** See *Swindling. Fraud*.

**Impost.** See *Customs*.

**Impotency;** is a ground on which a marriage may be declared void, as having been in truth no marriage at all. *Ersk. B. i. tit. 6, § 7; Stair, B. i. tit. 4, § 6. See Marriage. Divorce.*

**Impressment.** The Crown is, in compliance with long-established custom, empowered, by the annual Mutiny Act, to grant commission for the impressment of men for the sea service. *Blair's Justice of Peace, vocs Seamen. See also Tail's and Hutch. Justice of Peace; Tomlins' Dict. h. t. See Seamen.*

**Imprisonment.** Imprisonment or incarceration may proceed either in virtue of a criminal or of a civil warrant. Criminal warrants are issued for the purpose of arresting the supposed offender, when a crime has been committed; and where imprisonment is part of the punishment, the sentence of the criminal court is the warrant for the convict's detention. Any sheriff, justice of peace, or other magistrate, may grant warrants for apprehension, although he has himself no jurisdiction in the trial of the crime committed. (See *Criminal Prosecution*.) Civil warrants are granted for the apprehension of a debtor. There are various civil warrants on which imprisonment may proceed, such as the act of warding, the *meditatio fugæ* warrant, letters of caption, and the warrant now inserted in decrees in terms of the Personal Diligence Act, 1 and 2 Vict., c. 114. The last mentioned is now the principal civil warrant, as to which, see *Execution of Decrees*. With regard to letters of caption, which were

formerly the only form of enforcing the civil decrees by imprisonment, excepting acts of warding, see *Caption*. The imprisonment for a civil debt consists in different acts, to which it is necessary to pay attention, since the Bankrupt Acts attach very important effects to imprisonment, by making it one of the equivalents of legal bankruptcy. See *Bankrupt*. The first step regularly is, for the messenger, with his blazon displayed, to touch the shoulder of the debtor with his wand, and to tell him that he is his prisoner. It is not absolutely essential, however, to the constitution of imprisonment, in the sense of the act 1696, c. 5, that the officer should make use of his wand of peace. See the case of *Scott*, 18th January 1855, 17 D. 292, where much information on this subject will be found. After this, should the debtor attempt to escape, or even take refuge in the sanctuary of Holyroodhouse, the messenger may follow him there, and take him out of sanctuary, and convey him to prison. The act of incarceration is the next step to that of the debtor's apprehension; and this consists in the messenger's actually lodging the debtor in prison. On this occasion, the messenger either leaves the caption in the hands of the jailor, or makes a copy of it, and certifies it; at the same time he enters the prisoner's name in the books of the jail, either for the whole or a certain portion of the debt, for which a fee is paid to the jailor. It is for the sum entered in the books that the magistrates are liable, should the prisoner make his escape; and if the debtor pays the sum entered against him in the books, he is free. See *Booking a Prisoner*. *Escape*. It commonly happens, however, that neither of those steps is taken. In the ordinary case, the diligence is put into the hands of the messenger, with directions as to the terms of settlement which will be accepted: and, in consequence of this power, he takes the debtor to a tavern or coffee-house, or to the messenger's chambers, in order, if possible, to obtain a settlement according to his instructions. Those are the transactions which are so apt to raise doubts as to what constitutes legal imprisonment; and, until some more precise legislative provision has been made, it is the duty of persons acting for creditors to have those difficulties in view when instructing the messenger to execute personal diligence. See *Apprehending a Debtor*. The messenger, without a special mandate, has no right to receive payment; his duty, *qua* messenger, is merely to execute the diligence; therefore, if the debtor make payment to a messenger, he does it at his own risk, and may be called on by the creditor to pay a second time, should the messenger retain the

money. On the other hand, if the express instructions of the messenger's employer authorise the messenger to receive payment of the debt, the messenger's receipt will be an effectual discharge to the debtor; and the cautioner for the messenger, in case of the misapplication of the money, will not be liable for what may have thus come into the hands of the messenger. *Stair*, B. iv. tit. 47, § 16; *More's Notes*, p. cccxxx.; *Ersk. B. iv. tit. 3, § 12, et seq.*; *Bank. vol. i. p. 64*; *Bell's Com. ii. 536, et seq.*; *Bell's Princ. § 2395, et seq.*; *Hutch. Justice of Peace*, vol. i. pp. 219–22, 282, 485; *Tait's Justice of Peace, h. t.*; *Tait's Justice of Peace, h. t.*; *Jurid. Styles*, 2d edit. vol. iii. pp. 567, 816; See *Caption*. *Prison*. *Magistrates*. *Bankrupt*. *Apprehending a Debtor*. *Factum præstandum*. *Meditatione fugæ*. *Act of Warding*.

**Improbation**; is the disproving and setting aside of writs *ex facie* probative on the grounds of falsehood or forgery. The form of process by which this is generally done is an action of reduction-improbation; but improbation may also be proponed by way of exception. The action of reduction-improbation requires the concurrence of the Lord Advocate, whether the falsehood and forgery alleged be real or only constructive; but the Lord Advocate cannot withhold his concurrence. See, on the subject of *Improbation*, *Ersk. B. iv. tit. 1, §§ 18, 19*; *Stair, B. iv. tit. 20*; tit. 40, § 39; *Bank. vol. ii. p. 637*; *Kames' Stat. Law Abridg. h. t.*; *Maclaurin's Sheriff Process*; *M'Glashan's Sheriff Court Prac. p. 19*; *Tait on Evidence*; *Dickson on Evidence, 468, et seq.*; *Shand's Prac. 612, 639, 257, 289*; *Alexander's Abridg. of A. S. 1, 34, 58*. See *Certification*. *Reduction*.

**Improbatory Articles**. See *Articles improbatory*.

**Improvements**. See *Meliorations*. And as to improvements on entailed estates under the stat. 10 Geo. III., c. 51, see *Tailsite*.

**Improving Lease**. When, from the dilapidated state of a farm, and the exhaustion of the soil, it would require much labour and outlay to prepare it for successful cultivation, it is usual, for the sake of encouraging the tenant to improvements, by the hope of reaping the benefit of them, to grant him a lease of more than ordinary duration. Such a lease is called an *improving lease*, and is generally double the length of an ordinary lease. A lease of ordinary endurance is a lease for nineteen or twenty-one years; and an improving lease is usually for thirty-eight or forty-two years. In improving leases, the doctrine of the landlord's *delectus personæ* is excluded; and in the absence of stipulation to the contrary, the tenant's assignee, or heirs, or creditors, are entitled to possess un-

der the lease, or to demand a compensation for being deprived of it. For the form of an improving lease, see *Bell on Leases*, ii. 186. As the power of granting leases of more than ordinary duration is strictly limited in many deeds of entail, the act 10 Geo. III., c. 51, empowers the heir in possession to grant leases of thirty-one years, or fourteen years and a life, or two existing lives; the tenant being bound, in leases for two lives, to inclose one-third of the lands in ten, two-thirds in twenty, and the whole in thirty years. In leases of more than nineteen years, the tenant must be bound to inclose one-third of the lands before the expiration of one-third of the lease, two-thirds before the expiration of two-thirds, and the whole before the expiration of the lease. No one inclosed arable field shall exceed forty Scotch acres, and all the fences must be kept and left in good repair. By § 5 of the same act, what are called building leases may be granted, not exceeding ninety-nine years, under the following provisions:—1. That the lease be of five acres, and no more, to one person, not being within 300 yards of the mansion-house. 2. That it be void if a house to the value of L.10 shall not be built on each half acre within ten years. 3. That the houses be kept tenantable and in repair. 4. That the rent be not under the former rent, and without grassum. *Bell's Princ.* § 1214, 1764; *Bell on Leases*, i. 73, 129; ii. 186, 368; *Hunter's Landlord and Tenant*, i. 71, 114. See *Lease. Tailzie*.

By 20 and 21 Vict., c. 26, leases for thirty-one years and upwards may be registered, and such recorded leases are effectual under certain regulations against singular successors without possession.

**Incapacity.** See *Idiocy. Imbecility. Facility. Insanity. Evidence*.

**Incest**; is defined by Erskine to be “an unnatural commixtion of the bodies of man and woman, contrary to the reverence due to blood.” It applies to all who stand within the degrees of consanguinity or affinity within which marriage is by law prohibited. But it is not committed by connection with bastard relations how near soever. It is essential to the crime that the accused knew of the relationship; but the *onus* of proving ignorance lies upon him. Incest is a capital offence, and the attempt to commit it is punishable arbitrarily. The punishment of incest in recent cases has been transportation for life. *Neilson*, 1855, 2 *Irv.* 235; *Ersk.* B. iv. tit. 4, § 56; *Hume*, vol. i. p. 441, *et seq.*; *Steele*, 181; *Alison's Princ.* 562; *Bank. i.* 145; *Kames' Stat. Law, h. t.*; *Tait's Justice of Peace, h. t.*

**Incident Diligence.** Letters of incident diligence in the Court of Session, are signet

letters authorised by the Court, to be issued incidentally in the course of a process, for the purpose of compelling the attendance of witnesses or havers, to bear evidence, or to exhibit and produce writings. By 13 and 14 Vict., c. 36, § 25, it is unnecessary to obtain a formal extract of diligences; and a certified copy of the interlocutor granting the diligence is declared to have the same force and effect as an extract. Such diligences seem also, at one time, to have been used for the purpose of bringing new parties into the field; but the only example of this in modern practice, is in the process of ranking and sale, where, in the event of the death of the debtor, or of any of the creditors who have appeared, their heirs may be cited on a diligence, without waiting the expiration of the *tempus deliberandi*, or transferring the process *passive* against them. In the case of parties interested, as being liable in relief or otherwise, it was also customary, by the older practice, to intimate the dependence of the action by incidental diligence. This, however, is now done by an interlocutor ordering the cause to be intimated, without a diligence or extract; a mere certificate of intimation being sufficient evidence of the notice. And when the interest of the party is more important, a supplementary summons is required; for, according to the old rule, no decree could issue against a party called by an incident diligence. Neither (with the above exception) is this a competent mode of transferring an action against the representative of one of several defenders, or against the husband of a party who has married during the dependence of the action. In the inferior courts, incidental diligences are issued under the warrant of the inferior judge: and if the witness or haver live beyond the jurisdiction of the court, letters of supplement will be obtained in the usual manner. See *Supplement*. On the subject of this article, see *Ersk.* B. iv. tit. 1, § 52, and *Note by Mr Ivory*; *Bank.* vol. ii. p. 626; *Stair*, B. iv. tit. 20, § 9; tit. 33, § 2; tit. 41, § 4; *A. S. 23d. Nov.* 1711; *Shand's Prac.* 492, 543, 851, 870, 366; *Bell's Com.* ii. 479; *Maclaurin's Sheriff Prac.*; *Brown's Synop.* 365. See *Haver. Prof. Evidence. Commission*.

**Incidental Jurisdiction.** Where, in order to enable him to pronounce a definitive judgment in an action brought before him, a judge finds it necessary to decide questions which do not fall under his original cognizance, he may determine them incidentally; his sentence having no further effect in that incidental question, than to support his judgment or explicate his jurisdiction in the original cause carried on before him. Thus, a sheriff need not stay process for want of juris-



diction, because forgery is alleged in an action to which he is confessedly competent, but may judge in the forgery *incidenter*. See *Ersk. B. i. tit. 2, § 8*.

**Inclusures.** The act 1661, c. 41, enables a proprietor to force a conterminous proprietor to concur with him in mutually inclosing their property. And, accordingly, the conterminous heritors must, under this statute, mutually bear the expense of making a march-dike or proper fence. But there is an exception in the case of a feuar or small proprietor, whose lands do not exceed five or six acres. Where the march is crooked, application may be made to the judge-ordinary to straight it, and determine the compensation to which either may be entitled, by the operations necessary in straightening the march. *Stair, B. ii. tit. 3, § 75; B. iv. tit. 27; Ersk. B. ii. tit. 6, § 4; B. iv. tit. 4, § 39; Bank. vol. i. p. 679; Hutch. Justice of Peace, vol. ii. p. 516; Tait's Justice of Peace, voce Planting; Blair's do. voce Planting. See Marches. Planting and Inclosing.*

**Incompetency;** was formerly one of the grounds on which a cause might be brought from an inferior court, by advocacy, to the Court of Session. Under incompetency was included not only want of jurisdiction, but every ground of declining a jurisdiction, arising either from privilege in the party or suspicion of the judge. *Stair, B. iv. tit. 37, § 12.* The act 16 and 17 Vict., c. 80, § 24, 1853, limits the power to advocate to interlocutors sisting process, giving interim decree for payment of money, or disposing of the whole merits of the cause. See *Advocacion. Declinature.*

**Incorporation;** is an association for the purpose of trade or manufactures, established by grant from the Crown. Incorporations are perpetual, if their duration be not limited by the grant or charter. The majority of the members of the incorporation may make bye-laws. The share of the individual partner transmits to his representative on his death, and may be transferred during his life, to the effect of rendering the dispoonee one of the incorporation. See *Community. Exclusive Privilege.*

**Incorporeal.** See *Corporeal and Incorporeal. Heritable and Moveable.*

**Inculpatæ Tutela.** See *Moderamen inculpatæ tutela.*

**Incumbrances.** However unexceptionable the titles to land may be, the land may be burdened with incumbrances, and these the seller is bound to discharge, the purchaser being entitled to retain the price until this is done. The burdens by real security remain as incumbrances on the land, although extending beyond the price which the purchaser

has agreed to pay; and a receipt from the creditors whose debts are paid off, with a discharge of the price by the seller, will not free the land. But, in judicial sales, and in sales under the Sequestration Act, the burden is limited to the amount of the price. Payment of the price to creditors as ranked in the judicial sale disburdens the land; and, in sequestration, payment of real securities to the amount of the price, with a discharge by the trustee, completely disencumbers the land. The real burdens which are to be discharged from the price before the trustee draws any part of it, are such only as are preferable to the disposition or decree vesting the estate in the trustee. Inhibition does not fall under this description, the Bankrupt Act declaring that the adjudication or conveyance to the trustee shall not be struck at by any prior inhibition; and hence the purchaser is not entitled, before paying the price, to insist for a discharge of the inhibition. The purchaser's right of retention until incumbrances be purged, may be, by stipulation, limited to a certain number of years; or, if the years of prescription have expired, and warrandice be given, with caution to relieve, the Court will in equity interpose to order payment of the price. In the case of a voluntary sale by trustees, in terms of which the purchaser was not bound to pay the price till incumbrances were purged, the Court, when the purchaser had been in possession for six years, ordered that the annual rents of the price should be paid to the trustees, to be by them laid out at interest till the incumbrances were purged. In another case, *L. Clunie, 20th July 1626, Mor. 543,* the Court found that the purchaser possessing the land and retaining the price was liable in payment not only of the interest, but of the excess of the profits of the subject above the interest. *Bell's Com. ii. 417-8; Bell's Princ. § 892; Illust. ib.; Brown on Sale, 200.* See *Burdens.* It is of importance for a lender on heritable security, or a purchaser, to discover the incumbrances which affect the borrower's or the seller's estate. This is effected by a search for incumbrances, some practical directions as to which will be found under the article, *Search of Incumbrances.*

A sale by an heritable creditor in virtue of a power of sale in his bond and disposition, and carried through under the provisions of the act 10 and 11 Vict., c. 50 (1847), has the effect of completely disencumbering the lands of all securities and diligences posterior to the security of the creditor who sells, as well as of the security and diligence of such creditor himself. See *Heritable Securities.*

**Indebiti Solutio.** The payment of what

is not due, when made from ignorance or mistake, may be recalled. See *Condictio Indebiti*, and authorities there cited.

**Indecent Exhibition.** Any gross lewdness publicly practised, or indecent exhibition, is an indictable offence. *Hutch. Just. of Peace*, ii. 331; *Shaw's Digest*.

**Indecent Practices;** by which the morals of female pupils are corrupted, have been repeatedly punished with scourging or transportation for seven years. *Hume*, i. 309; *Steele*, 114; *Alison's Princ.* 225. See *Lewd*.

**Indefinite Payment;** is where a debtor is due several debts to one creditor, and he makes a payment to the creditor, without specifying to which of the debts he means the payment to be ascribed. The rules which are adopted in this case have in view the interest of the creditor more than that of the debtor. Thus, if there be one debt secured by inhibition, and the other not, the payment is ascribed to the debt unsecured. But this does not happen where the security is an adjudication, because the rigorous nature of that diligence may carry off the estate of the debtor; and, therefore, the payment will be imputed to account of the debt covered by the adjudication. Again, where one debt bears interest, and another does not, the indefinite payment is applied in extinction of the debt which does not bear interest; and indefinite payments must always be applied in extinction of interest before being applied to principal sums. Where a cautioner is bound for one debt, and another debt is unsecured, although the interest of the creditor might lead to the application of the payment in extinction of the debt unsecured, yet the interest of the cautioner counterbalances that consideration, and equity divides the payment between the cautioner's debt and the others. It has also been decided that a creditor cannot apply the payment in such a manner as to leave the debtor exposed to penal consequences. The payment cannot be ascribed to a disputed debt, nor, on emerging circumstances, can it be applied differently from what was understood at first. A dividend from a sequestrated estate cannot be applied otherwise than to the whole debt. *Ersk. B.* iii. tit. 4, § 2; *Stair*, B. i. tit. 18, § 3; *More's Notes*, pp. cxxvii. cclxxv.; *Brodie's Sup.* p. 940; *Bell's Com.* ii. 535; *Bell's Princ.* § 562; *Illust. ib.*; *Tait's Just. of Peace, voce Payment*; *Kames' Equity*, 265.

**Indemnity.** Acts of indemnity, after rebellions, have been passed for quieting the minds of the people, and throwing former offences into oblivion; but it has been made a question whether those acts were meant only to protect against criminal prosecutions, or also against civil actions for reparation of

damages suffered by individuals. Acts of indemnity are passed every session of Parliament for the relief of those who have neglected to take the necessary oaths, &c., required to qualify them for their respective offices. *Ersk. B.* iv. tit. 4, § 106; *Kames' Stat. Law*, h. t.; *Hutch. Just. of Peace*, i. 48.

**Indenture;** in the law of England, is a writing containing some contract, agreement, or conveyance between two or more persons, indented in the top (according to the older definition) to correspond with another part having the same contents. As contradistinguished from a *Deed poll*, an indenture is a bilateral or other deed of the nature of a contract, whereby the parties undertake reciprocal obligations, whereas a deed poll is unilateral. *Tomlins, h. t.* See *Deed Poll*.

**Indentures.** This term is in our practice commonly applied to the mutual contract between master and apprentice, by which the master becomes bound to teach the apprentice his trade or profession, and the apprentice to give his time and services, and to pay an apprentice fee. Where the apprentice is a pupil, his father, tutor, or some kinsman, becomes bound for him; but where the apprentice is a minor *pubes*, he will be bound by his indentures entered into with the consent of his curators, if he has curators, or, if he has no curators, by himself alone. At the same time, indentures may be set aside on the head of minority and lesion. *Ersk. B.* i. tit. 7, § 62; *Bank.* vol. i. p. 58; *Kames' Stat. Law Abridg. voce Writ.*; *Hutch. Just. of Peace*; *Tait's Just. of Peace, vocibus Apprentice, Soldier*; *Jurid. Styles*, 2d edit., vol. ii. pp. 174-80, 400-1, 561; vol. iii. pp. 630, 751. See *Apprentice*.

**India.** The act transferring the government of India to the Crown is 21 and 22 Vict., c. 106.

**Indictment;** is the form of process by which a criminal is brought to trial at the instance of the Lord Advocate. It runs in the name of the Lord Advocate; and addressing the panel directly by name, charges him with being guilty of the crime for which he is to be brought to trial. Although this be the form peculiar to those criminal prosecutions raised by the Lord Advocate alone, yet, where a private party joins in the prosecution, his name may be added to that of the Lord Advocate. But where the private party is the principal prosecutor, although he has the concurrence of the Lord Advocate, it is not in the form of an indictment that he brings his action, but in the form of criminal letters, which are letters running in the name of the Sovereign, passing under the signet of the Court of Justiciary, and addressed to messengers-at-arms, stating the crime, and contain-

ing a command to the officers to whom the letters are directed, to summon the person accused, to appear and underlie the law, and also for summoning witnesses and a jury. These letters are sometimes used even in prosecutions at the instance of the Lord Advocate, where the accused party is not in custody. See *Criminal Letters*. *Criminal Prosecution*. *Concourse*. The indictment is prepared in a syllogistic form, in which the *major proposition* states the nature of the crime that is meant to be charged against the offender, and, in general, that it is severely punishable; and the *minor proposition* states the offence actually committed, and avers that it constitutes the crime stated in the major proposition; the *conclusion* is, that on the panel's conviction by the jury, he ought to suffer the punishment inflicted by law on the crime. See *Major*. The indictment is executed by messengers-at-arms, by macers of Justiciary, or even by sheriff-officers, where the indictment is contained in what is termed the Porteous Roll, or presentment by the county; but, in this last case, there must be a precept from the sheriff. The execution is made by serving the accused with a full copy of the libel, with a notice attached, requiring him to appear and underlie the law for the crime set forth in the libel, and that within fifteen days. This notice must be subscribed by the officer who serves it, and by one person who shall witness the service; and it is not necessary for the officer to subscribe any other part of the copy of the libel; 9 *Geo. IV.*, c. 29, § 6. There must also be served on the accused a copy of the list of names and designations of the witnesses who are to be examined against him, and of the names of the assize who are to pass on his trial; and no witness or juror whose name is omitted, can competently be examined as a witness, or can act as a juror on that libel. The style of an indictment will be found in *Alison's Prac.* 212. See also *Ersk. B. iv. tit. 4, § 87, et seq.*; *Hume*, ii. 148, *et seq.*; *Bell's Notes*, p. 169; *Bank. ii. 524*. By the statute 11 and 12 *Vict.*, c. 79, the record copies of indictments, instead of being in writing, according to the previous practice, may be printed, or partly printed and partly written, provided they are authenticated by the subscription of the Lord Advocate or of one of his deputies; and in the case of criminal letters, by the subscription of one of the clerks of court, according to the existing practice; § 1. Letters of diligence for the citation of parties, witnesses, and assizers, instead of requiring a bill and a deliverance thereon by one of the judges, are issued by the clerk of court, on exhibition of the indictment signed by the crown agent, and need not pass the signet; § 2. Indictments and other writs may be served and executed either by a macer

or by a messenger-at-arms, "or by any sheriff-officer or steward's officer of the county or stewardry within which such service or execution shall be made; § 6." Objections to the relevancy of indictments must be stated and disposed of before the panel is called upon to plead; if it is found relevant, the panel is called upon to plead to the libel. In case he shall plead Guilty, the court is to proceed to pass sentence; and in case he shall plead Not Guilty, is to remit him, with the libel as found relevant, to the knowledge of an assize, and the case is to be otherwise proceeded with in ordinary form; § 9. See *Criminal Prosecution*. *Execution*. *Det. Circuit Court*. *Alibi*. *Locus Delicti*. *Production*.

**Indivisible.** It is an exception to the action of removing, that the defender possesses the lands in question *pro indiviso* with other lands. But this is not relevant against removing from any subject of which there are daily profits divisible, as a coal-heugh or fishing. Neither is it relevant for a liferenter on her terce against the fiar of an indivisible tenement, for the heir may remove the relic and pay her a third part of the rent. So, if a tenement be possessed by several tenants *pro indiviso*, and having different houses, any of these tenants may be removed, and another put in his place, or the landlord may possess it. Indivisible rights fall to the eldest of heirs-portioners. See *Heirs-Portioners*. *Brieve of Division*. The stock of a company is held *pro indiviso* by all the partners in trust. Under the head "*Indivisible*" in the *Dictionary of Decisions*, are digested questions arising as to subjects legally indivisible, and part of which it is therefore incompetent to adopt without the whole. Thus, a decree-arbitral is indivisible, and when *ultra vires compromissi*, cannot be registered, even with respect to those parts of it which are within the submission. But this rule may be modified by circumstances. When an obligation to pay money would otherwise be null on account of informalities in the deed, such as being a deed notarially executed, but subscribed by only one notary or only three witnesses, the claim may be restricted to L.100 Scots, which is proveable by parole evidence. So also, a verbal legacy exceeding L.100 may be restricted to that sum. Other questions of a similar nature will be found in the *Dictionary of Decisions* and *Brown's Synop. h. t.* See also *Stair*, B. iv. tit. 26, § 8; *Bank. ii. 115*; *Bell's Princ.* § 353.

**Indorsement, or Indorsation.** This term was formerly used to signify the executions of messengers, which, being usually written on the back of the letters, were hence termed indorsements; but the term is now more generally applied to the transference of a bill, by the drawer or indorser putting his name on

the back of the bill. See *Execution*. A bill, although it be not taken payable to the drawer "or order," is transferable by indorsation. The indorsation may be made by the creditor putting his name merely on the back of the bill, and this carries a right which is transferable by delivery alone, or by the creditor's filling up the indorsation, by putting above his subscription, "Pay the contents to A. B.," in which case it can be further indorsed by A. B. only. When there is no such order to pay to another, it is called a blank indorsement. Although a bill may have been stolen or fraudulently obtained by a previous holder, yet, if it has come onerously and fairly into the hands of the present holder, it will be effectual to him against the drawer, acceptor, and previous indorsees. Under the recent Mercantile Law Amendment Act, however (19 and 20 Vict., c. 60, § 15), the holder of such a bill or note suing or doing diligence thereon is bound to prove that he gave value for it, such proof being competent by parole evidence. By § 16 of the same statute, when any bill or note is indorsed after the date of payment, the indorsee is deemed to have taken it subject to all objections or exceptions to which it was subject in the hands of the indorser. It is held in England, that the creditor in a bill cannot indorse it in part, one reason for which seems to be, that it would subject the debtor to a double action for recovery of the debt. In Scotland, the precise question does not appear to have occurred. The indorser of a bill thereby gives the holder the same summary diligence and execution against himself for repetition of the amount, should the acceptor fail to retire it, as if he had accepted a new bill to the indorsee. But where a person has a bill vested in him for the mere purpose of recovering payment, and has occasion to indorse it, he may do so without rendering himself liable, by expressing the indorsement in this way: "Pay the contents to A. B. without recourse against me." A bill may also be indorsed "for my use," in which case, any one who discounts the bill must hold the contents as the money of the person interposing the restriction. A condition annexed to an indorsation is available against the acceptor, if the bill be accepted with such condition in the indorsement. Indorsation does not transfer to the indorsee prior diligence raised on the bill. Such diligence must be transferred by special assignation. The scoring of an indorsation reinstates the indorser, if intended to do so. The indorsation to a deposit receipt may be signed by a mark. *Forbes's Exec. v. Western Bank*, 1853, 16 D. 243, 807.

By the statute 18 and 19 Vict., c. 111, which proceeds on a preamble that, "Where-

as, by the custom of merchants, a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee; but, nevertheless, all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property: and whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden," it is enacted (1), that every consignee and every indorsee of such bills to whom the property shall pass by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract in the bill of lading had been made with himself; (2), that no right of stoppage *in transitu*, or to claim freight against the original shipper or owner, and no liability of the consignee or indorsee, by reason of his being consignee or indorsee, or of his receipt of the goods, by reason of such consignment or indorsement, is to be affected by the act; and (3), that every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped, shall be conclusive evidence of such shipment, as against the master or other person signing the same, notwithstanding that the goods, or part thereof, may not have been so shipped, unless the holder shall have had actual notice at receiving the bill, that the goods had not been laden on board; provided that the master or other person signing may exonerate himself from such misrepresentation, by showing that it was caused without default on his part, and wholly by the fraud of the shipper or holder, or some person under whom the holder claims. *Ersk. B. iii. tit. 2, § 27; Mr Brodie's Sup. to Stair*, 861; *Bank. vol. i. p. 363; Bell's Com. i. 401; ii. 211; Bell's Princ. § 329, et seq.; Illust. ib.; Thomson on Bills*, 256; *Tait on Evid.*, p. 120; *Dickson on Evid.*, pp. 210, 354, 361, 409. See *Bill of Exchange. Bill of Lading. Draft*.

**Indorsing of a Warrant.** See *Backing a Warrant*.

**Inducis Legales;** or the legal *inducis*, are the days which intervene between the citation of a defender and the day of appearance in the action or process. These differ according to circumstances. In ordinary actions in the Court of Session, the days of comppearance were formerly two diets of twenty-one and six days' warning, unless when the

defender resided in Orkney and Shetland, in which case the *inducia* were forty and six days. Where, again, the defender was out of the kingdom, he was cited on sixty and fifteen days. There are other actions which are termed privileged, which were formerly executed on shorter *inducia*, as on fifteen or on six days: these required a bill. See *Bills of Signet Letters*. But by the statute 6 Geo. IV., c. 120, § 53, all summonses, after the 11th November, 1825, are directed to proceed on one diet; and by the act 13 and 14 Vict., c. 36, § 21, all summonses before the Court of Session may proceed on fourteen days' warning where the defender is in Scotland, unless in Orkney or Shetland, and twenty-one days' warning where he is in Orkney or Shetland, or furth of Scotland, in place of the longer *inducia* previously in practice; and such shorter *inducia* are competent and sufficient in respect to all other letters passing the Signet bearing a citation, charge, publication, or service against persons within or furth of Scotland, and in respect to all edictal charges upon decrees and registered protests, without prejudice to shorter *inducia* previously sufficient continuing to be sufficient. The same term is applied to the days which are allowed to a debtor to obey the command of letters of horning, and these vary according to circumstances. See *Diligence. Charge on Letters of Horning*. The *inducia* of criminal letters and indictments are fifteen days. See *Criminal Prosecution. Diet*. As to the *inducia* of general and special charges, see *Charge. Ersk. B. ii. tit. 5, § 55; tit. 12, § 40; B. iv. tit. 1, § 6; tit. 3, § 10; tit. 4, § 87; Kames' Stat. Law Abridg. h. t.; Bell on Leases, 4th edit. ii. 80; Shand's Prac.; Hutch. Just. of Peace, vol. i. pp. 280, 416, 2d edit.; M'Glashan's Sheriff Prac. p. 179; Jurid. Styles, 2d edit. vol. iii. pp. 1-4, 577, 984-5, 969. See Citation. Edictal Citation. Diet.*

**Induction of a Clergyman**; was a term used in the times of Episcopacy. When the clergyman was inducted to his living, there were three acts: 1. Presentation by the patron; 2. Collation by the bishop, which signified his approbation; and, 3. Induction, which consisted in his being placed in the pulpit by a deputation of presbyters appointed by the bishop. These forms fell with the abolition of prelacy. *Ersk. B. i. tit. 5, § 18; Bank. ii. 85. See Minister.*

**Industrial Accession**; signifies the addition made to the value of a subject by human art or labour exercised thereon. The law of Scotland on this subject is derived from the Roman law; and in all cases of industrial accession, where one man adjoins or attaches his own property inseparably to that of another, the presumption is that he has done

so *bona fide*. The modes of industrial accession usually enumerated are adjunction, specification and commixtion; and the general rule of law is that, where the addition is made *bona fide*, the gainer must indemnify the loser, on the obvious principle of equity. *Nemo debet ex alieno damno lucrari*. See *Ersk. B. ii. tit. 1, § 15. See Accession. Adjunction. Commixtion. Specification. Contecture.*

**Infamous**. A person is said to be infamous who has been convicted of crimes that infer infamy, or who has been declared infamous by a sentence of the Court of Session or of Justiciary. Such a person was formerly inadmissible as a witness; but, by 1 Will. IV., c. 37, § 9, it is enacted, that where a person, who has been convicted of any crime (except perjury, or subornation of perjury), and has endured the punishment to which he has been sentenced, he shall not thereafter be deemed, by reason of such conviction or sentence, an incompetent witness in any court or proceeding, civil or criminal; and, by 15 Vict., c. 27, § 1, the objection of infamy as a ground for excluding a witness is altogether abolished. Infamy is inferred by all the *crimina falsi*, by theft and reset, and all capital crimes. A proof of conviction without a jury, which, though it did not, even before the passing of the above statute, disqualify a witness, yet affected his credibility, was allowed. *Infamia juris*, or the infamy proceeding upon conviction, was alone admitted to be proved. *Infamia facti*, or that proceeding from general bad character, or a crime for which the witness has not been convicted, could not be proved to the effect of excluding; but it might be elicited by questions put to the witness himself, and, in that case, affected his credibility. *Hume, ii. 351, et seq., 471; Burnet, 397; Steele, 17; Alison's Princ. 482, 567; Prac. 385, 448, 451, 672; Ersk. B. iv. tit. 2, § 23; Bank, vol. i. p. 273; vol. iii. p. 58; Macfarlane's Jury Prac. p. 162; Hutch. Justice of Peace, 2d edit. vol. i. p. 197-9; Tait's Justice of Peace, vocibus Punishment, Proof; Tait on Evidence, 233-4, 85-6, 345-7; Dickson on Ev. 887, 897, 706, 1004. See Evidence.*

**Infang**. See *Fang*.

**Infangtheft**; "is a liberty or power, pertaining to him who is infest therewith, to cognosce upon theft committed by his own man taken within his own dominion and lands." *Skene, h. t.*

**Infant**. See *Child-murder. Concealment of Pregnancy.*

**Infants**. This term, in the law of England, is applied to every person under the age of majority. In Scotland, the term is not used in that sense. The periods of life distinguished by our law are three: Pupillarity, which reaches from the birth of the child to

the age of fourteen in males and twelve in females; and during this period they are termed pupils:—puberty, which reaches from the termination of pupillarity to the age of twenty-one years, which is the period of majority in both sexes; and from that time forward the person is said to be of lawful age. *Stair*, B. i. tit. 5, § 3; tit. 10, § 13; *Ersk.* B. i. tit. 1, § 11; *Bank.* vol. i. p. 161, *et seq.*, 200; vol. iii. p. 48; vol. ii. pp. 339, 669; *Bell's Com.* ii. 567; *Tomlins' Dict.* h. t. See *Curatory. Minor. Pupil. Tutor.*

**Infestment**; may be said, correctly speaking, to be the act of giving symbolical possession of heritable property; the legal evidence of which is an instrument of sasine. But this distinction, in the colloquial language of the law of Scotland, is not always attended to. Anciently, infestment seems to have been synonymous with investiture; in which last sense it signified both the charter by which the superior conferred the right, and the sasine or infestment by which possession was given. There was in former times less room for any distinction, because the superior, by one and the same act, in presence of the *pares curiæ*, gave out lands to his vassal, and gave him sasine; and this was done without the intervention of writing, the evidence of the *pares curiæ* being that on which the rights of superior or vassal depended. In modern language, investiture is the term applied to the whole progress of titles, whereby the right is vested in the feudal proprietor. *Ersk.* B. ii. tit. 3, § 18; *Stair*, B. ii. tit. 3; *More's Notes*, p. clvii., *et seq.*; *Bank.* vol. i. p. 546, *et seq.*; *Bell's Com.* i. 681; *Kames' Stat. Law Abridg.* h. t.; *Ross's Lect.* ii. 259. See *Investiture. Sasine.*

By the Infestment Act, 8 and 9 Vict., c. 35, 1845, infestment may be effectually obtained by producing to the notary-public the warrants of sasine and relative writs which are in use to be produced at taking infestment, and by expediting and recording in the appropriate register an instrument of sasine setting forth that sasine had been given in the lands, and subscribed by the notary-public and witnesses according to the form then in a schedule annexed to the Act. By the Titles to Land Act, 21 and 22 Vict., c. 76, 1858, instruments of sasine are no longer necessary, but the conveyances themselves may be recorded instead. See *Titles to Land.*

**Infestment in Security.** According to the modern use of the term, infestment in security is used to express an heritable bond and sasine, or a disposition in security and relative sasine, by which the creditor is infest in an annualrent out of the lands, corresponding to the principal sum, and in the lands themselves in security of the principal

sum, interest, and penalty, or in the lands themselves redeemably, in security of the principal sum and interest. *Stair*, B. iv. tit. 35, § 24; *More's Notes*, p. ccx.; *Ersk.* B. ii. tit. 8, § 35; *Bell's Princ.* § 901: *Illustr.* See *Bond. Annualrent. Titles to Land.*

**Infestment of Relief.** An heritable security to a cautioner or co-obligant, that he shall be relieved from the engagement he has come under, by which the cautioner is infest in lands, in security of such relief, is termed an infestment of relief. *Stair*, B. ii. tit. 3, § 48; *Ersk.* B. ii. tit. 8, § 35; *Bank.* ii. 122. See *Bond of Relief. Titles to Land.*

**Infensare curiam**; “is when the judge informs the suitors in things whereof they are ignorant.” *Stens*, h. t.

**Information.** Under the old form of process in the Court of Session, an information was a written argument ordered by the Lord Ordinary, when he took a cause to report to the Inner-House. It served to explain to the Judges the circumstances of the case which the Lord Ordinary was to report, and to enable them to give their decision in the cause. The analogous pleading, according to the present practice, is called a *Case*. See *Cases*. In the Court of Justiciary, in cases of difficulty on questions of law and relevancy, the Court is in use to order Informations, on which the points raised are argued fully in writing. See *Criminal Prosecution*. As to Informations in the Exchequer Court, see 19 and 20 Vict., c. 56, § 7.

**Information**; in English law, is an accusation or complaint exhibited against a person for some criminal offence, either immediately against the Sovereign, or against some private person. It differs from an indictment in being only the allegation of the officer who exhibits it. Informations are either partly at the suit of the Crown, and partly at the suit of a subject, or only in the name of the Crown. The former are usually brought upon penal statutes, inflicting a penalty on conviction of the offender, one moiety to the Crown, and another to the informer. The latter are also of two kinds: *First*, Such as are properly the Crown's own suits, and are filed, *ex officio*, by the Attorney-General. The objects of such suits are enormous misdemeanours, tending to disturb or endanger Government. *Secondly*, Those in which, though the Sovereign is the nominal prosecutor, it is at the instance or promotion of some private person, or common informer. These are filed by the master of the Crown-office, under the express direction of the Court, and are directed against any gross misdemeanours, riots, &c., deserving of public animadversion. *Tomlins' Dict.* h. t.

**Information and Presentment**; in criminal process. See *Circuit Court. Dittay.*

**Informer.** Various statutes enact pecuniary penalties, and award part, or the whole, to the informer. In such a case it is usually provided that any person may prosecute; and then it is not necessary to qualify a peculiar interest, or to have the concurrence of the procurator-fiscal. An informer, entitled to a reward on conviction, is not inadmissible as a witness. *Hunter*, 1838, 2 *Swinton*, 1. And, in questions of defamation, a person informing against his neighbour as disorderly, or a thief, will be presumed to have done so to satisfy justice, or maintain good order. In England, by 18 Eliz., c. 5, it is enacted, that if a common informer wilfully delays his suit, or discontinues, or be nonsuited, or has a verdict or judgment against him, he must pay costs to the defendant. And 27 Eliz., c. 10, makes an informer compounding with an offender liable to be set on the pillory, to suffer fine and imprisonment, and to forfeit L. 10. He is also disabled to sue popular actions for the future. The Lord Advocate and inferior public prosecutors in Scotland, may be compelled to give up their informers; and if the information was malicious, the informer will be liable in damages and expenses. *Ersk. B. iv. tit. 1, § 17; tit. 4, §§ 80-6; Bank. ii. 610; Tait's Justice of Peace*, 19, 245; *Tomlins' Dict. h. t.; Alison's Prac.* 94.

**Inhibition;** is a writ passing under the Signet, whereby the debtor or party inhibited is prohibited from contracting any debt which may become a burden on his heritable property, or whereby his heritage may be attached or alienated to the prejudice of the inhibitors' debt. Like every other signet letter, the inhibition contains a narrative and a will. The narrative recites the ground of debt, and asserts that the debtor, knowing that the creditor will proceed against him with diligence, means to sell and dispose of his effects, unless a remedy be provided. On this narrative, the will of the letters inhibits the debtor from selling, annailzieing, wadsetting, disposing, and so forth, his lands, teinds, heritages, &c.; and also from granting any deed, or contracting any debt which may affect his lands. The will farther prohibits the lieges from taking from the debtor any conveyance of his property, or any vouchers of debt; so that there is a double prohibition; one against the debtor, and the other against the public. This diligence may proceed on a liquid ground of debt, or on the decree of a court, or on a decree of registration; and it may also proceed on a depending action, or even on a conditional debt. But on whichever of these several grounds the inhibition is raised, a Bill must be presented to the Lord Ordinary on the Bills, stating the nature of the debt, and craving warrant for the

letters; which warrant is granted, as a matter of course, on production of the ground of debt, or of the executed summons.

In virtue of this Bill-Chamber warrant, letters of inhibition are expedite and signeted; after which they must be executed and published in the following manner: (1.) There must be a personal execution against the debtor, by a messenger-at-arms, in the usual manner, and with the formalities explained, *voce Charge on Letters of Horning*. (2.) The inhibition must be published at the head burgh of the shire where the debtor resides, or edictally, where the debtor is forth of the kingdom. This publication is also made by a messenger-at-arms, who, after crying three several *oyesses* at the cross of the burgh, reads over the letters of inhibition, and affixes there a copy of the letters and charges. (3.) The last requisite towards the completion of the diligence is registration. By the act 1581, c. 119, the letters and executions must be recorded in the books of the shire where the debtor resides, and of the county where his lands lie, which registration must take place within forty days from the day of publication of the inhibition. The act 1600, c. 13, gives the creditor an option to record the letters and executions in the General Register at Edinburgh; one advantage of which is, that when recorded in the General Register, the inhibition affects the debtor's lands wherever situated in Scotland; whereas, if the Particular Register be taken, there must be a registration in the books of every county in which the debtor has lands; otherwise the inhibition will have no effect, *quoad* the lands in the county, in the books of which it has not been recorded. The inhibition thus executed, published, and recorded, strikes against all the acts and deeds of the debtor falling within the words of the prohibition, done or granted posterior to the execution of the diligence. But the diligence is strictly personal to the party inhibited, and strikes against the debtor only. If he should die, his heir will not be affected by the prohibition, unless it be renewed against him.

The terms of the prohibition include *moveables*; but whatever may have been the intention when this style of the letters was originally introduced, the diligence has long been restricted to *heritage*, as above explained. This diligence, however, will affect not only the heritage belonging to the debtor at the date of its execution, but also future acquisitions, provided they be within the shire, in the books of which the inhibition has been recorded, or wherever they be, in Scotland, if the registration has been in the General Record. Inhibition strikes, however, only against the voluntary deeds of the debtor

posterior to its execution, and not against debts or deeds, resulting from obligations previously contracted. Thus, if prior to the date of inhibition, the debtor has become bound, by minute of sale, to sell his lands, a disposition, in implement of that prior obligation, although executed posterior to the inhibition, will not be affected thereby. Neither will the inhibition strike at posterior judicial rights, such as an adjudication proceeding on a debt contracted prior to the date of the inhibition. It would even seem, according to some of the undernoted authorities, that it will not strike at a conveyance to trustees for behoof of creditors, or at a fair sale for an adequate price, to be distributed amongst the creditors. Another peculiarity in this diligence is, that it confers no active right on the creditor using it. It is an inert prohibition, merely negative in its operation; and although the creditor is entitled to reduce deeds to his prejudice, executed *spreta inhibitione*, he cannot rank on the debtor's estate in virtue of the inhibition *per se*. In order to give himself an active right, he must follow up his inhibition by an adjudication. Practically, no doubt, an inhibition becomes a very efficient diligence; since, so far as concerns voluntary sales, no purchaser will pay the price until the inhibitions appearing on the record are discharged. Still, if, apart from this indirect advantage, the creditor mean to take active steps, he must adjudge; and then his inhibition, followed by adjudication, will give him an available preference over all the creditors whose debts were contracted posterior to the execution of the inhibition. Prior personal creditors by bond, bill, or decree, antecedent to the date of the inhibition, may also adjudge, and will not be prejudiced by the inhibition. But if such personal creditors do not secure a *pari passu* ranking, by adjudging within year and day of the inhibiting and adjudging creditor, he will exclude them, in virtue, not of his inhibition, however, but of his adjudication. On the other hand, personal creditors, whose debts were contracted posterior to the inhibition, will be entirely excluded in competition with the inhibiting creditor. In the case of sequestration under the bankrupt statute, the trustee's right is not challengeable on the ground of any prior inhibition; but the effect which inhibitions may be entitled to in the ranking of creditors is saved; 19 and 20 Vict., c. 79, § 102. It is thus, in strict principle, incorrect to describe inhibition as a *real* diligence. It is rather of the nature of a *personal* prohibition; which, by certain ulterior proceedings on the part of the inhibiting creditor, may secure him a preference on the debtor's heritage, in competition with pos-

terior debts or contractions by the inhibited party. The following authorities, as to the nature, operation, and character of this diligence, about which many loose and inaccurate views prevail, may be consulted and considered: *Stats.* 1581, c. 119; 1597, c. 264 and 265; 1600, c. 13; 1672, c. 16, § 32; 1693, c. 14; *A. S.* 15th July 1692; *Stair*, B. iv. tit. 50; also tit. 20, § 28; tit. 35, § 21; *More's Notes*, p. ccccxiii.; *Ersk.* B. ii. tit. 11; *Bank.* B. i. tit. 7, § 139; *Bell's Com.* ii. 141, *et seq.*, 418, and authorities there cited; *Bell's Princ.* § 2390; *Kames' Elucid.* art. 42; *Kames' Stat. Law*, h. t., and *voce Recognition*; *Bell on Leases*, i. 110-2; *Hunter's Landlord and Tenant*; *Brown on Sale*, 203; *Bell on Purchaser's Title*, 368, 374; *Jurid. Styles*, ii. 409, iii. 525-40, 990; *Ross's Lect.* i. 459, *et seq.*; *Thomson on Bills*, 577; *Douglas, Heron and Co.*, 24th July 1785, *Mor.* 7070; *Ferrier v. Pennyquick*, 8th July 1812, *Fac. Coll.*; *M'Cartney*, 15th Jan. 1702, *Mor.* 6965; *Monro*, 19th July 1777, *Mor. App. Inhibition*; *M'Lure*, 19th Nov. 1807, *Mor. App. Competition*; *Holmes*, 7 S. & D. 535; *Roberts*, *ib.* 611; *Carlisle*, 1st Feb. 1739, *Mor.* 6971; *Stormont*, 5th Dec. 1783; *Hailes*, ii. 933; *Mensies*, 4 D. 257; *Livingstone*, 5 D. 1.

**Inhibition against a Wife.** This diligence is intended to notify to the public that the wife's legal *propositura* over the domestic affairs has ceased; so that she may not longer have it in her power to burden her husband with the expense of domestic furnishings, usually falling within the wife's province. Like the inhibition for debt, this is a writ in the Sovereign's name passing the Signet, obtained upon a bill presented to the Lord Ordinary on the Bills; and it prohibits and discharges all and sundry from transacting with the wife, or from giving her credit. It is executed against her and against the public, and recorded like an inhibition by a creditor. The husband is not bound (how rigorous and harsh soever it may appear) to assign any reason for this step; nor will he be allowed, in the narrative of his diligence, to assign any grounds injurious to the wife. The consequence of this is, that the inhibition cannot be stopped by the wife, however little ground there may be for the measure. Its effects, though it saves the husband from liability for such furnishings as he can prove to have been otherwise made for the family, will not protect him against paying for those which are proper and necessary, and for which he has not otherwise provided. *Ersk.* B. i. tit. 6, § 26; *Stair*, B. i. tit. 4, §§ 15 and 17; B. iv. tit. 50, § 21; *More's Notes*, p. xxiii.; *Bank.* vol. i. p. 126; *Bell's Princ.* § 1566; *Jurid. Styles*, 2d edit. vol. iii. p. 540. See *Propositura. Wife.*



**Inhibition of Tithes**; is a writ issuing either under the Signet or from the Commissary Court, by which the titular of teinds is enabled to interrupt the possession of a tenant of the teinds possessing by tacit relocation. In consequence of this diligence, the titular, in place of the teind-duty stipulated in the lease, is entitled to draw the full teind; and all concerned are discharged from meddling with the teinds. This founds an action at the instance of the titular, in which he will be entitled to the actual proven teind of each year, or where there is a valuation to the valued teind. *Ersk. B. ii. tit. 10, § 45; Stair, B. ii. tit. 8, § 23; B. iv. tit. 24, § 2; Bank. vol. ii. p. 65; Bell's Princ. § 1158; Hutch. Justice of Peace, 2d edit. vol. ii. p. 451; Brown's Synop. pp. 292, 974, 2418; Jurid. Styles, 2d edit. vol. i. pp. 683-5; iii. pp. 227, 542, 900.*

**Inhibition**; in English law, a writ to forbid a judge from further proceeding in a cause depending before him. *Tomlins' Dict. h. t.*

**Iniquity**. This is a technical expression, usually applied to the decision of an inferior judge who has decided contrary to law; he is in that case said to have committed iniquity. *Ersk. B. iv. tit. 3, § 41. See Advocacion.*

**Initialia Testimonii**. It was formerly the practice before a witness was allowed to be examined in relation to the cause, to interrogate him in regard to his disposition towards the parties; whether he bore malice or ill-will to either of them; whether he had been instructed what to say, and had undertaken to give his evidence accordingly; whether he had received any bribe or reward for what he was to say, or had been promised any reward. This was called the examination of a witness in *initialibus*, by which the witness was said to be "purged of malice and partial counsel;" and where it was intended to oppose the examination of a witness on the ground that he was disqualified by ill-will, bribery, or the like, the evidence in support of the objection might be instantly brought forward. Where the opposing party could not bring immediate proof to disqualify the witness, it was the practice to protest for reprobaters; in consequence of which he might afterwards have brought an action of reprobator, in which he would have been allowed to bring evidence for disqualifying the witness.

Initial examinations are not now usual or necessary, but they are still competent; 3 and 4 Vict., cap. 59, § 2; and in certain circumstances are properly insisted in. *Dickson on Evid. 906, 964; Ersk. B. iv. tit. 2, § 28; Tait on Evid., 424. See Evidence.*

**Initials**. *Subscription by*. The initials of

a party's name, adhibited to a writing, are, in some cases, held equivalent to subscription. Erskine says, it is seldom admitted as a ground sufficient by itself for supporting a subscription by initials, that the granter usually signed in that way; a proof by the instrumentary witnesses being also required that the granter did *de facto* sign the particular deed in question, at least if it be challenged during the life of instrumentary witnesses. A subscription by initials, however, with the attestation by one notary that the party could not write otherwise, and production of another writing by the same party subscribed in a similar way, was found good; and a cautioner's subscription by initials to a lease was sustained, it not being denied that the initials were those of the cautioner. This mode of subscription is inadmissible in the case of a witness. A bill subscribed by initials will not authorize summary diligence; but it will be a valid document of debt and a good ground of action, if, as in the case of other writings so subscribed, it be proved that the indorser *de facto* adhibited his initials, and that it was his usual mode of subscribing. Even when no such proof is brought, a bill signed by initials may be received as an admittance in proof of the debt. *Ersk. B. iii. tit. 2, §§ 8 and 26, notes by Ivory; Bell's Com. i. 325, 390; Bell's Princ. § 323; Illust. ib.; Bell on Leases, i. 275; Hunter's Landlord and Tenant; Thomson on Bills, 46; Tait on Evid. 8, 64, 116; Ross's Lect. i. 136; Dickson on Evid. 360, 409, 412, 374, 617. See Mark, Subscription by. Testing Clause.*

**Injunction**; in English law, is a writ generally grounded upon an interlocutory order or decree, out of the Court of Chancery or Exchequer, sometimes to give possession to the plaintiff, in consequence of the defendant's failure to appear; sometimes to stop proceedings in a cause, upon the ground, that the rigour of the law, if it take place, will be against equity and conscience, or on similar grounds of equity. The writ of injunction is directed not only to the party himself, but to his counsellors, attorneys, and solicitors; and if any attorney, after having been served with an injunction, proceeds contrary to it, the Court of Chancery will commit him to the Fleet prison for contempt. But if an injunction be granted by the Court of Chancery in a criminal matter, the Court of Queen's Bench may dissolve it, and protect any one who proceeds in contempt of it. *Bank. ii. 675; Tomlins' Dict. h. t. In Shand, Dow's App. Reports, ii. 523, and Goldie, ib. 536, the English reporter applies the word injunction to Scotch cases. See Interdict.*

**Injury**. An injury is defined to be anything said or done with the intention of hurt-

ing, and which actually does hurt another in his person, character, or property. It is so called, as being an infringement of the natural right which every one has to safety in goods and person. It has been usual to make a division of injuries into verbal and real; the former comprehending wrongs which an individual suffers, in consequence of the words or writings of another; the latter, such as are inflicted by deeds. A verbal injury, pointed against a private person, consists in the uttering, or writing, of contumelious words which tend to vilify his character, or render it little or contemptible. For satire, though it does not blacken a man's moral character, but only places him in a ridiculous light, may be injurious. The *animus injuriandi*, which is of the essence of this crime, will be inferred from presumptions; and in general, it is presumed from the words themselves, especially where they are made use of to hurt one in his moral character, or to fix some particular guilt upon him, as if one should give his neighbour the name of *thief*, *cheat*, *liar*, &c. This presumption, however, may be either weakened or elided by special circumstances; e.g., if the expressions have been used in the heat of passion, with no previous or subsequent indication of a malicious purpose. Verbal injuries are punished by fine, according to the circumstances of the case. They also found a civil claim for damages or reparation, at the instance of the injured party, against him who has done the injury. A real injury is committed by doing anything which may hurt one's person, infringe his right of personal liberty, or affect his honour and dignity. The offender is liable both to a criminal prosecution, and to a civil action for reparation and *solatium*. Although, strictly speaking, no act ought to be called injurious, where there is not *animus injuriandi*, yet the term is frequently applied where there is reparation due on account of wrongs suffered through gross carelessness, the law holding such fault equivalent to malice. *Stair*, B. i. tit. 9, § 1, *et seq.*; *Ersk. B.* iii. tit. 1, § 13; B. iv. tit. 4, § 81; *Bank. i.* 248, 302; *Bell's Princ.* § 2028; *Tail's Justice of Peace, h. t.*; *Blair's Justice of Peace, h. t.*; *Shaw's Digest, voce Reparation*. See *Damnum sine injuria. Damages. Defamation*.

**Inland-Bills.** An inland bill, is one drawn upon a person living in the same country with the drawer, either in favour of a third party or of the drawer himself. A bill drawn by a person in Scotland, on a person in England, or *e contra*, was formerly held not to be an inland bill; but by the Mercantile Law Amendment Act 1856 (19 and 20 Vict., c. 60, § 12), all bills drawn in any part of the United Kingdom, and made payable

in or drawn upon any person resident in the United Kingdom are to be deemed inland bills. By § 14 of the same act, notice of dishonour is required in the case of inland bills, as in the case of foreign bills. Under § 13, notarial protest of such bills is unnecessary. *Bell's Com. i.* 419; *Thomson*, 2; *Bell's Princ.* § 308. See *Bill of Exchange*.

**Inner-House**; the name given to the chambers in which the First and Second Divisions of the Court of Session hold their sittings; applied also to the Courts themselves, and used in contradistinction to the Outer-House, or hall in which the Lords Ordinary sit to hear motions and causes. All causes commencing in the regular form by summons, or by notes of suspension or advocacy, arrive at the Inner-House after passing through the Outer-House. But there are some cases, which, though originating with summonses, are specially appropriated to the Inner-House, in the first instance, and in which no discussion takes place in the Outer-House, except by special remit from one or other of the Divisions of the Court. Such are actions of proving of the tenor and formerly reductions, actions of aliment, of *cessio bonorum*, and of cognition and sale. These causes, on appearing in the Outer-House rolls, are at once transmitted to the Inner-House; great *avisandum*, as it is technically called, being the first motion in such cases. The Inner-House has an original jurisdiction in all cases which commence by summary or incidental application, except notes of suspension and advocacy, which must be presented in the first instance in the Bill-Chamber. The whole Judges formerly sat together in the Inner-House; but the Court was, in 1808, divided into two Divisions; the Lord President and three ordinary Judges now forming the Inner-House of the First Division; the Lord Justice-Clerk and other three ordinary Judges forming the Inner-House of the Second Division; and the remaining Judges officiating as permanent Lords Ordinary in the Outer-House. During session, the Inner-House meets at 11 o'clock daily. There are four rolls in the Inner-House, the roll of single bills, the summar roll, the long roll, and the short roll. (See *Rolls of Court*.) The usual manner in which a cause comes into the Inner-House is by reclaiming note (see *Reclaiming-Note*); but there are several other modes. Thus, the Lord Ordinary, without himself pronouncing any decision, may *report* a case as it is expressed, which appears to be attended with more than usual difficulty or importance, to the Inner-House of the Division to which the cause belongs. After the record and papers are boxed (which must be done immediately

after the warrant to enrol is granted), or after a reclaiming note is presented, the cause belongs to the Inner-House, where it is regularly enrolled by the keeper of the Inner-House rolls, in the Long or in the Summar roll, according to the nature of the case. The rules as to the preparation, lodging, and signing of papers, reporting of diligence, &c., are the same in the Inner as in the Outer-House. See *Outer-House*. The following regulations are peculiar to the Inner-House. When causes are set down for advising in the *Short roll* (which is just a section of the *Long roll* put out daily for hearing), or in the *Summar roll* (which is the roll for *summary cases*), no delay will be granted on account of the absence of counsel or agent, except in the case of unexpected and necessary absence, and then only for such short time as may be necessary to instruct other counsel or agents; *A. S. 11th July 1828*, § 81. Where a party fails to lodge his paper within the time fixed, the cause may, immediately on the expiration of the time, be enrolled in the Summar roll; and judgment will be pronounced against the party so failing, in such manner, and to such extent, as may, in the form and circumstances of the process, be competently craved; unless in those cases where no prorogation has been previously granted, and where the party in default can satisfy the Court that a further time ought to be allowed him. But such prorogation can be granted only on payment of such previous expenses as the Court may judge reasonable; *A. S. ib. § 80*. See *Default*. The only other mode of obtaining a prorogation in the Inner-House is by application by Note to the Lord President of the Division. Parties or their agents cannot, in the Inner-House, as they may in the Outer-House, prorogate of consent the time for lodging papers ordered by either Division of the Inner-House; *A. S. 18th Nov. 1829*. See *Prorogation*. The most solemn mode of determining a cause in the Inner-House is after a hearing in presence. See *Hearing in Presence*. All interlocutors pronounced in the Inner-House are now final, no reclaiming against them being competent. In deciding the cause, the matter of expenses must also be determined; *6 Geo. IV., c. 120*, § 21. All acts pronounced in the Inner-House may be extracted immediately, without abiding the reading thereof in the Minute-book.

Under the Act 13 and 14 Vict., c. 36, § 32, certain advocations and suspensions may be taken *de plano* to the Inner-House, on a motion by either party before the Lord Ordinary at the first calling of the cause. By the statute 20 and 21 Vict., c. 56, § 4, summary petitions and applications to the

Lords of Council and Session (not being incident to causes actually in dependence), which were previously in use to be disposed of exclusively by the Inner-House, are appointed to be brought before the Junior Lord Ordinary in the Outer-House. See these Statutes. See also *A. S. 11th July 1828*, § 116; *Ersk. B. i. tit. 3*, § 16, *note by Mr Ivory*; *Shand's Prac.* 751, 757, 963, &c. See *Consultation of Judges. Session, Court of. Judicial Factor. Reduction. Actions. Advocation. Suspension*.

**Innkeepers.** This seems to be the appropriate head for an explanation of the extent to which the Roman law edict, *Nautæ cautiones stabularii*, has been adopted in the law of Scotland. Under that edict, the masters of ships, inns, stables, &c., were held liable for the loss of luggage, goods, &c., placed under their charge by passengers, lodgers, and the like. The principle of that edict has been fully recognised in our practice; and with us the liability extends not only to losses arising from the fault, negligence, or fraud of the innkeeper himself, but also to those cases in which the loss has resulted from the fault or crime of his servants, or of the other inmates of his house. The only case in which the innkeeper is not liable, is when the loss arises from an unavoidable accident, or *damnum fatale*. The rule, as laid down in England, is, "that nothing is an excuse except an act of God, or of the King's enemies." (See *Act of God*.) What is to be considered *damnum fatale* is sometimes a question of considerable difficulty. Some authorities do not reckon fire such an accident; but in one case, it was decided that an accidental fire, whereby both stables and horses were destroyed, did not subject the innkeeper. Loss by robbery is also a controverted point; but it is unquestionable, that in England it is not held *damnum fatale*, and that even in Scotland loss by theft makes the innkeeper responsible. The edict applies to the keepers of tipping-houses, with whom travellers lodge, and even to mere vintners; but it is a question still open, whether it applies to lodging-house keepers. (See *Lodging-Houses*.) Where a horse has been put into a stable to bait, and money or goods have been abstracted from a valise or portmanteau on the horse's back, the stabler must make good the loss; and a stabler has been found liable for the value of a horse which died in consequence of an accident while under his care. An innkeeper neglecting to give a parcel containing money to a carrier, as he ought to have done, was held liable for its contents. But this liability does not extend to money contained in a parcel, addressed to his care, but to a person not a guest in his house. It is sometimes a

question whether, in order to make the innkeeper liable for a certain article, it is necessary to give him information respecting it, or to commit it to his care. An innkeeper has been found not liable for a purse of gold alleged to have been lost, of which he was told nothing previously. But he was held liable for a pair of breeches and their alleged contents, said to have been abstracted from a traveller's room. The danger of admitting such allegations without proof is apparent; and it is now established, that although the extent of the loss may be ascertained against the innkeeper by the oath *in litem* of the party suffering the loss, fortified in the general case by such reasonable collateral evidence as may prevent an extravagant demand, yet it is necessary for the traveller to prove that some of his property has been carried away, or some of his securities broken open. See, however, as to the mode of proof, *Crawcour*, 1842, 5 D. 10; and the act 16 and 17 Vict., c. 20, § 3. An innkeeper has a lien upon a traveller's luggage and goods for the price of his lodging and entertainment, and upon his horse for its provender and stabling. This lien operates even against the true owner of the horse, though it had been stolen by him who brought it to the inn. It is strictly confined to the keep of the horse itself, and is lost without revival, if the horse has once been allowed to go away. Effects belonging to a traveller in an inn or hotel are not subject to the landlord's hypothec. In the *Jurid. Styles*, iii. 81, will be found the form of a summons upon the edict, *Nautæ, caupones*, against an innkeeper for the loss of a horse. See *Stair*, B. i. tit. 9, § 5; *More's Notes*, lvii.; *Brodie's Supp.* 918; *Ersk.* B. iii. tit. 1, § 28, and notes by *Ivory*; *Bank*. B. i. tit. 16; *Bell's Com.* i. 469; ii. 103, 311; *Bell's Princ.* § 236; *Illust. ib.*; *Bell on Leases*, i. 387; *Hunter's Landlord and Tenant*; *Hutch. Justice of Peace*, ii. 164, 494; *Tai's do.*, *vocibus Location, Nautæ, Caupones, Alehouses*; *Blair's do.*, *voce Nautæ*. See *Nautæ Caupones. Carriers. Public Carriages.*

**Innovation**; is a technical expression, signifying the exchange, with the creditor's consent, of one obligation for another; so as to make the second obligation come in the place of the first, and be the only subsisting obligation against the debtor, both the original obligants remaining the same. This change is not to be presumed, and must therefore be precisely expressed; e.g., where the second obligation bears to have been granted "in satisfaction" of the first. *Ersk.* B. iii. tit. 4, § 22; *Stair*, B. i. tit. 18, § 8; *Bank*. i. 495; *Bell's Princ.* § 576; *Brown's Synop.* h. t.; *Shaw's Digest*; *Thomson on Bills*, 136, 146, 166. See *Delegation.*

**Inns of Court.** In England, the colleges of municipal or common law professors and students are called *inns*. The inns of court are governed by masters, principals, benchers, stewards, and other officers; and they have public halls for exercises, readings, and the like, which the students are obliged to attend for a certain number of years before they can be admitted to plead at the bar. Although these societies have no judicial authority over their members, there exist among themselves certain orders or regulations, which have, by consent, the force of law. The gentlemen in these societies may be divided into benchers, outer-barristers, inner-barristers, and students. The four principal inns of court are the Inner and Middle Temple, Lincoln's Inn, and Gray's Inn. The other inns are the two Serjeants' Inns. The *Inns of Chancery*; were formerly preparatory colleges for younger students; and many were entered there before they were admitted into the inns of court. They are now almost entirely occupied by attorneys, solicitors, and others. They all belong to one or other of the inns of court. They are Thavie's, New, Symond's, Clement's, Clifford's, Staple, Furnival's, and Bernard's Inn. *Tomlins' Dict. h. t.*; *Blackst.* i. 23, 25.

**Innuendo**; a word frequently used in English writs, declarations, and pleadings, to ascertain a person or thing named before, but left doubtful; as "he (*innuendo*, the plaintiff), did so and so." *Tomlins, h. t.*

In the law of libel and slander, words which are not *per se* injurious or actionable may become so by reason of the meaning or signification with which they are uttered. The meaning conveyed by the words as used is called the *innuendo*, and is usually introduced into the record and issue by the words "meaning thereby," after the expressions alleged to have been used. See *Borthwick's Law of Libel*; *Macfarlane and Cleghorn on Issues.*

**Inquest**; is a certain number of men to whom the trial of a question, civil or criminal, is committed. They are termed the inquest, from their being appointed to inquire into the state of the facts; and jury, because they are sworn to give their verdict according to the evidence. See *Jury. Jury Trial. Challenge of Jurors. Brieve. Service.*

**Insanity.** There are various degrees of aberration of intellect recognised in the law of Scotland as calling for its special protection. But in determining the appropriate measure of protection to be afforded to persons affected in mind, they may be divided into two great classes. The first comprehends every one who is, in legal language, fatuous and naturally an idiot, or furious, mad, and a lunatic; or whose external senses

are so imperfectly organised as to render him totally incapable of the independent management of himself or his affairs. The second comprehends those who, although not so devoid of reason as to be absolutely incapable of acting for themselves in the minor affairs of life, are yet, from imbecility or weakness of judgment, considered by the law fit subjects for a limited degree of restraint, in matters of importance. The remedy in the former case is to place the fatuous or furious person under permanent and unlimited curatory; and for that purpose an inquiry is made into his state of mind by a cognition and inquest, the proceedings in which will be found explained in the articles *Brieve. Fatuous. Furious. Idiocy*. The remedy afforded in the latter class of cases is interdiction, by which lavish and facile persons are disabled from signing any deed to their prejudice without the consent of their interdictors. (See *Facility. Imbecility. Interdiction*.) A very good illustration of the distinction between the two classes of persons will be found in a full and excellent report of the proceedings under a brieve of idiocy against David Yoolow (reported by Mr Ludovic Colquhoun, 1837). The insanity of a partner, when of a permanent nature, is a ground for dissolving a partnership. Notwithstanding a mandant's supervening insanity, the acts of a mandatory previously appointed, are good to the public against the mandant's estate. The curators of insane persons can grant leases of a duration only equal to that of their office. See *Bell's Com.* i. 489; ii. 279, 453, 635; *Hunter's Landlord and Tenant; Tait on Evidence*, 342; *Blair's Justice of Peace, h. t.*; *Thomson on Bills*, 226, 246; *Brown's Synop.* 209, 1744; *Shaw's Digest*, 155, 239; *S. & D.* xiii. 703. For the rules as to the admissibility of witnesses subject to insanity, and the excuse which insanity furnishes for crime, see *Idiots; Imbecility; Dickson on Evid.* 844; *Smith*, 1855, 2 *Irv.* p. 1; *Gibson*, 1844, 2 *Br.* 332; and for the treatment of insane persons, see *Madhouses, Lunatics*, and the statute 20 and 21 *Vict.*, c. 71. Insanity, besides being pleadable as freeing from responsibility for criminal acts, may also be pleaded in bar of trial where the party is incapable of pleading to the libel.

**Insolvency.** When a person's debts exceed the value of his estate, he is said to be insolvent; and this has various effects in law. Insolvency is a ground for reducing or setting aside all voluntary gratuitous rights by the insolvent debtor which come in competition with the claim of a creditor; 1621, c. 18. An insolvent person has not the power of effectually disposing of his means and estate to the prejudice of his creditors. But insol-

veny is a fact very difficult to be established. Nor would it be possible, in a commercial country, to fix on insolvency alone as the point at which a mercantile man must suspend his transactions, and surrender his affairs into the hands of his creditors. Our law therefore, in the ordinary case, takes *bankruptcy* as the legal indication of insolvency; the distinction between the two being, that a man may be actually insolvent, although not bankrupt; since he may have so managed his affairs as to have escaped the execution of those steps of real or personal diligence, which are requisite to render him *notour* or legally bankrupt. See *Bankrupt. Conjoint and Confident. Sequestration. Ranking and Sale. Diligence*.

**Instalment.** When parties have agreed that a sum of money due shall not be paid in the gross, but in parts, at certain stated intervals, that sum is said to be payable by instalments. In the case of a bill or note payable by instalments, effect is given to a condition inserted in the bill, that if there should be a failure to pay one instalment, the whole shall become due. In England, it has even been doubted whether the holder of a bill or note payable by instalments is not entitled to take a verdict for the whole of them at once, although not more than one has become due. But in Scotland neither action nor diligence can be raised on such a bill or note, except for the several instalments as they respectively become due. Where, however, the debtor is sequestrated, the holder of a bill payable by instalments would be entitled, under the bankrupt statute, to rank immediately for the amount of each instalment, under an abatement of interest corresponding to the time that must elapse before it falls due. For the form of an inland bill payable by instalments, see *Jurid. Styles*, ii. 4.

**Institor**; in the Roman law, was a person to whom the immediate management of any manufactory, shop, or undertaking was committed. A mercantile consignee or factor is, in this sense, an *institor*. Those granting the deputation were termed *prepositors*. In the same way with exercitors, who are liable for the acts of the shipmaster (see *Exercitor*), prepositors are liable for the acts of the institor; only that it is more incumbent on those who transact with institors that they should know precisely the powers of the institor. Institors do not, like shipmasters, bind themselves in their transactions; they bind only their constituents. *Ersk. B.* iii. tit. 3, § 46; *Stair*, B. i. tit. 13, § 18; *Bank.* vol. i. p. 400; *Bell's Com.* i. 477, 490; *Bell's Princ.* § 231; *Illust. ib.*; *Tait's Justice of Peace, voce Mandate*. See *Factor. Mandate*.

**Institute**; is the person to whom the estate

is first given in a destination. Thus, where a person executing a settlement disposes his lands to A., whom failing, to B., &c., A. is the institute, B., and all who follow him in the destination, are heirs, or *substitutes*, as they are also termed. Hence a considerable degree of nicety sometimes arises in completing the title to the estate; for the procuratories of resignation and precepts of sasine for completing the title of the donee may be directly used by the institute, but cannot be used by any of the heirs without a service. When the institute predeceases the granter of a deed, the next in order becomes the institute, and takes without a service. In directing the conditions or prohibitions of the deed against those who are called to possess the estate, it is also requisite to distinguish between the institute and the heir, since conditions, directed against heirs only, will not affect the institute. *Ersk. B. iii. tit. 8, § 44; Stair, B. iii. tit. 8, § 17; Bell's Com. i. 46; Bell's Princ. § 1745; Sandford on Herit. Succession, i. pp. 264, 380; Sandford on Entails, pp. 48, 135-6-8, 317. See Tailzie. Conditional Institute.*

**Instrumentary Witnesses;** are such as attest the subscription of parties. The witnesses to a formal written deed or instrument must be of the male sex, and above fourteen years of age. Being of the male sex is a requisite stated by most of the institutional writers; but it is proper to mention, that, according to the older practice, women were frequently inserted as witnesses; and that a recent annotator holds, that now, when the incompetency of female testimony in a court of justice is entirely removed, it is probable women would not be objected to as instrumentary witnesses (*Moré's Notes on Stair, cccxcix.*). Where a person is so blind as to be incapable of seeing the party touch the pen of the notaries who subscribe for him, or of knowing whether a paper laid before him is written upon or not, he is an *inhabile* instrumentary witness. The witnesses ought to know the party, and to see him subscribe, or hear him acknowledge his subscription. In the latter case they ought, immediately after the acknowledgment, to add their subscriptions as witnesses. This is not necessary in the former case; and, indeed, two witnesses may attest all the subscriptions, however numerous, and although adhibited on different days, provided they have seen the parties subscribe. At first, the rules as to instrumentary witnesses were very lax; designation was not necessary; and it was not even required that the witnesses should subscribe, it being sufficient that their names were mentioned in the testing clause. But improvements were gradually introduced; and the law was finally

placed upon its present secure footing, by 1681, c. 5, enacting, that only subscribing witnesses should be probative, and that they should be designed in the body of the writ. Where there is any error in specifying the name or designation of the witness, or where he is named by a familiar appellation instead of his true name, or where there is an error in his Christian name, the deed is null. Where such mistakes are committed inadvertently, they may be corrected before producing the deed in judgment, by inserting at the end of the testing clause a correction of the mistake. Grammatical errors are not regarded when the meaning is plain; nor is it an objection that the witnesses, though mentioned in the testing clause, are not there described as witnesses; and an execution of arrestment has been sustained, which one of the witnesses had subscribed without adding the word "witness," in regard he was designed as one of the witnesses in the body of the writ. Witnesses are necessary to authenticate the subscription of consenters (such as curators), as well as of the principal party. Where a deed is granted by two persons, and subscribed by a notary for one of them, the same witnesses may authenticate both subscriptions. It has been said, that where the parties to a deed are numerous, they are presumed to be witnesses to one another's subscriptions; but there are several more recent decisions establishing a contrary doctrine. Where a tack or other contract has been subscribed by the parties, but not by the witnesses, the witnesses cannot *ex intervallo* subscribe it at the desire of one of the parties. In terms of 1686, c. 17, witnesses to sasines must subscribe each leaf; and although there have been several cases decided on the assumption that the necessity for this was taken away, yet one of these decisions was reversed in the House of Lords, and it is now understood that the subscription to each page is essential to the validity of the deed. The objections of partial favour, undue influence, or immoral character, did not affect instrumentary witnesses, in so far as they attested the subscription of parties; but might formerly have been pleaded against them if they were afterwards produced in proof of extrinsic facts affecting the validity of the deed; e.g., the state of the granter's health when he signed the deed. An executor in a testament has been found a valid instrumentary witness to support the deed, in every respect, except his own nomination. Both trustees and legatees may attest the deed in which they are appointed. The creditor in a bond cannot be an instrumentary witness; but it is thought that one of the creditors concerned in a relief may be witness to a bond of warrandice or

relief, his interest being only consequential. The instrumentary witnesses may be examined as to the fact of their having seen the granter subscribe, or heard him acknowledge his subscription; but it will not invalidate the deed, that they do not distinctly recollect having seen it subscribed. Yet, if it be clearly proved that one of the instrumentary witnesses neither saw the party subscribe, nor heard him acknowledge his subscription, it is a relevant ground for reducing the deed, though it should not be alleged that the deed is false or forged. But a party cannot, without averring forgery of his subscription, challenge his own deed on the ground of its not having been subscribed in the presence of the instrumentary witnesses. It is not necessary for the witnesses to a messenger's execution, or a notarial instrument, to see the messenger or notary sign; they do not attest the subscription, but the transaction narrated. For the same reason, where an execution consists of several pages, they ought, like the executor, to sign each page. Witnesses cannot sign by initials. *More's Notes on Stair*, clxii., cccxvii.; *Ersk. B. iii. tit. 2, § 7*; *B. iv. tit. 2, § 27*; *Bank. i. 349*; *Tait on Evidence*, 5-11, 21-7, 81, 99; *Ross's Lect. i. 127, et seq.*, 141; *Bell on Purchaser's Title*, 216; *Bell on Leases*, i. 274; *Hunter's Landlord and Tenant*, 310; *Brown's Syn.* 2701; *Shaw's Digest*, 637; *S. & D. xi. 915*; *Dickson on Ev.* 369, 350, 421. See *Evidence. Writ. Testing Clause*.

**Instruments.** In the phraseology of the Scottish law, the term instrument is usually applied to notarial instruments, such as instruments of sasine, instruments of resignation, instruments of intimation of an assignation, instruments of premonition, of protest, and the like. Where certain demands are by contract agreed to be made, it is generally under form of instrument that the demand is made. The evidence which these notarial acts afford varies according to circumstances. Thus, instruments of sasine or of resignation are the only legal evidence of those acts of possession and of divestment; whereas the notarial intimation of an assignation may be supplied by equipollents; and demands made, or facts attempted to be established by notarial instruments, require, if disputed, to be established by the evidence of those concerned in the act. *Tait on Evidence*, 5, 21-41, 54, 217, 318; *Dickson on Evidence*, 596, *et seq.* See *Sasine. Resignation. Assignation. Evidence*.

**Insucken Multures.** In the servitude of thirlage, *insucken multures* are the multures exigible from the *suckeners*, or parties astricted to the mill; and, having been originally composed in part of a *premium* to the pro-

prietor of the mill, they exceed in amount what may be called the market price of grinding. They are contradistinguished from *outsucken multures*, which is the price or return for grinding exacted by the miller from parties who are under no obligation to come to his mill. *Ersk. B. ii. tit. 9, § 20*; *Bell's Princ. § 1018*; *Hunter's Landlord and Tenant*, 206. See *Thirlage. Multures. Astricted Multures. Out-Sucken*.

**Insufficiency.** See *Fault*.

**Insurance;** is a contract by which a person, who thence is termed the *insurer*, in consideration of a sum of money (technically called a premium), becomes bound to indemnify the *insured* against certain risks to which his property is exposed. Insurance is a consensual contract; but a written instrument, on stamped paper, is, by statute, requisite to its constitution. This instrument is called the policy, and specifies the premium, the risk, the names of the underwriters or insurers, and the name of the insured. The best known and most important kinds of insurance are,—*Marine Insurance*; *Insurance on Lives*; and *Insurance against Fire*.

#### I. MARINE INSURANCE.

1. *Of the parties to the contract.*—Under this head, it may be questioned whether an insurance in favour of an alien enemy would be effectual. Against such insurances there have been temporary statutes, as 21 Geo. II., c. 4, and 33 Geo. III., c. 27, § 5. But, independently of these, the intercourse which such a contract occasions seems to be contrary to the allegiance of a subject; it is inconsistent with the superior maritime power of the country, and counteracts its influence on the enemy; nor would it be possible to enforce such an agreement during war, as the alien would not be permitted to appear in court. This seems to be the only exception to the rule, that every person may insure his goods at sea. The question, who may be parties to the contract, was formerly affected by the statute 6 Geo. I., c. 18, which authorized his Majesty to grant a monopoly to two companies for the insurance of ships, goods, and merchandises at sea, or lending money on bottomry, to the exclusion of all other corporations or partnerships. Individual persons, however, were entitled to underwrite policies or lend on bottomry, if not on account of a corporation or partnership. In pursuance of that power, the two companies of the Royal Exchange Assurance and the London Assurance were established by royal charter, 22d June 1720; and under their charters they had the exclusive right of making marine insurances, as a company or

partnership, on a joint capital. This privilege is now taken away by the act 5 Geo. IV., c. 114, which makes it lawful for other corporations and bodies politic, and persons acting in partnership, to grant and make policies of assurance and contracts of bottomry.

2. *Of the articles insured.*—The subject must be lawfully insurable. An insurance of contraband and illicit trade is void, or rather cannot be enforced by a court of justice. But where the object of the voyage is inimical to the revenue laws of another state, this rule does not necessarily apply. So also warlike stores, carried to a nation with whom Great Britain is at war, whether they belong to a native or to a foreigner, cannot lawfully be insured in Britain; and it has been found in England, that trading with an enemy without the Sovereign's license is illegal, and therefore that the insured could not recover on a policy which covered trade of that description; *Marshall's Treatise on Insurance*, B. i. ch. 3, § 4. Finally, seamen's wages in England are not a fit subject of insurance, though goods belonging to them on board the vessel may be insured.

3. *Of the interest of the insured.*—Insurance is a contract of indemnity, and it is absolutely necessary that the subject be one in which the insured has an interest, though it need not be specified. This rule is enforced by statute, prohibiting assurances by way of wagering or gaming, and assurances, "interest or no interest; or without farther proof of interest than the policy;" 19 Geo. II., c. 37; 14 Geo. III., c. 48. The insurance profit on a fishing adventure is not a mere wager policy, and has been held effectual; *Addison v. Duguid*, 23d May 1757. But a qualified property in the thing insured, or any reasonable expectation of profit or advantage, will constitute that sort of interest which the party may legally protect by insurance. The holder of *respondentia*, or bottomry bonds, may insure the interest thence arising to him from the ship over which the bonds extend. See *Bond of Bottomry. Bond of Respondentia*. It is held to create an insurable interest, if a person has already underwritten a policy; and he will be allowed to protect himself against his own risk, as an original insurer or underwriter, by what is termed a re-assurance. See *Re-insurance*. The freighter has an insurable interest in any advances made to the shipmaster, provided they be distinguished as freight, or made to depend on the earning of freight. The effect of stopping *in transitu* a cargo insured has, in one special case, been held to annihilate the vender's interest under the policy; but this case has not been held to settle the general point; and its

principle has been questioned. *Bell's Princ.* § 461; *Illust. ib.*

4. *Of the voyage.*—The voyage may be distinguished from the trade in which a vessel is engaged: Thus, the trade may be illegal, and the voyage perfectly lawful; or the voyage may be illegal, though the goods are not contraband. The general rule is, that no insurance can be legally made on a voyage prohibited by law. Hence, a voyage contrary to the British navigation laws cannot be the object of insurance; and, in the same way, insurance on a voyage undertaken contrary to the monopoly formerly granted to the East India Company would have been void. See *East India Company*.

5. *Of the risks insured against.*—All the risks incident to a sea voyage may be insured against, subject, however, to such exceptions as are founded on public policy; as, for instance, an insurance cannot be made against losses arising from the fault of the insured, nor against losses arising from an infringement of the laws; nor, before the slave trade was declared illegal, could policies on the slave trade insure the dealers in that traffic against the mortality of slaves by natural death or ill-treatment, or by throwing them over-board on any account whatever; 30 Geo. III., c. 33, § 8; 34 Geo. III., c. 80, § 10, and 39 Geo. III., c. 80, § 24. The words of the policy by which the risks are described are broad and extensive. The perils against which the underwriters become bound to insure "are of the sea, men-of-war, fire, enemies, pirates, rovers, jettisons, letters of mart and countermart, surprises, takings at sea, arrests, restraints and detentions of all kings, princes and people, of what nation, condition or quality soever, barratry of master and mariners, and all other perils, losses, or misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, &c., or any part thereof, during this adventure." But to the policy is added a memorandum which qualifies the obligation on the underwriter. The memorandum is in these terms:—"N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average, under 5 per cent.; and all other goods, also the ship and freight, are warranted free from average under 3 per cent., unless general, or the ship be stranded." This form of the memorandum is used in the English policies, and has given rise to much dispute, whether the words "free from average, unless general, or the ship be stranded," be a condition or an exception. This is a point on which the highest authorities in England have differed, though latterly they have come



to consider the stranding as a condition, which, in the event of its happening, takes off entirely the effect of the restriction created by the memorandum, and gives the same meaning to the policy as if no such memorandum had been entered in it. A case taken notice of by *Marshall* puts this question in a very clear light. The ship had struck on a rock off Sicily, and to save the vessel it was run on shore; the cargo was saved, and brought to the port of destination, but considerable damage was done to some fruit which had been insured, though the damage did not arise from the stranding of the vessel, but from the opening in the ship's bottom made by the rock against which it struck. The question was, whether, as the damage arose from one of the perils of the sea against which the general tenor of the policy insured, and not from the stranding, the underwriters were liable; and this raised the question, whether the memorandum created an exception or a condition: for, if it made an exception only of the damage arising from stranding, then the damage that occurred in this case was not owing to the stranding; whereas, if the memorandum created a condition, as, if it had said that no average should be due unless the ship was stranded, the condition being purified by the stranding of the ship, an average loss (in the same way as if there had been no restriction by the memorandum) was due. The Court found that the stranding of the ship rendered the underwriters liable for the loss, in precisely the same manner as if there had been no memorandum annexed to the policy. Lord Kenyon, in delivering his opinion, said, "I do not know how to construe the words of the memorandum grammatically, but by saying, that if the ship be stranded, that destroys the exception, and lets in the general words of the policy. If a general provision be made in any instrument, and it be then said that certain things shall be excepted, unless another thing happen, if that other thing do happen, it destroys the exception, and gives effect to the general operation of the deed." The Scotch policies are not all expressed in the same terms with the English private policies (those of the two English companies omit the condition in regard to the stranding). Some of the Scotch policies bind the underwriters for a particular average on the articles excepted in the memorandum, only where the damage happens "from stranding or bulging," and this leads necessarily into the cause of the damage, which it seems to have been the great object of the memorandum to avoid. The insertion of the clause, "unless the ship be stranded," in the memorandum, has given rise to a number of questions as to what

amounts to stranding. These are considered under the article *Stranding of Ships*. There appears to be still a question undecided on the nature of a general or a partial loss, in the case where goods are put up in separate packages or in barrels, and one or two of these are completely destroyed, whether each package or barrel is to be considered as separate, and the loss to be considered as a total loss, or as a part only of the whole, and calculated at so much *per cent.* on the whole cargo.

The duration of the risk differs on the goods, on the ship, and on the freight. 1. *Upon goods*.—By the policy, the insurance on the goods is made "from the loading thereof on board the said ship, until the same be discharged and safely landed." From these terms, it would seem that the risk commences when the goods are actually put on board, and terminates when they are landed or put on board another ship. But this general rule has exceptions, as,—1st, The course of trade in the port of loading or unloading must regulate the endurance of the risk; and, therefore, where lighters are used, the risk of the goods while in these lighters is part of the risk insured against. In English practice, a distinction has been made where the insured receives the goods on board his own lighter. This has been considered as a delivery to the insured, and sufficient to put an end to the insurance. In the same way, although the goods are to be delivered as soon as convenient at the port of delivery, yet the course of trade will also regulate this matter; *Noble v. Kennoway, Doug.* 492. A ship in the Labrador trade arrived at her point of destination June 22, and from the time of her arrival the crew were employed in fishing till August 13, when an American privateer took the ship. Lord Mansfield, on the practice of the trade, held the insurers to be liable for the loss, and so the Court decided. 2d, In the case of the ship being disabled in a storm, so as to render it necessary to shift the cargo to another ship, the risk will continue on the new ship till she arrive at the port of destination in the common way. 2. *Upon the ship*.—The terms of the policy and the nature of the voyage seem to regulate this matter a good deal. Where the policy bears from one port to another, the risk commences only from the time the ship breaks ground; but if it be expressed at and from a port, then the risk commences from the date of subscribing the policy. Where the policy bears, "from the ship's arrival at a port abroad," then the risk commences from her first arrival there during her continuance at that port. The policy bears, that the risk continues until the ship be moored at

anchor twenty-four hours in good safety; but it is not a mooring, in this sense of the expression, where she is obliged to perform quarantine; she must be moored with a power of unloading; and where a ship was destroyed by fire during the time she was lying at quarantine, the underwriters were held to be answerable for the loss; *Waples v. Corses*, 2 Str., 1248. The risk on the rigging, tackle, furniture, and provisions, continues no longer than while they are attached to the ship, unless when they are put on shore in order to repair the ship; *Pelly v. Roy, Ex. Ass.*, 1 Bur. 341; *Brough v. Whitmore*, 4 T. R. 206. Liberty to touch at a place or places, means places in the course of the voyage; liberty to touch and stay does not authorize the ship to trade. 3. *Upon freight*.—The risk begins from the time the goods are put on board; but, if the ship be chartered to proceed to a port, and there to take her cargo on board, the freight may be insured, and the risk commence from the sailing of the vessel to the port where the cargo is to be shipped; and a capture before its arrival at that port will give the owner a claim for the freight against the insurers; *Thomson v. Taylor*, 6 T. R., 478. (See *Charter Party*). The nature of the risk under a policy of insurance cannot be changed, unless with the consent of the insurers, otherwise it voids the policy. For instance, letters of marque given to a trading vessel after she has been insured is such an alteration in the condition of the ship as to change the risk entirely.

6. *Of the policy*.—The policy is a written instrument upon stamped paper, by statute made requisite to the constitution of the contract. The stamp cannot afterwards be supplied. A policy may be distinguished as an interest or as a wager policy. It is the former only which constitutes a proper contract of insurance binding on the underwriters. The interest policy may be either an open or a valued policy. The open policy is one where the value is left to be ascertained should a loss arise. A valued policy is when a value has been set on the ship or goods insured, the sum specified being demandable without proving the amount, when there is no fraud. At first it was thought that valued policies were struck at as wager policies by the statute of Geo. II.; but the contrary is now established. Investigation is open to the insurer, to see that there is no fraud. The insurance is usually made by the interposition of an insurance-broker. Mutual accounts are kept, in which the broker states in the underwriter's account all the premiums which he is authorized by the underwriter to draw, as already received, and as articles to the

underwriter's credit, against which he places all return premiums or sums received for losses (if he be authorized to recover them), and he settles the account periodically with the underwriters. On the other hand, in account with the insured, he debits him with the unpaid premiums, giving him credit for any return premiums, or for losses which he may be empowered to recover. This arrangement is accomplished by means of a receipt for the premiums signed by the underwriter, in these terms: "The assurers confess themselves paid the consideration due to us for this assurance by the assured." This receipt delivered to the broker, is a warrant to him to receive the premiums so acknowledged; but it is not effectual to discharge the insured, since it is not delivered to him as his document of discharge. When, however, the broker gives the insured credit for the premiums, the underwriter is bound by his discharge, although the broker never paid any part of them. But recall of the broker's authority while things are entire, transfers the accounting to the insurers and insured, and the former are entitled directly to claim the unpaid premiums. In this question, the broker's bankruptcy is equivalent to a recall. The receipt has the effect of laying the *onus probandi* on the underwriter, to show that neither actual payment has taken place, nor such a settlement of accounts between the parties as is equivalent to payment of the premiums. *Bell's Com.*, i. 599, *et seq.*, and *authorities there cited*. An agent for a merchant abroad must employ a broker and procure insurance: 1. Where the agent has effects in his hands. 2. Where the agent here has been in use to answer orders of insurance on former occasions. 3. Where the agent here receives bills of lading with an order to insure. In making the insurance, the agent must proceed regularly and actively, and will be answerable for the failure of the act he has undertaken to perform. The policy may be considered under the following heads: 1. *The names of the insured*.—The statute 25 Geo. III., c. 44, requires the name of the insured to be inserted in the policy, whenever the insured resides in Great Britain; where he resides abroad, that the name of his agent be inserted. This act was repealed by the act 28 Geo. III., c. 56, which, however, provides that no person shall effect any policy on "any ship or goods, without first inserting the name or names, in the usual style and form of dealing, of one or more of the persons interested, or of the consignor or consignees, consignee or consignees, of the property to be insured, or of the person or persons residing in Great Britain, who shall re-

ceive the order for and effect such policy, or of the person or persons who shall give the order to the agent or agents immediately employed to negotiate or effect such policy; and every policy made contrary to the true intent and meaning of this act shall be null and void." 2. *The name of the Ship, &c.*—It is necessary that the name of the ship should be mentioned, in order that the nature of the risk may be known; and no other ship can be substituted unless in the case of necessity, or with the consent of the underwriters. At the same time, where it is not known in what ship a cargo is to be sent home, it may be insured generally, as goods on board "ship or ships." The name of the master ought also to be declared; but it is generally expressed in the policy, "or whosoever else shall go as master in the said ship;" and under these terms the master may be changed; but this ought not to be done unnecessarily. The names of the ship and master are required, not as a warranty, but as identifying the risk; and an innocent mistake in those names will not defeat the insurance, provided there is clear proof of the identity of the ship. 3. *The subject insured.*—The policy must express whether it be goods, freight, ship, or whatever is the object of the insurance; but it is not necessary that the goods be specified, though it is sometimes done on the foot of the policy; and in that case, no other goods than those expressed will be insured. 4. *Description of the voyage.*—The voyage must be truly and accurately described; the time and place at which the risk is to commence; the time of the ship's departure; her destination; and the time when the risk shall end; or, when the insurance is on time, the commencement and end must be distinctly specified. 5. *The perils insured against.*—The perils are sufficiently expressed in the policy; but those arising from bad stowage, from wet, from theft and embezzlement of the master or mariners, do not fall on the underwriter. In the policy, the words "lost or not lost" are inserted, and they insure against losses whether they happen subsequent or prior to the date of the policy. 6. *The powers of the insured in case of loss.*—Under a clause in the policy, the insured, or those acting for them, may take every means to defend, preserve, or recover the goods insured, the expense of which shall be contributed proportionally by the underwriters. 7. *The acknowledgment of the receipt of the premium.*—This acknowledgment does not preclude the underwriter from demanding the premium, nor can it be founded on by the insured as a discharge of the premium. 8. *The testing clause.*—In all Scotch deeds, it is requisite that the writer

(or filler up of that part of the deed which is written) should be named and designed, and that the witnesses should be named and designed. Those are statutory requisites, without which a Scotch policy would not be effectual. The testing clause, then, may be in this form: "In witness whereof, these presents, printed on stamped paper, conform to Act of Parliament, and the written parts thereof being written by C., insurance-broker here, are subscribed by us at L., of the dates put by us respectively to our subscription, before these witnesses, the said C., and D., his clerk." A policy of insurance, however, being a writing *in re mercatoria*, is effectual if signed by the underwriters only, with the sum for which each is to be liable. No witnesses are required; *Bell's Com.*, i. 606. 9. *The common memorandum.*—The use of this is to save the parties from adjusting trifling losses arising from causes which, properly speaking, do not fall under the nature of the contract, and which would not admit of being easily settled.

7. *Of warranties.*—A warranty is an absolute condition, expressed or implied, which, if not true, or not complied with, defeats the insurance, whether material to the risk or not. An express warranty is a stipulation on the part of the insured *affirmative* or *promissory*, and it is binding according to the commercial meaning put upon the words. But it must be strictly and literally performed; and therefore the falsehood of an affirmative, or the non-performance of a promissory warranty, will vacate the policy. In England, the warranty must be written on the policy; the same statement on a paper apart is not sufficient. The warranty to sail on a given day must be strictly performed; nor would the best reason, or even detention by Government, be received as an excuse for not complying with the warranty. But should the ship break ground on the day of sailing, and begin the voyage, the fact of her being afterwards brought back (however little way the vessel had made), and laid under an embargo, would not vacate the policy. The warranty to sail with convoy must also be strictly complied with. In sailing with convoy, the following things are essential. 1. The vessel must sail with a regular convoy appointed by Government. 2. It must be from the place of rendezvous appointed by Government. 3. It must be a convoy for the voyage. 4. The ship insured must have sailing instructions. 5. It must depart and continue with the convoy, unless separated by necessity. See *Convoy*. There are also certain implied warranties, the most important of which is sea-worthiness. See No. 10, *Infra*. It is of no avail, in defence

against breach of warranty, that the representation was true, according to the belief of the insured. The insured is not bound to disclose what is the subject of a warranty. The truth of the warranty is presumed, especially of sea-worthiness, subject to refutation by evidence or counter presumption.

8. *Of representations.*—A representation means a collateral statement of such facts and circumstances as are material in forming a judgment of the risk. This statement may be untrue, either fraudulently or innocently. Where the representation is untrue, with a fraudulent design to impose on the underwriter, the policy is completely vacated; and a loss, even from a cause not depending on the untrue statement, will not be covered by the policy. But where the statement has been fairly and honestly made, and, though not true in every point, yet, if it be substantially true, it is not judged of with the same precision as a warranty, and does not necessarily vacate the policy. The warranty is invariably made part of the policy by an entry on the back or margin of the policy; but a representation is made on a separate paper, as in a letter shown to the underwriters.

9. *Of Concealment.*—This consists in the suppression of any circumstance material to the risk, and it vitiates completely the policy; nor does it alter the case that the concealment has been the effect of inadvertency alone. The insured ought therefore to disclose every circumstance which has come to his knowledge with the most perfect frankness. But there are certain things which the insured are not bound to communicate, because the insurer must be supposed to be equally well acquainted with them; as, general intelligence, the result of political speculations, the natural perils to which the voyage is subject. It is such facts only as vary the nature of the contract, which one party privately knows, and the other is ignorant of, and has no opportunity of knowing, which cannot be legally concealed. The question, therefore, in cases of concealment, must always be, whether, under all the circumstances at the time the policy was underwritten, there was or was not a concealment, material to the risk, or which, if known to the underwriter, would probably have altered his resolution.

10. *Of the ship.*—Under this head the principal obligations on the insured are, that the ship shall be sea-worthy—that it shall not be changed—and that it shall be navigated according to law. In regard to sea-worthiness, if the ship be found incapable of performing the voyage insured, from some latent defect existing before the voyage commenced, the insurer is not bound. Under sea-worthiness is understood that the ship

shall be tight, staunch, and strong, properly manned, provided with all necessary stores, and in all respects fit for the intended voyage; for, otherwise, the insurer has not a fair chance of gaining the premium. He undertakes to indemnify the insured against the extraordinary and unforeseen perils of the sea, but the ship must be in a condition to encounter the ordinary perils of her voyage. See *Charter-Party*. If in the course of the voyage the ship be disabled, by stress of weather or any other peril of the sea, the captain ought to hire another vessel for completing the voyage; so that, although the rule certainly be, that the ship ought not to be changed on the insurer, yet, where it is an act of necessity, the change may be made without liberating the insured. It is allowable to insure goods from abroad by a ship or ships, where the insured is ignorant of the ships by which the goods are to be sent. The ship must be navigated according to law, that is, according not only to the laws of this country, but according to the treaties subsisting between this country and foreign states. In short, in the branch of trade in which the ship is employed, all the statutory regulations in regard to that trade must be observed. See *Sea-worthiness*.

11. *Of deviation.* By deviation is understood voluntary deviation; and from the moment that a voluntary deviation takes place, the insurer is discharged from all subsequent responsibility. In judging of a deviation, it is not the shortest possible way from the port of departure to the port of delivery that constitutes the voyage; it is the usual tract of the voyage that is the rule; hence stopping at such places as it has been the usual and settled practice to stop at in the course of the voyage, is no deviation. But where a deviation has been made, it will be no answer that after the deviation the ship regained her original tract. In order to discharge the insurer, the deviation must be a voluntary deviation; for where the captain, in making the deviation, acts fairly and *bona fide*, e. g., deviates to avoid danger, the insurers are not liberated. Thus, a deviation may be made by stress of weather, from the necessity of repairs, in order to avoid an enemy, or in consequence of a mutiny in the crew. These are all cases of imperious necessity, sufficient to authorize a deviation; but it must in its extent be commensurate to the cause, and will in no case be allowed to exceed what necessity requires. See *Deviation*.

12. *Of loss.*—A loss in this sense is damage sustained by the insured from one or other of the misfortunes against which the insurer is bound to indemnify him; and they are all very particularly enumerated in the policy.

Losses are distinguished into total or partial losses. A total loss is either where the thing insured is completely destroyed, or where, although it specifically remains, it is of no value, or not sufficient to bring the amount of the freight. A partial loss is one short of a total loss; or, where the articles insured are actually landed at the port of delivery, the injury will amount to a partial loss. A partial loss is sometimes denominated an average loss, because these partial losses are often the subject of average contributions; and they are distinguished into general and particular averages. See *Average*. The losses insured against may be brought under the following heads:—1. *Loss by perils of the sea*.—This may happen from the ship's foundering. Of this fact the insurers are not entitled to require direct and positive evidence; and the law has fixed on no time within or beyond which a legal presumption of the ship's being lost arises; the circumstance must be left to the mind of the court, or the jury. The loss may happen from the ship stranding; which is either accidental, where the vessel is driven on shore by the winds and waves; or voluntary, when it is run on shore to save it from a worse fate. Stranding may be followed by shipwreck, in which case the loss is total; or the vessel may be got off in a condition to prosecute the voyage, in which case the damage and expense incurred will be a partial loss, of the nature of an average. Another peril of the sea is the ship's striking against a rock, which may occasion a leak or absolute shipwreck. A loss consistent with the ordinary service in which a ship is engaged founds no claim against the underwriter, as where an anchor is lost by the rubbing of a cable on the rocks; but, should it happen from the violence of the winds, it becomes a loss within the policy. Where animals on board a ship are insured, their death, if occasioned by the shot of an enemy, or by a tempest, or by their being necessarily thrown overboard, founds a claim against the insurer. 2. *By running foul*.—The injury sustained by one ship running foul of another is a loss within the policy, unless it be imputable to the misconduct of the master or mariners; though even then it might be covered under the head of barratry, and relief would be due by those to whom the accident was imputable. See *Collision*. 3. *Loss by fire*.—This is one of the losses falling under the policy; and it will authorize a claim even where the ship is set on fire by the master to preserve her from the enemy. 4. *Of loss by capture*.—Capture may be either by an enemy, according to the rules of war, or contrary to those rules, or by a pirate; but in whatever way the capture may be made, and whether

or not the property be thereby actually transferred, the insurers are bound to indemnify the insured to the extent of their loss, in so far as they are respectively bound. A capture may be total, as where the ship is not recovered; or partial, where the ship is recaptured; in which case the underwriter is bound to pay the salvage, and the expenses which the insured may have been put to. When a capture takes place, the insured lose all control over the property, and are entitled to abandon; but should they not declare that intention, and should the ship be retaken, they cannot then abandon, unless the object of the voyage has been lost by the capture. In all cases, therefore, between the insurers and the insured, there is no question as to the legality of the capture or the change of property, but simply whether it be a total or a partial loss, and whether it admits of an abandonment; and these depend on the circumstances which have been already taken notice of. 5. *Of loss by detention*.—This applies to all detentions by the ruling power of the country, and whether of any foreign country or of this, on whatever account the detention may be made, unless from the fault of the captain or mariners, by infringing rules which occasion the detention; in all other cases the detention by the ruling power of a country occasions a loss falling under the policy. 6. *Of loss by barratry*.—Barratry is any species of fraud, knavery, deceit, or cheating, committed by the master or mariners, whereby the owners sustain an injury, as by running away with the ship, wilfully carrying it out of the course of the voyage, sinking or deserting it, embezzling the cargo, smuggling, or any other offence whereby the ship or cargo may be subjected to arrest, detention, loss, or forfeiture; barratry, in short, comprehends every fraud which may be committed by the master or mariners against the owners. But this does not protect the insured against loss arising from the ignorance or unskilfulness of the master; the cause must be fraudulent. See *Barratry*. 7. *Of loss by average contributions*.—Average signifies a contribution made by the owners of the ship, freight, and goods on board, in proportion to their respective interests, towards any particular loss or expense sustained for the general safety of the ship and cargo, to the end that the particular loss may fall equally on all; as where goods are thrown overboard in a storm, or where the masts, cables, or anchors are cut away or destroyed for the general preservation, or money or goods given as a composition to pirates, or damage sustained in defending the ship against an enemy, or expense in curing the wounded, or the expense of defending an action for dis-

charging the ship from an unjust capture, or detention. In those cases, and in every one where an expense is *bona fide* incurred to prevent a total loss, it ought to be borne ratably by all concerned; and this equitable contribution is called general or gross average. In opposition to this is particular average; but this means nothing more than a particular loss, and has no affinity to an average loss properly so called. Besides these, there are what are called *petty* or *accustomed averages*—as pilotage, towage, beaconage, anchorage, &c. &c. But, where these are incurred in the ordinary course of the voyage, they are not considered as losses, but as part of the necessary expense; it is only where charges of that kind are incurred for an extraordinary purpose, and to provide against any impending danger, that they will be deemed gross or general average, for which the insurer will be liable. The contribution, in this case, is settled by ascertaining the value of the ship and cargo as if it had arrived safe. They are then valued at the ready-money price they would bring at the port of discharge; and the nett amount, deducting all charges, is the sum subject to the contribution; and each person's share of the loss will be in the same proportion to the value of his property as the whole loss bears to the whole property. These contributions, under the general words of the policy, are a charge which the underwriter is bound to pay. 8.

*Of loss by the expense of salvage.*—The expense of salvage, like other average contributions, is a charge for which the insurer is liable. It is understood to mean the allowance made to those by whose means the ship or goods have been saved from shipwreck, fire, pirates, enemies, or any other loss or misfortune. When the salvage is very high, the insured may abandon. See *Average Contribution. Jactus Mercium.*

13. *Of abandonment.*—By a total loss is meant not only the absolute destruction of the thing insured, or such a damage as renders it of little or no value, but also such a loss or misfortune as shall have occasioned the loss of the voyage. In such cases the insured may abandon as for a total loss. In consequence of this abandonment, the insurers come into the place of the insured, and are entitled to all that can be rescued from destruction. From the instant that a capture or detention takes place, the insured may abandon; but if advice be at the same time received that the ship has been retaken, or been allowed to resume her voyage, the insured cannot abandon, unless the object of the voyage has, by reason of the capture or detention, been disappointed, or rendered not worth pursuing; or, if farther expense be necessary, which the

underwriter will not undertake, the insured may abandon. Shipwreck entitles the insured to abandon; yet the mere stranding of the vessel does not necessarily authorize an abandonment. But if the voyage be lost, from whatever cause, it is held to be a total loss, which is a ground for abandoning. In the same way, where the cargo is damaged, so as to reduce it to a less value than the freight, it is held to be a total loss. There is no time within which the insured are bound to abandon; but, whenever they receive intelligence of the loss, they must decide whether they are to abandon; and of this intention the underwriters must receive intimation within a reasonable time; nor can the insured abandon after having once treated the loss as a partial one. Where a ship is not heard of for a reasonable time, the insured may abandon. There does not seem to be any form of intimation by which the insured must intimate to the underwriters that they mean to abandon; on the contrary, it would appear that the intimation may be effectually made by letter to the underwriter, or to the agent who has subscribed for him. Where an abandonment takes place, the insured resigns his entire interest in the ship or in the goods insured, and they become the property of the underwriters, in proportion to their respective subscriptions. When there has not been a full insurance, and the insured means to abandon, he abandons in proportion. Thus, if the value of the goods was L.5000, of which only L.4000 was insured, he abandons to the extent of four-fifths of what is saved; and, to the extent of the fifth retained, he will have a right of common property along with the underwriters. In the case of shipwreck or other misfortune, the ship and goods continue the property of the insured until abandonment; but, by a clause in the policy, the master and others may do every thing to preserve the property without being understood to act for the insured, or to deprive them of the right of abandoning; and the underwriters are liable for the expense which such attempts to save the property may occasion. The captain, therefore, acts for those who may ultimately be found to have an interest in the ship or cargo. Although, in the exercise of this power, where the wreck has happened abroad, the master seems to be warranted in selling the *wreck* for behoof of all concerned, yet it would appear that the master has no power to sell the *vessel*, so long as she preserves the appearance and character of a ship, and is not what has been called a mere "congeries of planks." *Hughes on Insurance*, 383; *Cambridge v. Anderson*, 4 *Dowling and Ryland*, 203; 2 *Barn. and Cress*. 691; *Holt on Shipping*, 243; *Gardner v. Salvador*, 2 *Moodie and*

*Martin*, 1. See *Abandonment*. See also 3 *Ross's L. C.* 783, *et seq.*

14. *Of the adjustment of losses.*—The first thing to be considered is how the quantity of the damage for which the underwriters are liable shall be ascertained; the next point is by what rule this shall be appreciated. 1. *How the amount of damage shall be ascertained.*—The insured ought to be well informed of the circumstances; and if it appear to be a total loss, and he decide to abandon, he must intimate his intention, or he will be held to have waived his right, and to be entitled to claim only as for a partial loss. When the loss is total, and the policy valued, the insured is entitled to receive the sum insured, subject to the deductions pointed out by the policy, on his proving that the goods insured were actually on board. Where the policy is not valued, but an open policy, the insured must prove not only that the goods were on board, but he must also prove their value, which value, not exceeding the sum insured, is the amount of his claim. In the case of a partial loss, the same inquiry as to the value of the loss must be made, whether the policy be a valued or an open one. Where the loss is that of ten barrels out of an hundred, the English practice seems to render this a loss which the underwriter must pay. When the part of the goods saved exceeds the amount of the freight, the practice is to deduct the freight from the salvage, and to make up the difference. But when the freight exceeds the salvage, it is held to be a total loss. Where goods have been damaged, their present value is taken from the prime cost, and the difference is the damage. Where articles are insured for one entire sum, but each article separately valued, the insured will recover the amount of any one of the articles which may have been lost. When the underwriters are to be freed from average under so much *per cent.*, any loss that may arise must be estimated on the cargo as it stood at the time of the loss; and whether the proportion renders it a claim on the underwriters or not will depend on the proportion between the loss and cargo as it then stood. 2. *How the loss is to be appreciated.*—In England, the practice, in case of a loss, is to value the goods at the prime cost, and the duties, expenses of shipping, and premium of insurance. The ship is valued at the price she is worth at the time of her sailing, including the expense of her repairs, the value of her furniture, provisions, and stores, the money advanced to the sailors, and, in general, every expense of the outfit, and premium of insurance. A partial loss, on either ship or goods, is that proportion of the prime cost equal to the diminution in value occasioned by the damage. Where the

policy is valued, the loss is that proportion of the value in the policy which the difference between the price of the sound, and the price of the damaged, bore to the price of the sound at the port of delivery. Thus, if sugars are valued in the policy at L.30 per hogshead, and are so damaged as to be worth no more than L.20, 0s. 8d. per hogshead, while, if sound, they would have brought L.23, 7s. 8d., the difference being L.3, 7s., the loss would be that proportion of the L.30, which L.3, 7s. bears to L.23, 7s. 8d.; and the same rule holds whether the goods come to a rising or to a falling market. 3. *The effect of an adjustment.*—An adjustment of the loss indorsed on the policy, and signed by the underwriters, is like a note of hand, and supersedes all further proof on the point. At the same time, the underwriters will be allowed to traverse it by direct evidence, disproving the grounds of adjustment. See *Adjustment*.

15. *Of return of premium.*—The premium and risk are co-relatives. The insurer cannot be exposed to the risk without being entitled to the premium, nor entitled to the premium without having been exposed to the risk. It remains, therefore, to be considered, under what circumstances the insured shall be entitled to demand a return of premium. 1. *Where the contract is void ab initio.*—This is owing either to want of interest in the insured, or because the insurance is illegal, or on account of fraud. When there is no interest, or an interest much below the sum insured, the insurer must return the whole premium, or retain so much of it only as may be proportioned to the actual interest; and where there are more than one policy, the underwriters settle according to the sum subscribed by each, without regard to priority of dates. If the insurer might at any time have been called on for the loss, the premium is carried; therefore, in a valued policy, though there be twice the amount of the value insured, no return is claimable. A voyage on trade with an enemy is not insurable; yet the premium cannot be demanded back—*Potior est conditio possidentis*. But when the policy is void without any fraud on the part of the insured, the premium may be demanded; or where it is void from the fraud of the underwriter, the same thing happens. It seems to be doubtful when the fraud is on the part of the insured. 2. *Where the risk has not been commenced.*—In this case, whether it be owing to the neglect or fancy of the insured, the return of the premium may be demanded, since the underwriters never ran the risk of which it was the consideration. When the voyage is divided into separate risks, the premium may be allocated according to the several risks; and in case one or more has not commenced, a pro-

portional return may be demanded. When the insurance is at and from a place with convoy, and the ship sails without convoy, the premium may be demanded back, but under a small deduction for the insurance at the port of departure, for which the underwriters were liable. When the risk has commenced, though the insurer should be relieved by a deviation, or by the voyage being abandoned, the premium cannot be demanded back by the insured. 3. *Upon the performance of some stipulations.*—It is frequently a stipulation, that upon the happening of certain events, or the performance of certain things, the insured shall return a part of the premium. If the event shall have happened, the insured will be entitled to the return, though the underwriter be liable for a partial loss. 4. *Of the deduction of one-half per cent. on a return of premium.*—Where the insurer puts a stop to the risk, the underwriter is entitled to one-half per cent. from the premium, which, in that case, he retains, on account of the entries he has had to make in his books. See *Marshall's Treatise on the Law of Insurance*.

16. *Of the action on the policy.*—The action on the policy of insurance is a maritime action, and as such could formerly be brought before the Judge-Admiral alone in the first instance; and it was only by appeal that the Court of Session had jurisdiction. But this is now one of the class of actions which were, by the Judicature Act, 6 Geo. IV., c. 120, § 28, appropriated to jury trial.

17. *Of the duties.*—There are certain stamp duties payable on marine insurances. These are regulated by 55 Geo. III., c. 184, amended by 3 and 4 Will. IV., c. 23. See, on the subject of marine insurance, *Tomlins' Dict. h. t.*; *Bell's Com.* i. 593, *et seq.*; *Ersk. B.* iii. tit. 3, § 17; *Bank.* vol. i. pp. 419, 426; *Bell's Princ.* § 457, *et seq.*; *Illust. ib.*; *Swint. Abridg. h. t.*; *Kames' Stat. Law Abridg. h. t.*; *Jurid. Styles*, 2d edit. vol. iii. pp. 563–9; *Brown's Synop. h. t.*, and p. 1779; *Shaw's Digest*, p. 243; *S. & D. vol.* xi. p. 21; *Kames' Equity*, 213; *Brodie's Supp. to Stair*, 988; *Watt, Dow's Appeal Cases*, i. 32; *Tenant*, 324; *Watson*, 326; *Brown*, 349; *Sibbald*, ii. 263; *Hall*, 367; *Smith*, 538; *Parker*, iii. 23; *Wilkie*, 57; *Reid*, iv. 97; *Douglas*, 269; *Arnot*, v. 274; *Fasker*, *Bligh*, i. 87. See also *Marshall on Insurance*. *Park on Insurance*. *Miller on Insurance*. *Phillips on Insurance*. *Hildyard on Marine Insurances*. *Duer on Marine Insurances*. *Arnould on Insurance*.

## II. INSURANCE ON LIVES.

The insurance upon life is a contract by which an underwriter, for a certain sum, proportioned to the risk (judged of from the age,

state of health, or profession of the person whose life is to be insured), engages to pay a certain sum, should the person die within the time limited in the policy. To prevent the application of this useful expedient to the improper purposes to which it was sometimes applied, it was enacted, by the statute 14 Geo. III., c. 48, that no insurance shall be made on the life or lives of any person or persons, wherein the person, for whose use the policy is made, shall have no pecuniary interest; or by way of gaming or wagering; policies made contrary thereto being declared void and null. And it is provided, that the names of those interested in the policy shall be inserted therein, and no greater sum can be recovered from the insurer than the value of the interest of the insured on such life or lives. Under this interest a creditor may insure his debt, where the debt stands upon a personal obligation only. He may either himself open a policy on his debtor's life, or he may have assigned to him a policy opened by the debtor on his own life. It has been doubted whether an heritable creditor can validly insure his debtor's life. A father has no insurable interest in the life of his son; but in a policy opened by a person on his own life his family has a sufficient interest. The interest is not to be reckoned by the actual value of the life. It is not diminished to the creditor by collateral securities; for while the debt subsists the policy is good, leaving the collateral securities to be otherwise available. In a life insurance, the underwriter usually undertakes to answer for all those accidents or diseases to which human life is subject, except duelling, suicide, the hands of justice, and death at sea. But death by duelling, suicide, and the hands of justice, are not understood to be excepted where the insurance is effected on the life of another. The death must happen within the time specified in the policy, in order to render the insurer liable; and although the insured receives the wound of which he dies before, if he does not die till after the period, the insurer is free. Fraud may be the ground for voiding this, as it does every other contract into which it enters. When the risk has once begun, though it should be shortened by the suicide of the person, the whole premium is due; there is no apportionment of the premium, and no return of any part of it. See *Bell's Com.* i. 627; *Tomlins' Dict. h. t.*; *Bell's Princ.* § 518, *et seq.*; *Illust.* 518.

Where a party effected an assurance on the life of another, it was at one time held that his right to recover upon the policy was limited by the interest he had in the life of the party assured at the time when the ac-



tion for recovery was brought, and consequently, that if the debt of a creditor who had effected an assurance was paid at that date he could not recover. Such was the law laid down in the case of *Godsall v. Boldero*, 25th Nov. 1807, 9 *East*. 71. A different law was laid down in the case of *Dalby v. The India and London Life Assurance Company*, 2d Dec. 1854, 18 *Jurist*, 1024. It that case it was held, that the provisions of the act 14 Geo. III., c. 48, were satisfied if the party effecting an assurance on the life of another had an interest in the life at the time the assurance was effected. Whether the case of *Godsall v. Boldero* was otherwise rightly decided or not, it may be doubted whether the judgment did not go too far in restricting the claim of the plaintiff to the interest he had in Mr Pitt's life at the date of the action being brought. Possessing, as he did, an interest in Mr Pitt's life, down to the date of his death, it would rather seem that he was entitled to recover the amount of his interest as at the date of the death, and that the circumstance of a third party having paid the debt after Mr Pitt's death ought not to have prevented his recovering the amount assured. The purpose of the statute seems to have been to prevent a party holding an assurance on the life of another when he had no interest depending on the life. If, however, the party retain his interest, down to the death of the party whose life is assured, the object of the statute seems to be satisfied. In the recent case, however, effect was given neither to this middle view, nor to the view adopted by the Court of Queen's Bench, and it was held that the third section of the statute was to be taken in connection with the first section, and that a party effecting an assurance upon the life of another was entitled to recover whatever amount of interest he had in the life at the date of effecting the assurance, although the day after effecting it his interest might have entirely ceased. It may be doubted whether such a result was intended by the legislature in passing the act. It may rather be thought that the true object of the statute was to prevent any party not merely effecting, but also holding a policy of assurance on the life of another, when he had no interest in the life. To effect an assurance one day having an interest, and to hold it the following day without an interest, has rather the appearance of being an evasion of the statute. If, therefore, the construction recently put upon the statute be the right one, it will be for the legislature to consider whether the statute ought not to be amended, so as to prevent any one holding a policy of assurance upon the life of another, when he has no interest in the life. Public

policy would seem to point to such a limitation in the law of life assurance. See 3 *Ross's L. C.* 703, *et seq.*

#### INSURANCE AGAINST FIRE.

This is a contract by which the insurer undertakes, in consideration of the premium, to indemnify the insured against all losses which he may sustain in his house, furniture or goods by means of fire, within the time limited in the policy. The contract must be by policy on stamped paper; but the agreement may be so conclusively fixed before delivery of the policy, as to ground an action for implementing it by a regular policy. The insurer must have value; but it is not required that he should have the absolute and unqualified property of the effects insured: he may insure as a trustee, an heritable creditor, a far, or a factor with the custody of the goods. But the nature of the property must be distinctly specified; and all the insurances, by those having an interest in the same subject, must not exceed its fair value. Fire policies are not valued policies: they limit, but do not measure, the liability for loss. The settlement is on the principle of average loss, not of abandonment. When insurance against fire is made at different offices, intimation of the different insurances should be made to each office. The dangers against which the insurer undertakes to indemnify the insured are those arising from fire; but there is an exception of those arising in case of invasion, foreign enemy, or any military or usurped power, or civil commotion; and to this effect a memorandum or condition is entered in the policy. In England fire policies are not assignable at law, but they are in equity. They are assignable in Scotland, provided the interest goes with them. Upon the death of the insured, the interest is continued in his heir; but it can be assigned only with the consent of the insurer. Where a loss happens, evidence of the loss must be produced to the office; and allowance is made not only for what has been actually consumed, but for what has been damaged, and also for the expense incurred in removing the furniture. But it is not held a loss by fire if there be no ignition; as in heat by effervescence, or injury by the over-heating of a flue not followed by actual ignition. Upon each insurance an annual duty is payable; see 19 *Vict.*, c. 22, and acts therein referred to. From this annual duty, insurances upon agricultural produce, farming stock, and implements of husbandry are, by statute, excepted, provided such insurances are effected by a separate and distinct policy, relating solely to such agricultural subjects;

3 and 4 *Will. IV.*, c. 23, § 5. It is also provided by the same statute, that, in rendering their quarterly accounts, insurance companies shall deliver to the commissioners a separate account of all insurances of agricultural produce, farming stock, &c.; § 6. See, on fire insurance, *Bell's Com.* i. 539-543, 625, *et seq.*; *Bell's Princ.* § 508, *et seq.*; *Illust. ib.*; *Hunter's Landlord and Tenant*; *Newcastle Fire Insurance Company, Dow's Appeal Cases*, iii. 255; *Menzies*, 9 D. 694.

**Intendment**; the understanding, intention, and true meaning of law. Also, the true meaning of parties contracting, as distinguished from the literal interpretation of the words employed. *Tomlins' Dict. h. t.*

**Intercommuning, Letters of.** Letters of intercommuning were letters from the Scotch Privy Council passing (on their act) in the King's name, charging all and sundry the lieges not to reset, supply, or intercommune with the persons thereby denounced; not to furnish them with meat, drink, house, harbour, or any other thing useful or comfortable; nor to have intercourse with them by word or writing, or otherwise, under pain of being repute art and part in their crimes, and dealt with accordingly; desiring all sheriffs, bailies, &c., to apprehend and commit such rebels to prison. See *Nimmo's Hist. of Stirling (per M'Gregor, Stirling)*, 2 edit. vol. ii. 426, in note.

**Interdict**; is an order of the Court of Session, or of an inferior court, pronounced, on cause shown, for stopping any act or proceedings complained of as illegal or wrongful. The interdict is obtained in the Court of Session on presenting what is termed a note of suspension and interdict to the Lord Ordinary on the Bills. It may be resorted to as a remedy against all encroachments either on property or possession; and is a protection against any unlawful proceeding. For the form of the note see *Shand's Pract.* p. 1059; and 1 and 2 *Vict.*, c. 86, § 6. In the course of the proceedings, the propriety of granting an interdict will be discussed. But the decision on that point is quite distinct from the question of right; and an interdict may be granted in consequence of previous possession, though there be no ground to support an ultimate decision in favour of such possession. It is necessary, however, that the party applying should have both title and interest to apply for an interdict. When a note of suspension and interdict is passed, and a declaratory action also brought into court, the action, of suspension and interdict, and the declaratory action may be conjoined, and the right in dispute settled in the course of the conjoined action. In the inferior courts, the procedure is analogous, only that, instead

of a note of suspension and interdict, the process commences by a summary petition to the inferior judge. *Ersk. B. iv. tit. 1, § 47*; tit. 3, § 20; *Bank. vol. ii. p. 619*; *Bell's Com. i. 123*; *Hunter's Landlord and Tenant*; *Shand's Pract.* pp. 440, 448, 460, 975; *Maclaurin's Sheriff-Court Process*; *Jurid. Styles*, vol. ii. p. 78; *Thomson on Bills*, 216. See *Injunction*.

**Interdiction**; is a system of judicial, or of voluntary restraint, provided for those who, from weakness, facility, or profusion, are liable to imposition. It is directed at the sight of the judge, on proper evidence of the facility of the party, or voluntarily imposed by the party himself. Hence the distinction into voluntary and judicial interdiction. *Voluntary interdiction*, is imposed by the sole act of the interdicted person, who, being conscious of his facility, lays himself under this restraint. This interdiction is usually executed in the form of a bond, whereby the grantor obliges himself to do no deed which may affect his estate, without the consent of certain persons therein named, technically called interdictors. But although this is a voluntary restraint, it cannot be recalled at the pleasure of the person who has laid himself under it. It may be removed, however, 1. By a sentence of the Court of Session, either on the ground that it was originally unnecessary, or that the interdicted person has, since the date of the bond, become *rei suæ providus*. 2. Without judicial interference, it may be removed by the joint act of the interdictors and the interdicted person. 3. Where a quorum of interdictors is named, the restraint ceases, if by death, or otherwise, the number of interdictors is reduced below the quorum. *Judicial interdiction*, is imposed by sentence of the Court of Session; generally proceeding on an action at the instance of a near kinsman of the facile person; but sometimes *ex nobili officio* of the Court, where, during the dependence of a suit, they discover that any of the litigants, by reason of natural infirmity, is subject to imposition. Judicial interdiction cannot be recalled but by the authority of the Court of Session, by whom it was imposed. The sentence of the Court, recalling the interdiction, affords security to those afterwards contracting with the interdicted person, even although evidence should be brought that he still continues profuse. An interdiction need not be served against the interdicted person; but it must be executed or published by a messenger-at-arms at the market-cross of the jurisdiction within which the prodigal resides, by publicly reading the interdiction there, after three *oyesses*. A copy of the messenger's execution must be affixed to the cross; and thereafter the interdiction and execution

must be registered in the books both of the jurisdiction within which the interdicted person resides, and in that within which his lands lie, within forty days after the publication; 1581, c. 119; 1597, c. 264; or the interdiction may be recorded in the general register at Edinburgh; 1600, c. 13. And before such registration, the interdiction has no effect against third parties, although they should be in the private knowledge of it; but it operates against the interdictors themselves, as soon as it is delivered to them. All deeds done by the interdicted person, after interdiction thus duly completed, without the consent of the interdictors, and affecting his heritable estate, are reducible. Registration in the general register secures all the lands belonging to the interdicted person, within Scotland, from alienation by him; but where the interdiction is recorded in the particular register, it protects the lands within that district only. Interdiction imposes no restraint on the interdicted person's management of his moveable property, of which he may dispose not only by testament, but by deeds of present alienation. Hence creditors, in personal bonds granted after interdiction, may use execution against the debtor's person, and against his moveable estate; such bonds being reducible only in so far as diligence against the heritable estate may have proceeded upon them. Onerous or rational deeds, granted by the interdicted person, are effectual without the consent of the interdictors; but he cannot alter the succession of his heritable estate by any settlement, however rational. Deeds granted with consent of the interdictors are not reducible, although lesion or prejudice to the interdicted person should be proved. In such a case the only remedy is an action against the interdictors for indemnification of the loss occasioned by their undue consent. The interdictors have no concern in the management of the interdicted person's estate, or in the receipt of his money; their duty is confined merely to interposing their authority to reasonable deeds; and hence they are accountable for nothing but fraud or fault in giving their consent. Where a deed has been granted by the interdicted person, which is liable to reduction on the head of interdiction, an action of reduction, *ex capite interdictionis*, may be brought not only by the heirs of the interdicted person, and by the interdictors, but by the interdicted person himself. *Ersk. B. i. tit. 7, § 53, et seq.*; *Stair, B. i. tit. 6, § 28*; *B. iv. tit. 20, § 30*; *Bank. vol. i. p. 191*; *Bell's Com. i. 139*; *Bell's Princ. § 2123, et seq.*; *Kames' Stat. Law abridg., voce Registration*; *Hunter's Landlord and Tenant*; *Brown on Sale, p. 173*; *Thomson on Bills, p. 242*; *Hutch. Jus-*

*tice of Peace, 2d edit. vol. ii. p. 267*; *Jurid. Styles, 2d edit. vol. ii. pp. 94, 414*; *iii. 179, 199, 228, 544-6, 991*; *Kames' Equity, 399*. See *Facility. Idiot.*

**Interest Excluding a Witness.** Interest in the issue of a cause or trial was formerly a ground of exclusion against a witness, but now it is enacted by 15 and 16 Vict., c. 27, § 1, *inter alia*, That "no person adduced as a witness in Scotland before any court or before any person having by law or by consent of parties authority to take evidence shall be excluded from giving evidence by reason of interest." This Act does not apply to instrumental witnesses; who, however, are not disqualified by any interest which is not material and direct; *Menzies' Lec. p. 110.*; *Dickson on Evidence, 370, 889*. No objection made by a witness against his own deposing is sustained, unless where the fact put to him may infer guilt or infamy; and accordingly, in exhibitions and other cases, witnesses may be examined upon facts which may infer against themselves fraud and damage. As to the former state of the law on this subject, see *Stair, B. iv. tit. 43, § 8*; *More's Notes, cccciii.*; *Ersk. B. iv. tit. 2, § 25*; *Bell's Com. ii. 482-5*; *Bell's Princ. § 2244, and authorities there cited*; *Macfarlane's Jury Prac. 142*; *Hutch. Justice of Peace, i. 266*; *Tait on Evidence, 349*; *Ross's Lect. i. 148*; *Thomson on Bills, 616*, where several English cases are analysed. See *Evidence*.

**Interest (AS A QUALIFICATION OR DISQUALIFICATION.)** In order to entitle a party to institute an action in a court of law, he must have a title, and also a proper interest in the issue, for if he can derive no benefit from the result, the action will not be sustained; the presumption being, "that it is calculated to distress the defendant, and done *in emulationem vicini*;" *Kames' Equity, 37*. Such cases are necessarily of rare occurrence; but it is a question frequently tried, whether a person has sufficient interest to sist himself as a pursuer or defender, in a cause to which he has not been specially summoned. Where an action is raised against a party, who, if unsuccessful in his defence, will have a claim of relief against another, the party liable in relief may appear and defend the action. One may appear and defend his author's title, where an action has been raised for setting it aside. A landlord having interest may sist himself as defender in an action raised against his tenant. In actions of competition, such as multiplepointings, rankings and sale, &c., a party, though not cited, may appear and compete, and crave a preference. But it has been held, that the omission to cite the real creditors in possession, in a process of ranking and sale, cannot be supplied

by their appearing and sisting themselves. In some cases, the interest has not been held sufficient to make it competent for a party to sist himself. Thus, one cannot appear and defend an action raised against another for payment of a sum contained in a document of debt, on the ground that he has the preferable right to the debt. Nor can the debtor, in an action of mails and duties, object to decree passing against his tenants who have not entered appearance. Where a creditor has a peculiar interest, adverse to the general interest of the creditors, he will not be allowed to vote, where the object or effect of that vote is to stifle inquiry, or determine any questionable matter against the interest of the creditors generally. A creditor, however, having an adverse interest, although himself ineligible as trustee, will not be deprived of his right of voting in the election of a trustee, without evidence of collusion to the injury of other creditors. Marine policies of insurance are invalid, unless they contain the name of a person or persons interested in the event. And by 14 Geo. III., c. 48, no policy of insurance against fire is valid where the person for whose use it is made has no interest in the event; nor can any greater sum be recovered than the amount of the interest of the insured. In life assurance there is, by statute, the same necessity for the person insuring having a pecuniary interest in the life which he insures. *Bell's Com.* i. 604, 625-9; ii. 350, 367-9; *Princ.* §§ 456, 461, 508, 520; *Illust.* §§ 461, 520; *Shand's Prac.* 139, 489; *Maclaurin's Sheriff Prac.* 90, 393. Interest in the cause is a ground of declination of a judge. *Ersk. B.* i. tit. 2, § 25; *Bank.* ii. 480; *Shand's Prac.* 62. See *Declination*.

**Interest of Money**; may be defined to be the creditor's share of the profit which the borrower or debtor is presumed to make from the use of the money. The prohibition in the law of Moses to take interest had operated so powerfully with the clergy, that by the canon law it was prohibited, and the taking of interest was regarded as criminal. This led to various devices, such as the introduction of wadsets and of annual rent rights (see *Bond*); until at last, on the wider diffusion of commercial notions, the taking a certain rate of interest was made lawful. After the Reformation there was no restraint on the amount of interest, when by the act 1587, c. 52, the rate of interest was regulated, and was then fixed at 10 per cent. From that time it gradually fell, till by 12 Anne, stat. 2, c. 16, it was reduced to 5 per cent. By the Acts 4 Will. IV., c. 98, 7 Will. IV., and 1 Vict., c. 80, and 13 and 14 Vict., c. 56, bills of exchange and promissory-notes were ex-

empted from the operation of the usury laws; and by the act 17 and 18 Vict., c. 90, 1854, all existing laws against usury were repealed; subject to the following provisos.—1st (§ 2), That transactions previous to the passing of the act should not be affected; 2d, (§ 3), That the expressions *legal* or *current* rate of interest should continue after the passing of the act to mean the same rate of interest as before; and 3d (§ 4), That the act should not affect the laws as to pawnbrokers. The statutes as to usury are contained in a schedule annexed to this act.

Interest is due *ex lege* or *ex pacto*. It is due *ex lege*, or by the act of the law itself: 1. By statute, as in the case of bills of exchange, inland bills and promissory-notes, which by 1681, c. 20, 1696, c. 36, 12 Geo. III., c. 72, bear interest from their date, in case of non-acceptance, or from the day they fall due, in case of non-acceptance or non-payment. Interest is due on the whole sum contained in a horning, interest as well as principal, accumulated into a principal sum from the day of denunciation, if made at the head burgh of the debtor's residence; 1621, c. 20; and by 1 and 2 Vict., c. 114, §§ 5 and 10, the registration of an execution of charge has the same effect as denunciation on letters of horning. Sums paid by cautioners on distress bear interest by the Act of Sederunt, Dec. 21 1590. By Act of Sederunt, July 31 1690, where there is a sequestration of rents, and a factor appointed, the factor is liable in interest on the rents recovered, or which he might by diligence have recovered, within a year after they are due. Interest is due *ex lege*, on the price in a sale of lands, from the time at which the purchaser gets right to the rents, and that from whatever cause the delay to pay the price may have originated. Where one receives money belonging to another, which formerly bore interest, he is liable for interest on the sum received; or, when money is paid at the desire of one, he must be liable for the interest of the money advanced at his desire. Merchants, in the same way, are entitled to interest on the price of goods sold by them, where the payment is beyond the usual credit of the trade. Interest is not due on feu-duties *ex lege*; it requires express stipulation; *Napier*, 31st May 1831, 9 S. and D. 655; *Marquis of Tweeddale*, 1842, 4 D. 862. See *Denunciation*. *Drawer of a Bill*. *Double Bonds*. Interest is due by paction, express or implied. It is due by express paction wherever the ground of debt bears a clause of interest; but in the expression of this clause there must be no provision for accumulating the arrears of interest into a principal sum bearing interest. Yet it is allowable to take a bond payable at

a term for the principal sum, and interest from the date of the advance to that term, by which means the whole becomes a principal sum bearing interest from that time. Interest is due from tacit or presumed paction, as, where a person becomes bound for interest on a sum for the time past, which implies an obligation for the time to come. Interest can in no case begin to run until the debt exists; and therefore, wherever it is made to run for a period prior to the existence of the debt, the contract becomes usurious. See *Bell's Com.* 16th edit. p. 348; *Ersk. B. iii. tit. 3, § 75, et seq.*; *Stair B. i. tit. 17, § 16*; *More's Notes*, p. lxxviii., *et seq.*; *Bank. vol. i. p. 436, et seq.*; *Bell's Com. i. 645, et seq.*; *Bell's Princ. § 32, 1479-84-95, 1503, 1880*; *Illust. § 32*; *Swint. Abridg. voce Usury*; *Kames' Stat. Law abridg. vocibus Usury, Annualrent*; *Brown on Sale*, pp. 347, 350; *Thomson on Bills*, pp. 14, 39, 133, 587, 740; *Tait's Just. of Peace, h. t.*; *Blair's Just. of Peace, h. t.*; *Jurid. Styles*, 2d edit. vol. i. p. 260-1; ii. pp. 23, 73, 332, 422-6; *Brown's Synop.* pp. 5, 86, 343, 2196; *Shaw's Digest, h. t.*; *Shand's Prac.*; *Ross's Lect. i. p. 4, et seq.*, 3, 5; ii. 379; *Kames' Equity, 488*; *Graham, Bligh's App. Cases*, ii. 126; *Hamilton*, ib. 170; *Union Canal Co.*, 1 *Bell's App.* 316; *Hurlet and Campsie Alum Co.*, 13 *D.* 370; *Blair*, 5 *D.* 1315; *Dalmahoy and Wood*, 1859, 21 *D.* 210. See *Compound Interest. Fenus Nauticum.*

**Interim Decree**; is a decree disposing of part of a cause, but leaving the remainder unexhausted. The most ordinary examples of such decrees occur in cases of accounting, or in actions concluding for a certain sum, where the defender admits so much to be due, but disputes the balance. In these, and similar cases, it is competent to the pursuer to apply for an interim decree to the amount of the admitted or indisputable balance. According to the strict rule of the Judicature Act, 6 Geo. IV., c. 120, it would seem not to be competent to pronounce such an interim decree until the record is closed; but in one case, where a party in his defences made such an admission, interim decree was pronounced for the admitted balance before the record was closed, and *quoad ultra*, a record was, in that case, directed to be made up; *Crawford*, 22d Nov. 1833, 12 *S. & D.* 113. Formerly no interim decree could be extracted until the final issue of the cause, unless the judge granted warrant for extracting it as an interim decree. Hence, where such a decree was pronounced, or where, in the course of a process, the expenses of any part of the discussion were incidentally found due and discerned for, a warrant to extract the decree as an interim one had to be applied for, where there was any risk of the payment not being

made without an extract. This is now altered by 13 and 14 Vict., c. 36, § 28; and interim decrees are now extractable without a special allowance, unless it is otherwise directed. Similar rules apply in the inferior courts. See *Maclaurin's Form of Process*, 426. In Sheriff-court causes above L.25 value, interlocutors giving interim decree for payment of money are, under 16 and 17 Vict., c. 80, § 24, reviewable by the Court of Session. See also *Record. Decree.*

**Interim Execution, pending an Appeal.** The presentment and intimation of a petition of appeal to the House of Lords, and warrant of service, suspends execution of a decree of the Court of Session. But, by the act 48 Geo. III., c. 151, § 17, it is declared, "that when any appeal is lodged in the House of Lords, a copy of the petition of appeal shall be laid by the respondent or respondents before the Judges of the Division to which the cause belongs, and the said Division, or any four of the Judges thereof, shall have power to regulate all matters relative to interim possession or execution, and payment of costs and expenses already incurred, according to their sound discretion, having a just regard to the interests of the parties, as they may be affected by the affirmance or reversal of the judgment or decree appealed from." Under this statutory provision, the practice is, for the respondent in the appeal who wishes to have interim execution pending the appeal, to present a summary petition to the Division of the Court to which the cause belongs, to which petition a copy of the petition of appeal is appended; and the prayer of the petition for interim execution is, that the Court may allow the decree of the Court of Session appealed against to go out and be extracted in name of the petitioners, and execution to proceed thereon, notwithstanding the appeal, with the expense of extract, upon caution to repeat what may be paid under the decree, in the event of the decree being reversed in the House of Lords. This petition is intimated by delivering copies to the agent of the appellant in the Court of Session, and in the ordinary case the prayer of it is granted. Cases illustrative of this article will be found in *Shaw's Digest*. See, *inter alia*, *Sir J. Inglis Cochrane*, 1849, 12 *D.* 302; *Young*, 1852, 14 *D.* 746, 811; *Granger*, 1857, 19 *D.* 1010; *Russell*, 1858, 20 *D.* 772; *Tulloch*, ib. 1319. See also *Paton's App. Prac.* p. 48, and the article *Appeal*.

**Interim Factor.** Under the former bankruptcy statutes, 54 Geo. III., c. 137, §§ 16, 17; 2 and 3 Vict., c. 41, § 45; and 16 and 17 Vict., c. 53, § 1, the first step in a sequestration was the appointment of an

interim factor for the preservation of the bankrupt's estate until the election of a trustee, which was a matter frequently attended with delay. See *Bell's Com.* iii. 360. By the recent bankruptcy act, 19 and 20 Vict., c. 79, provision is made for the immediate election of a trustee, and the appointment of an interim factor is no part of the ordinary procedure in a sequestration. The interim preservation of the bankrupt's estate, pending a petition for sequestration, and until the election of a trustee, where this needs to be attended to, is provided for by §§ 16 and 17, the former of which enacts that "it shall be competent for the Court to which a petition for sequestration is presented, whether sequestration can forthwith be awarded or not, on special application by a creditor, either (1) in such petition, or (2) by a separate petition, with or without citation to other parties interested, as the said Court may deem necessary, or (3) without such special application, if the Court think proper, to take immediate measures for the preservation of the estate, either (1) by the appointment of a judicial factor, who shall find such caution as may be deemed necessary, with the powers necessary for such preservation, including the power to recover debts, or (2) by such other proceedings as may be requisite; and such interim appointments or proceedings shall be carried into immediate effect; but if the same have been made or ordered by the sheriff, they may be recalled by the Court of Session on appeal taken in manner hereinafter directed." Section 17 gives power to the sheriff, upon cause shown by a creditor, or without any application, if he shall think fit, at any time after the sequestration and before the election of a trustee, "to cause to be sealed up and put under safe custody the books and papers of the bankrupt, and (2) to lock up his shop, warehouse, or other repositories, and (3) to keep the keys thereof till a trustee is elected and confirmed.

**Interim Managers.** Prior to the passing of the Burgh Reform Act, it was customary for the Court of Session, where a royal burgh had been disfranchised, or had no regular magistrates, to appoint persons by special commission to act as officers of the law in completing of feudal rights, where property might be in danger by the death or supervening incapacity of the proper functionaries. Thus, when the city of Edinburgh was, after Michaelmas 1745, without a magistracy, and so had no bailies to receive resignation or give sasine in burgage tenements, the Court appointed certain persons bailies for that special purpose, till a new magistracy should be established in due

course of law. Since then there have been frequent instances of this power having been exercised in the appointing of persons not only to give sasine, but to manage all the ordinary affairs of the burgh during its disfranchisement. Such emergencies, however, are now provided for by the statute 16 Vict., cap. 26, entitled "An Act to provide for the supplying of vacancies in town councils of burghs in Scotland, consequent on null or irregular elections." On the death of any sheriff-depute, the Court of Session has power, *ex nobili officio*, to appoint an interim deputy, who acts under their authority, not only as an officer of the law, but as a judge. *Ersk. B. i. tit. 3, § 23; Shand's Prac. p. 42. See Burgh Royal.*

**Interim Possession.** In all advocations of interlocutors pronounced by sheriffs, it is competent to the inferior judge to regulate, in the meantime, on the application of either party, all matters regarding interim possession, having due regard to the manner in which the mutual interests of the parties may be affected in the final decision of the cause. This interim order is not subject to review, except by the Lord Ordinary or the Court, in the course of discussing the process of advocation. But full powers are reserved to the Court of Session or Lord Ordinary, during the discussion of the cause, to give such orders and directions in respect to interim possession as justice may require. 6 *Geo. IV.*, c. 120, § 42; 1 and 2 *Vict.*, c. 86, § 4; *A. S. 10 July 1839*, § 130. See *Advocation. Interim Execution.*

**Interim Warrant.** Where, in a process of ranking and sale, there is a class of creditors preferable on a particular subject which has been sold, it is the practice, without waiting for the sale of the remainder of the property, to prepare an interim scheme of division, that the price may be divided without delay. The expense of such interim warrants falls on the particular creditor thereby benefited. The principal and interest of these preferable creditors' debts is accumulated at the term of the payment of the price; and, unless when the warrant is obtained expressly in payment of interest, the partial payments are, contrary to the ordinary rule in indefinite payments, deducted from the accumulate sum. It was formerly common for preferable creditors to obtain interim warrants on the judicial factor, or purchaser, or bank in which the money was assigned, for sums to account of their claims. But the confusion thereby occasioned led to the *A. S. 11th July 1794*, by which, § 13, it was declared that no creditor should in time coming draw by interim warrants any sum out of the common

fund without sufficient cause shown to the Court, and in no case should draw full payment; and that no interim warrant should be granted before decree of certification is pronounced, except for interest or annuities. No such application can be received after the 25th February for the winter session, or the 5th of July for the summer session, or during the five sederunt days preceding the rising of the Court for the Christmas recess; *A. S.* 13th July 1844, and *A. S.* 21st Dec. 1765. When it is doubtful whether or not an interim warrant should be granted, a remit is made to an Ordinary to investigate. The common agent, or, before his appointment, the agents for the raisers of the process, may get interim warrants on the factor for payments to account of the expenses of the proceedings. *Bell's Com.* ii. 280; *Shand's Prac.* 919. See *Ranking and Sale*.

**Interlineations.** The subscription to the bottom of the page of a formal writ does not apply to the interlineations in that page. Such interlineations, when of no importance, are held *pro non scriptis*, and as if they were blank. *Stair*, B. iv. tit. 42, § 19; *More's Notes*, ccviii.; *Ross's Lect.* i. 143; *Menzies' Lect.* 123; *Dickson on Evid.* 389. See *Erasures. Testing Clause. Illegibility*.

**Interlocutors;** correctly speaking, are judgments or judicial orders pronounced in the course of a suit, but which do not finally determine the cause. The term, however, in Scotch practice, is applied indiscriminately to the judgments or orders of the Court, or of the Lords Ordinary, whether they exhaust the question at issue or not. All interlocutors pronounced by Lords Ordinary must be signed by the Judge pronouncer; and interlocutors of either Division of the Court must be signed by the presiding Judge in presence of a *quorum* of the Court; *I.P.D.*, for *In Presentia Dominorum*, being added to the presiding Judge's signature, 1693. c. 18. Every paper given in to process in the Inner or Outer House, in terms of an interlocutor, ordering or allowing the same to be given in, and also every reclaiming note, and every note craving to reponne the petitioner, which, by Act of Sederunt, is required to be presented within the reclaiming days, must have prefixed thereto a full copy (including the date) of the interlocutor ordering or allowing such paper, or of the interlocutor complained of, as the case may be. The interlocutor need not be repeated in the body of the paper. There must also be prefixed, in like manner, a copy of any interlocutor prorogating the time originally allowed; *A. S.* July 11, 1858, § 110. Every interlocutor of the Lord Ordinary is final in the Outer-House, subject, however, to the review of the

Inner-House; 6 *Geo. IV.*, c. 120, § 17; 13 and 14 *Vict.*, c. 36, §§ 11, 12. The Lord Ordinary may, with consent of both parties, correct or alter any interlocutor at any time before extract, provided that consent be given by the counsel for the parties in a minute signed by them; *A. S.* July 11. 1828, § 63. It is also competent to get a clerical error corrected. *Ersk. B.* iv. tit. 2, § 40, *Note by Mr Ivory*; *Bank.* vol. ii. p. 675; *Shand's Prac.* 347, 968; *Maclaurin's Sheriff-Court Prac.*; *Dickson on Evid.* 342, 625; *Shaw's Digest, voce Process*; *Stewart, Dow's App. Cases*, ii. 36.

By 16 and 17 *Vict.*, c. 80, § 47, Sheriffs are empowered to pronounce and sign interlocutors when furth of their sheriffdoms; and by § 20, any sheriff-substitute or sheriff may correct "any merely clerical error" in their judgments, "at any time before the proceedings have been transmitted to the judge or Court of Review, not being later than seven days from the date of such judgment." By § 13 the grounds of judgment must be set forth in the interlocutor or in a note. Interlocutors pronounced in the Court of Session in causes commencing in the inferior Courts where proof is allowed, must specify and separate findings in fact and findings in law; 6 *Geo. IV.*, c. 120, § 40; *Shand's Prac.* p. 465. This rule is applied also to all interlocutors pronounced by the inferior courts, where matter of fact is disputed and proof is allowed; *A. S.* 15th Feb. 1851. An interlocutor not signed is null; *Smith*, 1846, 9 *D.* 190. By 11 and 12 *Vict.*, c. 79, § 10, provision is made for a new and shorter form of interlocutor of relevancy in criminal cases in the Court of Justiciary. See *Clerical Error*.

**Interlocutory Decrees.** In England, in a suit in equity, if any matter of fact be strongly controverted, the fact is usually directed to be tried at the bar of the Court of Queen's Bench, or at the assizes, upon a feigned issue. If a question of mere law arises in the course of a cause, it is the practice of the Court of Chancery to refer it to the opinion of the Judges of the Court of Queen's Bench, upon a case stated for that purpose. In such cases *interlocutory decrees* or orders are made. *Interlocutory judgments* are such as are given in the middle of a cause, upon some plea proceeding on default, which is not intermediate, and does not finally determine or complete the suit. But the interlocutory judgments most usually spoken of are those incomplete judgments by which the right of the plaintiff is established, but the *quantum* of damages sustained by him is not ascertained, which is the province of a jury. *Interlocutory orders* are such as do not

decide the cause, but settle some intervening matter relating to the cause. *Tomlin's Dict. h. t.*

**Interlocutory Judgment.** As contradistinguished from a final judgment, an interlocutory judgment is any judicial order or interlocutor pronounced in the preparation or disposal of a cause, whether in the Court of Session or in an inferior court, which is not decisive of the whole merits of the suit. In the inferior courts, it is not competent to advocate an interlocutory judgment, except under the circumstances explained, *voce Advocation*; and, in the Court of Session, an appeal to the House of Lords is not competent against an interlocutory judgment, except with the leave of the Division of the Judges pronouncing it, or unless there has been difference of opinion among the Judges. 48 *Geo. III.*, c. 151, § 15. See also 1 and 2 *Vict.*, c. 86, § 3; 16 and 17 *Vict.*, c. 80, §§ 19, 24; 13 and 14 *Vict.*, c. 36, § 12; *Paton's Appeal Practice*. See *Appeal. Final Judgment. Advocation.*

**International Law.** The term *law of nations*, among the Romans, had a somewhat different signification from that which it bears in modern times. It comprehended all those laws and customs which are so reasonable in themselves, as to be embraced by all civilized nations, modified by the particular constitution of each individual state. But the division of modern Europe into a number of independent kingdoms, and the frequent intercourse maintained between them, has given birth to a system of express or tacit rules, scarcely, if at all known among the Romans, and termed the law of nations, or international law. This law considers independent nations as so many political persons in a state of equality, and owing to each other duties similar to those which individuals reciprocally owe. By it are constituted the rights of war, the security of ambassadors, the obligations arising from treaties, and the like. It also comprehends those rules generally received by sovereign powers for fixing the order of their mutual correspondence during war and peace; such as the form of declaring war previous to any acts of hostility, the regulations relating to reprisals, to contraband goods found on board neutral ships, to the exchange of prisoners, and to suspensions of arms or negotiations of peace, the ceremonial of receiving and entertaining ambassadors, the privileges indulged to their servants and domestics, &c. Recent legal authors have also considered under this head questions relative to the conflict of laws; to what is called *comitas*; to the effect given in one country to the law of another; the constitution, evidence, interpretation, and dissolution of foreign contracts; the force of foreign awards; the laws of succession to foreign heritage or moveables; the mutual

relation between the bankrupt laws of different countries, and so forth. See *Inst. of Justinian*, lib. i. tit. 2, and *Commentators*; *Grotius de Jure Belli ac Pacis*; *Mackintosh's Discourse on the Law of Nature and Nations*; *Stair*, B. i. tit. 1, §§ 11 and 16; *More's Notes, i. et seq.*; *Ersk. B. i. tit. 1, § 14*; *Bank. i. 9*; *Bell's Com. ii. 680*. *Wheaton's International Law*. *Story's Conflict of Laws*. See *Foreign*.

**Interpretation.** It is scarcely possible to express laws in such terms as to avoid all ambiguity. Such a degree of precision is perhaps unattainable; and the want of a clear and distinct idea of the object, or of views sufficiently comprehensive, or the defect of language, will constantly either encumber the regulation, or leave some parts of the rule to be inferred. Even in the framing of private deeds (which properly form the law of the transaction, for the regulation of which they are provided), the same inaccuracy prevails; and, circumscribed as the object is, the provisions of the deed will be found in many cases to have fallen short, or to have misrepresented the views and intentions of the parties. Hence, rules of interpretation are required, which may insure just and uniform decisions. The rules for interpreting a statute have been laid down by Mr Erskine; and every deed which receives the decision of a court has rules of interpretation peculiar to itself, drawn from the general scope and intention of the deed; from the nature of the transaction; from the legal rights of the parties, independently of agreement; and from circumstances which it is impossible to particularize, but which render this one of the most important studies of the lawyer, and in a particular manner of the conveyancer; since a thorough knowledge of the rules of interpretation must ever be the surest ground on which to place that knowledge which is required in framing deeds. *Stair*, B. iv. tit. 1, § 61; tit. 43, § 21; *More's Notes*, i.; *Bank. i. 339*; iii. 52, 82, 93; *Ersk. B. i. tit. 1, § 49, et seq.*; *Sandford on Entails*, pp. 155, 175, 287; *Duarris on Statutes*. See *Conveyancing. Deeds. Contract of Marriage*.

**Interrogatories.** An interrogatory, although frequently used to signify every kind of question put to witnesses or others, is applied in a technical and more limited sense to a written question previously adjusted. By the Act of Sederunt "regulating procedure in jury causes" (16th February 1841, § 17), it is provided, That "when it shall be made out upon oath, to the satisfaction of the Court, that a witness resides beyond the reach of the process of the Court, and is not likely to come within its authority before the day of trial, or cannot attend on account of age or permanent infirmity, or is labouring under



severe illness, which renders it doubtful whether his evidence may not be lost, or is a seafaring man, or is obliged to go into foreign parts, or shall be abroad and not likely to return before the day of trial, it shall be competent to examine such witness by commission, on interrogatories to be settled by the parties, and approved of by one of the principal Clerks of Session, or Record Clerk; and it being established at the trial, to the satisfaction of the Court, by affidavit, or by oath in open Court, that such witness is dead, or cannot attend, owing to absence, age, or permanent infirmity, it shall be competent to use at the trial the evidence so taken, subject to all legal objections to its admissibility; and, in all cases where a commission is granted upon the application of one party, for examining witnesses as aforesaid, it shall be competent to the other party to have a joint commission, or to propose cross interrogatories to such witnesses, to be settled as aforesaid; and, in addition to the interrogatories so settled, it shall be competent to the commissioner to put such additional questions to the witnesses as may appear to him to be necessary, taking care to mark the question so put as put by him. That when one party obtains a commission to examine witnesses, and does not use the evidence obtained under the commission, the other party may use the evidence given under it at the trial, provided he satisfies the Court, at the trial, that he could not bring the witness or witnesses whose evidence he proposes to read, in which case he shall be liable for the expense of the commission. The depositions taken on commission shall not be used, if the witnesses so examined shall afterwards be brought forward at the trial." Under § 21 of the same Act of Sederunt, motions for such commissions may be made during vacation before the Judge who is to try the cause, or before either of the Judges appointed to be on the circuit at which it is to be tried, or, in their absence, before the Lord Ordinary on the Bills, it being shown to the satisfaction of such Judge that the motion could not have been made during session. No alteration is made on these provisions by the act 13 and 14 Vict., c. 36. In the A. S., 3d July 1823; also in *Macfarlane's Jury Prac. App.* 343, and *Jurid. Styles*, iii. 785, will be found the form of interrogatories attached to a commission for taking a proof. See also *Bell's Com.* ii. 395; *Macfarlane*, 88, 93, 188; *Dickson on Evid.* 973. See *Commission to take Proof. Evidence.*

**Interruption**; as a law term, is usually applied to the step legally requisite to stop the currency of the period of a prescription. Various prescriptions have been introduced, depending on *uninterrupted* possession or un-

interrupted silence, or acquiescence for a longer or shorter period of time, according to circumstances. The principles of these prescriptions, and the nature and effect of each, are explained under the title *Prescription*. At present it is only necessary to observe, that the acts whereby each of the prescriptions may be legally interrupted, and in effect put an end to, are of various kinds—as by an acknowledgment of debt—by citation in an action, or by execution of diligence—by partial payments, in the long negative prescription—and by payment of interest in all of them—by an instrument of protest, which is termed civil interruption, or interruption *via facti*. There is a register of interruptions, which it is sometimes necessary to examine in a search of incumbrances. The term interruption is not properly applicable to the triennial prescription. In cases where that prescription is pleaded, the question is, whether the statute applies, or has been obviated by the requisite "pursuit." See *Dunn v. Lamb*, 1854, 16 D. 944, and *authorities there cited*. See also *Napier on Prescription*; *Dickson on Evidence*; *Stair*, B. ii. tit. 3, §§ 22 and 73; tit. 12, § 56, *et seq.*; B. iv. tit. 35, § 14; *Ersk. B.* iii. tit. 7, § 37, *et seq.*; *Notes by Ivory*; *Bank. vol. ii.* p. 175, *et seq.*; *Bell's Com.* ii. 287, 335; *Bell's Princ.* § 615, *et seq.*, 2007; *Illust.* 614; *Tait's Justice of Peace, voce Prescription*; *Jurid. Styles*, 2d edit. vol. iii. p. 210; *Thomson on Bills*, 630, 659. See *Search of Incumbrances. Prescription.*

**Interventus Rei.** See *Rei interventus.*

**Intimation**; is a step necessary in certain circumstances for the complete transference of a right. An assignation is completed by intimation, which is necessary both for completing the transference, and for interrupting *bona fides* on the part of the debtor, so as to give the assignee a preference in competition. Intimation is regularly made by the assignee giving notice, in presence of a notary and witnesses, to the debtor personally, or at his dwelling-house, the procurator of the assignee reading the assignment of the special debt, or leaving a written schedule or copy of it. The proof of notice is a notarial instrument. But there are many substitutes for this formal method of intimation. It is sufficient if the debtor be a party to the assignation, or if he acknowledge having received notice in writing on the back of the assignation, or by letter; but a letter written to the debtor is not sufficient. Judicial notice is sufficient. A promise to pay, proved by writing, is sufficient. Certain assignations require no intimation. *Stair*, B. iii. tit. 1, § 5, *et seq.*; B. iv. tit. 32, § 4; *More's Notes*, p. cclxxxi.; *Ersk. B.* iii. tit. 5, § 3, *et seq.*; *Bank. vol. ii.* p. 191, *et seq.*; *Bell's Com.* i. 722; ii. 17, *et*

seq.; *Bell's Princ.* § 1462, et seq.; *Illust. ib.*; *Bell on Leases*, i. 452, et seq.; *Hunter's Landlord and Tenant*; *Tait on Evidence*, pp. 44, 218; *Jurid. Styles*, 2d edit. vol. ii. p. 343-4; *Brown's Synop. h. t.*; *Dickson on Evidence*; *Kames' Equity*, 38, 488; *Ross' Lect.* i. 181, et seq., 231; ii. 354, et seq., 488. See *Assignment*.

**Intoxication.** See *Drunkness*.

**Intrinsic**; is a term applied to circumstances sworn to by a party on an oath of reference, so intimately connected with the point at issue that they make part of the evidence afforded by the oath, and cannot be separated from it. *More's Notes to Stair*, p. ccccxviii; *Ersk. B. iv. tit. 2* §§ 11 and 12; *Bell's Com.* i. 333; *Dickson on Evidence*, 818; *Thomson on Bills*, 652. See *Evidence, Extrinsic*, p. 342.

**Intromission**; is the assuming of the possession and management of property belonging to another, either on legal grounds or without any authority. Intromission is therefore either legal or vicious.

## I. LEGAL INTROMISSION.

1. *Intromission as an adjudger*.—The adjudication was originally a purchase under reversion; and the estate having been in general proportioned to the debt, the rents were held to indemnify the adjudger for the interest of his money. But as this diligence degenerated from its original purity, the estate was carried off by the debt, however inadequate it might be to the value of the estate. An attempt was made to remedy this injustice, by the act 1621, c. 6, by which the rents of the estate, in so far as they exceeded the interest of the debt, were annually, during the legal, to be applied in payment of the principal sum. And, in the case of a minor, this was, by the act 1663, c. 10, to continue during his minority; and if, after this, the debt were not completely paid off, the estate, by the expiration of the legal, or period of redemption, was to become the property of the adjudger. This so far checked the abuse; and hence, where adjudgers have entered into possession by a decree of mails and duties, they are accountable, not only for what they have intromitted with, but for what they might have intromitted with by proper diligence. They are chargeable by a rental, and are entitled to take credit for those arrears only, in attempting to recover which they can show that they have used the most exact diligence. See *Adjudication. Expiry of Legal*.

2. *Intromission as an heritable creditor*.—In the common case, a written obligation requires a written discharge; but heritable bonds usually contain a clause empowering

the creditor to intromit with the rents of the subject; and as, when the creditor has intromitted, his intromissions consist of acts which may be proved, the proof of these forms one of the exceptions to the general rule, that a written obligation requires a written discharge. Proof of intromission under such a warrant, therefore, will be received to reduce the debt in whole or in part. See *Discharge*.

3. *Intromission on more than one title*.—Where one in possession of an estate is called to account by a person claiming a right to the estate, and the person in possession holds two titles, one of which is preferable, the other inferior, to the title in the person competing, it becomes a question whether the previous intromissions are to be imputed to the strongest or weakest of his titles; for, should the intromitter be obliged to impute his intromissions to the preferable title—as, for instance, to an adjudication or heritable bond—then all his intromissions must go to extinguish the heritable debt, which being thereby paid off, he draws nothing in respect of his inferior title; whereas, if he be allowed to impute his former intromissions to his inferior title, his future intromissions, after the appearance of the competitor, will go in extinction of his preferable claim, and thus a considerable advantage will be enjoyed by him. The rule of the law of Scotland, under certain modifications, authorizes this last mode of settlement. See *Ersk. B. ii. tit. 1* § 30; *Stair, B. iii. tit. 2*, § 29; *Bank. vol. ii. p. 229*; *Bell's Com.* ii. 85, 531, et seq.; *Bell on Leases*, ii. 31, 315; *Hunter's Landlord and Tenant*, ii. 412; *Tait on Evidence*, 3d edit. p. 313; *Jurid. Styles*, 2d edit. vol. ii. p. 399; *Brown's Synop.*

## II. VITIOUS INTROMISSIONS.

The term vitious intromission is applied exclusively to the heir's unwarrantable intromission with the *moveable estate* of the ancestor; his intromission with the heritage or rents of the heritage, being termed *gestio pro herede*. The effect of vitious intromission is to render the heir who is guilty of it liable, under the passive title, of vitious intromission, for the debt of the ancestor universally—the severity of this passive title being intended to prevent the carrying off of moveables, which are, from their nature, so liable to embezzlement. With the same view, its consequences are extended to every intromitter with the effects of the deceased, whether he be the heir or a stranger to the succession. A confirmation as executor puts an end to the vitious intromission, since it infers an intention on the part of the intromitter

to account for his intromissions, which takes off the vitiosity, and renders him liable only to the extent of his intromissions. This passive title is available only to creditors whose debts are constituted by an obligation *inter vivos*; and therefore legatees, or donees *mortis causa*, cannot sue upon it. *Ersk. B. iii. tit. 9, § 49, et seq.* See *Executor. Behaviour as Heir. Passive Titles.*

**Intrusion**; is the delict of entering into possession of an heritable subject without any title in the person entering. The remedy is generally sought in the Sheriff-court by an action or petition for ejection. See *Hunter's Landlord and Tenant*, 192; *Brown's Synop. h. t. Articles Ejection and Intrusion. Delinquency.*

**Invecta et Illata.** This term, in questions of hypothec and thirlage, applies to the articles brought within the tenement, or within the thirl. In the case of urban tenements, there is an hypothec upon the *invecta et illata*; that is, on the household furniture and articles for the use of the family, or for ornament, which are brought into the house; or over the instruments and utensils brought into a workshop by the tenants, for carrying on the business of the shop or manufactory. In retail shops, the articles there are liable to the same hypothec; but, to render it effectual to the landlord, the goods on sale must be sequestrated. See *Hypothec. Furniture.* In thirlage, again, there is sometimes a thirlage of the *invecta et illata*, in the case of a village where all the grain brought within the village "that tholes fire and water" (such are the terms of the astrictio) is liable to certain thirlage. These terms apply to malting and drying within the thirl, but not to baking and brewing; and accordingly no malture is due, in the thirlage of *invecta et illata*, for flour or oatmeal imported in that state into the thirl. *Stair, B. i. tit. 13, § 15; B. ii. tit. 7, § 20; B. iv. tit. 25, § 3; More's Notes, p. lxxxii; Ersk. B. ii. tit. 6, § 64; Bank. vol. i. pp. 386, 688; Bell's Com. ii. 27, et seq.; Bell's Princ. §§ 1028, 1275; Illust. ib.; Bell on Leases, 4th edit. vol. i. p. 387; Hunter's Landlord and Tenant, ii. 353, 357, 365, 375; Brown's Synop. p. 944. See Thirlage.*

**Inventory**; is a regular list of articles, or of an estate, describing each article fully and precisely by itself, and *seriatim*, so as to point out every article of which the estate consists. The evidence afforded by a regular and orderly list of articles has been resorted to by the law on different occasions, for the benefit of heirs, or of creditors, or of minors; and regular inventories have been required in different circumstances, where those beneficially interested in the estate are unable to

attend to their own interest; as in the case—

1. *Of heirs.*
2. *Of pupils, minors, and insane persons.*
3. *Of creditors and bankrupts.*

#### J. INVENTORY FOR THE SECURITY OF HEIRS.

This has been resorted to in the case of moveable succession as well as of heritage.

1. *Inventory in a service cum beneficio inventarii.*—The entry of an heir by inventory was introduced by the act 1695, c. 24, entitled, an "Act for obviating the frauds of apparent heirs," which, after making certain provisions against the contrivances of such heirs in prejudice of the creditors of their predecessors, provided that thereafter they might enter to their predecessors "*cum beneficio inventarii*," or upon inventory, as use is in executories and moveables." This inventory "must be full and particular" as to the heritable estate of the ancestor, and must be lodged within the year, with the clerk of the shire within which the lands lie: it is signed by the heir, the judge, and clerk of court, and recorded in the sheriff-clerk's books. In special circumstances, however, the Court will, on a summary petition, authorize the recording of the inventory after the expiration of the year and day; *Bell, 28th May 1830, 8 S. & D. 839.* An extract of the inventory must, within forty days after the expiration of the *tempus deliberandi*, be recorded in a register kept for that purpose in the books of Session. When the inventory has been made up within the year, and recorded in the books of Session within the forty days after the expiration of the year, the heir may enter at any time thereafter, with all the advantage of the act 1695, c. 24; and there is no alteration in the form of the service farther than that it is stated that he is served heir *cum beneficio inventarii*. The lodging of the inventory infers of itself no passive title, provided it be not followed up by service. *Bank. vol. ii. p. 311, et seq.; Bell's Com. i. 663; Bell's Princ. § 1926.* The benefit of entry with a limited responsibility is now effected in a more simple way under the Service of Heirs Act (10 and 11 Vict., c. 47, § 25), which practically supersedes the provision of the old act on this subject. *Menzies' Lect. p. 766. See Beneficium Inventarii.*

2. *Inventory of personal estate.*—Is a list of the whole moveable effects belonging to a deceased person, which must be given up on oath by his executor or nearest of kin, or other person entering on their administration. This is required, under penalties, by the act regulating the duties payable on succession, 16 and 17 Vict., c. 51, §§ 45, 46. It is also necessary as part of the procedure

in confirmations of executors. See *Confirmation. Executor. Stat.* 21 and 22 Vict., c. 56, §§ 8-15. By § 8 of the latter statute inventories of personal estates of deceased persons may be given up and recorded in, and confirmation granted by, any commissary court to which it is competent to apply under the act for appointment of an executor-dative. Under § 9, the inventory in the case of a person dying domiciled in Scotland may include personal estate in any part of the United Kingdom—personal estate in England and Ireland being stated separately. By § 11, such inventories must be sworn to before the commissary or his depute, or the commissary-clerk or his depute, or a commissioner appointed by the commissary, or a magistrate, or justice of the peace, or British consul. By § 15, for securing the payment of the stamp duties, the inventory required by law to be exhibited before obtaining confirmation must extend to and include the whole personal and moveable estate of the deceased in the United Kingdom, and the value thereof. A very full account of the procedure in this matter, so far as not altered by the recent statute, with a form of the inventory itself, will be found in the Appendix to the *Juridical Styles*, vol. ii. 2d edit. *Stair*, B. iii, tit. 8, § 54; *Bell's Com.* ii. 82, *et seq.*; *Bell's Princ.* § 1894-7-8; *Jurid. Styles*, 2d edit. vol. ii. p. 491-5.

## II. INVENTORY FOR THE SECURITY OF PUPILS, MINORS, AND INSANE PERSONS.

The tutorial or curatorial inventory is a list of the whole estate, heritable or moveable, which belongs to a minor, made up by the tutor or curator before he enters on his office, at the sight of a judge, and after citing the nearest of kin on the sides of the father and mother of the minor. In an action for making up tutorial inventories, the citation of the next of kin on the mother's side is sometimes dispensed with, where they live beyond the jurisdiction of the Court; but such dispensation can be granted only on a petition to the Court, stating the circumstances; *Nasmith's Tutors*, 8th Dec. 1830, *F. C.*; *Hobbs*, 29th June 1831, 9 *Sh.* 841; *Dingwall Fordyce*, 1836, 14 *Sh.* 992; *Bannerman*, 1838; 10 *Jur.* 241; *A. & B.*, 1841; 16 *F.* 1055. This inventory is ordered to be made up by the act 1672, c. 2, and three duplicates thereof, subscribed by the tutor or curator, and by the next of kin, and by a delegate appointed by the judge, are directed to be judicially produced before the Judge Ordinary; and, after being signed by the clerk of Court, one duplicate is to be delivered to the next of kin by the father, another to the next of kin

by the mother, and the third to the tutor or curator. If, after completing the inventory, any other property or estate be discovered, or shall open to the minor, it is to be added to the former inventory within two months after the minor has attained possession; the same forms being observed as at first. *Ersk.* B. i. tit. 7, § 21, *et seq.* The penalties of neglecting to make this inventory are, 1. That no expense incurred in the affairs of the minor shall be allowed to the tutors. 2. They shall be accountable for omissions, and may be removed from their offices as suspect; *Ersk.* ib. § 22. Forms of the summonses, and other writs used in the above cases, will be found in *Bell on Deeds*, vol. iii. *More's Notes to Stair*. p. xli.; *Bank.* vol. i. p. 168; *Bell's Princ.* § 2081-95; *Shand's Prac.* p. 560; *Jurid. Styles*, 2d edit. vol. ii. p. 499-503; iii. 39, 270-3. See *Curatory. Tutor.*

By the Pupils' Protection Act (12 and 13 Vict., c. 31, §§ 3, 25), all judicial factors, and persons served tutors of law to pupils, or appointed tutor-dative to pupils, insane persons, or idiots, or served curators to insane persons or idiots, are required, within six months of receipt of their bond of caution, to lodge with the Accountant of Court a distinct rental of lands, &c., and an inventory of moveables; and they must close their accounts once in every year, on a day to be fixed by the Accountant, and lodge an account with the Accountant within a month of that day, § 4.

By the Bankruptcy Statute (19 and 20 Vict., c. 79, § 80), trustees on sequestrated estates are required, "as soon as may be after the appointment," to make up and transmit to the Accountant in Bankruptcy an inventory and valuation of the bankrupt estate and effects.

**Inventory of Process.** The clerks of Court are directed to make out and maintain a correct inventory of the articles of which each process consists; specifying the dates of the productions and ingivings. Two duplicates of the inventory are made, of which one remains in the custody of the clerk of Court till the final transmission of the process to the keeper of the records, and the other forms one of the articles of the process when transmitted to the Lord Ordinary for advising. *A. S.* 10th March 1798, and 8th July 1819; *Alexander's Abridg. of A. S.* 109, 160-1.

**Investiture;** is the complete act by which a right of land is conferred, consisting anciently of the possession given to the vassal by the superior in presence of the *pares curia*, where, without writing or any other ceremony, the vassal was fully and completely possessed of his feu. But now this right is conferred by a charter and recorded instrument of sasine following upon it, or by the

charter itself being recorded in the register of sasines, in virtue of the Titles to Lands Act. Without this, no feudal right to land is completed; and what is called the investiture is thereby completed. Where, therefore, lands have been vested in a person by charter and sasine, the charter and sasine are said to be the investiture of the estate; and the person called by the title-deeds to succeed on the death of the vassal, whether heir-male of the vassal's body, or heir-at-law, is said to be the heir of investiture. See *Ersk. B. ii. tit. 3, § 17*; *Bank. i. 509*; *Shaw's Digest, 181*. See *Infeftment. Charter. Titles to Land*.

**Invoice**; a particular account of merchandise, with its value, custom, and charges, &c., sent by a merchant to his factor or correspondent in another country. *Tomlins' Dict. h. t.*

**Irritancy, Legal and Conventional**. The irritancy of a right is its forfeiture in consequence of some neglect or contravention. Such a forfeiture takes place either by the force of the law alone (*ex lege*), or in consequence of some previous stipulation (*ex contractu*). Of the former kind, is the irritancy of a feu from non-payment of the duty during two years. (See *Tinsel of the feu*.) In like manner a lease may be dissolved during its currency, by the operation of a legal as well as of a conventional irritancy. *Legal irritancies* are incurred by the lessee allowing his rent to fall into arrear for two full years, or by the lessee deserting possession, or neglecting to cultivate the farm at the usual period. The law with regard to this irritancy was formerly rather uncertain, and the Act of Sederunt, 14th Dec. 1756, was passed with the view of establishing a definite and permanent rule. Where a tenant has irritated his lease, by being two years in arrear, the lessor may have the irritancy declared before the Judge Ordinary, and insist on a summary removing. If a tenant run one full year's rent in arrear, or desert his possession and leave the farm unlaboured, action may be raised before the Judge Ordinary, who may decern him to find caution within a limited time, for arrears, and for the rent of the five succeeding crops, or during the currency, if the lease be of shorter duration than five years; and on failure, may decern him to remove, and eject him in the same way as if the lease were determined, and the lessee had been legally warned in terms of the statute, 1555, c. 39. If the amount of a year's rent be due, it is of no consequence whether it be the rent of a single crop, or made up of portions of the rents of several years. The landlord is not bound to accept of partial payments; and debts of the landlord, or even public burdens, paid by the tenant without authority, are not computed so as to diminish

the year's rent due. In construing the act relatively to desertion, or leaving the ground unlaboured, the leaning has been in favour of the tenant. The Act of Sederunt is applicable only to agricultural subjects, not to mines, collieries nor fisheries. Urban subjects are also excluded. But it is thought that the older law, viz., that the tenant might be removed, if he were behind in payment of his rent, unless he found caution as to the future, is still applicable to urban subjects. *Conventional irritancy* is the result of a stipulation in the lease. To secure regular payment, a clause is sometimes inserted in the lease, bearing, that if one whole year's rent shall remain unpaid after the term of payment specified, or, if two years' rent be allowed to run into the third unpaid, the lease shall, in the option of the lessor, be null and void, without any procedure of law, and the irritancy shall not be purgeable. In construing this clause, the decisions at first fluctuated a little; but it is now settled, that the irritancy is constituted by two years' rent remaining unpaid. Of course, conventional irritancies must vary according to the views of the contracting parties, and any complete enumeration of them is impossible. The following stipulations, however, sometimes occur. That the lease shall be void, on the bankruptcy of the tenant; on his non-residence; on his not searching for minerals, within a specified time, and continuing to work them; on his assigning or subletting; on his not possessing the farm with his own stocking. This last clause has not been strictly construed. At first, actions of declarator of irritancy, and extraordinary removings, were competent only before the Court of Session; but this power was afterwards given to Sheriffs; *A. S. 14th Dec. 1756*. There has been a good deal of discussion as to the jurisdiction conferred upon the sheriff by this Act of Sederunt, on the ground that actions of declarator can be pursued before the Supreme Court only. But with respect to conventional irritancies, it has been settled, that a clause in a lease, although expressed in the form of an irritancy, may, if it form a reasonable condition of the contract, support an action of removing before the sheriff; and that declaratory expressions do not necessarily infer a declaratory summons, so as to render the action incompetent before the Judge Ordinary; *Hall, 19th May 1831, 9 S. & D. 612*. In a former case, where the lease contained a provision that it should expire on the tenant's bankruptcy, and where the defender joined issue in the inferior court, on various pleas in fact and law, without objecting that no declarator of irritancy had been raised in the Supreme Court, and the cause had been

more than a year in dependence, before that plea was resorted to, it was held that the action was competent before the inferior court. Irritancies are purgeable at any time before decree. This is done by payment where the irritancy is for a failure in payment, or by producing a renunciation or decree of reduction of a sublease, where it is founded on the tenant's subsetting the farm; and in general by performing, where that is possible, the thing, the failure to perform which occasioned the irritancy. (See *Purging an Irritancy*.) But should the tenant allow a decree in absence to go against him and be extracted, he may find it difficult to get quit of the irritancy; and where there has been an appearance for him in the action, however absurd the defence, he will, on that decree becoming final, be deprived of all relief. *Stair*, B. ii. tit. 10, § 6; B. iv. tit. 5, § 3, and tit. 18; *More's Notes*, lxxx; *Bank*. vol. i. p. 584; vol. ii. p. 101; *Bell's Princ.* § 1248; *Bell on Leases*, i. 180, 199, 229; ii. 14, 17; *Hunter's Landlord and Tenant*; *Shand's Prac.* 554; *McGlashan's Sheriff Court Prac.* p. 46; *Jurid. Styles*, 2d edit. vol. iii. p. 188; *Brown's Synop.* and *Shaw's Digest*, voce *Irritancy*; *Kames' Equity*, 45, 148; *Ross's Lect.* ii. 483, et seq. See *Lease. Declarator*.

**Irritancy of a Feu.** See *Tinsel of the Feu*.

**Irritant Clause**; is a clause by which certain prohibited acts specified in a deed, if committed by the person holding under the deed, are declared to be void and null. But where the right of property is conferred on the disponee or substitute, his acts and deeds as far burden the property. Hence, in order to make the prohibition effectual, another clause, called a resolute clause, is required, whereby the right of the contravener is resolved and put an end to on his committing the acts against which the irritancies are directed. It is by the joint aid of those two clauses that the object of the maker of the deed is attained. *Stair*, B. i. tit. 14, § 4; *Elchies' Annotations*, p. 110, et seq.; *More's Notes*, clxxvi. et seq.; *Ersk.* B. iv. tit. 8, § 25; *Bank*. i. 584; ii. 101; *Bell's Princ.* § 1731; *Sandford on Entails*; *Duncan's Digest of Entail Cases*. See *Tailzie*.

**Ish and Entry.** The clause, *cum libero exitu et introitu* ("with free ish and entry,") in the *tenendas* of a charter, imports a right to all ways and passages, in so far as they may be necessary to kirk and market, through the adjacent grounds of the granter, who is, by the clause, laid under that burden. But though the ground through which the disponee must necessarily pass should belong to another than the granter, and though it should not be subjected to any conventional servitude, it arises from the rights and ob-

ligations essential to property, that every proprietor must afford to, and is entitled to claim from his neighbour, free ish and entry. This right, however, which is founded in necessity, will not be extended to all convenient passages, or to roads by the nearest line, or through different parts of the grounds belonging to the contemurous proprietor. *Stair*, B. ii. tit. 3, § 79; *Ersk.* B. ii. tit. 6, § 9; *Bank*. i. 592.

**Issue**; has different significations in law: it means the progeny begotten between a man and his wife; the profits arising from amerciaments and fines; or the profits of lands and tenements (see *Exitus*); but it most generally signifies the question of law or fact issuing out of the allegations and pleas of the pursuer and defender in a cause. When, in the course of pleading, one party makes an averment which his opponent denies, the parties are said to be at issue. Issues are either upon matter of law, or upon matter of fact. Issues in law are pure questions of law for the determination of a judge. In Scotland, an issue in law is brought out either, 1st, As preliminary, or in the shape of a question of relevancy; or, 2d, As resulting from admitted or proved facts; or, 3d, As arising out of a special verdict, bill of exceptions, or reserved question of law. In the recent practice of the Court of Session, the tendency has been to avoid disposing of questions of law before ascertainment of the facts, where there is issuable matter on record; although there are circumstances in which the Court will dispose of an action upon the relevancy in law of the averments upon which the cause depends; *Earl of Galloway v. Grant*, 20th June, 1857; *Dobbie v. Johnston and Russell*, 26th February 1859. The result of this course of practice is, that, in the general case, where parties do not renounce probation, and the questions arising between them are such as require and admit of proof, matters generally resolve at once into an issue or issues of fact. For the ascertainment of such matters of fact there are various forms of procedure adapted to the nature of the cause and of the matter to be ascertained; *inter alia* (1.) Proof by commission, 13 and 14 Vict., c. 36, § 49; (2.) Remits to persons of science and skill; (3.) Trial of special questions of fact before the Lord Ordinary under 13 and 14 Vict., c. 36, § 48; and lastly (4.) Trial by jury (or before the Lord Ordinary of consent without a jury, under § 46 of the above statute) upon issues adjusted at the sight of the Court. Of these the most important is the last; and in that form of process no step is of more consequence, or requires greater delicacy and attention on the part of practitioners, than the adjustment of the issue or issues.

As to the causes specially appropriated to jury trial, and which, in the ordinary course, lead to issues of fact, see the article *Jury Trial*. It is to be observed, however, that it is not merely in the enumerated actions, but wherever matters of fact suitable for trial by jury, and not appropriated to any other form of procedure, require to be ascertained, that issues may be ordered.

The mode of adjusting issues now in use is regulated by the Court of Session Act of 1850 (13 and 14 Vict., c. 36), by which the procedure in jury causes is assimilated as far as possible to the procedure in other Court of Session causes (§ 36). The offices of Issue Clerk and Jury Clerk are abolished, and their duties are transferred to the clerks of Session (§ 37); and it is enacted by section 38, as to the procedure for the adjustment of issues, "that where, in the course of any cause before the Court of Session, matter of fact is to be determined, and an issue is to be adjusted with reference thereto, it shall be the duty of the pursuer to prepare and lodge in process the issue he proposes, and it shall be the duty of the defender to prepare and lodge in process any counter issue required by the nature of his defence; and the Lord Ordinary, before whom such cause depends, after causing issues to be prepared and lodged as aforesaid, shall forthwith appoint parties to attend him at chambers, or shall order the case to the roll, for the adjustment of an issue or issues, for the trial of such cause, or of such matter of fact arising therein as is to be determined by jury trial; or if such issue or issues be not adjusted and settled with the consent of parties at the meeting or enrolment so fixed, or at a second such meeting or enrolment for the same purpose, if such second meeting or enrolment shall be appointed by the Lord Ordinary, the Lord Ordinary shall immediately report the matter to the Inner House, by whom such issue or issues shall, upon such report, be adjusted and settled." Section 39 enacts, "That it shall not be necessary to engross any issue or issues with a view to trial by jury, but such issue or issues, when adjusted and settled, as aforesaid, by the Lord Ordinary or the Court, shall at the same time be approved by interlocutor to that effect, and shall be signed and authenticated by the judge as relative thereto, which proceeding shall be equivalent to engrossment as at present practised." In order to discourage unnecessary disputes before the Lord Ordinary upon the terms of issues, involving the necessity of reporting the matter to the Inner House, the Court have recently disposed of the question of expenses connected with such reports apart from the general expenses in the cause, and in the same manner as if par-

ties had gone to the Inner House on a Reclaiming Note; *Mackellar v. Duke of Sutherland*, Jan. 14, 1859; 21 D. 222.

As to the general principle on which issues are framed in Scotland, doubts have recently been suggested (see case of *Tulloch v. Davidson*, July 17, 1858, 20. D. 1319) whether, in consequence of certain observations in the House of Lords in the case of *Morgan v. Morris* (20. D. H. L. p. 18; 39. Jur. p. 690), it is not necessary to make the issues more precise and specific than has been usual in recent practice. The observations referred to were to the effect that the issues adjusted are independent of the record, and that it is incompetent to refer to the record for the purpose of limiting or controlling a general issue. See opinion of LORD CHELMSFORD in the above case of *Tulloch v. Davidson*, and the opinion of LORD BROUGHAM in the case of *Leys, Mason, and Co. v. Forbes* (5 W. and S., p. 403). See also, however, the opinion of LORD CAMPBELL to a contrary effect in the case of the *Houshill Co. v. Neilson*, 6th March 1843, 2 *Bell's App.* p. 1. Issues are framed in the form of questions, raising not merely isolated points of fact, but the general question or questions on which the case or cases of the parties depends, or is alleged to depend; and these questions are expressed in as short and concise a form as possible, "consistently with a fair indication of the nature of the points in dispute, and the legal principles which are involved in the discussion of them" (*Macf. on Iss.*, p. 11). No issue will be allowed on a point not fairly within the action as laid, nor on a matter even within the grounds of action, if vaguely and indefinitely, or inconclusively set forth in the record. To entitle a party to an issue of fraud, or of acquiescence, or of homology, or of other matter involving legal considerations, the averments on record must be specific. The mere general statement of *fraud, acquiescence, &c.*, will not do; but facts must be set forth relevant and sufficient in law to support the statement. It is usual to preface the issues with such admissions as may be proper, for the purpose of narrowing the point or points to be tried. The Court, however, are not in use to compel a party to allow the facts admitted by him on record to be thus set forth. (See *Admissions*.) Where several different claims are involved they are referred to, as specified in a schedule subjoined; but this schedule is not in any other sense to be held a part of the issues than as showing the limits of the claims. Malice must be inserted in the issue where the defender is entitled to found on the protection of privilege, but not otherwise. (See *Malice, Probable Cause*.) Although both the summons and condensation aver malice, it

does not of necessity follow that it must be inserted in the issue. In actions for reducing deeds, where the grounds of action infer an absolute nullity, the general issue is adopted, e. g., whether the deed in question is not the deed of the party whose deed it purports to be? But where it is voidable only on special grounds, issues specifying the particular grounds of reduction are the proper issues. It is sometimes necessary for the defender to take an issue. Where his defence is a simple avoidance he does not require a separate issue. But where the case depends on two separate and distinct pleas, as to which the *onus* of proof is thrown on the parties respectively, each ought to take an issue. In general, the same issue or set of issues serves, where several defenders are called in the same action about the same subject matter. But special circumstances may render it inexpedient to adhere to this rule. After the issues have been adjusted and settled, the parties can have no farther discussion regarding them; a rule strictly adhered to, unless when both parties consent to an alteration. It is, however, competent for the Court at the trial, whether both parties consent or not, to allow a mere verbal alteration, or the correction of a clerical mistake, in the writing out or engrossing of the issues. For the forms of issues in different cases, see *Macfarlane and Cleghorn on Issues* (1849), and the cases in the Session Reports under the head *Process*. See also *Ersk. B. i. tit. 3, § 35,*

*note 77 by Ivory; Bell's Princ. § 2272; Macfarlane's Jury Prac. 63; Alexander's Abridg. of A. S. 281, 291; Shaw's Digest.*

**Issuing of Bills.** In questions as to the power of making certain alterations on the terms of a bill or note, it is of importance to determine whether or not it has been issued. A bill or note is issued as soon as it is in the hands of a person entitled to enforce payment, whether it has been given in exchange for a cross acceptance, or for any other value, and whether the payee and holder is the drawer or a third party. But it is not issued unless it is in the hands of the payee or other holder, when drawn in favour of a third party, or if it is made payable to the drawer, unless it has been accepted or indorsed by the drawer. In England, an accommodation bill, which, though both accepted and indorsed, was deposited in the hands of an agent for behoof of all parties, was held not to be fully issued till it had been given to a third party. *Thomson on Bills, 187. See Bill of Exchange.*

**Iter**; a Roman law rural servitude, signifying the dominant proprietor's right of a horse or foot passage for himself, his family and tenants, through the servient proprietor's lands. *Stair, B. ii. tit. 7, § 10; Ersk. B. ii. tit. 9, § 12. See Road. Actus. Via.*

**Iter**; according to Skene, is whatever travels. Thus, *iter camerarii*, the chamberlain aire; *iter justiciarii*, the justice aire. *Skene, h. t. See Justice Aire.*

## J

**Jactus Mercium, levandæ navis causa**; or Jettison. Where goods are thrown overboard for the purpose of lightening a ship during a storm, the owners, both of the ship and of the cargo saved, are liable to the owners of the goods thrown out for the common benefit, in a proportion of the loss. The necessity of the measure must be determined upon by the master and a majority of the mariners. But where the mast goes by the board, or the anchor is lost through the violence of the storm, and not by a voluntary act for the general benefit, the loss falls on the ship and freight alone. And even where any of these articles have been cut away to avoid danger, there is no contribution if the danger arose from the state of the articles themselves. Where the ship, notwithstanding the jettison, has been at last wrecked, if any part of the goods have been saved from the wreck, the owners of the goods previously thrown overboard to lighten the ship will have a claim to a proportional contribution from those whose goods are saved;

the presumption being that the prior lightening of the ship was the means of preventing the total loss of the goods. See this subject treated of, *voce Contribution*. See also *Stair, B. i. tit. 8, § 8; More's Notes, lv.; Brodie's Supp. 1006; Ersk. B. iii. tit. 3, § 55; Bell's Com. i. 584; Tail's Justice, voce Wreck; Jurid. Styles, ii. 554. See Average.*

**Jail.** See *Prison*.

**Jail-Breaking.** See *Breaking of Prison*.

**Jail-Fees.** Jailors had been in use to charge fees against debtors at so much a-day. But the point having been tried in a question between a jailor and a person imprisoned for a civil debt, it was held that the magistrates of every burgh are obliged to keep up a free jail; and that neither they nor their jailors are entitled to exact any such dues from debtors incarcerated in their prisons; *M'Whinnie, Dec. 7, 1803, Mor. p. 11,769.* When a debtor has obtained the benefit of the act of grace, the jailor has no right to jail fees from him; *M'Whinnie, March 11, 1801, M. App.*



**Prisoner, No. 1.** See *Mor. Dict. voce Prisoner; Brown's Synop.* 1769.

**Judge and Warrant;** is the authority given by the Dean of Guild to rebuild or repair a ruinous tenement. A petition is presented, praying the judge to visit the premises, and to grant warrant to build agreeably to a plan, and to find and declare the expense of the building to be a real and preferable debt affecting the subject; the account to be cognosed by the court after the building is completed. On this application the Dean of Guild, after a citation of all parties interested, summons a jury to examine the subject; and their verdict, on the necessity of the operation of building or repairing, authorizes the Dean of Guild to grant a warrant for having it done. The accounts are afterwards produced to the court, referred to tradesmen, and being approved of by those to whom they are referred, they are by the court declared to form a real burden on the property. This form is usually resorted to by those who have a title to the area, but are doubtful of the validity of their title. It may also be resorted to by an adjudger or heritable creditor in possession; since, without such judicial authority, it is doubtful whether he would, in accounting with other creditors adjudging, have a claim for the expense laid out in repairs. But where the person having right to the reversion or property either cannot be found, or takes no charge of the property, the creditor, adjudger, or other possessor is safe to make the repairs required; the Dean of Guild pronouncing a decree, cognoscing and declaring the amount of repairs, and costs of the proceedings, with interest, to be a real and preferable debt affecting the tenement, and granting a warrant to the applicant to let or possess the tenement until the sums expended, with interest, shall be repaid. The extract of the decree is the ground and voucher of the debt and of the preference, and the recording of it in the Dean of Guild books is held legal notice of the burden. (See *Search of Incumbrances.*) Where the tenement is ruinous, and has been uninhabited for three years, a judicial procedure is authorized by the statute 1663, c. 6, the provisions of which will be found in the article *Houses*. Where a tenement belonging to several persons has been burnt, and some of the proprietors will not consent to rebuild it, any one of them may apply to have the rest decreed to give their concurrence to a plan and elevation made out, and to build their respective portions within a limited time; and on their failure, for a warrant to the petitioner to do the work at their expense. The expense of the rebuilding the storeys or subjects becomes, as in the other cases, a real burden on the

property, and the petitioner may have warrant to let or possess the subjects until fully indemnified. The form of the application and of the other proceedings in the judge and warrant will be found in *Jurid. Styles*. See also *Bank. B. iv. tit. 20, § 2; Bell's Com. i. 750; Kames' Stat. Law, h. t.; Bell on Purchaser's Title, 139; Ross's Lect. ii. 505; Boyd's Jud. Proceed. 342. See Houses. Dean of Guild. Common Interest.*

**Jettison.** See *Jactus Mercium. Contribution.*

**Jewish Law.** The judicial law of Moses has no binding authority as law in this country. *Ersk. B. i. tit. i. § 26.*

**Jewish Religion.** Persons of the Jewish religion are relieved from taking the declaration required by 9 Geo. IV., c. 17, and are required instead thereof to make and subscribe the declaration set forth in the 8 and 9 Vict., c. 52. See that act, and 21 and 22 Vict., c. 48. As to Jewish marriages, see 10 and 11 Vict., c. 58. As to Jewish schools, and rights of property, see 9 and 10 Vict., c. 39, § 2.

**Joint Obligant;** means a person bound along with another to pay or perform. Such co-obligants were termed in the Roman law *correi debendi*. Where the obligation is to perform any act, they are bound *in solidum*, and each may be sued singly to perform the act; but where the obligation is to pay money, or to deliver fungibles, which admit of being divided into parts, each will be liable only for a proportional performance of the obligation. Even where the original obligation is such that it cannot be divided, and where, therefore, performance of the obligation might have been demanded from either of the obligants, yet where the obligation has not been performed, and where, in default of performance, a sum of money in name of damages has been awarded in lieu of performance, the money so substituted being divisible, each obligant will be liable only *pro rata*. Generally speaking it is only where joint obligants are bound *jointly and severally*, or bound as full debtors, that they are held liable *singulis in solidum*, or each for the whole, the exceptions to this rule being, 1st, In the case of the obligants, in a bill of exchange, who are bound jointly and severally, whether the obligation be so expressed or not; and 2d, In the case of indivisible obligations, as above explained. *Alexander, 28th Nov. 1827, 6 S. & D. 150; Darlington v. Gray, 6th Dec. 1836, 15 S. & D. 197; Ersk. B. iii. tit. 3, § 74; Bell's Princ. § 51, et seq.; Illust. ib.; Thomson on Bills, 262-4; Menzies' Lect. p. 206. See Correi Debendi, and authorities there cited. See also Conjunctly and severally.*

**Joint Trade or Adventure.** This differs from society. A copartnership is held in law

as one person, all the partners being bound *singuli in solidum* for the debts of the company. But a joint trade is merely an union of the joint adventurers for a particular adventure, in which there is no corporation nor firm to bind the persons concerned, who are not bound unless by their own acts, or the stipulation of the contract. Yet the joint concern is so far a *pro indiviso* property, that the creditors of one individual concerned cannot appropriate the joint stock to his own payment until the debts of the concern be paid off, and the other persons concerned receive their shares. A company may be partners to a joint adventure, and this to the effect of introducing a preference in favour of the creditors of the adventure over the creditors of the proper company. Where goods are purchased for the purpose of carrying on the joint adventure, the adventurers are liable as partners for the price. But there is no such responsibility for goods purchased previously to the contract, though afterwards brought into stock. In dealings within the limits of the concern, each partner is *præpositus negotiis societatis*, but he has no implied mandate to bind the partners generally. *Ersk. B. iii. tit. 3, § 29; Bell's Com. ii. 649; More's Notes on Stair, xviii; Thomson on Bills, 269; Blair's Justice of Peace, h. t.; Tait on Evidence, 299. See Partnership.*

**Joint-Stock Companies;** are associations of a number of individuals for the purpose of carrying on a specified business or undertaking. They are generally formed for the accomplishment of extensive schemes of trade or manufacture, or the completion of some object of national or local importance, to execute which individual capital or energy would prove inadequate; such as railways, bridges, canals, &c. They have also been found well adapted for the formation of banks, as the success of such establishments depends entirely on the amount of public confidence reposed in them. Joint-stock companies are usually constituted by a written contract, binding every one who becomes a shareholder to contribute an amount of capital corresponding to the number of shares which he may hold, and to concur with the other shareholders in carrying on the proposed undertaking under specified regulations. The transactions, however, of the company are not conducted by the personal co-operation of the shareholders, as partners in trade, but are managed by directors chosen by the association, and announced to the public by advertisement or otherwise. The shares are transferable. They are held by the original subscriber to the stock by means of a scrip receipt, which certifies that he is entered in the books of the company as possessor of a certain number of shares.

The scrip receipts are not transferable; and in the event of a sale, a regular stamped deed of transfer is required to be signed by both parties before witnesses. These deeds of transfer make over to the purchaser for a specified sum of money, a certain amount of the capital stock of the company; and the purchaser binds himself to fulfil all the conditions of the company's contract. The sale of a share in a joint-stock company cannot be relied on as terminating the seller's personal responsibility, unless it be accompanied by such precautions as are necessary in dissolving an ordinary partnership; *Bell's Com. ii. 630.* But a clause is usually inserted in the contract, by which the remaining shareholders guarantee the seller of stock against all the consequences of his personal responsibility. Several of the old banking establishments, such as the Bank of Scotland, the Royal Bank, and the British Linen Company, claim exemption for their partners from all responsibility beyond their shares. But with reference to associations of that nature of more recent formation, the understanding of the public, and of the companies themselves, undoubtedly is, that the holders of stock are liable to the full extent of their fortunes. Some legal writers, on the authority of a decision pronounced in the middle of last century, are inclined to hold it as the law of Scotland that the responsibility of the partners of joint-stock companies is limited to their shares; *Stevenson and Co. v. M'Nair, 14th Dec. 1757, M. 14607; 5 Brown's Sup. 340.* The question seems not to have occurred for determination since; but there is a strong impression that, were such a question to be raised, the individual responsibility would be held unlimited. A joint-stock company, with a descriptive firm, has no *persona standi* by that firm, and the partners cannot subscribe it to bind the company. But although an action cannot be raised by or against the company by a descriptive firm, action may be maintained by the social name, along with that of the partners, or against the society by its name only, if the partners be called. A distinction has been taken between a proper and a descriptive firm relatively to the right to sue and defend: the decisions upon this point are cited in the article *Firm*. Under the act 7 Geo. IV., c. 67, joint-stock banking companies may, on fulfilling certain conditions, sue and be sued in name of their manager; *Ersk. B. iii. tit. 3, § 28, note by Mr Ivory; Bell's Com. ii. 627; Bell's Princ. § 399; Illust. ib.; Thomson on Bills, 561. See Partnership. Bank.*

Persons not fewer than seven may now form themselves into a corporated company,

with or without limited liability, by subscribing their names to a memorandum of association in the form A, annexed to the Act 19 and 20 Vict., c. 47, 1856, and by having such memorandum registered in terms of that act. A partnership of more than twenty persons cannot now carry on any trade or business having gain for its object, unless it is registered as a company under the act, or are authorized to do so by some private act of Parliament, or by royal charter or letters patent. The memorandum of association sets forth (1.) The name of the company; (2.) The place of the registered office in which the company is to be established; (3.) The objects of the company; (4.) The liability of the shareholders, whether it is to be limited or unlimited; (5.) The amount of the nominal capital of the company; (6.) The number of shares, and the amount of each share. Where a company is formed with limited liability, the word "limited" must be the last word in the name of the company. Every subscriber to the memorandum of the association must take one share at least, and the number of shares taken by each subscriber must be set opposite his name in the memorandum, and upon the incorporation of the company he is entered in the register of shareholders as a shareholder to the extent of the shares taken by him. The memorandum of the association may be accompanied by articles of association signed by the subscribers to the memorandum, and prescribing regulations for the company, the articles being in the form C annexed to the schedule of the act. The memorandum, and also the articles of association, must respectively bear the same stamps as if they were deeds, and the execution by any person of the memorandum or the articles must be attested by one witness at least. The memorandums and articles must be delivered to the registrar of joint-stock companies, who retains, and registers, and certifies under his hand that the company is incorporated; and in the case of a limited company, that it is limited. On this being done, the subscribers of the memorandum become a body corporate by the name prescribed in the memorandum, having a perpetual succession and a common seal, with power to hold lands. Shares in the company are then issued, which form personal estate, and each share is distinguished by its appropriate number. A register of the shareholders is kept containing (1.) The names, addresses, and occupation of any of the shareholders and the shares held by each of them, distinguishing each share by its number; (2.) The amount paid by each shareholder; (3.) The date at which any person was entered in the register as a shareholder;

(4.) The date at which any person ceased to be a shareholder in respect of any share. An annual list of the shareholders must be made, specifying also (1.) The amount of the nominal capital and the number of shares; (2.) The number of shares taken up to the date of each annual list; (3.) The amount of calls made on each share; (4.) The total amount of calls received; (5.) The total amount of calls unpaid; and (6.) The total amount of shares forfeited. No notice of any trust, expressed or implied, or constructive, is entered on the register as receivable by the company, and every person whose name is entered on the register is, for the purposes of the act, deemed to be a shareholder. Shares are transferred in the form F in the schedule, and are executed both by the transferor and the transferee, the transferor remaining a shareholder until the name of the transferee is entered on the register. Calls unpaid on any share constitute a debt due by the shareholder to the company. The management and administration of companies formed under the act are regulated by §§ 28 to 58 inclusive. The winding up of such companies is regulated by §§ 67 to 105 inclusive. In the event of a company being wound up by the court or voluntarily, the existing shareholders are liable to contribute to the assets of the company to an amount sufficient to pay its debts, and the costs, charges, and expenses of winding up the same, with this qualification, that if the company is limited no contribution is required from any shareholder exceeding the amount, if any, which may be unpaid on the shares held by him. Where a company (not a limited one) is wound up, any person who has ceased to be a shareholder within the period of three years prior to the commencement of the winding up, is deemed, for the purposes of contribution towards payment of the company's debts, and the costs, charges, and expenses of winding it up, to be an existing shareholder, and has in all respects the same rights, and is subject to the same liability to creditors, as if he had not ceased to be a shareholder, with this exception, that he is not liable in respect of any debt of the company contracted after the time at which he ceased to be a shareholder. Where, also, a limited company is wound up, any person who has ceased to be a shareholder within the period of one year prior to the commencement of the winding up, is deemed, for the like purpose, and to the like effect, to be an existing shareholder. The winding up of a company is held to commence at the time of presenting the petition to the Court, or, if the company is wound up voluntarily, at the time of passing the resolution autho-

rizing the winding up. Where a former shareholder of an unlimited company is made to contribute, he is entitled to be indemnified by the transferee of his shares in a degree proportioned to the shares transferred. Where a former shareholder of a limited company is made to contribute, the transferee must indemnify the transferor against all calls made or accrued due on the shares transferred subsequently to the transfer. Where the directors of a company, constituted under the act, declare and pay any dividend when the company is known by them to be insolvent, or any dividend the payment of which would to their knowledge render it insolvent, they become jointly and severally liable for all the debts of the company then existing, and for all that shall be thereafter contracted so long as they shall respectively continue in office; the amount of such liability, however, not to exceed the amount of the dividend paid. If, however, any of the directors shall be abroad at the time of making the dividend so declared or paid, or shall object thereto, and shall file their objection in writing with the clerk of the company, they are exempted from this liability.

The Act 19 and 20 Vict., c. 47, 1856, was amended by the Act 20 and 21 Vict., c. 14, 1857, and the Act 21 and 22 Vict., c. 60, 1858. The Acts relating to the winding up of Joint-Stock Companies are 7 and 8 Vict., c. 111, 1844; 11 and 12 Vict., c. 45, 1848; 12 and 13 Vict., c. 108, 1849; and 20 and 21 Vict., c. 78, 1857. The Acts relating to Joint-Stock Banks are 7 and 8 Vict., c. 113, 1844; 9 and 10 Vict., c. 75, 1846; 20 and 21 Vict., c. 49, 1857; and 21 and 22 Vict., c. 91, 1858.

**Jointure**; is a conventional provision to a widow, consisting of an annual payment to her in money during her lifetime, or of a life-ent assignment of the rents of lands, or sometimes of the life-ent of lands called a locality, in which she is in-est, and whereby she takes her chance of the rise or fall in the rents of the lands. If a jointure-house be provided, it is by a life-ent infestment, or by an obligation to pay a certain rent in place of a house. In whatever way the jointure is constituted, whether by an annuity or by a locality of lands, and in whatever way it is secured, whether it rests on a personal obligation or is secured heritably, it excludes the widow's terce, unless the contrary be expressed. See *Terce*. But if, by fault or fraud of the husband, the wife's jointure is left unsecured, she seems entitled to recur to her terce; and sometimes there is a stipulation to that effect. *Bank*. ii. 289; *Bell's Com.* i. 637; *Bell's Princ.* § 1947; *Jurid. Styles*, i. 187, *et seq.*; ii. 264, 428.

See *Contract of Marriage*. As to the widow's share in the goods in communion, see *Jas Relictæ*. See also *Terce. Contract of Marriage*.

**Judges**. Jurisdiction flows from the Sovereign alone, and is divided into civil and criminal. The Court of Justiciary, consisting of the Lord Justice-General and Lord Justice-Clerk, and five of the Judges of the Court of Session, termed Commissioners of Justiciary, is the supreme criminal jurisdiction in Scotland. The Court of Session, consisting of a Lord President and twelve ordinary Judges (of whom the Lord Justice-Clerk is one), is the supreme civil court. Inferior to these, and possessing, to a certain extent, both a civil and criminal jurisdiction, are the sheriffs of the different counties and the magistrates of royal burghs; and inferior still in point of jurisdiction are the justices of the peace. There was also formerly a Commissary Court, which exercised, to a certain extent, the jurisdiction of the ancient ecclesiastical courts. And the jurisdiction on the seas, and within flood-mark, and over all maritime questions, was exercised by the Lord High Admiral, acting by the Judge of the High Court of Admiralty, and by inferior admirals. But the jurisdiction of the High Court of Admiralty has been transferred to the Court of Session, and that of the Commissary Court partly to the Court of Session and partly to the Sheriff of Edinburgh. See *Commissaries. Admiralty*. The Scotch Court of Exchequer, which was established at the Union, consisted of a Lord Chief-Baron and four puisnè Barons, and had jurisdiction in questions of revenue; but the jurisdiction of this Court also has been transferred to the Court of Session. See *Exchequer*. The Judges in these Courts, with the exception of the magistrates of burghs and of justices of the peace, receive stated and regular salaries, corresponding to the rank and dignity of their stations; and they hold their offices *ad vitam aut culpam*. See *Courts. Session, Court of. College of Justice*.

**Judge Ordinary**; a name applied to all those Judges, whether supreme or inferior, who, by the nature of their office, have a fixed and determinate jurisdiction in all actions of the same general nature, as contradistinguished from the old Scotch Privy Council, or from those Judges to whom some special matter is committed; such as commissioners for taking proofs, messengers-at-arms, who, in pointing, &c., have a kind of judicial authority, macers of the Court of Session, who, under the old law, had jurisdiction in services, and other the like cases of special or extraordinary jurisdiction. *Ersk. B. i. tit. 2, § 15*.

**Judgment**; the sentence of the law pronounced by a court upon the matter contained

in the record. The judgments pronounced in the different courts, unless it is otherwise provided by statute, may be brought under the review of a superior judicature, with the exception of the judgments pronounced by the Court of Justiciary. Thus the judgments of inferior courts may be brought under review of the Court of Session; and the judgments of the Court of Session are subject to the review of the House of Lords. See *Jurisdiction. Appeal. Decree. Interlocutory Judgment. Judicatum Solvi. See Caution.*

**Judicial Procedure.** This term is applied to all proceedings in a court of law falling under the cognisance of the judge. The particular rules, according to which the proceedings in the several courts in Scotland are conducted, will be more minutely treated of under distinct titles; but some general principles applicable to judicial process may here be taken notice of. 1. Although the general rule of law is, that no judicial step can have any effect except against those who have been regularly called as parties, yet there are certain proceedings which affect the whole community, upon the principle that they are parties. Thus the judgments pronounced in any suit are binding upon those only who are proper parties to it; and, therefore, although such judgments may be regarded as precedents for the determination of similar questions, they do not amount to *res judicata*, nor preclude the trial of the same points in a question between other parties. On the other hand, the existence of certain judicial proceedings infers litigiousity, which may have important effects even against third parties, who contract or enter into transactions with the party against whom litigiousity strikes. See *Litigiousity*. 2. The courts of law are of course open to every individual, whether a subject of this country or a foreigner. But with regard to the latter, he must have a mandatory resident in Scotland, personally liable for the expenses or costs of suit, in case they should be awarded against his constituent. See *Defender. Mandate*. 3. In order to secure a more strict attention to the forms of judicial process, it has been deemed expedient, generally speaking, to commit the conduct of all lawsuits in the inferior and supreme courts exclusively to certain licensed practitioners, who have undergone a course of study to qualify them for that duty, and who are subjected to certain probationary trials. In the Court of Session, although a party may be heard *viva voce* upon the merits of his case, he must devolve the general management of the process upon a counsel and agent. The same rule prevails in the sheriff courts and in the other inferior courts, in all of which (with certain exceptions introduced by special sta-

tutes intended to facilitate the recovery of small debts) the business is conducted by procurators duly admitted. 4. In judicial proceedings a party is entitled to aver any fact pertinent to the cause, however much it may militate against the character of his adversary, or of any witness offered against him; and action will not be sustained on account of pertinent, although calumnious, expressions thus used judicially. But any libellous matter irrelevantly introduced is not entitled to this protection—a distinction which has been recognised and repeatedly acted upon. See *Process. Courts. Defamation. Damages. Expenses.*

In the case of *Davidson v. Paul*, 29th June 1848, 10 D. 1457, it was ruled that a party might sign his defences. In a subsequent stage of the same case, it was ruled, however, that a party could not sign the minute closing the record. See *Davidson v. Paul*, 23d Feb. 1849, 11 D. 703. It was also ruled, in the case of *Rennie v. Murray*, 12th Nov. 1850, 13 D. 36, that a condescence must be signed by counsel, and not by the party himself.

**Judicial Factor;** is a factor or administrator appointed by the Court of Session on special application by petition, setting forth the circumstances which render the appointment necessary. The power of making such appointments is vested in the Supreme Court *ex nobile officio*, and as coming in place, it has been thought, of the Scotch Privy Council. The cases in which such appointments are usually applied for and made are, where a father has died without a settlement, leaving his children in pupillarity, in which case the factor is called a factor *loco tutoris*; or where a party resident abroad has succeeded to an estate in Scotland, the factor in that case being called a factor *loco absentis*. So also, where, from insanity or mental incapacity, extreme age, or even severe indisposition, a party has become incapable of managing his affairs, the Court of Session will appoint a *curator bonis*; or where trustees named by a party deceased have declined to accept, or have died or become incapable of acting, from bankruptcy or other causes; or where tutors have been removed as suspect; or where a subject, or its rents and profits have become the subject of judicial competition, or have been placed under sequestration; and generally, in all cases where, but for such an appointment, there is risk of the property perishing, or being injured or going to waste, the Court will, on the application of a party, or of the parties interested, name a *curator bonis* or judicial factor, with what are called "*the usual powers.*" On his appointment, the factor must find caution for his intrusions and management, his cautioners being bound con-

junctly and severally with him; but the Court have refused to accept a party's co-curators as his cautioners. In his management of the estate, he must conform to the directions of the *A.S. 13th Feb. 1730*; *11th Dec. 1849*; *11th March 1851*; the chief injunctions of which are, that the factor shall make up and lodge in Court a rental of the estate, or an inventory of the money and effects falling under the factory; that he shall annually lodge a state of his accounts, and that he shall do proper diligence in recovering rents and debts, and, if necessary, confirm money and moveable effects, as executor-dative and as factor. He holds the funds subject to the orders of the Court, and if he fail in observing these directions, he may be removed; and failure to lodge his accounts annually subjects him in a "mulet," to be modified by the Court, and not to be under one half-year's salary. The duties of a judicial factor in bankruptcy proceedings are regulated by *A.S. 25th Nov. 1857*. As to the extent of the factor's powers many questions have arisen. By the Act of Sederunt 1730, he is empowered to grant leases to continue during the term that the estate remains under the inspection of the Court, and for one year more; but with regard to other acts of administration, the practical result of a series of adjudged cases on the subject seems to be, that the Court never will give, prospectively, any extraordinary powers. If, however, in the course of the management, any emergency occurs, the Court, although with hesitation, will confer special powers on special application, but only in cases of absolute necessity. In special circumstances, powers to grant leases to endure for various periods have been conferred. Such powers, however, when granted, must always be exercised *periculo petentis*, and subject to challenge by the parties interested. The great object which, in all such cases, the Court has in view, is to preserve the property for the parties to whom it belongs as entire and as much unchanged as circumstances will possibly permit; and power to raise an action of reduction, to carry on a particular manufactory, and the like, has been expressly refused, leaving it to the factor to act in such matters on his own responsibility. This judicial management being in its nature temporary, expires when the cause which gave rise to it ceases, or when a more permanent judicial manager or guardian is appointed. The factor's commission or fee is generally fixed at 5 per cent. on the sums received by him; but in special cases higher and lower rates have been adopted; *Moore, 3d July 1849*; *11 D. 1495*. Before a judicial factor can obtain his discharge, the

Court must be satisfied that he has faithfully performed his duty, which is generally ascertained by a remit to an accountant, and he is not entitled to be exonerated on producing an extra-judicial discharge by parties interested in the estate; *Christie, 16th Feb. 1844*; *6 D. 681*. Where the factory is important, and the intromissions large and numerous, it sometimes happens that the factor applies at certain stated intervals to the Court, to have his accounts audited to a particular date, and to have a balance struck; which avoids the inconvenience of having old accounts and vouchers investigated when the circumstances connected with them are out of mind. The Court will not appoint more than one person judicial factor or curator at the same time, or one party to be factor, whom failing another; and although an unmarried woman may be appointed, a married woman, being herself under curatory, will not be appointed even to take charge of the estate of her insane husband. They have also declined to appoint a husband to be factor to the children of his wife by a former marriage, and likewise a party entitled to be tutor-at-law to a pupil to be factor on his estate. At common law, a factor or trustee is not entitled to purchase debts due by his constituents, or rights affecting the estate under his charge; and in the case of judicial factors appointed by the Court of Session over landed estates under sequestration, the common law principle is fortified by the Act of Sederunt 25th Dec. 1708, whereby such factors are prohibited, either directly or indirectly, from "buying in and composing the debts affecting the same." And it is declared, that if any such purchases are made, they shall be held equivalent to a discharge and renunciation of the debts so bought in and acquired by the factor; so that the lands and the debtor shall be freed and disburdened of the same; and further, that if any abatement or gratuity shall be obtained from any of the creditors to whom they make payment of any of the rents, the abatement or gratuity shall accrue to the common debtor and his creditors. See on the subject of this article, *A. S. 13th Feb. 1730*; *11th Dec. 1849*; *11th March 1851*; *25th Nov. 1857*; *Brodie's Sup. to Stair, 879, et seq.*; *Thomson on Bills, 223, 359, 371, 723, 755*; *Bell's Princ. 587, and authorities there cited*; *Shaw's Digest, voce Judicial Factor*; and for the forms of the application, &c., see *Jurid. Styles, vol. iii. p. 866, et seq.*, and *Shand's Prac. vol. ii. p. 683*; *Brown on Sale, p. 192*; *Fraser on Per. and Dom. Relations*.

**Judicial Declaration.** See *Declaration*.

**Judicial Law of Moses.** See *Jewish Law*.

**Judicial Sale;** a term applied, in a general sense, to any sale which takes place under ju-

dicial authority. The circumstances in which, in the practice of the law of Scotland, such a sale may be made are various. Thus, in the process of sett, one of the alternative conclusions of the action is, that the ship shall be sold by judicial authority, and the proceeds divided among the shareholders. See *Sett*. So, in the case of an indivisible heritable subject, any one of the common proprietors is entitled to call upon the co-proprietors either to purchase his share at a certain price, or to sell him their shares at the same rate, or to concur in exposing the subject to sale by public roup. See *Common Property*. Other instances of judicial sale are, the sale under a sequestration for rent, the sale of poinded effects, the sale of a minor's estate in a process of cognition and sale, and the sale of a perishable subject, pending a litigation respecting the right of ownership, or the like. By much the most important judicial sale, however, is that of the heritable property of an insolvent person, for the purpose of dividing the price among his creditors. Under the Bankruptcy Act, if any part of the sequestrated estate consists of land or other heritable subjects, it is in the power of the creditors, at the meeting held after the examination of the bankrupt, or at any other meeting called for the purpose, to resolve that the trustee shall dispose of the heritable estate by public sale, or bring it to a judicial sale; and if such resolution has been made before an heritable creditor, having a power of sale, shall have commenced proceedings for sale,—or if such proceedings, after being commenced prior to the date of such resolution, have thereafter been unduly delayed,—such creditor is not entitled to interfere with the sale by the trustee. If a public sale be resolved on, the sale is to be made by auction, at the upset price, and in the manner which shall be fixed by the trustee, with consent of the commissioners; it is provided, however, that the estate shall not be sold for less than the upset price, and that such upset price shall not be less than sufficient to pay the debt, principal interest, and expenses of the heritable creditor. It is competent for the trustee, with concurrence of a majority of the creditors in number and value, and of the heritable creditors, if any, and of the accountant, to sell the heritable estate by private bargain, on such terms and conditions as the trustee, with the concurrence of those parties, may fix. It is provided that the trustee shall make up a scheme of ranking and division of the claims of the heritable and other creditors on the price of the estate sold; that such scheme shall be reported by him to the Court of Session; and that the judgment thereon shall be a warrant for pay-

ment out of the price against the purchaser of the heritable estate. Provision is also made for the granting of interim warrants out of the price; 19 and 20 *Vict.*, c. 79, §§ 114, 115, 116, 117. The important process of ranking and sale, which may be considered not only as a species of real diligence, but also as an action of competition, is treated of under the article *Ranking and Sale*.

**Judicio Sisti.** See *Caution*.

**Judicium Dei;** the term anciently applied to all extraordinary trials of secret crimes, as those by single combat, the ordeal of fire, &c. See *Combat*.

**Judicium Parium;** a trial by one's peers. *Tomlins' Dict. h. t.*

**Jugglers;** are included amongst vagabonds and Egyptians, and other descriptions of idle and disorderly persons, against whom many penal laws were enacted by the Scotch Parliaments. *Ersk. B. iv. tit. 4, § 39; Hume, vol. i. p. 474.* See *Egyptians. Vagabonds*.

**Jurats;** in England, officers, like aldermen, sworn for the government of corporations. This term is also applied to the clause with which English affidavits close. *Tomlins' Dict. h. t.* See *Affidavit*.

**Juratory Caution;** is a description of caution, sometimes offered in a suspension or advocacy, where the complainer is not in circumstances to offer any better. Where a person wishes to advocate the judgment of a sheriff, or other inferior judge, upon juratory caution only, for expenses, he applies, by petition, to the judge of the inferior court, praying that such caution may be received; which application is intimated to the opposite party or his agent. Before any such application is granted, the complainer is required to depone, at a time and place previously intimated to the opposite party or his agent, in order that an opportunity may be offered of cross-interrogating him as to whether he has any lands in property or liferent, or bonds, bills, or contracts containing sums of money. Should he acknowledge that he has, he must condescend upon them, and depone that he has no other lands, bonds, bills, or contracts containing sums of money belonging to him. The complainer must also lodge with the clerk of the inferior court the bond of caution; a full inventory of his subjects and effects of every kind; and an enactment subjoined to the inventory, bearing that he will not dilapidate any of his property, and that he will not dispose of the same, or uplift any of the debts due to him, without consent of the respondent or his agent, or the authority of the judge (under pain of imprisonment, or being otherwise punished as guilty of fraud), till the advocacy be discussed, and till there be an opportunity of doing diligence for any

expenses that may ultimately be found due by him. Farther, the complainer must lodge in the hands of the clerk of the inferior court the vouchers of any debts due to him, and the title-deeds of any heritable subject belonging to him, so far as in his possession or within his power. And juratory caution has been refused, in respect of the non-delivery of the title-deeds, although they were not in the suspender's possession, but in that of his agents, subject to a right of hypothec, which they refused to waive. The complainer, if required, must grant a special disposition to the respondent of any heritable subject he may be possessed of, and an assignation of all debts or other rights due to him, for the respondent's further security. The disposition and assignation are made out at the expense of the respondent, and by his agent, and remain with the vouchers and title-deeds, if so deposited, in the hands of the clerk, subject to the directions of the court, till the advocacy be discussed. Upon all this being done to the satisfaction of the judge, he grants leave to advocate on juratory caution, which is certified by the clerk of the inferior court. In case of a note of advocacy which does not pass *de plano*, or a note of suspension being presented on juratory caution, the Lord Ordinary, when he appoints the bill to be answered, names a commissioner to take the complainer's deposition; and the complainer intimates to the opposite party or his agent that he may attend at the time and place fixed by the commissioner. Where the juratory caution is offered in the Bill-Chamber, the lodging of the bond of caution, inventory, &c., is made with the clerk of the bills, till which time it is not necessary for the opposite party to give in his answers in the Bill-Chamber. 6 *Geo. IV. c. 120, § 41*; 14th June 1799; A. S. 11th July 1828, § 3; 11th July 1839, §§ 121-25; *Alexander's Abridg. of A. S.* 111, 114, 302-4. Before the sheriff grants leave to advocate, he must be satisfied with the examination of the complainer, and with the fulfilment of all the other requisites above enumerated; and in one case, which went no farther than the Bill-Chamber, where the complainer's examination seemed contradictory, and yet the sheriff had granted leave to advocate, reserving to the respondent to urge any objections founded on the nature of the complainer's deposition, the Lord Ordinary refused the bill, observing that the sheriff ought not to have granted leave to advocate unless he was satisfied.

Where any note of advocacy is presented on juratory caution, it is incumbent on the advocator to make immediate application to the lawyers for the poor for a report that he has a *probabilis causa litigandi*; and if the ad-

vocator fails to make such application, or if the lawyers for the poor, upon such application, report their opinion that no *probabilis causa* has been established, it is provided that the advocacy shall be dismissed, with expenses, unless full caution be forthwith offered and found in common form. 13 and 14 *Vict., c. 36, § 34*. See, on the subject of this article, *Stair, B. iv. tit. 52, § 9-24*; *Ersk. B. iv. tit. 3, § 19*; *Bank. iii. 9*; *Ross's Lect. i. 369, 382*; *Jurid. Styles, ii. 79*; *iii. 287, 297, 978-81*; *M'Glashan's Sheriff-Court Practice, by Barclay, p. 452*; *MacLaurin's Forms of Process, vol. ii. p. 565*; *Shand's Digest, p. 13*; *Macbrair and Baird's Procedure, p. 55*; *Treatise on Bill-Chamber, p. 71*; *Beveridge's Bill-Cham. Prac. p. 45*; *Bev. Treatise on Bill-Cham. p. 37*. See also *Caution. Advocation. Suspension.*

**Juri Sanguinis Nunquam Præscribitur**; a Roman law maxim, importing that the right of relationship, being a personal right, is not lost *non utendo*. It is not to be understood, however, that one cannot, by prescription, establish his right to a subject which another claims in virtue of his right of relationship. Thus, after the lapse of the vicennial prescription of retours, the party served, although not the true heir, may exclude him. All that is meant is, that, if no other heir has been entered, the right of blood is not lost by the negative prescription, but that a person may enter heir to his predecessor, although he died centuries ago. *Stair, B. ii. tit. 12, § 15*; *Ersk. B. iii. tit. 7, § 12*; *Bank. ii. 352*; *iii. 49*. See *Prescription. Vicennial. Retour.*

**Juri pro se Introducto Cuique Licet Renunciare**; a Roman law maxim, importing that any one may at his pleasure renounce the benefit of a stipulation or other right introduced entirely in his own favour. Thus, in the ordinary case, if a mandate bear a definite term, this is understood to be in the mandant's favour, and he may recall the mandate at any time. But the rule is altered when the mandate is partly for behoof of the mandatory, who then has an interest that the term agreed upon should not be altered. *Stair, B. i. tit. 12, § 8*; *tit. 13, § 8*; *B. ii. tit. 9, § 38*; *tit. 11, § 6*.

**Jurisdiction**; is either civil or criminal. By the one, questions of private right are determined; by the other, crimes are tried and punished. Jurisdiction may be also divided into superior, inferior, and mixed. In this sense, the jurisdiction of the Courts of Session and Justiciary is superior, since the sentences of all the inferior courts of Scotland are subject to the review of one or other of them; while their sentences (with the exception of the Court of Justiciary), though subject to review in the House of Lords, are not subject



to the review of any court in Scotland. Inferior judges are those whose sentences are subject to the review of our Supreme Courts, and whose jurisdiction is confined to a county, burgh, or other special territory. Mixed jurisdiction partakes of the nature both of superior and inferior jurisdiction. Thus, before they were abolished, the High Court of Admiralty and the Commissary Court of Edinburgh had a universal jurisdiction over all Scotland, and might review the sentences of inferior admirals and commissaries—in so far they possessed a superior jurisdiction; but, on the other hand, their own judgments were subject to the review of the Court of Session or of Justiciary, and in so far they were inferior courts. See *Delegated Jurisdiction. Appeal*. Where a new civil jurisdiction is created by statute, with a power of judging in special matters, this jurisdiction is not exclusive of the judge formerly competent to that species of causes, unless the statute shall expressly give an exclusive right to the new court. It follows, also, that such new jurisdiction (unless the contrary be expressed) will be accounted subordinate, and subject to the review of the Supreme Civil Court. It is not sufficient to give a supreme and sole jurisdiction, that a new court is declared to have the right of determining *finally*; to confer such a power, the judgments of the court must be declared final, and not subject to review or appeal. *Ersk. B. i. tit. 2; Stair, B. ii. tit. 3, § 62; Bell's Princ. § 2223, et. seq.; Suint. Abridg. h. t.; Kames' Stat. Law Abridg. h. t.; Brown's Synop. h. t.; Kames' Equity, 480, 490; Ross's Lect. i. 279; Macqueen's Appellate Jurisdiction; Shand, Dow's Appeal Cases, ii. 519; Goldie, ib. 534; Campbell, v. 412. See Courts. Domicile. Citation. Edictal Citation. Exchequer. Commissaries. Admiralty. Dwelling-House. Jury Trial.*

**Jurisprudence**; is that science the object of which is to show in what manner the rights of individuals may best be protected. It points out the true nature of a right; it anticipates the dangers to which the enjoyment of rights is exposed, from crime, from injustice, or from uncertainty; and it directs the enactment of laws which may furnish incentives to virtue and discourage crime; which may protect the rightful owner from the force or fraud of aggressors; and which may establish rules for defining and rendering certain the rights of individuals, and prescribing the manner in which such rights are to be acquired, transmitted, and extinguished. See *Law. International Law. Rights.*

**Jury**; a certain number of men sworn to inquire into and try a matter of fact, and to declare the truth according to the evidence legally adduced. They are called jurors from

*juratores*, as being sworn to return their verdict faithfully; and in order that the evidence may be properly laid before them, and no illegal evidence admitted, the trial proceeds under judicial superintendence and direction, and in presence of the parties or their counsel. In criminal cases, the number of the jury is fifteen; and the *majority* of that number determine what the verdict shall be. In civil causes, the number of the jury is twelve; and the jury must be *unanimously agreed* in their verdict, according to the practice in England. But by Act 17 and 18 Vict., c. 59 (31st July 1854), it is provided, that if, upon the trial by jury of any civil cause in the Court of Session in Scotland, the jury are unable to agree upon a verdict, and if, after having been kept in deliberation for a period of six hours, nine of said jury shall agree, the verdict agreed to by such nine may be returned as the verdict of the jury, and shall be taken, and shall have the same force and effect as if found unanimously by the whole of the said jury. During the said period they may be furnished with necessary refreshment by leave of the judge. And by the Act 19 and 20 Vict., c. 56 (21st July 1856), which constitutes the Court of Session the Court of Exchequer in Scotland, this provision is (by § 6) made applicable to the verdicts of juries in Exchequer causes. An Act has just (Aug. 1859) been passed in Parliament shortening the period of deliberation provided by the above Statute, 17 and 18 Vict., c. 59, to *three hours*. The English and Scotch law relating to high treason having been assimilated at the Union of the kingdoms, the jury, in all cases of high treason, also consists of twelve; and their verdict must be unanimous. See *Treason. Exchequer*. See also *Evidence*. The Act 6 Geo. IV., c. 22, for regulating the qualifications and manner of enrolling jurors in Scotland, and choosing of jurors on criminal trials, made many important alterations on the former practice. 1st, As to the qualification. Every man between the ages of 21 and 60 years is qualified to serve, if he be infert in his own right, or in right of his wife, in heritage, in fee, or in liferent, to the yearly value of L.5 at least, in the county or city from whence the jury is to be taken; or if he have moveable property worth L.200 at least. But Peers, Judges of the Supreme Courts, sheriffs, stewards, magistrates of royal burghs, ministers of the Established Church, and all other ministers of religion who have taken the oaths, and whose place of meeting has been duly registered, parochial schoolmasters, practising advocates, practising writers to the signet, solicitors before the supreme and inferior courts who have taken out their annual certificates, all acting clerks or other officers

of any court of justice; all jailors or keepers of houses of correction; all professors in universities, physicians and surgeons duly qualified and practising as such; all officers of the army or navy on full pay; all officers of Customs or Excise; messengers-at-arms and other officers of the law—are exempted from being returned or from serving. 2d, The sheriffs or stewards of each county or stewardry were directed, before the 1st January 1826, to make up a roll of all the qualified persons within their territory, to be entered in a book called *The General Jury Book*, to be kept in the sheriff or steward-clerk's office of each county or stewardry, and to be open to public inspection on payment of a fee of one shilling. (See *General Jury Book*.) 3d, The sheriff or steward must select from the list in the general jury book the names of all persons qualified to be special jurors under the Jury Court Act, 55 Geo. III., c. 42 (i.e., paying cess upon L.100 of valued rent or upwards, or assessed taxes on a house rented at L.30 yearly or upwards), the names so selected to be entered in a *Special Jury Book*, to be kept in like manner in the sheriff-clerk's office, open to the public on the same terms; the persons whose names are inserted in the special jury book being liable to serve as special jurors in all cases, civil or criminal, where special juries are required; and the names of the persons qualified to be special jurors at the same time remaining in the list in the general jury book. The qualifications required by the Act 55 of Geo. III. having been found to be in many counties such as not to furnish an adequate number for the discharge of their duties, an act was passed extending the qualification; 7 Geo. IV., c. 8. Under this act, every person, residing within any county or stewardry in Scotland, who is infest in, and possessed of, lands and heritages in any part of Scotland, yielding the sum of L.100 sterling of real yearly rent or upwards, at the time, or who is possessed of personal property to the amount of L.1000 sterling or upwards, is qualified to serve as a special juror in Scotland, exclusive of, and in addition to, those qualified to serve as special jurors, in terms of 55 Geo. III. See *Special Jury Book*. 4th, The counties of Edinburgh and Lanark respectively are divided into separate districts, and have separate lists of the jurors for each district made up; and the sheriffs of Haddington and Linlithgow are directed to transmit from their counties certified copies of the lists, both general and special, to the sheriff of Edinburgh, from which lists, as well as from the Edinburgh lists, the names of jurors required for trials in Edinburgh are taken in certain proportions, stated in section 7 of the statute, viz., 24 for the city

of Edinburgh, 6 for the town of Leith, 6 for the remainder of the county of Edinburgh, 5 for Haddington, and 4 for Linlithgow; and in the same proportions where fewer than 45 jurors are required to be returned. And in all criminal trials, one-third of the whole 45 returned must be special jurors. 5th, Where the attendance of jurors at the circuits is required, the clerk of court must give notice to the sheriffs of the counties within the circuit of the number of jurors required; and the sheriff or steward must return the number required from the different counties in certain proportions, as directed in section 8 of the statute; taking the names from the special and general jury books. 6th, In criminal trials in inferior courts, the clerk of the inferior court will be in like manner furnished with names to the number required from the jury books of the county in which the court is held, one-third of the whole number returned being persons qualified as special jurors. 7th, In all returns made by sheriffs, the names must be returned in regular order, beginning at the top of the lists in the jury books; commencing every new return with the name immediately after that of the last juror in the preceding return; provision is then made for correcting the lists as occasion may require, and for going through the lists in regular rotation. 8th, Where the person to be tried is entitled to a jury of landed men, the sheriff, when required, must make a return of the names of landed men as they stand in the jury books, a majority of the jurors in such return being landed men. 9th, Any wilful or unwarrantable departure, on the part of the sheriff, from the provisions of the statute, will subject him in a penalty of L.50, to be recovered on summary complaint before the High Court of Justiciary, or the Circuit Court of Justiciary; half the penalty going to the Crown, the other half to the party suing for the same. But no irregularity in making up or transmitting the lists, or in the warrant of citation, or in summoning jurors, or in returning any execution of citation, will constitute a good objection to jurors whose names have been served on any person accused of a crime, reserving it to the court to judge of the effect of a felonious return. This provision is further strengthened by 9 Geo. IV., c. 29, § 7, which puts an end to all such objections by the general enactment, that it shall not be competent, in any criminal cause or prosecution whatsoever, for any prosecutor or person accused to state any objection to any juror, or to any witness, on the ground of such juror or witness appearing without citation, or without having been duly cited to attend. 10th, The Lord Justice-Clerk, or any one of the Commissioners

of Justiciary, may direct such number of persons, exceeding forty-five, as may be deemed necessary, to be summoned on any criminal trial in the High Court of Justiciary or in the Circuit Court; the warrant for summoning jurors requiring the signature of one of the said Judges only, and it being unnecessary to annex a copy of the signature of the Judge to the list of assize served on the accused. 11<sup>th</sup>, Peremptory challenges, without cause assigned, may be made of five jurors by each party in a criminal trial; the challenge to be made when the name of the juror challenged is drawn from the ballot-box. But of the five special jurors to be chosen, not more than two can be challenged peremptorily by each person accused, or by the prosecutor. Challenges, on cause shown, are unlimited; but where the ground of objection is that the juror has not the legal qualification, that can only be proved by the oath of the juror objected to; and no objection whatever to a juror can be competently made after he is sworn to serve. 12<sup>th</sup>, In all criminal trials, the number of jurors returned, unless the contrary be directed, is forty-five; and the fifteen jurymen to be taken from that number for the particular trial must be chosen in open court by ballot, in the manner pointed out in section 17 of the statute. And the jurors once so chosen may continue to serve on the trials of other persons accused, provided such persons and the prosecutor consent, and provided that the names of the jury so continuing to serve are contained in the list of assize served on the accused, and that such jurors are duly sworn to serve on each successive trial. 13<sup>th</sup>, The several courts mentioned in this act have power to excuse one or more jurors from serving, the grounds of excuse being stated in open court. 14<sup>th</sup>, All verdicts, whether unanimous or not, must be returned *viva voce* by the chancellor of the jury, unless the court direct a written verdict to be returned; the chancellor to mention whether the jury are unanimous or not, and that fact to be recorded with the verdict. This statute, section 21, also provides for the union of several counties in Scotland into districts, or larger counties, in cases of high treason, in order to obviate the inconveniences arising from the want of proper court-houses, and from the difficulty of getting a sufficient number of jurors for the grand and petty juries within the present limits of a county. In furtherance of this object, and *quoad hoc*, the counties of Edinburgh, Haddington, and Linlithgow are held as one county, under the description of the county of Edinburgh, the sheriff-depute of Edinburgh being held to be the sheriff of that enlarged county; the counties of Roxburgh, Berwick, Selkirk, and Peebles, as one

county, under the description of the county of Roxburgh; and so on through the other counties; it being lawful for the commission of Oyer and Terminer to sit in any town or place of the several counties, so held to be one county, whereof the county in which the treason has been committed is one. See *Treason*. It is sufficient for the legal citation of any juror or witness, in any cause or legal proceeding, civil or criminal, that such citation be given by any officer of the law duly authorised, without witnesses; and the oath of such officer, in support of the execution, is received as sufficient evidence of such citation when the same is questioned in a court of law; 1 *Will. IV.*, c. 37. To verify the fact of his having cited the jury, the officer has to exhibit under his hand a written execution, setting forth his having done so, which, by immemorial custom anterior to the statute of *Will. IV.*, is good without witnesses, under the hand of the officer alone.

It is always important, and often very difficult, to determine whether a particular offence should be prosecuted before an inferior court with or without the assistance of a jury. And the court, in cases where they think that a jury has been improperly omitted, are in use, not only to suspend the sentence *simpliciter*, but to find the prosecutor liable in expenses. The principle, as laid down by Hume, is, that an inferior judge may try without a jury on a libel concluding for fine and damages, or imprisonment only, or banishment forth of the burgh or county; *Hume*, ii. 147. This principle was confirmed by a former course of decisions. But of late the Supreme Court have adopted a different principle, and have held that the proper criterion is the nature of the crime charged, not the conclusion of the libel. What the nature of the crimes must be to require a jury has never been determined as a general rule, the court having usually confined their judgment to the special case brought before them. In each individual case, therefore, it is left to the prosecutor to judge whether the offence is one of that grave and serious nature which requires a jury, whatever the punishment may turn out to be. A late writer recommends that where the charge is of such a kind as to warrant, if proved, six months' imprisonment, and caution to the amount of £50, the case should not be tried without a jury; *Alison's Prac.* 53. In police offences, the sheriffs and inferior burgh courts may punish with fine and imprisonment without a jury. And inferior burghs have still the power, though of late never exercised, of inflicting, without a jury, corporal pains, such as scourging or the pillory. But sheriffs or justices of peace cannot exercise that power summarily,

at least in the more grave and serious transgressions. In many of the greater burghs the magistrates have a right of sheriffship, and, in virtue of it, instances have not been wanting of late years of trials by jury taking place before the magistrates of Edinburgh. All citations for criminal trial by jury must now be on fifteen days, whether in the supreme or inferior courts; and for summary trials without a jury, six days is the proper period. See *Criminal Prosecution. Justiciary, Court of. Sheriff. Burgh.*

The Statute 55 Geo. III. c. 42, introducing jury trial in civil causes in Scotland, provides that the common jurors shall be summoned by a precept signed by the clerk of the Jury Court; and that the number summoned shall not be less than thirty-six, nor more than fifty. From that number the jury is chosen by ballot, each party having four peremptory challenges. Persons so summoned as jurors, and failing, without a sufficient excuse, to attend, may be fined, not exceeding L.5, nor less than L.2 sterling. It is also provided by the same statute that either party may apply for a special jury, qualified in the manner above explained; and that the sheriff shall make up lists of persons qualified as special jurymen before the 1st of January yearly, and return the same to the clerk of the Jury Court before the 31st of January. The number of persons to be returned by the sheriff as special jurymen to try any issue must be thirty-six; and, on receiving this list, the clerk of the Jury Court must give notice to the agents and counsel for the parties to attend him; and, in his presence, each party alternately (beginning with the pursuer) strikes off one name from the list, until the number is reduced to twenty, which twenty are summoned to attend on the day of trial. In case either party fails to attend at the time fixed for reducing the list to twenty, the clerk of court shall strike off one for him, alternately with the other party who attends; and the jury for trying the issue is the twelve of the said twenty who shall appear first, on their names being called over in court. Where a full jury does not appear, the Court may direct the Sheriff to add to the list the names of any other persons then in court who shall be entered in some other list of jurors for that city or county; and the trial will proceed with those persons whose names were originally inserted in the list of jurors, together with the persons so added, in the same manner as if all those names had appeared in the original list—any person so added wilfully withdrawing being liable to a fine not exceeding L.5, nor less than L.2 sterling. Every juror who acts as a jurymen on the trial must be paid, by the party against

whom the issue is found, the sum of twenty shillings; and, in the case of a special verdict, this sum must be paid equally by both parties, the party ultimately successful being entitled to charge the sum so paid by him as part of the costs of the suit, in case costs are awarded to him against his adversary. By the Statute 59 Geo. III., c. 35, § 25, this provision is altered to a certain extent, and the amount of the sum paid to each juror for serving on a jury directed to be regulated by the presiding judge, no juror being entitled to more than twenty shillings for one trial, unless in cases of adjournment to a second day, when the sum may, in the discretion of the judge, be extended to forty shillings. The chancellor or foreman of the jury, in civil causes, is chosen by the majority of the jury after they are sworn, the juror first sworn having a double vote in cases of equality. The verdict, in which the jury in civil causes must be unanimously agreed, is declared verbally by the chancellor, and taken down by the clerk in writing before the jury is discharged; and if the jury are not so agreed within twelve hours after they are inclosed, they shall be discharged, unless they apply for further time; the issue, where the jury is discharged without returning a verdict, being either tried by another jury or disposed of by a proof on commission, as the Court may direct. But see provision already quoted from the Statute 17 and 18 Vict., c. 59 (31st July 1854), and the Act of 22 and 23 Vict., c. 7, Aug. 1859. Where a view of the subject in dispute is considered necessary, such view will be directed by the Court, and six jurors selected for that purpose, the viewers being summoned by the Sheriff to attend at the place in question some convenient time before the trial, and the matters in question being shown to them by two persons named by the Court. The expense of a view must, in the first instance, be equally borne by all the parties, and no evidence connected with the issue can be given at the time of taking the view. In all trials of any civil cause before any of the Judges of Justiciary on circuit, the jury are to be taken from the lists prepared for the trial of criminal offences; 1 Will. IV., c. 69, § 11. If any other judge is appointed to try the cause, the Court may, if necessary, cause a jury to be summoned therefor, in the manner provided by the Acts 55 Geo. III. c. 42, 59 Geo. III., c. 35, and 6 Geo. IV., c. 120. The qualifications of jurors in the Court of Exchequer, are, by the Statute 6 Anne, c. 26, settled upon principles nearly similar to those which have been above explained. There is no longer any distinction as to qualification between juries in Exchequer causes and other civil causes tried in the

Court of Session. See 19 and 20 of *Vict.*, c. 56, § 6 (21st July 1856). See *Exchequer*. Some interesting historical speculations concerning the nature and high antiquity of juries will be found in the Introduction to Mr Ivory's Form of Process in the Jury Court. See *Ivory*, ii. 259. See also *Ersk.* B. iv. tit. 4, §§ 84-92, 93-101; *Bell's Princ.* §§ 780, 2079; *Brown's Synop. h. t.*

**Jury Trial.** Jury trial in criminal cases "has, by custom from time immemorial, been the regular, constitutional, and ordinary way of trial for crimes in the Supreme (Criminal) Court of Scotland;" *Hume*, ii. 135; and in certain civil matters, e.g. services of heirs, cognition of idiots, ascertaining the extent of the widow's terce, dividing property amongst heirs-portioners, &c., inquests on juries have been immemorially known in our practice. It has also been asserted by legal antiquarians, that at one time jury trial was the prevailing form of trial in all civil causes in Scotland. See *Bell's Styles*, vi. 1, *et seq.*; also *Ivory's Form of Process*, ii. 259. But it was not until the year 1815 that jury trial was attempted to be introduced, at least into the modern form of process in civil causes. The statute by which this form of trial was introduced was 55 Geo. III., c. 42, by which an institution called the *Jury Court* was established. This Court was composed of a Lord Chief-Commissioner, who required to be legally qualified to hold the office of a Senator of the College of Justice, and of two other Judges or Commissioners, who were at the same time Judges of the Court of Session. The Court had, besides, a suitable establishment of clerks and other officers, who, after the union of the two courts, continued to discharge their duties in the Court of Session, both at Edinburgh and on the circuits. See *Clerks of Jury Causes*. The Jury Court was further regulated by the Statutes 59 Geo. III., c. 35, and 6 Geo. IV., c. 120; and the experiment having been thus made, it was considered to have been so far successful as to justify the incorporation of jury trial with the ordinary jurisdiction of the Court of Session. This was effected by the Statute 11 Geo. IV. and 1 Will. IV. c. 69, whereby the powers and duties of the Lord Chief-Commissioner, and of the other Commissioners, were, to a certain extent, reserved and continued for a period of three years. Under that statute all jury causes are directed to be prepared for trial by the Lords Ordinary respectively before whom such causes depend. And it is provided that the Lords President of the two Divisions shall respectively try by jury all issues arising out of causes depending in these Divisions respectively, when such trials take place in Edinburgh; but in the event of the indispo-

sition or necessary absence of either of the Lords President, such issues may be tried in Edinburgh by any other Judge or Judges of the Division of the Court before which the cause may depend. Either party may apply to the Division of the Court to which the cause belongs to have the issue or issues tried before such Division; and the Division may or may not, in its discretion, order the cause to be so tried. The Lord President of each Division of the Court may order any issue or issues to be tried before his Division of the Court. And trials by jury under said statute may proceed at all times, as well during session as in the vacation, as the Division of the Court before which the cause stands enrolled shall appoint; and all causes remaining untried, and entered as ready for trial at the termination of the winter or summer session, or at the commencement of the Christmas recess, shall be tried at sittings of the Court, to be held immediately after these periods respectively; excepting only such causes as, on the motion of any party, the Court may think fit to postpone. All proceedings for the correction of errors or injustice alleged to have been committed in the trial of a cause—all questions reserved for decision after trial—all questions relating to the application of the verdict, or the rights and interests arising therefrom—and all questions of expenses are appointed to proceed before the Division of the Court to which the cause belongs. Trials out of Edinburgh may take place before any one or more of the Judges of the Court of Justiciary when upon circuit; or, when it is thought necessary by either Division of the Court, they may direct any causes or issues to be tried by any other Judge or Judges of the Court of Session at any circuit town. Accordingly, the trials at circuit frequently take place before one of the Judges of the Court of Session, specially appointed for that purpose; 11 *Geo. IV.* and 1 *Will. IV.* c. 69, § 3, 11. Although the Jury Court, as a separate tribunal, was thus abolished, yet the provisions of the statutes introducing jury trial, in so far as not inconsistent with the incorporating act, were declared to remain in force; and all the rules and regulations which were in observance in the Jury Court at the time of its abolition, established and enforced by Act of Sederunt, it was enacted, should continue and be observed as applicable to jury trial in the Court of Session, § 16, until altered by acts of sederunt, which the Court were thereby empowered to pass. The Jury Court, as first established, was not a court of independent jurisdiction. On the contrary, every case which came before it must have originated in the Court of Session, or in the Admiralty or Commissary Court. As originally

established, indeed, this Court may be said to have been of the nature of a judicial commission, for the ascertainment, by means of a jury, of certain facts deemed pertinent to a cause, by the judges of the court by whom the issues were remitted to the Jury Court to be tried; and those acts having been so ascertained, the verdict of the jury was returned to the court from which the remit came, to be applied according to law. Afterwards, however, the original constitution of the Court was so far altered that it possessed a kind of privative jurisdiction in certain actions; and, although the acts which introduced this privative jurisdiction had reference to the Jury Court as a separate establishment, the incorporating act (§ 2) provides, that all causes and issues, which, if they had occurred before the passing of the act, must, by law, have been tried by jury in the Jury Court, shall be tried by jury in the Court of Session. The classes of actions so appropriated for trial by jury were all actions on account of injuries done to the person, real or verbal; assault or battery; libel or defamation; or on account of any injury to moveables or to lands, where the title is not in question; or on account of breach of promise of marriage; seduction or adultery; or any action founded on delinquency, or *quasi* delinquency of any kind, where the conclusion is for damages and expenses only; for, although all such actions must have been brought into the Court of Session or the Court of Admiralty in the first instance, yet the judge before whom the action came was required to remit it *de plano* to the Jury Court, to be there prepared for trial; and, where the verdict exhausted the conclusions of the action and contained no special findings which might require the judgment of the Court of Session on the law, then the Jury Court might ordain execution to follow in common form, and might also award the expenses incurred both in the Jury Court and in the Court of Session; 59 *Geo. III.*, c. 35, §§ 1, 2, 3, 19, 20. The Statute 6 *Geo. IV.*, c. 120, § 28, adds to the preceding enumeration, "all actions on the responsibility of shipmasters and owners, carriers by land or water, innkeepers or stablers, for the safe custody and care of goods and commodities, horses, money, clothes, jewels and other articles, and, in general, all actions grounded on the principle of the edict *Nauta caupones stabularii*; all actions brought for nuisance; all actions of reduction on the head of furiosity and idiocy, or on facility and lesion, or on force and fear; all actions on policies of insurance; all actions on charter-parties and bills of lading; all actions for freight; all actions on contracts for carriage of goods by land or water; and

actions for the wages of masters and mariners of ships or vessels."

Power was given to the Lord Ordinary, in all cases where matters of fact had to be proved, to order the whole process to be remitted to a jury for trial, without reporting to the Inner-House; or he might himself direct such issues as he thought fit, to be prepared and remitted for trial. In like manner, power was given to the Divisions of the Court respectively, to remit all cases, where matters of fact required to be ascertained, for trial by jury, or themselves to appoint particular issues to be tried; 59 *Geo. III.* c. 35, §§ 4, 5, 6, 7, 8. Power was also given to the Court of Session, in reviewing the sentences of inferior judges, except in consistorial causes, to send such issue or issues to be tried by a jury, as seemed necessary for ascertaining facts not proved to their satisfaction by the evidence already taken, or which might have been omitted in the cause; the verdict to be returned to the Court of Session, to assist that Court in the determination of the cause. All consistorial jurisdiction of inferior judges, except as to granting of confirmations, being abolished, the exception in regard to those actions is no longer applicable. And as to consistorial actions before the Court of Session, it is competent, by the Acts 11 *Geo. IV.* and 1 *Will. IV.*, c. 69, § 37, to either Division of the Court, or to a Lord Ordinary after advising with the Division of the Court to which he belongs, to direct that any such cause, or any issue or issues of fact connected therewith, be tried by jury. This provision is, by § 16 of the Act 13 and 14 *Vict.*, c. 36, made applicable to all consistorial actions, though not specially mentioned in said act. It is also competent to the Court of Session in reviewing the sentences of inferior judges to remit the whole cause for trial by jury, with such directions as to the proof already taken as to them may seem proper. And in all cases originating in the inferior courts, in which the claim is in amount above L-10, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior courts (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it is competent to either of the parties, who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session by bill of advocation, which is passed at once, without discussion, and without caution. And if no such bill of advocation be presented, and the parties proceed to proof under the interlocutor of the inferior court, they are held to have waived their right of appeal to the House of Lords against any judgment which may thereafter be pronounced by the Court of Session,

in so far as, by such judgment, the several facts established by the proof are found or declared; 6 *Geo. IV.*, c. 120, § 40. This section of the statute has been held to apply only to interlocutors allowing a proof *prout de jure*: *Hamilton*, 10th June 1837, 15 *S. & D.* 1105. See *Advocation. Macfarlane's Jury Prac.* 35. Trial by jury was thus made imperative in certain classes of cases, and left discretionary with the Court of Session and House of Lords, in all other cases coming before them, where matters of fact require to be ascertained. In the latter class of cases, the whole cause may be remitted for trial and disposal by a jury, or, in the discretion of the Court, an issue or issues, having reference to a particular part of the cause, or to special facts, may be sent for trial. Causes determined by the Court of Session, and appealed, are sometimes remitted by the House of Lords, with instructions to send issues to a jury for trial. It was decided by a majority of the whole Court, that, in the cases enumerated in the statutes as appropriated for jury trial, where the conclusion is for damages and expenses only, they had no power to take proof by commission, on remit, or *in presentia*, but must remit all such cases to be tried by jury. *Kerr*, 10th March 1837, 15 *S. & D.* 784.

Many of the above provisions have been materially altered by an act of Parliament passed in July 1850 (13 and 14 *Vict.*, c. 36), and which came into operation on 1st November 1850, entitled "An Act to facilitate Procedure in the Court of Session." By that act, which recites the several statutes 55 *Geo. III.*, c. 42, 59 *Geo. III.*, c. 35; 6 *Geo. IV.*, c. 120, 11 *Geo. IV.*, and 1 *Will. IV.*, c. 69, and 1 and 2 *Vict.*, c. 118, it is enacted, § 36, that in all causes appropriated for trial by jury, or in the course of preparation for trial by jury before the Court of Session, the procedure, both before and after the closing of the record, shall be in all respects the same, so far as applicable, as in other Court of Session causes for the time. Section 38 provides for the mode of adjustment of issues in any cause in which matter of fact is to be determined. Section 39 does away with the necessity for engrossing issues, and provides, as equivalent thereto, that the issues, when adjusted and settled by the Lord Ordinary or the Court, shall be approved of by interlocutor to that effect, and shall be signed and authenticated by the judge as relative thereto. By § 40 it is made competent, after issues are so approved of, to the Lord Ordinary in the cause, on the motion of either of the parties, to appoint a time and place for the trial of such issue or issues; such time being as soon after the date of such approval as, with reference to the proper trial of such issues, conve-

niently may be, and, except upon special cause shown, not later than three weeks from the date of such motion, and it is declared that such trial shall proceed at the time and place so appointed, unless at the time of such appointment one or other of the parties shall intimate to the Lord Ordinary that he objects thereto, in which case the Lord Ordinary shall report the matter to the Court, by whom it shall be fixed when and where the trial shall proceed. Unless a different arrangement is made by the Court, on motion to that effect, the Lord Ordinary before whom the cause depends is to preside at the trial of such issues, where such trial takes place during the sitting of the Court; § 41. All the powers in regard to summoning of juries for trial of issues in civil causes, previously exercised by the Court, or any Division of the Court, is conferred on the Lord Ordinary, and he is empowered, on the application of either of the parties, to appoint any issue or issues to be tried by a special jury; § 42. In every trial before the Court of Session, one counsel for the pursuer and one for the defender is to be heard after the whole evidence is closed; § 44. Bill of exceptions upon the ground of the undue admission is not to be allowed, if, in the opinion of the Court, the exclusion of such evidence could not have led to a different verdict; and it is not imperative on the Court to sustain a bill of exceptions on the ground of undue rejection of documentary evidence, when it shall appear from the documents themselves that they ought not to have affected the result at which the jury have arrived; § 45. With the consent of the parties, a Lord Ordinary, after an issue is adjusted, may try such issue before himself, without a jury; unless the Court, on the report of the Lord Ordinary, deem this course inexpedient and improper. On such trial the Lord Ordinary is to take notes of the evidence, and hear counsel thereon; the proceedings to be conducted as nearly as may be as in an ordinary jury trial. Within eight days after the proceedings at the trial are concluded, the Lord Ordinary shall pronounce an interlocutor specifying particularly what he finds in point of fact. Either party may, by written note, within eight days, bring this interlocutor under the review of the Lord Ordinary upon his own notes of the evidence; and he may, within eight days after hearing parties, either correct his interlocutor as regards such findings in fact, or order a new trial. If either of the said periods of eight days extend into vacation or recess, the period shall be held not to elapse until the fourth day after the next meeting of the Lords Ordinary, or the Court thereafter; § 46. The Lord Ordinary's findings,

in point of fact, are final, unless it shall appear that they proceed on some erroneous view of the law as to competency of evidence or otherwise; but either party may, on a reclaiming note to the Court, raise any question of law which may be relevantly raised on the evidence, as given in the Lord Ordinary's notes. No objection to any finding in point of law by the Lord Ordinary in the course of the trial shall be competent, unless such objection was stated and noted by the Lord Ordinary at the time; and the notes of the Lord Ordinary shall be referred to for no other purpose than to decide such questions of law. Appeals against any judgment by the Court upon such questions of law are put on the same footing as appeals against bills of exceptions; § 47. It is also competent to a Lord Ordinary, where there are any questions of fact which it is desirable should be investigated without jury trial or proof on commission, to pronounce an interlocutor specifying such questions, to which the parties are to address their proof, and appointing such questions to be tried before himself, without a jury; and the proof shall be limited to such questions, and shall proceed at such time and place as may be appointed, unless, on review, it appear to the Court that such a mode of investigation is not expedient, or the interlocutor be otherwise altered by the Court; and the Lord Ordinary shall on each such question find separately, and his findings thereon shall be final, subject always to the like review, correction, and objection as would be competent thereagainst, under the statute, if such questions had been tried by the Lord Ordinary on issues; § 48. In any cause not falling within those specially enumerated in 6 Geo. IV., c. 128, above quoted, it is competent to a Lord Ordinary, with consent of both parties, or upon the motion of one of the parties, with the leave of the Inner-House, on the Lord Ordinary's report, or to the Court when the cause comes into the Inner-House, to appoint the evidence in such case, or any portion of the evidence, to be taken on commission. And the Court may allow proof on commission in any of the enumerated cases, except an action for libel, or for nuisance, or in one which is properly and in substance an action of damages.

An interlocutor of the Court approving of the issues, in regard to which there is a difference of opinion among the Judges of the Division, may be appealed from to the House of Lords. *Johnston v. Johnston*, 10th Aug. 1859. 3 *Macqueen, House of Lords*.

The procedure in regard to jury trial is also regulated by A. S. of 16th February 1841, 10th July 1844, 24th February 1846, 18th July 1850, and 22d June 1859.

Without noticing the provisions more properly belonging to "process," those in force relating to jury trial, under the statutes and acts of sederunt, seem to be the following:—

1. Notice of trial for the sittings or the circuit may be given by the pursuer as soon as the issues are finally adjusted and authenticated. If he fail for ten days thereafter to give such notice, or if, after giving notice, he countermands the same, and does not renew the notice of trial within ten days after the countermand, it is competent to the defender to give notice of trial, and also to countermand the notice in the same way as the pursuer. But if the defender countermands, the pursuer's right to take the lead revives for other ten days after such countermand; A. S. 24th Feb. 1846. In *M'Cowan v. Wright*, 17th July 1852, 24 *Jurist*, 652, it was laid down by the Lord Justice-Clerk (Hope), that this provision gave right to the defender to give notice of trial, on the failure of the pursuer so to do for ten days after issues were settled—*only in cases to be tried before the Lord Ordinary during session*; that the defender is only entitled to give notice if the pursuer allows the sittings to elapse, and then forfeits his lead; and that it was a misconstruction of the acts to hold otherwise. And a notice given by the defender in the above state of matters was discharged. The circumstances, however, would have justified that motion independently of the above construction of the Act of Sederunt, which may well be doubted. See also *M'Neil v. Caldwell*, 22d March 1853, 15 *D.* 582, where the pursuer also held not to have lost the lead. In *Gilmour v. Gilmour's Trs.*, 11th March 1852, 14 *D.* 675, in appointing, on the defender's motion, a cause to be tried before a particular judge and a special jury, the pursuer's right to countermand, if he should see proper, was reserved to him, he having given the notice of trial.

2. As to trials before a Lord Ordinary, it has been held, where a motion was made to a Lord Ordinary within a few days of the close of the session, to fix a day for trial before him; and where the three weeks, therefore, expired before the next session, that he might fix a day for the trial during the next session; A. B., 16th March, 1855, 17 *D.* 759. Giving notice of trial for the ensuing sittings will not prevent either party from making a motion to the Lord Ordinary to fix a day for the trial before himself, under § 40 of 13 and 14 Vict., c. 36; *Morrison*, 7th July 1853, 15 *D.* 816. When such motion is made, the Lord Ordinary must report it to the Court—*M'Laren*, 6th June 1854, 16 *D.* 898—who must fix when and where the trial shall pro-



ceed; and while it has been held that the absolute right formerly in the pursuer to fix the time and place of trial is taken away by the statute, when the defender avails himself of the power to make a motion to the Lord Ordinary under § 40, still some cause must be shown to the Court for disturbing a notice of trial given by the pursuer, and the fact of the pursuer having given a notice of trial for the sittings is material in a question of fixing the time and place; *Faulks*, 17th June 1854, 16 D. 964. But on the report of the Lord Ordinary, the trial was fixed by the Court to proceed before his Lordship, although the defender had previously given notice of trial for the sittings; *Carron Co.*, 7th Feb. 1857, 19 D. 384. It is no reason for withdrawing a trial from before the Lord Ordinary during session, that the expense of citing the jury makes the cost of trial greater than at the sittings; *Lauder*, 21st Nov. 1857, 20 D. 71; or that the trial is likely to occupy more than one day; *Musket*, 2d Feb. 1856, 15 D. 486. Where a new trial had been granted on a defender's motion as against evidence, the pursuer, on 4th July, the day immediately following the interlocutor granting the new trial, gave notice of trial for the sittings in July. The defender thereafter, on 17th July, moved the Lord Ordinary to fix the time and place of trial. The Court held the motion so made before the Lord Ordinary incompetent under the statute, as an indirect attempt to deprive the pursuer of his right to countermand; *Shields*, 17th July 1856, 18 D. 1301. But see *Boyd*, 19th Feb. 1856, 18 D. 618; *Halliday*, 27th June 1857, 19 D. 929; also *Welsh*, 6th Feb. 1858, 20 D. 513; and *Moffat*, 7th Jan. 1859, 21 D. 212, where, in a question affecting the defender's character, issues having been adjusted, and the pursuers having, on 23d Dec. 1858, given notice of trial for the circuit—on the defender's motion to the Lord Ordinary to fix the time and place of trial before himself, in terms of the statute—the Court fixed the trial to take place before his Lordship.

3. To entitle a party to go to trial he must give fifteen days' notice previous to the trial, if the cause is to be tried in Edinburgh; and if the trial is to be on the circuit, he must give notice on or before the second last day of the session immediately preceding the circuit at which the cause is to be tried; *A. S. 16th Feb. 1841*, § 12. When a notice of trial has been given by either party for the sittings after the winter session, or after the summer session, or during the Christmas recess, it is not competent for him to countermand such notice after the expiry of the time within which notices of trial require to be

given for such sittings; but either party, after the expiry of said time, may apply to the Court to postpone the trial for any cause which could not have been foreseen previous to the expiry of such time; and such application may be made after the termination of the session to the Judge who is to preside at the trial, or, in his absence, to the Lord Ordinary on the Bills, it being shown to the satisfaction of such Judge or Lord Ordinary that the application could not have been made to the Court during session; *A. S.*, 22d June 1859.

4. An application for interdict against a threatened nuisance is not one of enumerated causes; *Arnot v. Brown*, 7th May, *House of Lords*, 1 M.Q., 229, 24 *Jurist*, 42. In a reduction on the head of facility and lesion, the Lord Ordinary, after advising with the Court, allowed proof by commission, the action, though one of the enumerated causes, not being "an action for libel or nuisance, or in substance an action of damages;" *Livingstone*, 7th Feb. 1852, 14 D. 456.

5. When a party gives notice of trial in Edinburgh or on the circuit, the other party, if he wishes to have the place of trial changed, must, within four days of the receipt of such notice, make a motion in the Division for that purpose.

6. Notice of motion for a special jury must be given also within four days after giving or receiving notice of trial, which notice of motion must be lodged and served 36 hours before it is moved in Court. The mode of striking the special jury is prescribed by *A. S. 16th Feb. 1841*, §§ 14 and 15. A special jury will not be granted merely in respect of the status of the parties; *Lizars v. Syme*, 25th June 1852, 14 D. 919.

7. All plans, maps, models, or other such productions proposed to be used at the trial of a cause, must be lodged eight days before the trial, if in Edinburgh, with the Clerk of Court, and if in circuit, either with said clerk or with the sheriff-clerk of the county town where the cause is to be tried, notice of the lodging being at sametime served on the opposite agent; but the Court may, if it be made out on oath to the satisfaction of the Court that such productions could not be lodged in time, permit them to be used at the trial. In like manner, all writings meant to be put on evidence at the trial must be lodged with the clerk eight days before the trial, and notice given at sametime to the opposite agent of the writings being lodged. No writings but those lodged as aforesaid can be used at the trial, except of consent. But the Court may permit such writings to be given in evidence at the trial on its being established to the satisfaction of the Court that they could

not be lodged eight days before the trial, nor before the period at which they are actually produced or exhibited to the opposite party, and that notice to the opposite party had been given of the particular writing or writings proposed to be produced; *A. S. 16th Feb. 1841, §§ 18 and 19.* This rule held to apply to writings in the possession of the party before the record was closed, and not then produced by him; and an exception to the ruling of the presiding judge who excluded such writings sustained. *Cameron v. Cameron's Trustees, 21st Dec. 1850, 13 D. 412.*

8. A trial will not be allowed to proceed in absence of a party, unless the presiding judge is satisfied that due notice of trial has been served upon the party, or upon the known agent, or the agent in the former proceedings of the cause.

9. In examining witnesses at a trial, the counsel who begins the examination of the witness shall continue it until he exhaust the examination. A counsel on the opposite side may then cross-examine until he exhaust the cross-examination; and then the counsel who first examined the witness may re-examine, confining his re-examination strictly to such new matter as arise in cross-examination, unless with permission of the Court. When a special verdict is to be found, it may, with consent of parties, be settled out of Court by the order of the presiding judge, or otherwise; but if parties do not consent to this mode of settling it, the different parts of the evidence shall be stated to the jury, that they may find the facts which are to constitute the special verdict.

10. Where the counsel for either party excepts to points of law laid down by the presiding judge in the course of a trial, or in his charge to the jury, the counsel tendering such exception shall deliver in a note thereof to the judge at the time the exception is taken; and the same shall be certified by the judge at the time, by subscribing his name to such note. And a note of all such exceptions shall be finally settled and certified before the jury is enclosed to consider their verdict. *A. S. 16th Feb. 1841, § 32.* See, as to the proper signing of such note at the trial, *Pollok, 4th July 1845, 7 D. 973; Hurlet Alum Company, 12th Feb. 1850, 12 D. 704; House of Lords, 26th June 1850, 7 Bell, 100.*

11. All the regulations as to notices of trial, abandonment of suit, not proceeding to trial, and as to not appearing and proceeding with evidence at the trial, and all other provisions regulating the conduct of parties as to trials, are the same in the case of a new trial as in the case of an original trial; *A. S. 16th Feb. 1841, § 41.*

12. In case either party do not appear at the

trial of a cause after due notice of trial has been given by the opposite party, the party appearing, if pursuer in the issue, shall be entitled to lead his evidence, and go to the jury for a verdict, and, if defender in the issue, he shall be entitled to a verdict in his favour, without leading evidence. If the party appearing decline to proceed in this manner, the judge presiding at the trial shall certify to the Division the fact of the other party not appearing, and the Division shall thereupon proceed as in cases in which parties are held as confessed, unless it shall be shown to the satisfaction of the Court that the failure of the party to appear at the trial was occasioned by some sufficient cause; *Do. § 46.*

13. The Act of Sederunt of 10th July 1844 regulates the mode of charging for witnesses summoned for either party to give evidence at a trial, and the sums to be allowed to them; and the Act of Sederunt of 18th July 1850 contains regulations as to the printing of documents to be used at the trial.

14. In regard to trials before the Lord Ordinary, under the 13 and 14 Vict., c. 36, without a jury, the "trial" is held to embrace the whole proceedings, including the rehearing before the Lord Ordinary, until his final deliverance is obtained; and so that to entitle a party to raise by reclaiming note objections in point of law to his interlocutor or verdict, he must ask from the Lord Ordinary findings in point of law; *Balfour, 9th July 1854, 16 D. 1028.* And that when a Lord Ordinary, after pronouncing an interlocutory verdict and appointing a rehearing, was removed to the Inner-House, there must be a new trial (also without a jury) before the Lord Ordinary who succeeded him in the Outer-House. *Allan, 20th June 1855, 17 D. 969.*

15. Questions to be tried before a Lord Ordinary without a jury, under § 48 of the Act 13 and 14 Vict., c. 36, ought to be such as to exhaust the debateable matter, and so framed as to admit of being answered by a simple negative or affirmative, and not so as to embrace a general inquiry; *Buchanan, 11th March 1857, 19 D. 716.* And it is not competent to a Lord Ordinary to pronounce after such trial findings as to facts not embraced in the questions. *Buchanan, ut supra.*

See, on the subject of this article, *Advocation. Damages. Remit. Issue. Interrogatories. Evidence. Relationship. Interest. Partial Counsel. Hearsay Evidence. Libel. Defamation. Veritas Convicii. Verdict. Exceptions, Bill of, &c.*

**Jus Accrescendi.** See *Accretion.*

**Jus Deliberandi.** The right of deliberat-

ing for a certain period after his predecessor's death, as to the propriety of taking up the defunct's succession, is one of the privileges of an apparent heir. Formerly, the period was one year; and hence, until the expiration of year and day after the ancestor's death, the heir could not be forced to enter as heir. By the Titles to Land Act (1858), § 27, the period is limited to six months. See *Annus Deliberandi. Heir. Beneficium Inventarii. Inventory. Entry of an Heir.*

**Jus in Re—Jus ad Rem.** These two expressions are derived from the Roman law, and serve to mark the distinction between the right in a subject enjoyed by the proprietor, and that enjoyed by a mere creditor for its delivery. The proprietor of a subject, he who has the *jus in re*, is entitled to claim the subject, or to defend it against all the world. The mere creditor, or he who has the *jus ad rem*, possesses no real right, and can claim the subject only from the debtor in the obligation. This distinction is well illustrated by the contract of sale. The completion of the contract of sale does not of itself transfer the property of the subject. The buyer is, before delivery, merely a personal creditor of the seller; and if the subject were to pass out of the seller's hands, the buyer would have no claim against the new possessor for the subject itself, but only an action of damages against the seller for not implementing his contract. The difference between *jus in re* and *jus ad rem* is also clearly marked in cases of bankruptcy. If one person has a right of property in a subject possessed by another when he becomes bankrupt, that subject cannot be seized by the bankrupt's creditors, but must be restored to its owner. If, however, all the right possessed be a *jus ad rem*, the other personal creditors of the bankrupt are not excluded. *Stair*, B. i. tit. 1, § 22; tit. 7, § 2; *Ersk.* B. iii. tit. 1, § 2; *Bell's Com.* i. 279; *Bell's Princ.* § 3, 87; *Bank.* i. 89; *Brown on Sale, Introduc.* p. 3, et seq. See *Sale. Property. Personal and Real. Obligation. Contract. Possession.*

**Jus Mariti**; is the uncontrolled power of administration of the goods in communion, vested by law in the husband. In virtue of this right, the husband acquires an unlimited right of management and disposal of the moveable estate of the wife, whether belonging to her at the time of the marriage or acquired during its subsistence. The husband is entitled to sue for, recover, and in his own name discharge, all sums due to his wife, and falling under the communion; and his creditors may also attach them for payment of the husband's debts; insomuch that, where the rents of the wife's heritable estate, or the interest of heritable bonds, in which

she is creditor, have been so attached as, falling under the *jus mariti*, she is not entitled to claim from the creditors an aliment out of the profits of her own property. Hence, the marriage may be said to be in effect a legal assignation by the wife of her whole moveable estate in favour of the husband; in virtue of which, even after the dissolution of the marriage, the husband or his heirs may recover subjects falling under the *jus mariti*, but not recovered during the subsistence of the marriage. This right includes all moveable subjects, the rents of the wife's heritage, the interest of heritable or of personal bonds. For, although personal bonds, bearing interest, are declared by statute to be moveable as to succession, yet the same statute expressly excepts from the *jus mariti* the principal sums in such bonds; 1661, c. 32. The *jus mariti* as to a particular subject (but not *per aversionem*) may be renounced by the husband in an antenuptial contract of marriage; or an estate may be given to the wife by a stranger, exclusive of the *jus mariti*. *Ersk.* B. i. tit. 6, § 13, et seq.; *Stair*, B. i. tit. 4, § 9, et seq.; *More's Notes*, p. xix. et seq.; *Bank.* vol. i. p. 128, et seq.; *Bell's Com.* i. 61, 632-8; *Bell's Princ.* § 1561; *Illust.* ib. See *Goods in Communion. Husband. Contract of Marriage.*

The legal assignation implied in marriage does not convey to the husband any moveable estate conveyed to the wife before marriage, by a deed excluding the *jus mariti* of any husband she might marry, it being immaterial whether the exclusion of the *jus mariti* has been made before or after marriage. Accordingly, in the case of *Young v. Loudon*, June 26, 1855, 17 D. 998, a wife was held entitled to protect, against the diligence of her husband's creditors, furniture conveyed to her before marriage by a deed excluding the *jus mariti* of any husband she might marry. Legitim may be sued for by a husband in his own name, and without his wife's consent. See the case of *Macdougall v. Wilson*, Feb. 20, 1858, 20 D. 658. Where, however, a wife has a right of election between her legitim and the provision in her father's settlement, the exercise of that right by the husband is subject to the control of the Court; and he or his creditors will not be entitled to enforce the wife's claim of legitim to her prejudice and that of her children. See the case of *Stevenson v. Hamilton*, Dec. 7, 1838, 1 D. 181; and the principle established in that case was affirmed by the subsequent case of *Lowson v. Young*, 16 D. 1098, in which it was held that a wife had the option of adopting the provision in her father's settlement in the place of her legitim, and that she could not be controlled in the exercise of that

option by her husband or his creditors. In the case of *Smith v. Frier*, Feb. 7, 1857, 19 D. 384, an heritable bond belonging to a wife had been conveyed by her in security to a third party, with the consent of her husband, shortly before his bankruptcy. A competition arose between the creditor assignee and the trustee in the sequestration for the interest which fell due subsequent to the assignation; and it was held that the interest claimed did not fall under the *jus mariti* of the husband, and the creditor assignee was preferred.

**Jus Relictæ**; is the share of the goods in communion to which a wife is entitled on the dissolution of her marriage by death. (See *Goods in Communion*.) Where the marriage is dissolved by the predecease of the husband, the moveables or goods in communion, after deduction of debts, suffer a division. When the husband has left children, either by his last or by any former marriage, the division is tripartite—one-third goes to the children as legitim—one-third is the dead's part, which is at the husband's disposal, and, failing his destination of it, it will go to the children as his executors—and the remaining third goes to the widow as *jus relictæ*. Where there are no children, the goods in communion are divided into two equal parts—one-half is dead's part of the husband, and the other *jus relictæ*. The wife has right to the *jus relictæ*, although she should also have a conventional provision from her husband, unless, in accepting such provision, she has bound herself to renounce her *jus relictæ*; *Bell's Com.* vol. i. p. 632. On the predecease of the wife, where there were no children, the division formerly was into two equal parts, one of which belonged to the husband, and the other to the next of kin of the wife, unless she had destined it otherwise. This, however, was altered by the Act 18 Vict., c. 23, 1855; and now a wife's representatives have no right to any share of the goods in communion, and no legacy or bequest by the wife will affect these goods. See *Goods in Communion*. Where there are children of the marriage, or of a former marriage of the husband's, not forisfiliated, the wife's share is only one-third; *Stair*, B. i. tit. 4, § 23. The husband cannot affect the *jus relictæ* by any testamentary, or revocable, or other *mortis causa* deed, although he may diminish its amount indirectly during the subsistence of the marriage by his manner of administering the goods in communion; *Ersk.* B. iii. tit. 9, § 16. Personal bonds bearing interest are declared, by 1661, c. 32, to be moveable and descendible to executors; but that statute makes an exception of the rights of husband and wife, and, consequently, such bonds do not fall under the *jus relictæ*.

As the *jus relictæ* is a share of the *free* goods in communion only, it follows that, if the husband is insolvent at the dissolution of the marriage, the wife cannot, in virtue of this right, compete with his creditors; nor does it create any *jus crediti* in the wife, entitling her to rank on the bankrupt estate. See *Divorce*. The *jus relictæ* being a legal right, vested in the wife, to a certain proportion of the goods in communion, is not to be regarded as a *succession*. Hence it vests in the wife without confirmation. *Stair*, B. i. tit. 4, § 23; *More's Notes*, pp. cv. cxxv.; *Ersk.* B. iii. tit. 9, § 15; *Bank.* vol. i. p. 135; *Bell's Com.* i. 142, 632; *Bell's Princ.* §§ 1591, 1946; *Illust.* § 1580; *Graham, Dow's Appeal Cases*, ii. 314. See *Confirmation. Executor. Ezeccutry. Dead's Part. Contract of Marriage*.

**Jus Crediti**; signifies the right vested in the creditor in a debt or obligation; and in legal phraseology the term is frequently used in contradistinction to a mere *spes*, or defeasible expectancy. This *jus crediti* is often of great importance; for although a person may not be entitled to be put in immediate possession of a subject, yet the obligation to deliver it to him at some future time creates in him a vested right, which forms part of his estate. Thus, when heritage has been conveyed by a trust-disposition, the completion of the title in the person of the trustee, although it vests the fee in him, yet leaves to the person for whose behoof it is intended a *jus crediti*, as a real burden on the trust-estate. The consequence of this right is, that the creditors of the trustee are not entitled to attach the trust-estate for the trustee's debts. And while the maxim of the law, that a fee cannot be *in pendente*, is satisfied, an effectual right is constituted for persons yet unborn, or otherwise incapable of holding the fee. Where heritable subjects are vested in trustees, with directions to convey specific portions of the heritage to the parties beneficially interested, the *jus crediti* thus created is heritable. If, on the other hand, the trustees are directed merely to pay over to the parties interested a sum or share of the general trust-fund, or of the proceeds of the trust-estate, the *jus crediti* is moveable. Under a marriage contract, provisions to the heirs of the marriage constitute in them a *jus crediti*, which vests in themselves, and transmits to their representatives, without service or confirmation, so that although, in some respects, they are heirs in questions with creditors, yet they are creditors in questions with heirs. As a consequence of this *jus crediti*, it has been held that the heir entitled to claim the benefit of the contract may discharge his claim under it, even before he could demand

the fulfilment of its terms. And where the father is bound not merely to provide the heir or children of the marriage in a sum, but to make payment of it to them at a term which may happen to exist before the father's death, they are, in virtue of their *jus crediti*, entitled to come into competition with the father's onerous creditors; and the preference will be determined according to the nature of their rights, and the priority of the diligence used upon them. *More's Notes on Stair*, cxviii.; *Ersk. B. iii. tit. 8, § 40*, and *Note by Ivory*; *Bell's Com. i. 34, 636*; *ii. 5*; *Bell's Princ. §§ 1482, 1968, 1980, 2017*; *Illust. § 1482*; *Sandford on Heritable Succession, i. 239, 243, 256*; *ii. 50*; *Majendie, Bligh's Reports, ii. 692*.

**Jus Devolutum.** In order that a church may not remain too long vacant, the patron must present to the presbytery a fit person to supply the cure within six months after a vacancy has occurred by the death of the last incumbent, or otherwise; and, if the patron fail to make such a presentation within the six months, the right of presentation devolves upon the presbytery. The right of presentation, thus accruing to the presbytery, is called the *jus devolutum*. It will be sufficient to bar the exercise of the right of the presbytery, if the patron's presentation to a new incumbent be executed within six months after the vacancy occurs, although, from accidents not imputable to the patron, the presentation should not reach the presbytery until after the expiration of the six months; *Lord Dundas, 15th May 1795, Mor. p. 9972*; *1567, c. 7*. See *1592, c. 115*; *1712, c. 12*; *Ersk. B. i. tit. 5, § 17*; *Hill's Church Prac. 58*; *More's Notes on Stair, cxliiii.*; *Connell on Parishes, 494*; *Brown's Synop. 1177, 1498*; *Cook's Prac. in Church Courts, 70*.

**Jus Præventionis**; the preferable right of jurisdiction acquired by a court, in any cause to which other courts are equally competent, by having exercised the first act of jurisdiction. *Ersk. B. i. tit. 2, § 9*. See *Jurisdiction*.

**Jus Quæsitum Tertio.** Where, in a contract between two parties, a stipulation is introduced in favour of a third, who is not a contracting party, the right thus created is said to be *jus quæsitum tertio*. Such a right, generally speaking, cannot be recalled by the contracting parties, and the third party, so far as he is concerned, may require exhibition and implement of the contract. In one case, where a promise, though gratuitous, had been made in favour of a third party, that party, although neither present nor accepting, was found to have right thereby. But provisions or destinations in contracts of marriage, in favour of other parties, are regarded,

not as *jura quæsita tertio*, but as destinations of succession, which may be altered by the spouses at pleasure. The maker of an entail, although he has delivered it to a third party, may demand it back for the purpose of cancelling it; and the substitutes cannot claim any *jus quæsitum* under it; but where the entail has been recorded, and an investiture expedite upon it, it cannot be altered or revoked, unless express power to that effect has been reserved in the deed. A right taken in favour of children by a father or other relation, and intimated to the children, cannot be recalled, either by the father himself or his creditors. When the purchaser of lands has been taken bound to pay the price, or a part of it, to the creditors of the seller, a right is thereby vested in the creditors, upon which they may use inhibition against the purchaser. And in such cases, the purchaser is not at liberty to prefer such creditors as he thinks proper, but, having received a list of the creditors, is bound to pay each creditor in this list proportionally. But the delivery of money by a person, with orders to apply it to a particular destination, vests no right in those for whom it is destined till it be paid to them, or until they are informed that it is held for their behoof. In the meantime, the money may be reclaimed by the person who delivered it, or it may be arrested by his creditors. Where a person takes a right in the name of a third party, which he never intimates or delivers to him, the insertion of the third party's name is regarded as a mere trust created in him for the benefit of the person who directed his name to be inserted. But some authors have thought this inconsistent with the general doctrine of *jus quæsitum tertio*. A trust-settlement partakes of the nature of *jus quæsitum tertio*, since the object in view is, not the beneficial interest of the trustee, but some purpose to be accomplished in which a third party is interested. A trust-disposition, for the behoof of creditors, and although followed by infestment, is not effectual to the creditors, and vests no interest in them, unless they accede to it where accession is a condition of the trust. *Stair, B. i. tit. 10, § 5*; *More's Notes, lxii. and cases there cited*; *Bell's Com. i. 31*; *Brown's Synop. h. t.*; *Kames' Equity, 321-7*; *M'Donald, Bligh's Reports, ii. 547*.

**Jus Representationis.** In heritable succession, this expression is usually applied to the rule of law, whereby the son or other issue of an elder son deceased, as coming in place of or representing their father, succeed to the grandfather's heritage, preferably to the grandfather's surviving younger sons, or other immediate children. This right of representation takes place in collateral succession to heritage, as well as in that of descendants in

the direct line, but formerly had no place in moveable succession; but this was altered by the Act 18 Vict., c. 23 (1855), to the effect of allowing the issue of a predeceasing next of kin to come in place of their parent in intestate succession. *Ersk. B. iii. tit. 8, § 11. See Succession. Executors.*

**Jus superveniens Auctori accrescit Successori.** The supervening right of the seller or grantor of a right accretes to the right of his donee or successor. This is the Roman law maxim, on which the Scotch law doctrine of accretion rests. *See Accretion.*

**Jus Tertii.** When a party in an action maintains a plea which he has neither title nor interest to maintain, he may be met by the reply, that it is *jus tertii* in him to maintain such a plea. It does not necessarily follow that the party so met would not be benefited by pleading another person's right; for there are frequently instances where, if he were allowed to do so, he would gain his own cause. All that is meant is, that although an objection may be pleaded against the title or claim of one party, it is the right of another than the opposite party to plead that objection, since, *quoad* him or his rights, the title or claim may be perfectly good. This will best be understood by examples. The cases in which the plea of *jus tertii* is most frequently urged are those where the rights of the pursuer and of the defender are both derived from the same author, and where the one cannot plead a defect in the other's title without admitting a defect in his own. In such a case, it is held to be the right of a third person to plead the objection against both. Thus, in a reduction of a sale, the defender objected that the title of the pursuer's author was defective. The pursuer's author being the common author of both parties, it was found to be *jus tertii* in the defender to object to that author's title; *Livingston, 14th July 1768, Mor. 7847; Fraser, 26th Feb. 1794, Mor. 7849.* It is usual, in granting leases, to insert a clause excluding assignees and sub-tenants. But when the tenant sublets the property, or, passing over his own heir, assigns the lease to a second son, or other person not his heir, it is *jus tertii* in his creditors or heirs to plead that the clause has not been complied with, since the limiting clause is held to have been introduced for the benefit of the landlord alone; *Hay, 8th Dec. 1801, F. C. Mor. 15,297.* In like manner, where a creditor had obtained decree of adjudication on his debt, and charter and infestment thereon, the debtor being alive and abroad, it was found to be *jus tertii* to the daughters of the debtor to offer payment of the debt, and that the creditor was not bound to accept of it, and disencumber the subject; *Gowans,*

*22d June 1810.* For a series of cases illustrative of this subject, see *Mor. Dict. h. t.; Brown's Synop. h. t.; Bell on Leases, i. 168, 200.*

**Justice, College of.** *See College of Justice.*

**Justice.** In a legal acceptance, justice may be said to be the impartial administration of the law, according to the principle of giving to every man that which is his due. As applied to the conduct of individuals, justice consists in the conformity of their actions to the law as established. Thus, a man is said to be just, who, whatever his motives may be, acts conformably to the principles of justice, by implementing his legal obligations and engagements. *Ersk. B. i. tit. 1, § 4; Stair, B. i. tit. 1, § 2; Bank. i. 2. See Equity.*

**Justices;** officers deputed by the Sovereign to administer justice, and do right by way of judgment. In England, justices are of various kinds. *Justices of Peace* (see *infra*); *Justices of Assize*, or such as were formerly sent by special commission into the different counties to take Assizes; *Justices of both Benches.* *See King's Bench. Common Pleas. Justices of the Forest*, who heard and determined all forest offences; *Justices of Gaol-delivery*, or such as are sent with commission to hear and determine all causes appertaining to those, who, for any offence are cast into gaol, &c. *Tomlins' Dict. h. t.*

**Justice of the Peace.** Justices of the peace are persons appointed by royal commission to keep the peace within a certain district. Their commission is in the following terms: "VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, To our most dear and faithful counsellors, (the princes of the blood,) the most reverend father in God, and our faithful counsellor, Archbishop of Canterbury, primate and metropolitan of all England, our well beloved and faithful counsellor, our Chancellor of that part of our United Kingdom of Great Britain and Ireland called Great Britain." *Then are named the Archbishop of York, the Archbishop of Armagh, certain of the members of the Privy Council, the Lord Justice-General, Justice-Clerk, and Commissioners of Justiciary for Scotland for the time being, the Lord President and Judges of the Court of Session for the time being, the Lord Advocate and Solicitor-General for Scotland. These are followed by the names of the Gentlemen of the county.*—"GREETING:—Know ye, that we have assigned you, jointly and severally, and every one of you, our justices, to keep our peace, in our county of \_\_\_\_\_, and to keep, and cause to be kept, all the ordinances and statutes for the good of our peace, and for the preserva-

tion of the same, and for the quiet rule and government of our people, made in all and singular their articles in our said county (as well within liberties as without), according to the force, form, and effect of the same; and to chastise and punish all persons that offend against the form of those ordinances or statutes, or any one of them, in the aforesaid county, as it ought to be done, according to the form of those ordinances and statutes; and to cause to come before you, or any one of you, all those who, to any one or more of our people concerning their bodies, or the firing of their houses, have used threats, to find sufficient security for the peace, or their good behaviour towards us and our people; and if they shall refuse to find such security, then them in our prisons, until they find such security, to cause to be safely kept. We have also assigned you, and every two or more of you, of whom any one of you, the aforesaid, (here the justices before named are again mentioned,) we will shall be one, our justices, to inquire the truth more fully, according to the law and custom of the land, of all and all manner of felonies or capital crimes, poisonings, enchantments, sorceries, arts, magic, trespasses, forestallings, regratings, ingrossings and extortions whatsoever, and of all and singular other crimes and offences, of which the justices of our peace may or ought lawfully to inquire, by whomsoever, and after what manner soever, in the said county, done or perpetrated, or which shall happen to be there done or attempted. And also of all those who, in the aforesaid county, in companies against our peace, in disturbance of our people, with armed force, have gone or rode, or hereafter shall presume to go or ride; and also of all those who have there lain in wait, or hereafter shall presume to lie in wait, to maim, or cut or kill our people; and also of all victuallers, and all and singular other persons who, in the abuse of weights or measures, or in selling victuals, against the form of the ordinances and statutes, or any one of them, therefor made, for the common benefit of our people, have offended, or attempted, or hereafter shall presume to offend or attempt; and also of all sheriffs, bailiffs, stewards, constables, keepers of gaols and other officers, who, in the execution of their offices about the premises, or any of them, have unduly behaved themselves, or hereafter shall presume to behave themselves unduly, or have been, or shall happen hereafter to be, careless, remiss, or negligent in our aforesaid county; and of all and singular articles and circumstances, and all other things whatsoever that concern the premises, or any of them, by whomsoever, and after what manner soever, in our aforesaid county, done, or perpetrated, or

which hereafter shall there happen to be done or attempted in what manner soever; and to inspect all indictments or libels whatsoever so before you, or any of you, taken or to be taken, or before others late our justices of the peace in the aforesaid county, made or taken, and not yet determined; and to make and continue processes thereupon against all and singular the persons so indicted or accused, or who before you hereafter shall happen to be indicted or accused, until they can be taken, surrender themselves, or be outlawed, or declared rebels; and to hear and determine all and singular the felonies, capital crimes, poisonings, enchantments, sorceries, arts, magic, trespasses, forestallings, regratings, ingrossings, extortions, unlawful assemblies, indictments aforesaid, and all and singular other the premises, according to the laws and statutes of the kingdom, as in the like cases it has been accustomed or ought to be done; and the same offenders, and every of them, for their offences, by fines, ransoms, amerciaments, forfeitures and other means, as according to the law and custom of the land, or form of the ordinances or statutes aforesaid, it has been accustomed, or ought to be done, to chastise and punish. Provided always, that if a case of difficulty, upon the determination of any of the premises before you, or any two or more of you, shall happen to arise, then let judgment in nowise be given thereon before you, or any two or more of you, unless in the presence of one of our justices, or of one of our justices appointed to hold courts of circuit, in the aforesaid county. And, therefore, we command you, and every one of you, that to keeping the peace, ordinances, statutes, and all and singular other the premises, you diligently apply yourselves; and that at certain days and places which you, or any such two or more of you (as is aforesaid) shall appoint for these purposes, into the premises you make inquiries, and all and singular the premises hear and determine, and perform and fulfil them in the aforesaid form, doing therein what to justice appertains, according to the law and custom of the land, saving to us the amerciaments, and other things to us therefrom belonging. And we command, by the tenor of these presents, our sheriff of the said county of \_\_\_\_\_, that at certain days and places which you, or any such two or more of you (as is aforesaid) shall make known to him, he cause to come before you, or such two or more of you, as aforesaid, so many, and such good and lawful men of his bailiwick, (as well within liberties as without,) by whom the truth of the matter in the premises shall be the better known and determined. We also command the keepers of the rolls of our peace in our county afore-

said to bring before you, at the days and places aforesaid, the writs, precepts, processes, and indictments aforesaid, that they may be inspected, and by a due course determined, as is aforesaid. In witness whereof, we have caused these our letters to be made patent. Witness ourself, at Westminster, the day of \_\_\_\_\_ in the \_\_\_\_\_ year of our reign.

(Signed by the Secretary of State for the time.)”

Annexed to the commission there is an oath of office, which is now invariably taken by justices of the peace in Scotland, before entering on their office, instead of the oath contained in the Scotch acts. The oath is in these terms: “Ye shall swear, that as justice of the peace in the county of \_\_\_\_\_, in all articles in the Queen’s commission to you directed, you shall do equal right to the poor and to the rich, after your cunning, wit, and power, and after the laws and customs of this realm and statutes thereof made: And ye shall not be of counsel with any person in any quarrel hanging before you: And that ye hold your sessions after the form of the statutes thereof made: And the issues, fines, and amerciaments which shall happen to be made, and all forfeitures which shall fall before you, you shall truly cause to be entered without any concealment or embezzling, and truly send them to the Queen’s Exchequer: Ye shall not let for gift or other cause, but well and truly ye shall do your office of justice of the peace in that behalf: And that you take nothing for your office of justice of the peace to be done, but of the Queen, and fees accustomed, and costs limited by statute: And ye shall not direct, nor cause to be directed, any warrant by you to be made to the parties, but you shall direct them to the bailiffs of the said county, or other the Queen’s officers or ministers, or other indifferent persons, to do execution thereof. So help you God.”

The office of justice of the peace was attempted to be introduced into the practice of Scotland by the Act 1587, c. 82; but the state of manners, as exhibited in that statute, was not such as to promise success to a regulation of this kind, and it required repeated legislative enactments to lay the foundation of this valuable system. Nor does this appear to have been fully done until the time of the Usurpation, after which, the Act 1661, c. 38, prescribed those rules which have ever since, in a great measure, regulated this important branch of public police. By the Articles of Union, the laws for regulating the trade, customs and excise, are declared to be the same in Scotland as in England; and, accordingly, justices of the peace in Scotland are vested with the same powers with those in England in matters touching the customs

and excise; and, by the Stat. 6 Anne, c. 6, § 2, the same powers were given to justices of the peace in Scotland which had formerly been enjoyed by justices of the peace in England in relation to, and for the preservation of, the peace; leaving the trials and judgments to be regulated by Scotch forms and customs. This act had the effect of doing away certain restrictions in regard to the persons subject to the jurisdiction of justices of the peace, and in regard to the time within which they were at liberty to act, and placed them on the same footing in those respects with the English justices of the peace. In Scotland, no particular qualification in rank or property is required to entitle a person to act as a justice of the peace. Whoever is named in the commission may accept and act. Neither is there any general disqualification preventing justices from acting, except that introduced by a recent statute, which declares, that no solicitor or procurator before any inferior court in Scotland, or the partner of such person, shall be entitled to act as a justice of peace while he or his partner shall continue to practise in a court of the above description; 6 Geo IV. c. 28, § 27. Even this restriction seems not to affect the nomination of such an individual, but merely to suspend his power of acting under the commission of the peace. No one named in a commission of the peace, is by law bound to accept the appointment. If he wish to abstain from being a justice, he may omit to qualify himself, by taking the usual oaths; and there is no reason for supposing, that a justice of the peace who wishes to be relieved of his office, may not resign as freely as any other public servant. Before acting, it is necessary to take the oath *de fidei administratione* in the above terms. The oaths of allegiance, of assurance, of abjuration, and of supremacy, must also be taken by the justices before they enter upon their office.

The general jurisdiction of justices of the peace relates only to the preservation of the peace. They are specially intrusted with the execution of several penal statutes concerning rural economy, such as the statutes relating to planting and inclosing, and the like; and various ministerial duties connected with the regulation of the highways are in like manner committed to them. They also judge in many important questions connected with the revenue of customs and excise, and other branches of the revenue, as to which the special statute imposing the duty gives justices of the peace certain powers; and, by special enactments in several statutes, certain ministerial or judicial powers are conferred on justices. Without enumerating those statutes, it may be stated as a general proposition, that no justice can safely act in virtue of



statutory powers without having before him the particular statute conferring those powers. The civil jurisdiction of justices of the peace has been greatly enlarged by the small debt acts. See *Small Debts*. But, independently of those acts, justices of the peace judge in questions as to the aliment of natural children, as being in some degree connected with the public peace; see *Bastard*; and also, by usage, resting partly on statute, they judge in questions concerning servants' wages. With these exceptions, however, they seem to have no civil jurisdiction except under special statutes. They have a statutory jurisdiction with regard to the expense of march fences and the straightening of marches, and also (although that is not so clear) with regard to the damage done by cattle who have trespassed, and have been poinded *brevi manu* on the grounds of another person. It is still more doubtful whether justices can competently judge in an action embracing a civil claim of damages for injury done by the offender, as well as a conclusion for fine or imprisonment *ad vindictam publicam*, e. g. in a libel at the instance of the public prosecutor and the private party for an assault. Under the small debt acts, a person who has been injured by assault or otherwise, may, no doubt, sue before the justices for reparation or damages from the person who has injured him, as a mere civil debt, provided he limits his claim of debt on that account to L.5. But there is an obvious and broad distinction between such a claim of debt under those statutes, and an action concluding for fine or imprisonment against the offender, on account of his offence against the public peace, and at the same time for civil reparation to the injured party. The jurisdiction of justices of the peace, in such mixed actions, may be warranted in some instances by custom, but it seems hardly reconcilable with sound legal principle. See *Damages*.

Although, generally speaking, justices cannot act in causes in which they are personally interested, they may act in all questions about the poor, vagrants, highways or other laws concerning parochial rates, though themselves liable in the burdens imposed for those objects; it has also been held that affidavits may be made before a justice though having an interest; *Kerr*, 12th June 1852, 17 D., H. L., p. 11. A justice of the peace may also commit a person who assaults or violently interrupts him in the execution of his office, until the offender find security to keep the peace, but he has no power to imprison in order to enforce his decisions in *ordinary civil cases*. Justices cannot act in the determination of any appeal to the quarter sessions, from anything relating to the parish or place

in which they are subject to those rates; 16 *Geo. II.* c. 18, §§ 1, 3. By special enactments, commissioners of excise and customs, and others connected with those branches of the revenue, cannot act as justices in revenue questions cognisable by justices of the peace; and similar exceptions apply to officers of the army, and to coal-masters in questions relating to soldiers and colliers. See *Colliers*. *Enlistment*. There are various other exclusions under special statutes, for which see *Barclay's Digest*, p. 557. Unless authorized by special statute, justices cannot exercise any judicial or coercive power as justices beyond the county to which they belong; but they may perform ministerial acts, such as receiving the statements of a person who has been robbed or assaulted; and they may also exercise voluntary jurisdiction beyond their territory, such as taking affidavits in general, taking the judicial ratifications of married women, and the like. Justices are liable to criminal prosecution before the Court of Justiciary; and in like manner to civil actions of damages before the civil court, on account of oppression or injustice, or other illegal proceedings in their official capacity. But in such cases they are leniently dealt with, and large allowances are made for errors and defects in judgment and capacity, where it appears that they were acting *bona fide* for the public good. And, by a special statute, it is provided that, in actions against any justice of the peace in Great Britain or Ireland (which statute is held to extend to Scotland), for any summary conviction under any act of Parliament, or for anything done by him towards carrying such conviction into effect, if the conviction shall be quashed, the plaintiff (besides any penalty levied) shall recover only twopence without costs, unless malice and want of probable cause be expressly alleged; and that the penalty, damages or costs, shall not be recovered if the plaintiff be proved guilty of the offence, and the punishment undergone did not exceed that assigned by law; 43 *Geo. III.* c. 131, § 1, *et seq.* This act has been extended by 9 *Geo. IV.*, c. 29, § 26, and 1 *Will. IV.*, c. 37. Justices of the peace, however, ought to act with exceeding caution in everything relating to the personal liberty of the subject; for, in such cases, the plea of good intention will be no justification of an illegal act. This is particularly the case under the Liberation Statute, 1701, c. 6, whereby justices and other judges are subjected to penalties for error, whatever their intentions may have been. See *Basil. Commitment for Trial*. *Arrestment of Persons*. *Backing a Warrant*. *Wrongs Imprisonment*.

A justice of the peace receives no pecuniary recompense; but he will be reimbursed

by the sheriff of the county for any pecuniary advances properly made for the public, in the execution of his office; such disbursements being either presented in Exchequer, or repaid from the rogue money of the county. A commission of the peace may be recalled at any time by the Sovereign, and it falls by the demise of the Crown; though, by 1 Anne, st. 1, c. 8, § 2, it is continued for six months longer, unless it shall be recalled by the successor. The clerk of the justices, or of the quarter sessions, is named by the Secretary of State, but failing his attendance, the justices may appoint a clerk *pro re nata* for any particular court. It is by the clerk that the books in which their proceedings are recorded are kept. See *Clerk of the Peace*. The fiscal is an officer who gives his instance or concurrence to the steps necessary to be taken for the apprehension and prosecution of delinquents; and this officer is also appointed collector of the fines and penalties which the justices of the peace have the power to impose. The procurators of the sheriff-court practise before the justices (except under the small debt acts), and the warrants of the justices are executed by constables, who are officers appointed by the justices of peace. See *Constables*. There is not in the Scotch commission a *custos rotulorum*, as in England; and the *quorum*, or a certain number of justices with superior powers, on account of their superior knowledge, formerly named by the English commissions, has never been introduced into the Scotch ones. See *Custos Rotulorum*. See, on the subject of this article, 12 and 13 *Vict.*, c. 34; 19 and 20 *Vict.*, c. 48; *Hutch. Justice of the Peace*, vol. i. p. 1, *et seq.*; *Tait's Summary*, p. 180, *et seq.*; *Barclay's Digest*; *Burton's Manual*, p. 24; *Ersk. B. i. tit. 4, § 13*; *et seq.* See also *Tomlins' Dict. h. t.*; *Bank. vol. ii. p. 568, et seq.*; *Bell's Princ.* § 2206; *Blair's Compendium, h. t.*; *Dunlop's Parish Law*, p. 267.

**Justice Ayres**; means the circuits through the kingdom made for the distribution of justice. See *Justiciary Court*. *Ersk. B. i. tit. 3, § 25.*

**Justice-Clerk**. See *Lord Justice-Clerk*.

**Justice-General**. The Lord Justice-General, as the President or head of the Court of Justiciary, was formerly an officer of high rank and consideration. For a long course of years, however, the office had been a sinecure, usually held by one of the Scotch nobility, while the duties of President of the Court of Justiciary were almost invariably discharged by the Lord Justice-Clerk. Hence, it was deemed expedient in effect to abolish the office; and, accordingly, by 1 Will. IV. c. 69, §§ 18 and 19, it was enacted, that, on the termination of the then existing interest,

the office should devolve upon, and remain united with, that of Lord President of the Court of Session, who should perform the duties of presiding Judge in the Court of Justiciary, without salary. In this capacity the Lord President may also be present at any circuit court, and may dispatch the business there, whether any other judge or judges of the Court of Justiciary be present or not. See *Justiciary Court. Circuit*.

**Justiciary Court**. The High Court of Justiciary is composed of five of the Lords of Session, added to the Lords Justice-General and Justice-Clerk, of whom the Lord Justice-General, and, in his absence, the Lord Justice-Clerk, is President. The constitution of this Court was settled by the Act 1672, c. 16. At first, the judges were named for life, and thereafter they seem to have been removable at the pleasure of the Crown; but, at the Revolution, it was made an article of the claim of right, "that the changing the nature of the judges' gifts, *ad vitam aut culpam*, into commissions *durante bene placito*, is contrary to law;" and, by the commission in 1690, no such power is reserved by the Crown. The quorum of this Court consists of three judges; 1681, c. 22; 23 *Geo. III. c. 45*; *Ersk. B. i. tit. 3, § 24, et seq.*; *Ivory's edit. note 58*; *Hume*, vol. ii. p. 1, *et seq.* The Court of Justiciary had anciently justice ayres or circuits for distributing justice in the different parts of the kingdom. These, however, notwithstanding the regulations which were made for them, had fallen into disuse; and, in 1748, by the Stat. 20 *Geo. II. c. 43*, it was directed that circuit courts should be held regularly twice a-year, on which footing they have ever since continued. By the Stat. 30 *Geo. III. c. 17*, the spring circuit must be held between March 12 and May 12. By the 23 *Geo. III. c. 45*, the Lords of Justiciary are directed to continue in each circuit town at least three days; by 11 and 12 *Vict.*, c. 79, § 8, the Judges on circuit in Glasgow are authorized to sit separately in different Courts—one Judge may proceed to business in the absence of his colleague; and when necessary the circuit Court may certify a case commenced before it to the whole Court of Justiciary for consideration. There are three circuits:—the South, consisting of the burghs of Jedburgh, Dumfries, and Ayr; the West, consisting of Glasgow, Inverary, and Stirling; and the North, consisting of Perth, Aberdeen, and Inverness. And under the Stat. 9 *Geo. IV. c. 29*, a winter circuit court, for criminal business merely, is held at Glasgow during the Christmas recess of the Court of Session. See *Circuit Court*.

The jurisdiction of the Court of Justiciary, which is the supreme criminal tribunal of

Scotland, extends to all crimes, and includes the whole of Scotland; and it is superior to that of all criminal judges, whose sentences it is entitled to advocate or suspend. A libel may be brought before the Justiciary Court, concluding, not only for the pains of law, but for damages to the suffering party, if it arises out of an act of criminal delinquency; but the patrimonial conclusions alone cannot be brought, though the loss had arisen from a criminal act. The circuit court, however, has a civil jurisdiction by way of appeal, as to which, see *Circuit Court Appeal*. All persons, whether native or foreigners, are amenable to the Court of Justiciary, if the offence committed be one against the public laws of the realm; and this rule comprehends even Peers, in regard to assaults and inferior crimes; although, for treason or any other felony, they can only be tried by a court of their own order, assembled by the Lord High Steward of Great Britain. See *Peer. Member of Parliament*. This court cannot try crimes of a military nature, such as crimes against the Mutiny Act, nor offences of soldiers against the regulations or discipline of the royal navy, nor of ecclesiastics against the rules and discipline of their body. But in offences, not included in the above restriction, committed in the Scotch or high seas, on board a British vessel, belonging to a Scotch port, they have a privative jurisdiction; and in inferior maritime crimes, a jurisdiction cumulative with that of the sheriffs; for, although a statutory court may have been appointed for the trial of special offences, the Court of Justiciary, in virtue of their original and inherent jurisdiction over all offences, have a cumulative jurisdiction in such cases, unless the jurisdiction of the Court is expressly taken away. And on the same principle, where new offences are created by statute, it requires the clearest expressions to limit the cognisance of such offences to any other court, and exclude the jurisdiction of the Justiciary Court. This Court has a privative jurisdiction in the four pleas of the Crown (see *Pleas of the Crown*); as also in falsehood and forgery, when remitted from the Court of Session; in all statutory offences where transportation may be awarded; 9 *Geo. IV.*, c. 69, § 11; in all capital crimes newly created; and in offences directed against the State, or the administration of justice, or the execution of their duty by its own officers.

There are also certain statutes creating offences, and limiting their cognisance to this Court; but these are almost all in desuetude. The Court of Justiciary has the exclusive power of providing a remedy for all extraordinary or unforeseen occurrences in the course of criminal business, whether before themselves or any inferior court. They have also the power of reviewing the sentences of all inferior criminal courts in Scotland; the method of review being either by advocacy, suspension, or appeal. No appeal lies from the decisions of the High Court of Justiciary, whether interlocutory or final, to the House of Lords, or to any other court. See *Hume*, ii. 1, *et seq.*; *Ersk.* B. i. tit. 3, § 24, *et seq.*; *Bell's Notes*, *Alison's Pract.* 1, *et seq.*; *Bank.* ii. 522. See *Criminal Prosecution. Appeal. Circuit Court. Jury Courts. Judges. Bill of Suspension. Bill of Advocacy.*

**Justifiable Homicide**; is homicide which the killer is bound or entitled to commit, on grounds of public or private duty. Public duty will excuse—lawful sentence of death; slaughter, necessary in the suppression of a riot; slaughter of a criminal by an officer, rendered indispensable by his violent resistance; homicide, on resistance of a civil warrant, when the resistance is such that the officer's life would be in danger if he were to persist in executing his duty; homicide by a sailor or soldier on duty, if violently invaded; homicide by a revenue officer on seizing run goods, when the resistance would put his life in danger were he to persist in making the seizure. Private duty will excuse—homicide in defence against an attempt to commit a felony; (for an enumeration of cases, see *Hume*, i. 217; *Steele*, 72); homicide in defence of life on a sudden quarrel, the motive being nothing less than that of saving life. The accused party, in order to justify the act, must show that he confined himself to the just measure of resistance, and that he entertained a reasonable apprehension of danger; and he must not have been in any degree the cause of the fatal strife. *Hume*, i. 195, *et seq.*; *Alison's Princ.* 105, 127; *Burnett*, 40, 57; *Syme*, 188, 219; *Steele*, 71; 9 *Geo. II.*, c. 35. See *Homicide. Moderamen inculpatae tutelæ.*

**Justification**; according to the English law definition, is a maintaining or showing good reason in court why one did the act or deed for which he is called to answer. *Tomlins' Dict. h. t.*

## K

**Kain**; derived from *canum*, a word used in ancient grants to signify the fowls or animals deliverable by the vassal to the superior, as part of the *reddendo*. In modern practice, the term is applied to the poultry, eggs, &c., deliverable by a tenant to his landlord in terms of his lease. Where kain forms part of the rent, the Court, in estimating the value of property, sold according to a rental, allow such as is convertible into money at the option of the lessor, but disallow such as is not convertible. There is no such distinction, however, as between the lessee and a singular successor. *Ersk. B. ii. tit. 10, § 32; Hunter's Landlord and Tenant*, pp. 294, 380, 634; *Bell on Leases*, i. 226; ii. 40, 4th edit.; *Hutch. Justice of Peace*, vol. ii. p. 458; *Ross's Lect.* ii. 236, 405.

**Kelp**. The introduction of the use of this article in the manufacture of glass gave rise to several questions as to the right to make it. These questions are either as between the neighbouring proprietors and the Crown, or as between landlord and tenant. It has been found that the taking of kelp is not one of the uses for which the shore is held by the Crown in trust for the public, and consequently the right is not inalienable by the Crown, but is transferred to the grantee, where land is granted bounded by the sea or sea-shore. In the case of the *Earl of Morton v. Covington*, June 20, 1760, *M. 13,528*, the defender's lands lay in a continued stretch along the sea-shore of Orkney, and the pursuer's were behind them, a little farther from the sea, except a small part which touched the shore. On the introduction of kelp as a manufacture, the pursuer claimed right to the ware of the whole coast, as *inter regalia*, and under his charter of the earldom of Orkney. But it was held that he had no right to the ware on the shore of the defender's lands. The designation of a glebe is a bounding charter; and where shores are not mentioned, although the glebe may be contiguous to the shore, the minister has no right to kelp. The right to kelp-ware is not a pertinent of an agricultural or pastoral farm, but may be let independently of, or along with, the lands upon the shores of which the kelp grows, under the denomination of the kelp-shores. In the Highlands and Islands, it is the practice for the proprietor to retain the shores in his own possession, and employ the tenants and cottars in manufacturing the kelp. *More's Notes on Stair*, clxxii; *Bell's Princ.* § 647, 1226; *Illust. ib.*; *Connell on Tithes*, 433; *Bell on Leases*, i. 357;

*Hunter's Landlord and Tenant*, 233, 573. See *Sea. Sea-shore. Sea-green*.

**Kenning to a Terce**. The kenning of a widow to her terce is the judicial act of the sheriff of the shire within which the lands lie. The widow is first served to her terce by the verdict of a jury, proceeding on a brieve from Chancery. By this verdict it is ascertained that the claimant is the widow of the deceased, and that certain lands are the lands in which her husband died infest. The next step is for the sheriff to ascertain the just proportion of the husband's lands which belong to the widow in virtue of her terce, and this is what is termed kenning her to her terce. It is done by the sheriff setting off two acres for the heir, and one for the widow alternately, through the whole property, beginning on the east or west of the property by lot. But as the object of kenning the widow to her terce is to separate the interests of the heir and of the widow, in order that each may possess independently of the other, an object not likely to be attained by this mode of division, it often happens that, in place of it, the parties agree to divide the estate into farms, or larger portions of the property, which division is then judicially authorized by the sheriff, and made the rule of his division. After the division is made by the sheriff, a procurator appears for the widow, sasine is given by delivery of earth and stone, and instruments are taken in the hands of a notary-public, on which an instrument is made out. The widow being thus kened to her terce, her title to her legal liferent is held as complete, and she may remove tenants from her terce lands, and possess them by herself or by her tenants. She may recover the rent of the lands, and exercise the other rights and privileges of a liferentrix. In this respect a widow kened to her terce is in a different situation from a widow entitled to a jointure from the estate of her deceased husband. Where the jointure has not been recovered out of certain lands set apart to her, she may have recourse on the other lands of her husband. But a widow kened to her terce is the proprietor of the rents; and if they are lost, they are lost to herself, without any recourse on the separate estate of her deceased husband. *Ersk. B. ii. tit. 9, § 50; Bank. i. 661; Bell's Com. i. 60; Bell's Princ.* § 1603. See *Terce*.

**Key, delivery of**. In a sale of merchandise deposited in a cellar or ware-room, the delivery of the key of the place in which the goods are deposited is held to be equivalent

to actual delivery of the articles to the purchaser. Nor does it seem to alter the case where the seller possesses a master key, or where the particular warehouse of which the key is delivered is within an outer gate, the property of the seller. In the transference of goods in a bonded warehouse, certain entries in the custom-house books are directed to be made by special statute; 6 *Geo. IV.*, c. 112, § 9. But it has been found, that where there are no goods in the cellar except those transferred, the common law will rule the case, and the seller, by delivering the key to the buyer, will transfer the goods beyond recall. *Macwell*, 2d March, 1830, 8 *S. & D.* 618, 4th April, 1831; 5 *W & S.* 269. See also *Bell's Com.* i. 175, 181, 212; *Ersk. B. ii. tit. i.* § 19; *Bank. i.* 509; *Bell's Princ.* § 1302, 1308. See *Delivery*.

**Keys.** In executing a caption, a messenger may break open doors. This, in the writ, is called using the king's keys. *Stair, B. iv. tit. 48, § 40*; *Bank. iii. 7*. See *Caption. Dwelling-house. Open Doors*.

**Kidnapping.** The forcible abduction and conveying away of a person from his own country, and sending him to another, is an offence at common law, punishable in England with fine, imprisonment, and pillory. *Tomlins' Dict. h. t.* See *Abduction. Child-stealing*.

**Killing;** the act of depriving a being of life. Where a human being is killed, the act is, by the law of Scotland, justifiable, excusable, or culpable, according to the circumstances attending it. See *Homicide. Murder. Justifiable Homicide*.

**Kiln.** Although a kiln be let as part of, or along with, a mill, and although the suckeners resort to the kiln, it does not form part of the thirl, and the suckeners are not restricted to it. A proprietor has been found entitled to build a draw-kiln for burning lime, upon the very extremity of his grounds, although it made his neighbour's dwelling very unpleasant; *Dewar, 20th Jan. 1767, M. 12,803*; *Hales, 177*. But a brick-kiln, situated on the extremity of one's property, having done real damage to another by scorching the garden, was ordered to be removed so far as necessary to prevent such damage; *Ralston, 29th July 1768, M. 12,808*. *Bell's Princ.* § 967; *Hunter's Landlord and Tenant, 219*; *Hutch. Justice of Peace, ii. 95*. See *Nuisance*.

**Kindly Tenant;** or *Rentaller*. A rental right, (which is now almost unknown in practice,) was a lease granted by the landlord for a low and favourable tack-duty, to those who were either presumed to be lineal descendants of the ancient possessors of the land, or who were persons whom the landlord

wished to favour. Such lessees were donominated rentallers, or *kindly tenants*. Originally, the entering of the rentaller's name in the landlord's, or the King's steward's rental-book, was held to be a sufficient title to him in all questions with the proprietors or his heirs; but the right was not effectual against singular successors, unless the rentaller could show a rental right, followed by possession. Where the rental right specified a certain period of endurance, it received effect for the specified period. If no period of endurance was expressed, it was held to create a life-right in favour of the tenant; or where it was given to the tenant and his heirs, it created a right which descended to the first heir of the tenant; *Ersk. B. ii. tit. 6, § 37, et seq.* The rentallers of Lochmaben, who were formerly servants to the Scottish kings, have rights which may be transferred to strangers, and which give a perpetual right, effectual against the person in whom the barony of Lochmaben is vested. And although these rights have not been feudalised, yet they may be feudalised by the rentaller, of which there is an example in a case where an heritable bond by one of those rentallers was sustained as a good title, though the rentaller's own right had not been feudalised. *Irvine and Jop v. Collins, Feb. 4, 1795*; *Fac. Coll.*; *Bell's Cases*; *Mor. p. 10,316*; and *Mounsey v. Kennedy, 30th Nov. 1808, Fac. Coll.* See *Bell on Leases, i. 88*; *Ersk. B. ii. tit. 6, § 37*; *Bell's Princ.* § 1279; *Hunter's Landlord and Tenant, 89, 330*; *Ross's Lect. ii. 478*. See *Lochmaben*.

**Kin, Next of.** See *Executors. Confirmation. Inventory*.

**Kindred, or Consanguinity.** Consanguinity is either lineal or collateral. Lineal is either ascending, as to the father, grandfather, and so upwards; or descending, as to the son, grandson, &c. Collateral consanguinity includes those descending from the same stock, but not each from the other, as for example, brothers, and the children of different brothers. See *Consanguinity*. In reckoning the degrees of kindred, the rule of the canon law is followed, which differs from that of the Roman law. In both, however, the degrees of consanguinity in the ascending or descending lines correspond; and each generation is reckoned a degree, as father and son one degree, father and grandson two degrees, and the same in the ascending line of kindred. But in reckoning the collateral degrees of consanguinity, the rules established in the two laws are very different. In the canon law, the degree of consanguinity between two persons descended from the same stock is reckoned according to their distance from the common ancestor; or where one is

farther removed from the common ancestor than the other, the number of degrees is reckoned by the distance of the one furthest removed. Thus brothers and sisters are related in the first degree, because from their father, the common ancestor, there is only one remove; a nephew and uncle are related in the second degree, because there are two degrees between the nephew and the common ancestor; and cousins-german are related in the same degree, because there are two degrees between them and the grandfather, who is the common ancestor. But, in the Roman law, one degree is reckoned for each ascending generation, and one for each descending one, in the connection between collateral kindred. Thus uncle and nephew are counted three degrees, the uncle being one degree removed from the common stock, and the nephew two degrees removed from the same common ancestor, making together three degrees. In the same way cousins-german stand related to each other in the fourth degree, the grandfather, who is the common stock, being removed two degrees from each; and the degrees, both ascending and descending, being reckoned, they are held to be related in the fourth degree. *Ersk. B. i. tit. 6, § 8, et seq.; Bell's Princ. § 1587; Hutch. Justice of Peace, ii. 204. See Executors. Heir. Succession. Degrees of Kindred.*

**King;** the person in whom the supreme executive power of the State is vested. It is not the object of this work to do more than explain the rights and privileges of the Sovereign as recognised in the municipal law of Scotland. In this view, these rights may be considered in relation to property, or as they come in competition with the rights of subjects, or in regard to the Sovereign's paternal power, or his right of succession. The public right, which, as applicable to Scotland, is of chief importance, relates to the Sovereign's connection with the established Church of Scotland. Under the articles *Church Jurisdiction*—*Church of Scotland*—*General Assembly*—and *Commissioner*—the constitution of the Church of Scotland is shortly explained; and with a general reference to these articles, it may be observed, that as, by the constitution of the Church, no change can be made in its faith or doctrines but by acts of the General Assembly; and as the deliberations of that body are, to a certain extent, conducted under the superintendence of the Sovereign, no change of any political moment can ever be effected on the constitution or principles of the Church of Scotland without the intervention of the proper and constitutional guarantees against usurpation on either side.

1. *The King's rights in relation to property.*—

In regard to landed property the law considers the whole land rights as having emanated from the Sovereign; and, therefore, as to land rights, the rule is, that whatever has no proprietor belongs to the King—*Quod nullius est fit domini regis*. The possession of land confers no right without a title in writing. In order to constitute a right in land, there must either be a direct title in writing, or the possessor must hold it as part and pertinent of other lands which have been conveyed to him, with parts and pertinents, in the title-deeds. Possession, if not founded on one or other of those titles, confers no right to land; and hence, in absence of such a written title, the land may be claimed by the King or by his donatory. So also moveables which have once had an owner, who is now unknown, or treasures which have been hidden, and are discovered, belong to the King. The King's right in regard to land is constituted *jure coronæ*; no sasine is necessary, nor indeed competent, since a sasine implies a superior, by whom the possession may be given, while, upon feudal principles, the King has no superior. It follows that, when lands which held of the Crown fall to the King by forfeiture, they become virtually consolidated with the superiority; and, in the same manner, when the King succeeds as heir to one of his subjects, although a service as heir is necessary, yet no sasine follows; the right vests in the King without sasine. The property belonging to the Crown was anciently very extensive, and constituted the principal means by which the Sovereign supported the expenses of his Court. The Act 1455, c. 41, may be consulted as explanatory, not only of the extent of the royal domains at that time, but as descriptive of the consequences which flowed from the liberality or profusion of our monarchs. See *Annexation*. At present the Crown lands in Scotland, *i. e.* the lands belonging in property to the Crown, are of very insignificant extent; and the feu-duties due from the lands formerly granted in feu-farms under acts of Parliament; or the casualties of the Crown's superiorities; or the rights arising from forfeiture, or under the right of *ultimus hæres*; or of bastardy; are all that truly constitute the revenue of the Crown in Scotland. See *Crown Lands*. Lest the King, in the transference of the property thus vested in the Crown, might be involved in questions arising from the inattention of his officers, in royal grants, warrandice is not inferred, and the negative prescription does not run against the Crown; 1600, c. 14; *Ersk. B. iii. tit. 7, § 31*. A right of property also competent to the King is that of escheat. See *Escheat*. But independently of the property enjoyed by the King, there are certain rights which he

holds, termed *regalia*, the principal of which is jurisdiction; and there are other *regalia* which the Crown may or may not transfer to individuals. Thus, 1. A right of forestry may be conferred on an individual; but where lands are conveyed within which a forestry is locally situated, the property of it is not carried without a special clause in the grant. See *Forestry*. 2. Salmon-fishings fall under the *regalia*, and may be conferred on a subject. See *Salmon-fishing*. 3. Gold and silver mines belong to the King. See *Mines*. 4. Rivers, ports, and highways, are *inter regalia*. A ferry or free port must be the subject of a special grant from the King. See *Highways*. *Rivers*. *Ports and Harbours*. *Ferry*. 5. The sea and sea-shores are in like manner held to be *inter regalia*. See *Sea and Sea-shore*.

2. *The rights of the King in competition with the subject*.—By the Statute 33 Henry VIII., c. 39, § 74, it is provided, "That if any suit be commenced or taken, or any process be hereafter awarded for the King, for the recovery of any of the King's debts, that then the said suit and process shall be preferred before the suit of any person or persons; and that our Sovereign Lord, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debts, before any other person or persons, so always that the King's said suit be taken and commenced, or process awarded for the said debt, at the suit of our Sovereign Lord the King, his heirs or successors, before judgment was given for the said other person or persons." And this act was extended to Scotland by the Articles of Union. The Crown's right under this statute has been held to be preferable to the landlord's right of hypothec, and that even after sequestration of the effects by the landlord, and at any time prior to the completion of the landlord's right by a sale of the hypothecated effects and a final decree in his favour for the proceeds. See *Bell on Leases*, i. 404. See also *Crown Debt. Extent*.

3. *The King's paternal power*.—In virtue of this power, and as *pater patriæ*, where no tutors have been named by the father, or where those named refuse to accept, and the tutor-at-law does not undertake the office, the King may appoint a tutor-dative. This appointment may be obtained by presenting a signature of tutory in Exchequer, after calling the nearest of kin on the father and mother's side; and if such nearest of kin have no good objection to state to the appointment, a gift of tutory-dative will be made. The gift following on this signature passes the quarter-seal. See *Tutor*.

4. *The King's right as ultimus hæres*.—Where

lands are taken to a person and his heirs whomsoever, and he dies without having made a settlement and leaving no person who can legally claim the succession, the lands go to the King as *ultimus hæres*; and the same rule applies to the defunct's moveable estate. See *Last Heir*. As to the powers and prerogatives of the King as connected with the public and constitutional law of Great Britain, see *Blackstone*, vol. i. p. 190, *et seq.*; *Tomlins' Dict. h. t.*; and generally, on the subject of this article, see *Ersk. B. iii. tit. 7, § 31*; *Bank. vol. ii. p. 462, et seq.*; *Bell's Princ. § 638*; *Hutch. Justice of Peace, vol. i. pp. 254, 348, et seq.*

**King's Advocate.** See *Advocate, Lord*.

**King's (Queen's) Bench**; the Supreme Court of Common Law in England. It is so called because the King used formerly to sit in court in person. During the reign of a Queen, it is called Queen's Bench; and during Cromwell's Usurpation, it was called the Upper Bench. The Court consists of a Chief-Justice, and four *puisne* Judges. It was formerly ambulatory. The jurisdiction of the Court is very high. It has a superintending control over all inferior jurisdictions; superintends all civil corporations; commands magistrates to do their duty; protects the liberty of the subject by summary interposition; and takes cognisance of criminal as well as civil causes; the former, in what is called the Crown side or office; the latter, in the plea side of the Court. Its criminal jurisdiction extends from high treason to the most trivial misdemeanour or breach of the peace. Indictments from all inferior courts may also be removed into the Court of Queen's Bench by *certiorari*. The Judges of this Court are the supreme coroners of the kingdom; and the Court itself is the principal court of criminal jurisdiction in England. *Tomlins, h. t.* See *Bench*.

**King's Cellars.** See *Bonding*.

**King's Ease.** See *Teinds*.

**King's (Queen's) Evidence.** In England, it has been usual with justices of peace, by whom prisoners are committed, to admit some one of their accomplices to become a witness, or, as it is generally termed, *King's evidence*, against his fellows, upon an implied confidence that, if such accomplice makes a full and complete discovery of that and of all other crimes with regard to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not be punished for that offence. This discretionary power exercised by justices of peace is founded on practice only, and cannot, at all events, exempt the accomplice from being prosecuted. In England, the admission of an accomplice to be a witness against his associates amounts to a promise of a recommendation to mercy, upon

condition of his making, at the trial, a full and fair disclosure of all the circumstances of the crime. Upon failure on his part to fulfil this condition, he forfeits all claim to protection. In Scotland, such bargains have seldom been made without the permission of the public prosecutor, even by sheriffs, still seldomer by justices of peace. And it seems to be now established in Scotland that it is only the public prosecutor who is invested with the uncontrolled power of tying up the hands of justice, by calling one of the accomplices in a crime as a witness for the prosecution. Inferior magistrates or jailors have no power to promise pardon to certain prisoners in the event of their being taken as King's evidence; and if they do so without authority from the Crown counsel, they exceed the limits of their duty; and the prisoner from whom these confessions have been thus obtained may, nevertheless, be brought to trial. A declaration, however, emitted by the culprit, upon the faith of his being admitted to be King's evidence, cannot be used or libelled on against him, should the public prosecutor bring him to trial. By the mere act of calling an accomplice as a witness, the prosecutor discharges all title to molest him for the future concerning the crime in question. This privilege is absolute, and is not, as in England, merely a right to a recommendation to mercy, nor is it at all dependent on the witness making a full and fair disclosure. The only remedy, in case of a witness retracting his previous disclosures, or refusing to make any confession after he is put into the box, is committal of the witness for contempt or prevarication, or indicting him for perjury, if there are sufficient grounds for any of these proceedings. Even where the witness was originally called by the Crown, the protection is absolute against a prosecution, not only at the instance of the public prosecutor, but also of the private party who has suffered from the offence. *Bell's Notes to Hume*, p. 561; *Blackst. B. iv. c. 15, note by Christian*; *Alison's Prac.* 453; *Dickson's Law of Evidence*, 851. See *Accomplice. Socius Criminis*.

**King's (Queen's) Freemen.** This name is applied to certain persons who, on account of their own service, or that of their fathers or husbands, in the army, navy, &c., have a statutory right to exercise trades as freemen, without entering with the corporation of the particular trade which they exercise. The exclusive privileges of burgh incorporations were, however, abolished by the Act 9 Vict., c. 19, 1846. See *Burgh. Exclusive Privilege. Soldier*.

**King's (Queen's) Tradesmen.** The Queen's tradesmen, holding commissions under the Privy Seal, with a clause of exemption, are

not liable in assessment for the poor or other burghal prestations; but the privilege does not extend to persons holding appointments from the officers of the household. The right of the Sovereign to appoint tradesmen, and thereby to exempt them from taxation, is limited to one of each craft or occupation. 1592, c. 155; 1594, c. 225; 1597, c. 279; 1681; *Dunlop's Parochial Law*, 248; *Shaw's Digest*, 99.

**Kirk.** See *Church*.

**Kirk Road.** See *Church Road*.

**Kirk or Market.** See *Deathbed*.

**Kirk-Session.** A kirk-session is composed of the minister and elders of a parish. Before the Poor Law Act, 8 and 9 Vict., c. 93, the kirk-session, along with the heritors, had the right of administering the funds belonging to the poor of the parish. In the case of the *Earl of Galloway v. the Minister and other Members of the Kirk-Session of Dalry*, Feb. 22, 1810, it was observed by Lord Meadowbank, and assented to by Lord Robertson, that, by the law of Scotland, a parish was a corporation to certain effects, such as the management of funds belonging to the poor, or left for pious uses; that the minister, the elders, and the heritors did not form three separate corporations, but that the whole composed one body, in which each individual was entitled to his own vote. It seems doubtful, however, whether a kirk-session can sue or be sued as a corporation. In the case of the *Kirk-session of North Berwick v. Sime*, 2 D. 23, the summons bore to be at the instance of the kirk-session of a parish, and of the members thereof individually. The libel was amended at the suggestion of the Court, to the effect that the summons should be at the instance of the individual members of the session *nominatim*, for themselves, and as composing the kirk-session, the kirk-session not being a corporation. In addition to the dues, kirk-sessions are, in some parishes, accustomed to exact fines from persons convicted of breaches of church discipline. Such individuals may, if they please, pay the fines in commutation of church censures, or other spiritual infliction; but kirk-sessions have no power to impose fines for offences of this nature, and could not enforce payment of them. A kirk-session cannot exact the payment of new fees not sanctioned by usage; nor can they increase the amount of such as are exigible by custom. Dues exacted for proclamation of marriage banns do not fall under the operation of the Poor Law Act, and a kirk-session is not bound to account for them to the parochial board; *Kirk-session of Ceres, v. Inspector of Poor for parish of Crieff*, Feb. 9, 1854, 16 D. 511. See *Heritors. Ersk. B. i. tit. 5, § 5; tit. 7, § 63, Notes by Ivory*; *Dunlop's Parochial*



*Law*, 54, 71, 74, 121, 263; *Darling's Prac.* 19, 109. See *Church Judicatories. Poor.*

**Knaveſhip**; is one of the ſequels of thirlage. The multure is the quantity of grain paid to the proprietor, or his tackſman of the mill to which the lands are aſtricted. The knaveſhip is that quantity of the grain which, by the practice of the particular mill, is given to the mill ſervant by whom the work is performed. *Stair*, B. ii. tit. 7, § 21; *Ersk. B.* ii. tit. 9, § 19; *Bank. i.* 684; *Bell's Princ.* § 1018; *Rosſ's Lect.* ii. 170. See *Thirlage.*

**Knight**; a title of dignity next in order to nobility. Knightſhip is the higheſt rank of a commoner; but a knight is ſtill a commoner, and may ſit as a juryman on any commoner, as his peer. See *Tomlin's Dict. h. t.*; *Bank. i.* 53.

**Knights Bachelors**; *Bas Chevalier.* It is a personal diſtinction, not hereditary. *Tomlins, h. t.*

**Knights Bannerets**; were created on the field of battle by the King under the royal banner; now in deſuetude. *Bank. i.* 54.

**Knights Baronets**; the only hereditary knights in Scotland. They were firſt created for encouraging ſettlements in Nova Scotia; now without regard to any ſuch object. *Bank. i.* 54. See *Baronet.*

**Knight's Fee**; in England, was ſo much inheritance as is ſufficient yearly to maintain a knight with convenient revenue. *Tomlins' Dict. h. t.* See *Hide.*

**Knights of the Shire**; two knights returned to Parliament from every county in England. Anciently, they were required to be real knights girt with the ſword; but now notable eſquires may be choſen. They muſt poſſeſs, as a qualification to be elected, not leſs than £600 *per annum* of freehold eſtate. See *Tomlins' Dict. h. t.*; *Bank. i.* 54. See *Parliament.*

## L

**Labes Realis**, or *vitium reale*; an inherent vice or defect in a right; in the title by which it has been acquired; or in the voucher, or written obligation on which it is founded; the effect of which is, that the right or voucher is null into whose hands ſoever it may come. Thus, theft, ſpuilzie, forgery, fraudulent vitiation of a bill, or the like, import a *vitium reale*. It has been now clearly eſtabliſhed, that fraud is not an inherent vice, and that a *bona fide* purchaſer from a fraudulent acquirer of a right is entitled to maintain his right even againſt the defrauded party. It has been made a queſtion, whether or not *force and fear* conſtitute *labes realis*. See *Fraud. Force and Fear.* But a diſtinction is to be taken between rights acquired by fraud, fear, or the like, in which the diſponer has a title of property to the goods, however liable it may be to be ſet aſide; and another claſs of caſes, in which the diſponer never poſſeſſed any title to the property, as, for example, where the goods were ſtolen, or were poſſeſſed on ſome inferior title, as pledge, loan, or deposit. Here, the want of a title is a *vitium reale*, ſince no one can transfer to another a right which he himſelf does not poſſeſs; *Nemo plus juris ad alium transferre poteſt quam ipſe haberet.* The true owner is entitled to follow the right wherever it may be taken, and to plead the maxim, *Id quod nostrum eſt, ſine facto nostro ad alium transferri non poteſt.* In England, indeed, a contrary rule has been adopted where the ſtolen goods have been ſold in open market; but this is admitted to be an exception to the or-

dinary rule even of the English law, and has no place in the law of Scotland. See *Market overt.* Theft does not attach as a *vitium reale* to a bill of exchange, indorſation carrying the bill diſcharged of all latent exceptions. *Stair*, B. i. tit. 9, § 15; B. ii. tit. 1, § 38; B. iv. tit. 35, § 20; tit. 40, §§ 21 and 28; *More's Notes*, pp. xlviii. cli.; *Ersk. B.* iii. tit. iii. § 8; *Bank. i.* 230; *Bell's Com. i.* 281, note; *Bell's Princ.* § 1318; *Illuſt.* § 1320; *Brown on Sale*, 15, 418; *Thomson on Bills*, 280. See *Loſt. Vitiatio. Bill of Exchange. Fraud. Theft. Forgery.*

**Labores**; a term applied to the lands cultivated by the monks themſelves, and which were exempted from payment of tithes. This privilege ceaſed whenever the lands were given to be cultivated by others. It was afterwards confined to three religious orders, Cistercians, Hospitaliers, and Templars. *More's Notes on Stair*, cxxxix; *Connell on Tithes*, 333, *et seq.* See *Teinds. Decimæ incluſæ. Navalæ.*

**Labour, Statute.** See *Statute Labour.*

**Labourer.** See *Workman.*

**Laches**; ſlackneſs or negligence. In England, laches of entry means neglect in the heir to enter. A perſon is ſaid to be guilty of laches when he has unduly delayed any proceeding. Thus, in the caſe of a bill of exchange, he who delays notifying the diſhonour, is guilty of laches, and loſes his recourſe. *Tomlins' Dict. h. t.*; *Thomson on Bills*, 486. See *Mora.*

**Lading, Bill of.** See *Bill of Lading.*

**Lady-Day**; the 25th of March.

**Lady's Gown**; the present sometimes made by the purchaser to a wife, on the occasion of her renouncing a life-tenure over her husband's lands. The lady's gown is recognised as a *peculium separatum*, part of the *paraphernalia*, and not attachable by the husband's creditors. *Ersk. B. i. tit. 6, § 15; Bell's Princ. § 1560; Illust. ib. See Paraphernalia.*

**Lesio ultra Duplum.** In the Roman law there was said to be *lesio ultra duplum* when the price of a thing sold was more than double its value. In that case, fraud was presumed, and the buyer was held entitled to set aside the sale, and to demand repetition of the price. There is no such rule in the law of Scotland, no action being competent for setting aside sales on account of the disproportion, however great, of the price to the value of the commodity. See *Provost of Queen's College, 25th May 1542, Mor. 8021 and 7934. See L. 2, C. de rescind. vend.; Stair, B. i. tit. 9, § 10; tit. 10, § 14; Ersk. B. iii. tit. 3, § 10, note by Ivory; Bank. B. i. tit. 19, § 3; Kames' Equity, 167, 182, 363; See Sale. Quanti Minoris. Actio redhibitoria. Warrantice. Fault.*

**Laity**; as opposed to clergy, comprehends all persons not ecclesiastical. *Ersk. B. i. tit. 5, § 1.*

**Lakes.** In infeftments of land, woods and lochs are frequently specified; but if not specified, they are carried by the expression "parts and pertinents." The proprietor has right not only to the water of a loch entirely surrounded by his land, but also to the *solum*, for every purpose to which it may be turned. If the loch be not entirely within the property disposed, but partly within or adjacent to another property, the loch, unless it be otherwise provided in the deed, will be allocated among the proprietors whose lands front or surround it. Although, however, lochs surrounded by the lands of different proprietors are thus common property, they are not commonities within the meaning of the Act 1695, c. 38, nor can they be divided otherwise than by consent or by special act of Parliament. Lakes, which are the permanent sources to rivers, cannot be drained by the owner of the ground in which they are situated. But if the lake do not supply a stream, it is entirely within the power of the owner of the ground, provided there be no servitude over it in favour of water-gangs for mills or other works. Lakes, although navigable, are not, generally speaking, *inter regalia*, like navigable rivers. But it becomes a doubtful question when such lakes form great channels of communication in a district of country, whether their navigable character does not involve a trust vested in the Crown for the public benefit, which cannot be defeated by any grant, and which may be vindicated the mo-

ment the lake is laid open to public use. This point was involved in a case lately decided, but was not purely tried, being mixed up with certain specialities. The Commissioners for the Caledonian Canal led that canal through Loch Oich, which was surrounded on every part by the lands of Glengarry. The owner brought an action to have it declared, that as Loch Oich was surrounded on every part by his lands, it was his exclusive property, with the salmon therein, and the right of draining it; and that the occupation of it for public navigation in the course of the Caledonian Canal was a trespass, for which damages were due. It was found, 1. That the loch and its salmon were the exclusive property of the pursuer; but, 2d. That the claim for damage by navigation, to the injury of the privacy, amenity, &c., of the pursuer's residence and grounds, was incompetent under the canal acts; *M'Donnell of Glengarry v. Caledonian Canal Commissioners, June 5, 1830, 8 S. & D. 881. See Stair, B. ii. tit. 3, § 73: Bank. i. 593; Bell's Princ. § 643, 1110; Illust. ib.; Hutch. Justice of Peace, ii. 449. See Regalia. Rivers. Common Property. Sea.*

One of two joint-proprietors of a loch may communicate to a disponee of a portion of his lands adjoining the loch a right in the loch, and the joint-proprietor cannot interfere if the disponee and his author do not exercise a right of property in the loch beyond the extent of the disposer's right. See the case of *Menzies v. Macdonald*, March 10, 1854. 16 D. 827; affirmed, June 10, 1856. 2 *Macqueen*, 413.

**Lammas-Day**; the 1st of August. *Tomlins' Dict. h. t.*

**Landed Men.** In criminal trials, when the panel is a landed proprietor, he is entitled to have a jury the majority of whom are composed of landed men. The eldest son or apparent heir of a landed proprietor cannot claim this privilege, nor any one infeft in security or relief only, or on any inferior title to that of property. If the panel mean to avail himself of his privilege, he must allege and prove it by immediate production of his infeftment. 6 *Geo. IV. c. 22, § 12; Alison's Prac. 387.*

**Landlord**; in reference to the contract of lease, is the proprietor of the ground, or grantor of a lease. See *Lease.*

**Landlord's Hypothec.** See *Hypothec.*

**Land-Tax.** The land-tax of Scotland, or cess, is a permanent tax fixed at L.47,954 *per annum*, to be levied out of the land rent of Scotland for ever, subject, however, to a power of redemption. This burden on the land rent is payable partly from burghs and partly from shires; the inhabitants of burghs being assessed according to their rents and

income, by stentmasters; and the inhabitants of counties, according to the yearly revenue of their land and other heritage, by the commissioners of supply. But although this be a tax which attaches to the land into whose hands soever it may come, it is still no more than a personal claim against the present proprietor, not properly a *debitum fundi*. It is a tax, however, which accompanies the land, the owner of the land for the time being liable for the tax as it falls due. But the arrears do not affect singular successors. See the *statutes* 38 *Geo. III.* c. 60; 39 *Geo. III.* c. 6 and 21; and the *Consolidating Act*, 42 *Geo. III.* c. 116. See also *Bell's Com.* i. 700. The commissioners of supply, by whom the land-tax is assessed, are empowered to do everything for adjusting the valuations of the several lands within their respective counties; and the rent fixed by those valuations is called the *valued rent*, in contradistinction to the old and new extent. The commissioners may alter the valuation of lands which have been overrated; but they are not permitted to alter the total sum charged upon the shire. The valuation of the county, as well as of the particular estates thus remaining the same, the duty of the commissioners of supply now is to split the valuations of larger properties, where parts have been alienated. In general, the valuation is put upon the vassal in possession. The proceedings of the commissioners of supply are subject to the review of the Court of Session; *Wight on Elections*, p. 182, *et seq.* The cess bears interest after it has been six months due, though no hording or other diligence has been used against the debtor; 1686, c. 2. The collection and management of the land-tax was given to the commissioners of taxes by the statute 3 and 4 *Will. IV.* c. 13, § 4. The collector of the land-tax was formerly appointed by the commissioners of supply; but this appointment has been lately transferred to the treasury. See *Commissioners of Supply*. The following are the steps directed to be taken under the statutes for the redemption of the land-tax. Application must be made to two commissioners of supply to have the proportion of land-tax adjusted to the lands for which the exemption is to be purchased, and a certificate granted to that effect. The sale is then bargained for, and when it is completed, the owner of the land is exempt from payment of land-tax already imposed, but subject to any future imposition. The commissioners must continue, even after the exemption of any particular lands, to state in the certificate of assessment the land-tax charged on the parish, till all be redeemed; and they receive from the commissioners of taxes a certificate of the redeemed portion. The act gives

power to sell lands under entail, or to borrow money upon the security of the lauds, for the purpose of redeeming the land-tax of the entailed estate. Unfairness, such as a collusive lease affecting the price, is a ground for reducing the sale; but an error of judgment in the Court in executing the act, will not annul the sale. Land-tax, when paid by the tenant, constitutes a part of the rent paid by him for the land, and is to be considered part of the income for which the owner votes. See, in addition to the acts above cited, 41 *Geo. III.* c. 72; 53 *Geo. III.* c. 142; 57 *Geo. III.* c. 100; 1 and 2 *Geo. IV.* c. 123; 4 and 5 *Will. IV.* c. 11 and 60; 7 *Will. IV.* and 1 *Vict.* c. 17; 16 and 17 *Vict.* c. 117, 1853; *Ersk. B.* iii. tit. 8, § 33; *Bell's Com.* i. 700; *Bell's Princ.* § 1123; *Illust. ib.*; *Sandford on Entails*, 226; *Tait's Justice of Peace*, h. t.; *Blair's do.*, h. t.; *Chalmer's Election Law*, h. t.; *Baird*, June 12, 1835, 13 *S. & D.* 927. See *Commissioners of Supply. Extent. Election Law. Tailzie.*

**Lapsed Legacy.** A legacy is said to lapse, that is, to fall, and not to be demandable by any one, where the legatee has predeceased the testator. In that case, where it is not otherwise directed in the testament or settlement, the lapsed legacy falls into, and becomes part of the residue of the estate. *Ersk. B.* iii. tit. 9, § 9; *Bell's Princ.* § 1877; *Illust. ib.*; *Shaw's Digest*, 605. See *Testament. Legacy.*

**Larceny;** in English law, a theft or felony of another's goods, in his absence. It is called *grand larceny* when the value of the goods taken exceeds, and *petit larceny* when the value does not exceed, 12d. *Simple larceny* is plain unaggravated theft; *compound* or *mixed* is theft, aggravated by taking the article stolen from one's house or person. *Tomlin's Dict.* h. t.

**Last Heir.** The Sovereign, in the character of last heir, is entitled to the property, both heritable and moveable, of any one who dies intestate, and without lawful heirs entitled to take up his succession. In like manner, the Sovereign succeeds to a bastard who dies intestate and without lawful heirs of his body, since a bastard, as having no father in the eye of the law, can have no heirs but his own children. In either case, where the heritable property holds of the Crown, there is an *ipso jure* consolidation; though, where it is given to a donatary, he must obtain a decree of declarator of *ultimus hæres* or of bastardy, and then present a signature to Exchequer, on which he obtains a warrant of infeftment. Where the property holds of a subject superior, it is necessary to interpose a donatary, as the Crown cannot hold of a subject. The donatary must obtain a declarator, and com-

plete his title holding of the subject superior. The declaratory action is executed against all and sundry; and where there is a widow she must be cited. Then a letter passes the quarter seal, charging the superior to give infestment to the donatary, to be held in the same manner and for the same duties and services as the deceased held. The widow of a bastard is entitled to terce and to her *jus relictae*. As the Sovereign succeeds as *heir*, a deed done on deathbed hurtful to the Crown's right may be reduced, *ex capite lecti*. When the Crown succeeds as *ultimus hæres*, whether to a bastard or to a person lawfully born, the Sovereign or the donatary must pay the debts of the deceased so far as the value of the estate goes, but no farther; and the creditors of the deceased may attach the estate by proper diligence, calling as parties the Officers of State as representing the Crown. See *Stair*, B. iii. tit. 3, § 47; *More's Notes*, xxxiii.; *Ersk.* B. iii. tit. 10, § 1; *Bank.* B. iii. tit. 3, § 91; *Bell's Princ.* §§ 1669, 1940; *Illust. ib.*; *Kames' Stat. Law abridg. voce Ultimus Hæres*; *Hunter's Landlord and Tenant*, 178, 344; *Jurid. Styles*, iii. 202, 402. See *Ultimus Hæres. Succession. Bastard. Bastardy, Declarator of King.*

**Last Will**; synonymous with testament. See *Testament*.

**Latent**. Rights which remain unknown and concealed are ineffectual against creditors, when in the person of relatives and confidants. See *Conjunct and Confident. Bankrupt. Reputed Ownership*.

**Latent Fault**. See *Fault*; and in addition to the authorities there cited, consult *Stair*, B. i. tit. 9, § 10; tit. 10, § 15; tit. 14, § 1; B. iv. tit. 40, § 24; *More's Notes*, xcii.; *Ersk.* B. iii. tit. 3, § 10; *Kames' Equity*, 147, 175; *Brown on Sale*, 296. See also *Warrantice*.

**Latitat**; in English law, a writ by which parties are originally called to answer in personal actions in the Queen's Bench; so called from the supposition that the defendant is hid, and cannot be found in the county of Middlesex to be taken by bill, but is gone into some other county, to the sheriff of which this writ is directed, to apprehend him there. *Tomlins' Dict. h. t.*

**Lavish Persons**. See *Interdiction*.

**Law**; in the sense in which it is to be considered here, applies to the different systems of rules by which the subjects in this country are associated; by which they conduct themselves in their intercourse with other nations; or by which the conduct of individuals is regulated, or their rights and interests in property ascertained. Hence, law is subdivided into departments, little connected with each other; and a change in one department may be made without at all affecting the others.

**Constitutional law**.—The law of the State is that by which the reciprocal obligations of the governors and governed to each other are regulated.

**The law of nations**—regulates the intercourse of one nation with another. This code is composed of written as well as of unwritten law; the one depending on the principles of natural reason and European usages; the other arising out of the subsisting treaties. By those the rights of the respective nations in peace and war are regulated. See *International Law*.

**The municipal law**.—The municipal law of a country is divided into the civil and criminal departments; the former ascertaining private property, and regulating the rights and interests of individuals; the latter prescribing a rule of conduct to each individual, in relation to himself, to his neighbour, to the public, and to religion; these rules being fitted for all stations, adapted to all circumstances, and enforced by punishment proportioned to the extent of the crime, or to the nature of the offence.

**The criminal law of Scotland**.—The criminal law of Scotland is founded on ancient usage, on acts of Parliament, on the Roman law, and also on the Jewish law; for all of those have contributed to the completion of our criminal code. Hence, an important distinction has arisen between the criminal law of Scotland and that of England. In England, the offence, before it can be comprehended under the legal description of a crime, must be declared to be so by statute, and the degree of punishment prescribed. In Scotland, the Supreme Criminal Court has an inherent power to take cognizance, to a certain extent, of new offences, and is authorized by usage to inflict an arbitrary punishment; that is, a punishment not affecting the life of the offender; and, generally speaking, and in the ordinary state of society, and for all practical purposes, this system is attended with great advantages. *Hume*, i. 12. We have differences equally remarkable in the forms of our criminal trials, to which the same observations are applicable, viz., that, in the ordinary state of society, and for the repressing of common crimes, our forms are more humane, and much more effective than those of England. Thus the law of Scotland requires the evidence of two witnesses to prove a criminal act, while the English law holds the evidence of a single witness sufficient. In Scotland, the libel, and lists of the names of the witnesses and of the jurors, are served upon the accused fifteen days before he is brought to trial, and he is allowed to be heard by counsel; whereas, in England, the accused is brought to the bar without enjoy-

ing the same advantages; and until the passing of the act 6 and 7 Will. IV. c. 114, except in cases of treason, the accused in England were not allowed to be heard by counsel. *Hume*, i. 11. See *Criminal Prosecution*. *Bail*.

*The civil law of Scotland.*—The civil or municipal law includes the rules by which property is preserved or vindicated, and the rights and interests of individuals ascertained. Without speculating on the origin of the municipal code of Scotland, or attempting to trace the share which the aboriginal customs of the people, or the canon law, under the influence of the clergy, or the Roman and feudal laws, respectively had in producing the complex system by which our civil rights are now regulated, it is sufficient for all the purposes of the present sketch to observe, that institutional writers divide the existing law of Scotland into *written* and *unwritten*; the former consisting of the rules prescribed in acts of Parliament; and the latter, being the consuetudinary law, either founded on immemorial custom, or adopted into our system from the Roman law, or from the canon, or from the feudal law. The statutory law of Scotland commences with the acts of the Parliament of James I. of Scotland, in 1424; one peculiarity of the acts of the Scotch Parliaments being, that they may fall into desuetude, or may be abrogated by a contrary usage. See *Desuetude*. In this way it has happened that the Scotch statutes now in observance are not numerous. The Acts of Sederunt, which are the acts or ordinances of the Court of Session, have no proper legislative force beyond what relates to the form of administering justice in that Court. Where they go farther, as they do in some instances, they are to be considered rather as declaratory judgments, or declarations of the opinion of the Court on points of law, and a certification to the public of the judgment which will be pronounced when the case provided for occurs. But the Court may decide differently, or the House of Lords may disregard such declaratory acts, except when (as now frequently happens) a special enactment in a statute confers powers on the Court to make effectual and binding regulations by Act of Sederunt. See *Act of Sederunt*. The unwritten law consists of certain legal rules, such as the law of primogeniture, the law of deathbed, the *terce*, the courtesy, the *legitim*, and some others, established by immemorial custom. The decisions of the Court of Session, or of the House of Lords, where they have been uniform on the same point, have been held as proving our consuetudinary law; but it is as affording evidence of the custom, rather than as possessing any power in them-

selves, that with us adjudged cases have been regarded as forming part of the law. See *Decisions*.

The private law of a country may be regarded in two aspects: *first*, As it operates on those living under it; and, *secondly*, As it relates to foreigners. In regard to those under it, the security of property is chiefly to be considered; and in no country is property better secured than in Scotland. Our system of records gives a degree of security to the transmission of landed property which is peculiar to Scotland. The law of deathbed, which is also peculiar, operates for the benefit alike of the heir and of dying persons; and the law regulating the rights of debtor and creditor exposes every species of property belonging to the debtor to the attachment of the creditor; while, on a surrender of his property, a debtor whose misfortunes have been innocent may secure his personal liberty. In regard to strangers, the point of chief importance relates to the recovery of debts; with respect to which they enjoy, in common with domiciled Scotchmen, the full right of attaching every species of property belonging to their debtor; while those laws by which diligence is equalized, and the property of a debtor fairly distributed amongst his creditors, give an opportunity to distant creditors to claim and draw their shares along with those upon the spot. In particular, the Scotch system of mercantile sequestration is directed to the distribution of the whole estate of the debtor, and to the fair and legal ranking of every creditor, foreign or domestic. In fine, the law of Scotland, whether regard be had to security in the possession and transmission of property, or to the ready means afforded for the recovery of debts, or to the respect uniformly shown for the personal liberty of the subject, need not fear a comparison with any existing municipal code. The practical application of its principles is besides, generally speaking, rational and intelligible, and peculiarly free from the fictions and technicalities which, to a certain extent, conceal the merits of other systems from unprofessional inquirers.

**Law of Arms**; is that law which regulates the proclamation of war; the making and observing of leagues and treaties; assaults on and encounters with an enemy; and the punishment of offenders in camp, &c. The law of arms, when in force, supersedes the civil law. *Tomlins' Dict. h. t.* See *International Law*.

**Lawburrows**; are letters passing under the signet, running in the Sovereign's name, and obtained at the instance of one who has, or thinks he has, reason to apprehend danger to his person or property from the acts of

another. These letters command the person complained of to give security that the person at whose instance the letters issue shall be free from every violence to be done by the person against whom they are directed, or those depending on him, under a penalty fixed by the act 1593, c. 166. That statute, in the case of an earl or lord, imposes a penalty of L.2000 Scots; for a great baron, L.1000 Scots; for a freeholder, 1000 merks; for a feuar, 500 merks; for a yeoman, 100 merks; for every gentleman unlanded, 200 merks; for each person summoned on an assize, 100 merks. These penalties are now either increased or diminished by the judge at passing the bill on which the letters proceed, and the sum is always specified in the judge's deliverance. The person at whose instance the letters are obtained must bring proof of his cause of alarm, or swear that he dreads harm; and this oath is administered by the messenger before he executes the letters. Lawburrows are not granted to one spouse against the other, nor to a father against his child, unless on proof of the cause of dread, nor until application has been first served on the opposite party. In such cases of family quarrel, it has been suggested as a proper course, to appoint the application to be made, and answers to be lodged, within a limited time, under certification that in default a proof will be allowed. When the letters are executed, the person against whom they are directed must find caution to the extent required, within the days specified in the letters; which caution is lodged with the clerk in the Bill-Chamber, who issues a certificate of the fact. When these letters are taken out maliciously, and without probable cause, they may be suspended, and damages awarded; but where there is reason for them, if the person does not find caution within the time specified, the letters may be denounced and registered, and a caption raised thereon, which will be a warrant for imprisoning the person who has neglected to find caution. When the letters have been taken out, and caution found, they give rise (in case the person shall do any violence to the complainer or any of his family) to an action of contravention of lawburrows, which follows on the letters of lawburrows and bond of caution; and of course decree will be given against both the offender and cautioner. Contravention of lawburrows infers liability in the party complained of, whether he has found security or not. This action may properly be brought before the justices of the peace, when one of them has exacted the security. The fiscal must concur with the private complainer; but cannot prosecute alone, unless for ordinary punishment of the act as a breach

of the peace; and, in such a case, a fine imposed on the offender would not free him from an action of contravention. The fiscal may insist criminally, where the private party's right to prosecute for contravention is barred, by remission, express or implied. By the tenor of the bond of caution, the obligants bind themselves that the complainer, *his wife, bairns, servants, &c.*, shall be kept skaithless; but, unless these several parties have concurred in the application, an action of contravention for injury done to them will not lie at their instance, but only at the instance of the complainer himself. This action, being penal, is not incurred merely by the uttering of reproachful words, where they are not accompanied with violence, or at least with a real injury. The amount of the penalty is properly that stated on the bond; but sometimes, when the contravention is trifling, less is awarded, and occasionally no more is awarded than the actual damage. In this last instance, the amount levied goes to the party injured; but in other cases the penalty is equally divided between the complainer and the fisk. *Ersk. B. iv. tit. 1, § 16; Stair, B. i. tit. 9, § 30; B. iv. tit. 48; Bank. vol. i. p. 282; Kames' Stat. Law Abridg. h. t.; Hutch. Just. of Peace, vol. i. pp. 39, 399, 2d edit.; Tail's Just. of Peace, h. t.; Blair's do., voce Surety; Barclay's Digest, h. t.; Jurid. Styles, 3d edit. vol. ii. pp. 91-2; vol. iii. pp. 96, 298, 768, 992; Alexander's Abridg. of A. S. 3, 85; 11 and 12 Vict. c. 79, § 3.* For the other kinds of surety, see the articles *Bail. Cautioner. Surety.*

**Lawful Children.** See *Children.*

**Lawful Day.** See *Day.*

**Lay Day.** See *Charter-Party.*

**Lead Mines.** See *Mines and Minerals.*

**Leading a Witness.** It is a general rule that leading questions, or such as have a tendency to suggest to the witness the answer expected from him, or to instruct him as to the answer he should give, are not allowed. Thus, it is not permitted, with the view of proving a conversation, to mention to the witness a particular expression, and ask whether it was used. This rule is not so strictly enforced in regard to cross-examination. *Macfarlane's Jury Prac. 131; Alison's Prac. 596; Dickson's Law of Evidence, pp. 987-8.*

**Lease, Contract of;** it is a mutual contract between the proprietor or lessor of lands, houses, mills, fishings, or the like, and a tenant or lessee to whom the temporary possession of the subject and its fruits or profits is given for a certain stipulated rent, or annual payment, in money, grain, or services. The lease was originally in the form of a grant from the lessor; but as agriculture improved,

it became necessary to introduce a variety of conditions obligatory on both parties. Hence it assumed the form of a mutual contract. As this contract affects heritage, the right to which is regulated by charter and sasine, and by a system of records, it became necessary for the Legislature to interfere, and to render the tenant's right *real*, so as to prevent him from being dispossessed by a purchaser or other singular successor. This was done by the act 1449, c. 18, which declares, "That for the safety and favour of the poor people that labours the ground, that they and all others that has taken or shall take lands, in time to come, frae lords, and has terms and years thereof, that suppose the lords sell or anailzie that land or lands, the takers shall remain with their tacks until the issue of their terms, whose hands that ever the lands come to." In this manner has the lease not only of lands, but of houses, fishings, mills, &c. been secured during their currency against singular successors; but to entitle a lease to the protection of the act, it must be a written lease—it must have a stipulated rent—the term of its endurance must be specified—and possession must have followed on the lease. It is thus that a lease, though properly a *personal contract*, is made effectual against a singular successor. But against the grantor and his heirs, a perpetual lease, or a lease where no rent is stipulated, or where the accruing rents are appropriated prospectively to the payment of a debt due to the tenant, will be effectual.

I. *Of the constitution and effects of the contract.*—In the constitution of the lease there are several matters worthy of attention; as, —1. By whom a lease may be granted. 2. The powers reserved by the grantor. 3. To whom it may be given. 4. The powers conferred on the tenant. 5. The conditions of the lease. 6. The forms necessary for a binding lease.

1. *By whom a lease may be granted.*—To entitle a person to grant a formal lease, he ought to be infest in the subject; for, although the subsequent infestment of the lessor will validate the lease by accretion, provided there be no mid-impediment, yet, should he die uninfest, the lease may be defeated, by a stranger coming into the feudal right, who does not represent the lessor, such as a purchaser, a stranger substitute in an entail, or an adjudging creditor. But the heir of the grantor of the lease, taking the land as his representative, is bound by the contract. When the lessor is infest, although he may be married, or even have given a locality to his widow, there is nothing to prevent him, in the exercise of his right of administration, from granting a lease; nor will his widow be permitted,

on the right opening to her, to set aside the lease. During the pupillarity of the proprietor, a tutor is not entitled to grant a lease for a longer period than the endurance of his office; but a minor *pubes* may, with the consent of his curator, let a lease, though it will be liable to reduction on the head of lesion, if lesion can be proved. A proprietor is not prevented from exercising the common acts of administration, by having granted an heritable bond, which, as being merely a right in security, leaves the right of property unaffected in the person of the debtor. A proprietor, therefore, after granting heritable securities, may grant a valid lease; but the effect of real diligence is, to circumscribe the proprietor's power of administration; and, accordingly, our law has introduced what has been denominated litigiousity, by which, from the time that a summons of adjudication or letters of inhibition are executed and published, a lien is created over the subject, which exposes to challenge a sale made or a lease granted by a party against whom such diligence has been commenced. So also, a mercantile sequestration, which deprives the proprietor of the power of administration, will have the same effect. The law of deathbed also will expose to challenge, *ex capite lecti*, a lease to the prejudice of his heir, if the lease be an extraordinary act of administration; but not where it is a lease of ordinary endurance, and at an adequate rent; *Semple*, 1st June 1813, *Fac. Coll.* An entail, in like manner, circumscribes the powers of a proprietor; but that depends on the terms of the entail. See *Tailzie. Grassum*. Where a life-renter grants a lease, it can endure only during his lifetime.

2. *The powers reserved by the grantor independently of stipulation.*—Under this implied reservation are included,—1. The mines and minerals, and the power of working them on payment of surface damage. 2. The trees and wood on the farm; the tenant having a right merely to the annual crops which the soil produces. 3. Where the subject is destroyed, the landlord is not bound to rebuild. See the case of *Bayne v. Walker*, as reversed in the House of Lords, 3 *Dow*, p. 233. In virtue of his inherent right of property, he may also hunt on the farm. 4. The landlord, independently of stipulation, has a right of hypothec, in security of his rent. This right gives the landlord a security over the crop of each year, for the rent of that year of which it is the crop; and over the cattle and stock on the farm for the current year's rent, which last right endures for three months after the last conventional term of payment of the year's rent. See *Hypothec*.

3. *To whom a lease may be given.*—This de-

pend entirely on the convention of the parties ; and all that is to be considered is, the extent of the right conferred by the terms used in describing the tenant. Where a lease is given simply to a tenant by name, it will go to his heirs on his death, if he dies before the expiration of the lease, although heirs be not mentioned. Where the lease is given to two persons, or to joint tenants, as they are termed, the interest of one of the tenants, on his death, will go to his heirs, and not to the surviving tenant. Where the lease is given to two, and to the longest liver, and to their heirs, each of the original tenants has a joint right ; but on the death of any one of them, the heir of the deceased has no right, the whole belonging to the surviving tenant. Where, again, a lease is given to a company, it becomes a difficult question to say what effect is produced on the lease by a dissolution of the company. This point, therefore, ought to be settled by an express stipulation in the lease. It ought to be declared, whether the lease is to be thereby terminated, or whether a power of assigning or of subsetting is intended to be given ; and the company ought to subscribe and to bind themselves, not by the firm of the company, but in their individual names, and as taking burden for the company. When a lease is given to a tenant, and to his heirs, it is the heir-at-law who is understood to be meant ; and therefore care ought to be taken, either to give to the tenant a power of assigning or of subsetting, or at least a power of naming a successor in place of the heir-at-law ; a precaution useful both to landlord and tenant, as the heir may be unfit or disinclined to take the management, or the tenant may be succeeded by heirs-portioners. Power ought also to be given by the lease to the tenant to appoint a manager of the farm for his heir, in case the tenant should die, leaving his heir in minority, or otherwise incapable of managing for himself—the manager so appointed being taken bound to perform the obligations incumbent on the tenant by the lease.

4. *The powers conferred by the lease.*—Under the lease, the tenant has a right to the annual fruits, and to the use and possession of the subject. Hence, where the subject of the lease is rendered unfit for the purposes for which it was let, overblown with sand, inundated, or otherwise destroyed, there must be a proportional diminution, and, in extreme cases, a total discharge of the rent. Where, from the inclemency of the season, a degree of sterility has been produced, such as to yield the tenant no more than seed and labour, cases have occurred in which the rent has been held not to be demandable. See *Sterility*.

5. *The conditions of the lease.*—The usual conditions of this deed are, on the part of the landlord, warrandice, which, whether expressed or implied, binds him, unless the contrary be expressly stipulated, to warrant to the tenant undisturbed possession during the continuance of the lease, and to protect him against all encroachments on his right. On the part of the tenant, the implied obligations are, that he shall stock and labour his farm according to the rules of good husbandry ; that he shall regularly pay his rent ; shall keep and leave the houses and inclosures on the farm in repair ; and that he shall remove from the farm at the expiration of the lease. These, with obligations on the parties to perform their respective parts of the agreement under a certain penalty, are the common and ordinary conditions of the lease. But there may be an infinite variety of others applicable to the special circumstances of the particular case or the nature of the farm. In particular, it is common to prescribe positive rules as to the mode of labouring and managing the farm ; though that practice is not now so prevalent as it once was, the most approved course being to prohibit an injurious rotation, or to prescribe a particular rotation for the last four or five years only of the lease, leaving the choice of a rotation consistent with good husbandry entirely to the tenant. These conditions may be enforced, by exacting or stipulating for a higher or additional rent for such parts of the farm as shall be labour-ed differently.

6. *The forms necessary for a binding lease.*—A lease merely verbal, to endure for more than one year, will not bind the parties. To produce this effect, writing must intervene. Even where possession has followed on a verbal lease, that is not sufficient ; it may be resiled from, and terminated at the expiration of the current year, though stipulated to continue for a tract of time. In the case where money has been expended, or an engagement come under on the faith of the lease, although a breach of the verbal agreement may found a claim of damages, yet the verbal agreement will not be taken as a ground for giving effect to the lease. A verbal lease may, indeed, be made effectual against the grantor and his heirs, by *rei interventus*, provided such *rei interventus* shall distinctly apply to a right of longer duration than a single year. But a lease established *rei interventu* has no effect against singular successors without possession (see *Rei interventus*) ; and, generally speaking, the terms of a verbal lease cannot be proved by oath of party, so at least as to make it effectual for more than one year. But a written obliga-



tion to grant a lease is equivalent to an actual lease; and any writing, however informal, if followed by possession, will be as effectual as a formal written lease, not only against the grantor and his heirs, but against singular successors, provided such writing contain *in græmis*, the essentials of a lease under the statute 1449, c. 18, viz., a rent and a definite period of endurance, and that the writing is followed by possession referable to it. In order to be effectual to ground an action, a written lease must be on stamped paper. The want of a stamp may be supplied at any time on payment of certain penalties; but the practice of sisting process till the stamp be obtained is not correct. See *Stamp Laws*.

II. *Of the transmission of the lease.*—The lease may be transmitted by assignation, or the right of possessing under the principal tacksman may be given by a sub-lease. A power of assigning or of sub-setting, however, is not implied in a lease of the ordinary endurance of nineteen years. In such leases, therefore, an express authority to assign or subset must be given. Where the lease exceeds nineteen years' endurance, or where it is given for a life rent, a power of assigning and subsetting is implied, unless expressly excluded; and in the case of an urban tenement, whether the lease be long or short, the tenant may assign or subset, if not prohibited by the lease. When a sublease is given, the principal tenant, in the ordinary case, remains bound; but it is doubtful whether the same holds in the case of an assignation. Both the sublease and assignation are completed by possession; but it may happen that a lease is assigned which has been previously subset; so that the assignee does not enter into the natural possession of the subject, but draws the rents only, and that is equivalent to natural possession. Where, again, it is necessary to complete the transference more immediately than can be done in this way, the assignation must be intimated to the subtenant or person in possession. On this point, which is attended with many practical difficulties, the following authorities may be consulted: *Bell's Com.* i. 66; *Ivory's Ersk.* B. ii. tit. 6, § 26; *Hunter's Landlord and Tenant*, 398; *Bell on Leases*, i. 451; *Russell*, 3d Dec. 1822, 2 S. & D. 62; 5 S. & D. 891; 7 S. & D. 767; 1 W. & S. 620; 9 S. & D. App. 6; *Young*, 14th Dec. 1824, 3 S. & D. 338, and 3 W. & S. 404; *Marston*, 16th Jan. 1827, 5 S. & D. 200; *Kennedy*, 19th Feb. 1829, 7 S. & D. 435; *Inglis & Co.*, 26th Feb. 1829, 7 S. & D. 469; *Brock*, 5th March 1830, 8 S. & D. 647, *affirmed on appeal*, 5 W. & S.; *Hamilton's Trustee*, 25th May 1830, 8 S. & D. 799. See also *supra*, *voce Assignation*, p.

78. But although an express power of assigning or subsetting be required, in order to authorize a tenant voluntarily to assign or subset a lease of the ordinary endurance of nineteen years, yet such a lease is adjudgable by a creditor of the tenant, unless it contain an express exclusion of assignees and subtenants, in which case both voluntary and judicial assignees are inadmissible. As to the transmission of a lease on the death of the lessee, see *supra*, p. 517.

III. *Of the termination of the lease.*—When the term of the lease is expired, it is in the power of the landlord and tenant to continue the lease from year to year by tacit relocation; that is, to continue the possession from year to year on the old terms. The consequence of this is, that a warning is understood to be requisite in order to break the implied agreement. See *Tacit Relocation*. Formerly, this warning was regulated by the act 1555, c. 39, under which removing proceeded on a precept in the landlord's name. But the Act of Sederunt, Dec. 14, 1756, greatly simplified the process, by requiring, in place of the statutory and cumbrous form of removing, the mere calling of the tenant in an action of removing before the Judge Ordinary forty days before the Whitsunday of the year in which the lease is to expire. Where there is a regular lease, it generally contains an obligation to remove at the expiration of the term, and a warrant for letters of horning is given, in which case letters of horning may be raised and executed forty days before the Whitsunday of the year of removal—a charge on which the Act of Sederunt declares to be sufficient to entitle the landlord to obtain a warrant of ejection. The lease may be prematurely terminated by the tenant's desertion. In such a case, the safe course for the landlord seems to be to apply to the Judge Ordinary, stating the circumstances, and praying for judicial authority to dispose of the unexpired period of the lease by public roup, under a reservation of all claims against the tenant who has deserted. Where a subtenant has deserted, the same course may be pursued by the principal tacksman. A current written lease may also be brought to a close, during its currency, by a voluntary renunciation by the tenant, provided the landlord agrees to accept of it, and, upon principle, it would seem that such a renunciation must be in writing. If so, all agreements on the part either of the landlord or of the tenant, having in view the termination of a current written lease, may be resiled from, unless writing have intervened. It has been said that where the lease is informal, the renunciation may be so likewise; but in that case there must be cir-

circumstances corroborative of the renunciation to counterbalance the *rei interventus* on the lease. There is no particular form of renunciation required, but there must be a clear and explicit notice to the right party forty days before Whitsunday. See *Removing. Renunciation.*

A summons of removing may now be raised at any time, provided there is an interval of 40 days between the date of the execution of the summons and the term of removal, or where there is a separate *ish* as regards land and houses or other subjects between the date of the execution of the summons and the *ish* which is first in date. A lease which contains an obligation to remove has the same force and effect as an extract-decree of removing obtained by the party in right of the lease against the party in possession under the lease, whether the original lessor or not, and along with a written authority signed by the landlord, or his factor or agent, is a sufficient authority to any sheriff-officer or messenger-at-arms within the county within which the lands are situated, to remove the party in possession. Previous notice, however, must be given to the tenant, at least 40 days before the expiration of the term of endurance specified in the lease; or where there is a separate *ish* as regards land and houses or other subjects, at least 40 days before the *ish* which is first in date. The notice in the form of schedule I, annexed to the act, must be delivered to the party in possession, or left at his ordinary dwelling-house, or transmitted to his known address through the post-office by a sheriff-officer or messenger-at-arms. No removal under the act can take place after six weeks have elapsed from the expiration of the term of endurance specified in the lease, or from the *ish* which is last in date where there is a separate *ish* as regards the land and houses or other subjects. A letter of removal, in the form given in schedule K, has the same effect as an extract-decree of removal obtained against the granter of the letter, or any party in his right; but where the letter of removal bears date more than six weeks before the term of removal specified in it, 40 days' notice must be given. See *act 16 and 17 Vict. c. 80, 1853.*

By the act 20 and 21 *Vict., c. 26 (1857)*, leases for thirty-one years and upwards may be recorded in the Register of Sasines, and such leases so registered are effectual against all singular successors in the lands let whose infestments are posterior in date to the date of registration of such leases. Such leases, when recorded, may be assigned, in whole or in part, in the form given in schedule A annexed to the act, and the recording of such

assignment effectually vests the assignee with the right of the granter of the assignment in the lease to the extent assigned. Such assignment, however, does not prejudice the right of hypothec or other rights of the landlord. A party in right of any such recorded lease, and whose right to the lease is also recorded, may assign the lease in whole or in part in security for the payment of borrowed money, or of annuities, or of provisions to wives and children, or in security of cash-credits or other legal debt or obligation in the form given in schedule B annexed to the act, and the recording of such assignment in security completes the right of the assignee, and a real security over the lease is thereby constituted to the extent assigned.

Where the party in the right of any such lease or assignment in security is not the original lessee in the lease, or the original assignee of the lease, he must, before presenting the lease or assignment in security for registration, expedite a notarial instrument in the form given in schedule C, and the keeper of the register on such notarial instrument being produced to him, records the lease and assignment in security along with the instrument.

A recorded assignment in security is transferable in whole or in part by translation in the form given in schedule D, and the party in right of such recorded assignment in security is entitled, in default of payment of the capital sum for which the assignment in security was granted, or of a term's interest thereof, or of a term's annuity for six months after the capital sum or the term's interest or annuity shall have fallen due, may apply to the sheriff for a warrant to enter to possession of the lands leased, and the sheriff, after intimation to the lessee for the time being and to the landlord, shall, if he see cause, grant such warrant. The warrant so granted is a sufficient title to the party so obtaining it to enter into possession of the lands, and to uplift the rents from the subtenants, and to sublet the lands as freely as the lessee might have done. He is not, however, personally liable to the landlord in any of the obligations and prestations of the lease until he so enters into possession.

The heir of any party who dies vested in right of any such recorded lease or assignment in security may complete his title thereto by a writ of acknowledgment from the proprietor infest in the lands held by such lease, or from the party appearing on the register as in absolute right of such lease of or over which such assignment in security has been granted. The form of such writ is given in schedule E, and the recording of such writs in the register in which such lease or assigna-

tion in security is registered completes the title of the heir. No defect, however, in the title of the proprietor or granter of such writ will affect the writ or title of such heir.

The heir of any party who dies fully vested in right of any such recorded lease or assignation in security, who obtains a general or special service to such party, or the general disponent of such party, may complete his title to such lease or assignation in security by expediting a notarial instrument in the form given in schedule F.

Where an assignee dies without recording the assignation in his favour, his heir or general disponent may complete his title by expediting a notarial instrument in the form given in schedule F, and the keeper of the register, on such instrument being presented to him, records the assignation along with the instrument.

The right of an adjudger of any recorded lease or assignation in security from the party vested in the right thereof, or from the heir of such party, is completed by recording the abbreviate of adjudication in the register in which the lease is recorded. A trustee on a sequestrated estate of any party in right of such lease or assignation in security may complete his title by expediting a notarial instrument in the form given in schedule F, and recording the instrument in the register in which the lease or assignation is recorded. The date of all such leases and assignations is regulated by the dates of recording. Renunciations and discharges of such leases or assignations may be in the form given in schedules G and H, and may be endorsed on the lease or assignation in security and recorded. Decrees of reduction of any such lease, or any assignation thereto, may also be recorded.

Leases containing an obligation upon the granter to renew the same from time to time at fixed periods, or upon the termination of a life or lives or otherwise, are deemed leases in the meaning of the act, and may be registered, provided such leases shall, by the terms of the obligation, be renewable from time to time, so as to endure for a period of thirty-one years or upwards. No lease of land other than subjects held by burghage tenure executed after the passing of the act, unless executed in terms of an obligation to renew, contained in a lease granted prior to the act, can be registered, unless the name of the lands of which the subjects let consist or form a part are set forth in the lease, and no lease of lands, except where the same consist of mines and minerals, can be registered unless the extent of the land be set forth in the lease, and shall not exceed fifty acres.

On the subject of this article, see *Bell on*

*Leases*, 4th edit.; *Hunter's Landlord and Tenant*; *Ersk. B. ii. tit. 6, § 20*, and numerous valuable notes by *Ivory*; *Stair, B. ii. tit. 9*; *Moré's Notes*, pp. lxxvi., lxxx., cxxxviii., clxxx., cclxviii.; *Bell's Com. i. 65*; *Bank. vol. ii. p. 94*; *Bell's Princ. § 1177, et seq.*; *Illust. ib.*; *Hunter's Landlord and Tenant, passim*; *Sandford's Herit. Success. i. pp. 34, 138*; *Sandford on Entails*, pp. 69, 163, 175, 180-4-5, 213; *Bell on Purchaser's Title*, 2d edit. pp. 107-111; *Ross's Lect. ii. 456, et seq.*; *Wight, Dow's App. Cases, i. 141*; *Kerr, ib. ii. 212*; *Henderson, ib. 285*; *Rozburgh, Bligh's App. Cases, ii. 156*. Consult also the following articles in this Dictionary: *Arrears. Assignation. Bona Fides. Chalking the Door. Coal. Crop. Cropping. Crown Lands. Currente Termino. Damage. Delectus Personæ. Discharge. Dung. Earnest. Ejection. Ejection and Intrusion. Factor. Fallo. Farm-Servants. Fences. Ferries. Fire. Fisheries. Fictures. Fodder. Forehand Rent. Furniture. Game. Grass. Grassum. Growing Corn. Hypothec. Improving Lease. Invecta et Illata. Irritancy. Ish. Judicial Factor. Kain. Kelp. Kindly Tenants. Landlord. Lochmaben. Machinery. Marches. Melioration. Mills. Mines and Minerals. Mul-tures. Plough Goods. Poinding. Purgation of Irritancy. Rabbits. Removing. Rent. Salmon Fishing. Sequestration. Steelbow. Sterility. Stocking. Straw. Tenant. Terms, legal and conventional. Violent Profits. Warning. Warrandice. Way-going Crop.*

**Lease and Release**; in English law, a conveyance of the fee-simple, right or interest in lands or tenements, under the statute of uses, 27 Hen. VIII. c. 10; giving first the possession, and afterwards the interest in the estate conveyed. *Tomlins' Dict. h. t.*

**Leaseholders**; as to their right of voting under the Reform Act, see *Reform Act*.

**Leasing-Making**; or verbal sedition, as it is also termed, consists, according to the language of the old statutes, in "slandering and untrue speeches, to the disdain, reproach, and contempt of his Majesty, his council and proceedings, or to the dishonour, hurt, or prejudice of his Highness, his parents and progenitors," &c.; 1584, c. 134. By this act, and by the act 1585, c. 10, and others of a still older date, this crime is made punishable with death. But this having been declared a grievance in the claim of right, the punishment of the offenders was, by the act 1703, c. 4, declared to be an arbitrary one; and the punishment was still further mitigated by 6 Geo. IV. c. 47, by which it was provided, that persons convicted of leasing-making, sedition, or blasphemy, should be liable to be punished only by fine and imprisonment, or both, at the discretion of the

court; or on a second conviction in the same way, or by banishment. So much of this act as regards the punishment by banishment is repealed by 7 Will. IV. c. 5. See *Ersk. B. iv. tit. 4, § 29*; *Hume, i. 344, 2d edit.*; *Kames' Stat. Law abridg., h. t.*; *Hutch. Justice of Peace, i. 358*; *Shaw's Digest, 148*. See *Blasphemy. Sedition. Libel.*

**Lectures, Publication of.** See *Literary Property.*

**Lectus Ægritudinis.** The weakness occasioned by extreme illness, such as child-birth pains, is a relevant ground for reducing a bond or a discharge. *Brown's Syn. 950*; *Kames' Equity, 69*. See *Imbecility. Facility. Fraud. Deathbed.*

**Legacy**; is a bequest or donation of a sum of money, or of a moveable subject, to be paid or delivered to the legatee by the executor of a deceased person, out of the moveable estate of the defunct. Legacies are usually bequeathed by a testament, by which the testator appoints an executor, and directs him, against a certain time (usually the first term of Whitsunday or Martinmas after the testator's death), to pay the legacies to the legatee. Where the legacy consists of an article which is to be delivered, it is understood, unless otherwise directed, that the delivery is to take place immediately after the testator's death. The legacy is personal to the legatee to whom it is given; and were he to die before the testator, the legacy would lapse, and not be demandable by the heir of the legatee. If, therefore, it be meant to give a legacy to a person, and, in the event of his predeceasing the testator, to confer it on his heir, the bequest must be so expressed; in which case (should the legatee predecease the testator) a right to the legacy will vest in the heir, and, in the event of his death, the legacy will go to the heir of the testator, in preference to any other heir of the legatee. A legacy may be contained in a general disposition as well as in a testament. The legacy may be either general, or special, or universal. See *Disposition General.*

**General legacy.**—A general legacy is that where a certain sum of money, as L.100, or a certain amount of property of any kind, is bequeathed in general terms; and this is payable out of the moveable estate of the testator. If there be a shortcoming in the moveable estate, or any subsequent loss, it falls proportionally on all the general legacies. But if a sum be bequeathed for a special purpose, in making the abatement necessary on account of the shortcoming, where otherwise practicable, enough must be left to execute the purpose of the bequest.

**Special legacy.**—The legacy is said to be special, where a particular subject or debt is

bequeathed to the legatee; in which case the legatee must bear any loss arising from the bankruptcy or inability of the debtor. But, on the other hand, he gets the subject or debt such as it is, and suffers no share of any loss which may fall upon general legatees in consequence of a shortcoming in the testator's fund for general legacies. Neither special nor general legacies, however, can be paid to the prejudice of the rights of the onerous creditors of the deceased. Where a particular debt is bequeathed, should it have been paid up during the lifetime of the testator, the legacy is at an end; or, should an heritable security be taken for the debt, that also, by converting it into heritage, operates an extinction of the legatee's right to the debt. But where creditors take a particular subject to the exclusion of a special legatee, they must assign their debts to him. A special legacy has the effect of an assignation *mortis causa* to the particular thing, the right to which is completed by the testator's death; and, consequently, such a legatee has his action directly against the possessor of the fund or subject, the executor being called as a party; while a general legacy confers on the legatee only a personal right of action against the creditor. A *universal* legacy comprehends all the testator's estate, or the reversion or residue, after satisfying expenses, debts, and other legacies. **Verbal Legacy.**—A verbal legacy is ineffectual to any greater extent than to the sum of L.100 Scots (L.8, 6s. 8d.)

If no term be appointed for the payment of a legacy, it is due at the testator's death, from which time it bears interest; but payment cannot be enforced till six months thereafter. If a day be fixed, or if an event, certain to arrive, be expressed, on the arrival of which the legacy is to become due, the legacy vests from the testator's death; but is not payable, nor does interest begin to run upon it until the arrival of the specified time or event. A possible condition in a legacy receives effect; an impossible condition is held *pro non scripto*. (See *Vesting of Legacies*.) When the testator bequeaths a subject belonging to another, which he believes to be his own, the legacy is ineffectual; but if he knows that it is not his own, the subject must be purchased, or the legatee otherwise satisfied out of the executry. The bequest of a thing erroneously supposed to be moveable is ineffectual. See *Ersk. B. iii. tit. 9, § 6, et seq.*; *Stair, B. iii. tit. 8, § 20, et seq.*; *More's Notes, p. cccxli. et seq.*; *Bell's Com. i. 142*; *Bank. vol. ii. p. 388, et seq.*; *Bell's Princ. § 1870, et seq.*; *Illust. ib.*; *Thomson on Bills, 18, 390*; *Tait on Evidence, pp. 224, 305*; *Jurid. Styles, 2d edit. vol. ii. pp. 307, 322*,

388, 456—460, *App.* 11; *Kames' Equity*, 168. See *Testament. Conditional Obligation. Condition si sine liberis. Dead's Part. Evidence. Executor.*

**Legacy and Residue Duties.** For purposes of revenue, legacies are subject to certain duties, the rates of which vary from one to ten per cent. on the sum bequeathed; the duty rising in amount according to the remoteness of the relationship of the legatee, and reaching its *maximum* where he is not related to the testator. All legacies of L.20 and upwards, out of estates above L.100, pay duty. And where any legatee takes two or more distinct legacies or benefits under any testament, which together amount to L.20, each is charged with duty, although each or either separately may be under that value. A donation made *intuitu mortis*, while the testator is still in life, and in order to evade the duty, is not accounted an illegal evasion. The duty is payable by the legatee, unless the will shall otherwise direct; and if the first legatee is exempted from the duty, his substitutes are also, *in dubio*, held to be exempted. Before executors or trustees can legally retain the residue of the defunct's personal estate, or any part of it, they must deliver to the Stamp Office, or to the stamp distributor in whose district they reside, an account in duplicate of the particulars of such residue, with its amount, and the moneys arising from the sale or burdening of real estate, or the value of the real estate, if not sold, when it is directed by the deceased to be sold, and of all payments made out of it. The duty must be paid within fourteen days after the commissioners have assessed it, under a penalty of treble the amount of duty. The duplicate accounts must also be accompanied with an extract or copy of any will or testamentary instrument executed by the deceased, and all other documents necessary for ascertaining the duties exigible from the estate. The duties on legacies must be paid when the legacies are discharged; but if the legacies are retained by the executors for the use of legatees, who from infancy, absence, or any other cause, cannot yet receive them, the duties must be accounted for when the legacies are so retained. Where the legacy is payable at a future period, the duty must be paid immediately, if the interest of the legacy is directed by the will to be applied for the benefit of the legatee until that period arrive. All rents of heritable estates directed to be sold, and all dividends, interests, and profits arising from the personal estate of the deceased, subsequent to the time of his or her death, with all accumulations of such profits down to the time of the executors or trustees delivering the accounts, and offering to pay the duty on

the residue, are considered as part of the deceased's personal estate, and must be accounted for accordingly; *Attorney-General v. Cavendish, Trinity Term*, 1810. Effects not consisting of money, or securities for money, are valued at the time the account is rendered, when inventories and proper valuations are required to be produced. Money in the public funds is valued at the medium price of stocks on the day on which the account is dated. The values of annuities are calculated by the tables annexed to 36 Geo. III. c. 52. Special circumstances attending a case may be introduced into the account, or stated in a separate paper annexed to it. Where the residue of the personal estate is given to one for life, a distinct account must be given of the profits which have accrued subsequent to the testator's death, and of the payments made for interest of legacies and of the testator's debts, so that the balance due to the residuary legatee for life may appear. Notwithstanding insolvency, an account must be rendered, to satisfy the commissioners that the estate is not chargeable with duty. Persons paying or receiving any legacy or residue liable to duty, without taking or signing a proper receipt, in which the duty is expressed to have been deducted, are subject to a penalty of 10 per cent. on the amount of such legacy or residue. Every legacy receipt must be dated on the day of signing, and the duty paid within twenty-one days from the date, under a penalty of 10 per cent. on the amount of the duty; and if the duty is not paid within three months from the date of the receipt, a penalty will then be incurred of 10 per cent. on the amount of the legacy. As above stated, the amount of the duty varies according to the nearness of the legatee's consanguinity to the deceased. The husband and wife are not subject to the duty on legacies, annuities, and residues, bequeathed to each other. Lawful children of the testator and their descendants, the father, mother, or any lineal ancestor of the testator, pay 1 per cent. Brothers and sisters, and their descendants, pay 3 per cent. Brothers and sisters of a father or mother, and their descendants, pay 5 per cent. Brothers and sisters of a grandfather or grandmother, and their descendants, pay 6 per cent. Strangers in blood, persons in any other degree of collateral consanguinity, and illegitimate children, pay 10 per cent. Where a husband and wife in different degrees of relationship to the deceased have been named as joint legatees, the rule of different rates is held to apply, and duty is paid on one-half of the legacy in the husband's, and on the other half in the wife's proportion. The rates given above are applicable only to the estates of persons who have died

since 5th April 1805; 55 *Geo. III. c. 184*. The preceding summary has been abridged from the printed directions issued by the Solicitor of Legacy Duties in Scotland. See *Succession*.

**Legal, or Legal Reversion.** This is the period within which a debtor whose heritage has been adjudged is entitled to redeem the subject; *i. e.*, to disencumber it of the adjudication, by paying the debt adjudged for. Or rather, it is the period on the expiration of which the adjudger may convert his judicial security into an irredeemable right of property, by obtaining decree of declarator or expiry of the legal. For the debtor may redeem the lands at any time before decree of declarator of expiry, or before forty years' possession has run on charter of adjudication and sasmine. The *legal* of the special adjudication is five years; 1672, c. 19; of the general adjudication, ten years; 1661, c. 62, and 1672, c. 19; and of the adjudication *contra hereditatem jacentem*, seven years: 1621, c. 7. *Stair, B. iii. tit. 2, § 29; B. iv. tit. 3, § 2; tit. 23, § 7; tit. 36, § 2; More's Notes, p. cccv.; Ersk. B. ii. tit. 12, §§ 10, 22, 39, 49; Bell's Com., 6th edit. ii. 943, et seq.; Bell's Princ. § 829; Shand's Prac. p. 731; Jurid. Styles, 2d edit. vol. iii. p. 407; Robertson, Dow's Appeal Cases, iii. 108. See Adjudication. Expiry of Legal.*

**Legate**; an ambassador or pope's nuncio. *Tomlin's Dict. h. t.*

**Legatee**; is the person to whom a legacy is payable.

**Legitim, or Bairns' Part of Gear**; is the legal share of the father's free moveable property due on his death to his children. Where a father dies leaving a widow and children, his free moveable estate suffers a division into three equal parts; one-third part is divided equally amongst all the children, whether of his last, or of any former marriage, as *legitim*; another third goes to his widow, as her *jus relictæ*; and the remaining third is what is called *dead's part*, which the father may dispose of as he pleases, by testament or otherwise. Where he has made no testamentary or other destination of the dead's part, it goes to his children, as his executors. Where the father leaves children, but no widow, or where the widow, in her contract of marriage, has renounced the *jus relictæ*, one-half of his free moveable property is *legitim*, the other *dead's part*; *Ersk. B. iii. tit. 9, § 20*. The children of a deceased child are not entitled to claim any part of their grandfather's moveable estate, as the *legitim* to which their parent would have been entitled. It is the children alive at the time of the father's death to whom alone the right of *legitim* belongs. The claim of *legitim* may be excluded by giving the children a provi-

sion in an antenuptial contract of marriage, in name of *legitim*. But where this has not been done, the right is not directly or gratuitously defeasible; and even where a conventional provision has been substituted in an antenuptial contract of marriage in lieu of the *legitim*, it would seem to be optional to the child or children either to accept the conventional provision, or to reject it, and insist for their *legitim*. Where, however, the conventional provision bears expressly to be given in name of *legitim*, the children can neither take the provision nor any other benefit under the contract, and at the same time insist for the *legitim*. A provision in a contract of marriage, whether antenuptial or postnuptial, whereby the *legitim* of the children should be entirely excluded, without making any other provision for the children, would be inoperative against them. The father, no doubt, in the exercise of his uncontrolled power of administration during his life, may, by converting moveable into heritable property, or even by a *de presenti* and completed conveyance of his whole moveable property, diminish or entirely defeat the claim of *legitim*; *Hog, 14th May 1800, Mor. App. h. t.* The *legitim* cannot be diminished or affected by a deathbed deed, or by a testamentary, or *mortis causa*, or revocable deed of any kind, whether deathbed or not; the dead's part alone being disposable in this way. And no deed or settlement of the father, regulating the succession to the *legitim*, is effectual, even where the child is a bankrupt, a pupil, or an idiot. See *Ersk. B. iii. tit. 9, § 25; Bank. B. iii. tit. 8, § 15*. Where a child has expressly discharged his claim of *legitim*, either gratuitously or on receiving an equivalent, during his father's life, he is said to be forisfamiliar. But the discharge must be express. The effect of a discharge of this kind is not to augment the dead's part; nor does it make the slightest alteration on the general amount of the *legitim*, which still continues to be a half or a third of the free moveables at the time of the father's death, the share of the forisfamiliar child going merely to increase the fund for division amongst the remaining children entitled to *legitim*; *Ersk. B. iii. tit. 9, § 23*. A discharge of the *legitim* by all the children leaves the moveable estate to be equally divided between the husband and wife; or, if the wife be already dead, it converts the whole into *dead's part*. And a discharge by one or all, after the father's death, makes the *legitim* accrue to the person entitled to the residuary right of succession. The child claiming *legitim* must collate any separate provision received from the father, unless such separate provision shall appear to have been intended by the father as a *præci-*

*pnum*. All sums of money advanced for the child must also be collated; but neither the expense of education, nor inconsiderable presents, nor any advances which bear to be made over and above the *legitim*, are to be taken into computation. And in the *Chandos* case, the *legitim* was held not to be excluded by a child's acceptance from her father, under an English marriage-contract, of a provision declared to be her "portion or fortune." This provision was not imputed in fixing the amount of the *legitim*; *Breadalbans v. Chandos*, Jan. 20 and Nov. 19, 1836, *D. B. & M.* xiv. 309; xv. 48. The heir in heritage is excluded from a share of the *legitim*, unless he choose to collate the heritage with the younger children. The heir-male and of line, succeeding in the character of heir-male to an entailed estate in which the deceased had been infeft under an entail executed by a predecessor in favour of heirs-male, is not entitled to claim a share of the executy without collating his life-interest in the entailed estates; *Anstruther*, Nov. 28, 1833, *S. & D.* xii. 140; Jan. 20, 1836, *S. & D.* xiv. 272; *Chandos*, *ut supra*. But although the heir is excluded where there are other children, yet where he is an only child he will be entitled to *legitim*; *Kennedy*, 15th July 1622, *Mor.* p. 8163. The *legitim* vests in the children *ipso jure* without confirmation; but it does not constitute a *jus crediti* in them sufficient to entitle them to claim, or to rank in competition with the creditors of the defunct. *Stair*, B. iii. tit. 8, § 44; *Mor's Notes*, pp. cccxlvii-li.; *Ersk.* B. iii. tit. 9, § 17; *Bank. B.* iii. tit. 8, § 15; *Bell's Com.* i. 632; *Bell's Princ.* § 1582, 1949; *Illust.* § 1583; *Kames' Stat. Law abridg. h. t.*; *Hutch. Justice of Peace*, 2d edit. vol. ii. p. 256; *Jurid. Styles*, 2d edit. vol. ii. p. 389. See *Forisfiliation. Jus Relictæ. Dead's Part. Executy. Succession. Collation.*

**Legitimacy.** A child is said to be legitimate which has been lawfully procreated in marriage, or legitimated by the subsequent intermarriage of its parents. All children born of a mother who, at the time of conception, was lawfully married, are presumed to have been begotten by him to whom at the time the mother was married; nor can this presumption be defeated, except by clear evidence that the husband of the mother could not have been the father of the child. Where a marriage is celebrated between parties, one of whom is already married to a person still alive, it would rather appear that *bona fides* on the part of one or both the parents will make the issue of the second marriage legitimate, but the point is not by any means fixed. The only case in which the question has occurred was compromised; but the opinions of the Court are given in *Bell's Case of*

*a putative marriage.* *Ersk.* B. i. tit. 6, § 49; *Bank.* vol. i. pp. 46, 133; *Bell's Princ.* § 1624, *et seq.*; *Illust.* ib.; *Hutch. Justice of Peace*, 2d edit. vol. ii. p. 249; *Tait on Evidence*, 3d edit. p. 488-90; *Shaw's Digest*, p. 320; *Routledge, Dow's Appeal Cases*, iv. 392. See *Bastard. Filiation.*

**Legitimation**; is the act whereby children, born bastards, are made lawful children, or by which certain of the privileges of lawful children are conferred on bastards. This may be accomplished—1. By the subsequent intermarriage of the parents. If, however, either of the parents was married to another person at the time of the birth, the child will not be legitimated by the subsequent marriage. When, again, another marriage has intervened between the date of the birth and the marriage of the parent, it was doubted whether legitimation took place. Voet held that it did so to all effects; while Erskine lays down the doctrine, that although the second marriage may legitimate the bastard in questions with his brothers of the full blood, yet the intervening marriage is so far a mid-impediment, that the children born of it are not prejudiced by the legitimation; *Ersk.* B. i. tit. 6, § 2. It has now been decided that legitimation takes place even although another marriage intervenes; *Kerr*, 6th March, 1840, 2 *D.* 752; but it was not decided in that case what the rights of the children so legitimated were in competition with the children of the intervening marriage. The effect of legitimation seems to follow, although the bastard should have died before the marriage, so as to confer on his descendants all the rights which belong to the children of one lawfully born. Parties domiciled and having bastard children in a country where legitimation *per subsequens matrimonium* is not recognised, cannot legitimate their children by marrying in that country, to the effect of entitling them to succeed to a landed estate in Scotland; *Sheddan*, 1st July 1803, *Fac. Coll.*, *Mor. App. voce Foreign*, No. 6, affirmed on appeal, 2d March 1808. 2. So far as the rights of the Crown are concerned, bastards may be legitimated by letters of legitimation from the Sovereign, which generally empower the bastard, where he has no lawful children, to dispose of his heritage or moveables at any time during his life, and to make a testament. These privileges, however, he now enjoys without letters of legitimation. See *Bastard*. Letters of legitimation cannot affect the rights either of the bastard's lawful children or of third parties; nor can they give the bastard any right to *legitim*, or any other legal right of succession to his father or mother, or any other of his relations, as if he had been a lawful child.

But letters of legitimation may confer a right to succeed *ab intestato* to the bastard, on any one who would have been his heir, had the bastard been a lawful child; for, by conferring this privilege, the Crown only gives that which would otherwise have belonged to itself; *Stair*, B. iii. tit. 3, § 45; *Ersk.* B. iii. tit. 10, § 7. See also *Ersk.* B. i. tit. 6, § 52; *More's Notes to Stair*, p. xxxii.; *Bank*, vol. i. p. 121; vol. ii. p. 278; *Bell's Princ.* § 1627, 2064; *Illust.* § 1627; *Kames' Stat. Law abridg. voce Bastard*. See *King. Bastard. Last Heir. Domicile*.

The question of legitimation *per subsequens matrimonium* depends not on the place of the child's birth, nor on the domicile of the parents at the date of its birth, nor on the place where the marriage was constituted, but solely on the domicile of the parents at the date of the marriage. Consequently, a child born in England of parents domiciled there at the time of its birth, would be legitimated by the subsequent marriage of its parents in England, if at the date of the marriage they were domiciled in Scotland, or in any other country in which the principle of legitimation *per subsequens matrimonium* was recognised. If, however, the parents were domiciled in England at the date of the marriage, the fact that the marriage was constituted in Scotland would not have the effect of legitimation. See the case of *Rose v. Monro*, 15th May 1827, 5 *S. & D.* 605. Reversed in House of Lords, 16th July 1830; 4 *W. & S.* 289; also the case of *Munro v. Munro*, 16th Nov. 1839; 16 *S.* 18. Reversed in House of Lords, 10th August 1840. 1 *Rob.* 492.

A child legitimated *per subsequens matrimonium* cannot succeed to real estate in England. This arises from the law in England in regard to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother. This is held to have been framed for the direct purpose of excluding in the descent of land in England the application of the rule of the civil and canon law, by which the subsequent marriage between the parents was held to make the son born before marriage legitimate. This rule of descent is held to be a rule of positive law annexed to the land itself, and is not allowed to be broken in upon or disturbed by the law of any other country. See the case of *Birchwhistle v. Vardell*, 9; *Bligh*. 32; 2 *Clark and Finelly*, 571; and August 10, 1840, 7 *Clark and Finelly*, 895.

**Lenocinium**; is the husband's connivance at his wife's adultery, and his participation in the profits of her prostitution, or his lending himself in any way, directly or indirectly,

to his own and her disgrace. It affords the wife an available defence against an action of divorce for adultery. The plea was found relevant in a case in which the husband had "caused, prompted, or hounded" the party with whom his wife had committed adultery to attempt to debauch her, although the pursuer averred that he merely intended a trial of her chastity. It has even been found a competent defence to a wife that her husband committed such indecencies towards her as invited others to seduce her. *Ersk.* B. i. tit. 6, § 45; *Lothian's Consistorial Prac.* p. 165; *Bell's Princ.* § 1534; *Illust.* ib. See *Divorce*.

**Leonina Societas**; a partnership in which one partner has all the loss, and another all the gain. *Stair*, B. i. tit. 1, § 3. See *Partnership*.

**Lesemajesty**. See *Leasing making*.

**Lesion**; is the degree of harm or injury sustained by a minor, or by a person of weak capacity, necessary to entitle him to reduce the deed by which he has suffered. *Kames' Equity*, 66, 167, 182, 363; *Thomson on Bills*, 103, 199. See *Minor. Idiot. Facility. Fraud*.

**Lessor and Lessee**; the parties to a lease. The former is the landlord or grantor of the lease; the latter the tenant in whose favour it is granted. *Ersk.* B. iii. tit. 3, § 15, 16. See *Lease*.

**Lethal Weapon**. In ordinary language, this term seems to import some such weapon as a sword, knife, or pistol; but, in cases of homicide, the law holds every weapon to be lethal by which a human being has died. *Hume*, i. 260; *Steele*, 82; *Alison's Princ.* 7.

**Letters**. Our ancient deeds were in the form of letters addressed to all and sundry, or to certain descriptions of persons, according to the nature of the subject; and more formal deeds, as the charter and judicial writs under the Signet, bear still the form of letters.

**Signet Letters**; are writs for enforcing the decrees of courts, or for attaching the property of debtors, or for citing defenders or other parties in actions before the Court of Session. These run in name of the Sovereign, and are authenticated by the Signet. See *Horning. Caption. Inhibition, &c. Summons. Advocation, &c.*

**Letters of Four Forms**; were warrants for successive charges to debtors to pay before the penalty of rebellion was incurred; now abolished. *Stair*, B. iii. tit. 2, § 22; *Bank*. ii. 260; *Menzies' Lectures*, 278.

**Letters of Marque**; are warrants for reprisal, where British subjects are injured in their persons or goods by the subjects of foreign countries who refuse redress. *Stair*, B. ii. tit. 2, § 1; *More's Notes*, cliii.; *Bank*. i. 520.

**Missive Letters**. Where these relate to mercantile affairs, they will bind the parties,



although neither holograph nor signed in the presence of witnesses. But wherever the transaction has no relation to mercantile transactions, in favour of which there is a departure from the established formalities, the letters must be executed agreeably to the statutory requisites, in order to be effectual to produce action; that is, the writer must be named and designed, and there must be witnesses to the subscription, who must also subscribe, and be named and designed; or the writing must be holograph of the granter. *Bank*. i. 333; ii. 171; *Hunter's Landlord and Tenant*, 327; *Bell on Deeds*, 144; *Tait on Evidence*, p. 120; *Bell's Com.* 6th edit. vol. i. p. 53; *Dickson's Law of Evidence*, p. 409; *Menzies' Lect.* 828. See *Deeds. Evidence.*

**Letters Conform.** The letters issued by the Supreme Court in aid of the decrees of inferior judicatures, and authorizing execution in terms of those decrees, were anciently termed *letters conform*. They were granted by the Court of Session upon second summonses, calling the parties to the Court of Session to hear and see the letters granted, or show cause on the contrary; and the sentence pronounced on that occasion was called a *decreet conform*. The same object is now attained by bills presented in the Bill-Chamber, and passed of course. *Ross's Lect.* vol. i. p. 237; *Kames' Stat. Law Abridg. voce Personal Execution*. See this subject more fully explained under the article *Decree Conform*. See also *Bills of Signet Letters. Diligence.*

**Letter of Attorney**; in English law, a writing, authorizing another person, who, in such case, is called the attorney of the party appointing him, to do any lawful act in the stead of another; as to give sasine of lands, receive debts, or sue a third person, &c. *Tomlins' Dict. h. t.* See *Mandate*.

**Letters of Correspondence.** In criminal trials, letters of correspondence may be produced in evidence against the panel. A letter of a third party found in the panel's possession is not of itself evidence of its contents against him, since it may have been sent through mistake or malice. But a letter from the panel is evidence against him. *Hume*, ii. 395; *Steele*, 25; *Alison's Prac.* 611. Such letters may also be given in evidence in civil causes. See *Production. Evidence.*

**Letter of Credit**; a letter written by one merchant or correspondent to another, requesting him to credit the bearer, or a particular person named, with a certain sum of money, or to furnish him with goods. It was at one time held that no action would lie on a letter of credit, unless intimation were made of the furnishings, or advances made on the faith of it; but it is now fixed that no such intimation is necessary, and that the writer

of every such letter is bound to understand that it may have been acted upon to its full extent. The terms of every letter of credit must be strictly complied with, otherwise no claim will arise against the writer; and a letter of credit addressed to one person cannot be transferred to another, so as to bind the writer. In the case of a proper or simple letter of credit, the debt constituted by its being complied with is between the writer and the person addressed; but the letter may be conceived in such terms as to raise a debt also against the person who is supplied by the mandatory. Where the letter is purchased with money, or for some other onerous consideration, by a person wishing for credit on a merchant at a distance or abroad, the holder of the letter incurs no debt by the letter being complied with. Where, again, the letter is not paid for, and merely contains an engagement to see the advances furnished to the holder made good, it becomes a written guarantee, and raises a debt against the person accredited in the first instance, and then against the writer of the letter, as his cautioner. *Stair*, B. i. tit. 11, § 7; *More's Notes*, lxxii.; *Bank*, i. 367; *Bell's Com.* i. 370; *Thomson on Bills*, 28; *Tomlins' Dict. h. t.*

In the case of *Orr and Barber v. Union Bank*, Jan. 31, 1852, 14 D. 395, a clerk of the pursuers, in whose favour a letter of credit had been granted by the defenders, obtained payment of the amount on a forged order. The Court held that no action lay against the defenders for repayment of the sum paid to them for the letter of credit, on the ground that the letter itself was not produced, it being in the hands of the defenders' correspondent. This judgment was reversed in the House of Lords, on the ground that the defenders were bound to show that the letter of credit had been complied with, or pay back the money they had received, and that the proper evidence that the letter of credit had been complied with was a draft by the party in whose favour it had been granted; August 7, 1854; 1 *Macqueen*, 513. By the act 16 and 17 Vict. c. 59, 1853, letters of credit are liable in a penny stamp-duty, and the stamp may be either impressed or affixed. By the same act (§ 19) bankers are not liable to pay a second time who have paid on a forged indorsation of a cheque.

**Letter of Guarantee**; an undertaking, in writing, to answer for the payment of a debt, or the performance of some engagement, in case of the failure of another person liable in the first instance. See *Cautionary. Guarantee.*

**Letter Stealing.** This offence was formerly capital; but by 5 and 6 Will. IV. c. 81, explained by 6 Will. IV. c. 4, transportation or imprisonment was substituted as the punish-

ment. Persons in Scotland accused of letter stealing are not entitled to insist on liberation on bail. But it is discretionary to the Court of Justiciary, or the sheriff, or sheriff-substitute, to admit such persons to bail. 6 Will. IV. c. 21. See *Bail. Post-Office Offences*.

**Letters, Franking of.** See *Franking*.

**Levant and Couchant;** in English law, a legal term for cattle that have been so long on the ground of another as to have lain down and risen again to feed. *Tomlins' Dict. h. t.*

**Levari Facias;** in English law, a writ of execution directed to the sheriff for levying a sum of money upon a man's lands and tenements, goods and chattels, who has forfeited his recognisance. *Tomlins' Dict. h. t.; Kames' Equity*, 390.

**Levity.** See *Imbecility. Facility*.

**Lewd, indecent, and libidinous practices** and behaviour towards females under the age of puberty, constitute an offence subject to arbitrary punishment. *Hume*, i. 309; *Bell's Notes*, 85; *Alison*, i. 225; *Philip*, 2 *Irvine*, 243.

**Lex Apparens;** according to the definition of Skene, is the law concerning single combat. *Skene, h. t.*

**Lex Loci Contractus.** In questions as to obligations contracted in one country, of which implement is sued for in another, the law of the country where the obligation was contracted is called *lex loci contractus*, and governs everything which relates to the nature of the obligation, *ad valorem contractus*; while the *lex fori*, or law of the country to whose courts the application is made for performance, or for damages, regulates whatever relates to the remedy, by suits, to compel performance, or by action for a breach *ad decisionem litis*. *Thomson on Bills*, 157. See *Foreign, and authorities there cited*.

**Lex Rhodia.** See *Rhodia Lex. Contribution*.

**Lex Talionis;** a rule of the judicial law of Moses, directing the punishment to be analogous to the crime;—an eye for an eye, and a tooth for a tooth. Thus, if one swore falsely that another was guilty of a capital crime, the swearer was himself punished capitally. This law does not seem ever to have been established in any civilized state. It was at one time attempted to introduce the *lex talionis* into England in the case of malicious accusations; it being enacted, by statute 37 Ed. III. c. 18, that such as preferred any suggestions to the King's Great Council should put in sureties of taliation. But, after one year's trial, this punishment of taliation was rejected, and imprisonment adopted in its stead. *Deut. xix. 16, et seq.*; *Stair*, B. i. tit. 9, § 2; *Ersk. B. iv. tit. 4, § 75*; *Tomlins' Dict. h. t.*

**Libel.** This term, in the law of Scotland, is used in different significations; it is applied

to the form of the complaint, or the ground of the charge on which either a civil or criminal prosecution takes place. It is also applied to scandal reduced into writing.

**Criminal Libel.**—For an account of the criminal libel, see *Indictment. Criminal Letters. Criminal Prosecution. Amendment of the Libel*.

**Libel in a civil action.**—The libel in the Supreme Civil Court is contained in letters passing under the Signet, called a summons, addressed to messengers-at-arms as sheriffs in that part. See *Summons. Amendment of the Libel*.

**Libel.**—Scandal reduced into writing, and published or circulated, is, of all others, the most public and permanent, and ought, therefore, to be punished with greater severity than where the scandal is merely spoken; the *animus injuriandi* is likewise more clearly evinced. This offence may be the foundation of a criminal prosecution, or of a civil action for reparation, or of a combination of both actions. The offence consists either in turning the person into ridicule or in blackening his moral character; and the punishment will be proportioned to the nature of the offence, and the malignity of the disposition which the offender may have discovered. *Ersk. B. iv. tit. 4, § 81*; *Bank. i. 250*; *Bell's Princ. § 2043*; *Shaw's Digest*, 510. See *Injuries. Veritas Convicii. Defamation. Damages*.

**Liberation.** Where a debtor is imprisoned under letters of horning and caption for non-payment of a debt, he is considered, not only as indebted to his creditor, but as guilty of civil rebellion. Hence, formerly, the mere payment of the debt was not sufficient to entitle the debtor to his release; it was further incumbent on him to present a bill of suspension and liberation, stating the fact that he had paid the debt, and praying to be liberated from prison. The expense with which this was attended seems to have moved the Court to take the situation of debtors into consideration; and accordingly, by Act of Sederunt, 5th December 1675, they authorized jailors to set debtors in small sums at liberty without the necessity of the form of a suspension and liberation. And, by the present practice, the mere payment of the sum for which the debtor is booked in the jail books entitles him to be immediately liberated—a suspension and charge to set at liberty being in no case necessary where a person incarcerated for non-payment of a civil debt, or for non-performance of a civil obligation, pays the debt or performs the obligation.

Under the statute 1701, c. 6, any person in custody for trial is entitled to call upon the prosecutor to bring him to trial within a reasonable period; and in the event of undue delay on the prosecutor's part, to obtain his

liberty. The prisoner may run his letters, that is, he may apply in writing to any of the Lords of Justiciary, or other judges or judicatory competent for judging the crime or offence for which he is imprisoned; and within twenty-four hours, the judge must issue precepts to intimate to the public prosecutor and party concerned, if there be such, to fix a diet for trial,—under certification, that the prisoner shall be set free if a diet for trial be not fixed within sixty days. If the prosecutor fail to fix a diet, the prisoner may apply to any Lord of Justiciary or judge competent, who, on the matter being duly instructed, is bound, within twenty-four hours, to grant warrant for his release. The diet for trial before an inferior court may be any time within thirty days after the expiration of the sixty days; but the whole proceedings must be brought to a close within the thirty days, so that the prisoner may not be detained beyond ninety days in all from the date of his intimation, unless delay has taken place on the prisoner's own account and request. If the prosecutor fixes a diet within the sixty days, the additional thirty days for completing the proceedings begin to run from that date. If the prosecutor does not insist at the diet appointed, or does not bring the whole proceedings to an end within the time allowed, the prisoner may apply for release, which must be granted, just as if the diet had not been fixed within the proper time. When the trial is before the Court of Justiciary, instead of thirty days, the period within which the trial requires to be concluded is forty days. A prisoner once liberated on the ground of a diet not having been fixed, cannot be recommitted on the same charge, except upon new criminal letters from the Court of Justiciary, and on these his trial must be terminated within 100 days from the date of intimation; or, in the Court of Justiciary, within forty days from the time when the criminal letters are executed on the prisoner. If this is not done, he is entitled to a complete and final discharge for the offence. Refusal or delay on the part of judges or officers to give effect to this statute, makes them liable to penalties for wrongous imprisonment, which are recoverable in the Court of Session. Gross and wilful disregard of the law exposes the offender to the pains of loss of office and incapacity for public trust. The act does not apply to trials for forgery or fraudulent bankruptcy before the Court of Session; but it does to all such trials before the Justiciary Court. See 11 and 12 *Vict.*, c. 79, § 3; *Ersk. B. iv. tit. 3, § 15*; *Bell's Com.*, 6th edit. 1077, *et seq.*; *Bank. vol. i. p. 64*; *vol. iii. p. 8*; *Hutch. Just. of Peace*, 2d edit. *vol. i. p. 479*; *Ross's Lect. i. 346, et seq.*

*Hume*, ii. 98; *Alison's Prac.* 182. See *Imprisonment. Booking a Prisoner. Caption. Bail. Criminal Prosecution. Criminal Letters. Wrongous Imprisonment.*

**Liberatio**; according to Skene, is a livery or fee given to a servant or officer. *Skene, h. t.*

**Liberatorium Pactum.** See *Pactum Liberatorium.*

**Liberum Tenementum**; according to Skene, commonly and properly called frank tenement or liferent; sometimes also used for the property, fee, or heritage. *Skene, h. t.*

**Liberty.** Every one is held to have a right to the enjoyment of absolute personal freedom, until he forfeits that right by committing crime or incurring debt; and, in order to prevent the abuse of these legal restraints on freedom, statutes have been passed, both in England and Scotland, for the purpose of providing against illegal imprisonment. In England there is the *habeas corpus* act; in Scotland, the act of 1701, c. 6, "for preventing wrongous imprisonment." See *Habeas Corpus. Wrongous Imprisonment.*

**Libraries.** On the principle, that no effectual entail can be made of property upon which infestment cannot follow, a library, or paintings, or other personal effects, though sometimes included in deeds of entail, are nevertheless liable to be attached by the diligence of the creditors of the heir in possession. *More's Notes on Stair*, clxxx. See *Heirship Moveables.*

**License.** See *Attorney's Certificate.*

**License**; a power or authority given to a man to do some lawful act. It is personal to the party on whom it is conferred; and cannot be assigned, unless it bear to be given to a man and his assignees.

**License to Sell Spirits.** No person is entitled, directly or indirectly, to keep any alehouse, tipping house or victualling house, or to sell ale, beer, spirits, strong waters, or other exciseable liquors, by retail, unless he have received a certificate from the local magistrates; and no one can actually retail exciseable liquors unless he possess an excise license, which cannot be granted without production of the previous certificate. The statutes regulating this matter contain provisions relative to the meetings of justices, the applications for certificates, the renewal and transference in the event of the death or removal of the person licensed, and as to the breach of certificates, appeals against decisions, the penalties to be exacted and the like, for which reference is made to the existing act. See *Alehouses, and authorities there cited*; also 6 *Geo. IV.*, c. 81; 4 and 5 *Will. IV.*, c. 75; 5 and 6 *Will. IV.*, c. 39; 6 and 7 *Will. IV.*, c. 72. In like manner, the makers and distil-

lers of spirits require what are called *general licenses*, without which they are not authorised to make or deal in spirits and other exciseable commodities. The limits of this work, however, necessarily preclude any analysis of the various statutory regulations on this subject, all of which will be found digested in *Huie's Excise Laws, voce Licenses*.

By the act 16 and 17 Vict., c. 67, 1853, no certificate for the sale of spirits, wine, or other exciseable liquors can be granted, unless on the express condition that no groceries or other provisions to be consumed elsewhere shall be sold on the premises to which the certificate applies. Grocers, however, may obtain certificates for the sale of porter, ale, spirits, &c., and other exciseable liquors, by retail, but not to be consumed on the premises, at the same rate as is exigible for a certificate for a public-house. No certificate can be granted to blacksmiths, tacksmen of tolls, or toll-gatherers, or to any person occupying a house not hitherto licensed, situated at or near any toll-bar. One of the conditions annexed to the certificate is, that liquors shall not be sold before eight o'clock in the morning, and after eleven o'clock at night; nor on Sunday, except in the case of inns and hotels, and then only for the accommodation of lodgers and *bona fide* travellers. The police are empowered to enter any public-house, or any house where refreshments are sold to be consumed on the premises. A Commission has been appointed to inquire into the operation of this act, and evidence is now (1859) being taken in regard to it.

**License to Kill Game.** See *Game Laws*.

**License to Preach.** After the applicant for a license to preach has been subjected to his trials, the presbytery pronounce their judgment. If dissatisfied, they remand the student to his studies, or appoint new trials for him to undergo, or refuse altogether to license him. If their judgment is favourable, certain questions are put, and when the student has given satisfactory answers, he subscribes the formula in which the substance of the questions is embodied. The act against simony is then read to him in presence of the presbytery; the moderator is appointed to license him to preach the gospel; and the clerk is ordered to furnish him with an extract of his license. A license to preach, obtained without the bounds of the Church of Scotland, disqualifies a presentee to a parish. *Hill's Church Prac.* 44, 47, 64; *Gillan's Acts of Assembly, vocibus Probationer's Ordination. See Minister.*

**License to Pursue;** is an authority given by the commissaries to an executor, which entitles him to pursue the debtors of the deceased, but not to take decree. *Ersk. B. iii.*

*tit. 9, § 39; Stair, B. iii. tit. 8, § 56; Bank. ii. 395. See Confirmation. Executor.*

**Licking of Thumbs;** a symbolical mode of indicating that a bargain has been concluded. It is occasionally practised in bargains of minor importance amongst the lower classes. *Ersk. B. iii. tit. 3, § 5.*

**Lieges.** The Queen's subjects.

**Liege Poustie;** is that state of health which gives a person full power to dispose *mortis causa*, or otherwise, of his heritable property. The term, according to our institutional writers, is derived from the words *legitima potestas*, signifying the lawful power of disposing of property at pleasure. It is used in contradistinction to *deathbed*—a *liege poustie* conveyance being a conveyance not challengeable on the head of deathbed; see *Ersk. B. iii. tit. 8, § 95*. The tests of *liege poustie*, opposed to the presumption of deathbed, are, survivance during sixty days, and going to kirk or market unsupported. *Stair, B. iv. tit. 20, § 40; More's Notes, p. cccxiii; Bell's Com. i. 85, 5th edit.; Bank. vol. ii. p. 303; Bell's Princ. 3d edit. § 1788; Shaw's Digest, p. 160. See Deathbed. Morbus soniticus.*

**Lien;** in English law, an obligation, tie, or claim annexed to, or attaching upon, any property, without satisfying which, such property cannot be demanded by its owner. Before the introduction of the term *lien* into Scotch legal phraseology, the right to retain the property of a debtor was recognised under the name of the right of *retention*; but of late, it has become general to employ the terms *lien* and *retention* indifferently to signify the same right. Mr More, indeed, draws a distinction between the two, holding that the right of retention was originally much wider in its operation than *lien*, being borrowed from the Roman law, and having been recognised and acted upon, before compensation was allowed to be pleaded by way of exception or defence. The right of retention he holds to have been a necessary counterpart of the diligence of arrestment in security. It would be a strange anomaly, he observes, if a third party could, by arrestment, compel the holder of any fund or article belonging to their common debtor, to retain it in security of his debt, while the holder himself could not retain it in security of a similar debt due to himself. In England, no right of retention at common law is recognised; and the *lien* of the English law is rather of the nature of an equitable encroachment upon the common law, proceeding upon the principle of implied agreement; *More's Notes on Stair, cxxxi*. Whatever may have been the extent to which retention was originally permitted in the law of Scotland, it

would rather appear that such a general right as that here spoken of, comprehending all cases where there is legitimate possession and a debt due to the possessor, is now no longer recognised; *Bell's Princ.* § 1431. The practical results of the English lien and the Scotch retention being now nearly assimilated, they will both be considered in this Dictionary under the general head *Retention*.

**Lieutenant**; an officer who supplies the place and discharges the office of a superior in his absence. The *Lords-Lieutenant* of counties are officers appointed by the Crown, who, upon any invasion or rebellion, have power to raise the militia, and to give commissions to colonels and other officers of that force, and to arm and form them into regiments, troops, and companies. Under the lords-lieutenant are deputy lieutenants, who are appointed by the lord-lieutenant, and presented to the Sovereign for approbation. A deputy lieutenant must be seised or possessed of an estate in property, either in his own right or in right of his wife, of four hundred pounds Scots of valued rent in Scotland, or be heir-apparent of some person seised or possessed of a like estate. And those who, being unqualified, or who, without delivering in their qualifications, act as deputy lieutenants, are liable to a penalty of L.100. The duty of the courts of lieutenancy is to superintend the balloting for the militia, and to make regulations concerning the volunteer forces. Regulations have been enacted by various statutes for the granting commissions in the militia by the lord-lieutenant, and carrying on the other business connected with the militia. The militia acts passed previously to 42 Geo. III. c. 91, were consolidated and superseded by that statute, which, although followed by other enactments, continues the groundwork of our militia law. When the services of the militia are not required, an annual act is passed suspending the operation of the militia statutes. But when these acts are in operation, a general meeting of the lieutenancy of every county, stewartry, city, and place is directed to be held at least once a year. These general meetings consist of the lieutenant, together with two deputy lieutenants at the least; or on the death or removal, or in the absence of the lieutenant, then of three deputy lieutenants at the least. At this annual meeting the lieutenant and two deputy lieutenants, or the three deputy lieutenants, may summon other general meetings on any days they may fix upon. Sub-division meetings consist of two deputy lieutenants at the least, or one deputy and a justice of peace. In questions arising out of the proceedings of courts of lieutenancy under

the militia statutes, the Court of Session, before holding it competent to interfere, have required very strong *prima facie* evidence of excess of powers. In one case, a bill of advocation or suspension was held to be incompetent, although there was reason for thinking that the commissioners had exceeded their statutory powers; and in another case, it was held to be settled that the excess of power must be flagrant before the Court of Session can be warranted to interfere, and stop or impede ministerial acts, conducted under colour at least of parliamentary authority, on which the general safety may depend. *Ersk. B. i. tit. 2, § 7, note by Mr Ivory; Hutch. Justice of Peace, 59, et seq.; Kames' Stat. Law abridg. voce Lord-Lieutenant.* See *Militia*.

**Life.** Life is presumed in law to extend to the age of 100 years, unless death be proved. What circumstances and presumptions shall be proof of death is a question of evidence. Several cases on this point are cited in *Tait on Evidence*, 478. See also *Stair, B. iv. tit. 45, § 17, 19thly; Ersk. B. iv. tit. 2, § 36; Bank. ii. 668; Brown's Synop. 1727; Bell's Princ. § 1640; Illust. ib.*

**Life Estates**; in English law, estates of freehold, not of inheritance, analogous to the Scotch liferents. *Tomlins' Dict. h. t.*

**Liferent.** A liferent right entitles the liferenter to use and enjoy the subject of the liferent during life, without destroying or wasting its substance, or *salva rei substantia*, according to the expression of the Roman law. The proprietor of the subject is called the *fiar*; the subject, which is either a sum of money or an heritable subject, is called the *fee*; and the person in possession the liferenter. The legal liferents of the Scotch law are the *terce* and the *courtesy*. See *Kenning to the Terce. Courtesy*.

Conventional liferents of heritage are divided into simple liferents, and liferents by reservation. The former are constituted by a grant containing a precept of *sasine*, in virtue of which *sasine* must be taken, and recorded, in order to render the right effectual against the creditors and singular successors of the granter. This right is regulated by the terms of the grant; and although the profits of it may be conveyed to another by assignation, the continuance of the right depends entirely on the life of the original grantee. A liferenter by reservation is more like a limited *fiar* than a mere liferenter. Such a liferenter must have originally possessed the whole property under his own *sasine*; and therefore, when he conveys the *fee*, reserving his own liferent, that reserved right rests on his original *sasine*, and requires no new infeftment for its constitution. Hence

a liferenter by reservation, who has previously been infeft in the lands, is permitted to enter vassals, which a liferenter by constitution, or a liferenter by reservation, whose right was merely personal, cannot do; *Ersk. B. ii. tit. 9, § 42.*

Liferenters are entitled to the fruits and annual produce of the subject liferented; and they may possess by themselves, their servants or tenants; but the trees planted for ornament cannot be cut down by the fiar during the currency of the liferent. The liferenter must leave the subject in as good condition as that in which it was at the commencement of the liferent; hence a liferenter has no right to cut timber unless it grows again after being cut, or has been divided into hags and laid out in annual cuttings. But a conjunct fiar, or a liferenter by reservation, is entitled to cut timber come to maturity, though not laid out in hags, which, according to the practice of the country, is accustomed to be cut at maturity. Such liferenters are also entitled to cut wood of mature growth, for the purpose of maintaining the houses, &c., in tenantable condition. The liferenter is entitled to windfalls and underwood. A liferenter has no right to the mines or minerals; and where a right to coal is given, he cannot increase the average quantity which has been usually brought up. The obligation not to waste the subject exposes a liferenter to an action, at the instance of those interested in the estate, to find caution that he shall preserve the subject in the same condition in which it stood at the time of his entry; 1491, c. 25; and should he refuse to find caution, he may, under the act 1535, c. 15, be excluded from possession until he complies; *Ersk. ibid. § 59.* The liferenter of a house is bound to make the usual and necessary repairs; but if the house, from natural decay, becomes untenable in the course of the liferent, the liferenter is not bound to repair it, neither is the fiar. But should the liferenter be at this expense, he should do it under warrant of the judge ordinary; and, in that case, the expense incurred may form a burden on the fiar on the expiration of the liferent. Or, should the repair be made by the fiar, he will be entitled to claim from the liferenter the interest of the money expended in repairing the subject. See *Houses.* As to the liferent of furniture, see *Furniture.* Liferenters are liable in the burdens affecting the subject liferented, as feu-duties, minister's stipends and taxations; but not to occasional burdens, such as the building or repairing of churches or manses. The liferenter of a landed estate is also said by institutional writers to be burdened with the support of the heir, when he has no other fund of sub-

sistence, though this does not take place in liferents of sums of money. And even in the case of a landed estate, such a claim would not now be listened to with much favour, and would not in any view be extended so as to deprive a liferentrix under a marriage-contract of any part of what is requisite for her own support. Nor does this claim affect the creditors of a liferenter. See *Aliment.* A liferent right is extinguished by the death of the liferenter; and the interest of his executors in competition with the fiar depends on the precise time of his death, and the state of the liferented subject. Where it is let to tenants, the liferenter's executors, if he survive the term of Whitsunday, have right to one-half of that year's rent; if he survive the term of Martinmas, his executors have right to the whole year's rent; and that although the conventional terms of payment of the rent may fall much later. Where a liferenter dies on the term-day of Martinmas or Whitsunday, the rent of that term is transmitted to his executors. For this purpose it was at one time held that he must have outlived the noon of the term-day; but it is now settled that the executors are entitled to the preceding term's rent, if the liferenter lives until the morning of the term-day. The executors are also entitled, under the Apportionment Act, to the proportion of the rent accruing between terms, for the period during which the liferenter survived. Where the subject of the liferent is in the natural possession of the liferenter, the executors have right to the crop of such parts of the lands as have been sown by the liferenter, but to no more. In a liferent of money due on a personal bond, the executor has a right to interest down to the day of the liferenter's death. Mills, though their profits are drawn *de die in diem*, are yet, from their connection with land, regulated by the same rules which apply to lands; and so also is a liferent annual payment in grain. But the liferents of fishings, collieries, salt-works, and other subjects, the profits of which arise from continual daily labour, are computed *de die in diem* until the liferenter's death, and do not depend on any particular terms. The same rules which regulate the termination of a liferent right regulate also its commencement, where that depends on the death of a person in possession. A liferenter of a superiority has right to the feu-duties, but not to the casualties, unless he be a liferenter by reservation. The liferenter gets the dividends or interest of bank stock, and the interest on a bonus, but not the bonus itself. Liferenters are not entitled, in the absence of express stipulation, to grant feus or leases effectual beyond the liferent. A liferenter is entitled to exercise the right of

patronage. As to the right of voting for a member of Parliament, see *Fiar*; 2 and 3 *Will. IV.*, c. 65, §§ 7, 8; 5 and 6 *Will IV.*, c. 78, § 10. Liferent is extinguished not only by the death of the liferenter, but also by renunciation without recording. *Ersk. B. ii. tit. 9, § 40, et seq.*; *Stair, B. ii. tit. 3, § 74*; *tit. 6*; *B. iii. tit. 1, § 16*; *More's Notes*, p. cexii.; *Bell's Com. i. 54*; *Bank. vol. i. p. 657*; *Bell's Princ. § 1037, et seq. 2198*; *Illust. § 1037*; *Kames' Stat. Law Abridg. h. t.*; *Hunter's Landlord and Tenant*, p. 95; *Bell on Leases*, 4th edit. i. 186, 216, 223; ii. 102, *et seq.*; *Sandford's Heritable Succession*, vol. ii. pp. 117, 120; *Bell on Purchaser's Title*, 2d edit. p. 92; *Ross's Lect. ii. 484*; *Thomson, Dow's Appeal Cases*, i. 417. See *Conjunct Fee. Fee and Liferent. Fiar. Terms, Legal and Conventional.*

**Liferent Escheat.** See *Escheat*.

**Ligantia**; according to Skene, is a league, bond, or obligation. *Homagium ligium*, is homage without any exception; *homagium non ligium*, is homage made to an overlord, with reservation of the fidelity due to the King or an elder overlord. *Skene, h. t.*

**Light.** The servitudes of light and of prospect are servitudes whereby the servient proprietor is restrained from building or planting on his own grounds, or from otherwise exercising his right of property, so as to intercept the light or prospect of the dominant tenement. There is no such implied restraint on the use of property. On the contrary, every proprietor is entitled to make any use he pleases of his property, however detrimental to his neighbour's lights or prospect, provided such use is not wanton and emulous, or objectionable under the law of nuisance. This servitude from its nature seems to require writing towards its constitution; the exercise of a conterminous proprietor's right to intercept, being what is called *res mercæ facultatis*, i. e. a right which he may exercise or not at pleasure, and which he will not lose *non utendo* for any period, however long. But a restraint on the free exercise of this right may be imposed by an express permission, or tolerance, of a certain number of windows looking into the adjoining property. It would also appear that a servitude of light does not imply a servitude of prospect also, an *ell's* distance having in one case been held sufficient for light, where there was no servitude of prospect. In connection with this subject it may be observed, that although a conterminous proprietor may strike out windows, so as to overlook his neighbour's grounds or garden, yet a restraint on this use of property, of the nature of a servitude, may also be created; or the party so looked in upon (if his neighbour have no servitude *non officendi liminibus*), may raise a screen or wall for the express purpose

of obstructing the view from such windows, and securing his privacy. *Glassford*, 12th May 1808, *M. App. Property*, No. 7; *Forbes*, 1st July 1724, *M. 14505*; *Ogilvy*, 5th Feb. 1678, *M. 14534*; *Ersk. B. ii. tit. 9, § 10*; *Bell's Princ. § 1015, and authorities there cited*; *Stair, B. ii. tit. 7, § 9*; *Hutch. Justice of Peace*, 2d edit. vol. ii. p. 395; *Shaw's Digest*, p. 565. See *Emulatio Vicini*.

**Limitation**; in English law, a certain time, assigned by statute, within which an action must be brought. This matter is regulated by certain acts of Parliament, called statutes of limitation. An impression has long been prevalent, that the limitation of the English corresponds exactly to the prescription of the Scotch law. But this seems to be a mistake, arising from the term prescription being applied to two distinct modes in which obligations are extinguished by lapse of time. In some cases where a certain period has elapsed from the time when the obligation was contracted, the *jus crediti* is presumed to be abandoned, or the obligation is presumed to be satisfied, and so extinguished. In other cases, after the lapse of a certain time, action is denied on an instrument or document of debt, without regard to the actual subsistence of the debt. It is this latter mode which has been considered analogous to the English limitation; and, accordingly, recent authors have applied to it the term limitation, and confined the term prescription to the former mode, i. e. to the absolute extinction of the debt. In this sense bonds of caution are said to be limited to seven years, bills and notes to six, and holograph writings to twenty; that is to say, they are, on the lapse of these respective periods, of themselves incompetent grounds of action or of summary diligence; although the debt which they contain may be established by other proof. But when a debt is extinguished by the lapse of forty years, the obligation is said to be prescribed, not limited. The distinction is important, and recourse is frequently had to it in argument; but the custom has been so long established of classing all these modes of dissolving obligations under one name, that it would not be advisable, in a practical work like the present, to separate them. They are therefore all treated of in the article *Prescription*.

**Linen Manufacture.** The linen manufacture was the object of several statutes before the Union. See 1693, c. 29. After the Union, a new system of regulations was adopted. The statute 13 Geo. I., c. 26, authorised the establishment of a board of trustees; and afterwards a board was instituted accordingly, which has been since considered as in some measure vested with the functions of the

Scotch Privy Council. For the particular regulation of the linen manufacture, see 13 *Geo. I.*, c. 26; 18 *Geo. II.*, c. 24 and 25; 24 *Geo. II.*, c. 36; 22 *Geo. III.*, c. 36.

**Lining, Brieve of.** This was one of the brieves not retourable. It was directed to the provost and bailies for settling the boundaries of disputed property within burgh,—“*lineari faciatis tenementum terræ de B.*”—“*et sic ut dictum tenementum per dictos limitores liniatum fuerit, ita illud de cæteris firmiter faciatis observari.*” The formal issuing of such brieves is now almost entirely in desuetude, the dean of guild and his council being judges in all such matters. *Stair*, B. iv. tit. 3, § 13; *Bell's Princ.* § 2241; *Jurid. Styles*, i. 419. See *Dean of Guild. Dean of Guild Court.*

**Lint.** Lint is prohibited to be steeped in lochs and burns under a penalty of 40s. *toties quoties*, and confiscation of the lint to the poor of the parish; because it infects the water, kills the fish, is prejudicial to the cattle, and noisome to the neighbourhood; 1606, c. 13; 1685, c. 20. By a later statute, lint or hemp may not be steeped in any bog-hole, peat or moss or tan-pit, nor watered for two years successively in a pool or hole of standing water, unless the pool be near a running stream where fresh water may be often let in, under pain of forfeiting the hemp or lint for the use of the informer. 13 *Geo. I.*, c. 26, §§ 4, 31, 32; *Ersk. B. iv.* tit. 4, § 40; *Tait's Justice, h. t.*; *Blair's Justice, h. t.*

**Liquid.** A liquid debt is a debt the amount of which is ascertained and constituted against the debtor, either by a written obligation or by the decree of a court. *Stair*, B. i. tit. 18, § 6; *Ersk. B. iii.* tit. 4, § 16; *Bell's Com.* i. 734; *Bank. i.* 492. See *Compensation.*

**Lis Pendens**; an action depending in court. It is a defence in an action that the same claim is the subject of a *lis alibi pendens*. It has been decided, in several cases, that the defence of *lis pendens* between the parties, in a foreign court of competent jurisdiction, is no bar to a similar action being tried in Scotland. A recent writer draws a distinction between the case where the defender has deserted the foreign law-suit, and has retired to Scotland, and that where he has found caution in the foreign country, and is going on with the suit there; and observes, that in the latter case, *lis alibi pendens* is a good defence, though not in the former. The English courts observe the same rule of rejecting the defence of *lis pendens* in Scotch courts. An action is depending whenever the summons is executed, and no other action can be raised till it is discharged; but the *lis pendens* must be regular, and the very same matter must be depending before another court.

It is no bar to an action of reduction and declarator against the creditors of a person deceased, to have it found that the pursuers do not represent their parents, that an action against them, on the ground of representation, is in dependence before the sheriff. A party cannot resort to an action of damages in the Supreme Court, after having instituted a similar action on the same *species facti* in another court. Where an action is depending in an inferior court, and one on similar grounds is brought in the Court of Session, the plea of *lis alibi* cannot be competently obviated by advocating the former *ob contingentiam*. It has been held competent for a sheriff, in vacation, to grant warrant, on application, to sell grain, and consign the price in Court, where delay might affect the value, although the grain was the subject of an action depending before the Court of Session, the pleas of parties on the merits being reserved, *Bannatyne*, iii. D. 429; *More's Notes to Stair*, p. xi; *Bell's Com.* 6th edit. 935; *Bank.* vol. ii. p. 627; *Macfarlane's Jury Prac.* p. 54; *Maclaurin's Sheriff Process*, p. 78; *Shand's Prac.* 200; *Brown's Synop.*, voce *Lis alibi*. See *Defences. Exceptions.*

**Literary Property**; or copyright; is the property which an author or his assignee has in any literary work. The question has been much agitated whether, at common law, and independently of statute, the copyright vests in the author, so as to entitle him to claim reparation and damages from those who infringe his right. But it has been finally settled, both in Scotland and England, that the copyright of published works is protected by statute alone. The rule is different with respect to unpublished works, which are property at common law. The first statute on this subject was 8 Anne, c. 19, by which it was provided, that the author of any book should in future have the sole liberty of printing it for fourteen years; and if alive at the end of that term, for another period of fourteen years; and if any person should, within that time, print, reprint, or import such book, without the consent of the proprietor in writing, or should knowingly publish it without such consent, he should forfeit the books and sheets to the proprietor, and one penny for every sheet found in his custody, one-half to the Crown, and one-half to the prosecutor. But to entitle the author to the benefit of the statute, the whole book, and every volume thereof, must, under the act 15 Geo. III., c. 53, § 64, have been entered in Stationers' Hall, and sixpence paid for such entry; and nine copies of the book must have been delivered to the company's warehouse-keeper, before publication, for the use of the royal library, the libraries of Oxford and Cambridge,



Sion College in London, the four Universities in Scotland, and the Advocate's Library; and also (by 41 Geo. III., c. 107, § 6) to Trinity College and King's Inns, Dublin. The regulations as to the delivery of copies to the public libraries fixed by 54 Geo. III., c. 156, were, that eleven copies of all works whatever, printed or published, should be delivered to the several universities, &c., if demanded, within twelve months after publication, but not copies of subsequent or second editions, without alteration, and that amendments of early editions might be printed separately and delivered. By the same statute, all books were required to be entered (within one month, if published in London, and three months, if published elsewhere), at Stationers' Hall, and one copy on the best paper to be then delivered for the British Museum, and 2s. to be paid for each entry, under a penalty of L.5, and eleven times the price of the book; the warehouse-keeper at Stationers' Hall being bound to transmit lists of all publications to the librarians of the libraries entitled to copies, of the publishers, who may themselves, however, if they pleased, have delivered the copies at the several libraries. By 6 and 7 Will. IV., c. 110, the former acts requiring copies to be delivered for the libraries of Sion College, of the Scotch Universities, and the King's Inn Library at Dublin, are repealed. Such an annual sum as may be equal in value to, and a compensation for, the loss sustained, is directed to be paid to the said libraries out of the consolidated fund; to be ascertained and determined according to the value of the books actually received by each library, in such manner as the Commissioners of the Treasury shall direct, upon an average of the three years ending 30th June 1836. The compensation must be applied in the purchase of books of literature, science, and the arts, for the use of the library; and no issue of money can be made until sufficient proof have been adduced of the application of the money last issued.

By the statute 54 Geo. III., c. 156, instead of two terms of fourteen years each, the author's right was extended to twenty-eight years absolute, and to the end of the author's life—the privilege being extended to authors of books published before the date of the statute (1814). The statute 8 Anne, c. 19, was, by 41 Geo. III., c. 107, extended to all parts of the united kingdom of Great Britain and Ireland, and of the British dominions in Europe; which last statute also increased the penalty to threepence *per* sheet; and, in addition, conferred on the author a claim of damages against transgressors. The four Scotch Universities, the two English Universities, and the Colleges of Eton, Westminster, and

Winchester, as also the Trinity College of Dublin, are enabled to hold in perpetuity (under the penalties of the statute 8 Anne) their copyright in books given or bequeathed to them for the advancement of useful learning, and other purposes of education; 15 Geo. III., c. 52; 41 Geo. III., c. 107.

The act 5 and 6 Vict., c. 45, 1842, repeals the acts 8 Anne, c. 19, 41 Geo. III., c. 107, and 54 Geo. III., c. 156, and now regulates the law of copyright. By this act, the copyright of every book endures for the natural lifetime of the author, and for seven years after his death. If, however, the term of seven years shall expire before the end of forty-two years from the first publication of the book, the copyright endures for the term of forty-two years from its first publication. When a book is published after the author's death, the copyright endures for forty-two years. When the proprietor of a copyright of a book refuses to republish it after the author's death, the Privy Council, on complaint to them, may grant a license for its republication. Copies of every book must be delivered to the British Museum, and also, on demand in writing, to the following libraries:—The Bodleian Library at Oxford, the Public Library at Cambridge, the Library of the Faculty of Advocates at Edinburgh, and the Trinity College Library at Dublin. The British Museum is entitled to the best copy published of the book, and the other institutions to one of the ordinary copies only. Importation for sale or hire of any book published in the United Kingdom, and reprinted abroad, is prohibited, except by the proprietor of the copyright, or some one authorised by him. Copyright is declared to be personal property; and a book is interpreted to mean "every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan, separately published."

The property of prints and engravings, and of new models and casts of busts, &c., are secured to the inventors by similar statutory provisions; see 8 Geo. II., c. 13; 7 Geo. III., c. 38; 17 Geo. III., c. 57; 38 Geo. III., c. 71; 7 Will. IV., c. 59, and 15 and 16 Vict., c. 12, 1852. By special statute, the author of any tragedy or any dramatic piece not printed, or of any such printed after or within ten years before the 10th June 1833, has the sole right of representing it, or causing it to be represented at any place of dramatic entertainment for twenty-eight years. Those who infringe this right forfeit forty shillings, or the greatest benefit gained, or the greatest loss sustained, whichever shall be the greatest benefit to the author. The right of action is limited to twelve calendar months after the offence; 3

*Will. IV.*, c. 15. The copyright statutes protect a work consisting of a single sheet, printed separately; or a part of a book, as a tale or a song in a book; and notes on a book; *Bell's Princ.* § 1359; *Illust. ib.* The title of a book or other publication is also protected.

The copyright of designs is now regulated by the act 21 and 22 Vict., c. 90, 1858; and international copyright by the acts 7 and 8 Vict., c. 12, 1844, and 15 and 16 Vict., c. 12, 1852. See *Designs*.

As already mentioned, unpublished documents are property at common law; and the publication of them is an invasion of the owner's right; and even when a manuscript has been given away or sold, the donee or buyer is not entitled to publish it, although he may make any other use of it. Nor is one entitled to take down the words of an unpublished play and afterwards publish it. Doubts having been entertained as to the right of a lecturer to prevent the publication of his lectures, this case has been provided for by statute. The author of lectures, or the person to whom a copy of lectures has been sold or conveyed for the purpose of delivering them in any school, institution, or other place, has the sole right of printing and publishing such lectures. The penalty on others publishing such lectures without leave, is the forfeiture of the copies, and one penny for each sheet. Newspaper printers publishing lectures without leave, are liable to the penalties. No person attending lectures for a fee or reward, is held to have leave to print, copy, or publish them, because of such leave to attend. The right to prevent publication ceases after expiration of the period allowed by the statutes of copyright. The protection does not extend to lectures, of the delivery of which notice has not been given in writing to two justices, living within five miles of the place of lecture, two days at least before their being delivered; nor to lectures in any university, public school, or college, or on any public foundation, or by any individual, in virtue, or according to any gift, endowment or foundation. The law relating to such lectures remains the same as if the act had not been passed; 5 and 6 *Will. IV.*, c. 65. Private letters cannot be published without leave of the writer. This rule is established on different principles in the law of England and Scotland. In England, it is held that the writer of the letters never lost the property of the letters, or, at all events, that he retains a joint property in them, which would be infringed by their being published without his permission. In Scotland, again, the writer or his representatives have a right to interfere, chiefly on the ground that his reputation may be injured by the publication of

confidential letters. The English doctrine, that the right of property is the only ground on which one is entitled to interfere, produces an extraordinary result in the case of unpublished works containing libellous or dangerous matter. Such works cannot be legally published, and they are therefore held not to be property; so that when they fall into the hands of a person who prints and publishes them, the author cannot obtain an injunction. Literary property may be assigned either before or after publication, provided it be done in writing. In all actions in which another than the author is prosecutor, a written title is necessary under the statute. *Ersk. B. ii. tit. 1, § 16, note by Ivory; Bell's Com. i. 115; Bell's Princ. § 1355, et seq.; Illust. § 1356; Kames' Princ. of Equity (1825), 228; Watson's Stat. Law, voce Copyright. See Copyright. Patents. Chamberlain. Comedian.*

**Litigiosity**; is a tacit legal prohibition of alienation, to the disappointment of a begun or inchoate action or diligence, the object of which is, to attain the possession, or to acquire the property of a particular subject, or to attach it in security of debt. Without this, or some similar legal provision, whenever a creditor proceeded to do diligence for attaching or securing the property of his debtor in payment of his debt, the debtor might instantly, and before the completion of the diligence, dispose of his property and defeat the object of the creditor. Thus, the object of the diligence of inhibition is, to prevent a proprietor from alienating or burdening his heritable property to the prejudice of the inhibiting creditor; and there, litigiosity commences from the time that the diligence is executed. But, for that purpose, it is necessary not only that the diligence should be executed against the debtors, but published against the lieges. The adjudication, again, which attaches the heritable estate of the debtor in security of the debt, is founded on a summons; and from the date of the execution of the summons, the subject becomes litigious. Litigiosity operates even against onerous purchasers, and so presents a striking defect in the records. But, 1. Litigiosity does not affect the terre; 2. It does not operate against deeds executed in virtue of previous obligations, but only against voluntary deeds; and, lastly, Where there is undue delay or *mora* in proceeding with the action, or in completing the diligence, the litigiosity ceases to operate as a protection. *Ersk. B. ii. tit. 11, § 7, and tit. 12, §§ 16, 41, and B. iv. tit. 1, § 38; Stair, B. iii. tit. 1, § 18, et seq.; Bell's Com. 6th edit. 935, 975, 1138; Bank. vol. iii. p. 41, et seq.; Kames' Stat. Law Abridg. h. t.; Hunter's Landlord and Tenant, 2d edit. vol. ii. 533; Bell on Leases, i. 111,*

463-472; *Bell on Purchaser's Title*, 368-70; *Shand's Prac.* 276, 604, 692; *Kames' Equity*, 307, 395. See *Conjunct and Confident. Adjudication. Diligence*. And for some remarks upon the nature of litigiousity, and the defect of the records in this respect, see *Search of Incumbrances*.

**Litiscontestation**; was a term applied, in the Roman law, to the case where both the parties to a suit had stated their pleas judicially. It was held as a species of contract between them, that they should abide by the decision of the judge on the facts as proved. By the earlier practice of the Court of Session, after the parties had stated their respective pleas, the Court, after settling the relevancy, granted a warrant for proving the conflicting allegations, which was termed an act of litiscontestation. Before litiscontestation, and while no peremptory defence has been pleaded, the defender may withdraw, and allow decree to go out against him, which will be held to be a decree in absence; but, after litiscontestation, the defender cannot pass from his appearance, and the decree is held to be a decree *in foro contentioso*. In virtue of the judicial contract implied in litiscontestation, the action, even though penal, is, after litiscontestation, transmissible to heirs; for the parties, by an act of litiscontestation, are held bound, as if by a contract (*quasi ex contractu*), to acquiesce in the decision founded on the proof that may be brought of the points stated in the act of litiscontestation. *Ersk. B. iv. tit. i. §§ 69, 70; Stair, B. iv. tit. 39; Bank. ii. 625; iii. 92; Brown's Synop.* 1551; *Shand's Prac. ii. 542*. See *Divorce. Abandoning an Action*.

**Livery**; in English law, for delivery of sasine, is a delivery of lands, tenements, and hereditaments, unto him who has a right to the same, being a ceremony in the common law, used in the conveyance of lands, &c., where an estate of fee-simple, fee-tail, or other freehold passes; *Tomlins' Dict. h. t.* The corresponding term in Scotch law is *infestment*, or *sasine*. See *Executry. Infestment. Sasine. Precept*.

**Loading**. Under the contract of affreightment, the shipmaster and owners are bound to see that due preparation is made, and care taken of the goods in loading and unloading. Tackling must be supplied sufficient to guard against injury. The ship must be capable of receiving the sort of cargo for which she is engaged, and must not be overloaded, but room left for her own furniture, and the provisions of the crew, and the proper working of the vessel. A failure in any of these respects grounds a claim against the estate of the owners and master. Thus, if a cask be accidentally staved in letting it down into

the hold of the ship, a claim lies for the loss; or if a ship is freighted to go to America for timber, and, owing to the small size of her port-holes, she cannot take in the large timber of that country, a claim of damage will arise to the merchant, on the warranty that there shall be no obstruction to the loading. In receiving goods on the quay, or in sending his own boats for them, the master is responsible for them from the moment of delivery. In the timber trade, if it is the custom to float down the timber in rafts by the merchant's servants, the responsibility of the shipowners and master begins only with delivery into the ship. But if the master send his crew to float down the timber, he incurs the risk from the moment the timber is delivered to them. *Bell's Com. i. 547; Brodie's Supp. to Stair, 985; Bell's Princ. § 408; Illust. ib.* See *Ship. Affreightment. Charter-party. Warranty. Stowage*.

**Loan**. In its general acceptation, this word signifies the agreement by which the use of anything is given, under condition of its being returned to the owner. But as some articles, as provisions, must be destroyed in their use, or given away, as money, a distinction was made in the Roman law between *mutuum* and *commodate*; the former term being applied to the loan of fungibles, or such articles as perish in the use; the latter to the loan of those subjects which must be individually returned to the owner, and which subjects must therefore be of a nature capable of being used without destruction or alienation. In *mutuum*, the property of the subject is transferred; and if the subject be destroyed, the borrower to whom the property is transferred suffers the loss; but in *commodate*, as the property remains with the lender, and the use merely is given to the borrower, any loss befalling the subject must be borne by the lender. *Ersk. B. iii. tit. 1, § 18; Bell's Com. i. 255; Bank. vol. i. p. 354; Bell's Princ. § 194, et seq.; Illust. § 199; Ross's Lect. i. 67*. See *Borrowing. Commodate. Mutuum*.

**Lobsters**. In Scotland, the taking of lobsters is forbidden from 1st June to 1st September, under a penalty of L.5 for each offence. Two justices may try such a cause summarily, and the penalty goes to the prosecutor; *9 Geo. II., c. 33, § 4*.

**Locality**. The decree of the Teind Court, modifying a stipend to a minister from the teinds of the parish, is called a decree of *modification*; and the adjustment or apportionment of the aggregate stipend amongst the several heritors liable to pay it, is called a *locality*. This allocation of the stipend is made according to certain rules; and the decree of the Court, approving of the allocation, is called a decree of *locality*; and, after such

a decree has been pronounced, no heritor is liable in more than the proportion fixed by the decree. After the stipend is modified, and before a decree of locality has been pronounced, the minister may select any heritor he pleases, who will be liable in the first instance for the whole stipend, or at least as far as such heritor's teinds extend, although that should exceed his due proportion—the heritor so selected having, however, a claim of relief *pro rata* against the other heritors liable in the stipend; *Ersk. B. ii. tit. 10, § 47*. According to the present form of process, after an augmentation has been granted by the Teind Court (as explained *voce Augmentation*), the cause is remitted to the Second Junior Lord Ordinary, and the judicial process of locality then commences. The cause is enrolled before the Second Junior Lord Ordinary; the minister selecting the Division of the Court to which he chooses that the process shall belong. In this process, one of the first steps is to have a common agent appointed in the manner described *voce Common Agent*; and, at the same time, the heritors are ordained to produce their rights to the teinds within a time limited by the Lord Ordinary, under certification that, failing their doing so, a remit will be made to the teind-clerk to prepare a scheme of locality, either according to the proven rental or according to the rights and interests produced. This scheme, when prepared, is approved of by the Lord Ordinary as an *interim scheme*, according to which the stipend is paid, until a *final scheme* of locality is settled; and, in the meantime, the minister is furnished by the common agent, at the expense of the heritors, with an extracted decree, approving of the *interim scheme*. The duty of the common agent is to obtain a full production of the heritors' rights to the teinds, and their decreets of valuation, if there be any; and thereafter to prepare a *State of the teinds*, classifying and arranging the various rights of the heritors. The order in which the teinds of the parish are allocated upon is explained *voce Teinds*; and, in practice, the final scheme of locality, with which the process is closed, as well as the interim scheme, is framed by the teind-clerk; the parties interested being allowed judicially to see and object to the scheme, and to their respective rights and valuations. This is, in general, a long protracted process; and during its dependence, the interests of the minister are regulated by the *interim decree of locality*. The judgment of the Lord Ordinary on the questions raised in the course of the process of locality, whether between the minister and heritors, or among the heritors *inter se*, is final in the Outer-House, but subject to the

review of the Division to which the cause belongs, by reclaiming note, lodged within twenty-one days after the date of the judgment. The decree of locality is enforced by diligence, passing under the signet. The Teind Court has no signet; but the extracted decree of that Court is the warrant for passing a bill at the Bill-Chamber for a horning on ten days' charge; which horning is signed by a writer to the signet, and must pass the signet of the Court of Session. This horning is a sufficient warrant for charging the several heritors, or their successors, or other occupiers of the lands, and intromitters with the rents and teinds. And if the incumbent die, or is translated, his successor, on production of the former horning, or of the extracted decree, with a certificate of his ordination and induction, will, on passing a bill at the Bill-Chamber, obtain a new horning. Teinds are *debita fructuum* only; and the arrears are payable by the actual intromitter, or his heirs, but not by a singular successor. Hence, teinds not being *debita fundi*, the decree is not a warrant for pointing the ground; but the minister may charge the tenants for payment of the sum localled on the lands possessed by them; and such tenant will be liable to the extent of his rents, crop, and teind, so far as the rent is in his hands. Observe, however, that the claim for stipend prescribes in *five years*. The decree of modification and locality is a sufficient warrant to point and arrest the moveables or rents of the intromitter for the time; and if the party charged be mentioned *nominatim* in the horning, and if the precise sum charged for be there specified, he may be denounced rebel in common form. But this is not usual; the arrestment or pointing being, in the ordinary case, sufficient to attain the minister's object; especially as charges on such decrees cannot be suspended, except on consignment. See on the subject of this article, *A. S. 22d June 1687, 9th July 1809, and 12th Nov. 1825; Ersk. B. ii. tit. 10, § 47; Ivory's Forms of Process, ii. 444, et seq.; Shand's Prac. 68, 294; More's Notes on Stair, p. cccxxxviii; Bank. ii. 60; Bell's Princ. § 1162; Connell on Tithes, i. 462, et seq. See Augmentation. Teinds. Proven Rental. Minister's Rental. Decree Conform. Modification.*

**Locality of a Widow.** The lands life-rented by a widow under a contract of marriage are called her locality lands. Where lands are given in this way, the widow has the profits of the lands, whatever they may be; and should any loss arise from the bankruptcy of tenants or otherwise, she must bear the loss, without recourse on any other part of the husband's estate. Where power is given by deed of entail to provide wives, by way of

locality, to a certain limited amount of yearly rent, it has been held that the rent payable at the date of the wife's infestment is the rule, and not that which may be payable from the lands given in locality at the period when the wife succeeds. And where a deed of entail allowed the heir in possession to provide his widow with a suitable liferent, "by way of locality, not exceeding the half of the present rent for the time," it was decided, that a locality which, at its date, did not exceed the half of the rent then payable, could not afterwards be restricted, though it came greatly to exceed the half of the free rents, and was alleged to be more than a suitable provision. Leases of lands, over which a locality has been constituted in favour of a wife, granted *stante matrimonio* by her husband in the fair exercise of his right of administration, are effectual, notwithstanding his decease. But it is usual in marriage-contracts to insert a power to grant leases of such lands. *More's Notes on Stair*, clxxxviii.; *Bell's Com.* i. 55, 636; *Bell's Princ.* § 1947; *Hunter's Landlord and Tenant*, 95-7; *Jurid. Styles*, i. 184. See *Jointure. Contract of Marriage*.

**Location.** The contract of location is that by which the use of any moveable subject is agreed to be given for hire; or by which a person gives his work or services on the same condition. He who lets his work, or the use of his property, is called the *lessor* or *locator*, and the hirer is called the *conductor* or *lessee*. The lessee is entitled to the mere use of the subject let, which subject must be restored to the owner at the stipulated time. The lessor is bound to procure for, and to continue the use and enjoyment of the subject to, the lessee; but if by some fatality, not imputable to himself, he shall not be able to put the lessee into possession, he cannot be sued *ex locato* for damages; and, on the other hand, he has no claim for hire. But if the lessee should be excluded by any fault or act of the lessor, the implied warrantance of the contract would render him liable in damages. The lessee is bound to put the subject to no other use than that for which it is let—to preserve it in good condition during the lease—and to restore it to the lessor, and to pay the rent or hire agreed upon. The risk of the property let to hire remains with the owner, who is at all times liable for the loss or injury it may sustain; unless where he can prove that the loss has occurred through the negligence, fraud, or fault of the lessee. Where a workman, who lets his labour for hire, from carelessness or want of skill, neglects or destroys the work, he is liable to his employer in damages; but if through no fault of his the work has not been performed, he is entitled to

the full stipulated wages. A servant, who is hired to a precise day or time, is entitled to his full wages, though he should, by sickness, be disabled for service for part of that time. But if the inability should continue long, and a substitute should be required, the master will be discharged from his obligation to pay wages; and if the servant die before the term be elapsed, his wages are due only for the time he served. If the master should die, or if he turn off a servant without a reasonable cause, the servant has a right to full wages, and also to his maintenance for the term agreed on. But should the servant desert his service, he forfeits his wages and maintenance, and is farther liable in damages. *Ersk.* B. iii. tit. 3, §§ 14, 15, 16; *Stair*, B. i. tit. 15; *More's Notes*, p. xcvi; *Bell's Com.* i. 255, *et seq.*, 451, *et seq.*; *Bank.* vol. i. p. 429; *Bell's Princ.* § 133, *et seq.*; *Illust.* § 137; *Brown on Sale*, pp. 574-6; *Hutch. Justice of Peace*, ii. 158; *Tait on Evidence*, 3d edition, pp. 298-9, 453-5; *Blair's Justice of Peace*, h. t.; *Ross's Lect.* ii. 456. See *Artists and Artificers. Workman. Lease*.

**Lochmaben.** The small property called the *four towns of Lochmaben* is held by a tenure peculiar to itself. The proprietors are enrolled as *kindly tenants* in the rental-book of the proprietor of the barony; and this constitutes a title of property which has been judicially recognised. And although those tenants have neither charter nor sasmine, yet it has been held that they are not removeable by the landlord; and that they may dispone or burden their rights. *Kindly Tenants of Lochmaben v. Lord Stormont*, 24th November 1726, *Mor.* p. 15,195; *Irving*, 4th Feb. 1795, *Mor.* p. 10,316, and *Bell's Folio Cases*, p. 145; *Mounsey*, 30th Nov. 1808, *Fac. Coll.*; *Ersk.* B. ii. tit. 6, § 38, *note by Ivory*; *Hunter's Landlord and Tenant*, 383; *Bell on Leases*, i. 89; *Connell on Parishes*, 389. See *Kindly Tenants*.

**Lochs.** See *Lakes*.

**Lock or Gowpin;** is the perquisite of the servant in a mill, and consists of a small quantity of meal regulated by the custom of the mill. This is one of the sequels, or small services, as the multure is the payment due to the proprietor of the mill, in right of the thirlage. *Ersk.* B. ii. tit. 9, § 19; *Hunter's Landlord and Tenant*, 212; *Ross's Lect.* ii. 171. See *Thirlage*.

**Lockfast Places.** The opening of lockfast places is an aggravation of theft, and, when combined with housebreaking, is of a very serious nature: It is immaterial how the security has been overcome, provided the place was locked, and the key was not in the lock. *Alison's Princ.* 296; *Steele*, 123. As to the mode of obtaining access to lock-

fast places in order to execute diligence or the like, see *Open Doors*; *King's Keys*.

**Locus Delicti.** It is necessary in criminal libels to specify the place where the crime was committed with as much precision as the circumstances will allow, and so as not to embarrass or perplex the panel. But in crimes the nature of which makes the place immaterial, this rule is relaxed; as well as when the place cannot be known to the prosecutor with certainty. To warrant conviction, the place must be proved as set forth in the libel; but what amounts to such proof will depend entirely on the specialties of the case. *Ersk. B. i. tit. 2, § 23*; *Hume, ii. 207, et seq.*; *Alison's Prac. 257*. See *Alibi. Indictment*.

**Locus Pœnitentiæ;** a power of resiling from a bargain, before any act has been done to confirm it in law. It depends entirely upon the nature of the contract, what are the requisites of final and conclusive engagement in the particular case; but it is a general rule, that until such final engagement, there is always a privilege to either party to retract his intention of becoming bound, however strongly expressed. Thus, in consensual contracts, if one make an offer of such a nature that an express acceptance of it is expected, he may withdraw the offer at any time before acceptance. The rule, however, is different where the offer is of a gratuitous nature, and acceptance being presumed is not expected to be expressed. In such a case there is no *locus pœnitentiæ*, since, as soon as the offer reaches the party to whom it is made, there is a *consensus in idem placitum*. There may be circumstances, however, in which even a gratuitous offer may be withdrawn, as when the person making it has intimated his desire that he should be informed whether or not it is accepted. Where there is an engagement among several individuals, each has *locus pœnitentiæ* until the consent of the last has been given. The parties have *locus pœnitentiæ* where writing is legally requisite, or has been stipulated, and has not yet been authentically executed; such is the case in a verbal agreement about heritage. But sometimes the parties may be bound by a present agreement, although it is their intention subsequently to complete the transfer in a more formal manner. And whenever there has been *rei interventus*, following upon an informal agreement, the *locus pœnitentiæ* is barred. *Ersk. B. iii. tit. 2, § 2, 3*; *Stair, B. i. tit. 10, § 9*; *B. ii. tit. 9, § 20*; *More's Notes, pp. lxx. xcvi.*; *Bell's Com. i. 327*; *Bell's Princ. § 25-6-7*; *Illust. ib.*; *Hunter's Landlord and Tenant, pp. 277, 283*; *Bell on Leases, i. 281-5, 294*; *Kames' Equity, 132*. See *Lease. Rei Interventus. Homologation. Offer. Promise. Obligation. Contract*.

**Lodgers.** In England, it would seem that lodgers, though possessing the principal part of a house, have no right to vote in virtue of such possession, the owner, how small however the part reserved for himself, being the tenant of the whole in the eye of the law; *Chambers' Election Law, h. t.* But in Scotland, if the yearly rent paid by the lodger for his apartments, exclusive of board, amounts to L.10, the sheriffs are in the practice of enrolling him as a voter on this qualification. See *Reform Act*.

**Lodging-Houses.** It seems formerly to have been laid down, that the keepers of lodging-houses were, like innkeepers, &c., liable under the edict *Nautæ, coupones*, for the safety of goods and luggage brought into the house by lodgers; *May, 16th Feb. and 10th July 1694, Mor. 9236*. But there has been no recent decision to support the old precedent. And in *Watling v. Macdougall, 10th June 1825, S. & D. 83*, "the Lords wished it to be distinctly understood that they did not mean to decide the question, whether or not the keepers of lodgings fell under the edict." The landlord's hypothec does not extend over the effects of lodgers in a lodging-house. *More's Notes on Stair, lvii.*; *Bell's Com. i. 469*; *Bell's Princ. § 236*; *Hunter's Landlord and Tenant, 685*. See *Nautæ, Coupones. Innkeepers. Furniture*.

**Lodging of Papers.** See *Interlocutor. Prorogation. Process. Record. Fee-Fund*.

**Log-Book.** The log-book of a ship is a book into which the contents of the log-board are daily copied at noon, together with every circumstance deserving notice which happens to the ship, either at sea or in harbour. In the contract of insurance, as proof of loss, the log-book and protests taken on occasion of the loss, are expected to be furnished to the underwriters, to direct their inquiries; but they are not proofs on which the loss can be rested, unless they become so by the inevitable loss of other evidence. They may be used to contradict the evidence of the master or mate, whose statements they are; and the log-book, unless there be evidence of its loss, must be produced, as a check on the proceedings of the voyage. The log-book of a ship of war proves the time when her convoy sailed, or when a ship became part of her convoy. *Bell's Com. i. 612*; *Bell's Princ. § 498*. *Tait on Evidence, 52*. See *Evidence*.

**Loosing of Arrestment.** An arrestment may be loosed on caution, wherever it is laid on for securing an illiquid debt; but in every case where the debt is constituted by the decree of a court, or where there is a decree of registration, it can be loosed only on consignation of the debt; and, accordingly, there is a distinction in the form of the let-

ters of arrestment in these two cases. From this rule, however, there are the following exceptions: 1. When the time of paying of the debt is not arrived, although the arrestment proceed on a decree, the arrestment may be loosed on caution. 2. An arrestment founded on a mutual contract may be loosed on caution. 3. So may an arrestment on a decree which has been suspended or turned into a libel. Arrestments *ad fundandam jurisdictionem*, are loosed upon the debtor's giving security *judicio sisti*; and where an arrestment appears to be nimious and oppressive, the Court of Session will grant warrant for loosing arrestment, without caution or consignment. A letter from an arrester passing from arrestment, or holding it as recalled, is equivalent to a discharge, or to a loosing of the arrestment. A discharge granted by an arresting creditor to an arrestee does not discharge the common debtor of the remainder of the debt, the arrestee having been discharged only as such. See 1 and 2 *Vict.*, c. 114, §20; and *A. S.*, June 8, 1850. See also *Ersk.* B. iii. tit. 4, § 12; *Stair*, B. iii. tit. 1, § 34; *Morre's Notes*, p. cxcxi.; *Bell's Com.* ii. 69; *Bank.* vol. ii. p. 199; *Bell's Princ.* § 2361-2; *Maclaurin's Sheriff-Court Process*, p. 245; *Tait's Justice of Peace, voce Arrestment*; *Jurid. Styles*, 2d edit. vol. ii. p. 80; iii. p. 556, *et seq.*; *Ross's Lect.* i. 458. See *Arrestment. Forthcoming.*

**Lord's Day.** See *Sunday.*

**Lord**; a title of honour given to a peer of the realm. It is applied also by courtesy to all the sons of a duke, and to the eldest son of an earl. It is also used to the judges of the Court of Session, and to other persons honourable by their offices. See *Tomlins' Dict. h. t.*

**Lord Advocate.** See *Advocate, Lord.*

**Lord Justice-Clerk.** The Lord Justice-Clerk, in absence of the Lord Justice-General, is the presiding judge in the Court of Justiciary. He is also one of the Officers of State for Scotland, and one of the commissioners for keeping the Scottish *regalia*. The Lord Justice-Clerk is always one of the Senators of the College of Justice, and Lord President of the Second Division of the Court of Session. It appears that, prior to 1671, the Justice-Clerk was not one of the judges of the Court of Justiciary, but merely the clerk and assessor of Court; *Hume* ii. 17. The office of Lord Justice-Clerk is now, in point of rank, the second judicial appointment in Scotland. See *Justiciary Court. Session, Court of.*

**Lord Justice-General.** See *Justice-General.*

**Lord-Lieutenant.** See *Lieutenant.*

**Lord President**; the presiding judge in the Court of Session. See *Session, Court of. Colledge of Justice.*

**Lords of the Articles**; a committee of the Scottish Parliament, by whom the laws to be proposed in Parliament were prepared. See *Articles, Lords of.*

**Lords of Erection.** On the Reformation, the King, as proprietor of the benefices formerly held by the abbots and priors, gave them out in temporal lordships to those whom he chose to favour, who were termed Lords of Erection. See *Erection, Lords of.*

**Lords of Justiciary**; the judges of the Court of Justiciary, or Criminal Court. See *Justiciary Court.*

**Lords of Regality**; were persons to whom rights of regalities were given by the Crown. Under those rights they possessed a civil jurisdiction equal to that of a sheriff; and their criminal jurisdiction extended to the four pleas of the Crown. Persons amenable to the jurisdiction of a Lord of Regality might have been repledged from the Justiciary. It was on account of this extended and royal jurisdiction that the persons to whom regalities were given received the titles of Lords of Regality, though only commoners. The Lord of Regality acted by a steward or bailie appointed by himself. *Ersk.* B. i. tit. 4, § 7. See *Regality.*

**Lords of Parliament.** The House of Lords is the second branch of the Legislature, consisting of the Lords Spiritual and Temporal, assembled in one house. The nobility of Scotland in the Imperial Parliament is represented by sixteen noblemen, chosen from the body of the Scotch nobility. See *Election Laws. Parliament.*

**Lords of Session**; the judges of the Court of Session. See *Session, Court of.*

**Lost.** Things lost (other than strays and waifs, regarding which there are certain peculiarities elsewhere noticed) may, after all means have been taken to advertise them, be possessed by the finder without fault; and if not claimed, he may dispose of them if they cannot be conveniently preserved without hazard. The loser has, however, a right to restitution on identifying his property, at any time within the long prescription; and if the finder sell the subject to a third party, that third party must, if called upon, restore it to the owner, and take his recourse under the warrandice against the seller. The effect of a personal exception raised against the owner, in consequence of neglect implying dereliction, must depend upon specialties and the degree of care with which the finder advertised. The possession of moveables presumes the right of property, and when the alleged true owner comes to vindicate his property, from a person in whose possession it is found, it is not sufficient for him to prove that it once belonged to him; he must also

prove that he lost the possession, either by the fraud of some other party, or upon some footing which did not deprive him of the ownership. When title-deeds are lost, the remedy provided is an action of proving the tenor. See *Proving the Tenor*. Should the finder of a bill transfer it to another party for value, the acquirer has, under certain modifications, a full right to it. But an action lies to recover the document or its value from one proved to have found it. Formerly, in Scotland, the holder of such a document, though he got it from the thief or the finder, was not bound, even on notice by the former owner, to prove that he gave a consideration for it; but the other party required to prove that the holder gave no value. This, however, was altered by the Mercantile Law Amendment Act, 19 and 20 Vict. c. 97, 1856, and the holder of a lost or stolen bill must now prove that value was given for it; but such proof may be by parole evidence. Bankers incautiously changing lost or stolen notes have, in several cases, been found liable for the amount; but this is a question necessarily depending upon specialties—the suspicious circumstances in which the bank-note was offered—the unusually large amount—the notices given of the loss or robbery, and the like. Although a bill or note should be lost or destroyed, even while in the drawer's hands, the creditor must protest it for non-acceptance and non-payment, as if it were extant, and must give due notice of its dishonour to all the previous parties, otherwise he will lose his recourse against them. The protest, in such a case, may be made on a copy of the bill or note. In Scotland, the tenor of a lost bill may be established by a process for proving the tenor, in which the pursuer must first prove the *casus amissionis*, and he will then be entitled to prove the tenor, in the same manner as is usually done in such processes. The action has occasionally been dismissed, on the ground, that the *casus amissionis* libelled was not sufficient to warrant a proving of the tenor. A proving of the tenor may be pursued by any party who has a direct interest in it. But, although the loss of a bill and its contents be thus proved, the creditor is not, in all cases, entitled, unconditionally, either to have a new instrument from the drawer in place of the former one, if it has been lost or destroyed before the term of payment, or to enforce payment of it when due. If, indeed, the first instrument have been actually destroyed, or if it were specially indorsed to the loser, the drawer, when called upon for a new bill or note, cannot object that he runs the risk of a claim from a third party on the former one. It is thought, however, that in Scotland, it would be necessary for one claim-

ing payment of a lost bill not indorsed, or specially indorsed to him, or requiring the drawer to grant a new bill or note instead of it, to find caution that he will not indorse the first bill, if found, to a third party. If the lost bill or note is blank indorsed, or payable to the bearer, so as to be transferable by delivery, the creditor cannot maintain action for it, without finding security to the debtor against his being made liable for payment to some other holder. See the subject of lost bills fully and ably treated in *Thomson on Bills*, 309, *et seq.* See also *Stair*, B. i. tit. 7, § 3; tit. 11, § 2; *More's Notes*, xviii., cli.; *Ersk. B. ii. tit. 1, § 12*; *Bank. B. i. tit. 8, § 4*. See *Vitium Reale. Proving the Tenor. Damage. Risk. Dereliction.*

**Lottery.** State lotteries are a kind of public game at hazard, resorted to by Government in order to raise money for the service of the State. In Britain, these lotteries were sanctioned by Parliament; and managed by Commissioners named by the Lords of the Treasury for that purpose. In the reign of Queen Anne, it was thought necessary to suppress lotteries as public nuisances; but after that time, they were licensed by act of Parliament, under various regulations. The act passed in 1778 restrains any person from keeping an office for the sale of tickets, shares or chances, or for buying, selling, insuring or registering, without a license. The act also contains certain regulations for the prevention of fraud, prohibits the division of tickets into more than sixteen shares, and provides for the transacting of business in the lottery offices. A supplementary act was passed in 1793 to prevent the frauds committed by insuring tickets; but at length, state lotteries, which had been found to be highly prejudicial to public morals, were abated by a Treasury minute, which provided, that from and after the 18th of October 1826, they should cease and determine; and this abolition was accompanied with a prohibitory declaration against all attempts on the part of individuals to revive or continue them in any mode or form whatsoever. In the year 1831, a private act of Parliament (1 and 2 Will. IV. c. 8) was passed, under colour of which certain street property in Glasgow was disposed of by way of lottery; but it is now well understood that this act was passed *per incuriam*, and in ignorance of its true purport, and that any future attempt of a similar description would be unsuccessful. See 4 and 5 Will. IV. c. 37, by which the Glasgow street-lottery was brought to an end. It would rather appear that private lotteries may be removed as a nuisance at common law; but the point has not been decided. By 6 and 7 Will. IV. c. 66, the advertisement in Britain of foreign



and other illegal lotteries is prohibited, under a penalty of L.50. *Hutch. Just.* ii. 353, 365; *Tait's Just. h. t.*

**Lucrative Succession.** The passive title of *præceptio hæreditatis*, is that whereby an heir-apparent who accepts gratuitously of a grant from his ancestor of any part, however small, of the estate to which he is to succeed *qua* heir, is thereby subjected to the payment of all the debts of the ancestor contracted prior to the grant. But the heir, before he incurs this passive title, must be successor *titulo lucrativa*, by a lucrative title—that is, he must have received the grant gratuitously; for wherever an heir has made a *bona fide* purchase from his ancestor, not struck at by any of the bankrupt statutes, he does not incur any passive representation. Where, however, as in this case, the transaction is *inter conjunctas personas*, the mere recital of onerous causes in the deed will not be held sufficient proof of onerosity. If the price paid by the heir comes near the value of the property which he has thus acquired, he will thus escape the penal consequences of passive title; but prior creditors of the ancestor may set aside the right under the act 1621, c. 18, in so far as it appears to be gratuitous—the heir being in that case liable only *in quantum lucratus est*. *Ersk. B.* iii. tit. 8, § 87–89; *Stair, B.* iii. tit. 7; *More's Notes*, cccxxxviii.; *Bank.* ii. 374. See also *Conjunct and Confident. Passive Titles*.

As a special service no longer infers a general passive representation, it may be doubted whether the representation would now be held to extend beyond the value of the subject acquired by the heir from his ancestor. The acceptance of the subject is held to be equivalent to an entry as heir. It should, therefore, be attended with the same consequences, but not greater.

**Luctus.** See *Imbecility*.

**Luggage.** The proprietors of a stage-coach are liable for the safety of the luggage of passengers. The value of the lost article is ascertained in the manner explained in the articles *Nautæ coupones*, and *Innkeepers*. The coach-master takes his risk of the probable value of the luggage, including such a sum of money as may reasonably be carried in the portmanteau for the occasions of the journey. But if the luggage be of extraordinary value, this ought to be stated, and, if demanded, additional hire paid in proportion to the additional risk incurred; otherwise the coach-master will not be liable beyond the value to

be reasonably expected; 11 *Geo. IV.* and 1 *Will. IV.* c. 68. There is a lien on a passenger's or traveller's luggage for his passage money or fare. *Bell's Com.* i. 471; ii. 100. See *Public Carriages*.

**Lunatic;** is one who is seized with periodical fits of frenzy. See *Idiot. Insanity. Imbecility. Brieve of Furiosity*.

**Lunatic Asylum.** The act 20 and 21 *Vict.* c. 71, 1857, now regulates the care and treatment of lunatics; and the previous acts, 55 *Geo. III.*, c. 69; 9 *Geo. IV.*, c. 34; and 4 and 5 *Vict.*, c. 60, are repealed. Under this act, the term lunatic means “any mad, or furious, or fatuous person, or person so diseased or affected in mind as to render him unfit, in the opinion of competent medical persons, to be at large, either as regards his own personal safety or conduct, or the safety of the persons and property of others, or of the public.”

**Lyon-King-at-Arms.** This officer takes his title of Lyon from the armorial bearing of the Scottish kings, the lion rampant. The officers serving under him are heralds, pursuivants, and messengers. The ancient duty of this officer was to carry public messages to foreign states; and it is still the practice of the heralds to make all royal proclamations at the cross of Edinburgh. The jurisdiction given to the Lyon-King-at-Arms by the acts 1592, c. 127, and 1672, c. 21, empowers him to inspect the arms and ensigne-armorial of all the noblemen and gentlemen in the kingdom, to distinguish the arms of the younger branches of families, and to give proper arms to virtuous and well-deserving persons; to matriculate such arms; and to fine those who use arms which are not matriculated, in L.100 Scots, with the forfeiture of the goods and furniture on which the arms are represented. The Lyon-King-at-Arms may deprive or suspend messengers by the advice of the Court of Session; and he may fine them to the extent of the sum for which, at their admission to the office, they found caution. The Court of Session has the power of reviewing the decision of the Lyon Court as to the matriculation of arms; but a reduction of a matriculation of arms is incompetent at the instance of a party who does not claim right to the arms in question. *Ersk. B.* i. tit. 4, § 32; *More's Notes on Stair*, cclxx.; *Bank.* ii. 507; *Kames' Equity*, 316; *Shaw's Prac.* i. 20, and cases there cited. See *Arms. Messengers-at-Arms*.

## M

**Macer.** The mace-bearers are officers attending on the Courts of Session, Teinds, Justiciary, and Exchequer. They are nominated by the Crown, or by a person deriving right from the Crown; and, properly speaking, they are the servants of the courts, and the attendants on the judges on the bench. It is the duty of the macers to preserve silence in the court, to execute the orders of the judges, to call the rolls of court, and to execute such warrants for the apprehension of delinquents, &c., as are addressed to them. See 11 and 12 *Vict. c. 79, § 6*. When processes, after being borrowed, are not returned in proper time, they, as well as messengers-at-arms, may execute the captions issued against the borrowers to force them back. See *Caption, process*. The fixed salary of each of the seven macers of the Court of Session and of the Teind Court is, by 1 and 2 *Vict. c. 118, § 25, L.100 per annum*; besides certain other gratuities, variable in amount, but divisible equally amongst the whole macers of those courts. They hold their office *ad vitam aut culpam*. There were three macers in the Jury Court before its incorporation with the Court of Session; and it was enacted, that the macers of the Jury Court should continue, both at Edinburgh and on the circuits, to discharge the duties of their respective offices in the Court of Session after the union of the two Courts; and that as vacancies should occur, the number of macers should be reduced, so that they should not exceed the number of macers formerly officiating exclusively in the Court of Session; 1 *Will. IV. c. 69, §§ 12, 13*. Brieves for serving heirs, where the Judge Ordinary is incompetent, or where expediency renders it necessary, were formerly directed to the macers of the Court of Session, as sheriffs in that part, under a special commission from the Scotch Chancery Office. The practice, however, was abolished in the year 1821; and by 1 and 2 *Geo. IV. c. 38, § 11*, those services which were in use to be conducted before the macers, are directed to proceed before the Sheriff depute of Edinburgh, or his substitute, under a special commission from Chancery, similar to that in virtue of which the macers formerly acted. *Stair, B. iv. tit. 3, § 18; More's Notes, p. cclxxvi.; Ersk. B. i. tit. 4, § 33; B. iii. tit. 6, § 7; tit. 8, § 64, and Notes by Ivory; Bank. vol. ii, pp. 507, 471; Kames' Stat. Law abridg. h. t.; Macfarlane's Jury Prac. p. 9; Shand's Prac. i. 119. See Brieves. Service.*

**Machamium;** according to Skene, is manzio, hurt, mutilation, demembration, or

the loss or tinsel of any member of a man's body. *Skene, h. t.*

**Machinery.** Questions sometimes occur between landlord and tenant, or between heir and executor, as to the property of machinery in mills and manufactures; and in particular, as to whether certain parts of the machinery are heritable or moveable. Such questions are considered in the article *Fixtures*. In addition to the authorities there cited, see *More's Notes on Stair, cxlv.; Ersk. B. ii. tit. 2, § 4, note by Ivory*. And as to leases of machinery in manufactories or public works, see *Manufactories*.

**Magistrate.** In a large acceptance, this term comprehends all in authority, including even the Sovereign. Magistrates, therefore, are either supreme or subordinate. The subordinate magistrates are those (as judges) who derive from the head of the State, or first magistrate, all their authority, and are accountable to him for their conduct. This term is colloquially applied to the provost and bailies of burghs. The magistrates of all burghs have the cognizance of debts and questions of possession between the inhabitants of the burgh; and it is generally supposed that the magistrates of royal burghs have as extensive a civil jurisdiction within the burgh as a sheriff has in his territory, except in so far as particular jurisdictions conferred by statute on the sheriff are exclusive. The criminal jurisdiction of the magistrates of burghs is now very limited, extending merely to petty riots and matters of police; but, in some of the larger burghs (as Edinburgh, Glasgow, and Aberdeen), the magistrates have a right of sheriffship, which gives them the same jurisdiction within their bounds as the sheriff possesses in the county. The magistrates have been found competent judges concerning debts due to the burgh, and they have jurisdiction in a cause at the instance of a tacksman of their customs; but they are incompetent to judge as to the power of levying assessments laid on by themselves in questions between the collector of the assessments appointed by them, and the parties on whom they are imposed. They have also been found incompetent in a question between their own treasurer and other parties relative to an alleged violation of the right of the burgh. *Stair, B. iv. tit. 47, § 19; More's Notes, p. ccccxxxii.; Ersk. B. i. tit. 4, § 21; Dickson on Evidence, ii. 801; Ross's Lect. i. 90, 324, 343; Alison's Prac. 61; Maclaurin's Sheriff Process, 2d edit. 40. As to the election of magistrates, see*

*Bargh Royal. Election Law*; and as to their obligation to maintain sufficient prisons, see *Prison*.

**Magna Charta**; the great charter of English liberties, granted in the ninth year of King Henry III., and repeatedly confirmed during the reign of that monarch and of his successors. It relates to the freedom of the church; the nobility; the guardianship and marriage of heirs; the dowers of women; the duties of sheriffs; the liberties of towns and corporations; the appointment of courts; remedies for oppression, and appeals against unjust judgments: and contains other the like provisions calculated to preserve the liberty of the subject and promote the welfare of the country. *Magna Charta* is the most ancient written law of England. *Tomlins' Dict. h. t.*; 4 *Blackst. c. 33*, p. 423. See *Liberty. Habeas Corpus*.

**Maihem or Mayhem**; in English law, the violently depriving another of the use of such of his members as may render him the less able, in fighting, either to defend himself or to annoy his adversary. A person who maims himself, that he may have the more colour to beg, or that he may not be impressed for a soldier, may be indicted and fined. *Tomlins' Dict. h. t.* See *Maiming*.

**Mail**; is an old Scotch law term signifying rent. *Grass-mail* is the rent payable for cattle sent to graze on the pasture of another. The proprietor or principal tenant of the pasture has a lien or right of retention of the cattle in security of the grass-mail. Where the cattle of others are admitted to graze by a principal tacksman, his landlord's right of hypothec does not extend over such cattle, but only over the grass-mail payable for them. *Bell's Com. ii. 29* and 104, and *Bell on Leases, i. 398*. See *Grass*.

**Mail**. It is an indictable offence for a servant of the Post-Office to open a mail-bag with an intent to steal; *Alison's Princ. 342*; and whoever detains letters or mail-bags in course of conveyance by post, which have been dropped and found on the highway or elsewhere, is guilty of a misdemeanor; 4 *Geo. III., c. 81, § 1*; *Steele, 131*. For the provisions of 7 *Will. IV., c. 36*, relative to robbery from the mail, and other Post-Office offences, see *Post-Office Offences*.

**Mail-Coaches**. The proprietors of mail-coaches are, like other public carriers, liable under the edict *Nautæ, cauponæ*, and are responsible for the negligence of their drivers. But there are statutory restrictions of the liability of public carriers for certain goods above the value of L.10, unless certain specified conditions are complied with; 11 *Geo. IV. and 1 Will. IV., c. 68*. See *Nautæ, cauponæ. Carriers. Public Carriages. Luggage.*

**Mail and Duties**; are the rents of an estate, whether in money or grain; hence, an action for the rents of an estate, competent either to a proprietor or to one claiming right under a conveyance, legal or voluntary, or even an assignation to the rents, is termed an action of mails and duties. This action is either petitory or possessory. The petitory action is founded on a right in the pursuer on which no possession has followed; and in such an action it is necessary to call not only the tenants, but also the proprietor or life-renter, and the pursuer must support his right of action by the production of titles preferable or superior to theirs. In the possessory action there is no occasion to call any other than the parties in the natural possession of the ground; *Ersk. B. iv. tit. 1, § 49*. In the action of mails and duties there is an exception in favour of the tenant, who is not liable for arrears of rent after five years from the time of his removing from the lands. This quinquennial prescription was introduced by the act 1669, c. 9. *Stair, B. ii. tit. 12, § 32*; *B. iv. tit. 22, §§ 7 and 15*; *tit. 26, § 4*; *More's Notes, p. cclxxiii*; *Bank. vol. ii. p. 170*; *Bell's Princ. § 634*; *Illust. ib.*; *Hunter's Landlord and Tenant, pp. 663-8*; *Jurid. Styles, 2d edit. vol. iii. pp. 7, 126, 652*; *Bell on Leases, ii. 51*; *Ross's Lect. ii. 235, 381, 431-9*; *Kames' Equity, 390*. See *Prescription, Quinquennial*.

**Maiming**. Shooting, stabbing, or throwing of sulphuric acid with intent to maim or disfigure, is a capital offence; 6 *Geo. IV., c. 126*; *Alison's Princ. 168*. See *Shooting and Stabbing*.

**Mainprise**; in English law the taking or receiving into friendly custody a person who otherwise might be committed to prison, upon security given that he shall be forthcoming at a time and place assigned. It differs from bail in this, that a person mainprised is said to be at large until the day of his appearance. A man let to bail is still within the judge's ward of time. *Tomlins' Dict. h. t.*

**Maintenance**; in English law the unlawful taking in hand or upholding of a cause or person; an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it. It also signifies the buying or obtaining of pretended rights to land, for the purpose of raising actions upon them; or entering into an agreement by which a stranger gets the benefit of a suit, on condition of his conducting and prosecuting it. An attorney is guilty of maintenance who undertakes a suit upon the understanding that he is to bear all the costs out of his own pocket, and that his client will be free from all loss; or who

offers to recover a doubtful claim, on condition of getting part of the product of the suit. At common law, persons guilty of maintenance may be prosecuted by indictment, and be fined or imprisoned, or be compelled to make satisfaction by action. *Tomlins' Dict. h. t.* See *Pactum Illicitum. Buying of Pleas. Champerty.*

**Maintenance.** See *Aliment.*

**Majestatis Crimen**; or treason; a crime aimed against the Sovereign or the State, and intended to subvert the constitution. See *Treason.*

**Major**; a person of full legal age, which, both in male and female, is the age of twenty-one years complete. See *Minor. Curatory. Pupil. Tutor.*

**Major and Minor in a libel.** The major proposition in a criminal libel names the crime to be charged, or, if it have no proper name, describes it at large, and characterizes it as a crime severely punishable. The minor proposition avers the panel's guilt of this crime, and supports the averment by a narrative of the fact alleged to have been committed; it being necessary that the minor agree with the major. And the conclusion infers that, on conviction, he ought to be punished with the pains of law applicable to his offence. *Hume, ii. 155, 164, 181; Steele, 188; Alison's Prac. 228, 245.*

**Majority**; the major or greater number of persons intrusted with the performance of a certain act or duty. Independently of special statute, or covenant, or of inveterate consuetude (as in the case of public assemblies, courts of justice, &c.), there seems to be no sound principle under which the majority can bind the minority. But under various statutes, of which the Bankrupt Statute is one, as well as under contracts of copartnership, nominations of trustees, the constitutions or charters of joint-stock companies, and other analogous associations, special enactments, conditions, or articles are usually inserted, declaring that the majority shall decide. Under the Bankrupt Statute, the majority of creditors in value or extent of debt determines the election of trustee or commissioners, or gives directions as to the management of the estate. More than a mere majority, however, is required to discharge the bankrupt or to accept of a statutory composition. See *Bell's Com. ii. 357, et seq.* See also *Quorum. Sine quo non. Composition. Discharge.*

**Mala Fides**; bad faith. A *mala fide* possessor is a person who possesses a subject not his own, upon a title which he knows to be bad, or which he has reasonable ground for believing to be so. A *mala fide* possessor, who retains possession to the prejudice of the true owner, is obliged to restore to the proprietor

all the fruits and profits, natural, industrial, or civil, accruing during his *mala fide* possession; and that whether he has actually reaped the fruits and profits, or might, by proper care and diligence, have done so; or whether he has consumed them or not. It is often difficult to determine when *bona fides* ceases and *mala fides* begins, since this depends very much upon the circumstances of the particular case. Sometimes *mala fides* commences from the date of citation in the action of restitution; sometimes from litiscontestation; and sometimes, in very doubtful cases, *bona fides* has been held to continue till the judgment of the House of Lords. *Ersk. B. ii. tit. 1, § 25; Stair, B. ii. tit. 1, § 24.*

**Male Appretiated.** See *Omissa. Confirmation. Inventory.*

**Malice**; a deliberate, preconceived design of doing mischief or injury to another. There can be no proper crime without the ingredient of malice; *crimen dolo contrahitur*. But if a man, having a malicious intention to kill one person, in putting his intention in execution, kills another, the malice will attach to this slaughter, and he will be adjudged a murderer. And although the maxim *Culpa lata dolo æquiparatur* does not apply to crimes in its full extent, yet gross negligence frequently subjects the person guilty of it to punishment. In actions of damages, it is sometimes necessary to allege and prove malice. In actions for wrongous imprisonment, this is not necessary, since such actions will lie against an individual merely for the improper use of diligence. Malice is an ingredient in the action for defamation; but in ordinary cases it is not necessary to aver malice, since it is implied in every insult and injury. There are, however, certain cases called privileged, in which the law presumes that the act complained of was done in the discharge of a duty, and requires that malice should be averred and proved. Such are injurious words written or spoken by judges or magistrates in the discharge of their duties; by parties, or witnesses, or counsel in a cause; by reporters of judicial proceedings; by authors or critics in the fair course of literary criticism or observation, and other the like cases. *Hume, ii. 254; Ersk. B. iv. tit. 4, §§ 5 and 8; Alison's Princ. 2, 49, 434; Prac. 150; Bank. ii. 645; Bell's Princ. §§ 2039, 2044; Shand's Prac. 219; Borthwick's Law of Libel, 117, et seq.; Macfarlane's Jury Prac. 33, 61, 72, 221; Kames' Equity, 36. See Issue. Crime. Enmity to Panel.*

**Malicious Mischief.** Any serious damage, wilfully occasioned to another's property, is an indictable offence, whether it has proceeded from malice or gross misapprehension of right. But inconsiderable damage, done through

manifest ignorance, is not punishable as a criminal offence, unless aggravated by circumstances of tumult or outrage. The punishment of malicious mischief is arbitrary. *Hume*, i. 122; *Alison's Princ.* 448, 631. *Steele*, 157.

**Malum in se**—**Malum Prohibitum**. An act is called *malum in se* the culpability of which does not arise from special enactment, but from its being contrary to the law of nature and the rules of morality. An act is called *malum prohibitum* which, although innocent in itself, has been prohibited by statute. It was at one time thought that there was a distinction between them; that a party could not violate the natural law without criminality; but that the fine or other penalty attached to an act forbidden by statute was merely the price at which liberty to commit the prohibited act might be purchased. This fallacy, however, is now exploded; and it is settled that, where an act otherwise innocent has been lawfully prohibited, no one can disregard the prohibition without incurring guilt. *Blackst. Introd.* § 2, and *Christian's Notes*; *Tomlins' Dict. h. t.* See *Penalties. Crime.*

**Malversation**; misconduct in the discharge of a duty or trust. Malversation is a ground on which tutors may be removed as suspect. It has been held malversation that a tutor did not make up an inventory. Malversation in office subjects an officer to the punishment of fine, and sometimes of deprivation, as most public offices are held *ad vitam aut culpam*. See *Brown's Synop.* p. 532, for several cases in which agents, officers, &c., were deprived or otherwise punished for unfaithful discharge of their duty. *Stair*, B. i. tit. 6, § 26; *Bank.* i. 171; ii. 474.

**Mandamus**. In English law, a writ of *mandamus* is a command issuing in the Sovereign's name from the Court of Queen's Bench, and directed to any person, corporation, or inferior court of judicature; requiring to do some particular thing therein specified, which appertains to their office and duty, and which the Court of Queen's Bench has previously determined, or at least supposes to be consonant to right and justice. *Tomlins' Dict. h. t.*

**Mandate**; is a contract by which one employs another to act for him in the management of his affairs, or in some particular department of them, of which employment the person accepts, and agrees to act. The person giving the employment is called the mandant—the person undertaking it is called the mandatary. This contract is not binding on the mandatary until it has been accepted of. A mandate, generally speaking, is presumed to be gratuitous; and no commission is demanable unless it has been promised, or is

presumed to be due from the nature of the employment or the business of the mandatary. A mandate may be constituted by writing, or it may be constituted even tacitly. Thus, when a person, in the presence and with the knowledge of another, acts for him, this will be considered as a mandate, and have the effect of binding him for whom the other acts. The appearance of an advocate in court implies a mandate from the party for whom he appears, unless the party be out of the kingdom, in which case there must be a written mandate. The mandatary is bound to execute the mandate in conformity with its terms; and whatever is done beyond his instructions does not bind the mandant. But where no instructions are given, the mandatary may act according to his own discretion, and his constituent will be bound. Where the mandatary purchases at a lower price than he is authorized to give, this is not inconsistent with his powers, since the less is included in the greater sum. Even where it exceeds the sum, he may still render his constituent liable, by restricting his demand to the sum which he was authorized to give. A general mandate implies no power of gifting—it does not imply a power to sell, nor to enter the mandant heir, nor to enter into a submission; and where a general mandate specifies certain particulars, the general words must be restricted to particulars of the same kind with those specified. The mandatary, in a proper mandate, where he has no claim to any recompense, is not held to be liable farther than for his actual intromissions, and for such diligence as a person employs in his own affairs. But where a recompense is due, he must act with that care which a man of prudence bestows on his own affairs, and must repair the damage arising from his neglect; and where a mandatary exceeds his commission, he is liable for all the consequences of such excess of power. See *Culpa. Diligence*. Mandates expire by the revocation of the mandate, or even by the nomination of a new mandatary; they expire also by the resignation of the mandatary; and they expire by the death either of the one party or of the other. Although a mandate expires on the death of the mandant, yet, if the mandatary be ignorant of his death, his actings will bind the heirs of the mandant. Even after he comes to know of the death of the mandant, the mandatary may proceed to complete transactions previously begun, and which require to be completed. After the death of the mandatary, his heir may finish what was left undone by the mandatary, if it requires dispatch, and there be no time to receive the directions of the mandant. See generally, on the subject of this article, *Stair*, B. i. tit. 12; *Morr's Notes*, p. lxxi., et

seq.; *Ersk. B. iii. tit. 3, § 31, et seq.*; *Bank. vol. i. p. 392*; *Bell's Com. ii. 318, 349, 445, 463, 674*; *Bell's Princ. §§ 216-231*; *Illust. § 217*; *Tait's Justice of Peace, h. t.*; *Blair's do. h. t.*; *Tait on Evidence, pp. 299, 302, 338-9*; *Ross's Lect. ii. 228*; *Thomson on Bills, 220, 371*; *Davidson, July 14, 1815, 3 Dow, 229*. See *Bailment*.

**Mandatory, in judicial proceedings.** When a party, pursuer or defender in a cause, is resident out of Scotland, his opponent is entitled to insist that a mandatory for the absentee be sisted, who will be liable for costs, if they should be awarded against his principal. Such a mandatory is unobjectionable if he be in the same condition of life with his constituent, and not bankrupt, nor living in the Abbey for the benefit of the Sanctuary. It is no good objection that he may be thought insufficient for the costs; *Duncan, 4th March 1830, 8 S. & D. 641*; *Turnbull v. Paul, 26th Nov. 1829, 8 S. & D. 124*. If the pursuer go abroad during the dependence of the process, the action cannot proceed unless a mandatory be sisted. A Scotchman, proprietor of lands in Scotland, does not require a mandatory while abroad, where the property is sufficient to meet the expenses of the process. In the case of *Sandilands v. Sandilands, May 31, 1848, 10 D. 1091*, an absent proprietor was held bound to sist a mandatory, his title being under reduction. See the cases there cited. See also the case of *The Caledonian and Dumbartonshire Railway Company v. Turner, Dec. 21, 1849, 12 D. 406*. It would appear that a pursuer who has a domicile in Scotland must appoint a mandatory when he goes abroad, though on business; but on this point the decisions have not been uniform. A mandate, qualified with the condition that the mandatory is not to be liable for past or future expenses, will not be received unless the party be upon the poor's roll; and the mandatory will not be liable for expenses if the party be upon the poor's roll, even although the mandate be not so qualified. The mandate must apply to the action in court, and should be probative or holograph. A mandate to carry on a process in the sheriff-court is not sufficient to authorize an advocacy to the Court of Session. The mandatory of a pursuer is liable in expenses, but not in damages, if he act *bona fide*. The summons should be raised in name of the pursuer and his mandatory. The validity of proceedings in court is not affected by the want of a mandatory, it being the duty of the opposite party to state the objection if he mean to found on it. In the case, however, of statutory complaints against the resolutions of freeholders under the old election law, where

the complainer was forth of Scotland, his petition and complaint was held incompetent if not presented by himself along with a mandatory, within the statutory period; *Stewart, 14th June 1831, 9 S. & D. 727, and authorities there cited*. But in ordinary cases it would seem that the want of a mandatory can be remedied *cum processu* on the objection being stated. See, on this subject, *Arbuckle, 2d March 1827, 5 S. & D. 505*; affirmed in House of Lords. Diligence at the instance of a party forth of Scotland does not require the intervention of a mandatory. See the case of *Ross v. Shaw, Mar. 8, 1849, 11 D. 984*. A pursuer has a right to require that a defender who is abroad should sist a mandatory. When a mandatory intends to withdraw, it is not enough that his name is omitted in the proceedings; he must lodge a minute, withdrawing from the process; and in that case, if no other mandatory be named within a reasonable time, the Court will pronounce decree of absolvitor, or in terms of the libel, as the case may be, and find the party and mandatory, conjunctly and severally, liable in expenses. And after such a judgment, the mandatory who has withdrawn is not entitled to resume and carry on the action, in order to show that no expenses should have been awarded; *Gordon and Gibson-Craig, 11th Dec. 1823, 2 S. & D. 572*. It has been said that a mandatory has no *positive*, but merely a *relative* existence, and that he is liable in costs only in the event of his principal being found liable; *Reoch, 14th May 1831, 9 S. & D. 588*. And a question of some nicety has arisen, whether, where the *mandant* has died abroad, and where his representative has not sisted himself, or authorized a mandatory to be sisted for him, the process can proceed to the effect of taking decree for expenses against the mandatory of the defunct. The difficulty is that, as regards the principal, there is no process, since it has fallen by his death, and hence no decree can be obtained against him; while, as regards the mandatory, the condition of his obligation is, that he shall be liable in costs only in the event of their being found due by his constituent. See the case of *Cairns v. Anstruther, 16th March 1841, 2 Rob. App. 29*; also the case of *Marshall v. Common, Dec. 16, 1848, 21 Jurist, 63*.

In the inferior courts, even when the defender is within Scotland, his procurator, upon stating defences, must either produce a written mandate from the defender, or the service-copy of the summons or citation, which is held equivalent to one. A mandate of this description, however, does not make the mandatory liable for expenses, as in the case where the *mandant* is abroad. The

rule, that a mandatory must be sisted for a person abroad, is the same in the inferior as in the Supreme Court. *Shand's Prac.* 154; *Maclaurin's Sheriff Process*, 73, 291; *Thomson on Bills*, 574. See *Agent. Mandate*.

**Maneleta**; in old law language, a kind of pestilent herb which grows amongst corn, called *guld*. The law of *maneleta* was instituted by King Kenneth, who ordained that he who through negligence suffered noisome herbs to spring up in sown land should for the first fault pay one ox, for the second, ten, and for the third be removed from the possession and labouring of the land. *Skene, h. t.*

**Manerium**; lands laboured with the hands. *Skene, h. t.*

**Manner**; or *Mainour*; from the French *manier*. To be taken with the *manner*, is an English law phrase, used where a thief is taken with the stolen article about him; as it were in his hands, or *flagrante delicto*. *Tomlins' Dict. h. t.* See *Fang*.

**Manor**; in English law, jurisdiction or right over a certain district of land. This was a noble sort of fee, granted partly to tenants for certain services to be performed, and partly reserved for the use of the lord's family, with jurisdiction over his tenants for their farms. Lords of manors were formerly in use to grant large parcels of land, which became manors themselves; the chief manor being called an *Honour*. *Tomlins' Dict. h. t.*

**Manrent**; signifies personal service or attendance. It was the token of a species of bondage, whereby free persons became bondmen or followers of those who were their patrons or defenders. See *Hope's Minor Practicks*, p. 58, in *Notes*, edit. 1734. *Stair*, B. i. tit. 2, § 12; *Bank*. vol. i. p. 69; *Ross's Lect.* ii. 157. See also "*Summary of Feudal Law*," anon. 1710.

**Manse**. The term was originally applied to a portion of ground set apart for the clergyman; but now, in Scotland, it is used to signify the dwelling-house of the clergyman, the ground to which he is entitled being termed his glebe. Every rural parish minister is entitled to a manse, and to have it upheld by the heritors; and where there is no manse, the minister is entitled to have half an acre of ground designed to him by the presbytery for a manse, offices, and garden, and to have the heritors ordained to erect a manse and offices thereon. The heritors on whom this burden lies are the proprietors of lands within the parish. Titulars or tacksmen of teinds are not liable; nor superiors in respect of the feu-duties of lands in the parish; nor liferenters. In the allocation of the expenses the general rule is, that each heritor pays in proportion to his valued rent, although this rule is not invariable; and in

Shetland, where there is no valued rent, the real rent is taken as the criterion. Singular successors and creditors are not liable for arrears; but they are subject to this burden, in so far as it falls on the lands, for the years of their possession.

The statutes on the subject require that the manse should be near the church, and, except in special circumstances, this rule is observed. The leading statute is 1663, c. 21, which provides that where competent manses are not already built, the heritors shall build them, at an expense not exceeding £1000 Scots (£83, 6s. 8d. sterling), and not under 500 merks; and it has been questioned whether the heritors can be compelled to expend more than the statutory *maximum*. But this doubt is now confined to the case where a manse is proposed to be built in a parish where there has not been one previously; for where a manse has been once built, and the question is as to the rebuilding, adding to, or repairing it, the rule is, that the heritors must expend such a sum as may be necessary to render the manse a "*competent*" residence for the clergyman. In this respect, however, while in repairing, adding to, or rebuilding the manse, a style and size consistent with the mode of living of the day will be adopted, regard must also be had to the extent of the parish, to the amount of the stipend, and to other circumstances; and above all, moderation in dimension and simplicity in ornament must be rigidly observed. Acting on this principle, the sum most commonly allowed of late years, for rebuilding a manse, has been £1000 sterling; although a larger sum has often been voluntarily expended by the heritors in rendering the manse and offices suitable and comfortable.

It is frequently made a question whether the minister is entitled to have the manse rebuilt, or merely repaired and added to; but on this point it is impossible to lay down any invariable rule. Every case must depend less or more on its peculiar circumstances; and in reference to the circumstances of one of the latest cases, the law, so far as general, has been thus stated by Lord Moncreiff: "It appears to be settled on the one hand, that where a manse has been built, and accepted of and approved of by the presbytery, the minister is not entitled, simply on the ground that the accommodation is not such as may have been generally provided in other cases, or because the sizes and forms of the apartments may not be according to the fashion of the times, to require the heritors to make extensive alterations on it, or additions thereto; and that, even although some repairs may be necessary of a small or inconsiderable nature, such a necessity will not make way

for a demand for re-modelling and adding to the house, so as to render it in all respects a suitable manse, according to the views entertained at the time. But, on the other hand, he (Lord Moncreiff) holds it to be equally settled, that where a manse has, either from original insufficiency or by the lapse of time, come to be in such a state that it requires extensive repairs to render it even habitable, it is then competent for the presbytery, and for this Court in reviewing their sentence, to consider not merely what is absolutely essential to render the old building habitable, but what ought reasonably to be done, by alterations and additions, to render the manse a suitable residence for the minister in the circumstances of the parish." *Symington, infra cit.*

The manse includes a dwelling-house, stable, barn, and byre; and the usual occasion for settling the matter between the minister and the heritors is the induction of a new incumbent. The manse is then either re-built, added to, or repaired, as circumstances may require; and when these operations are completed, the manse is, in the ordinary case, declared a *free manse*; that is, the presbytery, after due inspection, take the manse, as it were, off the hands of the heritors. This is a form introduced by practice for ascertaining that a competent manse has been provided. Its effect is to lay the burden of all ordinary repairs on the minister during his incumbency; and the heritors are entitled to have the manse declared *free*, whether it has been built or repaired voluntarily or under a decree of the presbytery. But this declaration will not bar the same incumbent from insisting for such repairs or additions as may be rendered necessary by the decay occasioned by time, or by the manifest incompetency of the manse as a suitable residence.

Where a manse stands in need of repairs or additions, or where a new manse is necessary, the course is for the clergyman, either on his induction or when the necessity occurs, to apply to the presbytery by petition to hold a meeting for the purpose of inspecting the manse. On this petition a deliverance is pronounced, appointing a visitation on a day fixed, of which edictal notice is directed to be given from the pulpit, and also by letters addressed by the minister to the non-resident heritors. At the same time, skillful tradesmen are directed to attend the presbytery on the appointed day, the expense of the tradesmen's attendance being borne by the heritors. At this diet the tradesmen make a report on oath, which is the ground for a finding by the presbytery, which is followed by an order for plans, estimates, and a contract, and

finally by a decree of the presbytery against the heritors for the sum necessary to defray the expense of the building and other incidental expenses. The presbytery may proceed in absence of the heritors; but, in the ordinary case, the matter is otherwise managed:—The subject is taken into consideration at successive meetings of presbytery, and it is only in comparatively rare cases that compulsory measures are requisite against the heritors; but where that happens, and where the parties insist on having their respective rights judicially determined, the decree of the presbytery may be brought under the review of the Court of Session by suspension. The higher church-courts have no jurisdiction in this matter. While the re-building or repairs are in progress, or during the time that the minister is excluded from his manse, either by those operations or by a relative litigation, he is entitled to an allowance from the heritors as manse-rent. This allowance must be claimed in a separate process at the instance of the minister against the heritors, unless they consent to the Court awarding a sum as rent, in the suspension of the decree of the presbytery. If an action be raised for manse-rent, the summons must conclude against each heritor for his proportion of the rent, not against the whole heritors as jointly and severally liable; and where a difficulty had arisen as to the *quantum* of rent, the Court, in one case, remitted to the sheriff to report as to what would be a reasonable allowance.

It has been said by some authorities, that all ministers are entitled either to manses or to a pecuniary allowance in lieu of a manse; but this is a mistake. The ministers of royal burghs proper have no such right; although, where the royal burgh has a landward district attached, and forming part of the parish, it is now settled that the first minister is entitled to a manse; *Auld*, 16th June 1825, 4 S. & D. 99; *House of Lords*, 2 W. & S. 600. The second minister of a parish, whether landward or burghal, seems to have no legal claim to a manse; although, where a manse has been once provided by the heritors, they may be bound to keep it up. *Dunlop*, 88.

By 5 Geo. IV., c. 72, a statutory provision is made for an allowance or additional stipend in lieu of manse and glebe to clergymen whose stipend is under L.200, and who have no manse or glebe. The regulation of that statute is, that a payment shall be made from the public revenue, so as to raise the stipend to L.200 where there is neither manse nor glebe, and to L.180 where either the manse or the glebe is wanting. See *Small Stipend*. And the stat. 5 Geo. IV., c.



90, regulating the erection of government churches in the Highlands and Islands of Scotland, also provides for the erection of dwelling-houses for the clergymen of such churches. Those dwelling-houses are on a very moderate scale, the statutory sum at the disposal of the commissioners for the erection both of church and dwelling-house not exceeding L.1500 sterling.

Numerous questions have occurred connected with the subject of this article, as to which see *Stair*, B. ii. tit. 3, § 40; *More's Notes*, clxx.; *Bank*. i. p. 667; ii. 29, 46; *Ersk.* B. ii. tit. 10, § 55, *et seq.*; *Bell's Princ.* § 1165, *et seq.*; *Illust.* *ibid.*; *Bell's Com.* i. 701; *Kames' Stat. Law*, h. t.; *Hunter's Landlord and Tenant*, 105-7, 432, 490; *Connell on Parishes*, 240, *et seq.*; *Dunlop's Parish Law*, pp. 7, 10, 11, 27, 45, 75, *et seq.*; *Hill's Prac. of Church Courts*, 139, *et seq.*; 2 *Dow*, 433. And the following cases may be also particularly consulted: *Strathblane*, 10th July 1827, 5 *S. & D.* 913; *Lochcarron*, 30th June 1835, 13 *S. & D.* 1014; *Strathaven, House of Lords*, 1 *Dow*, 393; *Channelkirk*, 18th June 1818, 13 *S. & D.* 1018; *Symington*, 25th May 1837, 15 *S. & D.* 1020. See *Glebe*.

**Mansion-House.** The heir in possession under a deed of entail is not entitled to grant a lease of the family mansion-house or pleasure-grounds to endure beyond the period of his own lifetime. If he should do so, however, the lease does not expire *eo ipso* on his death, but must be set aside by reduction. By the Montgomery Act, as it is called, this prohibition is extended to the manor-place, offices, gardens, and adjacent inclosures, which have been usually in the natural possession of the proprietor; and building leases cannot be granted of any lands within 300 yards of the manor-place; 10 *Geo. III.*, c. 51, § 6. By the same statute it is provided, that if the heir of entail expends money in building or repairing the mansion-house, he may become a creditor for three-fourths of the money expended to the next succeeding and subsequent heirs of entail, provided he take the steps prescribed by the statutes for preserving evidence of the expenditure, and making it a proper charge against the succeeding heirs. See the form of a summons for the expense of building a mansion-house on an entailed estate, *Jurid. Styles*, iii. 60. If there are more entailed estates than one, the right to build a mansion-house is not barred by the existence of a mansion-house already on another estate. The mansion-house is one of the rights to which the eldest of two or more heirs-portioners is entitled as a *præcipuum*. *More's Notes on Stair*, clxxv.; *Bell's Com.* i. 53-8; *Bell's Princ.* § 1752, 1770; *Illust.* *ib.*; *Bell on*

*Leases*, i. 123; *Hunter's Landlord and Tenant*, 94, 353; *Sandford on Heritable Succession*, i. 8; *Entails*, 163-5, 248; *Queensberry Leases*, July 2, 1819, 1 *Bligh*, 340. See *Tailzie. Meliorations. Heirs-Portioners. Terce.*

**Manlaughter.** See *Homicide*.

**Manus.** according to Skene, a habitation, dwelling-place, or bothie; also, so much land as will sustain a man and his family honestly, and pay the duty to his master. *Skene*, h. t.

**Manufactories and Machinery.** Several statutes have been passed relative to the conduct of various manufactures, and the mutual rights and duties of master and workman. The health of young persons in factories has been provided for in certain salutary acts. See *Factories*. In some manufactories, justices of peace are empowered to settle differences between masters and operatives, by reference to persons of skill, or in other summary ways. The seducing of workmen to go abroad is an indictable offence; and the exporting of tools used in certain manufactures may be prevented by justices of peace, who are authorized to seize such tools when destined for exportation. A contract is beginning to come into use, by which the proprietor of a manufactory lets it for hire, along with the machinery which it contains, and sometimes with steam-power. When let without steam-power, there is no difference between such a lease and an ordinary lease of a shop,—the machinery or other articles being let according to inventory. When steam-power is included, the landlord lets the mill or building in whole or in part, with a right to each of the tenants to a proportionate share of the machinery, or of the chief mechanical power; and it is usually stipulated that the lessor shall keep the building and steam-engine, and the “great gearing” connected with the engine on the outside of the building, in proper repair; while the lessees are taken bound to keep the small machinery within their respective portions in repair. If the engine be not kept going regularly, the lessee may, upon notice in writing, appoint an engineer to superintend it, and to keep it going at the stipulated rate, and deduct the expense from the rent. A stipulation to make up stoppages, either by *extra* work or a deduction of rent, does not include extraordinary stoppages: the lessor is held to warrant the condition of his engine, and the lessee is entitled to damages to the extent of the loss sustained by any imperfection or fault in the engine. But although such is the general doctrine laid down by text writers on this subject (see *Hunter on the Law of Landlord and Tenant*, *ut infra*), yet the result of some decisions renders it at least questionable whether this contract is to be regarded as properly of the nature of a

lease. Thus, where the question was whether, in a contract with the proprietor of a steam-engine for a supply of power, failure to pay rent for a single year entitled the lessor to stop the supply, the contract was held to be *locatio operis*, not lease, and the stipulated consideration to be hire, not rent; *Auld*, Jan. 31, 1827, 5 *S. & D.* 264. In a subsequent case it was found in the House of Lords (reversing the judgment of the Court of Session), that the price to be paid for a supply of steam-power and water is not rent, and that although the lease of a tenement and the hire of a steam-engine may be combined, yet they are separate stipulations; *Catterns*, June 6, 1834, 12 *S. & D.* 686, reversed 15th May 1835. *Kames' Stat. Law Abridg. h. t.*; *Swint. Abridg. h. t.*; *Hunter's Landlord and Tenant*, 233, 306, 473, 584, 689, 852; *Hutch. Justice*, ii. 178; iii. 210; *Tait's Justice, h. t.*; *Blair's Justice, h. t.* See *Workman. Factories. Fixtures. Combination. Artisans.*

**Manumission**; in the Roman law, was the act by which a master gave liberty to his slave, or freed his son from the *patria potestas*. The slave, when made free, became his master's freedman, and owed him certain duties as patron; and if he failed in these, he returned to servitude. By the old law of England, while villanage subsisted, a lord might manumit his bondmen in various ways. Some were freed by delivery to the sheriff, and proclamation in the county; others by charter: one way was for the lord to take the bondman by the head, and say, "I will that this man may be free," and then push him forward out of his hands; and manumission was implied when the lord made an obligation for payment of money to the bondman, or sued him where he might enter without suit. *Stair*, B. i. tit. 2, § 13; *Bank*. i. 67; *Ross's Lect.* ii. 465; *Tomlins' Dict. h. t.*

**Manure**. See *Dung*.

**Manus Mortua**. *Dimittere terras ad manum mortuum*, signifies to mortify lands, to dispose them to a kirk or university, the term being so used either because all casualties must necessarily be lost to the proprietor, where the vassal is a corporation which never dies, or because the property of those subjects is made over to a dead hand, which cannot, contrary to the donor's intention, transfer it to another. *Ersk.* B. ii. tit. 4, § 10; *Skene, h. t.* See *Mortification*.

**Maps**; may be founded on, when distinctly authenticated and sworn to. But a map is not evidence of itself; it is rather an adminicle, explanatory of other proper evidence. *Macfarlane's Jury Prac.* 183. See *Plan*.

**Marches**. By the act 1661, c. 41, ratified by 1685, c. 39, the proprietor of land may compel the conterminous proprietor to bear

with him half the expense of a mutual fence or inclosure; and, in the same manner, fences once made may be kept in repair at the mutual expense of the parties. Where the march is a rivulet, which is not a sufficient fence, a proper fence may be built upon the spot, if it be practicable. The fence may run along one side of the stream; but if it be desired, the stream ought to run a space within the fence and a space without, that both parties may have the benefit of watering. A tenant, contrary to the general rule, is bound, independently of stipulation, to maintain march-fences erected by the landlord during the lease. See *Fences*. By the act 1669, c. 17, landholders may apply for a streighting of marches, and the judge ordinary may straighten them, and order a compensation for what is taken from the one and given to the other. Considerable portions of land may be exchanged. Entailed lands are comprehended under these regulations, provided the ex-cambion be regulated by the entail statutes. See *Excambion*. The conterminous proprietor ought to be called as a party. The obligation to bear the expense of half-march does not take place in small properties; and practice has excluded it where the property does not exceed five or six acres. See *Kilkerran, Planting and Inclosing*, No. 1; *Ersk.* B. ii. tit. 6, § 4; *Stair*, B. ii. tit. 3, § 73; B. iv. tit. 27; tit. 43, § 7; *Bank*. vol. i. p. 282; *Bell's Princ.* § 958; *Hunter's Landlord and Tenant*, pp. 576-82; *Hutch. Justice of Peace*, 2d edit. vol. ii. p. 250; *Tait's do., voce Planting*; *Bell on Leases*, i. 206; *Kames' Equity*, 114.

**Marcheta Mulieris**; the "raide of a woman, or the first carnal copulation with her. King Evenus ordained that the lord of the ground should have the first night of each married woman within the same; but Malcolm III. abrogated this ordinance, and appointed each bridegroom to pay a piece of money, called *marca*, as a compensation," *Skene, h. t.* Bankton doubts the infamous origin of this casualty, i. p. 595; and Hailes, in a treatise on this subject, annexed to his *Annals*, attempts to show that no such custom ever existed in Scotland. He explains the term *macheta* to mean, a fine paid to the lord by a sokeman or villain, when his unmarried daughter chanced to be debauched; or a composition by the sokeman for the lord's permission to give his daughter in marriage to a person not subject to the lord's jurisdiction; or the fine for giving her away without such permission. *Hailes' Annals*.

**Marginal Addition, or Note**. A marginal addition to, or alteration on a deed, must be made before the final execution of the deed, by its being signed in presence of the witnesses. Marginal notes, being parts of the

deed, require subscription. The practice is to comprehend them within the subscription; *i. e.*, to write the Christian name upon the left side, and the surname upon the other, which must be done before the subscribing witnesses. The marginal note or addition ought to be mentioned in the testing clause of the deed: it ought to be there stated by whom the note or addition is written, and that the witnesses were also witnesses to the party's having subscribed the marginal note; otherwise it will be held *pro non scripto*. Such notes are presumed to have been added after the execution of the deed, unless the contrary is stated in the testing clause. *Ersk. B. iii. tit. 2, § 20; Stair, B. iv. tit. 42, § 19; More's Notes, p. ccciii.; Bank. vol. i. p. 336; ii. 635; Hunter's Landlord and Tenant, pp. 310-12; Tait on Evidence, p. 74, 75; Ross's Lect. i. 143, 158.*

**Marine Stores.** Dealers in marine stores are bound to keep books, in which they are to enter the name and address of all with whom they deal, together with the price of the articles purchased by them. *Tomlins' Dict. h. t.*

**Mariners.** See *Seamen*.

**Marischal.** This officer, along with the Lord High Constable of Scotland, formerly possessed a supreme itinerant jurisdiction in all crimes committed within a certain distance of the court, wherever it might happen to be. *Ersk. B. i. tit. 3, § 37. See Constable, Marshal.*

**Maritagium;** "tocher gude." *Skene, h. t.*

**Maritagium Hæredis;** according to Skene, is the casualty of marriage which falls to the superior. *Skene, h. t. See Marriage, Casualty of.*

**Maritime Law.** The maritime law partakes more of the character of international law than any other branch of jurisprudence; and both English and continental collections and treatises are received as authority in our courts. Formerly, the Judge-Admiral was judge in the first instance in all maritime causes; but his jurisdiction has been transferred partly to the Sheriff, and partly to the Court of Session. See *Admiralty*. The doctrines of maritime law are considered under the following heads in this Dictionary:—*Charter-Party. Letters of Marque. Bill of Lading. Freight. Salvage. Wrecks. Bottomry. Respondentia. Insurance. Loading. Seaworthiness. Stranding. Barratry. Contribution. Jactus Mercium. Voyage. Demurrage. Lay-Days. Reprisals. Deviation. Collision. Pilots. Stowage. Ship, &c.*

**Mark;** an ounce, or half a pound, whereof the dram is the eighth part. *Skene, h. t.*

**Mark;** an old English coin. The mark of silver is now 13s. 4d.; although in the reign of Henry I. it was only 6s. and a penny in weight. *Tomlins' Dict. h. t. See Merk. Scots Money.*

**Mark.** A subscription by a mark, and the name written around it in presence of witnesses, may, on a proof by the instrumentary witnesses, be the ground of an obligation; but it requires the evidence of the witnesses to give it validity; *Ersk. B. iii. tit. 2, § 8.* In England the personating of a person, and putting down his mark, has been held to be forgery. This form of accepting a bill is irregular, and contrary to the nature of bills, which are intended for summary execution. In certain circumstances, however, a bill so subscribed may be the ground of an action for the debt. *Stair, B. i. tit. 11, § 7; More's Notes, p. cccci.; Hunter's Landlord and Tenant, p. 309; Thomson on Bills, 48; Tait on Evidence, pp. 68-9, 117; Bell on Leases, i. 275. See Bill of Exchange. Initials, Subscription by, and authorities there cited.*

**Market Overt.** The law of Scotland differs from that of England as to the legal effect of a sale in open market. For the security of purchasers, the English law recognises the principle that property may in some cases be transferred by sale, although the seller has no right of property in the goods. Thus, if one steal an article, or retain in his possession goods which he has already sold; and if he sell these goods in *open market*, the buyer is secure of his purchase, it being held that a sale of anything vendible in market overt is not only good between the parties, but also binding on all (except the Crown) having any right or property therein. Market overt in the country is only held on the special days provided for particular towns by charter or prescription; but in the city of London every day except Sunday is market-day. The market, place, or spot of ground set apart by custom for the sale of particular goods, is also the only market overt in the country. In the city of London, however, every shop in which goods are publicly exposed to sale is market overt, but only for such things as the owner professes to trade in. But there are certain exceptions to the general rule; such as, that the property is not changed by a sale in a *covert* place in a fair or market—*e. g.* in a back room or warehouse, behind a hanging or cupboard, or where the windows of the shop are shut. In Scotland, again, no such privilege is attached to sales in open market; and the owner of goods, sold by one who has stolen them, or to whom they have been lent, may reclaim them from the purchaser. It is true that a second sale with delivery is effectual against the first sale without delivery; but this is not from any privilege of market, but from the universal doctrine of the law of Scotland, that the property of a thing sold is not transferred without delivery.

Although some doubt existed on the point in the earlier law, it is now assumed as quite fixed, that when corn, subject to the landlord's hypothec, has been sold by bulk in open market, the purchasers are safe against the operation of the hypothec. There are two exceptions to this rule: purchasers by sample in open market and purchasers at a public sale, who have been warned that the rent has not been paid, are subject to the operation of the hypothec. *Earl of Dalhousie v. Dunlop*, Feb. 17, 1828, 6 S. 626,—*affirmed*, Dec. 9, 1830, 4 W. & S. 420; *Stair*, B. ii. tit. 1, § 42; B. iv. tit. 25, § 6; *More's Notes*, p. xlvi., cli.; *Bell's Com.* i. 281, 287; *Add. No. XIII.*; *Bell's Princ.* § 527, 665, 1242; *Illust. ib.*; *Brown on Sale*, 15, 29, 420; *Blackst.* ii. 449; *Bell on Leases*, i. 375; *Hunter's Landlord and Tenant*, 705; *Tomlins' Dict. h. t.* See *Sale. Labes Realis. Hypothec.*

**Marking of Goods.** The marking of goods is one of those forms of constructive delivery by which the property of a thing sold is transferred, while the seller retains possession. It cannot be said to be a general rule that marking goods is equivalent to delivery—*Bell's Com.* i. 181; but in the special case where there is some difficulty in the way of immediate delivery, marking appears to be equivalent. Thus, where the thing sold is not yet separated from the soil, and cannot instantly be separated and delivered, it is held as delivered when marked for the buyer; and the property of cattle sold while grazing seems to be transferred by their being marked for the buyer. Goods sold and sent to the buyer at a distance are not held as delivered while in the hands of a wharfinger or public warehouseman for the carrier's convenience; but if, in such circumstances, the buyer claim the goods and mark them as his, the delivery is completed. *Bell's Com.* i. 181, 201; *Bell's Princ.* § 1303; *Brodie's Sup. to Stair*, 897, note 9. See *Delivery, and authorities there cited.*

**Marle-Pit.** The landlord has the sole right to shell marle found within the farm; and he may work it, and make roads, &c., on paying surface damage. A minister has been found entitled to sell the produce of a marle-pit discovered in his glebe, upon applying the price to the use of the benefice. *More's Notes on Stair*, p. clxxii.; *Bell's Princ.* § 1226; *Hutch. Justice of Peace*, ii. 420, 450; *Bell on Leases*, i. 344; *Hunter's Landlord and Tenant*, 570. See *Lease. Mines and Minerals. Glebe.*

**Marquis**; is a title of honour below a duke, but above an earl.

**Marriage**; is a civil and solemn contract between a man and a woman, whereby they unite themselves for life in a domestic society,

for the mutual solace and comfort of each other, and having in view chiefly the propagation of the species and the rearing of a family. This contract is indissoluble, except by the death of one or other of the parties, or decree of divorce founded on adultery or desertion; for, although impotency or a natural incapacity on either side for procreation is a ground on which the marriage may be annulled, yet it is not so much a ground for divorce as an essential nullity, in respect of which the contract may be declared to have been void from the first. The subject will be briefly considered in the following order:

- I. *Of the constitution of marriage.*
- II. *Of the rights consequent on marriage.*
- III. *Of the manner and effects of its dissolution.*

**I. OF THE CONSTITUTION OF MARRIAGE.**—Marriage is a contract completed by consent alone. The parties must have arrived at the age of puberty; that is, the male at the age of fourteen, the female at the age of twelve, before they are held legally capable of the requisite consent; but after that age parties, where there is no disqualification, may validly intermarry. A marriage entered into even before the age of puberty, if the parties after arriving at that age cohabit as man and wife, is effectual; *Ersk. B. i. tit. 6, § 2.* A marriage, as regards the ceremony, may be either regular, clandestine, or by mere consent, without the intervention of a clergyman. A regular marriage is performed by a clergyman in presence of at least two witnesses, and is preceded by the proclamation of banns according to the rules of the church. A certificate of the session-clerk is received as evidence of proclamation of banns. See *Banns*. The consent of parents or of curators is not required in order to constitute a legal marriage by the law of Scotland. Clandestine marriages are also performed by clergymen, and are equally effectual with regular marriages; but they expose the clergyman and the parties to certain penalties. They differ from regular marriages in this, that they are not preceded by the publication of banns. See *Clandestine Marriage*. Marriage being a civil contract, may be completed by consent alone, solemnly and deliberately given *de presenti*. In the case of an antenuptial contract of marriage, where the parties, according to the expression in the deed, agree to take each other as husband and wife, the effect of this agreement as a *de presenti* acceptance is counteracted by the subsequent obligation which the deed also contains, to enter *de futuro* into a regular marriage; thus indicating the understanding

of the parties that the written contract imports a mere engagement to enter into the marriage hereafter. See *Espousals. Contract of Marriage*. Deliberate consent *de præsenti*, without a *copula*, completes a marriage; for, according to the law of Scotland, *consensus non cotius facit matrimonium*. So, also, a promise or engagement to marry, followed by a *copula*, constitutes a marriage; for, *præsumptione juris et de jure*, consent *de præsenti* is presumed to have been adhibited at the time of the *copula*. In marriage thus constituted, the *copula* must be proved to have taken place. See *Dalrymple v. Dalrymple*, 16th July 1811, *Consistorial Court, London, Haggart's Reports*, ii. 54. It must be distinctly shown that the promise preceded the *copula*, for a promise after *copula* does not constitute marriage, unless the intercourse be renewed in such a way as to show that the new *copula* follows upon and is connected with the promise. The question has been raised whether promise *subsequente copula* constitutes a marriage *ipso jure*? or whether it requires a declarator or subsequent completion of the marriage, which may be barred by another marriage intervening? It was held, but with some division on the bench, that the marriage is constituted *ipso jure*; *Pennycook*, Dec. 15, 1752, *M.* 12,677. A promise or engagement to marry, however formal, where no *copula* has followed, may be resiled from; the party so resiling, however, being liable in damages for breach of promise. Marriage may be constituted by an acknowledgment in writing, or by an acknowledgment made to the midwife who delivered, or to the clergyman who christened, a child born to the spouses. But in order to fix the *status*, it is necessary that the written acknowledgment should have been produced and acted upon during the lifetime of both parties. It is not sufficient that, after a man's death, an acknowledgment by him is produced certifying that he was married to a certain person. This will not give the woman the *status* of his widow. Marriage also may be inferred from cohabitation, and from the parties living together at bed and board, and being habit and repute husband and wife; 1503, c. 77. But if the habit and repute have begun in avowed concubinage, a palpable change of purpose must be shown in order to establish a marriage by habit and repute. This statute gives the *terce* to a woman who has been reputed the wife of a man till his death. With regard to the evidence of a marriage having been contracted, the exchange of mutual consent *de præsenti*, or cohabitation, or habit and repute, may be proved by parole evidence; but a promise of marriage can, like other promises, be com-

potently proved in the ordinary case only by writ or oath of party. When a marriage is once fairly constituted, no subsequent acts of the parties (except such as warrant divorce) can dissolve it; but in the case of an irregular marriage, it is competent to found on subsequent facts and circumstances as qualifying the previous apparent consent, so as to show that the parties never had any deliberate or serious purpose of marriage. See *Evidence*.

The legal disqualifications for marriage are, 1. Pupillarity, since a person before arriving at the age of puberty is not legally capable of giving consent. 2. Defect of judgment, as in the case of idiocy, because an idiot cannot give that consent which is requisite to complete the contract of marriage. 3. Impotency; but it is *jus tertii* in any other than the parties to plead impotency as a nullity. 4. The having entered into a previous marriage which still subsists. 5. By the act 1600, c. 20, a marriage between a divorced person and his or her paramour, mentioned as such in the decree of divorce, is declared illegal. See *Divorce. Adultery*. 6. Propinquity within the forbidden degrees is a ground for dissolving a marriage; and the act 1567, c. 15, adopts the Jewish law, by declaring that marriage shall be as free as God has permitted it, and that seconds in the degrees of consanguinity and affinity, and all degrees further removed, contained in the Word of God, may lawfully intermarry. By Leviticus, c. xviii., the following rules are laid down: 1. Intermarriages between ascendants and descendants *in infinitum*, are prohibited. 2. Marriage in the collateral line *in infinitum*, is forbidden; that is, where the one party is brother or sister to the direct ascendant of the other party. 3. In every instance not falling under those rules, marriage is lawful in the second degree, according to the canon law, or in the fourth degree, according to the Roman law. See *Kin*. Consequently, cousins-german, and all more remote relations, may intermarry. 4. The degrees in consanguinity which are prohibited are equally prohibited in affinity; and the rules are the same whether the parties are related by full or only by half-blood; *Ersk.* B. i. tit. 6, § 3, *et. seq.*

By the act 19 and 20 Vict., c. 96, 1856, no irregular marriage contracted in Scotland, by declaration, acknowledgment, or ceremony, is valid, unless one of the parties had, at the date of the marriage, his or her usual place of residence in Scotland, or had lived there for twenty-one days preceding the marriage.

II. OF THE RIGHTS CONSEQUENT ON MARRIAGE.—The first effect of marriage is to produce a communion of goods, which extends

to all subjects not heritable, excepting personal bonds bearing interest. (See *Bond*.) Though the goods of the married pair are in communion, yet the management of them is vested by law in the husband, and this power of management is termed the *jus mariti*. See *Jus Mariti. Goods in Communion*. The husband is the proper curator of his wife; and immediately on the marriage, the office of her curator, where she happens to be in minority and to have a curator, expires; the whole of his powers and duties being devolved on the husband. Hence, in every action brought against a wife, the husband must be called for his interest; and, in virtue of the husband's power over the person of his wife, she cannot be imprisoned for debt. He is imprisoned in place of her for the non-payment of her debts, or the non-performance of her obligations, unless where the diligence issues against the wife on account of her failure to perform an act within her power, or where she is imprisoned *in modum pœnæ* for a delict. See *Delict*. Another consequence of the curatorial power of the husband is, that he must sign as consenter to the wife's deeds; and where he does sign as such, the deed is not reducible on the head of lesion, as in the common case of a deed consented to by a curator. But all personal obligations on the wife are null, though signed by the husband as consenter, excepting in the case where she has a separate stock, exclusive of the husband's *jus mariti*, which the wife may assign or burden; or where a separation has taken place between the husband and wife; or where the wife is intrusted with the management of a particular branch of business, as *præposita*, or with the affairs of her husband; and there, her acts bind her husband. Under this *præpositura* are included furnishings made to the family, for which the husband is liable, unless he see reason to inhibit his wife. See *Præpositura. Inhibition of a Wife*. The wife may, without her husband's consent, execute a testament or a *mortis causa* conveyance of her landed estate, provided she be of age at the time of executing the deed. These are the rights consequent on marriage during its subsistence. The other rights arising to either party do not emerge until the dissolution of the marriage. See *Terce. Jus Relictæ. Courtesy. Goods in Communion. Legitim, &c.* Where either party, during the subsistence of the marriage, makes a gift or donation to the other, it is in the power of the donor to retract it, either by an express revocation, or by implication, as by making a subsequent donation of the same subject, or even by contracting debt, in satisfaction of which the subject may be taken notwithstanding the donation. But this does not

apply to mutual remuneratory grants; hence, postnuptial contracts, where there have been no previous provisions for the spouses, are not, so far as they are rational, revocable. It is to be observed, however, that a deed by the husband, proceeding on the narrative of his having value of the wife's in his hands, is not revocable, unless on evidence of its falsehood. See *Donatio inter Virum et Uxorem. Contract of Marriage*. All deeds executed by a wife, or to which she consents, ought to be ratified by her in presence of a judge, and out of the presence of her husband. This ratification is a declaration by the wife, upon oath, emitted before a magistrate, that she has acted freely and voluntarily in executing the deed; and, if regularly done, it precludes her from challenging the deed. The ratification, however, has no effect in preventing her from recalling a donation to her husband. *Ersk. B. i. tit. 6, § 1, 28, et seq.* See *Ratification*.

III. OF THE MANNER AND EFFECTS OF THE DISSOLUTION OF MARRIAGE.—Marriage is dissolved by the death of either of the parties, or by a sentence of divorce. *Divorce* is the sentence of the Court of Session (as coming in place of the late Commissary Court), declaring the marriage to be dissolved; and the divorce may proceed either on the ground of adultery, or of wilful desertion. See *Divorce. Desertion*.

EFFECTS OF THE DISSOLUTION OF THE MARRIAGE.—Formerly, where the marriage was dissolved by death within year and day of the marriage, without the birth of a living child, and where the matter was not otherwise regulated in the contract of marriage, all grants made in consideration of the marriage became void; the tocher returned to the wife, or to her executors, or to the giver; and every interest in the estate of the husband returned to the husband. But this related only to the provisions as between the parties; for a provision to one of them, by a grant, for example, and not given to the other, was effectual notwithstanding the dissolution of the marriage. It was therefore provisions by the one to the other, or provisions made *intuitu matrimonii*, which fell by the dissolution within year and day without a living child. In accounting for the tocher in the event of such premature dissolution, the husband was entitled to deduct the funeral expenses of the wife; and where matters could not be restored on either side, the rule as to restitution did not hold, as it would have been unjust to restore to one party and not to the other. Gifts by the friends of the new married pair did not fall under the rule, but are divided; *Waugh, Jan. 14, 1679, M. 6179*. But the case of such a premature

dissolution was usually regulated by a special clause in the contract of marriage, modifying or altering the legal rule. See *Ersk. B. i. tit. 6, § 38, et seq.*

By the act 18 Vict., c. 23, 1855, it is enacted, that when a marriage is dissolved before the lapse of a year and day from its date by the death of one of the spouses, the whole rights of the survivor, and of the representatives of the predecessor, shall be the same as if the marriage had subsisted for a year and day.

1. *By the death of the wife.*—If there has been a living child born of the marriage, and if the wife has left no heir to her heritage by a former marriage, the surviving husband has a life interest right to the rents and profits of the wife's heritable estate, which is called the *courtesy*. On the death of the wife, the goods in communion also suffer a division. Formerly, where there were no children, the free goods in communion, after deduction of debts, were divided into two equal parts, one of which belonged to the husband, the other to the next of kin of the wife, unless she had destined it otherwise by a testamentary or other deed. Where there were children of the marriage, or children of the husband by a former marriage not forisfamiliarized, one-third only was the wife's share. (*Stair, B. i. tit. 4, § 21.*)

By the act 18 Vict., c. 23, 1855, where a wife predeceases her husband, her next of kin, executors, or other representatives, whether testate or intestate, have no right to any share of the goods in communion; and no legacy, or bequest, or testamentary disposition thereof by the wife, will affect the goods in communion. On the death of the wife, the children have no claim to *legitim*, that being a claim which arises only on the death of the father; but formerly, if they were of age, they might have insisted for an immediate distribution of their deceased mother's share of the goods in communion. Where the children of the last marriage were under age, the father, as their administrator, was entitled to the management of this share; and if, in the course of such management, he became insolvent, before having accounted to the children for their mother's share, they had a *jus crediti* to the extent of that share, which entitled them to rank on their father's bankrupt estate. But before they could so rank, it must have appeared that at the date of the dissolution of the marriage the husband was solvent, and that the sum for which they claimed to be ranked was no more than the free third of the goods in communion. The children of the wife by a former marriage, who, along with the children of her last marriage, are her next in kin, might also

have insisted for their proportion of their mother's share of the goods in communion immediately on the dissolution of the marriage; and where the wife had no children by either marriage, her next in kin of more remote degrees might also have insisted for an immediate distribution. See *Ersk. B. i. tit. 6, § 41.* See also *Courtesy. Jus Relictæ. Executry. Executors.*

2. *By the death of the husband.*—Where the wife has no conventional provision, she has a right to the *terce*, which is a life interest of a third of the heritage in which the husband died infest; 1681, c. 10. She has also the *jus relictæ*, which is a share of the free moveable estate, or goods in communion, amounting to one-half where there are no children of the marriage, or where the husband has left no children by a former marriage—and to one-third only where there are children. The widow has also a claim for aliment, from the time of her husband's death to the first term of payment of her provision. She has likewise a claim to mournings; and where she is delivered of a posthumous child, she is entitled to the expenses attending the birth, &c.; *Ersk. B. i. tit. 6, § 41, note*; see *Mr Ivory's edition, note 172.* The children, on their father's death, have a right to *legitim*, which is a third part of the free goods in communion. But although such are the legal rules, it generally happens that the parties, instead of leaving the law to operate, regulate their own rights and those of their children by special contracts of marriage or other settlements. In that case, the particular contract or deed will afford the rule, where it is not *ultra vires* of the contracting parties; as to which, see *Contract of Marriage. Legitim. Jus Relictæ. Terce.*

II. *Effects of dissolution by divorce.*—The effects of the dissolution of a marriage by divorce, whether on the ground of adultery or of wilful desertion, are fully explained under the article *Divorce*. See also *Desertion*. The legal or conventional rights of the children of the marriage are not altered or affected by this method of dissolving the marriage.

SEPARATION.—A wife, on account of harsh usage, may sue for a separate maintenance; which, on proving the husband's misconduct, she will be allowed; or the parties, on account of mutual dissatisfaction, or from other causes, may agree to live apart. The amount of the allowance made on these occasions is regulated by the rank and fortune of the parties, and by the other circumstances of the particular case. Where the terms on which the spouses are to separate are reduced into writing, the deed is called a contract of separation. But such voluntary separations are revocable at any time; for no such separation,

whether judicial or voluntary, amounts to a dissolution of the marriage; and, while the marriage subsists, the law looks unfavourably on any arrangement adverse to the inherent nature of the institution. See *Separation*. And see, on the subject of this article generally, *Stair*, B. i. tit. 4; *More's Notes*, p. xiii; *Bank*, vol. i. p. 105, 140; *Bell's Princ.* § 1506, *et seq.*; *Illust. ib.*; *Tovey*, May 14, 1813, 1 *Dow*, 117; *Macadam*, May 17, 1813, 1 *Dow*, 148. See *Contract of Marriage*.

**Marriage**; was a casualty in wardholding, which entitled the ward superior to demand a certain sum from the heir of his former vassal, on the heir's marriage, or on his becoming marriageable. Wardholding was abolished by the statute 20 Geo. II. c. 50; and as it had been customary for superiors in feu-rights to insert a clause, declaring that the vassal should be liable in the casualty of marriage, the same statute, § 10, prohibits such a clause, and declares it to be of no force, even although inserted in deeds prior in date to the statute. The compensation to superiors who may suffer by the retrospective operation of the statute is the same as that provided for superiors who have lost by the abolition of clauses *de non alienando*. *Stair*, B. ii. tit. 4, §§ 37-61; *More's Notes*, p. ccviii.; *Ersk. B. ii. tit. 5*, §§ 18, 20, 21; *Bank*, vol. i. p. 637; *Kames' Stat. Law Abridg. h. t.*; *Brown's Synop. h. t.* See *Avail of Marriage*.

**Marriage, Clandestine.** See *Clandestine Marriage*.

**Marriage-Contract.** See *Contract of Marriage*.

**Marriage, English.** Originally, the contract of marriage seems to have been as little encumbered with forms in England as in Scotland. But by the Marriage Act of 1757, it was required, under pain of annulling the marriage, that the consent of parents or guardians should be given to the marriage of minors; and that there should be publication by banns, and open celebration in the parish church, or in a chapel in which marriage was wont to be celebrated. The rules have, however, been considerably relaxed by recent statutes; and now the marriages of dissenters, such as Jews, Quakers, Roman Catholics, and other sects and persuasions, may be legally and adequately solemnized in their own synagogues, tabernacles, chapels or meeting-houses, subject to certain restrictions. It is now the law, that marriages may be solemnized not only in churches and licensed Episcopal chapels, but also at places of worship registered according to 52 Geo. III., c. 155, in the presence of a registrar, or his deputy, and two credible witnesses, or at the office of a superintendent-registrar, in his presence, and in the presence of a registrar of the dis-

trict, or his deputy, and of two credible witnesses. The parties, solemnizing marriage in a registered building, may adopt any form or ceremony they may think fit, provided that in some part of the ceremony, and in presence of the registrar and witnesses, each of the parties declares as follows: "I do solemnly declare, That I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D.;" and each of the parties must say to the other, "I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife, or husband." Provision is also made for the giving of notice in lieu of banns. See 4 and 5 *Will. IV.*, c. 28; 6 and 7 *Will. IV.*, c. 85; 1 *Vict.*, c. 22; and 3 and 4 *Vict.*, c. 72.

**Marriages, Registration of.**—The registration of births, deaths, and marriages is regulated by the acts 17 and 18 *Vict.*, c. 80, 1854; 18 *Vict.*, c. 29, 1855; and 19 and 20 *Vict.*, c. 119, 1856.

**Martial Law**; that branch of the laws of war which respects military discipline, or the government and control of persons employed in the operations or for the purposes of war. Military law is not exclusive of the common law, for a man, by becoming a soldier, does not cease to be a citizen; he is still answerable in the ordinary courts of law for his conduct in that capacity. Acts are passed annually for the government of the forces, naval and military. See *Court-Martial*, and *authorities there cited. Law of Arms. See Mutiny Act.*

**Martinmas**; the 11th of November. See *Terms, Legal and Conventional. Whitsunday.*

**Mason Lodges.** The acts 37 Geo. III., c. 123, and 39 Geo. III., c. 79, against unlawful societies, were declared not to extend to regular lodges of Freemasons which were in use to be held before these acts were passed. But this exemption is not to be enjoyed unless two members of each lodge claiming it certified, upon oath, before any justice of peace, or other magistrate, that such lodge had, before passing the act, been usually held as a lodge of Freemasons, and according to the rules prevailing among such lodges in this kingdom; which certificate, attested by the magistrate, and subscribed by the persons certifying, must, within two months after the act passed, have been deposited with the clerk of the peace for the place where such lodge is usually held. It was also necessary that the name of the lodge, the places and times of its meetings, and the names and descriptions of all its members, should be registered with the clerk of the peace within two months after passing the acts; and this must still be done on or before 25th March, yearly. The clerk of the peace is directed to lay such cer-



tificate and registry once a year before the general sessions, who may order any lodge to be discontinued, if likely to be injurious to the public peace. Like most other societies constituted for other purposes than trade, mason lodges can neither sue nor be sued by their office-bearers; *Lodge of Lanark v. Hamilton*, 11th June 1730, *Dict.* 14,554. *More's Notes on Stair*, ciii.; *Hutch. Justice*, i. 303; *Tait's Justice*, 341; *Blair's Justice*, 291; *Brown's Synop.* 2264.

**Master and Servant.** A servant may agree to serve either for wages, or for bed, board, and clothing, &c., for a determinate time. Where this engagement is to continue for one year, it may be proved by witnesses; where it is meant to exceed that period, it must be established by writing. A servant, undertaking any particular work, ought to be acquainted with the work, and capable of performing it, and is liable for any loss arising from his want of skill, or carelessness. But if the loss or delay is not imputable to him, he is entitled to his full wages. A servant hired for a period of time is entitled to his wages, though he should be disabled for part of the time through sickness or accident. This has been carried the length of one-fifth part of the time, in an agreement for a year; *Nov. 29, 1794, White*. If he dies during his service, his wages are due only to the day of his death. Where the master dies, the servant is entitled to wages and board-wages to the next term. The same happens where the master turns off a servant between terms, or without giving the servant due time to provide himself with a place; but in these cases, as the servant is at liberty to employ his time, some allowance ought to be made, according to circumstances. A servant, on the other hand, who deserts his service, forfeits his wages, and is liable in damages, as well as to a fine. Servants' wages fall under the triennial prescription; and when it appears that a claim for remuneration is substantially a claim for wages as a servant, this rule holds, although there have been no agreement as to the remuneration; *Smellie*, Feb. 25, 1835, 13 *S. & D.* 544, and *Nov. 17, 1835, 14 S. & D. 12. Stair*, B. i. tit. 9, § 5; *More's Notes*, p. lviii.; *Ersk.* B. iii. tit. 3, § 16; *Bell's Com.* ii. 138; *Bell's Princ.* § 172, *et seq.* to 193, 630-2, 2031; *Illust.* § 173, *et seq.*, 630; *Hutch. Just. of Peace*, vol. ii. p. 158; *Tait's do.*, *voce Servant*; *Blair's do.*, *voce Servant*. See also *Privileged Debt. Executor. Location. Workman. Character to a Servant. Apprentice. Prescription, Triennial. Warning of Servants.*

**Masters and Workmen.** See *Workman*.

**Master of a Ship.** The shipmaster is the person who has the sole direction of the course and conduct of the ship. The shipmaster of

a British ship must be a British subject, but there is no other limitation; and whoever holds the appointment may bind the owners in relation to third parties, even where he has not been appointed by the owners of the ship. While at home, the ship's-husband has the management of the outfit; but if there be no ship's-husband appointed, and the owners do not take the management into their own hands, the master has an implied power to order the outfit. While at home, he has no power to freight the ship; but when the ship is advertised for general freight, he has full authority to receive goods on board. When abroad, he may freight the ship, and take the management of the fitting out, victualling, and manning of the ship, and ordering of necessaries. He may even borrow money for those purposes, provided the bond or voucher specify the purpose to which the loan has been applied. But this dangerous power is not extended beyond what falls within the proper province of the shipmaster. He may hypothecate the ship for necessaries. His fault or neglect binds the owners to the extent of the value of the ship; and he himself is also bound. He may be dismissed by his owners at once, his only remedy being an action. *Ersk.* B. iii. tit. 3, § 43; *Stair*, B. i. tit. 13, § 18; *Brodie's Sup.* 953, 970; *Bank*. vol. i. p. 397, *et seq.*; *Bell's Com.* i. 505; *Hutch. Just. of Peace*, iii. p. 194; *Jurid. Styles*, 2d edit. vol. ii. p. 559; *Bell's Princ.* § 450; *Illust.* ib. See *Ship. Nautæ, Caupones. Exercitor. Ship's-husband. Insurance.*

**Master of the Rolls.** See *Rolls, Master of*.

**Matrtera**; the mother's sister, but sometimes improperly taken for the father's sister. *Skene*, h. i.

**Maxims.** The maxims, particularly of the Roman law, are of great value, as embodying important legal principles in concise and apposite language. In the investigation of legal questions involving much nicety, and obscured, it may be, by perplexing details, it not unfrequently happens that a single legal maxim solves the difficulty, and enables the lawyer to systematize and arrange conflicting principles, and apparently inextricable involutions of fact. In the present work, many law maxims have been included in the alphabetical arrangement; but at the hazard of repetition, the principal maxims are here brought into one view,—referring to the separate articles for full expositions, where such have appeared to be necessary. Observe, however, that several of these maxims have not been adopted in the law of Scotland.

*Accessorium sequitur principale.*

*Accessorium sequitur naturam rei cui accidit.*

*Actio personalis moritur cum persona.*

Actio pœnalis in hæredem non datur nisi ex damno locupletior hæres factus sit.

Actor sequitur forum rei.

Affirmanti, non neganti, incumbit probatio.

Assignatus utitur jure auctoris.

Ædificatum solo, solo cedit.

Bona fides non patitur ut idem bis exigatur.

Bona fide possessor facit fructus consumptos suos.

Casus omissus habetur pro amisso.

Caveat emptor.

Certum est quod certum reddi potest.

Chirographum apud debitorem repertum præsumitur solutum.

Cogitationis pœnam nemo patitur.

Communis error facit jus.

Conditio illicita habetur pro non adjecta.

Consensus non concubitus facit matrimonium.

Consensus tollit errorem.

Consuetudo est optima legum interpretis.

Contra non valentem agere non currit præscriptio.

Corpus humanum non recipit æstimationem.

Crimina morte extinguuntur.

Cuilibet in arte sua credendum.

Cuique licit juri pro se introducto renunciare.

Cujus est commodum, ejus debet esse incommodum.

Cujus est solum, ejus est usque ad cœlum.

Cujus est dare, ejus est ordinare.

Culpa lata dolo æquiparatur.

Culpa tenet suos auctores.

Dans et retinens nihil dat.

De minimis non curat Prætor.

De non apparentibus, et non existentibus, eadem est ratio.

Debitor non præsumitur donare.

Decimæ debentur parochæ.

Delegatus non potest delegare.

Dies inceptus pro completo habetur.

Dies incertus pro conditione habetur.

Dies interpellat pro homine.

Dolus auctoris non nocet successori.

Dominium not potest esse in pendenti.

Dominus aliquando non potest alienare.

Donatio non præsumitur.

Ejus est periculum cuius est dominium—aut commodum.

Ex facto oritur jus.

Exceptio falsi est omnium ultima.

Exceptio probat regulam in casibus non exceptis.

Exceptio quæ firmat legem, exponit legem.

Fiat justitia, ruat cœlum.

Fraus auctoris non nocet successori.

Fraus latet in generalibus.

Frustra petis quod mox es restitutus.

Frustra probatur quod probatum non relevat.

Generalibus per specialia derogatur.

Hæres est eadem persona cum defuncto—pars antecessoris.

Hæres hæredis mei est meus hæres.

Hæres succedit in universum jus quod defunctus habuit.

Id nostrum solum quod debitis deductis est nostrum.

Id tantum possumus quod de jure possumus.

Ignorantia juris neminem excusat.

In alternativis electio est debitoris.

In claris non est locus conjecturis.

In commercio licet decipere.

In dubio pars mitior est sequenda.

In dubio pro dote,—libertate—innocentia—possessore, debitore—reo—respondendum est.

In dubio sequendum quod tutius est.

In favorabilibus, annus inceptus pro completo habetur.

In turpi causa potior est conditio possidentis.

Incommodum non solvit argumentum.

Jura eodem modo destituuntur quo constituuntur.

Juris executio non habet injuriam.

Jus publicum privatorum pactis mutari non potest.

Jus in re inhæret ossibus usufructuarii.

Jus non patitur ut idem bis solvatur.

Jus superveniens auctori accrescit successori.

Legatum generis perit hæredi;—legatum speciei perit legatario.

Liberi corporis nulla est æstimatio.

Locum facti impræstabilis subit damnus et enteresse.

Majori inest minus.

Malitia supplet ætatem.

Matrimonia debent esse libera.

Messis sementem sequitur.

Minor non tenetur placitare super hereditate paterna.

Mortuus sasit vivum.

Multa impediunt matrimonium contrahendum quæ non dirimunt contractum.

Multa non vetat lex quæ tamen tacite damnavit.

Nemo cogi potest præcise ad factum, sed in id tantum quod interest.

Nemo debet ex aliena jactura lucrari.

Nemo ex suo delicto meliorem suam conditionem facere potest.

Nemo mori potest pro parte testatus, pro parte intestatus.

Nemo præsumitur donare.

Nemo præsumitur malus.

Nemo præsumitur ludere in extremis.

Nemo tenetur jurare in suam turpitudinem.

Non creditur referenti nisi constet de relato.

Non exemplis, sed legibus, judicandum.

Novatio non præsumitur.

Nulla sasina, nulla terra.

Nunquam concluditur in falso.

Nunquam præscribitur in falso.

Officium nemini debet esse damnosum.

Omne majus in se continet minus.

Omnia præsumuntur solenniter acta.

Pactis privatis publico juri derogare nequit.

Pactum de assedatione facienda et ipsa assedatio purificantur—præcipue si possessio sequatur.

Partes rei sunt favorabiliores.

Partus sequitur ventrem.

Pater est quem nuptiæ demonstrant.

Paterna paternis, materna maternis.

Patrem sequitur sua proles.

Patronum faciunt dos, ædificatio, fundus.

Pendente lite nihil innovandum.

Periculum rei venditiæ, nondum traditiæ, est emptoris.

Plus valet quod agitur quam quod simulate concipitur.

Posteriora derogant prioribus.

Potior est conditio possidentis—prohibentis—defendentis.

Primus actus iudicii est iudicis approbatorius.

Prior tempore potior jure.

Probatæ extremis præsumuntur media.

Pro possessore habetur qui dolo desiit possidere.

Provisio hominis tollit provisionem legis.

Quæ temporalia ad agendum, sunt perpetua ad excipiendum.

Quem sequitur commodum, eum etiam sequitur incommodum.

Qui approbat non reprobat.

Qui cum alio contrahit, vel est, vel debet esse conditionis ejus non ignarus.

Qui facit per alium facit per se.

Qui in utero est, pro jam nato habetur, quoties de ejus commodo quaeritur.

Qui non habet in ære luat in corpore.

Qui providet sibi providet hæredibus.

Qui suum receipt, licet a non suo debitore, non tenetur restituere.

Qui tacet, consentire videtur.

Quisquis est rei suæ moderator et arbiter.

Quod fieri debet facile præsumitur.

Quod fieri non debet quancumque factum valet.

Quod inesse debet inesse præsumitur.

Quod meum est, sine me alienum fieri nequit.

Quod nullius est, fit domini regis.

Quod nullius est, fit occupantis.

Quod statim liquidari potest, pro jam liquido habetur.

Reipublicæ interest voluntates defunctorum effectum sortiri.

Res inter alios acta, aliis neque nocet, neque prodest.

Res judicata pro veritate accipitur.

Resoluto jure dantis, resolvitur jus accipientis.

Res perit domino.

Res sua nemini servit.

Scire debes cum quo contrahis.

Scire et scire debere æquiparantur in jure.

Semel baro, semper baro.

Si ingratum dixeris omnia dixeris.

Socius mei socii non est meus socius.

Spoliatus ante omnia restituendus.

Summum jus, summa injuria

Surrogatum sapit naturam surrogati.

Testimonia ponderanda sunt, non numeranda.

Traditionibus et usucapionibus, non nudis pactis dominia rerum transferuntur.

Tutor in rem suam auctor fieri non potest.

Tutor datur personæ—curator rei.

Tutor præsumitur intus habere, ante reditas rationes.

Unumquodque eodem modo dissolvitur quo colligatur.

Utile per inutile non vitiatur.

Uxor sequitur domicilium viri.

Venditor nominis tenetur præstare debitum subesse, non vero debitorem locupletem esse.

Verba interpretanda sunt contra proferentem.

Veritas convicii non excusat a calumnia.

Vigilantibus, non dormientibus, jura subveniunt.

Volenti non fit injuria.

Voluntas est ambulatoria usque ad mortem.

**Mayor**; the chief magistrate of a city or town—corporate in England. *Tomlins' Dict. h. t.*

**Measurement.** The effect of a sale of land by measurement depends upon the question, whether the measurement is taxative or exegetical in its terms. Whenever it appears that the measurement forms part of the contract, and is looked upon by the parties as an essential condition, the purchaser's right is confined by that measurement as by a bounding description; but if the measurement is merely spoken of in advertisements, or appears upon a plan or survey of the estate, as giving a general idea of the extent of the estate, the purchaser is not bound or entitled to consider it as a condition, or as relieving him of his obligation to satisfy himself by his own inquiries. In one case it was held that infestment in a mill and four acres of land was demonstrative and not taxative, and entitled the holder, with immemorial possession, to resist a removing from land beyond the four acres; *Douglas*, Feb. 2, 1630, *M. 2262*. In leases, it is often a difficult question, whether or not the measurement given of the

farm is intended to be taxative; and it has been recommended that a measurement ought never to be admitted into the description without some qualifying words, to show that the contents are expressed in a demonstrative sense only. It is not settled what would be the effect of a false measurement,—whether it would invalidate the lease or give a ground for abatement of the rent; *Balmer v. Hogarth*, March 11, 1830, 8 *S. & D.* 715; considered in the House of Lords in 1832—see 10 *S. & D.* 862. See *Quanti minoris*. The measurement of a commodity sold is often an important element in the question of the delivery of the commodity, and consequent transfer of the property. *Bell's Com.* i. 181; ii. 284; *Brown on Sale*, 44 *et seq.*; *Bell on Leases*, i. 201; *Hunter's Landlord and Tenant*, 290. See *Weights and Measures*.

**Medical Certificate.** See *Certificate*.

**Medical Jurisprudence;** is the application of the principles of medical science to the administration of justice and the preservation of the public health. The subjects with which chiefly it is conversant are, the development of the human frame; the duration of life; personal identity; marriage; impotency; pregnancy; paternity; presumption of survivorship; mental alienation; nuisances; detection of forgery and coining by chemical tests; rape; murder; poison, and the like. See a full article on this subject, *Enc. Brit.* See also *Paris and Fonblanque*, London, 1823; *Beck on Medical Jurisprudence*, by *Dunlop*, 7th edit., 1842; *Christison on Poisons*, 4th edit., 1845; *Wharton and Stillé on Med. Jur.*, 1855; *Taylor's Med. Jur.*, 6th edit., 1858; *Taylor on Poisons*, 2d edit., 1859.

**Medietas Lingue;** in English law, a jury, half natives, half foreigners, used in pleas between a foreigner and a denizen. *Tomlins' Dict. h. t.*

**Meditatio Fugæ.** When a creditor is in circumstances to make oath that his debtor, whether native or foreigner, is *in meditatione fugæ* in order to avoid the payment of his debt, or where he has reasonable ground for apprehending that the debtor has such an intention, it is competent for the creditor to apply to a magistrate, who, on inquiring into the circumstances, and finding reason to believe that the creditor's application is well founded, will grant a warrant for apprehending the debtor for examination; and may afterwards grant warrant to imprison him until he find caution *judicio sisti*. But should the creditor have proceeded without sufficient grounds for his application, he will be liable in damages; and even the judge who incautiously and illegally grants such a warrant incurs a similar responsibility. See *Ersk. B. i.*

tit. 2, § 21. This application is of a summary nature, and may be presented to any magistrate or judge ordinary; to the Court of Session,—the sheriff,—magistrates of burghs,—justices of peace, and when the debtor is in the Sanctuary, to the bailie of the Abbey. The last reported case of an application made to the Court of Session in the first instance was in the year 1700; but Hutcheson mentions a case which occurred in 1795; *Hutch. i.* 432. In general, the application is made to a magistrate exercising authority within the bounds where the debtor resides. If he has left that jurisdiction, he may be apprehended in any other place, on the warrant being indorsed by a magistrate exercising jurisdiction in the new territory; and, on being apprehended, he may be transmitted to the first magistrate for examination. The concurring magistrate cannot commit the debtor: to give him that power, there must be an original application to himself. When the creditor is a company, one of the partners of the company must make oath. When the creditor resides out of Scotland, the application is made in his name; but he must have a mandatory in Scotland. (See *Mandatory*.) The creditor must make an affidavit before a qualified person, and the mandatory ought to make a corroborative affidavit before the magistrate in Scotland. There is no necessity to produce a ground of debt—a claim of debt attested by the affidavit of the creditor is sufficient. It is not necessary that the debt be constituted by bill or decree, or that it be past due and payable. The Court has allowed this remedy even in cases in which the debt was contingent; but an application for warrant to incarcerate a person as *in meditatione fugæ*, till he found security not only for certain arrears and current rents, but for the prospective rents under a lease having fifteen years to run, was held to be irregular, and damages were awarded; *M'Gill*, March 17, 1837, 15 *S.* 882. The debt must in all cases be specific, that the cautioner may know the extent of his obligation. The circumstances which led the creditor to believe that the debtor means to fly the country must be stated, and the creditor's oath must bear this out. Without this statement and oath, both the creditor and judge would be exposed to a claim of damages at the instance of the debtor, were imprisonment to take place. But in the special case, where the debtor on examination admitted the debt and his intention to leave the country, the warrant of committal was supported without the creditor's oath. It is improper for the magistrate to delegate to any one the taking of the creditor's oath, or the examination of the debtor. The reasons of belief must be

sufficient to satisfy the judge. Immediately on the application to the judge, if the grounds of suspicion be pregnant, he grants a summary warrant for apprehending the debtor; and, on his apprehension, he ought to be examined by the judge; and it is from the circumstances as appearing on that examination that the judge will be enabled to determine as to the propriety of granting a warrant of imprisonment. The creditor's oath is taken as *prima facie* evidence of the existence of the debt. But when the debtor denies his intention to leave the country, and admits no suspicious circumstances, the magistrate ought not to commit without further evidence. Where the debtor has not sufficiently explained himself on his first examination, he may apply for another. When a proof is to be taken, the debtor may be detained on a warrant during the time of proving; and he is sometimes committed till he find caution to abide the issue. In either case, he must be liberated on finding caution to abide the issue. It is not a sufficient ground for this warrant that the debtor means to remove from one place of the country to another; he must have intended to leave Scotland. But it may be granted wherever there is a real intention to leave the country, even although the debtor should have a good reason for going, and no fraudulent design. So far, indeed, has this been carried, that an officer proceeding to join his regiment abroad was found liable to be arrested on a *meditatio fugæ* warrant. But the Court have more recently disapproved of that extension of the doctrine; *Bryson*, 10th March 1812, *Fac. Coll. and App. to Mor.* A *meditatio fugæ* warrant cannot be granted upon a debt below the statutory sum for which a debtor can be incarcerated; *Marshall v. Dobson*, Dec. 18, 1844, 7 D. 232.

The *meditatio fugæ* warrant is given equally against a foreigner as a native. There has been considerable fluctuation in the decisions as to what will be sufficient to expose a foreigner to this warrant. But there must at all events exist the grounds of jurisdiction for an ordinary action at law. The cases relative to the application against a foreigner are collected by Mr Barclay, in his treatise on *meditatio fugæ*; and the conclusions at which he arrives on a review of these cases are, That a foreigner is subject to the operation of this warrant—1st, Where he has acquired a legal domicile by forty days' fixed residence in Scotland, whether the debt be foreign or not; 2d, He is liable to be attached for Scotch debts, even where he has not acquired a domicile; and this rule is strengthened if the debts have been contracted since his last arrival; 3d, Where he has left another

country to avoid his creditors, and is in this country not with the intention of fixing his residence here, but with the view of avoiding his creditors; and in this case he may be attached by foreign as well as by Scotch creditors. The possession of a landed estate in Scotland has no effect upon his liability. It would appear that a *meditatio fugæ* warrant cannot be competently taken out against a foreigner not resident in this country, but on a journey of pleasure or of business, with no intention of defrauding his creditors; *Bell's Com.* ii. 563; *Barclay*, 57. This warrant differs from the ordinary personal diligence of the law, in so far that, being *quodammodo* criminal, it may be executed on Sunday as well as on any ordinary day. It may also be executed within the Sanctuary of Holyroodhouse, in which case the concurrence of the bailie of the Abbey is necessary. Nor will a personal protection under the Bankrupt Statute be any safeguard. Those, however, who are exempted from imprisonment by privilege, are free from the effects of the warrant; because it is a mere auxiliary to the right of imprisoning the debtor. When a debtor is imprisoned on a *meditatio fugæ* warrant, he is imprisoned for custody only, not that he may be compelled to pay by the *squalor carceris*; and therefore, although the magistrates should suffer him to escape, yet, if they recover his person in time to produce him at the requisite diets of court, they will not be liable to the creditor in any damages, or for the debt. This distinction between incarceration for debt and on a *meditatio fugæ* warrant was fixed in the case *Brown*, Nov. 16, 1792, *Mor.* 11,763. Relief from the imprisonment on this warrant is obtained by the debtor finding caution *judicio sisti*. See *Caution judicio sisti*. The law upon this subject has been very ably digested by Mr Barclay in his treatise on *meditatio fugæ* warrants, in the appendix to which styles are given of the petition and other procedure. See also *Bell's Com.* ii. 557, *et seq.*; *Ersk.* B. ii. tit. 1, § 21, and notes by Mr Ivory; *Stair*, B. iv. tit. 47, § 23; *Bell's Princ.* § 2309; *Shand's Prac.* p. 504; *Macfarlane's Jury Court Practice*, p. 59; *Hutch. Justice of Peace*, i. 424; *Tail's do.*, h. t.; *Blair's do.*, h. t.; *Ross's Lect.*, i. 345; *Kames' Equity*, 289; *Thomson on Bills*, 577. See *Arrestment of Persons. Cautionary. Diligence. Imprisonment. Prison.*

**Medium Impedimentum.** See *Mid-Impediment*.

**Meliorations.** Questions as to a claim for the expense of improvements upon land may be raised in three different situations: when the improvements have been made under a lease; when they have been made under a deed of entail; and when they have been

made on a liferented estate. 1. *Meliorations under a lease*.—When a tenant, of his own accord, expends money and labour in the improvement of his farm, this is presumed to be done not for the permanent benefit of the farm, but for his own use during the remainder of his lease. A tenant therefore is, in general, held not entitled to any recompense for such improvements. (See *Fences. Fixtures. Houses*.) Where, however, a tenant makes improvements in contemplation of his lease subsisting for the full period, and it happens to be terminated abruptly, he is in equity entitled to recompense, when the landlord can be proved *lucratus* by the transaction. In urban subjects, a distinction is taken between the expense of ornaments or mere conveniences, and of necessary repairs. The tenant has no claim for the former without express stipulation; but he is entitled to be compensated for the latter. (See *Repairs*.) These are the rules when there has been no stipulation; but it is usual to make repairs and meliorations the subject of express agreement. A clause binding the landlord to make the necessary meliorations is binding on the heir in the first instance; but the lessee will have a claim against the executors, if he cannot obtain implement from the heir. An heir of entail succeeding is not liable at common law to implement stipulations for improvements entered into by the heir in possession; but he may be made liable to a certain extent, by the exercise of the statutory powers (see *infra*, No. 2). A clause in a lease obliging the lessor to make meliorations, or to allow the lessee a sum for that purpose, or to reimburse him for outlay, will be binding upon singular successors; *Arbuthnot*, Feb. 5, 1772, *M.* 10,424; *Stotts*, Feb. 20, 1817, *F.C.* See also *Stewart v. McRa*, Nov. 12, 1834, 13 *S.* 4. An obligation upon the tenant to uphold, with a right to indemnification of any excess of value in additions, limits the tenant to the mere rebuilding or reparation of what becomes ruinous, and to the making of necessary or suitable improvements, but gives no right to pull down old houses or erect new ones, not necessary or suitable to the farm. Express clauses supersede local customs, as to indemnification for meliorations. An obligation on the tenant to meliorate or repair, if not implemented by himself, falls upon his representatives. But the burden falls upon an assignee or a sub-lessee, whether acknowledged by the landlord or not.

2. *Meliorations by an heir in possession*.—Certain statutory powers have been conferred upon heirs of entail in possession, by the exercise of which they may throw a proportion of the expense of improvements upon the substitutes; 10 *Geo. III.*, c. 51, §§ 9-26. But the

heir in possession under a strict entail has no means of burdening succeeding heirs with the price of meliorations, except by compliance with the terms of this statute. The act provides, that any heir of entail, laying out money in improvements, shall be a creditor to the succeeding and subsequent heirs of entail for three-fourths of the money expended, to the extent of four years' free rent of the entailed estate, after deducting liferents, and public burdens, and interest of debts, provided he give notice in writing to the heir of entail next after his own issue, three months before commencing his improvement, of the kind of improvement intended; and lodge a copy with the sheriff-clerk; and annually, within four months after Martinmas, lodge with the sheriff-clerk an account signed by him, with the vouchers of the money expended that year. The Rutherford Act provides for improvements not executed in terms of the Montgomery Act; see act 11 and 12 *Vict.*, c. 36, § 16, 1848. See *Tailzie. Mansion-House*.

3. *Meliorations on a liferent estate*.—A liferenter is bound to pay the interest of money laid out on necessary repairs of the liferented tenement. If the subject fall into decay or be destroyed by accident, neither the liferenter nor the fiar will be bound to repair or rebuild; and the liferenter may continue to draw the rent of the subject such as it remains. If, however, the fiar should repair or rebuild the house, the liferenter cannot possess it without paying the interest of the money expended. *Laird v. Fenwick*, Feb. 10, 1807; *M. App. voce Liferenter*. See *Liferent*. See generally, on the subject of this article, *Stair*, B. i. tit. 15, § 6; B. ii. tit. 1, § 40; *More's Notes*, p. clxxx.; *Ersk. B. ii. tit. 9, § 60, notes by Mr Ivory*; *Bell's Com.* i. 74, 82; *Addenda*, No. vi.; *Bell's Princ.* §§ 1253, 1062, 1768; *Illustr. ib.*; *Hunter's Landlord and Tenant*, 579; *Kames' Equity*, 111. See *Lease. Tailzie. Fixtures. Fences. Improving Lease*.

**Melletum**; strife, dissension, debate. *Skene, h. t.*

**Members of Parliament**. The members of the House of Commons are usually so styled, although, strictly speaking, the Peers, as well as the representatives of the Commons, are members of Parliament. *Ersk. B. i. tit. 2, § 24*; tit. 3, § 7; B. iii. tit. 1, § 29, and notes by *Mr Ivory*; *Bell's Com.* ii. 166, 175, 569; *Bell's Princ.* §§ 2150, 2194-5, 2201; *Kames' Stat. Law Abridg. h. t.*; *Watson's Stat. Law, voce Parliament*; *Tait's Justice of Peace, voce Imprisonment*; *Brown's Synop. h. t.*, and p. 2168. As to the qualifications for electing, or being elected, a representative of either the Peerage or Commons of Scotland in the British Parliament, see *Election Law. Reform*

**Act.** As to the privileges and usages of Parliament, see *Parliament. Privilege.*

**Memorandum.** It appears to be settled in the law of England, that a memorandum, written either on a bill or note, or on a separate paper, with the consent of parties before they subscribe, may limit or do away with the effect of the instrument in questions between the original parties, but not against a *bona fide* onerous indorsee. The memorandum has this effect only when proved to have been written before the subscription of the bill or note; and a memorandum annexed to a promissory-note, specifying a particular place of payment, is not in any case to be held as part of the note, or as limiting its operation. See this subject fully discussed in *Thomson on Bills*, 12, 384. As to the memorandum in a policy of insurance, see *Insurance.*

**Menemium;** "the timmer of a house." *Skene, h. t.*

**Menetum;** a stock horn. *Skene, h. t.*

**Mensal Church.** This was a term applied, during the times of Episcopacy, to a church that had been appropriated by the patron to the bishop, and made thenceforth part of his own benefice. *Mensalia;* livings united to the tables of religious houses. These terms were derived from *mensa*, which signified everything necessary for living. *Ersk, B. ii. tit. 10, § 11; Stair, B. ii. tit. 8, §§ 27 and 35; Hutch. Justice of Peace, ii. 426.*

**Mercantile Contracts;** are excepted from the solemnities required by law in other deeds. See *Evidence. Re Mercatoria.*

**Mercantile Writings.** See *Deeds. Evidence. Privileged Deeds. Writings in Re Mercatoria.*

**Merchant Company.** See *Guildry. Dean of Guild.*

**Merchant Seamen.** The statutes relating to merchant seamen are the 7 and 8 Vict., c. 112, 1844; 13 and 14 Vict., c. 93, 1850; 14 and 15 Vict., c. 96, 1851. The *Merchant Seamen's Relief Act* is the 4 and 5 Will. IV., c. 52, 1834; and the *Mercantile Marine Passengers Act* is the 15 and 16 Vict., c. 44, 1852. The act relating to the regulating of steam navigation is the 14 and 15 Vict., c. 79, 1851.

**Merchants' Accounts.** See *Accounts. Prescription, Triennial. Evidence.*

**Mercy, Recommendation to.** A jury is not entitled, in those cases in which the law seems to be rigorous, to return a verdict of acquittal in opposition to law. Their only course is to point out, in a recommendation to mercy, the circumstances which make the legal punishment of the panel severe in some peculiar case, and which therefore call for equitable consideration. *Hume, i. 496; Steele, 223.*

**Merk;** an old Scotch coin of the value of thirteen shillings and fourpence Scotch, or one shilling and one penny and four-twelfths of a penny sterling. See *Scotch Money.*

**Merk per Ton;** one of the sources of emolument of the eighteen endowed ministers of the city of Edinburgh. This assessment is levied in virtue of an act of Parliament, dated 22d March 1661. See *Annuity-Tax.*

**Mese;** of herring, contains five hundred. *Skene, h. t.*

**Messenger-at-Arms;** an officer appointed by and under the control of the Lyon King-at-Arms. (See *Lyon.*) Messengers-at-arms are said to be subservient to the Supreme Courts of Session and Justiciary, and they are employed in executing all summonses and letters of diligence, both in civil and criminal matters. Our signet letters seem to have been devised by the judges of the King's Court to supply the ancient writs of the law, and they were constantly directed to messengers-at-arms, as sheriffs in that part. It is the character, therefore, of sheriff in that part which has placed this duty in the hands of messengers-at-arms. Messengers and their cautioners are liable for damage occasioned by their undue or defective execution of diligence; but they are not liable for the loss of the debt until it has been constituted against the debtor. It is incompetent for a messenger to execute diligence for his own behoof and that of another party, on a bill which he has indorsed; *Dalgleish, June 18, 1822, 1 S. & D. 506.* A messenger cannot be a procurator before a sheriff-court; *Bowhill, June 2, 1825, 4 S. & D. 61.* In a simple reduction of a decree of suspension, the party who had, as messenger, signed the execution of intimation of sist, but was subsequently deprived of his office, was allowed to be called as a witness to disprove his own execution, and these circumstances were held only to affect his credibility; *Aitchison, Dec. 28, 1836, 15 S. 360. Stair, B. iv. tit. 47, § 15; Ersk, B. i. tit. 4, § 33; Bank. vol. ii. pp. 503-7; Bell's Com. ii. 170-2, 543; Bell's Princ. §§ 296-7; Illust. ib.; Kames' Stat. Law Abridg. h. t.; Shand's Prac. pp. 32, 232; Ross's Lect. i. 286, 302, et. seq., 338, 429, 446; Kames' Equity, 212; Thomson on Bills, 576. Darling's Messengers-at-Arms. See Execution. Deforcement. Lyon. Cautionary.*

**Messis Sementem Sequitur;** the crop belongs to the possessor by whom it was sown; is a maxim applied to the case of *bona fide* possession, and also in questions between heir and executor. Where a person is in possession of land which he has reason to believe to be his own, and sows that land, he has right to reap the crop sown by him, al-

though, before it be cut down, it should be discovered that another has a preferable title to the land. *Ersk. B. ii. tit. 1, § 26; Connel on Parishes, 435. See Bona Fides.*

**Messuage;** signifies the principal dwelling-house of a barony, in which sense it is synonymous with the English expression *manor-house*. In the law of England, messuage signifies a dwelling-house with some land adjoining, assigned for its use. Under this name may be included a garden, shop, mill, cottage, chamber, cellar, or the like. See *Skene, h. t.; Ross's Lect. ii. 137; Tomlins' Dict. h. t.*

**Metus.** See *Force and Fear.*

**Michaelmas Head-Court;** the annual meeting of the freeholders and commissioners of supply of a county, held at Michaelmas for various county purposes. This was formerly one of those meetings at which the presence of the heritors was required under a fine; but, by 20 Geo. II., c. 50, abolishing ward-holding, no heritor can now be fined for absence, unless he shall have been summoned as a juryman, or for some other legal purpose. It was at this meeting that, under the old election law, the roll of freeholders was revised, applications for enrolment disposed of, and freeholders put upon the roll, and the roll purged of those who had died, or disposed of the property on which they formerly stood enrolled; *Ersk. B. i. tit. 4, § 5.* The duties formerly discharged by the freeholders were transferred to the commissioners of supply by 2 and 3 Will. IV., c. 65. See *Election Laws. Reform Act. Commissioners of Supply.*

**Mid-Couples.** Where an heir, assignee, or adjudger takes infeftment in virtue of a precept of sasine granted in favour of his predecessor or author, it is necessary to deduce in the instrument of sasine the writings by which he is connected with the precept; 1693, c. 5. These writings are called the *mid-couples*. *More's Notes on Stair, clix.*

**Mid-Impediment;** the Roman law *medium impedimentum*; is anything which intervenes between two events, and prevents, *quoad* the former event, the retrospective operation of the latter. Thus, anything occurring between the date of a sasine on a precept *a me* and the charter of confirmation, to prevent the superior from granting a charter of confirmation, is called a mid-impediment. If the former proprietor have granted a conveyance to another person, on the procuratory of which that person has resigned and obtained a charter of resignation on which sasine has followed, the right will be completely transferred, and the superior's confirmation of the other conveyance will be unavailing. *Ersk. B. i. tit. 6, § 52; B. ii. tit. 7, § 15; Bell's*

*Com. i. 682; Bell's Princ. § 812; Illust. ib. See Confirmation.* As to the mid-impediment of an intervening marriage, in questions of legitimation *per subsequens matrimonium*, see *Legitimation.*

**Military Law.** See *Martial Law. Court-Martial.*

**Military Testament.** Among the Romans, certain ceremonies necessary in testaments were dispensed with in the testaments of soldiers, on account of their ignorance, or *ob imminens vitæ periculum*. In like manner, in this country, soldiers may make nuncupative wills, and dispose of their goods, arrears of pay and other personal property, without the forms and solemnities required in other cases. *Heineccii Elementa, p. 167; Tomlins' Dict. h. t.*

**Milites;** in old law language, freeholders holding their lands of barons in chief. *Skene, h. t.*

**Militia;** as distinguished from the regular forces, means the body of men who may be annually called out for a limited time, and armed and embodied for military service on occasions of emergency. After much uncertainty and change, the militia laws of England and Scotland were consolidated by 42 Geo. III., c. 90 and 91; and these statutes, with that of 49 Geo. III., c. 120, applicable to Ireland, contain, with some partial amendments made by later acts, the law applicable to the militia of the United Kingdom. The Sovereign appoints lords-lieutenant in England and Scotland (see *Lieutenant*), and governors in Ireland, to each county and province, with power to call out and train the militia annually, and to appoint twenty or more deputy lieutenants or governors, or other officers, subject to the royal approval. The qualifications for holding commissions are the possession of a certain amount of property, varying according to the rank. At the annual general meeting of the lieutenancy of each county, the next subdivision meeting is appointed, to which chief constables, or other officers, are required to direct constables or schoolmasters to return lists of all males, between the ages of eighteen and forty-five, in their respective parishes. By this means lists are obtained, which are transmitted to the Privy Council, distinguishing those liable to serve from those exempt. The men to be enrolled are chosen by ballot from every parish; all who are not above four feet and five inches in height, or are not approved of on examination by a surgeon, being discharged, and others balloted for in their place. Those who do not personally appear, or send an approved substitute to take the oath, are liable in a penalty of L.10. There are arrangements by which, with the consent of the inhabitants, volunteers, remunerated by parish



assessments, may be substituted for balloted men. The following persons are exempted from serving:—Peers; commissioned officers of the other forces, whether on full or half pay; non-commissioned officers and privates of the other forces; persons serving, or who have served for four years, as commissioned officers in the militia; persons serving in the yeomanry or volunteers; persons serving, or who have served at any time within a year past, in the local militia; resident members of the several universities; clergymen of the establishments, and registered dissenting clergymen; parish schoolmasters; articulated clerks; apprentices; seafaring men; persons employed in the Royal Docks, the Tower, Woolwich Warren, the gun-wharfs of Portsmouth, and the stores under the direction of the Board of Ordnance; persons free of the Company of Watermen of the Thames; any poor man with more than one child born in wedlock, in England; any man with more than two lawful children, and not possessing property to the value of L.50, in Scotland; and in Ireland, any poor man not worth L.10, or who does not pay L.5 a year of rent, and has more than three lawful children under the age of fourteen. The Military Act and the Articles of War apply to the militia when called out, with the limitation that no punishment can extend to life or limb. There are separate provisions for recovering deserters, &c. In addition to the general militia, who are liable to be marched to any part of the United Kingdom, there was, during the late war, what was called the local militia, embodied under 48 Geo. III., c. 111 and 150, and completed by several acts since passed, by which the men are apportioned to the respective shires in England and Scotland. The balloting, enrolling, and exercising of the militia takes place at present only occasionally, an act being generally passed each session of Parliament suspending the operation of the militia statutes. When the balloting is going on, it is a common thing to insure against being drawn. In one case, where a militia ballot was illegally conducted, it was held that an insurance against the consequences of militia ballots did not bind the insurers to protect the insured against any consequences of such irregular ballot; *Scott*, 25th May 1814, 2 *Dow's Reports*, 322. 'Those who have served in the militia acquire certain privileges of trade, which they transmit to their children. See *King's Freeman*. *Swinton's Abridg. h. t.*; *Kames' Stat. Law, h. t.*; *Hutch. Justice of Peace*, iii. 59; *Tait's Justice, h. t.*; *Tomlins' Dict. h. t.*; *Enc. Brit. h. t.*

The militia in Scotland is now regulated by the act 17 and 18 Vict., c. 106, 1854.

**Mill.** There is not an invariable rule as

to the question, whether or not a charter or conveyance of lands carries a mill previously erected upon them, without express mention of it. The right of thirlage attaching to mills formerly made them of such importance, that they were frequently taken to be distinct tenements, and conveyed by charter and infestment *per se*. In such circumstances the general rule is, that a mill does not pass as part and pertinent; but this is always a *quæstio voluntatis*; and wherever it appears that the mill never had been considered or transferred as a separate subject, and where the proprietor conveys all which is in his own titles, the mill is carried. From the indeterminate state of this matter, it is advisable that the deed of conveyance should expressly bear whether the mill is intended to be reserved, or to pass with the rest of the property. Where a mill already exists, with a thirlage in favour of another than the proprietor of the land, he is not entitled to build another mill, capable of grinding the astricted corn, since that might afford a temptation to defeat the thirlage. And in certain cases in which this had been done, the mill was either destroyed or ordered to be altered, so as to be incapable of grinding the astricted corn. The symbol for giving sasine in a mill is the clap and happer. *Stair, B. ii. tit. 3, § 75*; *Ersk. B. ii. tit. 6, § 5*; *Bank. vol. i. pp. 505, 569, 689*; *Bell's Princ. § 743, 1017, 1034-5*; *Illust. § 743*; *Kames' Stat. Law Abridg. h. t.*; *Hunter's Landlord and Tenant*, pp. 205, 217, 253-5, 302-3, 839; *Hutch. Justice of Peace*, ii. pp. 393, 566; *Bell on Leases, i. 249*; *Ross's Lect. ii. 169, 196*. See *Thirlage. Part and Pertinent*. And for the regulations respecting the hours during which children may be required to work in mills and factories, see *Factories*.

**Minerals**; in a limited acceptation, are those fossils, as coal, lime, chalk, marle, &c., which belong in property to the owner of the ground, and which are not included under an agricultural lease, unless expressly conveyed to the tenant. Neither do minerals fall under a liferent, unless specially given to the liferenter, whose right being enjoyed *salva rei substantia*, does not extend to minerals. But where the minerals have been let on lease, and it plainly appears to have been the intention of the grantor of the liferent that the liferenter should have the rents drawn from the lease of the minerals, that intention will receive effect; and a liferenter, although not entitled to dispose of the minerals, may yet use as much of the coal as is required in his own household. *Ersk. B. ii. tit. 6, § 1*; *tit. 9, § 57*; *Bell on Leases, i. 343*; *Bell's Com. i. 62*; *Stair, B. ii. tit. 9, § 39*; *More's Notes, pp. clxxxv., ccliv., cccvii.*; *Bell's Princ.*

§§ 740, 1034-51, 1226; *Illust.* § 669; *Hunter's Landlord and Tenant*. See *Coal. Clay. Marle-pit*.

**Mines**; are *inter regalia*. By 1424, c. 12, gold mines are declared to belong to the Crown without limitation; and silver mines, when of such fineness that three halfpence of silver can be extracted from the pound of lead. But it would appear, that not only gold and silver, but tin, copper, and lead mines were formerly annexed to the Crown. See an *unprinted act of the year 1592*. By that statute mines are dissolved from the Crown; and it is made lawful to the Crown to set in feu-farm to the baron, or other freeholder of the ground, all metals or minerals that may be found within his own lands, on payment of the tenth part to the Crown, without any deduction of charges; and in case the freeholder should refuse to work them, they may either be worked for the use of the Crown, or feued out to others. In the interpretation of this statute, it has been found that a positive right is conferred on the freeholder, by which he may demand a right from the Crown, in pursuance of the statute; and that the word freeholder means the possessor of the *dominium utile*. *Ersk. B. ii. tit. 6, § 16; Stair, B. ii. tit. 3, § 60; Bank. i. 573; Bell's Princ. § 669. See Gold Mines.*

**Minister**. A minister of the Church of Scotland is inducted to his charge in the manner which has been explained in the articles *Presentation—Call—Admission—Induction*; and it is only necessary here to state his qualifications. The student must have gone through a course of philosophy in a university; and, after finishing that course, he must have studied divinity for a certain period prescribed by the Church. He may then be proposed to a presbytery to be taken on trials; and the presbytery must obtain the consent of the synod; and, if a report unfavourable to the character of the candidate has arisen in any of the presbyteries of which the synod is composed, his trials cannot proceed till the matter be inquired into. And should there be any oppression, redress will be obtained by applying to their ecclesiastical superiors. The person licensed must subscribe a *formula*, owning his belief in the Confession of Faith of the Church of Scotland, and promising to adhere to the same, and to defend the worship, discipline, and government of the Church, by kirk-sessions, presbyteries, provincial synods, and general assemblies, &c. The person licensed is after this termed a probationer; he is entitled to preach, but has no authority to dispense the sacraments; see *License to preach*. The probationer is then qualified to receive a presentation to a church, which is addressed to the

presbytery within which the parish is situated; he is by them appointed to preach in the parish church; he is required to repeat his subscription to the formula; and he must undergo a second trial on his doctrine, literature, and moral character. A day is then appointed by the presbytery, at the distance of ten days, for the parishioners to meet in the parish-church, and witness the ordination, at which one of the presbytery preaches—informs the people that a presentation has been given to the candidate—and asks them to subscribe a call, inviting him to be their minister, and promising him subjection in the Lord. This is what is termed the moderation of a call; see *Call*. When the call has been sustained, the presbytery proceed to complete the settlement by putting to him, in the face of the congregation, the following questions: “1. Do you believe the Scriptures of the Old and New Testament to be the Word of God, and the only rule of faith and manners? 2. Do you sincerely own and believe the whole doctrine contained in the Confession of Faith, approved by the General Assemblies of this Church, and ratified by law in the year 1690, to be founded on the Word of God? And do you acknowledge the same as the confession of your faith? And will you firmly and constantly adhere thereto, and, to the utmost of your power, assert, maintain, and defend the same, and the purity of worship as presently practised in this National Church, and asserted in the 15th Act of Assembly, 1707? 3. Do you disown all Popish, Arian, Socinian, Arminian, Bourignian, and other doctrines, tenets, and opinions whatsoever, contrary to, and inconsistent with, the foresaid Confession of Faith? 4. Are you persuaded that the Presbyterian government and discipline of this Church are founded upon the Word of God, and agreeable thereto? And do you promise to submit to the said government and discipline, and to concur with the same; and never to endeavour, directly or indirectly, the prejudice or subversion thereof, but to the utmost of your power, in your station, to maintain, support, and defend the said discipline and Presbyterian government, by kirk-sessions, presbyteries, provincial synods, and general assemblies, during all the days of your life? 5. Do you promise to submit yourself willingly and humbly, in the spirit of meekness, unto the admonitions of the brethren of this presbytery, and to be subject to them, and all other presbyteries and superior judicatories of this Church, where God, in His providence, shall cast your lot? And that, according to your power, you shall maintain the unity and peace of this Church against error and schism, notwithstanding of whatsoever trouble or persecution may arise; and

that you shall follow no divisive courses from the present established doctrine, worship, discipline, and government of this Church? 6. Are not zeal for the honour of God, love to Jesus Christ, and desire of saving souls, your great motives and chief inducements to enter into the functions of the holy ministry, and not worldly designs and interests? 7. Have you used any undue methods, either by yourself or others, in procuring this call? 8. Do you engage, in the strength of Jesus Christ, our Lord and Master, to rule well your own family, to live a holy and circum-spect life, and faithfully, diligently, and cheer-fully to discharge all the parts of the ministerial work, to the edification of the body of Christ? 9. Do you accept of, and close with, the call to be pastor of this parish; and promise, through grace, to perform all the duties of a faithful minister of the gospel among this people?" See farther on this subject, *Church Styles, by Church Law Society, 1838.*

These questions being answered satisfactorily by the presentee, the minister performing the service proceeds to invest him with the full character of a minister of the gospel, conveying to him by prayer, and by the imposition of the hands of the presbytery, all the powers implied in that character. He then receives and admits the person to be minister of the vacant parish, by which deed the presbytery create a connection between him and the inhabitants of the parish, which gives him a legal title to the emoluments provided by law for the person who officiates there, and which renders him incapable of holding any other charge. And the connection thus formed can be dissolved only by the act of the Church accepting of his resignation, or deposing him, or translating him to a different charge. *Hill's Theological Institutes*, pp. 187, 212; *Hill's Church Prac.* 64; *Stair*, B. ii. tit. 8, § 26; *More's Notes*, pp. cccxxvii.-xli.-lxxiii.; *Ersk.* B. i. tit. 5, § 16; *Bank.* vol. i. p. 48; ii. 77, 221, 592; *Bell's Com.* i. 128; ii. 595; *Bell's Princ.* §§ 1163-6, 1172, 634. As to the appointment of ministers to churches endowed by voluntary contribution, see *Churches*. See *Deposition. Dilapidation. Designation. Manse. Glebe. Calls.*

**Minister's Claim to Vote.** A parochial minister of the Church of Scotland is entitled to a vote in the election of members of Parliament. A presentation is not sufficient to give the qualification; there must likewise be induction, and all the other forms of appointing to the pastoral charge. There is no distinct provision in the Reform Act declaring ministers entitled to be enrolled; and the proper form of drawing the claim is, "I, A. B., minister of the parish of C., claim to be enrolled

as liferent proprietor, by virtue of my office, of the manse and glebe of the said parish.'" But much less formal claims have been sustained, probably on the principle that the character of parochial minister *per se*, infers the right to a manse and glebe. Thus, the claim of "minister possessing or occupying the glebe," has been sustained. As the statute does not require occupancy in the case of owners, and as liferenters seem to be on the same footing with owners, it has been held that the minister may be enrolled on his manse and glebe, although it be in the immediate natural possession of another person; such as the minister's assistant and successor. Greater strictness has been required in the form of claims by dissenting ministers, whose appointment does not necessarily or *ex lege* carry the right to any heritable subject. Such a minister, claiming as a liferenter, must, in order to establish his claim of enrolment on a manse and glebe, show, 1st, The title to the subjects in the congregation, and that they hold it by right such as enables them to convey to him a liferent interest; and, 2d, his own title in the subjects—viz., that the congregation have conveyed a liferent right to him indefeasibly. But there has been some fluctuation in the decisions of the courts of appeal with regard to the claims of dissenting ministers. Ministers have been found not entitled to claim upon their stipends, or as drawing L.10 *per annum* out of the teinds. *Cay's Reform Act*, 95, 106.

**Minister's Horning.** The law on this subject is stated in the article *Decreet Conform*. The style of a minister's horning is given in *Jurid. Styles*, iii. 726.

**Minister's Rental;** the rental of the parish lodged by the minister in a process of augmentation and locality. See *Augmentation*.

**Minor.** In a large acceptation, a minor is a person under lawful age, or majority; but the term, when used in contradistinction to *pupil*, signifies a person above the age of pupillarity (twelve in females and fourteen in males), and under that of majority, which in both sexes is twenty-one years complete. Where a minor has curators, his deeds are not effectual to bind him without their consent; yet, in so far as he derives any benefit from his deeds, they will be binding on those with whom he contracts; and all obligations into which he enters, where the consideration has been profitably applied to his use, will to that extent be effectual against him. A minor with curators may effectually marry without their consent; he may also, without their consent, execute a testament bequeathing all his moveable funds; but he cannot, even with their consent, execute a settlement of his heritage. The curator of a minor

merely consents, but cannot compel the minor to act; the minor has a right to inquire into the management of his affairs, and, if he sees reason, he may refuse to act. A minor's person is not subject to the control of curators. Where, again, a minor has no curators, he may act by himself; and his deeds will be equally effectual with the deeds of a minor having curators, who have concurred with him in the execution of the deed. Minors are entitled to be restored against all deeds done to their prejudice during their minority, whether they have been done by their tutors, or by themselves, with consent of their curators. In all cases, in short, where a minor can prove lesion, he is entitled to restitution; and the only difference is, that where the deed has been executed by a tutor, or by a minor with consent of his curator, or by the minor alone, where he has no curator, as the deed is effectual in law till set aside, a reduction of it becomes necessary; whereas deeds executed by pupils, or by minors having curators, but without their consent, are null, and the nullity may be pleaded by way of exception. In an action of restitution, the minor must prove lesion, proceeding from the want of judgment on the part of the minor, and not from any fraud or unjustifiable act on his part; nor will the minor be protected against necessary payments, to his tutor or curator for example, though the payment may have been misapplied. Lesion is presumed in a donation by the minor; in a bond of caution entered into by him; even in a bond for borrowed money by the minor lesion is presumed, unless the creditor shall prove that the money was employed profitably for the minor. And it has been decided, that a party is not barred from pleading minority against an action for implement of a cautionary obligation, by his having previously made affidavit that he had attained majority to obtain the degree of M.D., and thereafter assumed the title of doctor; *Sutherland*, Jan. 19, 1825, 3 S. & D. 449. But there is an exception to the plea of restitution in all transactions connected with any trade or commerce in which the minor may have been engaged; even a bond for borrowed money will not necessarily imply lesion, where the minor is engaged in trade. A minor *pubes* is not entitled to restitution against a marriage, although he may be restored against hurtful provisions in a marriage-contract. The minor may be restored against judicial acts, as where competent pleas have been omitted, or where the minor has been entered heir, and the debts of the ancestor exceed the value of the succession. The privilege of restitution may be exercised by the minor at any time within four years after his arriving

at majority. But to entitle him to this privilege, he must have raised and executed the action of reduction of the deed or transaction he means to challenge within the four years, called the *quadriennium utile*. This privilege does not die with the person entitled to it, but may be transmitted to his heir, according to these rules: 1. Where a minor succeeds to a minor, the time allowed for claiming restitution depends on the minority of the heir, not of the deceased minor. 2. Where a minor succeeds to a major, who was not twenty-five years complete, the privilege continues with the heir during his own minority; but he cannot avail himself of his predecessor's *anni utiles*, except in so far as they were unexpired at his death. 3. Where a major succeeds to a minor, he has only the *quadriennium utile*, to be reckoned from the period of the minor's death; and if a major succeeds to a major dying within the *quadriennium*, he can avail himself of no more of the *quadriennium* than remained unexpired at the time of his predecessor's death; *Ersk. B. i. tit. 7, § 42*. Mere revocation within the *quadriennium utile* is not sufficient. The deeds against which the minor is entitled to be restored, must be challenged by an action of reduction in the Court of Session within that term. The minor is entitled only to be replaced in his former situation, not to derive an advantage which he could not otherwise have enjoyed. An objection to a decree, as pronounced by an incompetent court, is not barred by the lapse of the *quadriennium utile*; *Rankine*, May 31, 1821, 1 S. & D. 43.

Another privilege of minority is, that a minor cannot be compelled to defend his right to his ancestor's heritage, when that right is challenged by one who claims the heritage on a right preferable to that which was in the minor's ancestor; *minor non tenetur placere de hereditate paterna*. This privilege is limited to proper feudal heritage, and does not extend to leases, however long the period of endurance. Nor does it apply to the settling of marches, nor to the division of land, nor to a possessory action, nor to an action at the instance of the superior for feu-duties or casualties, nor where the action has been commenced in the lifetime of the ancestor. In order to entitle the minor to state this plea, he must be served heir and infest; and his infestment, when produced, supersedes all further production till he be of age. It is the heir of investiture alone who can plead the privilege; and it cannot be pleaded to support the fraud of the ancestor, nor to oppose the effect of the ancestor's obligation, nor in opposition to a minor suing for reduction on the head of minority and lesion; *Ersk. B. i. tit. 7, § 43, et seq.* The persons of pupils are pre-

tected against imprisonment for civil debts; but this privilege does not extend to minors past the age of pupillarity, who are liable to personal diligence and imprisonment on account of non-payment or non-performance of civil debts or obligations; *Ersk. B. i. tit. 7, § 47*. Minors, under seven years of age, are not liable to criminal prosecution; from seven to fourteen they are liable on conviction to an arbitrary punishment; and, above fourteen, they are liable to the ordinary punishment, even capital. A minor may be indicted without calling his guardian; *Hume, i. 33; Steele, 66; Alison's Princ. 663; Prac. 227*. Children under twelve cannot be examined upon oath, but they may be examined without it. The rule as to this is taken from the age as at the trial, provided the facts occurred not very long before; *Hume, ii. 341; Steele, 15*. A minor cannot be elected a member of Parliament; and the election is by statute declared to be void, under the same penalties as if he had presumed to sit without being returned; *7 and 8 Will. III., c. 85*. Minors may sit till displaced, because the law presumes them to be of full years till the contrary is proved. The claim of a minor to vote cannot be registered; *1681; 1707, c. 8*; but it would appear, that if the disability existed at the time of giving in the claim, but ceased before the sitting of the registration court at which it is considered, the claimant may be admitted; *Cases cited in Cay's Reform Act, 17*. It had formerly been decided, that the enrolment of a minor, under the provision that he should not vote till he was of perfect age, was contrary to law; *Macleod, Dec. 1765, M. 8684; Bell on Elections, 338*. In England, it is held that majority is completed the day before the twenty-first anniversary of the birth-day; *Chambers' Election Law, h. t.* A minor may, with consent of his curators, exercise the right of a patron in presentation; *Brodie, June 9, 1830, 8 S. & D. 899. Stair, B. i. tit. 6; More's Notes, pp. xlii. et seq. cxc.; Ersk. B. i. tit. 7; Bank. vol. i. p. 177, et seq.; iii. 48, 97; Bell's Com. vol. i. p. 134; Bell's Princ. § 593, 625, 2022, 2087, 2103; Kames' Stat. Law Abridg. h. t.; Hunter's Landlord and Tenant, pp. 64-5, 135-7, 164, 177, 432, 471; Brown on Sale, pp. 167-71; Thomson on Bills, 103, 198, 259; Shand's Prac. pp. 141, 560; Maclaurin's Sheriff-Court Prac. pp. 30, 69, 180; Hutch. Justice of Peace, ii. 266; Tait's do., h. t.; Blair's do., h. t.; Bell on Leases, i. 107-8, 143; Ross's Lect. i. 147; ii. 359, 364; Kames' Equity, 67, 252, 282. See also Curatory.*

**Minority**; the period from birth until twenty-one years of age; or, in a more limited sense, the interval between pupillarity and majority. See *Minor. Tutor. Pupil.*

**Mint**; the place or establishment in which the Queen's money is coined. By *39 Geo. III., c. 94, and 1 and 2 Will. IV., c. 10*, the salary of the master and worker of the mint was ascertained, and, along with the other charges of the mint, provided to be paid from various different sources, partly from fees, allowances, and emoluments authorized by the indenture between the Crown and the master, partly from the Consolidated Fund, partly by annual grants of Parliament, and partly from the profit derived from the coinage of silver and copper. By *7 Will. IV., c. 9*, it is provided, that after the 5th of April 1837, all fees, emoluments, &c., payable to the master of the mint shall cease. So much of the above acts as authorizes the charging of money upon the Consolidated Fund for salaries to officers is repealed; and the seignorage accruing upon the coinage of silver or copper is directed to be paid into the bank, to the credit of the Consolidated Fund. It is made lawful for the Treasury to authorize the issue of money for the purchase of bullion for coinage, an account of which must be annually laid before Parliament.

**Minute**; a short memorandum or sketch taken in writing.

**Minute**. When it is necessary to preserve evidence of any incidental judicial act or statement, this is done in the Court of Session, and also in the inferior courts, by a minute. Thus, where the pursuer restricts his libel, or makes a reference to the defender's oath, or where the parties mutually consent to a judicial reference, or to a remit to persons of skill, or to waken a process, or to an interim decree, and, in short, wherever the object is to preserve special evidence of any of the *res gestæ*, this is done by a minute. Strictly speaking, those minutes ought to be prepared by the clerk of Court, as their form imports. They commence with the name of the counsel (or in the inferior court, of the procurator) for the party, and purport to be a statement made by him; *e. g.*, "*Patrick Robertson, for the pursuer, stated,*" &c. If the minute be answered, the answer proceeds in the same style. The minute is signed by counsel, or in the inferior courts by the procurator; and where it is a minute of reference to oath, it must also be subscribed by the party referring, or he must subscribe a written mandate authorizing it; *A. S. 12th Nov. 1825; Maclaurin's Sheriff-Court Prac. 195. See Amendment of Libel*. It sometimes happens, after an argument at the bar of the Inner House of the Court of Session, where questions of difficulty have been raised, that the Court, instead of pronouncing an order for *Cases*, appoints the parties to prepare and lodge *Minutes of Debate*. These minutes,

which must be prepared by counsel, contain an argument on the points in dispute; and, after having been interchanged, revised, and relodged, they are printed and boxed for the Court in the usual manner; see *Cases*. In the inferior courts, when a proof, whether by witnesses or oath of party, is concluded, the inferior judge may either advise the case on the proof as it stands, or order minutes of debate or memorials on the proof or on the whole cause. These minutes must contain no previous narrative of the case, or detail of the procedure, nor quotations from the evidence, parole or written, except when absolutely necessary; but reference may be made to the proof by the page, or by the letters of the alphabet on the margin; *A. S.* 12th Noy. 1825, *Sheriff-Courts, &c.*, c. ix. §§ 18 and 19. No statements can be introduced into these minutes not contained in the closed record or in the proof, and no productions can be made with them. *Maclaurin's Sheriff-Court Prac.* 210.

**Minute of Sale.** See *Missives. Articles of Roup. Roup.*

**Minute-Book, of Records.** The minute-book, as part of the system of records in Scotland, was first introduced by the general act 1672, c. 16, "*Concerning the Judicatories*," § 32. That part of the enactment, however, having been but little observed, an attempt was made to revive it, by *A. S.* 15th July 1692, which was immediately followed by the subsisting statute, 1693, c. 14. This statute, on the preamble that the preceding enactments had been neglected, ordained all the keepers of the registers of sasines, reversions, hornings, inhibitions, interdictions, allowances of apprising or adjudications, to keep minute-books of all writs presented to them, to be inserted in their several registers, expressing the day and hour when, and the names and designations of the persons by whom, the writs are presented, and that the said minute be immediately signed by the presenter of the writ, and also by the keeper, and be patent to all the lieges who desire inspection of it *gratis*; and that the writs be registered exactly in the order in which they are entered in the minute-book. The keeper not complying with these regulations is liable to deprivation, and to reparation of the loss which the parties may sustain. A sasine is held as recorded from the time of its being entered in this minute-book, provided it remains with the keeper until the operation of transcribing into the register has been completed; but when the sasine is taken out of the keeper's hands before being recorded, and is not returned till the sixty days are expired, it will not be allowed to be recorded as of the date of its presentment, though regularly

marked *debito tempore* in the minute-book. It is now settled law, that insertion of a writ in the minute-book is indispensable to its due registration; but where either the minute-book has not been regularly kept, or where there has been no minute-book at all, the certificate on the sasine corresponding with the minute-book, or with the record-book, will be held as evidence of the registration. In a recent case, where two sasines were presented for registration on the same day, and by the same agent, and were both stated in the minute-book as given in between the hours of eleven and twelve, but the minute of the sasine prior in date was entered first in order and regularly signed, and the registration was in the same order, it was held, that the first in order was preferable, and that it was incompetent by parole to prove that they were *de facto* presented together. The Lord Ordinary (Moncreiff) in his note held, that when the act 1693, c. 14, required that the day and hour should be expressed, it was not meant to limit the question either of date or priority to the separate measured periods of sixty minutes in the usual reckoning of time in a day, but that it was implied, in the term hour, that there might be an equally clear case of priority within the minutes of the same nominal hour. It meant the precise point of time in a day; *Douglas*, Feb. 21, 1835, 13 *S. & D.* 505. In practice, persons searching the records usually confine their search to the minute-book, as being a statutory *index*, as it were, to the full register. And holding it to be settled that the minute-book is part of the record, it follows that a writ, although inserted *ad longum* in the register, will not be duly or availably recorded if it has not been entered, or if it has been imperfectly entered, in the minute-book. See an instructive case on this subject, *Part v. Wood's Trustees*, July 10, 1838, 16 *S.* 1363; where the omission in the minute-book of the names of two out of three inhibited parties was held by the consulted judges to void the registration, *quoad* the parties whose names were thus omitted, although the inhibition was inserted *ad longum* in the register against all the parties. See also *Maclaine v. Maclaine*, June 16, 1852, 14 *D.* 870. See generally, the acts 1672, c. 16, § 32; 1686, c. 19, in part repealed by 1696, c. 18, and 1693, c. 14; *Drummond*, June 24, 1809, *F. C.*; *Adam*, June 19, 1810, *F. C.*; *Stair*, B. iv. tit. 50, § 12, *App.* § 3; *Ersk.* B. ii. tit. 3, § 42, *note*; *Bank*. vol. ii. pp. 498, 675; *Bell's Com.* i. 676; *Bell's Princ.* §§ 773-4; *Illust. ib.*; *Ross's Lect.* ii. 211; *Bell on Eloc. Law*, 262. See *Records. Inhibition.*

**Minute-Book of Court of Session**; is a book in which is minuted, or shortly stated, the

heads of the judgments, that is, acts and decrees pronounced by the Court, or by Lords Ordinary. These minutes are intended to apprise the parties of the judgments which are pronounced: they are therefore entered by the different clerks of Court of the date on which the judgments or interlocutors are signed. Protestations are also inserted in the minute-book. A sheet of this book is printed and circulated by the keeper of the minute-book twice a week during session; and unless where the Court in its judgment or decree expressly dispenses with the minute-book, no decree can be extracted until twenty-four hours after it has been read (or may have been read) in the minute-book. The keeper of the minute-book holds his commission from the Crown, and is paid by fees on certain entries in the minute-book. *Bell's Com.* i. 722-5; *Shand's Prac.* 115; *Ross*, Jan. 31, 1829, 7 S. & D. 354. See *Decree. Protestation.*

**Minutes.** The *Minutes* of a meeting of creditors contain the import of what has been stated and agreed to at the meeting. When regularly made out and authenticated, the minutes are legal evidence of the proceedings and votes. See generally, *Stair*, B. iv. tit. 1, § 64; *Bank.* ii. 493; *Bell's Com.* ii. 352-9, 365-6; *Kames' Equity*, 283.

**Mischief.** See *Malicious Mischief.*

**Misdemeanour;** in English law, a crime. Every crime is a misdemeanour; but a distinction has been taken between crimes of a higher and lower kind; the former being termed felonies, the latter misdemeanours. *Tomlins' Dict. h. t.* See *Felony.*

**Misericordia;** according to Skene, was a "merciament, americiament, or unlaw." The word is still used in England to signify an arbitrary fine for an offence, called *misericordia*, because the amercement ought to be less than that required by Magna Charta. If one be immoderately amerced in a court that is not a court of record, the writ called *moderata misericordia* lies for moderating the amercement. *Skene, h. t.*; *Tomlins' Dict. h. t.*

**Misfeasance;** in English law, a trespass. *Tomlins' Dict. h. t.*

**Misnomer;** misnaming a person. An error in the Christian name of the defender, though otherwise correctly designated, is fatal to a summons. *Tomlins' Dict. h. t.*; *Shaw's Prac.* 218.

**Misprisions;** from a French word signifying contempt, are generally understood, in English law, to be all such high offences as are under the degree of capital, but nearly bordering thereon. A misprision is said to be contained in every treason and felony; and if the sovereign so please, the offender may be proceeded against for the misprision only.

Misprisions are generally divided into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought not to be done.

*Misprision of treason*, is committed by him who, being in the knowledge of a treasonable act, does not reveal it to a judge or justice of the peace. Hence, whenever a new treason is enacted, there necessarily results a new misprision of treason. By an act of Elizabeth, stat. 13, c. 2, it is declared, that those who forge foreign coin, not current in the kingdom, shall be held and punished as guilty of this offence. The punishment of this misprision of treason is perpetual imprisonment, forfeiture of goods, and of the profits of land for the offender's life. Misprision of treason, where accompanied with any probable circumstance of assent, may subject the offender to punishment as a principal in the treason. The form of prosecution for misprision is the same with that provided for actual treason. *Hume*, vol. i. p. 543; *Ersk. B.* iv. tit. 4, § 28; *Bank.* vol. ii. p. 261; *Swint. Abridg. voce Treason*; *Tait's Justice, voce Treason.* See *Treason.*

**Misrepresentation.** See *Insurance.*

**Missives;** *in re mercatoria*; are exempted from the solemnities requisite for the authentication of other deeds. *Ersk. B.* iii. tit. 2, § 4; *Stair*, B. iv. tit. 42, § 151. See *Evidence. Deed. Date of Deed. Writ. Holograph.*

**Missives and Minutes of Sale and Lease.** A binding sale of heritage may be concluded by an interchange of missives, as well as by a formal minute of sale. In the missives, the one party offers to buy or sell on certain conditions: the other party accepts of the offer. This constitutes a complete contract, which may be afterwards carried into effect by the execution of a disposition. See *Disposition.* The minute is a regular deed with a clause of registration for diligence, and a testing clause, executed according to all the requisites of the act 1681, c. 5. The missives may be holograph of the parties, the acceptor prefixing a copy of the offer in his own handwriting. If not holograph, the missives must be tested and authenticated like other probative deeds. The oath of party acknowledging his subscription will not supply a defect in any of the solemnities; and both missives must be probative, for the contract is binding on both or neither of the contracting parties; subject always to the legal effect of *rei interventus* and homologation. See *Rei Interventus. Homologation. Locus Penitentia.* Conditions are sometimes inserted in these preliminary deeds. Security may be stipulated for the regular payment of the price;

which may be done by agreeing that the disposition shall be retained in the hands of the seller until the price be paid, and in such a case it has been held that the seller is entitled to the subject or the price; *Baird*, Aug. 1758, *Mor.* 14, 156. Another mode of securing the price is to make the sale conditional on the payment of the price. Where the seller declares that the sale shall be effectual only in the event that the price is paid against a day certain, the neglect to pay is suspensive of the sale, and the seller may dispose of the subject to another. The missives by which the bargain is concluded ought to be written on paper duly stamped, or they ought to be stamped afterwards, before they can be founded on in a court of law. A written minute of lease with mutual stipulations, or an obligation or missive letter by the proprietor to grant a lease, accepted in like manner by the lessee, has equal force with a formal lease. It is necessary that the writings be probative, or that the defect be cured by possession or *rei interventus*. If there be a discrepancy between the formal lease and the previous minute or missive letter, the lease itself regulates the agreement. An essential defect in the missives of lease cannot be supplied by oath. It would appear that missives of lease, like missives of sale, require to be stamped to found an action. For the forms of minutes and missives of sale and lease, see *Bell's Deeds*, i. 144, *et seq.*; *Jurid. Styles*, i. 72, 80, 99, 687. See also *Bell's Princ.* §§ 889, 1190; *Bell on Leases*, i. 303-4, 312, 274; *Hunter's Landlord and Tenant*, 285, 316, 327; *Bell on Purchaser's Title*, 141, 154; *Ross's Lect.* i. 359.

**Mittimus**; in English law, a writ for transferring records from one court to another. Also a precept in writing, under the hand and seal of a justice of peace, directed to the gaoler, for the receiving and safe keeping of an offender until he is delivered by law. *Tomlins' Dict. h. t.*

**Mobbing**; is a tumultuary assembly of a number of people, to the terror of the lieges and the disturbance of the public peace. The meeting must be attended with circumstances of actual violence, or of such a tendency thereto as may be the ground of a reasonable apprehension of danger. A meeting or convocation of this kind may arise from an act in itself legal—as where a messenger unnecessarily raises the country to assist in ejecting a tenant, and proceeds in an irregular manner with a multitude of people to drive the cattle and turn out the furniture of the tenant, where no resistance has been made. That would be an instance of a mobbing or convocation arising from a legal act, and other instances may be figured. There must not

only be a tendency to violence in the convocation, but it must be a combination for violence in defiance of lawful authority. The offence of mobbing is distinguished from the crime of treason, by being confined to some matter of private concern, as a compulsory reduction in the price of grain—to prevent the division of a common—to rescue a criminal, &c. It is not necessary to the constitution of this offence that the assemblage shall have been brought together by preconcert. It is enough that an illegal outrage is committed or threatened, although the design of it should have been the result of a tacit confederacy, formed on the instant, and after the mob has been collected. In order to constitute the offence, it is only necessary that the property of individuals, or of the public, should be seized or damaged, or the persons of individuals in any way injured, or they themselves put in fear, or constrained to act contrary to their duty, interest, or inclination. The bare act of being tumultuously assembled for a violent purpose, though no further movement be made towards its execution, will fall under the offence of mobbing. He will be held as art and part guilty of this offence, who excites the mob, exhorts them to continue, or distributes money or liquor amongst them; even when the person is not present in the mob, if he should be able to communicate with, or direct the mob, or to influence their operations. The act of being present in a mob, if the person continues with them for any time, although he does not take an active part, may be construed into being art and part guilty of the offence; and, therefore, those who may be induced from curiosity to enter into a mob run a risk sufficient to deter any prudent person from attempting to gratify an idle curiosity of this kind. One who joins a mob does not *eo ipso* become art and part of a sudden and extraneous felony perpetrated by some rioters at the moment. When the libel on this crime is laid at common law, the punishment is arbitrary. The ancient law of Scotland, relative to convocations within burgh, seems now to be in a great measure superseded by the Riot Act, 1 Geo. I., c. 5. The first provision of that act relates to the pulling down, or demolishing of, or beginning to pull down, a church or place of religious worship, or dwelling-house, or barn, or out-house, by persons unlawfully, riotously, and tumultuously assembled; which shall be adjudged felony without benefit of clergy. 2. Where persons are riotously and tumultuously assembled for any purpose whatever, to the number of twelve, a proclamation is directed to be made, ordering them to disperse, and declaring that, in case of their continuing together for the space of an hour



thereafter, to the number of twelve or more, after such command or request made by proclamation, it shall be judged felony without benefit of clergy. Should this proclamation be impeded by any of the mob, this is made instant felony in those who are "offenders therein;" and the magistrates, peace-officers, and all whom they shall call to their assistance, are by the act empowered to disperse, seize, and apprehend the persons riotously assembled, to the number of twelve, within an hour after proclamation; and the act declares, that if any of the mob shall be killed, maimed, or hurt, by reason of their resistance, all concerned shall be indemnified and discharged of the consequences; and should it happen before the expiration of the hour, that the meeting are not only tumultuous, but shall proceed to violence against the property or person of any one, force may instantly be repelled with force. Nothing can be more erroneous than the notion, that after the proclamation an hour must elapse before force can be used. The proclamation is in these terms: "Our Sovereign Lady the Queen chargeth and commandeth all persons being assembled immediately to disperse themselves, and peacefully to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies.—God save the Queen." This proclamation may be made by a justice of the peace or other magistrate; and if the mob continue assembled for one hour after the proclamation, they, and each of them, are guilty of the capital offence, whether or not they have attempted to commit any felonious outrage. By 52 Geo. III., c. 130, it is enacted, that "if any person or persons unlawfully, riotously, and tumultuously assembled together, in disturbance of the public peace, shall unlawfully and with force, demolish and pull down, or begin to demolish or pull down, any erection and building, or engine which shall be used or employed in carrying on or conducting of any trade or manufactory, or any branch or department of any trade or manufactory of goods, wares, or merchandise of any kind or description whatsoever, or in which any goods, wares, or merchandise shall be warehoused or deposited; that then every such pulling down and demolishing, or beginning to pull down and demolish, shall be adjudged felony without benefit of clergy." *Hume* i. 411, 433; *Alison's Princ.* 509; *Ersk.* B. iv. tit. 4, § 29, and note by *Mr Ivory*; *Kames' Stat. Law Abridg., h. t.*; *Hunter's Landlord and Tenant*, p. 744; *Hutch. Justice of Peace*, i. p. 370; *Tait's do., voce Riot*; *Blair's do., h. t.* See the case of *Cairns and others*, 18th Dec. 1837, 1 *Swint.* 597.

**Mobilia Sequuntur Personam**; a Roman law maxim, importing that moveables follow the owner's domicile; so that a deed of transference, executed according to the forms of the *lex domicilii*, is effectual to carry moveables situated in a country where such a mode of conveyance would not be effectual. *Ersk.* B. iii. tit. 2, § 40, note by *Mr Ivory*. See *Foreign. Heritable and Moveable. Domicile*.

**Moderamen Inculpatae Tutelæ**; is a Roman law expression, signifying that degree of self-defence which a person may legally use, although it should occasion the death of the aggressor, without incurring the guilt of murder, or even of culpable homicide. *Hume's Crim. Law*, vol. i. p. 221; *Ersk.* B. iv. tit. 4, § 41. See *Chaud Melle. Homicide. Justifiable Homicide*.

**Moderata Misericordia**. See *Misericordia*.

**Moderator**; the person who presides at a dispute or in a public assembly. The president or chairman of the General Assembly of the Church of Scotland is styled *Moderator*. The moderator is chosen on the day on which the Assembly meets, from among the ministers upon the roll prepared by the clerks. It is usual for the moderator of the last Assembly to propose his successor; and on one occasion, when there were two candidates, each was proposed by the moderator. Any member of Assembly may propose another candidate for the chair. The majority of members of Assembly determine in case of a division. In the event of a contested election, the candidates are first called upon to give their votes. The chairman or president of the Commission of the General Assembly, of a synod, and of a presbytery, is also called moderator. The minister of a parish is *ex officio* moderator of the kirk-session, and he may appoint any other person to preside in his stead. *Hill's Church Prac.* 2, 41, 81, 90, 98; *Gillan's Acts of Assembly*, 180.

**Modification**; is the term usually applied to the decree of the Teind Court, awarding a suitable stipend to the minister of a parish. The amount of the stipend is fixed by the Court on a due consideration of the state of the teinds—the extent of the parish—its population—and the necessary expenses to which the clergyman is exposed. The Court, although formerly restricted by the act 1617, c. 3, to a *maximum*, beyond which they could not augment the stipend of the minister, have not, by the subsequent commissions, been so restrained; and accordingly they are now in use to give a reasonable stipend to the clergyman, varying with the circumstances of the parish and the state of the teinds. The Court may also grant an augmentation of stipend after an interval of twenty years from

the date of the last final decree of modification. The stipend, unless where peculiar circumstances render it necessary to modify it in money, must be modified in grain or victual, and paid in money, convertible according to the fair prices of the year for which the stipend is payable; 48 *Geo. III.*, c. 138. See *Ersk. B. ii. tit. 10, § 46, et seq.*; *Bank. vol. ii. pp. 60, 516.* See *Augmentation. Locality. Stipend.*

**Modus**; or *modus decimandi*; in England, is a particular manner of tithing allowed, different from the general law of taking tithes in kind. When tithes in Scotland have been valued, they are said to be paid by a *modus*. *Bell's Princ. § 1147, et seq.*; *Tomlins' Dict. h. t.*

**Moiety**. A sum payable in moieties is payable in two equal shares, though sometimes, erroneously, the term is applied to a sum payable in two or three different parts or instalments.

**Molestation**; is the troubling of one in the possession of his lands. This is a delict which subjects the molester to a claim of damages. An action of molestation is a possessory action, calculated for continuing proprietors in the lawful possession of their lands during the dependence of any question in relation to the right thereto. The action may, by act of sederunt 1580, ratified by stat. 1587, c. 42, be brought before the Judge-Ordinary, or the bailies of regality. *Ersk. B. iv. tit. 1, § 48*; *Stair, B. iv. tit. 27*; *Bank. vol. i. p. 280*; *Jurid. Styles, iii. 128, 137.* See *Ejection and Intrusion.*

**Money**. The current coin of the kingdom, which may be offered in payment, is of gold, silver, or copper, to which is affixed the royal stamp, and to which such nominal value is given as the queen, by her prerogative, may think proper to fix. Money cannot be identified, unless separated and marked for the purpose. Money in possession of an insolvent person is a general fund for division among his creditors; and no sum, or part of it, can be claimed by any one, unless it be distinguished and ear-marked as specific. At one time, gold coin was the only legal tender, except for taxes, or sums below forty shillings; but by a recent act, conferring certain privileges on the Bank of England, it is provided, that unless, and until, Parliament shall otherwise direct, the notes of the Bank of England shall be a legal tender, except at the bank itself and its branches; 3 and 4 *Will. IV.*, c. 98, § 6. Silver coin is a legal tender to the amount of forty shillings. Tokens given by manufacturers to their workmen are not now, as formerly, permitted to be used as money; 57 *Geo. III.*, c. 46, § 113. Money Scots is the ancient money of Scotland,

and was one-twelfth the value of sterling money.

In the English courts, the bringing money into court, or, in other words, the offer of payment to a party, is affected by many considerations unknown in Scotch practice. According to the English rule, an offer of the debt due will either put an end to the lawsuit, or, should the plaintiff's claim exceed the just amount, will have the effect of throwing on him the expense of the after proceedings. See *Tomlins' Dict. h. t. Stair, B. i. tit. 11, § 5*; *tit. 14, § 1*; *Bank. vol. i. pp. 356, 385, 407, 488*; *Bell's Com. i. 257, 264*; *ii. 378, 502*; *Bell's Princ. §§ 1332-7*; *Illust. § 1333*; *Kames' Stat. Law Abridg. h. t.*; *Tait's Just. of Peace, voce Coin*; *Blair's do. h. t.* As to the offence of counterfeiting the King's coin, see *Coining.*

**Monks**. The monks were the regular clergy, who had no *cura animarum*, nor the charge of any congregation, but were bound to close residence in their monasteries, unless when sent out on missions. They got the name of regular, because circumscribed by vow to certain rules of devotion and penance, according to the institution of their several orders. *Ersk. B. i. tit. 5, § 4*; *Stair, B. ii. tit. 8, § 15*; *Bank. vol. i. p. 73*; *ii. 5.*

**Monograms**; the signatures formerly admitted to deeds in place of full subscriptions, usually consisting of the letters of the subscriber's own name and of some tutelar saint fancifully combined. *Ross's Lect. i. 126.*

**Monopoly**; a license or privilege bestowed by the sovereign, by grant or otherwise, for the sole buying, selling, making, working, or using of anything. Monopolies are contrary to the spirit of the laws of this kingdom, and are void at common law. In England, by James I., c. 3, all monopolies, grants, letters-patent, and licenses, for the sole buying, selling, and making of goods and manufactures, were declared void, except in some particular cases; and persons aggrieved by putting them in use may recover treble damages and double costs by action on the statute. This does not extend to any grant or privilege conferred by act of Parliament, nor to any grant or charter to corporations or cities, nor to grants to companies or societies of merchants, for the benefit of trade; nor to inventors of new manufactures possessing patents; nor to grants or privileges for printing, making gunpowder, casting ordnance, &c. The Crown may grant to particular persons the sole printing of the Scriptures. In Scotland, an act was passed in the reign of Charles I. (1641, c. 76), declaring monopolies ineffectual; and since the Union, the same law rules both parts of the kingdom. A regulation made by the bailies of

Leith, confining the office of procurator before their court to those who had been apprentices to their procurators, was voided as a monopoly; *Young*, 21st Dec. 1765, *Dict.* 9564. See *Bank*. i. 411; *Bell's Com.* i. 109; *Kames' Stat. Law*, h. t.; *Kames' Equity*, 229, 341, 361; *Tomlins' Dict.* h. t. See *Pactum illicitum. Exclusive Privilege. Patents. Literary Property. King's Freeman.*

**Moot**; a hypothetical or debatable case, put and argued by young barristers and students of law at the inns of court in England, by way of practice, in a place formerly called Moot Hall. A bailiff or surveyor of the moots is annually chosen by the benchers. *Tomlins' Dict.* h. t.

**Mora.** *Mora*, or delay, is a general term applicable to all undue delay in the prosecution or completion of an inchoate bargain, diligence, or the like; and the legal effect of which may be to liberate the contracting parties, or to frustrate the object of the diligence. The question, whether or not undue delay has occurred, may be said to be a *jury question*; and in *re mercatoria*, the determination of it will be regulated very much by the usage of trade, or the practice of merchants in the particular transaction to which it relates. A creditor who has begun diligence against his debtor's person or estate, which he does not complete within the legal and requisite time, is said to be *in mora*; and such diligence will not be allowed to defeat the rights or diligences of subsequent purchasers or creditors. A superior who unduly delays to obey a charge to enter his vassal forfeits the non-entry duties during his life. *Mora*, in the performance of an obligation, subjects the debtor to liability for the direct loss sustained by the creditor; and if the subject to be delivered perish in the debtor's hands, after *mora*, the loss falls upon him, although he has not been otherwise in fault, unless it appear that it would have perished in the same manner in the creditor's hands. And even this is no defence, when it can be shown that the owner might have got it off his hands before the accident happened, especially if it be a thing for sale, and not for keeping. In the older law, on account of the disfavour in which the taking of interest was held, delay in the payment of a money debt did not entitle the creditor to interest without previous stipulation; but this doctrine has, in modern times, given place to more equitable rules. In general, the interest is held to be the loss which the creditor suffers by delay; but this rule is not inflexible; for when damage flows directly from the non-payment of money, the party failing to pay may become liable, just as one failing to implement an ordinary obligation is liable for

the direct damages. Thus, in a recent case, a trustee for creditors sold the trust-estate to a party who bound himself to pay the price by instalments at certain terms. Upon the faith of this, the trustee intimated to an heritable creditor on the estate, that the sum in his bond would be paid by a certain day; which intimation was accepted and acted upon. The buyer having made no payment till nearly a year after the last of the stipulated terms, the trustee was unable to fulfil his engagement to the creditor, who raised action against the trustee for the loss and damage thereby sustained. It was held that the buyer was liable to the trustee in relief; *Mansfield*, Feb. 27, 1836, 14 *D. B. & M.* 585. Delay is incurred, in pure obligations, by disregarding the creditor's requisition; for when no term is stipulated, the time of performance is in the creditor's option. In obligations prestatable at a stipulated day, the passing of the day puts the debtor in *mora*. See *Dies interpellat pro homine*. In conditional obligations, there is no *mora* until the condition has been purified; and even then, requisition, or the arrival of a previously stipulated term, is requisite. If requisition is impossible, *mora* is incurred if the obligation be not performed so soon as it may be; as in the case of restitution of things found, or coming in any other way into the possessor's hands without the owner's knowledge. In debts due to pupils, *mora* is incurred without requisition; and in obligations by delinquency, *mora* begins from the first moment that the obligation might have been implemented. In general, legal execution is not competent till there has been a failure to perform in terms of the obligation; but in some cases, precautionary steps for the creditor's security, by action or diligence, may be resorted to, before the arrival of the term of payment—*e. g.*, where the debtor is *vergens ad inopiam*. See *Ersk.* B. ii. tit. 5, § 45; *Bell's Com.* i. 326 *et seq.*, 445 *et seq.*; ii. 34 and 153, 194, 201, *et seq.*; *Stair*, B. i. tit. 13, § 2; tit. 17, § 15; *Mare's Notes*, p. lxxviii.; *Bank*. vol. i. p. 471; *Bell's Princ.* § 82; *Bell on Leases*, i. 392; *Hunter's Landlord and Tenant*, 728–33; *Kames' Equity*, 208. See also *Diligence. Damages. Conjunct and Confident. Dies interpellat pro homine. Arrestment. Inhibition. Adjudication.*

**Moravians**, a sect of dissenters, who, on account of conscientious scruples, are permitted, in lieu of an oath, to make a solemn affirmation in courts of justice, civil and criminal, and on all other occasions on which, either at common law or by statute, an oath is required to be taken. See *Affirmation*.

**Morbus Sonticus**; a mortal sickness. It has been otherwise defined, an illness so se-

vere as to furnish a just excuse from the performance of duty, or the transacting of business. More strictly, the term is applied to incapacitating diseases; *Laird*, 9th July 1763, *Mor.* 3315. At one time, it was necessary to prove a *morbus santicus* in reducing a deed *ex capite lecti*; but this is not now the law. *Stair*, B. iv. tit. 20, § 41. See *Deathbed*.

**Mortancestry.** The brieve of inquest is sometimes called a brieve of mortancestry. But the two brieves were originally distinct; the brieve of inquest being intended for the purpose of proving the propinquity; whereas the brieve of mortancestry was used for calling into court those in possession of the ancestor's property, for trying the title under which they possessed; *Ersk.* B. iii. tit. 8, § 62. See *Brieve*.

**Mortgage;** according to Skene, is a deed wed, as a sum given upon lands in wadset, and under reversion, called a deed wed, because, by the old laws of the realm, the annual of the sum was reckoned a part of the stock and principal sum, contrary to the posterior practice, by which the annual was yearly paid until redemption. *Skene, h. t.*

In English law, it is a pledging or pawning of freehold or leasehold, or any other property of a nature not susceptible of personal delivery. The form of a mortgage of land is by a conveyance of the inheritance or estate to another, on condition that, if the borrower do not by a certain day repay the money, the lender may enter and enjoy the land; or, in technical language, that the lender's estate shall be *absolute* in the premises. In equity, the lender or mortgagee is held accountable to the borrower or mortgager for the true value; and if the mortgagee is in possession, by virtue of an ejectment brought at law, equity will make him render an account of the profits received; and this account may be opened at any time during twenty years. The right which a mortgager has to redeem his property is called his equity of redemption. Mortgagers, while in possession, may vote as long as the interest due does not reduce the beneficial interest below forty shillings; but after a mortgagee is in possession, the mortgager's right ceases. Mortgagees may vote if in possession of the premises mortgaged, but not otherwise. Mortgage is not a Scotch law term, as is sometimes supposed. The corresponding term in Scotch law is *wadset*; and the right of an heritable creditor by bond and disposition in security, or by heritable bond, is in some respects analogous to that of a mortgagee. The mortgage of ships is provided for by special statute; 6 *Geo. IV.* c. 110, §§ 45-7. See *Tomlins' Dict. h. t.*; *Stair*, B. ii. tit. 10, § 3; *Bell's Com.* i. 164; *Bell's*

*Princ.* § 1739. See *Ships. Wadset. Bond. Burdens*.

**Mortification, Mortmain.** These terms are nearly synonymous, and are applied to lands given formerly to the Church for religious purposes, or, since the Reformation, for charitable or public uses. Those lands vested in the Church were held to be given for superstitious purposes, and were declared, by the act 1587, c. 29, to belong to the Crown. By the present practice, when lands are given for any charitable purpose, they are usually disposed to the trustees of the charity, to be held either in blench or feu. When mortifications are made for behoof of the poor generally, and the management is not intrusted to particular individuals, or when it is given to the "patron or overseers" of the poor, they fall under the administration of the heritors and kirk-session, in the same way as the ordinary funds for support of the poor, each member of the meeting having a vote; and this whether the benefit of the fund extend to the whole parish, or only to a particular district of it. Those only who are entitled to relief out of the ordinary parochial funds can claim the benefit of mortifications for behoof of the poor generally. It is declared by statute to be unlawful to alter, change, or invert any mortifications for support of schools and hospitals, or pious purposes, to any other than the specific use to which they are destined by the disposer; 1633, c. 6. This statute also gives right of action for calling the managers to account when they misapply the fund. - The managers of a mortification may let in lease, or feu out the mortified lands, when for the advantage of the fund; and they may sell the superiority for a fair price. Where the managers of a mortified fund are changed, any set of administrators may call their predecessors to account; and any individual manager may call his brethren to account for malversation. Persons entitled to benefit under a deed of mortification have a right to pursue an action for enforcing their claims. The jurisdiction of the Court of Session extends over hospitals and mortifications, so as to entitle them to control the management of the administrators; and in the event of a failure of the administrators in whom the management of a mortification for a definite purpose is vested, it has been found that the Court of Session may supply the deficiency by a new nomination; but this rule is subject to limitation. Lands mortified by a private individual as glebe to the minister of a parish, are not teind-free; *Wilson*, Feb. 1, 1831, 9 *S. & D.* 357. See, generally, *Stair*, B. ii. tit. 3, § 39; *More's Notes*, p. clxix., cccxliii.; *Ersk.* B. ii. tit. 4, § 10; *Bank.* vol. i. p. 558;

ii. 8, 46, 235; *Bell's Princ.* § 686; *Kames' Stat. Law Abridg. h. t.*; *Hunter's Landlord and Tenant*, pp. 107, 115; *Sandford on Heritable Succession*, i. 57; *Hutch. Justice of Peace*, ii. pp. 23, 410; *Dunlop's Parish Law*, pp. 223-6, 264, 343. See *Poor*.

**Mortis Causa.** A deed *mortis causa* is a deed granted in contemplation of death, and which is not to take effect till after the grantor's death. See *Testament. Disposition, General. Settlement, &c.*

**Mortuus Saut Vivum**; a maxim of English law, implying that a right vests in the person of an heir simply by the death of his ancestor. This doctrine has never been adopted in the law of Scotland, which rejects the principle of an *ipso jure* transmission of rights requiring sasine, by mere survivorship. *Bell's Princ.* § 1690; *Sandford's Herit. Suc.* i. 271. See *Heir. Service. Vesting*.

**Mote**; "mute, pley, action, quarrell, placitum." *Skene, h. t.*

**Mother.** As to her obligation to alimēt her children, and her right to the custody of a natural child, see *Alimēt. Bastard, Alimēt of*.

**Motions.** A motion is an application to the court, by the parties or their counsel, in order to obtain some order of court, which becomes necessary in the preparation of the record or in the progress of a cause. In the Court of Session, the record in every cause is made up and closed under judicial superintendence; and in all defended causes, the several orders requisite in the preparation of the record, including not only the usual orders for condescendences, answers, &c., but all demands for diligences for the recovery of writings, and in general, all incidental applications, are made on motion to the Lord Ordinary in the cause. These motions are disposed of according to a roll called the *Motion-roll*, called daily during session by the several Lords Ordinary. The course is, for the party making the motion to enrol the cause in the motion-roll of the Lord Ordinary before whom it depends. Notice of the enrolment and of its purpose must be given to the opposite agent, by a written or printed billet, delivered or despatched through the Post-office, on the day on which the enrolment is made—*i. e.*, always forty-eight hours, at the least, before the cause is to be called in the course of the motion-roll; and in addition to this notice, the roll of motions for each day is put on a board exposed on the tables in the Outer-House. In this respect there is a distinction between the motion-roll and the weekly printed roll of new causes; as to which last no notice of enrolment is necessary, the printed roll being held sufficient intimation. **Motions** are disposed of summarily, and al-

most invariably on the day specified in the roll; whereas causes frequently stand for many weeks in the *Debate-rolls* of the Lord Ordinary. See *A. S.* 6th Feb. 1806, and *Beveridge's Form of Process*, i. 266. See *Record*.

In the inferior courts, the practice is in some respects similar to that in the Court of Session. The agent for the party making the motion sends to the opposite agent a written notice, at least forty-eight hours before the court-day on which the case is to be in the roll, intimating the precise nature and object of the enrolment. A note of the motion ought also to be lodged with the process, in the hands of the sheriff-clerk, in time to be entered in the roll. When a case is called in the motion-roll, the agent for the party making the motion is heard; and when his statement is completed, the opposite party's agent is heard in reply. No new motion, or addition to the motion intimated, should be made either by the mover or the respondent. In general, the sheriff disposes of the motion in court, and the interlocutor thereon is written out and subscribed, proceeding on the narrative of having heard parties' procurators; and no other writing on the subject forms part of the process. But the sheriff may make *avizandum* with the cause, and give judgment, or he may order written pleadings when the case is important and difficult. *Maclaurin's Sheriff Prac.* 71; *Alexander's Abridg. of A. S.* 182-90. See *Enrolment. Record. Rolls of Court. Notes*.

**Mourning.** A widow has a legal claim to mournings for her husband, suitable to his quality, where his estate or rank requires mourning in point of decency; and this claim was in one case found good although the marriage had not subsisted for a year. But although the widow's mournings are, in a competition with creditors, held to constitute a privileged debt, yet, in another case, a claim for a widow's mournings was found not effectual in competition with the husband's creditors, where the marriage had been dissolved within year and day; *Neilson*, 21st Nov. 1776, *Mor.* 6165. The claim of a widow for alimēt and mournings will not be barred by her acceptance of provisions made for her by her husband, by a deed declaring these provisions to be in full of all claims whatever which she may have on her husband's effects. Mournings for such of the deceased's children as are to assist at the funeral also form a privileged debt; but no claim can be made by the children who were not present at the funeral. A minor has been found liable for an account of mournings incurred by him for himself, his brothers, and sisters; and in an action pursued against an apparent heir, brother to a defunct, by a

merchant who furnished mournings to the deceased's family, and to the defender in particular, although without any alleged order from him, the defender was found liable. *Stair*, B. i. tit. 4, § 10; *More's Notes*, xxvii. cccxii.; *Ersk.* B. i. tit. 6, § 41; B. iii. tit. 9, § 43, *Notes by Mr Ivory*; *Bell's Com.* i. 633; ii. 156; *Bell's Princ.* § 1406; 1 *Fraser*, 524. See *Funeral Expenses. Privileged Debt. Marriage. Aliment.*

**Moveables.** Moveables are, in the phraseology of the law of Scotland, opposed to heritage; so that every species of property, and every right a person can hold, is by that law either heritable or moveable. Hence, *moveables* are not merely corporeal subjects capable of being moved, but every species of property, corporeal or incorporeal, which does not descend to the heir in heritage; *Ersk.* B. ii. tit. 2, § 3. See *Heritable and Moveable. Execution.*

**Muirburn.** By 13 Geo. III. c. 54, every person setting fire to any heath or muir in Scotland, from 11th April to 1st November, forfeits 40s. sterling for the first, L.5 sterling for the second, and L.10 for the third and every subsequent offence; and on failing to pay the penalty within ten days after conviction, suffers six weeks' imprisonment for the first, two months' for the second, and three months' for the third and subsequent offences. The tenant is held liable, unless he prove that the fire was communicated from some neighbouring ground, or was raised upon his ground by some person not in his family or service. But the proprietors of high and wet muirlands are entitled to burn, or to authorize their tenant to burn, the heath between the 11th and 25th of April. The act extends to the Highlands. See the case of *Roger v. Gibson*, March 12, 1842, 1 *Broun*, 78. See also *Ersk.* B. ii. tit. 6, § 6, *note*; *Kames' Stat. Law*, h. t.; *Watson's Stat. Law*, voce *Game*; *Hutch. Just.* ii. 550; *Tait's Just. voce Game*; *Blair's Just. h. t.*; *Ness's Game Law*, 105. In England, by 7 and 8 Geo. IV. c. 30, § 17, maliciously setting fire to heath, wherever growing, is made felony; *Tomlins' Dict. h. t.*

**Mulet**; a fine. *Tomlins' Dict. h. t.* See *Fines. Amerciament.*

**Mulieratus Filius**; a lawful son, begotten with a lawful wife. *Skene, h. t.*

**Multiplepounding.** This term means double pouding, or double distress, and gives name to an action which may be brought by a person possessed of money or effects which are claimed by different persons pretending right thereto. Thus, where money due by a debtor has been arrested in his hands by the creditors of his creditor, or where the rents of an estate are claimed by different claimants

on the estate,—the arrestee, in either of those cases, may raise an action of multiplepounding, calling the different parties who claim the fund *in medio*, and all others, to settle their respective claims judicially; and also to have it found, that (whoever may be entitled to the fund) the arrestee is liable only "in once and single payment." This action may be raised by the arrestee, or by the person on whom the claim is made; but it may be also raised, *in his name*, by any of the parties interested in the competition, without his consent, or even against it; and every person interested, though not made a party to it originally, may, in the course of that action, produce an interest in it, and plead the grounds on which he conceives himself to be entitled to a preference. In this way the action becomes a process of competition between the different claimants on the fund; the holder of which, having brought it into Court, quits the field. The conclusions of the action are,—1. That the raiser shall be liable in once and single payment. 2. That the parties may debate their respective claims; that he or they who have the best right to the subject or fund *in medio* may be preferred; and that the raiser shall be entitled to the expense of raising the action and bringing the parties into Court. The subject of the action is in general a sum of money, but it may also be moveable or heritable property, or even a deed. Where the subject *in medio* is a sum of money, it must be such a debt as the holder may be obliged to pay. Rents to become due cannot competently form the subject of this process. When trustees have been appointed by a party deceased to pay off his debts, &c., and objections exist against some of the claims, it seems competent for the trustees to call all parties in a multiplepounding, to have the amount of the claims settled, the moveable estate distributed, and themselves exonerated; even though there be no double distress, and although a reduction has been raised of the settlement of the deceased, in so far as it conveys land; *M'Dougal's Trustees*, 9th July 1830, 8 *S. & D.* 1036. Where a defender, on being sued for payment in an ordinary petitory action, states as a defence that all parties interested do not concur in the suit, it seems competent for the pursuer to raise a multiplepounding in name of the defender, calling himself and the other parties; *M'Target*, 12th May 1829, 7 *S. & D.* 591. When a multiplepounding is raised in the name of a holder of a fund by one of the claimants, it must be intimated to the nominal pursuer, by being served on him by a messenger-at-arms, in the same manner, and on the same *inducia*, as if he were one of the defenders, and an execution of it must be returned along

with the executions of citation; *A. S. 11th July 1828, § 23*. The multiplepointing is executed by short copies, and proceeds on the short *induciae* of six days without a bill. The summons does not require to be printed; but if the multiplepointing contain conclusions for exoneration, or declaratory conclusions, the rules as to *induciae*, printing and executing, are the same as in an ordinary summons. Where the person possessed of the funds is the real pursuer, he must give out a condescence of the fund in his hands along with the summons; and where he is only the nominal pursuer, he must, at the first calling of the cause, either give in a precise and articulate condescence of the amount of the funds in his hands, stating likewise any claim or lien which he may think he may have on the fund, or produce objections as his defences against the summons served as a claim on him; otherwise he is held as confessed, or a condescence may be ordered from any of the claimants; *A. S. 11th July 1828, § 47*. Where the amount of the fund is correctly stated in the summons, a condescence is unnecessary. The holder of the fund is liable to the expense occasioned by his delaying to condescend. At the first calling of the cause, if the condescence is lodged, and no objections are made to the competency of the action, the usual interlocutor is pronounced, finding the raiser of the multiplepointing liable in once and single payment only, and appointing the creditors claimants to produce their claims and grounds of debt in the clerk's hands within ten days. The condescence of the holder will at the same time be allowed to be seen. The defences of the raiser are in the form of objections, either to the competency, or that all having interest are not called. It is no objection to the competency that the nominal raiser has no funds of the common debtor. The claimants may also lodge objections. When a fund is proved to be in the hands of the raiser, it will be ordered to be consigned in a bank, on the motion of any of the claimants, the receipt to be taken payable to such person as the Court or Lord Ordinary may direct, and to be lodged with the clerk to the process. See *Consignation*. But the raiser cannot be ordered *de plano* to consign, if he have any claim to the fund. On consignation, the holder is entitled to decree of exoneration, if the summons contain conclusions of exoneration, and also to the expenses incurred by him, which he may retain from the fund *in medio*; or if he have consigned the whole, he will obtain warrant for payment. He does not get expenses if the multiplepointing was unnecessarily raised by him, or if he occasioned unnecessary litigation; and in this last case he

may even be found liable in expenses to the other party. On an interlocutor finding the holder liable in once and single payment, or on a decree of exoneration being pronounced, the holder has no further concern with the process. If any claimant, after appearing in the action, proceed with diligence against the holder, he will be liable in damages; *White, 13th Feb. 1772, M. 9133*. The claimants in a multiplepointing must state their respective claims in the form of condescences, with the conclusions to be drawn from the facts so stated, in the shape of notes of pleas, producing therewith their grounds of debts and other writings for instructing their claims; and it is competent to the Lord Ordinary, if he see cause, to appoint the creditors to meet and choose a common agent, who shall prepare and lodge a state of the claims and preferences, putting his objections, as therein stated, to each or any of the claims, in the form of answers to a condescence, with a note of pleas; and, *quoad ultra*, the duty and nature of his office are similar to that of a common agent in a process of ranking and division. See *Condescence and Claim; Common Agent*. If no common agent be appointed, the parties are required to revise their condescences, each being allowed to state, in the close of his condescence, his objections to any other claim or claims, in the form of answers to a condescence, with a note of pleas; and thereafter the procedure corresponds, as nearly as may be, to what is provided in the case of an ordinary action; *A. S. 11th July 1828, § 48*. All parties having an interest in the subject of the action may appear and produce their claims, though not cited. An interlocutor preferring one creditor, has the effect of an interlocutor repelling the claims of all the rest; and each claimant who does not mean to retire from the contest must reclaim against the interlocutor preferring his competitor. By 1584, c. 3, one who can show a necessary cause of absence, or a minor who was without tutors or curators at the date of the proceedings, is entitled, if he had a preferable right to the fund, to reduce the decree, and even, although expressly called in the action, to claim from those preferred repayment of what he should have drawn; but if the party cited be a minor with tutors or curators, his only recourse is against them. Those who were not summoned will be entitled to show that the decree was erroneous, and that the fund should still be paid to them. To prevent such questions, it is the practice to publish advertisements in the newspapers, intimating the dependence of the multiplepointing, and requiring all having claims upon the fund to appear. These intimations generally contain a declaration, that those

who do not appear shall be excluded from any share in the division. But no such declaration can deprive a creditor of his legal right of preference, should he afterwards challenge the decree of multiplepointing, and be able to establish such preference. See the case of *Morgan v. Morris*, March 11, 1856, 18 D. 797; also the case of the *Magistrates of Dundee v. Lindsay and Morris*, Dec. 14, 1856, 19 D. 168. Where any of the claimants have creditors, these creditors may claim to be ranked on the fund set aside for their debtor. Such claims are called riding interests. See *Riding Interests*. A multiplepointing has been called a "congeries of actions;" inasmuch as, in the competition, each claimant, as against the competing claimants, may maintain all legal pleas, including pleas reductive of the grounds of the competing claim; *Bell's Com.* ii. 299. See generally, *Stair*, B. iii. tit. 1, § 39; B. iv. tit. 17, § 7; *More's Notes*, p. cccxxxviii.; *Ersk. B. iv. tit. 3, § 23*; *Bank.* vol. ii. p. 615; iii. 36; *Bell's Com.* ii. 297-301; *Bell's Princ.* § 2266; *Kames' Stat. Law Abridg. h. t.*; *Shand's Prac.* p. 579; *MacLaurin's Sheriff-Court Prac.* p. 363; *Davidson*, April 19 and July 4, 1815, 3 Dow, 218.

**Multures.** The multure is a quantity of grain, either manufactured or in kind, deliverable to the proprietor or tacksman of a mill in return for grinding the corn. There are other small dues, as the *knaveship*, *bannock*, *lock* or *gowpen*, exigible by the miller, or servant at the mill, by whom the work is performed. The multure is payable by every person who comes to the mill for the purpose of grinding the grain. But the tenants and proprietors of some lands are bound to use a particular mill; and the lands so bound, or restricted to the mill, are termed the *thirl* or the *sucken*, and the tenants or proprietors the insucken multurers; while those who use a mill without being bound to use it, are termed the out-town or outsucken multurers. Hence, multures are of two sorts—those due by the persons astricted to the mill, termed insucken multures, and the multure exigible from those who voluntarily use the mill, called outsucken multure. The former, of course, is much heavier than the latter, the amount of which always depends on the situation of the mill, and the competition there may be with other mills to which the outsucken multurers have access. *Ersk. B. ii. tit. 9, § 20*; *Stair*, B. ii. tit. 7, § 15; B. iv. tit. 15, § 2; *More's Notes*, pp. ccxxv., cclxxiii.; *Bank.* vol. i. 684-9; *Bell's Princ.* § 1018, *et seq.*; *Hunter's Landlord and Tenant*, pp. 206-11-14, 561; *MacLaurin's Sheriff-Court Prac.* p. 13; *Hutch. Justice of Peace*, ii. p. 450; *Ross's Lect.* ii. 170. See *Abstracted Multures*. *Knaveship*. *Thirlage*. *Insucken Multures*. *Outsucken Multures*.

**Municipal Law, Municipia.** *Municipia* were cities dependent on Rome, the citizens of which were allowed certain privileges as Roman citizens; and which preserved their own laws, under the name *leges municipales*. Hence the term municipal law came to signify the laws of any free city or kingdom, and municipal and civil law are synonymous; *Ersk. B. i. tit. 1, § 18*; *Kames' Equity*, 492-4.

**Murder**; is the depriving a human being of life, deliberately and wilfully, without a cause. The deliberation and malice, or forethought, with which it is committed is one of the characteristics of the crime of murder. But the malice or forethought is merely that wicked and mischievous purpose which is the essence of the crime, and which may have been engendered at the meeting of the parties. The act of killing, of itself implies malice; and it lies on the accused to prove any one of those palliating or justifying circumstances which the law admits. See *Homicide*. Should a person, therefore, occasion the death of another, though there may be ground to presume that he meant only to inflict a severe beating, even this shows such a disregard to the safety of his fellow-creature, and a resolution to proceed to such extremities in order to gratify his resentment, that he must abide the consequences; and if death ensue, he will be held guilty of murder. With regard to the nature of the weapon, there is this difference, that some, as fire-arms, &c., are perfectly inconsistent with any other than an intent to kill; but there are others which may be thought to favour the presumption that there was no such intention. The law, however, considers every weapon with which a murder is committed as lethal. In the same way, where a person gives a violent medicine in order to procure abortion, and death is the result, there is such a disregard of the safety of the person to whom the drug is administered, that the person by whom it has been administered shall be held guilty of murder. We have also in our law what may be termed statutory murder. Thus, by an old act, 1450, c. 30, the importers of poison, by which bodily harm may be taken, are to be punished with death; but the act has been long in desuetude. Another species of statutory murder is constituted by 1690, c. 21, which enacts, that any woman who shall conceal her being with child, during the whole time of her pregnancy, and shall not call for, or make use of, help in the birth, is to be reputed the murderer, if the child be found dead or missing. In order to avoid the effect of this statute, the mother who is charged with this offence must, in her defence, be able to prove that she discovered her pregnancy, and called for help. But by statute 49 Geo. III. c.



14, the punishment of this crime is made imprisonment not exceeding two years. A person is art and part of murder—1. By accession at the fact; as *e.g.* if he has gone out in company with others to commit the crime, though he does not do it with his own hand. 2. By accession before the fact; as by giving orders for its committal, or furnishing the immediate means of committing it. 3. By accession after the fact; as by concealing the corpse, assisting the murderer, &c. *Hume*, vol. i. p. 249, *et seq.*; *Ersk.* B. iv. tit. 4, § 40, *et seq.*; *Bank.* vol. ii. p. 669; *Swint. Abridg. h. t.*; *Tait's Justice of Peace*, voce *Homicide*; *Shaw's Digest*, pp. 150–1; *Atison's Princ.* 1; *Burnett*, 268; *Steele*, 83. See *Child-murder*; *Concealment of Pregnancy*.

**Musical Compositions.** See *Literary Property*.

**Mute.** By the old English law, a prisoner who stood mute, as it was expressed—that is, refused to answer to an accusation—was held guilty of the crime laid to his charge, and was frequently exposed to excruciating torture. *Tomlins' Dict. h. t.*

**Mutilation;** is the crime of disabling or wounding another in his members. It is punishable arbitrarily. But mutilation is usually considered as an aggravation of assault, and in that case the punishment generally awarded is transportation. *Hume*, i. 323; *Ersk.* B. iv. tit. 4, § 50, and *Note* 203, by *Mr Ivory*; *Atison's Princ.* 195; *Kames' Stat. Law Abridg. h. t.*

**Mutiny.** The Mutiny Act is an annual act, entitled, “An act to punish mutiny and desertion, and for the better payment of the army and their quarters.” This act regulates the quartering of soldiers, and declares the offences for which soldiers may be punished, and points out the mode of their trial. The Sovereign is authorized to give commissions for holding courts-martial for the trial of these military offences. And, by the 22 Geo. II. c. 33, the Lord High Admiral is, in like manner, authorized to give commission for holding courts-martial for the trial of offences committed at sea, by officers, mariners, or others in actual service. See *Court-Martial*; *Enlistment*. The offence of mutiny is open disobedience of, and resistance to, authority. Any officer or soldier who uses traitorous or disrespectful words against the sacred person of her Majesty, or the royal family; or who behaves himself with contempt or disrespect towards the general or other commander-in-chief of the forces, or speaks words tending to their hurt and dishonour; or who begins, excites, causes, or joins in, any mutiny or sedition in the troop, company, or regiment to which he belongs, or in any other troop or company in the service, or in any

party, post, detachment, or guard, on any pretence whatever; or who, being present at any mutiny or sedition, does not use his utmost endeavours to suppress the same, or, coming to the knowledge of any mutiny, or intended mutiny, does not, without delay, give information to his commanding officer; is guilty of mutiny. And any officer or soldier who strikes his superior officer, or draws, or offers to draw, or lifts up any weapon, or offers any violence against him, being in the execution of his office, on any pretence whatsoever, or disobeys any lawful command of his superior officer, is guilty of mutiny. The Mutiny Acts confer a privative jurisdiction in Scotland on the Court of Session, as to all actions, complaints, and suits against any person for anything done in pursuance of these acts, or against any member of a court-martial, in respect of any sentence of such court, or of anything done in virtue or pursuance thereof; *7 Will. IV. c. 7, § 75*. As changes are sometimes made upon the provisions of the Mutiny Act, it is always advisable to consult the subsisting act. See *Ersk.* B. i. tit. 3, § 36; *Hutch. Justice of Peace*; *Tait's Justice*, voce *Soldiers*; *Blair's Manual*, voce *Soldiers*.

**Mutual Contracts.** A mutual contract is an engagement entered into by two or more persons, by which a reciprocal obligation is raised; the one party being bound to give, or do, or abstain from doing, something, in return for something to be given, or done, or abstained from, by the other party. *Consensus in idem placitum* is not a peculiar attribute of the mutual contract; there is no contract, whether mutual or unilateral, which is binding without a *consensus in idem placitum*, expressed or implied. *Stair*, B. i. tit. 3, § 9; *Bell's Princ.* § 70. See *Contract. Obligation. Promise. Offer. Locus Pœnitentiæ. Unilateral Contract*.

**Mutual Entails.** If two persons enter into mutual obligations to execute entails in favour of each other, neither entail, when executed, is revokable without the consent of both parties; and if either party should sell his entailed lands, in consequence of the right which he still retained in them, with a fraudulent view to disappoint the succession, an action lies against him for damages. In the case of mutual and onerous entails, the prohibitions are effectual against the creditors of the entailor. *Ersk.* B. iii. tit. 5, § 24, and *Note by Mr Ivory*; *Bell's Com.* i. 47; *Sandford on Entails*, 114; *Bell's Princ.* § 1747. See *Tailzie*.

**Mutuum;** is that contract by which a loan is given of such things as are consumed in the use, or as cannot be used without their extinction or alienation,—such as corn, wine, money, or the like; and as to which, there-

fore, the obligation on the borrower is to restore as much, and of the same kind, quality, and value, as he received. For a farther explanation of this contract, and of the difference between *mutuum* and *commodate*, see

*Ersk. B. iii. tit. 1, § 18; Stair, B. i. tit. 11; More's Notes, p. lxxi.; Bank. vol. i. p. 354; Bell's Com. i. 255; Bell's Princ. § 200; Tail's Justice of Peace, voce Loan. See also Borrowing. Commodate. Loan.*

## N

**Namare**; or *Namos capere*; to take a pound or a distress. *Skene, h. t.*

**Name.** It frequently happens, that under deeds of entail, or as a condition of bequests, or for other causes, a person changes his name. In such cases, where a royal license or authority has been obtained, and inserted in the Gazette, authorising the change or the addition, a petition to the Court of Session for permission to use the additional name has been held unnecessary, not only in respect of the previous royal license, but also on the general ground that there is no need of the authority of that Court to entitle a man in Scotland to change his name. See *Kettle Young*, 14th Jan. 1835, 13 *S. & D.* 262. See, however, the *Acts of Sederunt*, 30th June 1757, 20th January 1764, 8th July 1774, 11th August 1789, and some others, for examples of petitions to the Court for authority to change the name; although in some of these instances the parties were not notaries-public.

**Name and Arms.** It is a common provision in entails, that the heir in possession shall bear the name and arms of the entailor; and if fenced by irritant and resolute clauses, this condition will be effectual. If the injunction be that the heir shall use the entailor's name and arms *exclusively*, and if the heir should succeed to another entailed estate, the entail of which contained a similar condition, it would be incumbent on him to make his election, since, consistently with such a condition, he could not take both. *Bell's Princ. § 1725. See Arms.*

**Name on Carts and Carriages.** The general Road Act, 1 and 2 Will IV. c. 43, provides, that the owner of every waggon or cart, and also of every coach, post-chaise, or other carriage, let either in the whole or in part to hire, must paint in a straight line horizontally, upon some conspicuous part, on the off or right side of his waggon or cart, and upon the panels of the doors of all such coaches, post-chaises, or other carriages, before they are used upon any turnpike-road, the Christian and surname, and place of abode, of himself, or the principal owner or partner thereof, in large, legible Roman letters, either of a dark colour upon a light ground or of a light colour on a dark ground,

not less than one inch in height, with numbers beginning with No. 1, where more of such carriages respectively than one belong to the same owner, and proceeding in regular progression. This must remain so long as the vehicle is used upon any turnpike-road. Every owner using, and every person driving, such a vehicle on a turnpike-road without this provision being attended to, is liable to a fine not exceeding forty shillings for every offence, and the vehicle pays double toll. Every person driving any such vehicle, who refuses to stop and permit the name to be read or uncovered by any person requiring him so to do, forfeits over and above, for every such offence, a sum not exceeding forty shillings.

**Narrative of Deeds.** The narrative describes the granter and the person in whose favour the deed is granted, and states the cause of granting. The effect of this clause, in all questions between strangers, is to prove against the granter the facts therein set forth, which he will not be allowed to disprove except by the oath or writing of the receiver. But our practice has introduced a different rule, where the deed is between conjunct and confident persons, and where creditors are concerned. In that case, it is not necessary for the creditors to prove want of value; but the *onus probandi* is on the granter to prove that he actually gave the value which the deed bears to have been given. *Ersk. B. ii. tit. 3, § 22; Bell's Com. ii. 191-7; Bell on Purchaser's Title, 29; Ross's Lect. i. 163, 373, 293. See Consideration. Conjunct and Confident.*

**National Debt.** The debt due by Great Britain is, in the hands of the creditors, termed stock, and may be transferred from one creditor to another. See *Stock*. Several statutes have been passed appointing measures to be taken for the reduction of the national debt. The principal act is 11 Geo. IV. c. 27, as amended by 3 and 4 Will. IV. c. 24, and 7 Will. IV. c. 17.

**Nations, Law of.** See *International Law*.

**Native**; according to Skene, born slaves or servants. *Skene, h. t.*

**Nativi**; or bondmen; were the slaves by whom, anciently, the ground was laboured. For the different ways in which men might

be reduced to this state of bondage, see *Reg. Majest.* i. 2, c. 12, §§ 4, 5, and *Quon. Attach.* c. 56. Slavery is said to have been abolished 100 years earlier in Scotland than in England; *Ersk. B. i. tit. 7, § 60.* See, however, *Colliers.*

**Natural Children.** A natural child is the child of a woman who was not married to the father at the time of conception, and who never was thereafter married to him. See *Bastard. Legitimation. Children.*

**Natural Obligations;** are those obligations which arise from the law of nature only, or from natural equity. Such is the obligation on parents, whose circumstances permit of it, to provide their children with reasonable patrimonies; or the obligation on a party who has bound himself, by an informal writing, to pay or to perform in terms of his engagement, even although, by reason of the informality, he may have contracted no binding obligation in law. The characteristic of a natural, as contrasted with a legal or civil obligation, is, that the latter may be legally enforced against the obligant, whereas the former cannot; although, where one has acted in implement of a natural obligation, he will not, generally speaking, be permitted to retract what he has done, by demanding repetition or restitution in an action. *Ersk. B. iii. tit. 1, § 4.*

**Nature, Law of.** The law of nature is that sense of justice, and that feeling of right and wrong experienced by every human being, and which has been emphatically described as a law written by the finger of God on the heart of man. *Ersk. B. i. tit. 1, § 7.*

**Naturalisation;** is a right conferred on an alien by act of Parliament, in virtue of which he acquires the privileges of a British subject. *Ersk. B. iii. tit. 10, § 10, Note by Mr Ivory; Bank. vol. i. p. 80; Bell's Princ. § 2136; Swint. Abridg. h. t.; Kames' Stat. Law Abridg. h. t.; Shaw's Digest, p. 217.* See *Alien. Denizen.*

**Nautæ, Caupones, Stabularii.** This is the title given to the well-known edict of the Roman prætor, by which shipmasters, innkeepers, and stablers were made answerable for the goods and effects of travellers which had been brought into the ship, inn, or stable. The edict is in these terms: "NAUTÆ, CAUPONES, STABULARII, QUOD CUJUSQUE SALVUM FORE RECEPERINT, NISI RESTITUENT, IN EOS JUDICIUM DABO." This rule, from its expediency, has been, with some variations, received into the law of Scotland. Persons of this description are liable for their servants, or even for the acts of guests and passengers; and the extent of the damage may be proved by the oath of the claimant, *in litem*, as it is termed, although this rule has

of late been considerably modified, both by statute and decisions. See *Innkeepers.* There is no liability for money said to be taken from the pocket of the traveller, though there is for money contained in the pockets of clothes which have been carried off, or in trunks which have been broken open or carried off. The rule extends, by Scotch practice, to vintners and all who carry goods for hire.

By 11 Geo. IV., and 1 Will. IV. c. 68, the liability of the proprietors of vehicles for carriage is placed under certain limitations. Mail-coach contractors, stage-coach proprietors, and other common carriers for hire, are not liable for certain goods (gold or silver coin, gold or silver in a manufactured or unmanufactured state, or precious stones, jewellery, watches, clocks, time-pieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland, and Ireland, or of any other bank in the kingdom; orders, notes, or securities for payment of money, English or foreign; stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured or unmanufactured state, whether wrought up with other materials or not, furs or lace), delivered for carriage, above the value of L.10, unless delivered as such, and an increased charge, or an engagement to pay an increased charge, accepted. When any such parcel is delivered, an increased rate of charge may be demanded by the coach proprietor or carrier, to be notified in legible characters in some conspicuous part of the office, warehouse, or other receiving-house; and all persons delivering such parcels are bound by this notice, without further proof of their knowledge. The carrier receiving the increased rate must, if required, sign a receipt for the parcel, acknowledging it to have been insured, which receipt is not liable for any stamp-duty; and if this receipt is not given when required, or if the notice above mentioned has not been affixed, the carrier is not entitled to the benefit of the act. The publication of notices does not limit the liability of the carrier for other goods than those mentioned above. Every office used by the carrier or coachmaster is held a receiving-house; and any one of several coach proprietors or carriers is liable to be sued, no action being abated for want of joining in the summons the name of a co-proprietor. The act does not in the least degree affect special contracts. Parties entitled to damages for loss may also recover extra charges. The carrier is liable for articles of the above description and value only when the ordinary legal evidence has been given of the value, and of the amount

of damage sustained, which can in no case exceed the declared value. Money may be paid into court by the coachmaster or proprietor with the same effect as in other actions. The act 17 and 18 Vict. c. 31 (1854), provides for the better regulation of the traffic on railways and canals. *Stair*, B. i. tit. 9, § 5; tit. 13, § 18; B. iv. tit. 44, § 4; *Ersk. B. iii. tit. 1, §§ 28-9, Notes by Mr Ivory*; *Bank. vol. i. p. 378*; *Bell's Com. i. 465-75, 559-64*; *Bell's Princ. §§ 235-45*; *Illust. ib.*; *Hutch. Just. of Peace, ii. p. 163*; *Tait's do. h. t.*; *Blair's do. h. t.*; *Tait on Evidence, pp. 283-6*. For a fuller statement of the doctrines of the law relatively to the class of persons here noticed, see the articles *Masters of Ships. Innkeepers. Carriers. Public Carriages. Lodging-house Keepers.*

**Navigation.** See *River. Sea.*

**Navigation Acts.** This term is applied to those statutes which have been passed with the view of regulating the commercial intercourse of this country and her colonies. According to Professor Bell, the objects of these acts have been the creation of a body of skilful and hardy seamen; the increase of the shipping in the possession of British subjects; and the promotion of English ship-carpentry, by confining the privileges to ships British built; *Bell's Com. i. 154*. The latest act upon this subject is 12 and 13 Vict. c. 29, 1849, which consolidates the preceding acts. See, on this subject, *Bell's Com. i. 152*; *Bell's Princ. § 1322*; *Mr Brodie's Sup. to Stair, 948, 985*; *Swint. Abridg. h. t.* See also *Ship. Registry Acts.*

**Navy.** The payment of the royal navy is provided for by certain recent acts. These acts regulate the advances made to marines, &c.; the remittance of wages by seamen; the wills of seamen; and other matters connected with the men on board royal ships. See 11 *Geo. IV.*, and 1 *Will. IV. c. 20*, and 4 and 5 *Will. IV. c. 25*. See also *Seaman. Court-Martial.*

**Navy Bills.** See *Exchequer Bills.*

**Necromancy**; or the corresponding with evil spirits, and the practising of witchcraft by their assistance; was formerly held to be a crime cognisable by law. By statute 9 *Geo. II. c. 50*, however, all prosecutions on account of witchcraft are prohibited; but pretenders to a knowledge of the occult sciences and the telling of fortunes are punishable by imprisonment for a year, and the pillory once in every three months of that year; *Ersk. B. iv. tit. 4, § 18*. See *Witchcraft. Egyptians. Pillory.*

**Negative Prescription.** See *Prescription.*

**Negative Servitude.** See *Servitude.*

**Negligence.** The negligence from which a loss arises will throw that loss on the per-

son guilty of the negligence; but different degrees of negligence are required in different situations to produce this effect. *Ersk. B. iii. tit. 1, §§ 13, 21*; B. iv. tit. 4, § 5; *Bell's Com. i. 360, 444, 453-9, 462-3, 558, 579*; *Bell's Princ. §§ 232, 525, 544, 553, 2031*; *Illust. § 234*. See *Diligence. Culpa. Damages. Mora.*

**Negotiation**; is the procedure which the holder of a bill must follow to procure acceptance of it, and payment when it falls due. The steps necessary to be taken to preserve recourse against the drawer and indorser, in case of non-acceptance or non-payment, are considered in other articles. *Ersk. B. iii. tit. 2, §§ 32-4*; *Bell's Com. i. 408-31*; *Bell's Princ. §§ 331-41*; *Illust. ib.*; *Shaw's Digest, p. 82*; *Thomson on Bills, 163, 407, 458, & seq.* See *Bill of Exchange. Acceptance. Dishonour. Protest. Noting a Bill. Indorsation.*

**Negotiorum Gestor**; is one who interferes spontaneously in the management of the affairs of another, without his knowledge and in his absence, and without any forma mandate or warrant from him for whom he acts. A *negotiorum gestor* is liable for all sums of money which come into his hands in the course of his actings; but he is entitled, on the other hand, not only to repayment of money paid by him for the principal, but to interest on the outlay. He is not entitled, however, to any remuneration for his trouble; neither is he liable for any loss the effects may suffer. The degree of diligence required from him depends upon the circumstances under which he has interfered. In a case of necessity, where immediate attention is required, the *gestor* is liable only for gross omissions; whereas cases may occur in which he engages him for whom he acts in transactions, as to which the *gestor* will be liable even for casual misfortunes. In the common case, he is liable in a middle kind of diligence. *Ersk. B. iii. tit. 3, §§ 52, 53*; *Stair, B. i. tit. 8, § 3*; *More's Notes, pp. liv. cclxiii*; *Bank. vol. i. p. 232*; iii. 66; *Bell's Com. i. 269*; *Bell's Princ. § 539*; *Illust. ib.*; *Tait's Just. of Peace, voce Recompense*. See *Diligence. Culpa.*

**Nemo Debet ex Alieno Damno Lucrari.** This is a maxim of the Roman law founded upon natural equity, and the principle of it may be said to be generally adopted in the law of Scotland. An illustration of its application occurs in the case where a person has erected a building on the property of another, in the *bona fide* belief that he was building upon his own ground. In that case, although the owner of the ground is entitled to take the building, he will be bound, under this maxim, to indemnify the person who built *bona fide*, to the extent at least of the benefit

gained at his expense. *Stair*, B. i. tit. 6, § 33; tit. 7, § 11; tit. 8, § 6; *Ersk.* B. i. tit. 7, § 33; *Bank.* vol. iii. p. 87; *Kames' Equity*, 92, 215, 317, 411, 440. See *Adjunction. Contexture.*

**Nemo Præsumitur Ludere in Extremis;** a maxim which has been sometimes applied in questions as to the construction of ludicrous or jocular bequests, and which imports, that an impossible or absurd condition adjoined to a bequest is not to be held as a proof of want of a serious intention of bequeathing. *Bell's Princ.* § 1881.

**Nemo Tenetur Edere Instrumenta Contra Se.** This rule of the Roman law, that no man is bound to produce writings against himself, is so far departed from in civil questions, that where writings in the hands of a defender are requisite to support the plea of the pursuer, the pursuer may specify what those writings are, and the defender will be bound to exhibit them; but the defender is not bound to make a production upon vague allegations. The same rule applies to the pursuer, where he has in his possession writings specially called for by the defender. In the prosecution of crimes, writings may be necessary in proof of the crime; but here the rule is rigidly adhered to, and no man is obliged to produce writings in his custody which may affect his life, estate, or good name. *Ersk.* B. iv. tit. 1, § 52, and tit. 4, § 95. See *Exhibition. Diligence.*

**Nemo Tenetur Jurare in Suam Turpitudinem.** The rule, that no one can be forced to give his own oath in evidence of his guilt, is received in all trials of crimes where the punishment may affect the life, limb, liberty, estate or reputation, of the panel; but, in slight offences which are punishable only by a small fine or short imprisonment, the rule does not hold, and the offence may be referred to the oath of the accused, if no other means of proof is to be obtained. *Ersk.* B. iv. tit. 4, §§ 94, 95. See *Evidence.*

**Neutrals.** During a war between two countries, the ships of neutral states are entitled to trade with both parties, unless when the port to which they are carrying the goods is under blockade. Neutrals are not entitled to carry contraband of war to either of the belligerents, and they are subject to be searched. *Stair*, B. ii. tit. 2, § 7; *Bell's Com.* i. 304; *Bell's Princ.* § 43. See *Reprisals. Capture. Blockade.*

**New Trial.** In jury causes, the time allowed to move for a new trial is twenty days after the trial, if there should be that period of the session to run, and if not, six days after the commencement of the next session. In the case of causes tried during the Christmas recess, and where twenty days have not

elapsed after the date of the verdict, the application may be made at any time within twenty days after the said date; *A. S. 29th Nov. 1825*, § 35. It is competent to move for a third, or any number of trials, and the same rules apply to each motion. The first step in the application is, to move the Court for a rule on the opposite party to show cause why a new trial should not be granted. Notice must be given to the opposite agent, and a copy lodged with the clerk. When the motion is founded on averments to be supported by affidavits, they ought to be duly lodged and intimated to the opposite party before the motion is heard. If the party moving succeed in making out a *prima facie* case, the Court grants a rule ordaining the opposite party to be ready to show cause why a new trial should not be granted; but if he fail in making out a *prima facie* case, the rule is *de plano* refused. After the rule has been granted, and previous to hearing counsel against and for the granting a new trial, a report in writing of what passed at the trial must be delivered to the Division of the Court in which the application for the new trial is to be heard, signed by the judge who presided at the trial; *A. S. 29th Nov. 1825*, § 55. The case is then again put out in the roll, and the counsel for both parties is heard. Every point in the case is open for discussion, so far as relevant to the grounds on which the motion has been rested. If a new trial should not be applied for, or if it should be refused, the verdict of the jury is final and conclusive as to the facts found, and is not liable to be questioned by an appeal to the House of Lords, except in the circumstances mentioned in the articles *Appeal*, and *Exceptions, Bill of*; *55 Geo. III. c. 42*, § 8; *59 Geo. III. c. 35*, § 16. The grounds on which a new trial may be moved for are: the verdict being contrary to evidence; misdirection on the part of the judge; undue admission or rejection of evidence; excess of damages; *res noviter veniens ad notitiam*; or such other cause as is essential to the justice of the case; *55 Geo. III. c. 42*, § 6. This last ground has been found to include cases where it appears doubtful whether justice has been done; where the evidence appears insufficient to support the verdict; where the damages are small and insufficient; where the verdict does not answer the issues; or proceeds on a manifest error, inconsistent with the justice of the case; where the unsuccessful party has been taken by surprise; where there are objections to the jurymen; and where there has been fabrication of evidence, and falsehood and fraud in the procedure. See a full statement of the law on this subject in *Macfarlane's Jury Prac.* 253, *et seq.* See also,

*Shaw's Digest*, 972. See *Jury Trial. Exceptions, Bill of Appeal.*

**Newspapers.** When a creditor with an heritable security is vested with a power of sale, under condition of advertising in a newspaper, publication in a paper containing nothing but advertisements is held sufficient compliance with the condition; *Dickson*, Jan. 15, 1831, 9 S. & D. 282. The good-will of a newspaper is held to be property transmissible *inter vivos*, or to heirs; and if, on the dissolution of a partnership carrying on a newspaper, by death of one of the partners, the surviving partners who may be desirous to continue the publication refuse to buy it, then, like the other rights of the deceased in the dissolved company, it must be sold for behoof of his representatives; *McCormick*, July 4, 1822, 1 S. & D. 541.

**Nexi**; among the Romans, were free-born persons who had been reduced to a state of slavery for debt.

**Next of Kin.** See *Executors.*

**Night Poaching.** By 57 Geo. III. c. 90, any one poaching at night, armed with a gun or other offensive weapon, or knowingly accompanying one so armed, is punishable with transportation for seven years. It is sufficient that the panel is seen on the ground, though he is only apprehended coming out of it. Gamekeepers may apprehend offenders, though not armed. By 9 Geo. IV. c. 69, amended by 7 and 8 Vict. c. 29, 1844, when three or more are found together in the ground, and any of them is armed, they are punishable with transportation for fourteen years. Night commences with the second hour after sunset, and ceases at the beginning of the last hour before sunrise; *Alison's Princ.* 548; *Steele*, 171. See *Game Laws.*

**Nisi Prius**; an English law judicial writ. The record of every cause in the law courts at Westminster adjourns the trial to a future day at Westminster; *nisi prius* (according to the old Latin form) *justiciarii domini Regis ad assisas capiendas venerint*; i. e., unless the judges previously come to the place named to hold the assizes, which they are sure to do. In London and Middlesex, courts of *nisi prius* are holden in and after every term, called sittings, before the chief or other judge of the several superior courts, to try causes by jury; and the causes tried at these sittings and on the circuits in England are called *Nisi Prius cases.* *Tomlins, h. t.*

**Nobile Officium.** The *nobile officium* of the Court of Session does not admit of a precise definition. Generally speaking, it may be said to be the equitable power vested in that Court, whereby it interposes to modify or abate the rigour of the law, and, to a certain extent, to give aid where no remedy could be

had in a court confined to strict law; *Stair*, B. iv. tit. 3, § 1; *More's Notes*, p. cccxxiv.; *Ersk. B. i. tit. 3, § 22*; *Bank. vol. ii. p. 517*. See this subject more fully treated under the article *Equity.* See also *Judicial Factor.*

**Nobility.** Under this title are comprehended all degrees of dignity above a knight baronet. Those degrees are duke, marquis, earl, viscount, and baron. But although the scale of dignity is thus graduated, the holders of those dignities are equal in all public acts, and are hence denominated peers of the realm. See *Dignities. Peerage.*

**Nobleman.** See *Peer.*

**Nolle Prosequi**; in English law, is where a plaintiff in an action does not declare, in a reasonable time; in which case it is usual for the defendant's attorney to enter a rule for the plaintiff to declare, after which a *non prosequitur* may be entered. *Tomlins, h. t.*

**Nomen Debiti**; the right to payment of a debt. *Legatum nominis*, is a legacy of a right to a debt due to the testator. *Ersk. B. iii. tit. 9, § 4.*

**Nominate and Innominate.** A nominate right is a right possessing a *nomen juris*, the use of which defines its boundaries, and settles the consequences to all concerned. Those rights generally receive a *nomen juris* which are frequently the subjects of contract and of legal discussion; while other rights of infrequent occurrence remain innominate, and must be determined by the application of the law to the circumstances in the particular case. The nominate and innominate contracts illustrate the doctrine. Where two parties enter into a bargain, recognised as a nominate contract, such as sale, the legal rules which regulate its operation are at once understood, and the reciprocal rights of the parties are implied in the mere name of the contract. The law thus supercedes the necessity of special stipulations, and creates an obligation in the one party to perform, and a right in the other to demand, whatever is necessary to the explication of that contract. In the case of the innominate contracts, again, the law supplies nothing beyond the express agreement of the parties; and there are no obligations or rights created, except such as have been matter of special covenant between the parties. In the Roman law, there were twelve nominate contracts; and for each of these there was a particular action, such as the *actio mutui*, the *actiones commodati directa et contraria*, the *actiones empti et venditi*, &c. When it was necessary to bring an action for implement of an innominate contract, the action was *in factum*, or *præscriptis verbis*. In the Roman law, innominate contracts could only be constituted *ex re*—that is, by the delivery of the subject of the contract:

in the law of Scotland, generally speaking, writing is required. In courts of justice, the *nominate* are more favourably viewed than the *innominate* contracts; and hence, an irregularity which, in the case of an innominate contract, would release the parties, will not have the same effect where the contract is nominate. The same distinction holds between nominate and innominate servitudes. And although Erskine says that there may be as great a variety of conventional servitudes as there can be ways in which one man's property may be burdened or restricted in favour of another (*Ersk. B. ii. tit. 9, § 2*), yet it would rather appear to have been the rule of our older law, as laid down by Professor Bell, that only well-established and defined servitudes can be constituted as real burdens effectual against singular successors; *Bell's Princ. § 979*. Thus, in *Jaffray*, Feb. 18, 1755, *M. 14,517*, it was held in the House of Lords, that bleaching is not a servitude acknowledged in the law of Scotland. In a later case, however, the servitude of bleaching and drying linen was held to have been acquired—*Sinclair*, Feb. 10, 1779, *M. 14,519*, House of Lords, March 8, 1779. And a servitude of golfing has likewise been admitted; *Dempster*, May 17, 1805, *M. 1614*, 2 *Dow*, 40; *Magistrates of Queensferry v. Malcolm*, June 12, 1829, 7 *S. 755*. But although these cases recognise the admissibility of innominate servitudes, yet the law regards them with more distrust, and requires much stronger evidence of their constitution and nature than it does in the case of servitudes possessing a recognised *nomen juris*. *Heinec. Elem. Juris. § 779*.

**Nominate Tutor.** See *Tutor*.

**Nomination.** In Scotland, this word is used to signify an appointment to an office. In England, it is applied to the appointment of a clergyman; in which sense it is synonymous with the Scotch term *presentation*. As to the nomination of candidates for a seat in Parliament, see *Reform Act*.

**Non Compos Mentis;** of unsound mind. *Ersk. B. i. tit. 7, § 48*; *Bell's Com. ii. 568*. See *Idiot*, *Furious Person*, *Brieve*, *Curatorty*, *Insanity*, *Imbecility*.

**Non Creditur Referenti, Nisi Constet de Relato;** a maxim used by Erskine, as implying that reference made in one writing to another is no proof of the existence of that other. Thus, an instrument of sasine does not prove the existence of the charter to which it refers. *Ersk. B. iv. tit. 2, § 5*.

**Non Memini.** When a party to whose oath a debt or payment is referred swears *non memini*, it has generally the effect of absolving him; but if the fact is so recent that the swearer cannot be believed ignorant of

it, he is held as confessed in the same manner as if he had refused to depone. *Non memini* is not equivalent to a denial of the fact, and does not shut out the person making the reference from establishing it by other proofs originally competent. *Ersk. B. iv. tit. 2, § 14*; *Tait on Evidence*, 240.

**Non Numeratæ Pecuniæ.** In the Roman law, an obligation might be raised *ex literis*, by granting an acknowledgment of having received a sum of money, although no such money had been actually paid. During two years, however, the debtor was entitled to plead the exception *non numeratæ pecuniæ*—*i.e.*, to plead that the money had not been received; and in that case the *onus* lay upon the holder of the bond to prove, by evidence external to the bond, that the money had been paid. But if two years were allowed to elapse, the debt was held constituted by the writing alone, and no proof of the non-existence of the debt could be received. It was formerly believed that this rule of the Roman law had force in Scotland, and hence it was customary to insert a clause in old Scotch bonds, binding the debtor not to avail himself of the exception *non numeratæ pecuniæ*. But no such law exists in Scotland. *Heinec. Elem. Juris. § 888*; *Stair, B. i. tit. 10, § 11*; *Ersk. B. ii. tit. 2, § 5*; *Ross's Lect. i. 53*.

**Non Officiendi Luminibus.** See *Light*.

**Non Valens Agere.** See *Contra non valentem, &c. Prescription. Interruption*.

**Nonage;** in English law, signifies, in general, all the time that a person continues under the age of twenty-one; but, in a special sense, it corresponds to the Scotch term *pupillage*, and denotes all the time that a person is under the age of fourteen. *Tomlins, h. t.* See *Minor*.

**Non-Adherence.** See *Adherence*.

**Nonconformists;** those who do not conform to the established religion. There were formerly severe statutory regulations against nonconformity; but these have all been repealed. See *Nonjurors, and authorities there cited*.

**Non-Entres;** is where a vassal, vest and seised in the fee and property of the lands, deceases, leaving behind an heir, who, being of lawful age, may enter to the lands by taking of sasine thereof, and yet enters not; in which case the lands are in the hands and power of the immediate superior, by reason of non-entresse. *Skene, h. t.* See *next article*.

**Non-Entry;** is the casualty which falls to the superior where the heir of a deceased vassal neglects to obtain himself entered with the superior; or, as it is otherwise expressed, who fails to renew the investiture. In virtue of this casualty, the superior is entitled to the rents of the feu; but in order to favour

the vassal, those rents, previous to the period of the superior's raising an action of non-entry, are held to be no more than the retoured duties of the lands; or, where there is no retour, than the valued rent of the lands. But after an action of declarator of non-entry has been raised, then, from the date of citation, the superior is entitled to the full rent. In this action the superior, in the ordinary case, must produce his sasine; the apparent heir (*i. e.*, the unentered heir) is made a party, but the action contains no personal conclusion for payment against him. The superior claims the retoured duties, because it is only after citation that the full rent is due; and there must be a conclusion for pointing the ground, in order to render the claim effectual, as no personal decree is pronounced against the heir. In virtue of the decree in this action, the superior may recover the duties due before citation (which are *debita fundi*) by a pointing of the ground; but the full rents which became due after citation belong to the superior, as interim proprietor, and are therefore to be recovered, not by a pointing of the ground, but by an action against the tenants for payment of their rents. Where the vassal dies after having disposed, and where the purchaser has not entered with the superior, the superior's usual remedy is an action of reduction-improbation against the purchaser, with a declarator of non-entry; and although it does not appear to be indispensable in such an action to call the heir of the deceased vassal, yet, if the heir choose in such circumstances to enter, to the effect of becoming the mid-superior of the purchaser, the superior must receive him; *Magistrates of Dundee*, 26th June 1829, 7 *S. & D.*, 801; *Piggot*, 9th Dec. 1829, 8 *S. & D.*, 213. Non-entry is excluded wherever the fee is held by a corporation, for then the fee is always full. A corporation never dies. The fee is considered as full, and therefore an action of non-entry is excluded, so long as the vassal lives, although he may have made over the feu to another. In the same way, where lands are conveyed to a husband and wife in conjunct fee and liferent, and the infestment following on the right has been confirmed by the superior, the fee is held to be full so long as either the husband or the wife remains alive. An infestment on a public right to be held of the vassal's superior, when confirmed by the superior, renders the fee full; and, lastly, non-entry is excluded by the husband's courtesy as to the whole of the lands; and to the extent of one-third by the widow's terce. Non-entry duties cannot be claimed by a superior when the entry is delayed through his own fault; and therefore, from the date of a charge at the instance of

an heir, who, at the same time, offers the relief and non-entry duties, non-entry is excluded. It is excluded, also, by a charge at the instance of an adjudger of the vassal's property, who offers a year's rent; further, a superior forfeits the non-entry duties during his life, where he is unentered, and refuses to complete his title. *Ersk. B. ii. tit. 5, §§ 29, 46; Stair, B. ii. tit. 4, § 18, et seq.; B. iii. tit. 2, § 12; B. iv. tit. 8; More's Notes, pp. ccvii., cccclxxvii.; Bank. vol. i. p. 622, et seq.; Bell's Com. i. 23; Bell's Princ. §§ 704-15; Illust. ib.; Kames' Stat. Law Abridg. h. t.; Bell on Purchaser's Title, 42. See Composition. Entry of an Heir.*

**Nonjurors**; were those who, from attachment to the Stuart family, refused to take the oaths to the Government as established at the Revolution of 1688. The objection to take the oaths rested on the obligation under which the nonjuror supposed himself to lie to the King *de jure*, as he was called. In order to exclude from all public employments those who professed opinions unfavourable to the rights of the reigning family, certain oaths were required to be taken by all who held public offices; and as those of the Scottish Episcopal Church were remarkable for their adherence to the exiled royal family, preachers in Episcopal meeting-houses were required to take the oaths, and pray for the King by name—5 *Geo. I. c. 28*; and where these were neglected, their hearers were punished; 19 *Geo. II. c. 39*, and 21 *Geo. II. c. 34*. These statutes are still unrepealed, although the political necessity which required them no longer exists. See *Hutch. Just. ii. 318; Tail's Just. voce Nonconformist; Blair's Just. cod. tit.; Swint. Abridg. cod. tit. See Episcopalian.*

**Non-Obstante**; a clause formerly frequent in statutes and letters-patent, importing a license from the King to do a thing which at common law might be lawfully done, but which, being restrained by statute, cannot be done without such license. A *non-obstante* is now against law. *Tomlins, h. t.*

**Non-Suit**; in English law, the dropping or renunciation of a suit or action by the plaintiff. This most commonly happens upon the discovery of some error in the plaintiff's proceedings, when the cause is so far proceeded in that the jury are ready to deliver in their verdict. *Tomlins' Dict. h. t.*

**Not Guilty and Not Proven**. *Not guilty*, is the general issue or plea of the accused, or panel, in any criminal action. A verdict of *not guilty* imports the jury's opinion that the panel is innocent. A verdict of *not proven* only indicates that, in the opinion of the jury, there is a deficiency in the evidence to convict him. *Alison's Prac. 363; Steele, 211. See Verdict. Plea of Panel.*



**Notarial Instrument.** See *Notary. Evidence.*

**Notary-Public.** A notary-public has been defined to be a public officer, who, upon examination and trial, being admitted by the Lords of Session, gets power to take instruments in any honest and lawful business, which instruments make faith in law. The candidate for the office must be of good fame, and possessed of a reasonable knowledge of law, and particularly of the law relating to the duties which, in the exercise of his office, he may be called upon to discharge. Where one desires to be admitted a notary, the present form is for the candidate to apply to the clerk to the admission of notaries, who holds his office under the Crown, and by whom a petition for the candidate is presented to the Court of Session, setting forth that the intrant has been engaged in studying the laws, forms, and practice of Scotland; and that, being now desirous to exercise the office of a notary-public, he prays to be examined as to his qualifications, and, if found qualified, to be admitted; and also, that the Court may grant warrant to the clerk to the admission of notaries, to mark his protocol book, receive his caution, &c. An attestation by an advocate and by a writer to the signet, setting forth their knowledge of the petitioner, and of his good fame and qualifications, must be subjoined to the petition; and, on its being moved, the Court remits to the examiners of notaries, who are certain members of the Society of Writers to the Signet, annually elected by the society for that purpose. If the report of the examiners be favourable, the Court admits the petitioner to be a notary-public, and remits to the Lord Ordinary in the Outer-House to administer to the intrant the oaths of allegiance, abjuration, and *de fidei*; and grants warrant to the clerk to the admission of notaries to mark his protocol-book. A notary being admitted to his office by royal authority, that authority is interposed in the form of a letter which passes the cachet, addressed to the Court of Session, declaring the King's intention to admit the intrant as a notary, provided the Court of Session find him qualified. This warrant, which is obtained as a matter of course, is recited in the act of admission of the notary, which is inserted in the register kept by the clerk to the admission of notaries, in which register, also, the sign, motto, and subscription of the notary are inserted for preservation. The clerk to the admission of notaries then gives the intrant his commission, which recites the procedure above mentioned—the fact that the notary has taken the requisite oaths—that he has found caution for the faithful performance of his office—that he has

received a protocol-book, and that he is to use the sign and subscription manual in the form annexed to his commission. This commission bears to be extracted from the records of the admission of notaries, and is signed by the clerk to the admission, and is the authority in virtue of which the notary exercises his duty as a notary. Some law writers have bestowed considerable historical research on the subject of notaries-public. Without citing special authorities on a matter really of no practical importance, the following points may be stated as ascertained:—1. That the office of a notary was known in ancient Rome. 2. That, after the establishment of Christianity, notaries were appointed by the Pope originally for the purpose of preserving the records of the Church, but afterwards for purposes almost entirely secular. 3. That the authority of apostolical notaries was recognised all over Christendom. 4. That after a conflict, the progress of which it is of no consequence to trace, apostolical and all ecclesiastical notaries were abolished in Scotland at the Reformation, and the appointment of notaries vested in the Sovereign, under regulations which, with certain modifications, remain in force at the present day. The statutes of the Scotch Parliaments connected with this subject are, 1469, c. 31; 1503, c. 64; 1540, c. 76; 1540, c. 78; 1551, c. 24; 1555, c. 43; 1563, c. 78 and 79; 1587, c. 45; 1617, c. 22; *A. S. 30th July 1691*. The protocols mentioned in several of those statutes are still given out to the notaries; but, in practice, they are never called back by the clerk; and it is believed that very few notaries make any use of them. A deed subscribed by notaries, without the mandate of the person by whom it bears to be executed, is held to be forged; the same is the case if a man personates another who cannot write, and thus obtains a false notarial subscription, by imposing on the notaries; *Hume*, i. 143; *Alison's Princ.* 381. The duties of notaries in preparing instruments of sasine—in executing deeds—in attesting copies of writings, and the like, and the evidence afforded by those notarial documents respectively, are necessarily treated of under different articles in this Dictionary. See, in particular, *Doquet. Evidence. Instruments. Testament. Sasine. Writ.* See also, on the subject of this article, *Ross's Lect.* vol. ii. p. 201, and *The Office of a Notary*, passim; *Mackenzie's Observations on the Statutes*, pp. 68, 122, 153, 167, 240, 356; *Stair*, B. ii. tit. 3, § 17; B. iii. tit. 8, § 34; B. iv. tit. 42, § 9; *Ersk.* B. iii. tit. 2, §§ 9, 23; B. iv. tit. 2, § 5; *Bank.* vol. ii. p. 500; *Bell's Com.* i. 460, 675, 323, 366; ii. 17; *Bell's Princ.* §§ 19, 298, 338, 770–1; *Illust.* §§ 298, 338; *Kames' Stat. Law*

*Abridg. voce Public Officer; Bell on Purchaser's Title, 217, et seq.; Thomson on Bills, 45, 554, 442; Kames' Equity, 202.*

**Note of Pleas in Law.** See *Pleas in Law.*

**Note, Promissory.** See *Promissory-Note and Bank Notes.*

**Notes.** In the judicial proceedings of the Court of Session, the most important *Notes* are *Reclaiming notes*, and *Notes of pleas in law*; as to which, see *Record; Pleas in Law; Reclaiming Note.* Notes of advocacy and suspension are now brought in virtue of 1 and 2 Vict. c. 86, 1838. But the term *note* is also applied to various incidental applications, the occasions for which it would be difficult to enumerate. In the Inner-House, such incidental notes are usually presented where a prorogation of the term for lodging a paper ordered by the Court is required; where it is necessary to have a remit of a depending cause to a new Lord Ordinary; where circumstances render it necessary to pray the Court to retard or expedite the decision in a particular cause, or the like. These notes are usually in MS., and are addressed to the Lord President of the Division of the Court in which the cause depends. They pray his Lordship to *move the Court* to the effect required; and they must be regularly intimated to the opposite party, by leaving copies at the office or place of business of his agent; *A. S. 9th July 1806.* In effect, these notes are mere *memoranda*, or notices of motion. In the Bill-Chamber, similar notes are presented when the parties wish to be heard by counsel before a bill of suspension and answers is disposed of, or when either party wishes time to reclaim against a Bill-Chamber interlocutor; and here also intimation is necessary to the agent of the opposite party. In the Outer-House, occasionally, although rarely, an application is made to the Lord Ordinary by a note, where, in peculiar circumstances, the requisite motion cannot be otherwise made. See *Motions. Old Witnesses. Bill-Chamber.*

**Noting a Bill.** When the debtor in a bill or note refuses acceptance or fails to make payment, the notary presenting the bill makes a minute at the time, on the bill or note, consisting usually of his initials and of the date. This is called *noting*, and is in effect a mere memorandum by the notary, to assist his memory in extending his protest. Hence noting, as distinguished from the protest, has been said to be "unknown to the law;" although it seems to be now settled, that it is a kind of initial protest, which will be effectual if a formal instrument of protest be afterwards extended. But in the event of the death of the notary before such protest is extended, or in his absence, it would

appear that, on the faith of the notary, the protest cannot be lawfully extended by another notary. No action of recourse can be maintained against the drawer or indorsers unless the instrument of protest be regularly extended; and in Scotland there can be no summary diligence on bills or notes, either against the acceptors, drawers, or indorsers, unless the extended protest is registered within six months from the date of the bill, in the case of non-acceptance, or from the term of payment, in case of non-payment. In practice, the bill, when dishonoured, is noted, and usually allowed to lie over for a day or two, so as to admit of a settlement; but if ulterior proceedings for the recovery of the debt become necessary, the protest must be extended; and in order to preserve recourse against the drawer and indorsers, the bill must be noted on the third day of grace, or, if that be a Sunday or a holiday, on the day preceding; *Smith v. Payne*, 29th June, 1786, *Mor.* 1612; 7 and 8 *Geo. IV. c.* 15. But as against the acceptor of the bill or note, it may be protested at any time within the six months; and hence, where, for example, a bill has been discounted at a bank, and dishonoured and noted by the notary of the bank, and thereupon retired from the bank by the drawer or indorser, it is perfectly competent for him, after the days of grace, and within the six months, to protest the bill, as against the acceptor, by means of another notary, and to record that protest, and expedite summary diligence. In such a case, although it is usual, it is not indispensable, that the notary who noted the bill at the bank should take or extend the protest against the acceptor. *Thomson on Bills, 446, et seq., 2d edit.; Glen on Bills, 194. See Bill of Exchange. Protest.*

**Notice of Dishonour.** See *Bill of Exchange. Negotiation. Protesting a Bill. Acceptance for Honour.*

**Notoriety.** According to Stair, proof by notoriety is when the judge knows that the point to be proved is commonly known or acknowledged to be true, whether it be known to a whole country, or to a whole vicinity. Such proof is not elided by showing that some particular persons are ignorant of the fact; but it may be redargued by stronger positive proof, when proponed in due time. Allegations for husbands, wives, parents or children, are received without proof of their character as such; unless pregnant proof to the contrary be offered, and instantly verified. But such proof to the contrary is competent in an action of reduction. In services of heirs, or of widows to their terece, the fact of relationship being "commonly holden and reputed" in the vicinity is sufficient, without

proving the marriage of the father and mother, or of the husband and wife. But proof that such persons could not have been lawfully married, if instantly verified, would stop or annul the service, or would be competent in a reduction. What is done in presence of the judge in judgment is accounted notorious; but this rule does not hold *ex intervallo*, since a judge deciding upon his individual recollection would be acting the part of a witness. Stair and Erskine consider the judge's knowledge of the notoriety admissible proof of the fact; but Glassford entertains a contrary opinion; *Glassford*, 602. See also *Stair*, B. iv. tit. 45, § 4; *Ersk.* B. iv. tit. 2, § 33; *Tait on Evidence*, 432. And as to the notoriety of dissolution of partnership, and of subscription by a company firm, see *Thomson on Bills*, 247, 554. See also *Habit and Repute*.

**Notour Bankrupt.** See *Bankrupt*.

**Nova Dissasina;** recent spulzie or ejection.

*Skene, h. t.*

**Nova Debita.** Debts newly or recently contracted, in contradistinction to old or prior debts. In questions as to fraudulent preferences given within sixty days of bankruptcy, security or payment granted as a consideration for a debt presently contracted is not reducible as fraudulent. *Bell's Com.* ii. 202, 220; *Thomson on Bills*, 686, 704. See *Bankrupt*.

**Novalia;** is a term applied to lands newly improved or cultivated, and in particular to those lands which, having lain waste from time immemorial, had been brought into cultivation by the monks. There are certain lands exempted from the payment of stipend, and this exemption has been ascribed to their formerly having been *novalia*, from which no teinds had ever been drawn. It has, upon a similar principle, been held that lands gained from the sea by embankments, or by the draining of a loch, are not liable to pay teinds to the titular or patron of the parish; though Mr More presumes that such lands would be liable for a proportion of stipend, if all the other teinds of the parish should be exhausted. By the canon law, the prescription of tithes did not extend to those of *novalia*, or newly improved lands. *Ersk.* B. ii. tit. 10, § 14; *More's Notes on Stair*, cccxxix.; *Bank*, B. ii. tit. 8, § 146; *Connell on Tithes*, 333, *et seq.* See *Teinds. Decimæ Inclusæ. Labores*.

**Novation.** See *Innovation*.

**Novels.** An institute of the Roman law was compiled under the direction of Justinian; and the subsequent constitutions of that emperor, and of a few of his successors, were called the *Novels*. See *Roman Law*.

**Novodamus.** A charter of *novodamus* is the name given to a charter by progress which contains a clause of *novodamus*. This clause is subjoined to the dispositive clause; and by

it the superior, whether the Crown or a subject, grants *de novo* the subjects, rights, or privileges therein described. Such a clause is usually inserted where the vassal is sensible of some defect or flaw in the former right, or where he desires, in this manner, to get free of burdens chargeable upon the subject for casualties due to the superior; for a charter of *novodamus* is accounted in law an original right, which imports a discharge of all prior burdens. It is not necessary that the subjects or rights conveyed by the clause of *novodamus* (as might be inferred from the term) should have been formerly invested in the vassal; for such a charter may be itself a *first* grant, as well as a *renovation* of a former grant; and every subject conveyed by it is held to be effectually conveyed to the vassal, although he may have had no antecedent title thereto in his person. But, on the other hand, a subject which has been formerly granted by the superior to the vassal, and which subject remains *in hæreditate jacente* of the vassal's heir, cannot be conveyed by the superior to any other vassal, by a charter of *novodamus* or otherwise, to the prejudice of the heir's right; although, no doubt, such a grant, even although *ultra vires* of the superior, might be the foundation of a prescriptive title. Where the lands hold of the Crown, a signature containing a clause of *novodamus* will not be passed in Exchequer, unless a complete search of encumbrances for forty years be shown, so that it may appear that the Crown has no unsatisfied claims or pretensions to the lands; and the signature, besides, must have the royal superscription. See *Ersk.* B. ii. tit. 3, § 23; *Jurid. Styles*; *Stair*, B. ii. tit. 3, § 15; *More's Notes*, p. clviii.; *Bank*. vol. i. p. 546; *Bell's Illust.* § 800. See also *Charter*.

**Nudum Pactum.** See *Pactum Nudum*.

**Nuisance;** anything noxious or offensive, or which makes life uncomfortable. In England, nuisances are of two kinds—public and private. The former of these is punishable by fine, and the removal of the offensive object; while private nuisances are remedied by a civil action at the instance of the person aggrieved. Public nuisances are such as affect the public generally; they are offences against the order and economy of the State. Among these may be enumerated annoyances in highways, bridges, and public rivers, disorderly inns, gaming-houses, lotteries; and, in general, everything detrimental to the public, which, if injurious to an individual, would be actionable. In Scotland, there is no such recognised distinction between public and private nuisances. Whatever obstructs passage along the public ways; whatever is intolerably offensive to individuals in their

dwelling-houses, by stench, noise, or indecency, is a nuisance. But the absolute right which a man has to use his property as he thinks fit will not be limited merely because he causes inconvenience to his neighbours; there must be positive discomfort or danger. Circumstances have always great weight in determining whether an operation is a nuisance or not. It makes a great difference when works are established in a populous neighbourhood, or in a place thinly or not at all inhabited; in a part of the town where similar works already exist; or in a situation where less cause of offence is required to make life uncomfortable. One coming to a nuisance cannot complain of it. In the ordinary case, redress is obtained by presenting a note of suspension and interdict to the Lord Ordinary on the Bills, or by means of an ordinary action to have the nuisance removed or put down, if necessary, concluding for the damages which the pursuer has thereby sustained. *Ersk. B. ii. tit. 2, § 2, Note 2 by Mr Ivory; Bell's Princ. §§ 973-8; Illust. ib.; Hutch. Justice of Peace, ii. pp. 6, 94; Jurid. Styles, 2d edit. vol. iii. p. 93; Kames' Equity, 32; Tomlins' Dict. h. t. See Damage.*

The Nuisance Removal Act is the 19 and 20 Vict. c. 103, 1856, which repeals the previous acts on the subject.

**Nulla Sasina, Nulla Terra**; a maxim importing that the proper test or evidence of property in land is sasine, or infestment therein. *Ersk. B. ii. tit. 1, § 11.*

**Nuncupative Testament, or Nuncupative Legacies.** A nuncupative or verbal nomination of an executor is ineffectual; but a nuncupative legacy is good to the extent of L.100 Scots (L.8, 6s. 8d. sterling). If it exceed that sum, it will be effectual to that extent if the legatees choose so to restrict it, but ineffectual as to the surplus. *Ersk. B. iii. tit. 9, § 7; Stair, B. iii. tit. 8, § 34; More's Notes, p. cccxxxviii; Bank. vol. ii. p. 378; Bell's Princ. § 1868; Treatise on Evidence, p. 305; Kames' Equity, 203. See Legacy. Evidence. Testament.*

**Nunquam Concluditur in Falso**; a maxim importing that, in actions of reduction-improbation on the head of falsehood or forgery, any relevant defence may be pleaded, or any additional proof brought forward, however late in the proceedings, provided decree has not been extracted. The application of this maxim has been very much limited in civil proceedings by the introduction of the new forms of process. *Ersk. B. iv. tit. 4, § 85; Bank. vol. i. p. 639.*

**Nunquam Præscribitur in Falso.** This maxim is applied to actions of reduction on the head of falsehood or forgery, the right to pursue which is not lost even by the lapse of the negative prescription of forty years; since this omission on the part of the person entitled to complain can never confer a right on one whose title is founded on a forgery. *Ersk. B. iii. tit. 7, § 12.*

## O

**Oath**; an affirmation, or denial, or promise, attested by the name of God. The judicial oath taken by a witness is in these terms: "I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth, and nothing but the truth, in so far as I know, or as the same shall be asked at me." This is the formula used by a witness when he is put upon his oath; he stands, and, with his right hand held up, repeats those words after the judge, or commissioner empowered to administer the oath. Quakers, and certain other sectarians, on account of their religious scruples, are permitted to *affirm*, without making oath. See *Affirmation*. With regard to evidence on oath, see *Evidence*.

Certain oaths are required to be taken under certain circumstances to Government.

**TEST.**—The test, as it is called, is in these terms:—"I, A. B., do solemnly and sincerely, in the presence of God, profess, testify, and declare, that I do believe in the sacrament of

the Lord's Supper, and that there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ, at or after the consecration thereof by any person whatsoever; and that the invocation or adoration of the Virgin Mary, or any other saint, and the sacrifice of the mass, as they are now used in the Church of Rome, are superstitious and idolatrous. And I do solemnly, in the presence of God, profess, testify, and declare, that I do make this declaration, and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by English Protestants, without any evasion, equivocation, or mental reservation whatsoever, and without any dispensation already granted me for this purpose by the Pope, or any other authority or person, or without any hope of any such dispensation from any person or authority whatsoever, or without thinking that I am or can be acquitted before God or man, or absolved of this declaration, or

any part thereof, although the Pope, or any other person or persons, or power whatsoever, should dispense with or annul the same, or declare that it was null and void from the beginning."

**FORMULA.**—The formula is prescribed by the act 1700, c. 3, and is in these words:—"I do sincerely, from my heart, profess and declare before God, who searcheth the heart, that I do deny, disown, and abhor those tenets and doctrines of the Papal Romish Church—*viz.*, the supremacy of the Pope and Bishop of Rome over all pastors of the Catholic Church; his power and authority over kings, princes, and states, and the infallibility that he pretends to, either with or without a general council; his power of dispensing and pardoning; the doctrine of transubstantiation, and the corporal presence, with the communion without the cup in the sacrament of the Lord's Supper; the adoration and sacrifice professed and practised by the Popish Church in the mass; the invocation of angels and saints; the worshipping of images, crosses, and relics; the doctrine of supererogation, indulgences, and purgatory, and the service and worship in an unknown tongue;—all which tenets and doctrines of the said Church I believe to be contrary to, and inconsistent with, the written Word of God. And I do, from my heart, deny, disown, and disclaim the said doctrine and tenets of the Church of Rome, as in the presence of God, without any equivocation or mental reservation, but according to the known and plain meaning of the words, as to me offered and proposed. So help me God."

**SUPREMACY.**—The oath of supremacy is as follows:—"I, A. B., do swear, that I do from my heart abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position, that princes excommunicated or deprived by the Pope, or any other authority of the see of Rome, may be deposed or murdered by their subjects or any other whatsoever. And I do declare, that no foreign prince, prelate, state or potentate, hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm. So help me God."

The oath of allegiance and the assurance, according to the form prescribed by the stat. 1693, c. 6, are in these terms. See also 1 Geo. I. c. 13.

**OATH OF ALLEGIANCE.**—"I do sincerely promise and swear, that I will be faithful and bear true allegiance to her Majesty Queen Victoria. So help me God."

**THE ASSURANCE.**—"I do, in the sincerity of my heart, assert, acknowledge, and declare, that her Majesty Queen Victoria is the only

lawful, undoubted Sovereign of this realm, as well *de jure*, that is of right Queen, as *de facto*, that is in the possession and exercise of the government. And therefore I do sincerely and faithfully promise and engage, that I will, with heart and hand, life and goods, maintain and defend her Majesty's title and government against the late King James and his adherents, and all other enemies, who, either by open or secret attempts, shall disturb or disquiet her Majesty in the possession and exercise thereof."

As to the *abjuration*, see *Abjuration*.

The trust-oath, which a freeholder may be required to take, will be found in the article *Reform Act*. For the oath taken by justices of the peace to qualify them to act, see *Justices of the Peace*.

By 5 and 6 Will. IV. c. 62, 1835, which repealed a statute previously passed the same session, provision is made for the abolition of unnecessary oaths. The Lords of the Treasury are empowered to substitute a declaration in lieu of an oath, affirmation, or affidavit, in any case where, by acts relating to the customs, or excise, the post-office, office of stamps and taxes, &c., an oath or affidavit is required. The provisions of the act apply to any declaration so substituted after twenty-one days from the date of its publication in the Gazette. It is unlawful to administer an oath in lieu of which a declaration has been directed. A false declaration in matters relating to the customs or excise, stamps and taxes, or post-office, is a misdemeanour. Oaths in courts of justice, or in any proceeding by way of summary conviction before a justice of the peace, and the oath of allegiance, are expressly excepted from the operation of the act. The Universities of Oxford and Cambridge, and other bodies authorised to administer oaths, are empowered to substitute declarations. The churchwarden's and sidesman's oath is abolished, and a declaration appointed to be substituted. Declarations are substituted for oaths and affidavits by persons acting in turnpike-trusts, and for oaths and affidavits required on taking out a patent. Declarations are substituted for oaths and affidavits required by the acts relative to pawnbrokers, and the penalties and other enactments as to such oaths are extended to the declaration. It is not lawful for any justice of peace, or other person, to administer, or cause to be administered, any oath, affidavit, or solemn affirmation, touching any matter of which he has no jurisdiction or cognisance by some statute in force at the time being. This provision is declared not to extend to oaths or affidavits touching the preservation of the peace, or the trial of offences, or any proceeding before either

House of Parliament, or a committee, nor to any oath, affidavit, or affirmation, which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in that country. Declarations are substituted for oaths and affidavits required by the Bank of England on the transfer of stock; and for oaths and affidavits required by 5 Geo. II. c. 7, and 54 Geo. III. c. 15, relative to the recovery of debts in the plantations and colonies in America and New South Wales. It is lawful for any attesting witness to the execution of any will or codicil, deed or instrument in writing, and for any other competent person, to verify and prove, by a declaration in writing, the signing, sealing, publication or delivery thereof; and justices, notaries, and other officers, are empowered to receive such declarations. Suits on behalf of the Crown are directed to be proved by declaration. In cases not specified, in which it may be necessary and proper to require confirmation of any transaction, justices of the peace, notaries-public, or other officers by law authorised to administer an oath, are empowered to receive declarations in the form given in the schedule annexed to the act. Fees formerly payable on making oath are payable on making declaration. Persons making a false declaration are held guilty of a misdemeanour. The form of a declaration is as follows: "I, A. B., do solemnly and sincerely declare, that, &c. &c.; and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an act made and passed in the fifth and sixth years of his late Majesty, William the Fourth, c. 62, intituled, An act for the abolition of unnecessary oaths." See also the act 1 and 2 Vict. c. 105, 1838, and the act 18 Vict. c. 25, 1855.

**Oath of Verity and of Credulity.** See *Evidence. Claim.*

**Oath in Litem.** See *Evidence.*

**Oath in Supplement.** See *Evidence. Semiplena Probatio.*

**Oath of Party.** See *Evidence.*

**Oath de Fideli.** See *De Fideli.*

**Oaths, Unlawful.** Persons in Great Britain administering any oath, binding the taker to commit treason, murder, or any other capital crime, are declared guilty of felony without benefit of clergy; and persons taking such oaths are declared felons, transportable for life; 37 Geo. III. c. 123; 52 Geo. III. c. 104.

**Obediential Obligations;** as opposed to conventional obligations, are such as are incumbent on parties in consequence of the situation or relationship in which they are placed. An example of obligations of this

class is the obligation upon parents to maintain their children. *Stair*, B. i. tit. 3, § 3; tit. 9, § 1; *Ersk.* B. iii. tit. 1, § 9.

**Oblati;** secular persons, who devoted themselves and their estates to some monastery, into which they were admitted as a kind of lay-brothers.

**Obligation.** An obligation is "a legal tie by which one is bound to pay or perform something to another." The debtor, whom the English term the obligor, is in Scotland termed the obligant or grantor, and the creditor in the obligation (termed in England the obligee), the receiver or grantee. The difference between a real right and an obligation of this kind is, that the former gives a *jus in re*, or right of possession or recovery of the subject; the latter gives no more than a *jus ad rem*, or right of action against the person who has become bound; by which he may be compelled to implement his obligation, and, in terms of it, to pay the money, or perform the act to which he has bound himself. Obligations are divided into merely natural, merely civil, and mixed; but mixed obligations only are those recognised by the law. Thus, an obligation granted under the influence of force or fear is an obligation merely civil, but imposes no natural obligation on the grantor, and hence the obligant may get free of his obligation. Thus, an obligation, in order to its being effectual, must be mixed, since he alone is a proper obligant *a quo invito aliquid exigi potest*. See *Natural Obligation*. Obligations are—1. Pure. 2. To a certain day. 3. Conditional. (1.) A pure debt is one to which neither day nor condition is adjected, and which may therefore be instantly demanded. (2.) Obligations *in diem*—that is, exigible against a certain day—constitute a debt from the first, because it is certain that the day will exist; *Dies statim cedit sed non venit*. (3.) A conditional obligation, dependent on an event which may never happen, has no obligatory force until the condition be purified. It creates not a debt, but the hope only of a debt. See *Conditional Obligation*. An obligation may be constituted in favour of persons ignorant of the obligation (see *Jus Quæsitum Tertio*); and where the obligation is granted for certain uses and purposes, this does not suspend the obligation until performance. When a person has become possessed of property belonging to another, even where he has purchased it from an illegal possessor, he is under an obligation to restore the property to the rightful owner. The only exception to this occurs in the case of property in bank-notes, which is constituted by possession. Bills also are, in this respect, subject to rules peculiar to themselves. An

obligation *ob turpem causam*, is not actionable. See *Pactum Illicitum*. An obligation to indemnify arises where one person is made richer through the act of another, without the intention of making a donation. Thus, if a person build in *bona fide* on the ground of another, supposing it his own, the proprietor of the ground claiming the house would be obliged to pay the expense of the building, to the extent, at least, of the benefit conferred. See *Adjunction*. *Contexture*. Obligations also arise from delict; since every one who can distinguish between right and wrong incurs an obligation to repair any damage befalling his neighbour from a wrong committed by himself. This wrong may arise from blamable omission or neglect of duty. Where several have been guilty of the wrong, either as principals or accessaries, any one of them may be sued for the whole damage; and the damage being paid by any one of them, the payer seems to have an equitable claim for relief *pro rata* against the rest. See *Delict*. *Damages*. Verbal obligations include all obligations which have no particular name by which they may be distinguished, as—1. Promises, or unilateral engagements. 2. Agreements where two or more different parties contract mutual obligations to one another; and these are binding, with the exception—(1.) Of all obligations relative to heritage, which are ineffectual if not constituted by writing. (2.) This extends even to a lease or other temporary right to lands. (3.) A verbal obligation relative to heritage cannot be competently proved by the oath of the party, or, what is the same thing, would not be effectual though proved; for as long as writing is not adhibited, either party has a right to resile. (4.) An agreement relative to heritage, in the form of mutual missives, requires to be probative, otherwise either party may resile; but payment of part of the price of lands, in terms of a verbal bargain, will bar the *locus pœnitentiæ*, which would otherwise have been competent to the parties. See *Rei Interventus*. *Homologation*. There is also another exception in the case where the agreement, though verbal, is to restrict an universal infestment in security to certain parts of the lands. See *Pacta Liberatoria*. Writing is required in bargains where it forms part of the agreement, or is *paris contractus*, as it is expressed, that writing shall intervene; and in such a case, until the agreement be reduced into writing, there is *locus pœnitentiæ*. Obligations by writing require certain solemnities; and a written deed, in the execution of which these solemnities have been observed, affords complete evidence of the obligation or contract; and if such a deed contain a clause of registra-

tion, the obligation thereby contracted may be summarily enforced by legal diligence. See *Deeds*. *Subscription*. *Notary*. *Decree of Registration*. On the subject of obligations, it may be farther observed—1. That certain things are exempted from commerce by nature, by destination, or by statute, or by having acquired a *vitium reale*, which renders them unfit objects of commerce, as stolen goods. 2. No person can be legally bound to do what is impossible, or unlawful, or immoral. 3. Conditions may be annexed to obligations; and where these are impossible, the obligation is void, unless the granter lie under a natural tie to the grantee, in which case the obligation is held to be *pure*. See *Ersk. B. iii. tit. 1, § 2, et seq.*, and *tit. 3, § 84, et seq.*; *Stair, B. i. passim*; *Bank. vol. i. p. 92, et seq.*; *Bell's Com. i. 293 et seq.*, 334 *et seq.*; *Bell's Princ. § 5, et seq.*; *Illust. ib.*; *Kames' Equity, 127, 317, 384*. See also *Contract*. *Jus ad Rem*. *Jus Crediti*. *Labes Realis*.

**Obligor**; the debtor in an obligation,—obligee, the creditor in an obligation.

**Obliteration**. See *Illegibility*.

**Obreption**. See *Subreption*.

**Occult Crimes**. See *Domestic Crimes*. *Evidence*.

**Occupancy**; is, by the law of Scotland, a mode of acquiring the property of moveables which have continued in their original state,—as precious stones, wild beasts, fowls or fishes; but where these have been appropriated, the right of occupancy ceases. In no case does it reach to heritage. Though land, therefore, were possessed for ever so long a time, if the possessor has no written title, he can have acquired no property in the land. *Ersk. B. ii. tit. 1, § 10*; *Stair, B. ii. tit. 1, § 33*; *Bank. vol. i. pp. 85, 505*; *Bell's Com. ii. 311–14*; *Bell's Princ. § 1287, et seq.*; *Illust. ib.* See *Property*.

**Ochiern**; ogetharius; according to Skene, a name of dignity, a freeholder. *Skene, h. t.*

**Œcumenical**; general or universal. Œcumenical councils were general councils. *Bank. vol. ii. p. 591*.

**Offence**; an act contrary to and punishable by law. Offences are either by commission or omission. See *Crim. Misdeemeanour*.

**Offer**. See *Promise and Offer*. *Unilateral Contract*. *Mutual Contract*.

**Offer**; at a public roup or sale. Such offers are usually made with reference to articles of roup, or conditions of sale, which regulate the reciprocal rights of exposor and offerer. And in connection with this subject, the question of chief importance relates to the contingent obligation which, in sales of heritage by articles of roup, the offerer usually under-

takes to take the subject, failing the higher offerer. See *Clause of Devolution*.

**Offerers at Auction.** See *Auction. Articles of Roup*.

**Office.** An office is a right to exercise a public or private employment, and to take the fees and emoluments belonging thereto. In Scotland, all heritable offices may be voluntarily sold, or they may be adjudged for debt; and so also may all patrimonial offices descendible to heirs and assignees. But offices in which there is a personal trust reposed in the functionary are not saleable nor attachable for debt. By the statute 49 Geo. III. c. 126, the sale of offices of public trust, and particularly of those offices connected with the administration of justice, is prohibited in Scotland; and the prohibition to sell offices and deputations is by the same statute extended to all offices in the gift of the Crown, and in the public departments of Government in the United Kingdom, or in the Colonies, or under the East India Company—excepting certain offices in the palace, and also excepting sales of commissions in the army. The right of appointing deputies, upon the same principle, cannot be made a source of gain, or adjudged, or otherwise directly attached by creditors, where the office is of the nature of a public trust, or connected with the administration of justice. But the salary or profits of an office are attachable by creditors, with the exception, perhaps, of such an allowance as may be requisite for the decent discharge of the duties of the office. By the law of Scotland, the salary of a judge, the stipend of a clergyman, and the pay or half-pay of a military officer, are held to be attachable to a certain extent; and the *arraars*, whether of salary or of pay, are attachable to the whole amount. All arrangements, generally speaking, whereby the salary of a public officer is burdened with the payment of a sum in return for influence exerted in procuring the nomination, or as a consideration to another candidate for withdrawing from the contest, or the like, are *pacta illicita*, which cannot be enforced in a court of law. But an agreement by an officer in bad health to share the emoluments with an assistant seems to be effectual. *Stair*, B. i. tit. 12, § 16; *Ersk.* B. ii. tit. 12, § 7; B. iii. tit. 6, § 7; *Bell's Princ.* § 36; *Brown on Sale*, pp. 115, 123. See *Cautionary*. See *Pactum Illicitum*.

**Officers of State.** The chief Officers of State in Scotland are the Keepers of the Great and Privy Seal, the Lord Clerk-Register, the Lord Justice-Clerk, the Lord Advocate, and the Gazette Writer. The Officers of State, when called in any process for the interest of the Crown, must be cited as

forth of the kingdom, and likewise at the Exchequer Chambers. A proper warrant must be inserted in the summons for that purpose. *Ersk.* B. iii. tit. 3, § 8; *Jurid. Styles*, iii. 7, 19, 971-5. See *Citation. Edictal Citation*.

**Officers of the Crown.** The Officers of the Crown, as they are styled, are the Lord High Constable of Scotland, the Heritable Standard-bearer, the Royal Standard-bearer, the Knight-Marischal, the Vice-Admiral, the Lord Justice-General, the Lord President of the Court of Session, and formerly the Lord Chief Baron.

**Offices.** See *Indemnity*.

**Official;** in the canon law, was an ecclesiastical judge, appointed by a bishop, chapter, or abbot, with charge of the spiritual jurisdiction of the diocese. An official is now a deputy appointed by an archdeacon as his assistant, and who sits as judge in the archdeacon's court. *Tomlins' Dict. h. t.*

**Officiendi Luminibus.** See *Light*.

**Officium Nemini debet esse Damnozum;** a maxim importing that one is entitled to be indemnified, or at least that he ought not to be subjected to loss, by the discharge of an office or duty. Thus, a mandatary is entitled to demand from the mandant all reasonable expenses disbursed by him *bona fide*, and the damage sustained by him in the execution of the mandate, even though the management should not have been prosperous or successful. *Ersk.* B. iii. tit. 3, § 38.

**Oker;** is the same with usury, or the taking of illegal interest for money. See *Usury*.

**Old and New Extent.** See *Extent*.

**Old Witnesses.** The depositions of aged witnesses—i. e., who are upwards of seventy years of age—may in certain circumstances be taken *in initio litis*, to lie *in retentis* in case of their death before the cause comes to be tried. See the circumstances under which these depositions may be taken, and the course of procedure, explained, *voce Evidence, supra*, p. 373.

**Oleron, Laws of.** The laws of King Richard I. of England, relative to maritime affairs, are called the laws of Oleron, because they were made by him when he was at Oleron, which is an island lying in the Bay of Aquitain, at the mouth of the River Charent. These laws are recorded in the Black Book of the Admiralty, and are accounted the most excellent digest of sea-laws in the world. *Bell's Com.* i. 499; *Tomlins' Dict. h. t.*

**Omissa et Male Apprehiata.** When an executor confirms, and omits in the inventory part of the defunct's effects, he may have the mistake corrected. But if he do not take steps for this purpose, any one interested in



the succession may apply, either to have the executor compelled to confirm the omission, or himself to have an edict to confirm it. Ordinary executors *ad omissa et male apprehiata* ought to call the principal executor to their confirmation, or it will be null; but this rule does not hold in the case of executors-creditors. Every person requiring confirmation is bound, upon oath, to confirm the whole moveable estate known at the time; it being lawful to oik to such confirmation any part of the estate which may afterwards be discovered; 4 *Geo. IV. c. 98, § 3*. In the case of an innocent omission, an additional inventory may be lodged; but it must specify the amount of the whole succession, and must be written on a stamp corresponding to the whole amount; and the solicitor of stamps is bound to repay the original duty thus twice paid. The distinction which subsists between the *omissa* and the *male apprehiata*, and which was formerly of more importance, is, that the former term applies to funds or effects actually omitted in the confirmation, the latter to effects or debts stated at an undervalue. From the precautions now taken to ascertain the value of the known funds, an important case of mal-apprehiation is unlikely to occur; and Mr More (in his *Notes on Stair, p. ccclii.*) holds that confirmation *ad male apprehiata* is now incompetent. See *Stair, B. iii. tit. 8, § 62; Bank. ii. 393; Bell's Com. ii. 85; Jurid. Styles, ii. 498. See Executor. Confirmation. Inventory.*

**Oneris Ferendi**; a Roman law urban servitude, importing a right in the dominant proprietor to rest the weight of his house on the servient proprietor's wall or pillar. *Bell's Princ. § 1003. See Support. Servitude. Common Interest.*

**Onerous Deeds**; are deeds granted for valuable considerations. See *Consideration.*

**Onus Probandi**; the burden of proving. The general rule is, that he who affirms must prove his affirmation. But this rule, in its application, frequently leads to questions of considerable nicety and of great importance, since the throwing the burden of the proof on one party is, generally speaking, tantamount to declaring that the right is established in his adversary. *Tait on Evidence, 1; Shaw's Digest, 385, 460. See Evidence.*

**Open Account.** See *Book-Debts. Claim. Affidavit.* And for the form of the summons for payment of an open account, see *Jurid. Styles, 17.*

**Open Charter**; a charter from the Crown, or from a subject, containing a precept of sasine which has not been executed. The advantage of such a charter is, that in the event of a sale the unexecuted precept may be assigned to the purchaser, and the expense

of an entry with the superior saved during the purchaser's life, or during the life of the party who first takes infestment on the precept. See *Charter. Base Right. Confirmation. Composition. Non-entry. Disposition.*

**Open Doors.** There are letters passing the signet, called *Letters of Open Doors*, which are requisite where goods are to be poinded, which are deposited in lockfast places. The messenger returns an execution, setting forth the fact that he cannot obtain admission; and on that an application by bill to the Lord Ordinary on the Bills may be made for a warrant for *Letters of Open Doors*, which authorise the messenger to break open the doors of those places in which the goods of the debtor are lodged. Where no violence is necessary, as where the removal of some trees which block up the entrance to a woodyard would procure admittance, no letters of open doors are required; *Steven, 25th Jan. 1769, Mor. 10,539.* Where the messenger or other officer who executes a poinding has got entrance into the house or other premises, he may force open presses or chests contained therein, in order to poind their contents, without any special warrant. A warrant of open doors is included in the warrant subjoined to extract decrees, under the act 1 and 2 *Vict. c. 114. See Stair, B. iv. tit. 48, § 40; More's Notes, p. cccxxii.; Ersk. B. iii. tit. 6, § 25; Bank. vol. iii. pp. 7, 25; Jurid. Styles, iii. 735-6, 770, 992; Ross's Lect. i. 443. See Caption.*

**Open Policy.** In marine insurance, an open policy is a policy where the amount of the interest of the insured is not fixed, but is left to be proved by the insured in the event of a loss; whereas in a valued policy, a specified value is put on the ship or goods insured, to save the necessity of proof, in the case of a total loss. *Marshall, 199. See Insurance. Valued Policy. Wager Policy.*

**Opinion, Oath of.** In proving mercantile usage, as affecting the construction of a contract, the witnesses' opinion is not sufficient. It is from a judge only, and in matter of law, that opinion can be received by a jury; other persons speak only to facts. But in some cases, tradesmen or scientific persons are allowed to swear, not to a positive fact, but to what they believe to be a fact. In such cases, perjury is not in general committed by a false oath of opinion, or pure belief, or credulity. But it is committed if it can be shown that the party did not believe what he swore he believed; or if the oath is only in appearance one of opinion. *Bell's Com. i. 607; Hume, i. 308; Alison's Princ. 468; Steele, 159. See Perjury.*

**Ora**; metal, such as brass or gold. *Skene, h. t.*

**Orchard.** The trees of an orchard fall

under the act for preserving planting; 1698, c. 16; *Robertson*, July 24, 1743, *Mor.* 10,484. The breaking of orchards is an offence cognisable by the sheriff. *Ersk.* B. i. tit. 4, § 4; *Hunter's Landlord and Tenant*, p. 205; *Hutch. Justice of Peace*, ii. p. 445; *Bell on Leases*, i. 351. See *Planting and Inclosing*.

**Order of Redemption.** A wadset is a conveyance of land or other heritage in return for an advance of money, whereby a temporary exchange is made; the proprietor of the land enjoying the use of the money, and the proprietor of the money the use of the land in return, with power to either party to put an end to the transaction. When the owner of the subject is desirous of repaying the advanced money and redeeming his lands, it is by the order of redemption that it is done—a form explained under the article *Wadset*. *Ersk.* B. ii. tit. 8, § 17; tit. 12, § 38.

**Ordinary;** in England, a bishop, or other person having peculiar or original ecclesiastical jurisdiction in a diocese, in contradistinction to extraordinary or delegated jurisdiction. *Tomlins' Dict. h. t.*

**Ordinary, Lord.** In the Court of Session, the judge before whom a cause depends in the Outer-House is called the Lord Ordinary in that cause. And the judge who officiates in the Bill-Chamber is called the Lord Ordinary on the Bills. See *Session, Court of Inner-House. Outer-House. Bill-Chamber*.

**Ordinary Endurance.** A lease of ordinary endurance is a lease of nineteen or twenty-one years, as contradistinguished from a lease of thirty-eight (twice nineteen), or fifty-seven (thrice nineteen) years, or for any period exceeding nineteen or twenty-one years. *Bell on Leases*, i. 215.

**Ordination.** See *Minister*.

**Ordnance. Board of.** By 1 and 2 Geo. IV. c. 69, the principal officers of the Board of Ordnance are authorised to hold feudal property in Scotland. Prior to the passing of that act, the government lands of Fort William and Fort George were conveyed in trust to the magistrates of Edinburgh, and vested in them for behoof of the Board. By 3 Geo. IV. c. 108, all estates and property occupied for the barrack-service were vested in the Board of Ordnance, and certain powers conferred upon them in relation to such property. By 2 Will. IV. c. 25, their powers are extended and made more effectual, and provisions are enacted for facilitating the business in the ordnance department. They are empowered to sue as "The Principal Officers of her Majesty's Ordnance," without being named; and it is provided that the suit shall not abate by their being changed. They are not personally liable. See also the act 5 and 6 Vict. c. 94.

**Origellum;** a habergeon edged with mailzie, of a yellow colour like gold. *Skene, h. t.*

**Outer-House;** the name given to the great hall of the Parliament House in Edinburgh, in which the Lords Ordinary of the Court of Session sit as single judges to hear causes. The term is used colloquially, as expressive of the business done there, in contradistinction to the *Inner-House*, the name given to the chambers in which the First and Second Divisions of the Court of Session hold their sittings. See *Session, Court of Inner-House. Record. Motions*.

**Outlawry or Fugitation;** is a sentence pronounced in a criminal court in the absence of the panel at the calling of the diet—that is, the day on which he is summoned to appear and stand his trial. The effect of this sentence is a forfeiture of the panel's person in law, so that he cannot bear testimony on any occasion, nor act as a juryman, nor hold any place of trust, nor even pursue or defend in any civil or criminal process, nor claim any benefit of the law. This sentence is a warrant for denouncing him a rebel, the consequence of which is the escheat of his moveable estate; and if he shall remain a rebel for the space of a year, the profits of his heritage become forfeited to his superior for his lifetime. The prosecutor may also obtain letters of caption against the panel, and imprison him if he is to be found within the kingdom; and being thus imprisoned he is not bailable, whatever the nature of the offence may have been; for, as an outlaw, he has no benefit from the law. The outlawed person may appear in the criminal court, and apply to be reponed against the sentence of outlawry. Whether he may be tried on the original libel is not so clear. The case of *Macrae v. Macrae*, led to a great deal of learned discussion on the effect of a sentence of fugitation upon the civil rights and powers of the person outlawed. In that case criminal letters, containing a charge of murder, were raised against a party who was infeft in fee-simple in a land estate. Before citation, he executed a disposition of the estate, *ex facie* absolute, in favour of a friend who was truly a trustee for his behoof, and who was immediately infeft. The party fled, and was afterwards decerned an outlaw, and ordained to be put to the horn, which sentence was followed by denunciation duly recorded. He lived abroad for many years, and died unrelaxed. In the interval, by a formal deed, he directed his trustee to execute a strict entail in favour of his (the outlaw's) only son—whom failing, his only daughter; and he further directed his estate to be burdened with a provision of L.5000 in favour of the daughter. The son of the outlaw having raised a reduc-

tion of the whole of these deeds, especially the entail and the application to the Court to record it, the Court of Session decided unanimously that the deeds were unchallengeable at the heir's instance, and that the entail was duly recorded. *Macrae v. Macrae*, 22d Nov. 1836, 15 D. B. M. 54; *Stair*, B. iv. tit. 3. § 30; tit. 38, § 27; *Ersk.* B. iii. tit. 7, § 37, *Note by Mr Ivory*; B. iv. tit. 4, § 83; *Bank.* vol. ii. p. 250; *Hume*, ii. 255, 270; *Ross's Lect.* i. 244, 322; *Alison's Prac.* 349. See *Dict. Fugitation. Denunciation.*

In England, in cases of treason and felony, the law interprets the party's absence a sufficient evidence of his guilt, and without requiring further proof accounts him guilty of the fact; upon which ensue corruption of blood and forfeiture of his personal estate. In civil actions, outlawry is putting a man out of the protection of the law, so that he is incapable of suing for the redress of injuries; he may likewise be imprisoned; and he forfeits all his goods and chattels, and the profits of his lands. Outlawry in civil actions is used where the defendant is abroad or keeps out of the way, so that he cannot be arrested or served with process. If there be several defendants in a joint action, and one of them be abroad or keep out of the way, the plaintiff must proceed to outlawry against him before he can go on against the others. *Tomlins' Dict. h. t.*

**Outsight Plenishing;** is the moveables without doors, as horses, cows, oxen, ploughs, harrows, carts, and other implements of husbandry; but fungibles, as corn, hay, &c., do not fall under the description of plenishing. *Ersk.* B. iii. tit. 8, § 18. See *Heirship Moveables.*

**Outsucken Multure;** is merely a fair remuneration to the miller for manufacturing the grain, paid by such as are not astricted. *Ersk.* B. ii. tit. 9, § 20; *Bell's Princ.* § 1018; *Hunter's Landlord and Tenant*, 206. See *Thirlage. Multure. Astricted Multure. Insucken.*

**Overseers;** in England, are the public officers elected to provide for the poor in every parish. Their duties are, to collect the poor-rate, to remove such persons as the parish is not liable to support, and do other acts incidental to the management of the poor, under the directions of the Poor-Law Commissioners or their assistant commissioner, or according to the provisions of any local act. An overseer may be indicted for not finding immediate relief for a pauper in cases of urgent necessity; but in ordinary cases he is not indictable, unless he have neglected a magistrate's order. He is indictable if he relieve where there is no necessity; *Tomlins, h. t.* In Scotland, inspectors of the poor are appointed

under the Poor-Law Amendment Act, 8 and 9 Vict. c. 83, 1845. *Dunlop's Parish Law*, 263. See *Poor.*

**Oversman.** An oversman is an umpire appointed by a submission to decide where two arbiters have differed in opinion, or he is named by the arbiters themselves, under powers given them by the submission. In either case, it ought to appear that the arbiters have accepted of the submission, and differed in opinion; and the nomination of an oversman by arbiters ought to be executed according to the statutory solemnities; although the Court have sustained the nomination of an oversman in a case in which the requisites of the stat. 1681, c. 5, were not attended to; *Stewart*, 8th March 1804, *Fac. Coll., Mor.* p. 16,911. When an oversman has been appointed, it is he alone who pronounces the decree. But where, without a devolution subscribed by the parties, a person to whom some particular point is referred for his opinion assumes the character of oversman, a decree pronounced solely by him is inept; *Telfer*, Jan. 31, 1823, 2 S. & D. 167. A decret-arbitral pronounced by arbiters themselves is good, where, with powers to name an oversman, they have done so, but before any difference of opinion; *Bryson*, June 10, 1823, 2 S. & D. 382. It has been found in England, that the appointment of an umpire should be an act of the judgment, and that an appointment by drawing lots or tossing up for the choice is inept; *Young*, 3 Barn. and Cr. 407; 5 Dowl. and Ry. 263; *Cassell*, 9 Barn. and Cr. 624. See the forms of a reference to an oversman, and of a decret-arbitral pronounced by an oversman, *Jurid. Styles*, ii. 193-7. See *Arbitration. Devolution. Clause of Devolution.*

**Overt Act;** in English law, an open act, which by law must be clearly proved. *Tomlins' Dict. h. t.*

**Overtures.** In church law language, an overture is a proposal to make a new general law, or to repeal an old one; to declare the law; to enjoin the observance of former enactments; or generally, to take any measure falling within the legislative or executive functions of the General Assembly. No new law can be enacted by the General Assembly, nor can an existing one be rescinded, without the consent of a majority of the presbyteries. It is provided, therefore, that any measure intended as a binding rule and constitution for the Church must first be proposed as an overture to the General Assembly; and if approved of by a majority of that court, must be transmitted to the several presbyteries, who are instructed to consider the same, and send up their opinions thereon to the next General Assembly; Act 9, Assembly 1697. When

the immediate enactment of the new law proposed in an overture appears essential for the good of the Church, the General Assembly exercises the power of converting the overture into what is usually called an *interim act*; and such temporary enactments are binding upon all the members of the Church until the meeting of the next Assembly. When overtures transmitted by the Assembly have been received, the presbytery, at an ordinary meeting, appoints the day on which such overtures are to be considered. In expressing an opinion upon an overture, nothing more is necessary than simply to approve or reject it; and those presbyteries only who approve of an overture *simpliciter* are reckoned by the Assembly among the number favourable to the measure being passed into a law of the Church. It is competent for any member of presbytery to move the transmission of an overture on any particular subject to a superior court. It is usual for him to give notice of his intention to do so at a previous meeting. If the overture is adopted by the presbytery, it is transmitted in the form of an extract from the minute. When an overture is transmitted to the synod, some member of synod is heard in support of it, and he generally makes a motion for its transmission to the Assembly for the disposal of it, or otherwise, as the case may be. See *Gillan's Acts of Assembly*, p. 185; *Hill's Church Prac.* 75; *Styles of the Church Law Society*. See *Church Judicatories*.

**Oxen, Houghing of.** By the statutes 1581, c. 110, and 1587, c. 83, the killing or houghing of oxen, horses, or other cattle, is punishable as theft, with the pains of death. *Ersk. B. iv. tit. 4, § 62.*

**Oxgate of Land.** See *Aratrum Terra Ploughgate*.

**Oyer and Terminer**; in English law, a commission directed to the judges and other gentlemen of the county to which it is issued, by virtue of which they have power to hear and determine treasons and all kinds of felonies and trespasses; *Tomlins' Dict. h t.* A commission of *Oyer and Terminer* may be issued by the Queen for trying treason in Scotland, under the statute 7 Anne, c. 21, provided three of the Lords of Justiciary be in such commission. At the desire of the Lord Advocate, and upon a writ of *certiorari* under the great seal of the United Kingdoms, any indictment of treason depending before justices of *Oyer and Terminer*, or before the judges in the Circuit Courts, may be removed for trial into the Court of Justiciary. *Hume*, vol. i. p. 528; *Ersk. B. iv. tit. 4, § 84.* See *Treason*.

**Oyess**; the term employed by a messenger-at-arms in denouncing a person rebel, and on the occasion of other proclamations, in order to call the attention of the people. The word is a corruption from the French word *oyer*! (the old imperative of *ouir*), hark! or hear ye! *Stair*, B. iii. tit. 3, § 8; *Ersk. B. ii. tit. 5, § 56*; *Bank. ii. 249*; *Ross's Lect. i. 307.*

## P

**Packing of Goods.** In England, packers of goods have a general lien. *Bell's Com.* i. 108; *Bell's Princ.* § 166; *Bell's Illust.* ib. See *Storage*.

**Paction.** In the Roman law, *pactio* was different from *pactum*. It was synonymous with *conventio*, and signified merely an agreement between two or more parties, irrespective of the question whether they were legally bound by that agreement. As a generic term, it embraced both pacts and contracts. *Stair*, B. i. tit. 10, § 6; *Heinec. Elem. Juris.* § 773. See *Pactum*.

**Pactis Privatorum Non Derogatur Juri Communi**; a Roman law maxim, importing that the consent or private agreement of individuals cannot validate any contravention of the law, or render just, or sufficient, or effectual, that which is unjust or deficient in what the law declares to be indispensable. Thus, an agreement by a married woman, that she will not object, on the ground of her being a wife, to a personal obligation which she has incurred, will not sustain an action or charge brought upon that personal obliga-

tion. This maxim is not of universal application. If what the law commands be merely circumstantial, the agreement of parties may supply the want of it; and there are many things *quæ fieri non debent, facta valent*. Thus, although the purchase of a lawsuit by a member of the College of Justice is forbidden by the law, under the pain of deprivation, the purchase itself is good, and will sustain action. See *Buying of Pleas. Pactum Illicitum*. A married woman cannot hold the office of tutory; and a provision in a will, that the *tutrix*-testamentary shall retain her office notwithstanding her marriage, is invalid; *Stewart*, 8th March 1636, *Mor.* 9585; *Kerbeckhill*, July 1586, *Mor.* 9585; — v. — 1585, *Brown's Sup.* i. 123; *Stoddart*, June 30, 1812, *F. C.* So, also, all attempts to dispense with the law of deathbed, or to reserve power of settling heritage *in lecto*, to the prejudice of the heir-at-law, are ineffectual. In like manner, an agreement between private parties to dispense with the statutory regulations as to cruives, is invalid, though acquiesced in for upwards of forty years; *Ful-*

*larton*, 7th July 1743, *Mor.* 9586. But it has been decided, that an obligation by a party, that he shall be satisfied with the evidence of one witness, is lawful and binding in civil matters; June 1665, *Brown's Sup.* ii. 419; *Stair*, B. i. tit. 17, § 14; B. ii. tit. 9, § 38; *Brown's Synop.* voce *Pactum Privatum*. See *Provisio Hominis, &c. Cuique licet, &c.*

**Pactum.** In the Roman law, the word *pactum* had a peculiar signification, which appears not to have been adopted in any other system of jurisprudence. In that law, a *pactum* was an agreement between two or more persons to give or perform anything, but which was practically defective, in so far as it did not produce what was called a civil obligation. There were, however, certain agreements, to which, on account of their reasonableness or expediency, either express written law or prætorian equity gave the binding effect of a civil obligation; while there were others which, being adjoined *in continenti* to a regular contract, were held to constitute part of that contract, and qualify or extend its provisions. Such *pacta* were styled *non nuda*, in contradistinction to the *pacta nuda* which produced no action. Yet a *pactum nudum*, although it gave no action, created a natural obligation, which furnished, like other natural obligations, a valid exception. The law of Scotland does not recognise the distinction between *pacta nuda* and *non nuda*; and the difference between the two systems may be illustrated by the real contracts—*e.g.*, loan, pledge, or deposit. Thus, the contract of loan requires for its completion that the thing shall have been actually given in loan. By the Roman law, the mere agreement to lend a thing was, without delivery, a *pactum nudum*, which could not be enforced by an action; but by the law of Scotland, one who legally binds himself to lend or impledge a subject, may be judicially compelled either to implement his obligation, or to pay damages for breach of bargain. *Ersk.* B. iii. tit. 1, § 17; *Heinec. Elem. Juris.* § 774; *Bell's Princ.* § 8.

There are several agreements to which the general word *pactum* has been applied, and which may be considered under this head.

**Pactum Donationis.**—This confers on the donee a *jus ad rem*, but gives no right to the thing itself, the donor continuing proprietor until delivery. If, therefore, the donor should, even gratuitously, give and deliver it to a second donee, the second donee becomes proprietor. *Ersk.* B. iii. tit. 3, § 90.

**Pactum de non petendo;** an agreement by which the creditor in an obligation binds himself not to insist for payment or performance. If the agreement be absolute, it is equivalent to a renunciation; but if it is only

temporary, it does not exclude a decree; it only supersedes the execution until the lapse of the specified time. The right of a repented rebel to demand payment of a debt cannot be prejudiced by a *pactum de non petendo* made by the donator of his escheat; *Mackieson*, 20th March 1624, *Mor.* 9449. A *pactum de non petendo* made to a principal, or to one of several co-obligants, does not free the cautioner or the other co-obligants; nor does it free the persons in whose favour it is made from their obligations to relieve. See *Mor. Dict. h. t.*; *Stair*, B. i. tit. 18, § 1; B. iv. tit. 40, § 31.

**Pactum de retrovendendo;** is a stipulation that the seller should be entitled to purchase back his property within a stipulated time. There do not seem to be any examples in the law of Scotland of such an agreement being made with regard to the sale of moveable property; but there are instances of rights of reversion being adjoined to a regular sale of lands. Such a stipulation is strictly interpreted; and the seller loses his right of reversion if he allows the time specified to elapse without making payment of the price, because, in a fair and onerous sale, there is no penalty nor loss of property in consequence of such strict interpretation of the clause. This distinction exists between the right of reversion conferred by a *pactum de retrovendendo*, and that to which a wadsetter is entitled; that in the latter case the reverser may redeem even after the lapse of the prescribed term, and at any time before declarator of the irritancy. *Stair*, B. ii. tit. 10, § 1; *Ersk.* B. ii. tit. 8, § 2; *Bell's Com.* i. 239; ii. 290; *Brown's Synop.* 1532; *Brown on Sale*, 429. See *Redeemable Rights*.

**Pactum Legis Commissoriæ.**—By this agreement, in the Roman law, the sale became void if the price was not paid before a certain day. This condition, when expressly stipulated, does not suspend the sale—the property is transferred to the buyer by the delivery; but, on his failure to pay within the time limited, the sale resolves, and the property (as against the buyer and his representatives) returns to the seller. But where the payment is made a condition of the sale, that condition is suspensive of the sale, which is not perfected until the condition be purified. The *pactum legis commissoriæ* was intended solely for the benefit of the seller, and could not be enforced against his will by the buyer. *Ersk.* B. iii. tit. 3, § 11; *Bell's Com.* i. 239; ii. 290; *Bank.* i. 107; *Brown on Sale*, 430. See *Conditional Obligation. Missives of Sale*.

The *pactum legis commissoriæ in pignoriibus* was also a Roman law pactio, sometimes adjoined to a redeemable right, whereby it was provided, that, if the subject were not

redeemed against a determinate day, the right of reversion should be irritated, and the subject should become the irredeemable property of him to whom it was impledged. Such stipulations were held in the Roman law to be *contra bonos mores*; but, by the law of Scotland, irritant clauses in contracts, obligations, infestments and the like, are effectual; *A. S. 27th Nov. 1592*; 1661, c. 62, § 14. Where it happens, however, that the irritancy is penal, the right will not be forfeited by the mere lapse of the time agreed upon. An action of declarator of the irritancy is requisite, in which action the defender may still avoid the forfeiture by redeeming the lands or other subject. By the Scotch law, moveables which have been impledged cannot legally be sold by the creditor without the warrant of a judge, obtained on an application to which the debtor is made a party. *Ersk. B. ii. tit. 8, § 14*; *Stair, B. i. tit. 13, § 14*; *B. ii. tit. 10, § 6*; *B. iv. tit. 5, § 7*; *tit. 18, § 5*; *Brown's Synop. 1092*. See *Pledge. Expiry of Legal*.

*Pacta Liberatoria*, in regard to land, are bargains, whereby a real right is either passed from or restricted. Such agreements form an exception to the general rule, that writing must intervene in all that relates to land, in order to bar the *locus penitentiæ*, or power of rescinding. Accordingly, a mere verbal obligation, followed by no *rei interventus*, agreeing to restrict an infestment in security, cannot be retracted, and may be proved by reference to the party's oath. Thus, a liberation from a bond by transaction, with regard to a sum in another obligation, was sustained without writing; *Hepburn, 12th Dec. 1661, Mor. 4865*. So also was a promise to liberate part of the lands burdened with a liferent; *Ker, 8th Feb. 1666, Mor. 8465*. See *Ersk. B. iii. tit. 2, § 3*; *Stair, B. i. tit. 10, § 9*; *Kames' Equity (1825), 329*; *Tait on Evidence, 225, 325-6*.

*Pactum Illicitum*; is a general term applied to all contracts opposed to law, either as being *contra legem*, *contra bonos mores*, or inconsistent with the principles of sound policy. It is a general rule, that no action can lie for implement of an illegal contract. But in the case where the terms of the contract have been fulfilled, a distinction is taken between the case in which there is turpitude *ex parte utriusque*, and that in which the turpitude attaches to only one of the parties. In the former case, there can be no action for restitution; the rule is, *Potior est conditio possidentis*, and the law gives no remedy to either party. In the latter, according to Erskine, the thing given *ob turpem causam*, must be restored, whether counterpart of the bargain has been performed or not. In the

great majority of cases, however, the turpitude necessarily attaches to both parties; and the law does not interfere either to compel implement or restitution. But, although action is refused to one *socius* against another, for a share in an illegal adventure, he may maintain a claim of accounting and repetition as to advances, which, although resulting consequentially from the adventure, are in themselves tainted by no illegal consideration; *Gibson, June 6, 1834, 12 S. & D. 683*, and *Dec. 16, 1835; 14 D. B. & M. 166*. The following are instances of contracts which have most frequently come under the view of courts of justice as *pacta illicita*:—

*Pactum de quota litis*; is an agreement between an advocate, or an agent or attorney, and his client, for a proportion of the subject of the suit, in place of his honorary or fees. Such an agreement was void by the Roman law, and the same principle has been adopted in the law of Scotland. The act 1594, c. 216, makes the purchase of the subject of a lawsuit by a member of the College of Justice punishable with deprivation of office. See *Buying of Pleas*. The course of decisions, however, has been to sustain the sale, and to regard the penalty as the only sanction of the act; *Purves, Dec. 20, 1683, M. 9500*; *Home, Dec. 15, 1713, M. 9502*. But a distinction has been recognised, although not very precisely, between such a purchase of a plea which is struck at by the act and the *pactum de quota litis*, which last seems to be held illegal, not by the express words of the statute, but rather as being at common law a *pactum illicitum*, and at the same time contrary to the spirit of the statute. Thus, in one case, after the plea that a transaction was a purchase of a lawsuit had been repelled, it was alleged that the right arose *ex pacto de quota litis*, and was therefore null. To this it was answered, that the statute was intended as a special remedy to supply the place of the Roman law respecting *pactum de quota litis*. This answer was not sustained; and Fountainhall, in his report of the case, mentions the *pactum de quota litis* as differing from the buying of a plea; *Ruthven, June 23, 1680, Mor. 9499*. The course of decisions has been to annul *pacta de quota litis*; *Macenzie, July 23, 1774, 5 Supp. 528*. In this case, the agent was likewise deprived of his office for a limited time. An agreement that a writer was to get half of certain property and rents, to be recovered in an action which he was to carry on, and that, if unsuccessful, he should charge nothing, was found null; although it was pleaded that the statute did not apply, and that, at common law, such agreements are bad only with practitioners, which this writer was not; *Johnston, Feb. 1,*

1831, 9 *S. & D.* 364. An agreement, by which a country agent became bound to employ an Edinburgh agent in the business of his clients, and to make advances for carrying on his business on condition of receiving a share of the profits, the agreement to be kept secret, was held illegal; *A. v. B.*, May 12, 1832, 10 *S. & D.* 523. See generally, on *pactum de quota litis*, 1594, c. 216; *Macbenzie's Obs.*, p. 289; *Stair*, B. i. tit. 10, § 8; *Bank*, B. i. tit. 11, § 11; *Bell's Illust.*, 49; *Kames' Equity*, 12, 335; *Glassford*, 24th June, 123, 2 *S. & D.* 417.

*Pactum super hereditate viventis*; an agreement to sell a right of succession, during the life of the ancestor, was forbidden by the Roman law, as *contra bonos mores*; but the law of Scotland permits an heir to dispose of his hope of succession during the life of his ancestor. *Stair*, B. i. tit. 10, § 8; *More's Notes*, lxiii.; *Bank*, vol. i., p. 326.

The law of Scotland takes no notice of debts contracted by gaming and betting. See *Gaming and Betting. Wager*. Agreements incentive to crime, or for compounding a crime, or procuring a pardon, cannot be the foundation of a judicial claim. A bond given as the price of prostitution gives no action; but when the bond is given subsequently to the act of connection, as a reparation for the injury sustained, it is valid. There would seem, however, to be an exception to this rule where the grantee is a prostitute, or where she knew the grantor to be married at the time of their connection; although this has not been authoritatively settled. The claim of the children of the connection to implement of the obligation has been admitted in cases in which that of the mother has been rejected. Obligations contracted on an indecent or mischievous consideration are void. No action can be maintained on a debt for spirituous liquors, unless *bona fide* contracted at one time to the amount of twenty shillings, or upwards; and the claim is not valid even as an item in an account, where the liquor delivered at one time, and mentioned in the item, is not to the amount of twenty shillings; 24 *Geo. II.*, c. 40. On this statute, action has been refused on a bill granted for the amount of an account for spirits furnished; *Russel*, 6th July 1808, *Fac. Coll.* All contracts imposing restraints on marriage are void; but an engagement between two persons to intermarry, fortified by an agreement that if either of them shall marry a third party he or she shall forfeit to the other a stipulated sum, has been said to form an exception to the general rule. Bonds or agreements to pay a sum of money, as a consideration for using influence to bring about a particular marriage, called marriage-rage

contracts, are *contra bonos mores*, and will found no action. Restraints on liberty are void, except in particular instances. A man may enter into a contract of service for wages, which will be binding, however long the stipulated term may be. So a man may bind himself not to exercise a trade or profession within certain limits, as within the same parish with the creditor in the obligation, or within half a mile of him, or within ten miles. But when the restriction extends to a whole country, or when it is manifest that the other party has no legitimate interest in the obligation being so strict, the contract is void. By the act 17 and 18 Vict. c. 102, 1854, if any person give, directly or indirectly, any sum of money, or other consideration, on an engagement to procure the return of any person to serve in Parliament, he is guilty of bribery, and any candidate for any place guilty of bribery by himself or his agents, is incapable of sitting in Parliament for such place during the Parliament then in existence. Contracts for defeating the revenue laws are void, at least in so far as relates to the parties privy to the design; and every native of this country is presumed to be acquainted with the laws against smuggling. A foreigner is presumed to be aware of the design to smuggle if he knows that the goods have been packed so as to escape detection, or assists in preparing false papers, or is active in planning or aiding the scheme for evasion, or in landing the goods in this country. Contracts relative to contraband goods are also void. This rule, however, does not hold when the goods are sold abroad, or when they have been bought *bona fide* in a market in this country. See *Smuggling*. It has been repeatedly decided in the English courts, that the sale or assignment of the pay or half-pay of an officer or soldier is void.

At common law the sale of offices of trust is void, except in those cases in which offices are expressly allowed to be sold, and in which the sale takes place under the authority of those who have the power of appointment, as commissions in the army. The common law forbidding the sale of offices has been aided by several statutes. See *Offices*. See generally, on the subject of this article, *Ersk.* B. iii. tit. 1, § 10, *Notes by Mr Ivory*; *Stair*, B. i. tit. 10, § 8; *More's Notes*, v., lxiii.; *Bell's Equity*, 298; *Bell's Princ.* § 36, *et seq.*; *Kames' Equity*, 331-4; *Kames' Stat. Law Abridg. h. t.*; *Brown on Sale*, 113, *et seq.*; *Gardner*, March 11, 1835, 13 *S. & D.* 664; *Johnstone*, Dec. 4, 1835, 14 *D. B. & M.* 106.

**Painting.** Paintings are taken in the civil law, and by our institutional writers, as illustrative of the doctrine of accession. Where the picture is painted on a wall, or other in-

moveable subject, which it is evidently intended to embellish, the possessor of that subject becomes proprietor of the picture also. Where, again, the picture is painted on a moveable board, the board is accessory to the painting. Paintings are sometimes included in a deed of entail; but may, notwithstanding, be attached by the diligence of the creditors of the heir in possession. *Stair*, B. ii. tit. 1, § 39; *More's Notes*, clxxx.; *Bank*, vol. i. p. 509.

**Palinode**; a recantation. In actions for damages on account of slander or defamation raised in the Commissary Court, with concurrence of the procurator-fiscal, it was formerly the practice to conclude not only for damages, expenses, and a fine, but also for a judicial recantation or palinode by the defender. In this palinode the defender set forth, that he had been convicted of scandalising, defaming and injuring the pursuer, and therefore, in obedience to an interlocutor of the commissaries, he declared that he had uttered and published what was false, scandalous, and injurious, and begged pardon of the court, of the pursuer, and of all persons for his offence; *Boyd's Judicial Proceedings*, 117. In more recent practice the conclusion for a palinode has been discountenanced, but it is still held to be a competent conclusion; and since the transference of the jurisdiction of the inferior commissaries to the sheriff, under the act 4 Geo. IV., c. 97, it has been decided, that the sheriff, as commissary, has jurisdiction to entertain an action for slander, concluding, with concurrence of the procurator-fiscal, for damages, fine, and palinode; *Turner v. Cuthbert*, 21st June 1831, 9 S. & D. 774. In that case it was observed by one of the Judges, that "the conclusion for palinode has for a long time past been generally, if not universally, discountenanced and rejected. It exposes a court to the risk of ordaining a man judicially to retract as false a charge which he may conscientiously believe, or even know to be true, though he had no means of proving it." But a majority of the First Division were of a different opinion, holding palinode to be a part of the law of Scotland; and that the question as to its expediency was one for legislative, and not for judicial determination. See *A. S. 21st Feb. 1824*, which recognises a palinode. *Stair*, B. i. tit. 9, § 4; *Balfour's Prac.* 664; *Ersk.* B. i. tit. 5, § 30; *Bank*, vol. ii. p. 548; *Bell's Princ.* § 2043; and other authorities cited in the case of *Turner*.

**Pandects**; are a digest of the whole Roman law made by the order of the Emperor Justinian. See *Roman Law*.

**Panel**. The accused person in a criminal action, from the time of his appearance, is

styled the *panel*. See *Criminal Prosecution*, *Diet*.

**Pannage**. See *Foggage*.

**Pannagium Porcorum**; an old law phrase, signifying the duty given to the King for the pasturage of swine in his forests. *Pannagium* signifies also a part of the King's domain given to a younger son. *Steu*, h. t.

**Papers of a Ship**. See *Ship*, *Capture*, *Reprisals*, *Neutral*.

**Papist**. Many regulations were thought necessary to repress Popery; and they were ratified and revived by the act 1700, c. 3. Papists were disabled from purchasing land by voluntary disposition, either in their own name, or through a trustee. Every grant in breach of the statute was declared void, and the property ordered to remain with the seller, without subjecting the seller to any action for recovery of the price. By the same act, all who profess the Popish religion were declared incapable of succeeding to heritage, if they refused to renounce Popery and sign the formula. And, in such event, the succession is declared to go to the next Protestant heir, who would be entitled to the succession were the Popish heirs naturally dead. The same statute farther enacts, that any person labouring under the repute of being a Jesuit priest, or trafficking priest, and being called upon to purge himself of the suspicion of Popery, according to a form prescribed by the statute, and refusing so to do, may be banished forth of the realm, never to return, under pain of death, while he continues a Papist. These highly penal regulations were repealed by the statute 33 Geo. III., c. 44, which provides a certain form of oath and declaration to be taken by those in Scotland professing the Roman Catholic religion; whereby they are relieved from all pains, penalties, and disabilities imposed, enacted, revived, ratified and confirmed, by the statute 1700, c. 3; and as fully enabled to take by descent, purchase, or otherwise, and to hold, enjoy, alien, settle, and dispose of any real or personal property whatsoever, within that part of Great Britain called Scotland, as any other person or persons whatsoever, anything in the aforesaid act (1700 c. 3), or in any other act or acts of the Parliament of Scotland, contained or implied to the contrary thereof, in any manner, notwithstanding. See also 10 Geo. IV. c. 7, and 7 and 8 Vict. c. 102. *Ersk.* B. ii. tit. 3, § 16, *in note*. See *Roman Catholic*.

**Paraphernalia**; are those moveables which continue the sole property of the wife notwithstanding the marriage. They consist of her body clothes and wearing apparel, with all the ornaments of dress proper to a woman's



person, necklace, ear-rings, breast or arm jewels. Those articles are exempted from the *jus mariti*, and can neither be alienated by the husband, nor attached for his debts. Things of promiscuous use to man and wife, as watches, jewels, medals, plate, and even the repositories for holding paraphernalia, are not paraphernal, unless they have been presented by the husband before or on the marriage-day. The same things presented to the wife after the marriage are not paraphernal,—they are gifts which the husband may revoke; and such things are paraphernal only with respect to the husband who gave them; for, in the event of the wife entering into a second marriage, they are held to be moveables only, and as such fall to the second husband. The present sometimes made by the purchaser to a wife on occasion of her renouncing a life-tenant over her husband's lands, commonly called the *Lady's Gown*, is also, by the custom of Scotland, regarded as paraphernal. See *Lady's Gown*. A wife may effectually impignorate her paraphernalia, in security of her husband's debts, even without his consent; but she cannot validly impignorate even her paraphernalia, in security of her own debts, without her husband's consent; and, if she do so, the impignoration will be null; *Ersk. B. i. tit. 6, §§ 15 and 27. See Jus Mariti. Stair, B. i. tit. 4, § 17; More's Notes, p. xviii.; Bank, i. 129; Bell's Com. i. 632; Bell's Princ. § 1555; Illust. ib.*

**Parceners**; in English law, persons holding land in copartnership, and who may be compelled to make division; *Tomlins' Dict. h. t.* The corresponding Scotch law term is common proprietors. See *Common Property*.

**Pardon**. The Queen, in virtue of her prerogative, has the privilege of extending her royal clemency to those whom penal laws in their strictness may have condemned. This power, however, extends no farther than to liberate the offender from public penalty for his offence; it does not deprive the injured party of his claim of damages; and it is provided by various enactments, that the remission shall not be pleaded until the assythment to the private party be paid. See 1457, c. 74; 1528, c. 7; 1592, c. 155; and 1593, c. 174. It is in the case of pardon, or of the offender having fled from justice, that an assythment is claimable; and in this last case it will be due from the donator of the offender's escheat; for, where the criminal has suffered the pains of law, no assythment is due; *Ersk. B. iv. tit. 4, § 105; Hume, i. 279, et seq., and ii. 476, et seq.; Bank. vol. ii. p. 275; Swint. Abridg. h. t. See Mercy.*

**Parent and Child**. Children are either

lawful or unlawful—that is, are either born in lawful wedlock or legitimated by the subsequent intermarriage of their parents, or they are bastards. See *Bastard. Legitimacy. Legitimation. Filiation*. The obligations arising from this relationship are reciprocal. They are, 1. The obligations of parents to children; and 2. The obligations of children to parents.

1. The father has the sole and absolute right of directing what relates to the person, education, or improvement of the minds of his lawful children; he is bound to support, clothe, and educate them according to their rank and station in life; and the performance of those duties may be judicially enforced. It is sufficient, however, that the parent receive the child into his own house, unless he behave with too great a degree of harshness; in which case the child may be taken from the father, and the father compelled to give a reasonable sum for the maintenance of the child. The father is likewise entitled to the profits of the labour of his child while he remains in family with him, and not forisfamiliated. See *Forisfamiliation*. The father is also the administrator for managing any separate estate belonging to his children during their minority, unless (1.) the estate has flowed from a stranger, and the right of management has been given by the donor to another; or (2.) the donor has excluded the management of the father without naming a curator, in which case a curator must be named by the judge. (3.) By the marriage of a daughter she is put under the curatory of her husband; or (4.) when the child has an action to maintain against the father, in which case a *curator ad litem* will be named by the Court. See *Curatory. Judicial Factor*. The administration of the father is restricted to such of his children as remain in family with him or live at his expense, though at a distance prosecuting their education, or acquiring a profession. The office of administrator belongs to the father alone; it requires no service; it is not necessary that he should take an oath *de fidei*; nor is he bound to find caution for his intrusions, unless his circumstances are low or embarrassed; nor is he obliged to make up an inventory. The presumed affection of a parent, and his consequent interest in the welfare of his child, supersedes the necessity of those guarantees which the law requires from stranger guardians. See *Administrator*. The father is bound by the law of nature to provide for his children after his death, as well as during his lifetime. But this obligation is not enforced by the law, farther than that, where a person leaves heritage, the heir succeeding to him must give an aliment to the younger children,

where they are unable to provide for themselves: thus, sons must be maintained till their majority, and daughters till their marriage. See *Aliment*.

2. Children are morally bound to honour and respect their parents, although that obligation cannot be legally enforced. But the grosser breaches of filial respect and reverence may, under some of the Scotch statutes, be visited with the highest penalty of the law. See *Cursing of Parents*. Children are under an obligation to support their indigent parents, and this obligation may be enforced by law. *Ersk. B. i. tit. 6. § 49; Stair, B. i. tit. 5; More's Notes, p. xxviii.; Bank. i. p. 122, et seq.; Bell's Com. i. 56; Bell's Princ. 444; Kames' Equity (1825), 71. See Father. Children. Aliment. Filiation. Semiplena Probatio. Patria Potestas. Bastard. Marriage.*

**Pares Curis.** *Curia* was the court or place where the superior exercised his power over his vassals; and those vassals, being all equally dependent on their superior, were termed peers, or *pares*; so that the *pares curiæ* were all the vassals holding of any one superior. They formed his court, and in their presence many things relating to the fee and the entry of heirs were transacted. *Ersk. B. ii. tit. 3, § 17; Bell on Completing Titles, 3; Bell on Leases, i. 20; Ross's Lect. ii. 119.*

**Pari Passu.** In a competition of creditors claiming a common fund, those who are preferred equally, or share and share alike, to the fund, are said to be preferred *pari passu*. See *Adjudication. Poiniding. Competition. Preference.*

**Parish.** A parish seems anciently to have signified the diocese of a bishop, though now it signifies the territorial bounds connected with a particular church of the established religion, and for the support of which alone the tithes within those bounds can be allocated. The bounds of each parish are precisely fixed. Hence, in the description contained in the title-deeds of lands, there is joined to the name by which the lands are distinguished the name of the county and parish within which they are locally situated. It had been found necessary in many cases to divide some parishes or to unite others; and powers to that effect were given, by different statutes, to commissioners for the plantation of kirks, &c., as by 1617, c. 3,—1621, c. 5,—1633, c. 19,—1661, c. 61,—1693, c. 23. At last the power of all former commissions was transferred, by 1707, c. 9, to the Court of Session as commissioners; and under that act the judges of that Court are empowered, with the consent of three-fourths of the heritors, to erect new churches and to disjoin parishes. But they may annex or unite two

parishes into one, on cause shown, without the consent of the heritors. By the act 7 and 8 Vict., c. 44, 1844, the consent of the majority of the heritors is sufficient. *Ersk. B. i. tit. 5, § 21; Stair, B. ii. tit. 8, § 3; Bank. ii. p. 4; Bell's Princ. pp. 304, 599, §§ 1132, 2157; Kames' Stat. Law Abridg. h. t. See Disjunction. Union. Annexation. Poor. Kirk-Session. Heritor. Teinds. Minister. Church. Patronage.*

**Park;** in the acceptation of the English law, is a large extent of ground enclosed and privileged for wild beasts of the chase, by royal grant, or by prescription. In Scotland, *park* has no such signification, the synonymous term being *forest*, whereby is meant a large tract of enclosed ground where deer are kept. Woods or parks enclosed by private persons for deer are *juris privati*, and are carried in charters as part of the land disposed, though not expressed. *Ersk. B. ii. tit. 6, § 14; Bank. i. p. 91; Tomlins' Dict. h. t. See Forestry. Deer.*

**Parliament.** The Parliament is the legislative branch of the supreme power of Great Britain. It consists of the Sovereign—the lords spiritual and temporal—and the knights, citizens, and burgesses, representatives of the commons of the realm. The representatives of the commons of the United Kingdom amount in number to 658, distributed in the proportions mentioned in the article *Commons, House of*. As to the manner of electing the representatives of the Scottish peerage and of the commons of Scotland, see *Election Laws. Reform Act*.

In the present article will be considered the assembling of Parliament; the laws and customs of Parliament; the method of conducting business; and the adjournment, prorogation, and dissolution of Parliament.

1. *Of the manner and time of assembling Parliament.*—The Parliament is summoned by a writ from Chancery, in the name of the Sovereign, issued by the advice of the Privy Council. This writ must be issued forty days before the sitting of Parliament; and by practice this writ is extended to fifty days. The calling together of Parliament is part of the royal prerogative, and a power properly and necessarily vested in the Sovereign, as being the only branch of the Legislature which has a separate individual existence. And although there may be instances of Parliaments called without the King's writ, as in the Convention Parliament which restored Charles II., or the Convention of Lords and Commons which called in King William, yet those are exceptions from the rule, justified only by necessity, and beyond the influence of common rules. The Sovereign

reign is, by the law of the realm, bound to convoke a Parliament "every year, or oftener if need be." This has been interpreted by some as if the calling a Parliament every year depended on the necessity of the measure; while, on the other hand, it has been maintained, that it was not the calling of a Parliament annually, but calling it oftener than annually, which was to depend on the state of the times. But, by subsequent statutes, this power has been regulated; and by stat. 6 Will. and Mary, c. 2, it is enacted, that a new Parliament shall be called within three years after the termination of the former one; though, practically, these regulations are of less value, as the Mutiny Act, and Land-tax and Malt-tax Acts, are passed for one year only; in consequence of which the Parliament must necessarily meet for the despatch of business once a year.

2. *Of the laws and customs of Parliament as an aggregate body.*—The power and jurisdiction of Parliament is, by Sir Edward Coke, said to be so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds. It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal—this being, by the British Constitution, the depository of that absolute power which must in all governments reside somewhere. All mischiefs and grievances, operations and remedies, which transcend the ordinary course of law, are within the reach of this tribunal. It can regulate and new-model the succession to the crown; it can alter the established religion; it can change and re-model the constitution of the kingdom, and of Parliament itself. It can, in short, do everything which is not naturally impossible; it is a power uncontrolled by any superior. The High Court of Parliament has its own peculiar law, called the *Lex et consuetudo Parliamenti*; a law to be learned out of the rolls and records of Parliament, and by precedents and experience. Of this law the great maxim is, "That whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere." Hence, the Lords will not suffer the Commons to interfere in settling the election of a peer of Scotland. The Commons will not allow the Lords to judge of the election of a member of their House; nor will either branch permit courts of law to examine the merits of such cases. But the maxims on which they proceed rest entirely with Parliament,

and are not defined and ascertained by precise regulations.

The House of Lords is a distinct court from the Commons for several purposes, and is the sovereign court of justice and dernier resort. This House tries criminal causes or impeachments of the Commons, and has an original jurisdiction for the trial of peers upon indictments found by a grand jury. It also tries causes upon appeal from the Court of Chancery, or upon writs of error to revise judgments in the King's Bench, or by appeal from the Court of Session. All the decrees of the House of Lords are as judgments, and may be executed in England by the Lord Chancellor—in Scotland by the Court of Session. The House of Commons is also a distinct court for many purposes. It examines the rights of election, is entitled to expel its own members, and to commit them to prison. The book of the clerk of the House is a record. The House is also the grand inquest of the kingdom, to present to the Sovereign or Lords public grievances or delinquents; and any member of the House of Commons has the privilege of impeaching a peer. The High Court of Parliament is the supreme court in the kingdom, not only for the making, but for the executing of the laws; by the trial of great and enormous offenders, whether lords or commons, by parliamentary impeachment. Acts of Parliament to attain particular persons of treason or felony, or to inflict pains and penalties, are new laws made *pro re nata*, and by no means an execution of those already in existence. But an impeachment before the Lords, by the Commons of Great Britain in Parliament, is a prosecution proceeding on the known and established law, being a presentment to the supreme court of criminal jurisdiction by the solemn grand inquest of the whole kingdom. The Commons, where a peer is impeached for treason, usually address the Crown to appoint a Lord High Steward, for the greater dignity and regularity of the proceedings, although it has been maintained that the House of Lords may proceed without such an appointment. The privileges of Parliament are large and indefinite; and are preserved indefinite, that their powers may meet all the attempts which may at any time be made, by such expedients as the executive power in bad times may devise, for the purpose of violating the privileges of Parliament. There are, however, certain privileges which are completely ascertained. These are the privileges of speech and of person. The privilege of speech is particularly demanded of the Sovereign in person, by the Speaker of the House of Commons, at the opening of every new Parliament.

But if any member, in the course of a debate, use offensive words, he may be called to the bar to receive a reprimand from the Speaker, or, if the offence be great, he may be sent to the Tower. With regard to privilege of person, it is now confined to freedom from arrest or imprisonment in civil matters; in the case of peers constantly, in that of commons during the sitting of Parliament, and for forty days after each prorogation, and for as many days prior to the day to which the Parliament is prorogued; and after a dissolution, the privilege continues for what is termed a reasonable time. All other privileges which obstruct the course of justice are now abolished by stat. 10 Geo. II. c. 50; whereby it is enacted, that any suit may at any time be brought against any peer or member of Parliament, their servants, or any other person entitled to privilege of Parliament, which shall not be impeded or delayed by pretence of any such privilege; except that the person of a member of the House of Commons shall not thereby be subject to any arrest or imprisonment on any such suit or proceedings.

3. *Of the laws and customs of the House of Lords.*—The Lords are entitled to have the attendance of the Judges of the Courts of Queen's Bench and Common Pleas, and such of the Barons of the Exchequer as are of the degree of the coif, or have been made serjeants-at-law; or likewise of the Queen's counsel, being serjeants, and of the Masters of the Court of Chancery, for their advice in point of law, and for the greater dignity of their proceedings. Every peer may, by license from the Sovereign, appoint any Lord of Parliament his proxy to vote for him in his absence; and even the license seems now to be presumed. A spiritual lord can alone be proxy for a spiritual lord, and a temporal for a temporal lord. These proxies cannot vote in a question of guilty or not guilty; and their authority ceases on the return of the lord by whom they are granted. No peer can hold more than two proxies at the same time. Each peer has a right, by leave of the House, when a vote passes contrary to his sentiments, to enter his dissent, with the grounds thereof, on the journals of the House. This is styled a protest. All bills which, in their consequence, may affect the peerage, by the custom of Parliament originate in the House of Lords, and suffer no changes or amendments in the House of Commons. In its judicial capacity, the House of Lords is the supreme court of judicature in the kingdom. It possesses no original jurisdiction in civil causes, but only by appeal and writ of error, that it may rectify any injustice or mistake committed by the courts of

law. It has, however, an original criminal jurisdiction in the case of impeachment by the Commons, and in the trial of peers.

4. *Of the laws and customs of the House of Commons.*—The Commons, in making and repealing laws, have equal power with the Lords; and it is the ancient indisputable privilege of that House, that all grants of subsidies, or parliamentary aids, shall be first introduced in that House; and all bills imposing taxes on the subject must also originate in the House of Commons, although such bills, in order to their being effectual as acts of Parliament, must have the assent of the other branches of the Legislature. So far is this privilege carried, that the House of Commons will not permit the House of Lords to alter or amend any money-bill; and this extends even to tolls, rates or duties to be collected, or where pecuniary fines are imposed for offences.

5. *The method of conducting business.*—The mode of making laws is much the same in both Houses of Parliament. In each House there is a Speaker. The Speaker of the House of Lords is the Lord Chancellor; but if the seals are not in commission, the House of Lords, it is said, may elect a Speaker. The Speaker of the House of Commons is chosen by the House, and must be approved of by the Sovereign. In this the usage of the two Houses differs—viz., that the Speaker of the House of Commons does not take part in the debate, nor offer his own opinion on the questions before the House; whereas the Speaker of the House of Lords (if a lord of Parliament) may in all cases speak and argue. In either House the voice of the majority binds the whole, and this majority is declared by votes openly given. In the House of Lords, the Speaker gives his vote as one of the peers, and has no casting-vote; and where the votes of the House are equal, the opinion of the non-contents is the prevailing one. Hence, were the peers equally divided in opinion on an appeal case, the judgment of the Court below would remain unaltered. In the House of Commons, again, the Speaker never votes excepting where there is an equality without his vote, in which case his vote creates a majority in favour of that side to which he gives it. In the House of Commons there is no precedence as in the House of Lords, only the Speaker has, towards the upper end, a seat or chair in the middle of the House; and the clerk, with his assistant, sits near him at the table, just below the chair. The Lords have robes; the members of the House of Commons have none, except the Speaker and clerks, who wear wigs and gowns, as English lawyers do during term-time.

The members of the House of Commons

are not at liberty to depart from Parliament without leave of the Speaker and Commons assembled; and the leave must be entered in the book of the clerk of Parliament. A call of the House is intended for the purpose of discovering what members are absent without leave or just cause. On the calling over the names, such as are absent are marked; and the defaulters being again called over on the same day, or the day after, and not appearing, are summoned by the serjeant-at-arms. Forty members are requisite to constitute a House for despatch of business. All bills, motions, and petitions, whether favourably or unfavourably received, and whether or not the bills pass into statutes, are, by order of Parliament, entered on the Parliament rolls. The Speaker of the House of Commons does not persuade or dissuade in passing a bill; he gives a short account of it, with a view to explanation. If any question is put, he may explain, but he enters into no argument. When he desires to speak, he ought to be heard without interruption; and when any other member stands up to speak at the same time, he ought to give way to the Speaker. When two members stand up to speak, he who is to speak against the bill should be first heard, or he who first caught the eye of the Speaker. No member can be silenced unless by the Speaker; though, if any person speak impertinently, or beside the question, the Speaker may interrupt him, and ask the pleasure of the House, whether he shall be further heard. Whoever hisses or disturbs any person in his speech is answerable at the bar of the House.

In enacting laws and other proceedings in Parliament, the Lords give their voices in their House from *puisse* lord *seriatim*, by the word *content* or *not content*. The manner of voting in the House of Commons is by *yea* or *no*; and when there is any difficulty in determining on which side the majority is, the House divides, the *ayes* going out and the *noes* staying in; and four tellers are appointed by the Speaker, two on each side, and the tellers report to the Speaker the numbers. When a bill of a private nature is to be brought into the House, a petition must be presented by one of the members of the House of Commons. The petition, if founded on facts, is sent to a committee, who inquire into the facts, and report to the House; and then, or if no investigation be necessary upon the bill, leave is given to bring in the bill. In public matters, the bill is brought in by a motion, and without the necessity of a petition. Formerly, all bills were drawn in the form of petitions, which were entered on the Parliament rolls, with the King's answer subjoined; and at the end of each Parliament the Judges

drew them into the form of a statute, which was entered on the Statute Roll. In the reign of Henry VI., bills in the form of acts (according to the modern custom) were first introduced. Any person may move for leave to bring in a bill, except it be for imposing a tax (which can be done only by an order of the House). When the motion is seconded, and leave given, the mover and seconder are ordered to prepare and bring in the bill. When prepared, it is drawn out on paper, with blanks wherever any point is dubious, or where blanks or sums are to be filled up. It is read a first time, and at a convenient distance a second time. After each reading, the Speaker states to the House the substance of the bill, and puts the question, whether it shall proceed any further. The introducing of the bill may be opposed, as the bill itself may be at either of the readings; and if the opposition succeeds, the bill must be dropped for that session. If the bill passes the second reading, it is committed—that is, referred to a committee, which is either selected in matters of little moment, or where the measure is of importance the House resolves itself into a committee of the whole House, which is done by the Speaker quitting the chair, and a member being appointed as chairman. The Speaker, in a committee of the whole House, may speak and vote as any other member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new-modelled. After the bill has been gone through, the chairman reports it to the House, with such amendments as the committee have made; and then the House reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. When the House has come to an opinion on the various points, the bill is ordered to be engrossed, or written in a strong gross hand, on one or more long rolls of parchment sewed together. This being done, the bill is read a third time, and amendments are sometimes made even then; and if a new clause be added, it is done by tacking a new piece of parchment to the bill, which is called a  *rider* . The Speaker then once more states the nature of the bill, and, holding it up in his hands, puts the question, Whether the bill shall pass? If it be agreed to pass the bill, the title of it is settled, and one of the members is commissioned to carry it up to the Lords, and to desire their concurrence. This member, attended by other members of the House, carries the bill to the bar of the House of Lords, and there delivers it to their Speaker, who comes from the woolstack to receive it.

The bill then passes through the same forms in the House of Lords which it has

passed in the House of Commons, except the engrossing. If it be rejected, no further notice is taken of it, in order to prevent unbecoming altercations between the two Houses; but, if it be passed by the Lords, they send a message to the Commons by two Masters of Chancery, or, in matters of great moment, by two of the Judges, that they have agreed to the bill; and if no amendment has been made, it remains with them; but if amendments be made, they are sent down with the bill, to receive the concurrence of the Commons. Where the Commons do not agree to the amendments, a conference usually takes place between members chosen from either House, who meet and debate the matter. If, in consequence of this conference, the Commons agree to the amendments, the bill is sent back to the Lords by one of the members, with a message to acquaint them therewith; but should both Houses remain inflexible, the bill is dropped. When the bill originates in the House of Lords, the same form takes place; but when an act of grace or pardon is passed, it is signed by the Sovereign, and then read over in each of the two Houses of Parliament, without any new engrossing or amendment; and where both Houses have agreed to a bill, it is deposited in the House of Lords, there to await the royal assent, unless it be a money-bill, which, after receiving the concurrence of the Lords, is sent back to the House of Commons.

The royal assent may be given in two ways:—1. By the Sovereign in person. In this case the Queen goes to the House of Lords in her royal robes, with the crown on her head; and being seated on the throne, a message is sent to require the presence of the Commons, who appear at the bar. The titles of all the bills which have been passed are then read, and her answer is declared by the clerk of the Parliament in Norman French. In a public bill, where the Sovereign consents, the clerk declares, "*La Reigne le veut*," The Queen wills it. If it be a private bill, the clerk repeats, "*Soit fait comme il est désiré*," Be it as it is desired. The refusal of the royal assent is expressed in these terms, "*La Reigne s'avisera*," The Queen will consider of it. When a bill of supply is granted, it is carried up and presented to the Queen by the Speaker of the House of Commons, and the royal assent is then expressed, "*La Reigne remercie ses loyal sujets, accepte leur benevolence et aussi le veut*," The Queen thanks her loyal subjects, accepts their benevolence, and wills it to be so. Where it is an act of grace, which originates with the Sovereign, and has the royal assent in its first stage, the clerk of Parliament pronounces the gratitude of the subjects in these terms, "*Les Prelats,*

*Seigneurs, et Commons, en ce present Parliament assemblez, au nom de tous vous autres sujets, remercient tres humblement votre Majesté, et prient à Dieu vous donner en santé bonne vie et longue*," The Prelates, Lords and Commons, in this present Parliament assembled, in the name of all your other subjects, most humbly thank your Majesty, and pray to God to grant you in health and wealth long to live. 2. The royal assent may be given by letters-patent under the great seal, signed with the Sovereign's hand, and notified in her absence to both Houses assembled in the House of Lords. When the bill has received the royal assent in any of those ways, it is then, and not before, a statute or act of Parliament, and is placed amongst the records of the kingdom.

6. *Of the adjournment, prorogation, and dissolution of Parliament.*—An adjournment is no more than a continuance of the session from one day to another, as the word itself imports; and this is done by the authority of each House separately every day, and sometimes for a fortnight, or even a month together, as at Christmas or Easter, or upon other particular occasions; but the adjournment of one House is no adjournment of the other. It has also been usual, on the suggestion of the Sovereign, for both Houses to adjourn themselves for the time pointed out by her Majesty; and the advantage of an adjournment in place of a prorogation is, that everything remains as it was, and may be taken up on the meeting of Parliament: whereas by a prorogation the session is at an end, and the bills at that time in their progress are lost, and must be begun of new. A prorogation is the continuance of the Parliament from one session to another, and is made by the royal authority, expressed by the Lord Chancellor, or by a commission from the Crown, or by royal proclamation. At the beginning of a new Parliament, when it is not intended that Parliament should meet for the despatch of business, at the return of the writ, the practice is to prorogue Parliament by a writ of prorogation, which is read by the Lord Chancellor in the House of Lords on the day of return of the summons; and notice is given by a proclamation when Parliament is to proceed to business on the day to which it stands prorogued. Both Houses are prorogued by these writs, it not being a prorogation of either House, but of Parliament. The session is never understood to be at an end until it is prorogued. All orders of Parliament are determined by prorogation; and a person taken into custody by order of Parliament may, after prorogation, be discharged on a *habeas corpus*; but impeachments brought up by the Commons, and

all cases of appeal and writs of error, continue in the state in which they were at the prorogation or dissolution of Parliament. Dissolution is the civil death of Parliament; and this may be effected in three ways:—1. By the Sovereign's will, expressed in person, or by representation; and this is a branch of the royal prerogative. 2. Parliament may be dissolved by the demise of the Crown; and this dissolution must take place within six months after that event, unless the succeeding Sovereign shall sooner dissolve the Parliament. If, at the time of the demise, Parliament be prorogued, it is ordered instantly to meet; and should Parliament have been dissolved, the last Parliament is instantly to re-assemble, and become again a Parliament for six months, or until dissolved by the Sovereign; *stat. 6 Anne, c. 7.* 3. Parliament may dissolve by length of time; for, as the matter is now ordered, it must die a natural death at the end of every seventh year, if not sooner dissolved. *Tomlins' Dict. h. t. See Amendment. Commons, House of Election Law.*

**Parochial Relief;** is a disqualification for registration as a voter. See *Alms.*

**Parochus.** See *Decimæ debentur parochi.*

**Parole Proof;** is evidence by the oaths of witnesses, in contradistinction to evidence by writ or oath of party. See *Evidence, and authorities there cited.*

**Parricide;** the murder of a parent. This is a crime so monstrous and unnatural as to have excited the just indignation of all Legislatures; and by the law of Scotland it is punished with more than ordinary severity. In addition to the punishment of death, it is ordered, by the act 1594, c. 220, that he who has slain "his father or mother, gudschir or gudedame," shall suffer a total corruption of blood, *in linea recta*, and be "disherished in all time thereafter fra their lands, heritages, tacks, possessions," which are to devolve on the next collateral relation, in the same manner as if the direct line had failed. These terms, however, do not comprehend the offence of killing father or mother by affinity. To have the effect of disinheriting the posterity of a parricide, it has been held necessary that he be convicted by a jury; it not being sufficient that he has been fugitated for non-appearance. In some cases of conviction for this crime, the right-hand of the criminal has been struck off before he was executed. *Hume, i. 285; Ersk. B. iv. tit. 4, § 47; Stair, B. iii. tit. 5, § 35; Bank. ii. 331; Kames' Stat. Law Abridg. h. t.*

**Parsonage Teinds;** were those tithes which belonged to the parson; and they consisted of the tithes of corn, or of wheat, barley, oats, peas, &c. They are termed

*decimæ rectoriæ* in our Latin charters, and sometimes *decimæ garbales.* *Stair, B. iv. tit. 25, § 10; More's Notes, cccxxi.; Ersk. B. ii. tit. 10, §§ 12, 33; Hutch. Justice, ii. 349; Connell on Tithes, i. 125; on Parishes, 303, 359. See Teinds. Decimæ Garbales.*

**Part and Pertinent.** Lands are generally disposed with all parts and pertinent thereto belonging; and the effect of that expression is often very important. Thus, it may import a conveyance of lands, or rights of servitude, which have been possessed for forty years as part and pertinent of the principal subject conveyed. So, also, this expression carries everything which, from its close connection with land, falls properly under the description of part and pertinent; hence, natural fruits, before they are separated, as fruit, natural grass, &c., are deemed part and pertinent. In the same way, woods or deer-parks are *juris privati*, and are carried as part and pertinent; so is a seat in a church, or a burial-ground. But a steilblow stocking, unless the lands have been sold on a rental, does not accompany the lands as part and pertinent. *Ersk. B. ii. tit. 5, § 3, et seq.; Stair, B. ii. tit. 3, § 60, et seq.; More's Notes, p. cc.; Bank. i. p. 592, et seq.; Bell's Princ. § 739; Illust. ib. See Commonly. Bounding Charter.*

**Partes Soli.** See *Part and Pertinent.*

**Partial Confirmation.** See *Confirmation.*

**Partial Counsel;** is one of the circumstances which throws discredit upon a witness's testimony. It is no disqualification that the witness has been the informer against the panel, even where he is not the injured party, or that he has endeavoured, by fair means, to support his evidence by that of others. Neither is suspicion thrown upon the testimony of a procurator-fiscal, sheriff, magistrate, police or sheriff officer, because he discharges his duty by making inquiries, or conducting a precognition against the accused. It is a good objection to the credibility of a witness, that he has been guilty of undue and illegal agency against the panel. In civil causes, instructing a witness what to say, or telling him what has been proved by other witnesses, or speaking to him regarding the cause after citation, renders him inadmissible; but the presence of a person in his official capacity, while a witness is under examination, infers no disqualification. Neither will the circumstance of a witness drawing up a written statement of the facts known to him, at the desire of the party, constitute a ground of exclusion. Agency was formerly a ground of exclusion of a witness; but by the act 16 and 17 Vict. c. 20, 1853, this ground was removed, except in consistent causes. *Stair, B. iv. tit. 43, § 9; More's*

*Notes*, cccxciv.; *Ersk. B. iv. tit. 2, § 28*; *Bell's Princ. § 2313*; *Tait on Evidence*, 368; *Macfarlane's Jury Prac.* 156. See *Evidence*. Partial counsel is a ground of declinature of a judge. *Maclaurin's Sheriff Prac.* 41. See *Declinature. Evidence*.

**Partial Loss.** See *Insurance*.

**Partial Payment.** No one is bound to accept part-payment of a debt; and the offer of part-payment has no effect in interrupting *mora*. But a creditor in two or more separate debts cannot refuse the payment of any one of those debts, though the debtor should decline to clear off even the interest on the others. It is a general rule, that payment of part of a debt extinguishes the debt to that extent; and the claim of the creditor receiving such payment from his debtor is, in ranking on his bankrupt estate, limited to the balance. This rule holds, whether the partial payment was made by the bankrupt himself, or by a solvent co-obligant. But partial payment, although it may diminish the debt, has no such effect on a real security given for it by way of pledge. Doubts were at one time entertained, whether partial payment to an adjudger did not diminish the security; but it is now settled, that notwithstanding such partial payment, the adjudger is entitled to rank for the undiminished amount of his original claim in a *pari passu* ranking of adjudgers; *Ersk. ii. 12, 67*. See also *Dalrymple's Trustees v. Cuthbertson*, May 18, 1825, 4 S. 16; and 2 *Bell's Com.* p. 532. A landlord may refuse part-payment of rent. The holder of a bill is not bound to take less than the whole sum contained in the bill; but he is entitled to take a partial payment from the acceptor, without cutting off his claim of recourse against the other parties, provided he protest the bill, in so far as it is not paid, and in other respects negotiate the bill duly. Suing one of the obligants in a promissory-note, and thereby receiving part of the debt in the note, does not discharge the other obligant. Partial payment by an indorser has been held equivalent to a waiver of notice. A partial payment by the acceptor precludes the holder from suing either the drawer or indorsers for more than the balance. And although there was at one time some doubt upon the point, it has been decided, that the payment of part of a bill by the drawer precludes the holder from suing the acceptor for more than the balance; *Thomson*, 26th Jan. 1819, cited in *Thomson on Bills*, p. 583. Partial payments made to account of a debt should be noticed in the summons; *Jurid. Styles*, iii. 26. Partial payments should also be mentioned in letters of horn-ing; *ib. pp.* 581 and 605, *Notes*. Partial payments made by the debtor interrupt the

long prescription; but none of the short prescriptions of debt are interrupted by partial payments. Yet markings of partial payments to account, made and entered in the debtor's handwriting, after a bill has undergone the sexennial limitation, amount to an acknowledgment by the debtor's writ that the principal sum was due after the six years, and therefore afford evidence that it is still resting-owing, unless he proves the contrary. See *Ersk. B. iii. tit. 4, § 1*; *tit. 7, § 39*; *Bell's Com.* ii. 427, 531; *Thomson on Bills*, 394, 524-8, 582, 637, 745. See *Payment. Indefinite Payment*.

**Partibus**; is a note written on the margin of a summons, or of notes of advocacy or suspension, when lodged for calling, containing the name and designation, in plain and legible writing, of the pursuer, advocator, or suspender; or of each pursuer, advocator, or suspender, if there be only two; or if more, the name and designation of the party first named, with the words, "and others." And if the defenders, respondents, or chargers, are not more than three, their names and designations, one or more, are inserted in the *partibus*; but if there be more, the *partibus* contains the name of the party first named, with the words, "and others, as per roll," referring to a separate roll of all the defenders, respondents, or chargers. The *partibus* must also contain the names of the pursuer's, advocator's, or suspender's counsel and agent. As it is from this *partibus* that all the entries in the calling lists, rolls, and minute-book are made, it is of great consequence that it be perfectly correct. See *A. S. 10th March 1772*; *A. S. 11th July 1828, § 27*. See also *Shand's Prac.* 265, *et seq.*; *Maclaurin's Form of Process*, 93. See *Calling a Summons*.

**Particata**; in old law language, a rood of land. Three bere corns, without tails, set together, in length make an inch, one of which corns should be taken off the mid-rig, one off the side of the rig, and one off the furrow. Twelve inches make a foot. Three feet and an inch make an ell. Six ells make a fall; and six ells long by six broad make a square fall or rood. *Skene, h. t.*

**Particular Average.** See *Average*.

**Partnership.** See *Society*.

**Passage.** See *Road. Ish and Entry*.

**Passengers.** As to the rights and liabilities of passengers by land and sea, see the articles *Nautæ, Caupones. Public Carriages. Luggage. Stage-Coaches*.

**Passes for Ships.** See *Ship. Prize Law. Capture*.

**Passive Titles.** By the law of Scotland, the whole property of a deceased person is liable for all the debts he may have contracted; and the heir who takes up the succession of the deceased thereby incurs a per-



sonal liability for his debts and obligations. Anciently, it would appear that the responsibility of the heir extended no farther than to the value of the property to which he succeeded. But this gave facilities to the heir for secreting much of the deceased's property, and thereby defrauding creditors; and in order to obviate such frauds, certain acts on the part of the heir are held sufficient in law to render him universally responsible for the debts of the ancestor. This has been termed a passive title, by which the heir, without acquiring an active title, as by service or confirmation, tacitly and by implication subjects himself to the responsibilities belonging to the character of heir. All passive representation was founded on a presumption of fraud on the part of the heir; and therefore, where an heir was desirous of intruding and fairly accounting for his intrusions to the creditors of the ancestor, he might do so by making an inventory of the heritable estate of the deceased, and serving with reference to such inventory, technically called *entry cum beneficio inventarii*. The ancient law has been restored by the act 10 and 11 Vict. c. 47, 1847, which limits the responsibility of an heir expeding a special service to the value of the lands embraced by the service. By the same act, the representation under a general service may be limited to the lands specified. With regard to moveables, where the heir chooses to pursue the regular method, he is accountable only for the effects confirmed; and the inclination of the more recent decisions is in every case, whether relating to heritable or to moveable succession, to restrict the responsibility to the value of the succession, wherever fraud is not imputable to the heir. See *Beneficium Inventarii*.

The passive titles which have been introduced for the security of creditors, are, I. GENERAL: as, 1. *Gestio pro hærede*; 2. *Præceptio hæreditatis*; and, 3. Certain statutory or presumptive passive titles. Or, II. PARTIAL: as, 1. By stating a peremptory defence; or, 2. By failing to renounce. The only passive title relating to moveable succession is vitious intromission. A few words will explain, sufficiently for the present purpose, the grounds and nature of those passive titles:—

### I. GENERAL PASSIVE TITLES.

#### 1. *Gestio pro Hærede*.

*Gestio pro hærede*, or behaviour as an heir, signifies the heir's behaving or conducting himself in such a manner, with respect to his predecessor's heritage, as none but the heir is legally entitled to do. See *Behaviour as Heir*.

#### 2. *Præceptio Hæreditatis*.

This passive title may be incurred where

the heir-apparent accepts from his ancestor a gratuitous right to the heritage, or any part of it, to which he himself might have succeeded as heir. It is called *præceptio hæreditatis*, because it is a taking of the succession prematurely, and before it has opened to the heir by his ancestor's death. The effect of this anticipation is to render the heir liable for the debts of his predecessor contracted prior to the date of the gift. But should the disposition to the heir remain latent, and should no infestment be taken upon it, it may be reduced on the head of fraud by posterior creditors of the person in possession. In order to subject the heir in this passive title, the grant must be gratuitous; for there is nothing to prevent a fair sale to the heir for an adequate price, provided evidence of the onerosity of the transaction be preserved, and that there be no room for challenge under the act 1621, c. 18. See *Conjunct and Confident*. When a right of this kind is given in implement of an obligation under a marriage-contract, its effect, as regards the passive title, depends on the fact whether the contract creates a *jus crediti* in the heir, or a mere *spes successiois*. Where the marriage-contract vests a *jus crediti* in the heir, as, for example, when it contains an obligation to infest the heir of the marriage against a certain day, the heir, in that case, incurs no passive title by accepting the conveyance from his father. On the other hand, where the heir has a mere *spes*, he will incur the passive title by accepting a gratuitous conveyance from his father. This passive title may be incurred by the mediate as well as the immediate apparent heir in the direct line. Thus, a proprietor cannot convey gratuitously to his grandson any more than he can convey to his son, the father of that grandson. But, in the case of a gratuitous right granted to a brother by one who has no issue, the brother, though next in succession at the date of the grant, is not liable *præceptione*; yet a daughter (though there might have been a male heir at the death of the father) was rendered liable *præceptione* for accepting of a disposition from her father. The conveyance of heritage, or an assignment to a loan, in the same way with a disposition to lands, falls under this passive title; but a conveyance of moveables to the heir in heritage has not the same effect. The heir who incurs the passive title of *præceptio hæreditatis* is no farther liable, in consequence of his acceptance, than he would have been had he, of that date, entered heir to the granter, so as to subject himself to the debts at that time chargeable against the granter. It may therefore be doubted whether he would now be held liable beyond the value of the subject received from his ancestor. The heir has no

concern with posterior contractions; not even with those contracted between the date of the right and the infestment following thereon. Hence, the heir is called *successor titulo lucrativo post contractum debitum*. *Ersk. B. iii. tit. 8, § 87, et seq.; Stair, B. iii. tit. 5, §§ 10, 14, and tit. 7; Morre's Notes, p. cccxxviii; Ersk. B. iii. tit. 8, § 87, et seq.; Bank. ii. 374; Bell's Com. i. 660; Bell's Princ. § 1918; Sandford on Heritable Succession, ii. 90-4; Brown's Synop. 1473, 1549; S. & D. xiii. 31.*

The passive titles of *gestio pro hærede* and *præceptio hæreditatis* agree in this, that neither of them can affect the heir, unless the subjects be such as, on the ancestor's death, he is entitled to take up *qua* heir. So much is this the case, that when a right is taken by a father, not to himself, but to his son, as the son does not take the property as heir but as donee, he is not liable on either of these passive titles. They farther agree in this, that neither title can be extended beyond the effect which would have been produced by the actual entry of the heir, so as to entitle him to the benefit of discussion and an action of relief against executors, or any other order of heirs, primarily liable in the debts he may have paid; and, lastly, they agree in this, that in both some intromission after the death of the ancestor must appear. These two passive titles differ, however, in so far, that behaviour as heir, as being intromission without the order of law, is a *quasi delict*; and therefore, unless an action has been raised against the heir during his lifetime, the action cannot be brought against those who may succeed to him; because no action founded on a delinquency is transmitted against heirs, where there has not been litiscontestation while the delinquent was alive. But the *præceptio hæreditatis* is considered as equivalent to an entry as heir, by which the heir enters into an implied contract with the creditors, and undertakes the burden of the ancestor's debts; and all obligations arising *ex contractu* are transmissible against heirs. *Ersk. B. iii. tit. 8, §§ 91, 92.*

### 3. Statutory Passive Titles.

1. *An adjudication on a trust-bond.*—This is an expedient whereby an heir, who is uncertain as to the state in which his ancestor has left his affairs, and of the obligations which he may incur by entering heir, instead of taking up the succession, executes a bond in favour of a confidential friend, acknowledging a debt to him, and at the same time obtaining a back-bond from the confidential person explanatory of the nature of the transaction. The nominal creditor in this *trust-bond*, as it is called, then charges the heir to enter to his predecessor in the usual form; the heir re-

nounces; and the nominal creditor, as creditor of the heir, obtains a decree of constitution, and thereafter an adjudication against the *hæreditas jacens* of the deceased. On this the trustee is infest; and then, in implement of the back-bond, he disposes the subject to which he has thus acquired a title to the heir. To prevent the bad consequences resulting to creditors from this device, it was provided, by the act 1695, c. 24, that if an heir, without being served, shall possess any part of his ancestor's estate, or purchase any right, redeemable or irredeemable, or any legal diligence affecting it, otherwise than as highest offerer, without collusion, at a judicial sale, such possession or purchase shall be deemed behaviour as heir. *Sandford on Herit. Success. ii. 9, 16, et seq.; Jurid. Styles, 2d. edit. ii. 96; Ersk. B. iii. tit. 8, § 72, and Note by Mr Ivory; Bell's Princ. § 834; Sandford on Entails, 349.*

2. *The passing by an heir three years in possession.*—This passive title is established by the act 1695, c. 24, and it arises where an heir, passing by a preceding heir who had possessed as apparent heir for the period of three years, serves to a more remote heir. Thus, if he pass by his father, and enter as heir to his grandfather, or succeed to one more remote, upon an adjudication proceeding on his trust-bond, the effect of this is to render the heir so passing by liable for the debts and deeds of the heir passed by, to the value of the estate to which he enters. In the sense of this act, the obligations come under by a marriage-contract will be effectual against the estate, because they are accounted onerous; but the heir passing by is not bound to give effect to the gratuitous deeds of the interjected apparent heir. Where, however, the heir, without entering, attains possession of the estate, he may continue the possession without falling under the statute, or incurring a passive title. *Ersk. B. iii. tit. 8, § 94; Bell's Com. i. 664; Bell's Princ. § 1929; Illust. ib.; Kames' Equity, 124.*

3. Under the same statute, 1695, c. 24, it is declared to constitute a passive title, that an apparent heir shall possess any part of the ancestor's estate, except upon lawful purchase by public roup, under a title vested in the person of any such near relation as the apparent heir may also succeed to as heir. *Ersk. B. iii. tit. 8, § 94. See Apparent Heir.*

## II. PARTIAL PASSIVE TITLES.

### 1. *By stating a peremptory defence.*

When an heir is cited as representing his ancestor, he incurs a passive title if he states a peremptory defence. For example, were he to state that the debt has been paid or ex-

tinguished, or that the debt is prescribed, he would incur a passive title, because, unless in the character of heir, he has no title to state such a plea. But this extends only to the particular debt, and does not infer a general passive title. *Ersk. B. iii. tit. 8, § 93.*

## 2. Where the heir neglects to renounce.

Where an heir is charged to enter, if he does not mean to represent the deceased, he ought to renounce the succession; and if he neglects to do so, he incurs a passive title, and may be pursued personally for the debt: this, in the same manner with the former, infers no farther obligation than in regard to the particular debt charged on. This renunciation may be made and produced in the process of constitution at any time before decree is given, or even after decree has been pronounced, if it has been pronounced in absence. *Ersk. ib.*

## VITIOUS INTROMISSION.

*Vituous intromission* is the only passive title recognised in moveable succession. It signifies an unwarrantable intermeddling with the moveable estate of a defunct without the order of law. This passive title is not, like those relating to heritage, limited to the persons legally entitled to the succession, but may be incurred by any one whose opportunities allow of his intromitting with the deceased's moveable effects; and the mere intermeddling is sufficient, although the article should not be applied to any use by the intromitter. So also, an executor confirmed, intromitting with more than is given up in the inventory in the confirmation, is accounted a vitious intromitter. But this passive title has no place—

1. Where the article intromitted with had ceased to be part of the defunct's estate prior to the intromission. By the stat. 1696, c. 20, the confirmation of an executor-creditor, as being of the nature of a step of diligence, does not screen from the passive title a third party intermeddling, unless he claim through the creditor confirmed, or unless his intromission has been merely with the special subject confirmed. 2. The passive title is excluded by any probable title in the intromitter sufficient to remove the presumption of fraud on which this passive title rests; and necessary intromission by the members of the deceased's family, *custodiæ causa*, infers no passive title. *Lastly*, The passive title is excluded by the intromitter's confirmation as executor, whereby he incurs an obligation to account to the extent of the inventory confirmed; and where the intromitter is a relic, or one of the next of kin, her or his confirmation, at any time within a year after the death of the defunct, will exclude the passive title, notwithstanding

a prior citation. As this passive title is intended for the benefit of creditors, it cannot be pleaded by legatees; and as it arises *ex delicto*, it cannot be founded on against the heir of the intromitter; but if the action be restricted to simple restitution, it may be insisted in against the intromitter's representative. It also follows, from this being a delict, that all the vitious intromitters are liable *singuli in solidum* to the creditors—the intromitter who pays having a claim of relief *pro rata* against his co-delinquents; and if the creditor sue the intromitters jointly in the same summons, they are liable *pro virili*—i. e., in equal sums according to their number, not according to the extent of their intromissions; *Ersk. B. iii. tit. 9, § 49, et seq.* The Act of Sederunt 23d Feb. 1692 establishes a presumptive vitious intromission against those who, on the death of a person who is succeeded by a minor, fail to seal up his repositories as soon as he becomes insensible. Where the defunct dies in his own house, this must be done by his nearest relations. Where he dies in the house of another, the duty devolves on the master or mistress of the house, who must deliver the keys of his repositories to the judge-ordinary, for behoof of all concerned. *Ersk. B. iii. tit. 9, § 49, et seq.; Bank. ii. 420; Bell's Com. i. 661; Bell's Princ. § 1921; Jurid. Styles, 2d edit. iii. 108, 112; Stair, B. iii. tit. 9; More's Notes, p. cccxiv. See Executor.*

**Pasturage**; is a known rural servitude, whereby the proprietor of the dominant tenement is entitled to pasture a certain number of his cattle on the grass grounds of the servient tenement. This right may be constituted either by express grant or by prescription. The right of common pasturage is often given generally in the original feu-right, and in that case the extent of the burden will be explained by possession; or the grant specifies the ground over which the servitude is to extend. Where the right extends over a common, and is indefinite as to the number of cattle to be pastured, the right is not unlimited, but will be regulated as to its extent by the number of cattle which each of the dominant proprietors can fodder during the winter on the dominant lands. The action whereby the parties having servitudes of pasturage over a common adjust their rights is called an action of *sowming and rouming*. Common pasturage may be constituted by prescription—i. e., by the acquirer's uninterrupted exercise of the right for forty years on lands contiguous to his own, under a general clause in his charter *cum communi pastura*; or even by the common clause of *part and pertinent*, without a clause of pasturage. The proprietor of the dominant tenement is not entitled to communicate the servitude to cattle and sheep

not his own; thus, he cannot let the right of pasturage to drovers or others not actually possessing the dominant lands. The proprietor of the servient tenement may plough portions of the ground over which the servitude extends, provided he leave enough in grass for the use of the dominant tenement. *Ersk. B. ii. tit. 9, § 14, et seq.; Bank. B. ii. tit. 7, § 32; Bell's Princ. § 1013; Illust. ib.; Ross's Lect. ii. 176; Bell on Leases, ii. 280; Stair, B. ii. tit. 3, § 73; tit. 7, § 14. See Sowing and Rowing.*

**Patents.** A letter-patent royal is a grant from the Crown under the great seal. The term *patent* is, however, generally understood to mean a patent for an invention. Patents for inventions were expressly excepted from the operation of the statute 21 James I. c. 3, against monopolies. See *Monopolies*. The 6th section declares, that the act shall not extend to letters-patent or grants of privilege for fourteen years, "of the sole working or making of new manufactures within the realm, to the true and first inventor and inventors of such manufactures, which others at the time shall not use, so as also they be not contrary to the law, nor mischievous to the State, by raising prices of commodities at home, or hurt of trade, or generally inconvenient. The said fourteen years to be accounted from the date of the first letters-patent, or grants of such hereafter to be made; but that the same shall be of such force as they should be if this act had not been made, and of none other." The act 5 and 6 Will. IV. c. 83 was passed to amend the laws touching letters-patent for inventions, and to afford better protection to the patentees. The following are the provisions of this act:—Any person who, as grantee, assignee, or otherwise, has obtained, or shall obtain, letters-patent, may enter with the clerk of the patents of England, Scotland, or Ireland, having first obtained the leave of the Attorney-General or Solicitor-General in the case of an English patent; of the Lord Advocate or Solicitor-General of Scotland in the case of a Scotch patent; or of the Attorney or Solicitor-General for Ireland in the case of an Irish patent—certified by his *fiat* and signature—a disclaimer of any part of either the title of the invention or of the specification, stating the reason for such disclaimer; or he may, with the same leave, enter a memorandum of any alteration in the title or specification, provided it be not such a disclaimer or alteration as shall extend the exclusive right granted by the letters-patent. This disclaimer or memorandum of alteration being filed by the clerk of the patents, and enrolled with the specification, is held as part of the letters-patent or specification in all courts whatever.

The specification here mentioned means a description of the invention, which, in terms of an act of Queen Anne, must be given in and enrolled in Chancery. The construction of the words in specifications is very strict. The invention must be fully, fairly, and intelligibly described, and must exactly accord with the patent. The method and effect must be fully detailed, and nothing useful omitted, and the most advantageous mode must be stated. The terms employed are interpreted according to the acceptance of practical men at the time of the enrolment. In order to give time for preparing a proper specification, the application for a patent may be preceded by a *caveat* to prevent surprise; but this will not prevent disclosure, nor debar other inventors—the preference of the pretensions of competitors being determined on proof of their rights. The act provides, that any person may enter a *caveat* against a disclaimer or alteration, which gives the party entering it a right to have notice of the application being heard by the Attorney-General or Solicitor-General or Lord Advocate, respectively. No disclaimer or alteration can be received in evidence in any action or suit (except in proceedings by *scire facias*) pending at the time when such disclaimer or alteration was enrolled; but in such actions the original title and specification alone are received. The Attorney or Solicitor General or Lord Advocate may, before granting his *fiat*, require the party applying for it to advertise his disclaimer or alteration, as may seem right; and if such advertisement is required, the *fiat* must certify that it has been duly made. If in any suit it be proved or specially found by the verdict of a jury, that any person who has obtained letters-patent for an invention, or supposed invention, was not the first inventor of it, or of part of it, by reason of some other person having invented or used it, or some part of it, before the date of the letters-patent; or if the patentee or his assignees discover that some other person had, unknown to him, invented it, he, the patentee, or his assignees, may petition her Majesty in Council to confirm the letters-patent, or grant new letters-patent. The matter of this petition is heard before the judicial committee of the Privy Council; and this committee, upon examining the matter, and being satisfied that the patentee believed himself to be the first and original inventor, and that the invention, or part of it, had not been publicly and generally used before the date of the first letters-patent, may report to her Majesty their opinion that the prayer of the petition ought to be complied with, and her Majesty may, if she think fit, grant the prayer. The letters-patent are then available, in law

and equity, to give to the petitioner the sole right of using, making, and vending the invention against all persons whatever. Any person opposing the petition is entitled to be heard before the committee; and any party to a former suit or action, touching the first letters-patent, is entitled to have notice of the petition before its being presented. If any action at law, or any suit in equity for an account, be brought for infringement of letters-patent, or any *scire facias* to repeal them, and if a verdict pass for the patentee or his assignees, or if a final decree or decretal order be made for him or them upon the merits of the suit, the judge before whom the action is tried may certify on the record, or the judge who makes the decree or order may give a certificate under his hand, that the validity of the patent came in question before him. And this record or certificate, given in evidence in any other suit or action touching the patent, entitles the patentee or his assignees, if a verdict pass or a decree be made in his or their favour, to treble costs, to be taxed at three times the taxed costs; unless the judge who tries the second or other action certify that treble costs ought not to be given. Application may be made for prolongation of the term of the patent. The provisions of the act upon this subject are, that if any person who has obtained letters-patent advertise in the London Gazette three times, and in three London papers, and three times in some country paper published in the town where, or near to which, he carried on the manufacture according to the specification, or in which he resides, if he carry on no manufacture, or published in the county, if there be none published in the town, that he intends to apply to her Majesty in Council for a prolongation of his exclusive privilege; and if he petition her Majesty to that effect, any person may enter a *caveat* at the Council Office. And if her Majesty refer the consideration of the petition to the judicial committee of the Privy Council, and notice be given to the persons entering *caveats*, the petitioner and persons entering *caveats* are heard by counsel and witnesses. The committee may then report to her Majesty that an extension of the term in the letters-patent should be granted; and her Majesty is authorized, if she think fit, to grant new letters-patent for a term not exceeding seven years after the expiry of the first term. No extension can be granted if the petition be not made and prosecuted with effect before the expiration of the term originally granted in the letters-patent. In any action brought for the infringement of letters-patent, the defendant, on pleading to the action, must give to the plaintiff, and in any *scire facias* to repeal

letters-patent the plaintiff must file with his declaration, a notice of any objections on which he means to rely at the trial of the action; and no objection is allowed to be made in behalf of such defendant or plaintiff unless he prove the objections stated in the notice. But any judge at chambers may, on summons served by such defendant or plaintiff on his opponent to show cause why he should not be allowed to offer other objections, give leave to offer objections of which notice has not been given. In actions brought for infringement of a letter-patent, the costs of each part of the case are given according as either party has succeeded or failed therein, regard being had to the notice of objections, as well as the counts in the declaration, and without regard to the general result of the trial. If any person put upon goods made or sold by him, without a patent, the name or imitation of the name of a patentee for such goods, or the word "Patent," "Letters-Patent," or such like word, without leave in writing from the patentee or his assignees, he is liable for each offence to a penalty of fifty pounds, to be recovered in any of the Courts of Record at Westminster or in Ireland, or in the Court of Session in Scotland. One half of the penalty goes to the Crown, the other to the person who sues for it.

In the construction of these statutes, it has been found that the subject of a patent must be something vendible. A mere principle or method would not be sufficient; but if the patent were actually for a process or thing produced, it would not be a valid objection that the specification described it as a method. A new process of manufacture, to be carried on by known implements, or elements acting upon known substances, so as to produce some other known substance, may be a lawful subject of patent, provided it be in a cheaper, better, or more expeditious manner. The improvement of an old commodity or manufacture is a fair subject of patent, provided the old part be not described as new. A patent for an entire subject, in which an old is united with a new commodity, is bad, unless the combination be new, and productive of a new result. The improver of a machine under an existing patent cannot, without the consent of the patentee, use his invention till the expiration of the first patent. A discovery or invention imported may be the subject of a patent. But a patent for an invention truly made by the patentee will be good, although a model of a similar machine imported from abroad had been seen before the date of the patent, provided the machine itself have not previously been made and introduced into practice. The patentee may either grant license to certain individuals to

use his right, or he may transfer his entire right by one deed of assignation, accompanying the transfer with delivery of the patent; and his creditors may compel him to raise money in this way for their payment. A patentee cannot transfer his right to more than five persons. In *Bell's Illustrations*, vol. i., § 1350, abstracts are given of several English decisions upon the subject of patents. See also *Bell's Com.* i. 109, *et seq.*; *Bell's Princ.* § 1318; *More's Notes on Stair*, cxli. See *Literary Property*.

The law concerning letters-patent for inventions was amended by the acts 15 and 16 Vict. c. 83, 1852, and 16 and 17 Vict. c. 115, 1853.

**Pater est quem Nuptiæ Demonstrant.** See *Filiation. Legitimacy*.

**Paterna paternis, Materna maternis.** In the Roman law, where a person died leaving half-brothers, both consanguinean and uterine, a distinction was taken, as to his succession, between what he had derived from his father and what he had derived from his mother. The former went to his brothers-consanguinean, the latter to his brothers-uterine, on the maxim, *Paterna paternis, materna maternis*. And generally, the principle of the maxim applied to any competition between relations on the father's and mother's side. This rule has no place in the law of Scotland, where the half-blood uterine, and in general all the relations by the mother's side, are excluded from succeeding. *Stair*, B. iii. tit. 4, §§ 8, 34.

**Paternity.** See *Filiation*.

**Patria**; in old law language, an assize or inquest of countrymen, which is called *recognitio patriæ*. *Skene*, h. t. See *Bona Patria*.

**Patria Potestas.** A term used to express the singular power of Roman citizens over their offspring. An unemancipated son, possessing in every other relation the high privileges of a Roman citizen, was merely a part of his parent's property. By the laws of the twelve tables, the father had the power of life and death over his children. He could expose them when infants, and their legitimacy depended upon his acceptance of them. He could sell them, or resign them, instead of paying the damages which he had incurred through their fault. He and they were, in matters of private right, held as one person, and there could be neither obligation nor action between them. They could neither contract marriage nor do anything else of importance without his consent. But when he did permit his daughter's marriage, his paternal rights as to her were destroyed, and she became, equally with her own daughters, the *filia familias* of her husband. A son could acquire no property but with his father's consent; and even when such consent was granted, his acquisitions were called *pe-*

*culium*, the term applied to the portion of a slave. See *Peculium*. The *patria potestas* yielded to the son's official dignity, but revived when that ceased, extending even to grandchildren and great grandchildren, and ceasing only when extinguished by natural or civil death, or by the ceremony of emancipation. Emancipation was effected *per æs et libram*—i. e., by selling the son three times, in presence of a competent magistrate, to a *pater fiduciarius*, who was held bound, after the third sale, to re-sell him to his natural father, who then finally manumitted him, retaining the *jus patronatus*. Daughters and grandchildren, in their manumission, were sold only once, with the same formalities. But these troublesome ceremonies were gradually abolished; and under Justinian, a father could go before any competent magistrate, and with his son's consent declare him free. The despotic authority here described as exercised by Roman parents was not authorized by the later law. Several emperors had issued constitutions to restrain the cruelty with which fathers abused their trust. First the right of sale, and then the power of life and death were taken away; while that of moderate chastisement was reserved, and, in aggravated crimes committed by the son, the privilege of prescribing his punishment to the judge. *L. 3, et ult. C. de pat.*; *pot. L. un. C. de emend. propinqu.*; *L. un. C. de bis qui per. vel lib. occid.*; *L. 11, D. de lib. et postum.* In Scotland, authority so great has never been recognised; and the relations of parent and child are, directed by the light of nature, viewed through a milder medium. On this subject, see *Stair*, B. i. tit. 5; *Mauls v. Mauls*, 9th July 1823, appealed in 1825, especially Lord Eldon's speech; *Wellesley*, June 4, 1823. See also *Parent and Child. Children. Foris-familiation. Aliment. Adoption. Arrogation*.

**Patriarch**; was the title anciently given to the head of the Christian Church. Thus there was the Patriarch of Jerusalem, of Alexandria, of Antioch, of Rome, and of Constantinople, each of which had primates, archbishops, and bishops under him; though the title *bishop* was used to express even the patriarch himself. These patriarchs originally were all of equal authority, and continued to be so until the beginning of the seventh century, when, from several favourable incidents, the Patriarch of Rome was acknowledged by almost all the western parts of Christendom as the first and universal bishop of the Church, by the name of *papa*, or father, an appellation formerly common to all bishops. *Ersk. B. i. tit. 5, § 2*.

**Patrimony**; an hereditary estate or right descended from ancestors.

**Patrimony of the Church.** The patri-

mony of the Church consisted of two branches: 1. Of the property of such lands as had been gifted or devised to the Church, which was called the temporality of benefices. 2. Of the tithes of lands, which got the name of the spirituality of benefices. *Ersk. B. ii. tit. 10, § 4. See Teinds.*

**Patronage.** A patron is one who enjoys, along with other rights of less importance, the right of presenting a parochial minister to a vacant charge. It would appear that patrons were originally merely the guardians of the temporal property of particular churches; and that the rights afterwards attached to patronage were at first conceded by the Church only to those who endowed particular churches, with a view to encourage the practice. Afterwards, however, similar rights, in reference to other churches, were assumed by persons of influence in the neighbourhood; and while the Roman Catholic religion prevailed, the Pope, and since the Reformation the Crown, have claimed to be considered patrons of all churches in regard to which no right of patronage could be shown by individuals. In addition to the right of presentation, the patron in former times had a pre-eminent seat and a burial-place in the church, and a right of precedency in processions; his name and arms were engraved on the church, bells, &c. He had also the disposal of the fruits of the benefice during a vacancy, and his consent was necessary to the validity of leases or feus by the incumbent. The vacant stipends now go to the Ministers' Widows' Fund. See *Vacant Stipend*. The statute 1567, c. 7, which abolished Popery and recognised the Reformed religion, reserved "the presentation of laick patronages," by "the just and auncient patrones." And, in still broader terms, the act 1592, c. 110, provided that the presbyteries, to whom all presentations were thereby appointed to be directed, "be bound and astricted to receive and admit quhatsumever qualified minister presented be his Majesty or laick patronis." The act immediately succeeding (c. 117) declared, in reference to benefices rendered vacant by the deposition of the incumbent, that if the presbytery refused a minister presented by the patron, the latter should be entitled to retain the fruits of the benefice. On the establishment of Episcopacy, the principle of these acts was adopted in the act 1612, c. 1, by which presentations were appointed to be directed to the bishop of the diocese; and it was provided that if the bishop should refuse to admit a qualified minister, still undeprieved, it should be lawful for the patron to retain the fruits of the benefice; and that if no sufficient reason should be given for refusal, letters of horning should

be issued, charging the ordinary (*i. e.* the bishop) to do his duty in receiving and admitting the presentee. Some time after the re-establishment of Presbytery, patronage was abolished by 1649, c. 23, which empowered presbyteries to settle ministers "on the sute and calling, or with the consent of the congregation, on whom none is to be obtruded against their will." At the Restoration, the act 1649 fell under the Rescissory Act. But patronage was again abolished by 1690, c. 23, and the right of election, for the approval of the congregation, given to the elders, with the heritors, or the magistrates in burghs. As compensation, patrons were to receive 600 merks (L.33, 6s. sterling); on receiving which they were bound to execute a deed of renunciation of the patronage. Only three parishes (Cadder, Old and New Monkland) had obtained effectual renunciations, when the right of patrons to present was again restored by 10 Anne, c. 12, which declared that it should be lawful to all patrons, who had not executed renunciations in terms of the former statute, to present as formerly, and that presbyteries should be bound to admit the qualified presentees as presentees ought to have been admitted before the passing of the act. This act is still in force; and at present, accordingly, the first step in the settlement of a parochial minister is the presentation by the patron. But the presentee must, before he acquires a right to the stipend and other emoluments of his office, be admitted to it according to the rules of the Church. The forms of admission and ordination by the presbytery, after trial and examination, are so far explained in the articles *Minister; Admission*.

Patronage is an heritable right. But it is naturally a *jus incorporale*, transferable by disposition without infestment. It is, however, capable of being feudalized, after which it can be completely conveyed only by infestment. The usual symbols are a psalm-book and the keys of the church. It was held that patronages were not included in the Act of Annexation 1587. Lords of Erection were held entitled to exercise a right of patronage, by presenting ministers to the several churches attached to the erected benefices. The Crown, as already said, has right to all patronages to which no title can be proved; and hence, in a question with the Crown, the failure of a subject to prove his title establishes the Crown's right. The *jus coronæ* is a title on which prescription may run. A Crown charter of resignation, containing patronages not previously belonging to the resigner, will not carry these patronages without a clause of *novodamus*. Titles to patronages, otherwise ineffectual, may be fortified by prescription. But, as in the case of other rights, the pre-

scription will not carry more than is in the title; and it has been held that a grant of the patronages of a lordship, qualified with a declaration that it was not to be prejudicial to the Crown's right of presenting, which was reserved, was not a good title for acquiring patronage by prescription; *King's Advocate*, 18th May 1830, 8 *S. & D.* 765. Nor can a title to a right to present *alternis vicibus* only be a foundation for acquiring by prescription a right to the exclusive patronage; *Brodie*, July 1777, *M.* 9937. It is difficult to say precisely what is to be considered as possession of a patronage during the years of prescription; for the possession of the presentee being altogether independent of the patron, cannot be held as the patron's possession. It has been decided, by a majority of the whole Court, that one act of presentation, though followed by an incumbency of the presentee for more than forty years, is not possession which can bestow a prescriptive right; *McDonnell*, Feb. 26, 1828, 6 *S. & D.* 600. But a majority of the judges inclined to the opinion that two acts of presentation were sufficient, if forty years had run from the date of the first, although forty years had not intervened between the two. One judge, however, held that there must be two acts of presentation, the one at or after the interval of forty years from the other. A right of patronage cannot be lost by mere neglect to exercise it. There must be contrary positive prescription. Where two or more parishes, having separate patrons, are united, the commissioners are authorized, by 1617, c. 3, to appoint the right of presenting to be exercised *per vices*. Even in cases where the rights of the patrons are not regulated by the commissioners, the rule of the statute takes effect. It was first decided that when there were different patrons of the united parishes at the date of the union, the presentation belongs to the patrons *per vices*, whatever be the inequality in extent of the respective parishes. And in a recent case where two benefices, A. and B., the latter of small value, belonging to the same individual, but held by separate feudal titles flowing from different authors under different superiors, and with different destinations, were united by decree of the Commission 1617, without any mention of the right of presentation—it being thereby declared that B. should be united and annexed to A., as a "part and pendicle of that parish"—and where the proprietor subsequently disposed the two patronages to different disponees, in terms of the titles as they existed before the union, it was held that the disponee to the patronage of A. had not the exclusive right of presentation to the united parish, and that the

disponsee to the patronage of B. had an equal *vice* therein; *Earl of Hopetown*, March 11, 1835, 13 *S. & D.* 685. The patron of the larger benefice is entitled to the first *vice* after the union. The Crown, when one of the patrons, is entitled to the first *vice*. Erskine lays it down, that in the case of heirs-portioners, a patronage is not a *præcipuum* falling to the eldest, but that all in turn are entitled to present, according to seniority; and that other joint patrons would have right to present *per vices*, and not jointly on each vacancy; *Ersk. B. i. tit. 5, § 1*; *B. iii. tit. 8, § 13*. Where, however, a patronage is conveyed to a class of persons, as the heritors of a parish, each individual has a vote, and the election is determined by the majority. If a new parish be formed out of parts of other parishes, the patrons of these will have right to present *per vices* to the new parish, without regard to the extent obtained from the several parishes. If a second charge be founded and endowed without reserving the right of patronage, it will belong to the patron, unless he be excluded by immemorial usage in presenting on the part of the founders of the second charge. According to Erskine, the reservation of the right of patronage would be effectual in such a case; *Ersk. B. i. tit. 5, § 15*. But it seems to have been considered ineffectual in the case of *Cunningham*, Feb. 26, 1762, *M.* 9933. A right of patronage may be made the subject of a liferent provision, by way of locality to a widow, and she will have right to present during her life. The magistrates of a royal burgh cannot alienate the patronage of a church within burgh. Where a patronage is given to one in liferent, and another in fee, the liferenter is entitled to present. Where, however (as may be validly done), the patronage is conveyed to the heritors of a parish, fiars only are understood to be meant. A presentation by a married woman must have the concurrence of her husband. A tutor may present to the churches of which his pupil is patron; and minors may present—their curators, if they have any, giving their consent. A patron cannot present himself to the benefice. For other questions relative to the exercise of patronage, see the article *Presentation*. The exercise of the right of patronage may sometimes give rise to questions of right; and it may be difficult to determine whether the civil or ecclesiastical courts have jurisdiction in these questions. The judgment of the church courts is absolute in determining the fitness of the presentee for the pastoral office; but the Court of Session has the primary and exclusive jurisdiction in questions relative to the validity of the presentation. Although, however, a presbytery should erroneously re-



ject a valid presentation, or refuse to settle a presentee on grounds not cognisable by them, they cannot be compelled to settle him by civil diligence, which the act 1612, c. 1, empowered a patron to employ against a bishop who refused to collate a qualified presentee. An action of damages, however, will lie against the presbytery; *Earl of Kinnoull v. Fergusson*, March 5, 1841, 3 D. 778. See *Ersk. B. i. tit. 5, § 9*; *Stair, B. ii. tit. 8, § 27, et seq.*; *More's Notes*, p. cexliii.; *Bank. vol. ii. p. 21, et seq.*; *Bell's Princ. § 836*; *Illust. ib.*; See *Admission. Benefice. Calls. Jus Devolutum. License to Preach. Minister. Prescription. Presentation. Simony. Transportation. Vacant Stipends. Widows' Fund.* As to the patronage of churches erected by voluntary contribution, see *Churches.*

**Patterns.** New patterns of linen, &c., are protected by the law of copyright. See *Literary Property.*

**Pawn.** See *Pledge.*

**Pawnbrokers.** A pawnbroker, in the statutory meaning of the word, is one who lends money on pledge, at a higher profit or rate of interest than five per cent. The previous acts upon this subject were consolidated and superseded by 39 and 40 Geo. III. c. 99.

Every taker of pawns must place over his door his name, and the word "Pawnbroker." A pawnbroker must not take pawns on Sunday, Good Friday, Christmas-day, or any fast or thanksgiving appointed by the Queen. He must not buy goods before eight o'clock in the morning, or after seven in the evening, at any time throughout the year. He must not take goods in pawn or exchange, unless between eight o'clock forenoon and eight o'clock afternoon from Michaelmas (September 29) to Lady-day (March 25), or between seven o'clock forenoon and nine o'clock afternoon throughout the rest of the year; the time being, however, extended till eleven o'clock in the evening of all Saturdays and days preceding fasts, on which the taking of pawns is forbidden. A pawnbroker must not employ, as a taker of pawns, any person under sixteen years of age; nor take a pawn from a person under twelve years of age; nor from one who is intoxicated. He must not take in pawn, exchange or purchase, a note of another pawnbroker; nor goods of manufacture in an unfinished state. The act 24 Geo. II. c. 40 provides that a retailer of spirits, receiving a pawn for their price, must re-deliver the article pledged. The pawnbroker must enter in his books the description of each pawn, the number, the date, the pawner's name, the street and number of his residence, with the letter L. for a lodger, or H. for a housekeeper, and the name and residence of the owner of the pawn, as stated by the pawner. On loans not ex-

ceeding 5s., this entry may be made within four hours after pawning; but on loans exceeding 5s. it must be made before lending. Pawns for loans above 10s. must be entered in a separate book by themselves; and the entries of such pawns must be numbered *seriatim* from the beginning of each month. At pawning, the pawnbroker must give, and the pawner receive a note, bearing the description of the pawn, and the name and residence of the pawnbroker—the pawnbroker charging for this note, on a loan under 5s. nothing; under 10s.,  $\frac{1}{4}$ d.; under 20s., 1d.; under L.5, 2d.; above L.5, 4d. A table of the prices of the notes must be placed conspicuously in the pawnbroker's shop.

The pawner has a right to redeem the thing pledged, which lasts for a year from the pawning. The time is prolonged for three months more, if notice not to sell be given, before or at the end of the year, to the pawnbroker in writing, delivered to him or left at his residence, or verbally, in presence of one witness. The pawnbroker is not bound to re-deliver the pawn without production of the note given at pawning. The producer of this note is entitled to redeem the pawn, unless the pawnbroker has received notice from the true owner, or information from other quarters, that the pawn was stolen, or is suspected to have been so. If the note given at pawning has been lost, or if a new person alleges himself to be the true owner of the pawn, the pawnbroker must give to the party demanding it a second note, being a copy of the first, and a form of an affidavit of the facts stated, receiving for those, in case of a loan under 5s.,  $\frac{1}{4}$ d.; under 10s., 1d.; above 10s., at the same rate as for the original note. Then the applicant, upon proving his right before a justice of peace of the place of pawning, and swearing to the affidavit, which is certified thereon by the justice, is entitled to redeem the pawn. The act 5 and 6 Will. IV. c. 62, relative to oaths, provides, that declarations be substituted for oaths and affidavits required in matters connected with pawnbrokers, and that the penalties and other enactments as to such oaths, be extended to the declarations. Pawnbrokers' legal profits, in full of interest and warehouse-room, are, per calendar month, on sums not exceeding 2s. 6d.,  $\frac{1}{4}$ d.; not exceeding 40s., 4d. per L.1; not exceeding 42s., 8d. in all; not exceeding L.10, 3d. per L.1. These rates of profits must appear in the pawnbroker's table. On redemption of a pawn, the amount of profits drawn by the pawnbroker must be endorsed by him upon the duplicate, which he must keep by him for the next year. If the owner, wishing to redeem a pledge for not more than L.10, tenders the loan and profits within a year; or

three months further, where notice has been given; and the pawnbroker, without just cause, refuses to re-deliver the pawn, the party may apply to a justice of the peace where the pawnbroker resides, who, on oath (declaration) to the facts alleged, and on production of the note, must bring the pawnbroker before him, and examine on oath (declaration) parties and such credible witnesses as appear. On proof of the offer of payment, or on tender and refusal of it in presence of the justice, he must order the pledge to be restored, and in default of delivery or satisfaction, must commit the pawnbroker to the house of correction or prison, till he obtemper the order. A justice finding it proved that a pawn has been sold too soon, or improperly, or embezzled, lost or injured, through the pawnbroker's fault, must award a proper satisfaction, to be allowed or paid by the pawnbroker.

Forfeited pawns—that is, pledges not redeemed within a year, or, when notice has been given, within the three additional months—may be sold. Pawns for sums between 10s. and L.10 must be sold by public auction. The salesman must exhibit them, and publish, with the pawnbroker's name and abode, catalogues, in which each article must be entered separately, with the month of pawning, and the number registered in the pawn-book. The sale, and the pawnbroker's name and residence, and the month of pawning, must be advertised, on two days, in a newspaper, not less than two days before the sale. Books, prints, pictures, statues and other similar articles specified in the act, must be sold apart on the first Mondays of January, April, July, and October, and the following days, if not all disposed of. They must be previously exposed to view, catalogues of them published, and the sale and pawnbroker's name advertised on two days, in a newspaper, three days before the sale. An account of all sales of pawns on which more than 10s. has been lent must be entered by the pawnbroker in a book, with the date of pawning, the pawner's name, the date of sale, the price, and the auctioneer's name and abode. The pawner is entitled to have access to this entry on payment of a penny. The surplus of the price beyond the loan, profits and expense, must be paid to the pawner or other person entitled to it, if demanded within three years. A pawnbroker must not buy pawns in his hand, except at public auction, nor allow pawns to be redeemed that he may buy them, nor make any bargain for their purchase till a year after pawning. Any person pawning goods without the owner's consent may be apprehended by warrant of a justice of the peace, and tried summarily before him. If the owner of goods unlawfully pawned or exchanged, by his own

or one witness's oath (or declaration), and production of probable grounds of suspicion, satisfy a justice of the bounds that there is reason to suspect a person within his jurisdiction of having received the goods in pawn or in exchange, the justice may grant warrant to search the premises of the suspected party during the hours of business, and to break open doors if refused admittance. Such goods being found on search, and the claimant's right being established before any justice, by confession of the party charged, or by oath (or affirmation) of one witness, the justice must restore them to the owner. If any person offering to sell, exchange, or pawn goods, cannot give a good account of himself, or of the way in which he obtained them, or if he wilfully give the pawnbroker false information as to his property in the goods, or as to his own or the proprietor's residence, or if there be other grounds of suspicion of the goods having been legally obtained, or if any one, not being entitled, attempt to redeem goods, the person to whom the goods are offered, or who holds them in pawn, may detain the party and goods, and deliver them immediately to a peace-officer, to be carried before a justice of the bounds, who, on seeing grounds of suspicion, may commit the person for a reasonable time for inquiry. And whenever he is satisfied of the person's guilt, he must commit him to the jail of the place, to be dealt with according to law, when the offence is of a higher sort, or else penally for any time within certain limits. If any one make or knowingly utter a counterfeit note of a pawnbroker, the person to whom it is offered may detain him, and have him carried by a constable before a justice, who may try him summarily. Provision is made for penalties on account of offences and contravention of the act, and directions are given for the conducting of prosecutions. For these, reference is made to the act itself. In interpretation of this statute, it appears to have been held, that it was intended to enable poor persons to obtain advances not exceeding L.10 on any single pledge; *Ross v. Equitable Loan Company*, Dec. 23, 1826, 5 *S. & D.* 192. In this case, advances had been made by the company on security of large assortments of haberdashery goods transmitted to them; and although the amount lent was divided into numerous sums of L.10 each, with corresponding tickets, to bring the transaction under the Pawnbrokers' Act, yet several of these tickets were frequently given on one unbroken piece of cloth or single package, so that L.40 or L.50, or even, in some instances, L.150 and upwards, were advanced on a single unbroken package. The company having intimated an intention to sell the goods in virtue of the Pawnbrokers'

Act, the trustee on the pawner's bankrupt estate presented a bill of suspension and interdiction against the sale, which was passed by the Court. See *Tait's Justice*, voce *Pledge*; *Blair's Justice*, voce *Pawn*; *M'Glashan's Digest of the Law of Pawnbroking*. See also the General Burgh Police Act for Scotland, 13 and 14 Vict. c. 33.

**Payee**; the person in whose favour a bill of exchange or a draft is drawn. See *Bill of Exchange*.

**Payment**. A creditor is entitled to demand full payment of his debt at once, and cannot be compelled to accept of partial payments, unless, by the original obligation, it has been made payable in parts; for in that case, there are held to be as many obligations as there are terms of payment. By the same rule, a creditor in two or more separate debts cannot refuse to accept payment of any of them, though the debtor should not offer to pay the others, or although he should not pay even the interest then due on the others. See *Partial Payment*.

**Indefinite Payment**.—Where there are several debts due, and an indefinite payment is made by the debtor, without specifying to account of which debt he wishes the payment to be applied, the payment is applied according to certain equitable rules which show an equal regard to the interests of the debtor and to those of the creditor; the creditor's interest, however, being chiefly regarded. For these rules, see *Indefinite Payment*, and authorities there cited.

**Payment bona fide**.—Where payment has been made *bona fide*, though to a person not entitled to receive it, the payment may nevertheless be effectual. Where, for example, a payment is made to a person who was formerly factor for the creditor, but whose factory has been withdrawn, without intimation to the debtor; in that case, the debtor who pays *bona fide*—that is, without having reason to suspect, and without knowledge of the factory having been withdrawn—pays with safety; and the discharge of the person who was formerly factor will be to him an effectual discharge. *Bona fides* ceases from the time that citation is given by those having an interest in the debt. Payment made to one who never possessed a power of receiving or discharging the debt is not accounted a *bona fide* payment. Thus, a payment to a messenger-at-arms entrusted with the execution of diligence will not discharge the debt, unless the money is accounted for by the messenger to his employer; for a messenger is not authorized, *qua* messenger, to do more than merely to execute the diligence. His employer, indeed, may expressly authorize him to receive and discharge the debt; but otherwise his dis-

charge will not be effectual against his employer; and as the debtor is presumed to know this legal doctrine, such a payment to a messenger, not specially authorized to discharge the debt, is not accounted a *bona fide* payment. *Ersk. B. iii. tit. 4, § 3*; *Stair, B. i. tit. 18, § 3*; *B. iv. tit. 40, § 33*; *More's Notes*, p. cxxiv.; *Bank. vol. i. p. 486*; *iii. 82*; *Bell's Com. ii. 45*; *Kames' Principles of Equity* (1825), 405; *Hunter's Landlord and Tenant*, 732-3; *Thomson on Bills*, 402.

**Collusive Payment**.—Rent is payable either at the legal terms of Whiteunday and Martinmas, or at such conventional terms as the parties may have fixed; and where a tenant anticipates the term of payment, and pays his rent beforehand to his landlord, such payment will be accounted collusive, in a question with the creditors of the landlord, who may have arrested before the term of payment, although posterior to the actual payment by the tenant. Hence the tenant will be obliged to pay over again to the arresters. The same happens in the payment of feu-duties; but in common debts, the debtor may safely pay even before the term of payment. *Ersk. B. iii. tit. 4, § 4*; *Bell's Com. ii. 219*.

**Presumed Payment**.—The payment of a debt is presumed to have been made wherever the voucher is found in the hands of the proper debtor, or of a cautioner. This holds not in bonds and bills only, but even an heritable bond with sasine, found in the hands of the debtor, will infer payment, unless it can be proved that the voucher of debt came into the hands of the debtor in some other way than on payment. *Ersk. B. iii. tit. 4, § 5*; *More's Notes on Stair*, pp. cxxiii-v.; *Bell's Principles*, § 566; *Illust. ib.*; *Thomson on Bills*, 400, 625; *Blair's Justice*, 205. See *Chirographum apud debitorem reperitum*.

**Payment by a Third Party**.—Payment of a debt by a third party is presumed *in dubio* to have been made with the proper money of the debtor. Thus, if a discharge or receipt bear the money to have been paid by A. in name of B., the proper debtor, the presumption is, that the money was B.'s, and that A. was merely interposed to make the payment. In an obligation where several are bound, and payment is made, and the money said to have been received from one of the obligants: should that obligant afterwards cancel the ground of debt, the presumption is, that he was the principal debtor from the beginning, or that he had actually received their shares from the other obligants. *Ersk. B. iii. tit. 4, § 6*.

**Proof of Payment**.—It is a general and established rule, that payment of a debt constituted by writing cannot be proved by witnesses. Where, however, the written obligation binds the party to the performance of special facts,

the performance of those facts may be proved by witnesses to the effect of discharging the obligation. Where the debt is not constituted by writing, payment to the extent of L.100 Scots (L.8, 6s. 8d.) may be proved by witnesses. *Ersk. B. iv. tit. 2, § 21; Stair, B. iv. tit. 32, § 3; tit. 43, § 4; Bell's Princ. § 563; Illust. ib.; Kames' Equity, 507; Tait on Evidence, 301; Dickson on Evidence, 329; Thomson on Bills, 397. See Evidence.* On the subject of payment generally, see *Stair, B. i. tit. 18; Bell's Com. ii. 210 et seq., 531 et seq.; Bell's Princ. § 556, et. seq.; Illust. ib.; Kames' Equity, 375, 329; Brown on Sale, 388; Thomson on Bills, 397. See Partial Payment. Indefinite Payment. Place of Payment.*

**Peace, Justices of.** See *Justices of Peace.*

**Peats.** See *Fuel.*

**Peculium**; in Roman law, was that property which a slave or a *filius familias* could acquire with his master's or father's consent. A son's *peculium* was of four kinds: *castrense*, acquired in war; *quasi castrense*, acquired in the exercise of public duty, or of some of the liberal arts; *adventitium*, derived from a stranger; or *profectitium*, derived from his father. The law as to the property of the *peculium* varied, according as it was of one or other of these kinds; *Stair, B. i. tit. 5, § 11.* Professor Bell uses the word *peculium* for the fund which, in addition to *paraphernalia*, is, by custom or special gift, appropriated to the wife, such as the "lady's gown," a sum secured by antenuptial contract, or derived from a stranger, or with regard to which the husband has renounced his *jus mariti*. *Bell's Princ. § 1560; Illust. ib.*

**Pede Pulverosus**; a "vagabond, especially a merchant or creamer who has no certain dwelling-place where the dust may be dight from his feet, to whom justice should be summarily ministered within three flowings and ebblings of the sea." *Skene, h. t. See Dusty-foot. Piepowder.*

**Pedellus**; according to Skene, the serjeant or beadle of the burgh, who should execute summonses, make attachment, or take poulds. *Skene, h. t.*

**Peer.** A peer is an equal; and hence all commoners, or those who are under the rank of nobility, are said to be peers of each other, being subject to the common tribunals and ordinary jurisdiction of the kingdom. But peers of Parliament or of the realm are the nobility of the kingdom, and constitute a branch of the Legislature. It would appear that originally the right of peerage was territorial, but it has gradually become personal. Peers are now created either by writ or by patent; a writ or patent being presumed in the case of those who claim by prescription. The creation by writ, or the Queen's letter, is

a summons to attend the House of Peers, by the style and title of that barony which the Queen is pleased to confer. The creation by patent is a royal grant to a subject of any dignity and degree of peerage. Peers are possessed of certain important privileges, among which is that of being judges of each other, and being exempt from the common and ordinary jurisdiction. By the Treaty of Union, art. 23, it is declared that the sixteen peers of Scotland, entitled to sit in the House of Lords, shall have all the privileges of Parliament enjoyed by the British peers, and particularly the right of sitting upon the trial of peers; and that all peers of Scotland, whether representative or not, shall be tried as peers of Great Britain, and shall enjoy all privileges as peers as fully as the British peers, except the right of sitting in the House of Lords, and the privileges depending thereon. The trial of a peer proceeds before the peers assembled in the Court of the Lord High Steward of Britain; towards a trial before which tribunal a true bill must be found by a jury of twelve men, who may be commoners, before a special commission issued for that purpose; 6 *Ann. c. 23.* This matter, in relation to the peers of Scotland, is now regulated by 6 *Geo. IV. c. 66*, which enacts that the crimes on account of which such a commission may issue are—all treasons, misprisions of treasons, murders, and other crimes which infer a capital punishment by the law of Scotland; and all felonies and other crimes for which, if committed in England, a peer of the United Kingdom would be tried by his peers. And the statute declares it unlawful for the Court of Justiciary, or any other court in Scotland, to take cognizance of any of the aforesaid crimes when committed by a peer. The law concerning the election of the sixteen peers of Scotland is given at length in the article *Election Law.* By the statute 2 and 3 *Will. IV. c. 63*, the peers of Scotland are enabled to take and subscribe in Ireland the oaths required for qualifying them to vote in any election of the peers of Scotland. See *Tomlins' Dict. h. t.; Alison's Prac. 14.*

**Peers.** See *Nobility. Election Laws. Dignities.*

**Pejorations**; deteriorations; used sometimes, though rarely, in contradistinction to meliorations. In one case the term was characterised in the House of Lords as a convenient one. See *Graham v. Jolly, House of Lords, 29th June 1831.*

**Penal Actions.** An action is said to be penal when the conclusions of the summons are of a penal nature; that is, when not merely restitution and real damages, but extraordinary damages and reparation, by way of

penalty, are concluded for. In such actions, whether they be of a *quasi* criminal character, and requiring the concurrence of the public prosecutor, or conclude for payment of heavy pecuniary penalties, great accuracy and precision are required in the summons or complaint. The time and place where the offence was committed must be distinctly libelled, and the persons against whom the charge is made must be clearly pointed out. Indeed, it has been said that, in respect to the precision required, there is little or no distinction between such a summons or complaint, and an indictment in the criminal court. Actions in which the pursuer insists barely for an indemnification of real loss are transmitted against heirs; but actions in which some demand is made by way of penalty die with the delinquent or transgressor, on the maxim, *Actio pœnalis in hæredem non datur, nisi ex damno locupletior hæres factus sit.* *Ersk.* B. iii. tit. 1, § 15; B. iv. tit. 1, § 14; *Bank.* vol. iii. p. 67.

**Penal Bond.** In England, bonds bear to be granted for double the actual debt, on the condition that, if the actual debt be paid, the bond shall be held as discharged. Such bonds are called penal bonds. An adjudication may proceed on an English penal bond without any previous decree of constitution; *Bell's Com.* i. 740. The form of a summons for payment of such a bond is given in *Jurid. Styles*, iii. 25.

**Penal Irritancies.** Irritancies were formerly strictly interpreted. Hence, the Act of Sederunt, Nov. 27, 1592, declared that irritancies were to be explained according to their express words and meaning; and although the act 1661, c. 62, in consideration of the political confusions which had preceded the passing of the act, allows proprietors to redeem wadsets within five years, yet in the statute it is assumed that the penal irritancies which those wadsets may contain are lawful; and, according to our ancient practice, the offer of payment before decree of declarator, in an action of declarator of irritancy, was not competent after the irritancy had been incurred. A distinction, however, is now made between irritancies penal and not penal. Where the irritancy is not penal, as in the irritancy of a sale for a just price, provided payment be not made at a certain term, the condition receives full effect even without declarator. But wherever it is of a penal nature, as in a redeemable right for a sum less than the value of the subject, the Court will soften the rigour of the condition, and allow the reverser a power of redemption, even after the time allowed by the deed; and at any time before declarator, provided the long prescription of forty years has not run

after the term of redemption, for, by the lapse of that time, the power to redeem is cut off by the negative prescription. *Ersk.* B. ii. tit. 8, § 14, and tit. 5, § 25.

**Penal Statutes;** are strictly interpreted—that is, they are not extended against the offender. Where a thing is prohibited by statute under a penalty, if the penalty, or part of it, be not given to him who sues for it, it goes to the Crown. See *Ersk.* B. i. tit. 1, § 55; *Tomlins' Dict. voce Penal Laws*; *King's Advocate*, 18th March and 23d Dec. 1793, *Mor.* 4900. As to the limitation of penal statutes, see *Prescription of Crimes.*

**Penalties.** Where an obligant fails to perform any act to which he has become bound, he will be liable in damages to the person who suffers by his breach of agreement. But in estimating this damage, where there has been no fraud, consequential or indirect damage is not taken into account. Thus, the failure to pay money at a stipulated time may occasion indirect damage to the creditor, but is not a damage which the law can estimate; and therefore the creditor's demand is limited to the principal sum with interest, and the expenses to which the creditor has been put. In order to cover the damage which may be sustained by failure in performance, penalties are usually adjoined to obligations. Where the penalty relates to the payment of money, it is fixed at a fifth part of the principal sum—probably because this is the extent of the statutory penalty in appraisings and adjudications; but this fifth part is never enforced beyond the amount of the expenses actually incurred by the creditor in endeavouring to recover payment. When, therefore, the debtor offers the principal sum, interest, and the expense of diligence, no more can be demanded out of the penalty. Even where an action has been raised, and decree obtained, the expense of that process cannot be demanded out of the penalty, unless expenses have been awarded by the decree. Where a penalty is annexed to the performance of a fact, it is to be considered more in the nature of a conventional liquidation of the damages, in order to avoid a question in regard to the extent of the damage, than as of the nature of a penalty adjoined to a money obligation. Hence, where a tenant becomes bound to pay a year's rent in case he does not enter, or a certain rent per acre in case he shall labour the ground in a certain way, these are considered as the equivalents to which, *ex contractu*, the landlord, generally speaking, will be entitled without modification. In one case a tenant had bound himself to pay L.4 of covenanted additional rent for each acre laboured contrary to a certain rotation of crops; and hav-

ing deviated, the Court held that such a covenant, being of the nature of estimated damage or additional rent, they had no equitable power to interpose; even although the tenant offered to prove that the deviation was necessary, and had been occasioned by the accidental failure of a field of grass, from its having been sown with bad seed, which compelled him partially to change the rotation; *Frazer v. Ewart*, Feb. 25, 1813, *F. C.* See also *Hunter v. Broadwood*, Feb. 2, 1854, 16 *D.* 441. But although the penalty may in this way be considered as the liquidated damage, still the obligant may be compelled, notwithstanding, to perform his obligation; for he is not entitled to pay the penalty and be free. In general, obligations of this kind bear that the penalty is to be exigible "over and above," or "by and attour performance;" but even without these expressions, the performance of the fact may be enforced by diligence. From this, however, there is an exception, as where a person becomes bound that another shall perform an act under a penalty; for here, as the obligant cannot perform the act himself, the conventional penalty, as to him, must free him from farther diligence. *Ersk. B.* iii. tit. 3, § 86; *Bell on Leases*, i. 253; *Bell's Com.* i. 654; *Stair*, B. i. tit. 10, § 14; *B.* iii. tit. 2, §§ 32 and 54; *B.* iv. tit. 3, § 2; tit. 18, § 3; *Moré's Notes*, p. lxxi.; *Bank.* vol. i. p. 473; *Bell's Princ.* § 34; *Illust. ib.*; *Kames' Princ. of Equity*, (1825); *Kames' Stat. Law Abridg. h. t.*; *Hunter's Landlord and Tenant*, 788-9; *Thomson on Bills*, 16, 27, 36, 146, 154; *Jurid. Styles*, 2d edit. iii. 97; *Ross's Lect.* i. 32, 58. See *Damages*.

**Penance**; an ecclesiastical punishment, by which a penitent gives satisfaction to the church for the scandal he has occasioned by his ill example. The judicatories of the Church of Scotland judge of and punish gross immorality, heresy, and schism, but with a degree of temper and moderation suited to the state of society in this country, and better calculated than a more rigid exercise of ecclesiastical discipline would be to attain the end in view. When penance is inflicted, it is done by applying the lesser excommunication; which excludes the offender from the ordinances of the church; and time and opportunity are given for reconciliation. It is only in the case of more hardened offenders, and where the offence is of a nature which cannot be overlooked, that the greater excommunication is used. See *Excommunication*.

**Pendente Lite Nihil Innovandum.** This maxim of the Roman law is adopted generally in the law of Scotland, and, according to Erskine, has been applied to the case where rights are rendered litigious by an action of

ranking and sale for behoof of creditors. According to this rule, no diligence carried on or perfected while the action of sale is pending, and intended to create a new preference to the user, in competition with the other creditors, ought to receive effect. But, in practice, this rule has been disregarded; and Erskine's doctrine, stated as referable to the maxim *Pendente lite nihil innovandum*, seems to be properly referable to the principle, that wherever the process can be regarded as a general measure, it ought to supersede the diligence of individual creditors. This doctrine is so established by the Bankrupt Statute. See *Bell's Com.* ii. 155; *Ersk. B.* ii. tit. 12, § 65.

**Pension**; is defined by Skene to be, a duty, such as an annual rent. *Skene, h. t.*

**Pension**; an annual allowance paid for a person's maintenance at the will of another. It is criminal to receive a pension from a foreign prince or state, without leave of our Sovereign. No person having any pension from the Crown is capable of being elected member of Parliament, or of sitting or of voting, and a penalty of L.500 is imposed upon pensioners who sit or vote; 6 *Ann.*, c. 7, § 25-29; 1 *Geo. I.*, stat. 2, c. 56. But Chelsea and Greenwich pensioners may vote, and out-pensioners are embodied under the statutes 6 and 7 *Vict.* c. 95, 1843; 9 and 10 *Vict.* c. 9, 1846; and 11 and 12 *Vict.* c. 84, 1848. Pensions from the Sovereign are held as alimentary, although they do not expressly bear a declaration to that effect. It has been repeatedly decided, that a pension granted for services done and to be done is good, although the pensioner should, from circumstances, find it impossible to perform these services for the future. *Stair*, B. ii. tit. 5, § 16; *B.* iii. tit. 1, § 37; *Ersk. B.* iii. tit. 6, § 7; *Bank.* i. p. 654; ii. 14; *Bell's Com.* i. 130; *Jurid. Styles*, ii. 283, 306; *Kames' Stat. Law, h. t.* See *Annuity*.

**Penuria Testium.** The disqualifications formerly attaching to witnesses, and especially that of relationship, were sometimes disregarded in occult or private facts, where there must, from the nature of the case, be a scarcity of unexceptionable witnesses; but such witnesses were examined *cum nota*—i.e., reserving consideration of their credibility. It was not enough in this sense, to constitute a *penuria testium*, to prove that the other evidence was scanty and defective; it must farther have been shown that the *penuria* was necessarily occasioned by the very nature of the question at issue. *Tait on Evidence*, 373; *Macfarlane's Jury Prac.* 92. See *Evidence. Domestic Crimes*.

**Perambulation.** Actions upon briefs of perambulation were authorized by the act

1597, c. 79, and were intended to settle the line of march between contemnerous properties. *Ersk. B. iv. tit. 1, § 48; Stair, B. iv. tit. 3, § 14; tit. 28, § 3; Bank. i. 281; Bell's Princ. § 2241; Kames' Stat. Law, h. t.; Jurid. Styles, i. 419.*

**Per Decretum Dominorum Concilii.** See *Ex Deliberatione, &c.*

**Perduellion;** treason. See *Treason.*

**Peremptory Defences.** See *Defences.*

**Periculum;** risk. The general rule with regard to risk is, that a subject perishes to its dominus, or to him who has the right of property in it.—*Res perit domino.* But this rule is frequently modified by the introduction of certain opposite principles; by the rules of particular contracts, and by the effect of *culpa* or fault in subjecting those to the risk of loss who would not otherwise be liable. The most important exception occurs in the case of a subject sold, but not delivered. The rule of the law of Scotland, adopted from the Roman law, is, that property is not transferred without delivery—*Traditionibus dominia rerum transferuntur.* Before delivery, the buyer has merely a *jus ad rem*: he is creditor for the delivery of the thing sold. See *Jus ad Rem; Jus Crediti.* And yet, if the subject perish undelivered, it perishes to the buyer,—*Periculum rei venditæ, nondum traditæ, est emptoris.* If the buyer has paid the price, he is not entitled to repetition; if he has not paid it, the seller may sue him for payment. The principle of this rule is, that by completion of the contract of sale, the obligation of each party to implement the bargain is perfected. The seller is bound to deliver the thing sold, the buyer to pay the price; and although the seller's obligation falls in consequence of the extinction of the subject of it, the buyer's still subsists. The rule may also be referred to the maxim, *Ejus est periculum, cujus est commodum*; since the buyer has the benefit of the accessions, fruits and profits of the subject, from the moment in which the contract is completed. When a commodity is sold as a fungible, not as a *corpus*—that is, when a certain quantity, by number, weight or measure, has been sold, and is not yet delivered—the loss falls upon the seller, since the buyer did not purchase any specific subject. Thus, when a proprietor sells so many bolls of his farm-grain, of a particular crop, without specifying any particular parcel, and a loss of that year's grain happens, the purchaser is not bound to suffer any part of the loss, as he did not purchase any precise part of the farm-grain. In conditional sales, the rule of the Roman law was, that if the subject perished *pendente conditione*, it perished to the vendor; but if it was merely deteriorated, without the fault of the vendor, the loss fell upon the vendee.

In alternative sales, if one of two subjects sold perish before the choice has been made, it perishes to the seller; because the remaining subject continues *in obligatione*, and demandable by the vendee; but if both perish, the loss falls on the buyer. When the seller has been *in mora* in making delivery, the loss falls upon him. See *Mora.* A subject likewise perishes to the seller which is lost through his fault, or by his neglecting the obligation under which he lies to attend to the buyer's interest, by taking care of the subject until it is delivered. Where the buyer gives directions for the transmission of the goods, if these directions be not followed, the loss falls upon the seller; *Harle, 24th Jan. 1749, Mor. 10,095.* If the buyer orders the goods to be sent by a certain mode of conveyance, and they are sent accordingly, it would appear that the seller is freed from the risk. When no particular carrier or ship is named by the buyer, delivery by the seller to any carrier or wharfinger, on account of the buyer, is the same as delivery to the buyer himself, to the effect of freeing the seller from further responsibility for care of the goods; provided he procures them to be delivered to the carrier or wharfinger in the proper and usual manner, and with the usual precautions to ensure the safety of the goods, and the claim of the buyer against the party entrusted with them. It has been held that it is no part of the seller's duty to ascertain the seaworthiness of the ship in which the goods are to be sent, and that he is not responsible for a loss occasioned by the defects of the ship. It is the duty of the seller to give timely notice to the buyer of the shipment of goods sent by sea, in order that he may know when the goods are likely to arrive, and that he may be enabled to insure them; but this rule is subject to certain limitations. The loss of an undelivered subject falls upon the seller, if it perish from a vice of such a nature that the seller would have been liable under his obligation of warranty had the subject perished from the same cause after delivery. Where the seller expressly takes the risk upon himself, or binds himself to deliver the thing sold at a certain place, his engagement makes him liable for the loss before such delivery. The modifications of the rule, that the risk is with the owner, arising from the obligation to a reparation of loss occasioned by fault or carelessness, and from the peculiar doctrines of certain contracts, such as affreightment and carriage by land, are noticed in other articles. See *Nautæ, Caupones. Innkeepers. Public Carriages. Damages. Culpa. Mora.* See generally, on the subject of risk, *Stair, B. i. tit. 11, § 2; tit. 14, § 7; More's Notes, lxxiii.—vii.*

viii., lxxxv.—vii.; *Ersk. B.* iii. tit. 1, §§ 19, 20, 26, 31, 33; tit. 3, § 7; *Bell's Com.* i. 169, 443, 458; *Brown on Sale*, 355; *Bell's Princ.* §§ 87, 141, 153, 199, 202–6, 225, 232; *Illust. ib.*; *Kames' Stat. Law Abridg. h. t.*; *Hunter's Landlord and Tenant*, 724.

**Perjury**; is the judicial affirmation of a falsehood upon oath. The essence of the crime consists in affirming a plain and obvious falsehood; for, where the oath can in any reasonable way be reconciled with truth, or an innocent intention, there is no perjury. Neither must there be any doubt about the true state of the fact, or the sense in which the panel's words are to be understood; and where it is possible to account for what may have the appearance of a falsehood, on the ground of its being an omission, that will save the panel. To constitute the crime of perjury, the person must have sworn absolutely, and not to the best of his recollection, where the matters are not recent, or of a nature not to call for his particular attention; for, where the matters are recent, or of a nature to which his attention may be supposed to have been specially directed, he will not be allowed to screen himself under the pretext that he had forgotten. The falsehood must be wilfully affirmed by one who knows the truth, and who, for some corrupt purpose, resolves to conceal it. Hence, there can be no prosecution for perjury where the oath is pure matter of opinion and belief, as in the oath of calumny, where his own prejudices may lead the deponent to view the cause in a different light from that in which it will be viewed by any other person. Of the same kind is the oath in lawburrows, where the complainer expresses his apprehensions of danger; which fears may have been genuine in him, though entirely chimerical. The oath, to found the charge of perjury, must be material to the point at issue, in the question where it is given; for where the falsehood extends only to trifling particulars, it will be attributed to inadvertency or oversight, rather than to that dole, or corrupt intention, which is the essence of this crime. The falsehood must have been affirmed on oath, in contempt of that high adjuration which the witness makes. The most formal written declaration is therefore no ground of prosecution as perjury. To this, however, the word of honour of a peer is an exception; and all affirmations allowed under the statutes are held identical with oaths. It is farther necessary that the oath should be given before a magistrate or other person empowered by law to administer an oath; because, without that, an oath has neither those consequences, in point of interest, to the man himself, nor that prejudice to his neighbour, which are the proofs of that malice

which is principally the object of punishment. Neither can falsehood contained in a voluntary affidavit given before a magistrate be the ground of prosecution for perjury. Not only must the oath be taken before a person entitled to administer it, but it must have been given in the due and accustomed form, in the department of business to which it relates; for example, it must have been read over, approved of, and signed, when the person can write. In short, all the requisite forms must have been observed. The crime of perjury may be committed by a party on a reference to oath, as well as by a witness in a cause. The same may happen in taking the oath of bribery, or of trust and possession—the oath to obtain the benefit of the act of grace—a suspender's oath at passing a bill on juratory caution—at obtaining the benefit of the *cessio bonorum*—or a discharge of debts under the Bankrupt Statute. The evidence of the terms of the oath ought to be the written oath, signed by the panel, or certified by the judge; and where the oath has not been taken down in writing, as in Justiciary trials and trials before the Court of Exchequer, and in jury causes, the terms of the depositions must be established by respectable and intelligent witnesses. The evidence of the falsehood may be by parole proof, or by writing; but it is not enough that the fact actually was contrary to what has been sworn to by the panel; it must further be proved, or sufficiently inferred from circumstance, that the panel actually knew, at the time he was delivering his oath, that the fact was inconsistent with what he was swearing. The punishment of perjury has been directed by statute, the last of which, 1555, c. 47, declares perjury to be punishable by confiscation of moveables, by piercing the tongue, and infamy; to which the judge, in aggravated cases, may add any other penalty that the case seems to require. No person convicted of wilful or corrupt perjury, or subornation of perjury after conviction, is capable of voting in the election of a member of Parliament. But the incapacity does not apply, unless action be commenced within two years after the ground of it occurred; 2 *Geo. II.* c. 24, §§ 6 and 11. The incapacity of bearing testimony consequent upon a conviction of perjury, or subornation of perjury, formerly could not be removed, as in the case of other crimes, by suffering the punishment; but this appears to be altered by the act 15 and 16 *Vict.* c. 27, 1852. The trial for perjury is proper to the Court of Justiciary; but it may be tried by the Court of Session, where it occurs in any examination on oath taken in the course of an action before that Court. Subornation of perjury, which consists in tampering



with those who are to appear as witnesses, and directing them what to say, without regard to truth, is directed, by the act 1555, c. 47, to be punished with the pains of perjury. See *Hume*, vol. i. pp. 360-74; *Alison's Princ.* i. 464; *Stair*, B. iv. tit. 43, § 6; *Ersk.* B. iv. tit. 4, § 74; *Bank.* vol. i. p. 299, *et seq.*; *Bell's Com.* ii. 343, 389, 390-5; *Kames' Stat. Law Abridg. h. t.* See *Oath*.

**Permissive Laws.** A law permitting certain persons to have or enjoy the use of certain things, or to do certain acts, by direct implication prohibits all others from obstructing the exercise of the right so conferred. *Ersk.* B. i. tit. 1, § 24.

**Permit**; a license or warrant for persons to pass with and sell goods, on having paid the duties of customs or excise for them. The statutes upon this subject have been consolidated by 2 and 3 Will. IV. c. 16. See *Excise*.

**Permutation or Barter**; is the exchange of one moveable subject for another; and, by the law of Scotland, the contract is completed by consent alone, so as to enforce the subsequent exchange. By this contract the property is transferred. *Stair*, B. i. tit. 10, § 14, and tit. 14; *Ersk.* B. iii. tit. 3, § 13. See *Barter*.

**Perpetuity.** In the law of England, a perpetuity seems to have been originally equivalent to a Scotch entail; but in that law an entail may be defeated by a common recovery. See *Tomlins' Dict. h. t.*; *Sandford on Entails*, 25, 31.

**Persona Standi in Judicio**; the right enjoyed by all, except by those who are deprived of it on account of civil death, nonage, or other disability, to pursue for and defend their rights in a court of justice. What *persona standi* is, may be more easily learned by considering the loss of it by civil death or outlawry. The outlaw is said *amittere legem terræ*, to be repelled *ab agendo et defendendo*, to be incapable of pursuing or defending in any process, civil or criminal. But there are others besides outlaws who have no *persona standi*. A pupil cannot pursue or defend; that must be done by his tutor in his name. And companies, as such, have not a *persona standi*. See *Firm*. *Persona standi* is different from title to pursue. *Persona standi* applies to the status of the person, as qualified to pursue or defend in actions generally; title to pursue applies to particular actions, and requires, in addition to a *persona standi*, that the party have a proper legal interest in the particular action pursued or defended. Thus, although a superior possess a *persona standi*, he cannot pursue a declarator of non-entry unless he produce an infestment in the lands. See *Title to Pursue*. *Interest*.

**Personal Bonds.** See *Bond*.

**Personal Execution.** See *Caption*. *Diligence*. *Imprisonment*. *Liberation*. *Act of Grace*. *Act of Warding*.

**Personal Objection or Exception.** When a party is, by his own act, or by the peculiar circumstances in which he is placed, incapacitated from maintaining a certain plea in an action or in a defence, he is said to be barred from maintaining that plea *personali exceptione*. Thus, one is barred *personali exceptione* or *objectione* from redarguing his own judicial assertion; from objecting to a deed to which he has already consented; from pleading the defect of his own or his author's title; from taking benefit by his own fault or neglect. It was even held in the Court of Session, that a woman who had been privately married, and who had connived at a second marriage which her husband entered into, was barred, *personali exceptione*, from challenging the second marriage. But this was reversed in the House of Lords; *Campbell v. Cochrane*, 28th July 1747, and Jan. 31, 1753, *M.* 10,456; *Cr. and Stewart*, 519. For illustrations of the cases in which personal objection is or is not inferred, see *Brown's Synop. h. t.*; *Shaw's Digest, h. t.*

**Personal Protection.** A warrant of protection to the bankrupt may be granted by the Lord Ordinary or the Sheriff, until the meeting of the creditors for the election of trustee; and the protection may be renewed on the application of the trustee, authorized to do so by the creditors. 19 and 20 Vict. c. 79, §§ 44 and 77, 1856.

**Personal Rights.** A real right, or *jus in re*, entitles the person vested with it to possess the subject of the right as his own, and to reclaim or vindicate it from others; whereas the creditor in a personal right or obligation has no more than a *jus ad rem*, or a right of action against the debtor or his representatives, whereby they may be compelled to implement the obligation, by transferring the subject to the creditor, or by paying or performing in terms of the obligation. See *Obligation*. Heritable rights in the persons either of heirs or of disponees, not completed by infestment,—such, for example, as the right of one who has obtained a disposition to an heritable subject on which he has not taken infestment,—are also termed personal rights. In such a case, the donee, before taking infestment, may sell the subject, and may assign to the purchaser the unexecuted procuratory of resignation and precept of sasine, in virtue of which the purchaser may complete his right by infestment; or the first donee, as if he were actually infest, may himself grant to the purchaser a precept of sasine, on which the purchaser may obtain himself infest; and

although such infestment will be ineffectual so long as the first disponee remains uninfest, yet, as soon as he completes his title, the prior sasine of the purchaser and the feudal right will be perfected by accretion. But the holder of a personal right is not so divested by a first conveyance as to prevent him, if fraudulently inclined, from granting a second conveyance to another disponee, which second conveyance, if first perfected by infestment, will exclude the first conveyance—and that although up to the date of the competition the original disponee's right should remain personal. *Ersk. B. ii. tit. 7, § 26; B. iii. tit. 1, § 2; Stair, B. iii. tit. 1, § 2; B. i. tit. 3, § 1; Bell's Principles, § 851; Illust. ib.; Ross's Lect. ii. 308, 314. See Disposition. Confirmation. Service. Brieve. Accretion. Jus ad Rem.*

**Personal Services.** It was anciently the custom in feu-rights to bind the vassal to attend the superior at huntings and hostings, with many other personal services peculiar to a rude and warlike period. But after the Rebellion 1715, by 1 Geo. I. stat. 2, c. 54, those personal services, whether due by charter or custom, were abolished. Notwithstanding this statute, however, there is nothing to prevent the superior from stipulating in the charter, that the vassal shall perform certain specified agricultural services. Thus, in the case of the *Duke of Argyle*, Feb. 5, 1762, *Mor. p. 14,495*, the vassal was taken bound to keep the castle of Tarbert, and to defend it against the enemies of the family of Argyle, as well as to keep a boat with six oars and a steersman for the use of the Duke in going from one place of the coast to another. All that related to the military part of this obligation was held to fall under the statute; but the keeping of the boat was held to be a legal obligation on the vassal. Where the personal obligations consist in annual agricultural services, the vassal is free unless they are demanded within the year. *Ersk. B. ii. tit. 5, § 2; More's Notes on Stair, cvii.; Kames' Stat. Law, voce Service; Brown's Synop. h. t.; Bell's Illust. § 691.*

**Personal Privilege from Arrest.** See *Privilege. Personal Protection. Protection from Diligence.*

**Personalty and Realty.** In the law of England, the distinction between real and personal property is almost but not entirely the same as the distinction between heritable and moveable property in the law of Scotland. Things real are described by Blackstone to be such as are permanent, fixed and immovable, which cannot be carried out of their place, as lands and tenements; while things personal include all sorts of things moveable, which may attend a man's person wherever he goes. Things personal, however, include something

in addition to things moveable; they comprehend every thing which wants the two requisites of a real estate—duration as to time, and immobility as to place. Whatever, therefore, is not a real estate, is a personal estate or chattel. There is also a subordinate division of personal estate or chattels into chattels real and chattels personal. Chattels personal are, properly and strictly speaking, things moveable, such as animals, household stuff, money, jewels, &c. Chattels real are interests issuing out of or annexed to real estates, such as terms for years of land, the next presentation to a church, &c. The essential distinction between a chattel real and a real estate is, that the duration of the former is limited to a time certain, beyond which it cannot subsist. Chattels real are not conveyed by sasine or corporal investiture; the possession of them is gained simply by the entry of the tenant. Two of the most important points in which the personalty of England does not coincide with the moveable property of Scotland are leases and securities affecting land. By the law of England, leases, of whatever duration, are chattels real, and of the nature of personal estate, and upon the lessee's death go to the personal representative. By the law of Scotland, they are heritable as to succession, but moveable as to the fisc. Mortgages and securities for money affecting lands or real estate in England, and bonds of all kinds, are of the nature of personal estate, and go to the personal representative; while in Scotland, all securities for money, affecting lands or heritable property, are themselves heritable, and descend to the heir. *Blackst. ii. 16, 384; Robertson on Personal Succession, 307. See Heritable and Moveable. Bond. Chattels. Succession.*

**Pertinent.** This term is used in our charters and dispositions in conjunction with *parts*. Thus, lands are disposed with *parts and pertinents*; and that expression may carry various rights and servitudes connected with the lands. See *Parts and Pertinents. Bounding Charter. Commonalty.*

**Petaria, Turbaria.** The clause, *Cum petariis, turbariis, &c.*, gives the privilege of taking fuel, by peats and turfs, in mooses and muirs. *Stair, B. ii. tit. 3, § 76.*

**Petitory Actions;** are actions by which something is sought to be decreed by the judge, in consequence of a right of property or a right of credit in the pursuer. Thus, all actions on personal contracts, by which the grantor has become bound to pay or to perform, are *petitory actions*. *Ersk. B. iv. tit. 1, § 47; Stair, B. iv. tit. 21, 22, and 24; Bank. vol. ii. p. 616; Bell's Princ. § 2243; Mac-laurin's Sheriff Prac. 285; Jurid. Styles, iii. 17; Ross's Lect. ii. 279.*

**Petition and Complaint.** In the judicial procedure of the Court of Session, a petition and complaint is the form in which certain matters of summary and extraordinary jurisdiction are brought under the cognisance of the Court. Petitions and complaints are addressed to one or other of the Divisions of the Inner-House. The petition sets forth the matter of complaint, generally in an argumentative detail of the facts, and concludes with a prayer, first for a warrant of service on the adverse party, and an appointment on him to answer; and then, that on resuming consideration of the petition and complaint, with or without answers, the Court may grant the appropriate remedy, the nature of which is specified; or such other redress as to them may seem proper in the circumstances. The petition and complaint is prepared and signed by counsel, and the occasions on which redress may be sought in this form are various. Thus, under the old parliamentary election law, this was the form of bringing the proceedings of freeholders and of magistrates of royal burghs, at their Michaelmas head-courts and election meetings, under the review of the Court. This branch of the jurisdiction of the Court of Session has been taken away by the Reform Act; but petitions and complaints are still competent in the following cases—viz., against magistrates and officers of the law, or against members of the College of Justice, or judicial factors, or other managers appointed by the Court, for malversation in office,—against parties guilty of breach of interdict, or of contempts of Court of all kinds,—and, in general, against all parties, officially or otherwise, summarily amenable, for irregularities or misconduct, to the jurisdiction of the Court of Session. When such petitions and complaints are presented, they are enrolled in the Single Bill Roll; and when moved in the course of that roll, an interlocutor is pronounced, granting warrant for service, and ordering answers to the petition within a certain number of days, varying in ordinary cases from eight to fifteen. By the same interlocutor, the case is sometimes remitted *de plano* to the Junior Lord Ordinary, although the Court have power, if they please, to remit to any of the other Lords Ordinary. But such a remit is not uniformly made, it being competent to the Court to order answers to themselves, and to hear and decide according as the circumstances of the case may require, without a remit to the Lord Ordinary. When a remit is made to the Lord Ordinary, he proceeds as soon as the answers are put in with the preparation of the cause, agreeably to the form in other processes; that is, he superintends the making up and closing of

the record; with this *proviso*, that in the event of no answers being lodged to the petition, or on the failure of either party to obtemper any of the orders of the Lord Ordinary, it is competent to him to report the cause to the Court, in order that judgment may be pronounced in absence, or by default. After the case has been prepared, and the record closed before the Lord Ordinary, he reports the case to the Inner-House. All proceedings in petitions and complaints are summary, both before the Lord Ordinary and the Inner-House. See *A. S.* 11th July 1828, §§ 83 to 96 inclusive. See also *Shand's Prac.* 1035, *et seq.*; *Beveridge's Forms of Pro.* i. 406, *et seq.* See also *Contempt of Court.*

**Petition, Reclaiming.** See *Reclaiming Petition.*

**Petty Average.** See *Average.*

**Physicians' Fees;** may be pursued for, but are presumed to be paid, unless inconsistent with the practice of the place, and excepting where the patient is on deathbed. In Edinburgh, a surgeon's fees do not fall under the presumption of payment. *Ersk.* B. iii. tit. 7, § 17; tit. 9, § 43; *Bank. vol.* iii. p. 76; *Bell's Princ.* § 568; *Illust. ib.*; *Tait on Evidence*, 3d edit. 471-2. See *Fee. Honorary.*

**Piokery;** is the stealing of trifles, which has never been punished in any other way than by an arbitrary punishment. The breaking into gardens and orchards, and the stealing of green wood, are punishable by a pecuniary fine, which rises in proportion as the crime is repeated; and it would appear that, when frequently committed, even a capital punishment has been inflicted. *Hume*, i. 85, *et seq.*; *Ersk.* B. iv. tit. 4, § 59; *Tait's Justice, voce Theft.*

**Pictures.** See *Paintings.*

**Piepowder Court.** See *Dustyfoot.*

**Pigeon.** It is enacted by several of the Scotch acts of Parliament, that the shooting of pigeons, without the consent of the owner, shall be reckoned theft. The breaking into dovecots is not only reckoned theft, but, under an old statute, might, on a third offence, where the offender had no effects, have been punished with death; 1579, c. 84. This offence may be tried before the sheriff. Justices of the peace may execute the acts against breakers of dovecots, but cannot judge in complaints for shooting or killing pigeons. The statute 2 Geo. III. c. 29, for the protection of pigeons, does not extend to Scotland. It has been held not relevant to justify a tenant in shooting his landlord's pigeons, to allege that they are destructive to his farm; *Easton*, 18th May 1832, 10. *S. and D.* 542. See *Hutch. Just.* i. 117, 557; *Tait's Just. h. t.*; *Blair's Just. h. t.* See *Dovecot.*

**Pillory**; an instrument by which an offender is fastened to the market-cross or other public place, and exposed in *modum pœnæ* to the contempt and derision of the public; to whom he is thus, as it were, introduced as a base and infamous person; *Hume*, ii. 470. By the stat. 56 Geo. III. c. 138, the punishment of the pillory was abolished, except in cases of perjury—fine or imprisonment, or both, being substituted in lieu of the pillory, as the punishment for those offences of which the pillory, prior to the date of that statute, had formed the whole or part of the punishment; and by the act 1 Vict. c. 23 (1837), it was absolutely abolished. *Stair*, B. iv. tit. 36, § 8; *Ersk.* B. iv. tit. 4, § 102; *Hutch. Just.* i. 198; *Tait's Just. voce Punishment*.

**Pilots**; persons licensed to offer themselves as guides for navigating ships through narrow firths and rivers, or into ports, or through any place where the navigation is difficult. In England, pilots are established at several ports, under the appointment of certain incorporations regulated by statute. The statutes on this subject were consolidated by the act 6 Geo. IV. c. 125; but none of the statutes extend to Scotland. In Scotland, this matter has been left to common law, and the regulations and usages of the several ports, firths, and rivers. By royal charter, the Trinity House of Leith has authority to examine and appoint pilots for the Firth of Forth, and for the seas and firths, and along the coasts and islands, of the Northern and German Oceans. The town of Edinburgh has a right to appoint pilots for the navigation of the port, harbour, and roads of Leith. But the magistrates are not liable for damage suffered by ships under the guidance of those whom they appoint; *Ogilvie*, May 22, 1821, 1 *S. & D.* 24. In contracts of affreightment and insurance, the obligation of the owners to have the ship provided with persons sufficient to navigate her implies the obligation to have a pilot on board, wherever a pilot is, by regulation or usage, held to be necessary. Where a pilot cannot be had, the aid of persons locally acquainted with the navigation must be taken. It is a sufficient compliance with this condition if the master take a person authorized by the regular custom of the port, or the law of the place, to act as a pilot, provided he be at the time fit to act, and not manifestly incapable through intoxication or otherwise. A pilot employed to bring the ship into harbour is not entitled to salvage; *The Juliana*, 2 *Dods (Adm.)*, 504. It has likewise been decided in the English Admiralty Court, that where towing is necessary, pilots are bound to perform it, having a claim of compensation for any damage to their boats, and for extra labour; they are

also bound to offer their services in all weathers; *General Palmer*, 1 *Hagg. (Adm.)* 176. See *Bell's Com.* 551, 594; *Brodie's Supp. to Stair*, 985–9, 1004.

**Pimp-Tenure**. As a matter of historical curiosity, and as indicative of the manners of that age, it may be mentioned that Willielmus Hoppeshor tenet dimidiam virgatum terra in Rockhampton de domino rege per servitium custodiendi sex demissellas, scil. meretrices, ad usum Dom. Reg. 12 Edu. 1.—viz., by Pimp-tenure. *Tomlins' Dict. h. t.*

**Piracy**; is hostility committed at sea by an individual without license or commission from any acknowledged state or government. Any adventurer, therefore, who sails on a voluntary unlicensed warfare, and who disposes of his prizes at sea or elsewhere by his own authority, is properly a pirate. Even where a person engaged in an adventure of this kind holds a commission, if he take the ships of his own nation, or of a nation not at war with his own, or if he act contrary to the terms of his commission, he is guilty of piracy. It is piracy in the captain or crew to run away with the ship or cargo. The trial of this crime formerly belonged to the High Admiral or his deputy; but the sentence of that Court was liable to review by the Court of Justiciary, in the form of suspension. Since the abolition of the Admiralty Court, the only competent court is the Court of Justiciary. The punishment of this crime is death. See the act 1 Vict. c. 88, 1837. *Ersk.* B. iv. tit. 4, § 6; *Hume*, i. 476; *Alison's Princ.* 639; *Bank.* i. 528; *Bell's Com.* i. 559; *Swint. Abridg. h. t.*; *Tait's Justice, h. t.*; *Brodie's Supp. to Stair*, 989.

**Piscationibus**. For the effect of the clause *cum piscationibus*, see *Fishing. Salmon-fishing*.

**Pit and Gallows**. See *Fossa et Furca*.

**Place of Crime**. See *Locus Delicti*.

**Place of Payment**. If the place at which an obligation is to be performed be previously stipulated, the agreement must be adhered to, unless access to that place be unsafe or impossible, in which case the rule is the same as if no place had been named. Where no place is named, and if the thing to be performed is delivery of a certain species or corpus, the place where the subject is understood; but if it be a quantity, the place of contract, or where the debtor resides, is understood; *Stair*, B. i. tit. 17, § 19. Whether or not this rule, as laid down by *Stair*, be still the law, is doubtful; but it seems to be held in England, that where no place of payment is specified, the debtor is bound to seek out his creditor; and that the creditor, when the debt becomes due, may raise an action without giving him notice; *Chitty on Bills*, 391. It is not indispensable to specify the

place of payment in a bill or note. When no place of payment is specified, it has been questioned whether the acceptor or granter is bound to seek out the creditor, and make payment, or whether the creditor ought to apply for it. The general rule laid down by Chitty applies to the case of bills and notes, where no summary diligence is to be used; presentment and protest being in all cases necessary to authorize summary diligence. Mr Thomson holds that there is an exception to the rule that the debtor must seek out the creditor, in the case of bills payable on demand, and at or after sight; *Thomson on Bills*, 384. To preserve recourse against the drawer and indorsers, it is indispensably necessary to present the bill for payment to the debtor personally, or at his residence, unless he has himself, in his acceptance, specified some other place of presentment. The question, whether the specification of a place of payment, in the body of a bill or note, makes the presentment of it at that place a condition of the contract, is discussed by Mr Thomson, p. 420. See also *Bell's Princ.* § 337; *Illust. ib.*; *Bell's Com.* i. 412; *Jurid. Styles*, ii. 12, 16.

**Place of Subscription.** The insertion in the testing clause of the place where a deed was subscribed is not a statutory requisite, and is not essential to the legal authentication of the deed. But it is the invariable custom to insert the place of subscription; and in a doubtful or suspicious case, the omission would be a very unfavourable circumstance. *Ross's Lect.* i. 141; *Stair*, B. iv. tit. 42, § 19; *Ersk.* B. iii. 2, § 18.

**Placitum**; "pley, contention, strife or debate." *Skene, h. t.*

**Plack Bills.** See *Bills of Signet Letters*.

**Plagii Crimen**; or the stealing of adult living human creatures; is a crime not known in the present state of society in this country; but in former times, under the notion that it was a treasonable usurpation of the royal authority in detaining the King's free lieges, it was punishable with death. The same punishment has been applied to the stealing of children; for which offence there are recent instances of capital sentences. *Hume*, i. 81 and 83, in *Notes*; *Alison's Princ.* 280; *Kames' Stat. Law, h. t.* See *Theft*.

**Plague.** See *Quarantine*.

**Plaintiff**; in English law, he that sues or complains in an assize or action personal. *Tomlins' Dict. h. t.* See *Pursuer*.

**Plan.** A particular plan of building may be enforced, provided it be clearly made a condition of the feu-contract. The plan of Charlotte Square of Edinburgh, which the feuars were called upon to sign and adhere to, was held binding; *Dirom*, June 5, 1812,

*F. C.* But the mere exhibition of a plan of a new street, at the time of the sale of a piece of ground for building a house in the intended line of the street, does not of itself amount to a warranty or engagement that all that is exhibited on the plan shall be done; *Heriot's Hospital*, May 4, 1814, 2 *Dow*, 301; *Gordon*, Feb. 9, 1819, 5 *Dow*, 87. In a subsequent case, however, the feuars, having proceeded on the plan of the New Town of Edinburgh in taking their feus, were held entitled to prevent any building deviating in an inconvenient or material degree from that plan; *Young*, Nov. 17, 1814, *F. C.* In a judicial sale, plans of the estate ought to be prepared, in which the lots may be distinguished as they are exposed to sale. Plans are allowed to be founded on as evidence, when distinctly authenticated and sworn to. They are not, however, properly evidence of themselves; they are rather adminicles, explanatory and illustrative of other and proper evidence. All plans, maps, models, or other such productions, proposed to be used at a jury trial, must be lodged eight days before the trial; if the trial is to be at Edinburgh, with the jury-clerk, at the office in the Register-house; if on circuit, either with the jury-clerk, or with the sheriff-clerk of the county; *A. S.* 1825, § 29. *Bell's Com.* ii. 274; *Princ.* §§ 867, 994; *Illust. ib.*; *Macfarlane's Jury Prac.* 183.

**Planting and Inclosing.** Various acts of the Scotch Parliaments were passed for the encouragement of planting and inclosing, and for the punishment of those guilty of injuring or destroying growing trees and plantations; and with regard both to planting and inclosing, justices of the peace have a statutory jurisdiction. At common law, injuries done to trees and inclosures are also punishable as malicious mischief. The general act, 1661, c. 38, directs justices to enforce the older laws for the protection and encouragement of planting, with a modification in the punishment—the penalties being thereby made pecuniary. The older statutes for the encouragement of planting are in desuetude; but injuries to existing plantations are still punishable, and may be punished by two justices, on proof of the facts: such are, setting fire to trees; cutting, breaking, or pulling them up, or peeling them; the penalty in these last cases being L.10 Scots for each tree less than ten years old, and L.20 Scots for each older tree. The haver or user of such trees is liable in the same penalties, unless he produce the party who brought him the trees. And in default of payment, the party convicted must, for each half merk of penalty, work one day for the party injured, on receiving meat and drink only; 1685, c. 39. Tenants and cottars are likewise liable

in the same pecuniary penalties, if the injury be proved to have been done by their families, servants, or others living with them; although it has been thought that these statutory penalties are subject to mitigation. Sundry British statutes make offences of this description punishable by fine, and even with transportation for seven years; but in this last case, the trial, of course, cannot proceed before the justices. See on this subject, and also as to inclosing, the acts 1 *Geo. I.* c. 48; 1 *Geo. I.* sess. ii. 18; 6 *Geo. III.* c. 36; 13 *Geo. III.* c. 33; 9 *Geo. III.* c. 41; although certain of these statutes have not been acted on in Scotland. The Scotch statutes on the same subject which may be consulted are—1457, c. 80, and c. 83; 1424, c. 33; 1503, c. 71 and 74; 1535, c. 10 and 11; 1579, c. 84; 1661, c. 41; 1685, c. 39; 1669, c. 17; 1503, c. 71; 1535, c. 11; 1587, c. 83; 1607, c. 3; 1641, c. 45; 1686, c. 11; 1689, c. 16. The statutes regarding inclosures and the protection of fences may be executed by sheriffs and other judges, and also by justices of the peace. Such are the statutes concerning mutual and march fences. See *Marches. Runrig*. And the statute 1685, c. 39, imposes penalties on parties injuring ordinary inclosures, or allowing animals to go over them; giving one-half of the penalty to the owner of the fence, and the other to the fund for repairing roads and bridges in the parish. A stranger found within a broken inclosure will be presumed to be the breaker; 1661, c. 41. By 1686, c. 11, the herding of cattle is enjoined under certain penalties, directed against the owner of the animals found trespassing; and in order to enforce payment, the heritor or possessor who has been injured may detain or pound the trespassing animals, until payment of half a merk of penalty (*i. e.* about 1s. 3½d. sterling); together with the expense of keeping the animals, and the damages. But the party seizing the cattle must give immediate intimation of the seizure to the owner, and must place the cattle where they can have fodder and water; nor can he make any use of them, except at the risk of being held liable in a spulzie. *Ersk. B.* iii. tit. 6, § 28; *Hutch. Just.* ii. 498, 513; *Tail's Just. of Peace*, h. t.; *Blair's Manual*, 208, *et seq.*; *Kames' Stat. Law*, h. t.; *Watson's Stat. Law*, h. t.; *Bank.* i. 679; iii. 27; *Bell on Leases*, i. 807; *Hunter's Landlord and Tenant*, 572–5; *Jurid. Styles*, iii. 95.

**Plat, Decrees of.** See *Teinds*.

**Player.** See *Comedian*.

**Pleas in Law.** Pleas in law, as a distinct portion of a record, were introduced by the Judicature Act, 6 *Geo. IV.* c. 120, § 9, in which they are defined as “a short and concise note, drawn and signed by counsel, of the

pleas in law on which the action or defence is to be maintained; and in such note the matter of law so to be stated shall be set forth in distinct and separate propositions without argument, but accompanied by a reference to the authorities relied on.” At first these pleas were put into process as a separate paper, but are now subjoined to the paper to which they relate; *A. S. 11th July 1828*, § 49. It is the statutory duty of the Lord Ordinary, in adjusting the record prior to closing it, to suggest any new plea which may appear to him to be necessary for exhausting the disputable matter; and the pleas in law stated on the record are to be held as the sole grounds of action or defence, to which the future arguments of the parties are to be confined; with power, however, to the parties, with the leave of the Lord Ordinary, or of the Court, to add to the record any additional plea which may have been suggested by the Lord Ordinary or the Court, or by the party, as fit to be discussed in relation to the facts already set forth; *stat.* § 11. If, after closing the record, either party wishes a new plea or ground in law to be stated on the record, he must enrol the cause and furnish the new plea to the opposite party forty-eight hours before the enrolment; *A. S. 11th July 1828*, § 59. It would be an obvious absurdity to deprive a party of the benefit of any plea in law which the facts of his case may warrant, merely because such plea had been omitted in the record; and hence it has happened in practice, that pleas in law are not prepared with that circumspection and care which the statute seems to have contemplated. The pleas are in general so framed as to ground any legal argument which the facts may warrant; but the statutory injunction as to the citation of authorities is not in very strict observance; and hence, and from other causes, it not unfrequently happens that, when a case comes to be more carefully considered and argued, either orally or in a written argument, it is necessary either to obtain leave of the Court to add farther pleas, or to maintain an argument which the pleas on the record barely cover. In the Court of Session, the pleadings to which pleas in law are subjoined are defences, revised condescendences, revised answers to condescendences, reasons of suspension, reasons of advocacy, condescendences and claims in multiplepointings, and other analogous pleadings in the less ordinary processes. In inferior courts, pleas in law are subjoined to the defences and to the replies in ordinary processes, and to no other; in summary applications, to the answers to the original petition and to the replies; and in multiplepointings, to the condescendence and claim. See 6 *Geo. IV.* c. 120, §§ 2, 9, 10, 11; *A. S. 11th July 1828*,

§§ 48, 49, 58; *A. S. 12th Nov. 1825*; *Shand's Prac.* i. 325; *Maclaurin's Sheriff-Court Process*, 116-8, 124. See *Record*.

**Plea of Panel.** The panel's plea must either be *guilty or not guilty*. When it is guilty, sentence is forthwith pronounced by the Court. In pleading not guilty, the panel is not always to be understood to deny the whole allegations of the libel. Thus, to a charge of murder he may plead *not guilty*, and yet admit the homicide. The panel may plead guilty to certain charges, and deny the rest; or he may admit the crime and deny the aggravations; in which case the prosecutor may either rest satisfied with the plea of guilty, so far as it goes, or proceed to prove the charges which are denied. The panel cannot plead guilty of the aggravations and not guilty of the crime. The particulars of a special defence intended to be maintained ought to be stated to the Court immediately after the plea of not guilty has been entered; and where a written defence has been given in, the clerk of Court reads it at the same stage of the proceedings. This statement of the panel has sometimes a considerable effect on the charge as set forth in the libel. 9 *Geo. IV. c. 29*, § 14; *Hume*, ii. 282; *Alison's Prac.* 357; *Steele*, 197. See *Not Guilty. Libel. Amendment of Libel*.

**Pledge**; is a moveable subject put into the hand of a creditor by his debtor in security of a debt, or of an advance of money; which subject the creditor is to re-deliver on receiving repayment. The creditor is liable in a middle degree of diligence for preserving the pledge (*præstat culpam levem*); and should it perish without any fault imputable to the creditor, beyond what is implied in this degree of diligence, it perishes to the debtor, as being the proprietor; and the creditor is entitled to the expense profitably disbursed on the subject while in his hands. The pledge cannot be sold without judicial authority; and therefore, where a sale becomes necessary, the proper course is to apply to the judge-ordinary for a warrant to sell the subject by public sale—the pledger being called as a party. *Ersk. B. iii. tit. 1*, § 33; *Bell's Com.* ii. 20, *et seq.*; *Stair*, B. i. tit. 13, § 11; B. ii. tit. 10, § 1; *More's Notes*, p. lxxvii.; *Brodie's Supp.* 913; *Bank. vol. i. p. 383, et seq.*; *Bell's Princ.* p. 56; *Illust.* 151; *Kames' Stat. Law Abridg. h. t.*; *Tait's Justice of Peace, h. t.*; *Bair's do. voce Pawn*; *Ross's Lect.* ii. 321. See *Pactum Legis Commissoriæ in Pignoribus. Culpa. Pawnbrokers*.

**Plegius**; “a pledge, borgh, or cautioner. *Dimittere terras ad plegium*, to let lands to borgh, is when, any controversy being for the possession of lands, the same are, after inquisition and trial taken thereanent, given

and committed to their last lawful possessor, under borgh and caution that he shall restore them to him who shall be found to have right thereto.” *Skene, h. t.*

**Plough-Goods.**—By the act 1503, c. 98, horses, oxen, and other goods pertaining to the plough, are forbidden to be poinded at the time of labouring the ground, when the debtor has other goods. The time of labouring in this statute is understood to be the time at which the individual is engaged in labouring, whether he be earlier or later than the rest of the country. This labouring does not extend to summer fallowing, but only to the labour necessary for raising the crop of the season, so that the land may not lie waste. Where there are not enough of other moveables to answer the debt, the messenger may poind even the plough-goods. If the messenger has been shown other poindable effects equal to the debt, exclusive of the plough-goods, and has notwithstanding poinded the latter, it amounts to a spulzie. If, on the other hand, the messenger has poinded plough-goods in consequence of not having made a sufficient search for others, the debtor is entitled to restitution merely. *Ersk. B. iii. tit. 6*, § 22; *Stair*, B. i. tit. 9, § 29; B. iv. tit. 30, § 5; tit. 47, § 34; *Hunter's Landlord and Tenant*, 41-2, 816; *Tait's Just. voce Poinding*. By the act 1587, c. 82, the offence of destroying plough-graith in time of tillage is punishable as theft; the offence may be tried before the judge-ordinary, and without a jury. *Ersk. B. iv. tit. 4*, §§ 39, 62.

**Ploughgate of Land.** According to Balfour, “ane pleuch sould contene viii oxengang, the oxengang sould contene xii aikers, the aiker sould contene iiiii rudis,” &c.; *Balfour's Prac. voce Brieve of Division*, c. 98, p. 441. But although this may have been a rule in measuring land anciently, it will not be found to correspond with the measurements specified in charters. A ploughgate of land is the property qualification to hunt under the game-laws. See *Acce*.

**Plumper.** If there be more seats vacant than one in the same county or burgh, and a voter chooses to vote for only one of the candidates, he can give him but a single vote, which is then called a *plumper*. See *Reform Act*.

**Pluris Petitio**; is the asking more judicially than is truly due. Where an adjudication is led for a larger sum than what is actually due to the adjudging creditor, it is said to be a *pluris petitio*, which, where it is material, or where there has been culpable neglect, or fraud, will have the effect of annulling the adjudication. Where the *pluris petitio* is slighter, its only effect is to reduce the adjudication to a security for principal.

and interest, without expenses or penalties. *Pluris petitio* in the libel is immaterial, if decree be taken only for the sums really due. *Bell's Com.* i. 745; *Kames' Equity*, 296. See *Adjudication. Articulate Adjudication.*

**Poin ding**; is the Scotch law diligence, whereby the property of the debtor's moveables is transferred to the creditor using the diligence. Poin ding is either real or personal: *Real poin ding* proceeds on *debita fundi*, and it affects the moveables on the lands to which the debt attaches; *personal poin ding*, on the other hand, is used by creditors in ordinary personal obligations, and affects the debtor's moveable goods and effects. There is a third description of attachment which has also been termed poin ding, whereby cattle found trespassing on the grounds of another are detained until the owner of the cattle make satisfaction for the injury. These several attachments will be shortly considered in their order.

### I. REAL POINDING, OR POINDING OF THE GROUND.

This species of poin ding commences with an action, and proceeds on an heritable security, or such other *debitum fundi* as may be the warrant of the action; which is of the nature of a real diligence or execution for poin ding all the goods on the lands over which the security extends. This action is competent to a superior for his feu-duties, to an annual-renter for the arrears of his interest, or to an heritable creditor, and, in general, to all creditors in debts which constitute a real burden or *lien* on lands. An assignee and disponee to an heritable bond on which sasine had been taken, though not himself infeft on the conveyance in his favour, was found entitled to pursue a poin ding of the ground; *Tweedie*, Jan. 22, 1836, 14 *S. & D.* 337. But it is not competent to proprietors, or even to creditors or others in possession of the ground; for it is incompetent to point the grounds of the lands possessed by the pointer himself—an action of mails and duties being the proper action for recovering what is due to such possessors by the tenants in the natural possession. This rule of law has given rise to the question how far it is competent to an heritable creditor who has taken his security in the form of an absolute disposition, qualified by a back-bond, to point the ground. The principle recognised in one old case is, that the absolute disponee cannot competently point the ground; because, in virtue of his absolute title, he may enter into the natural possession. In that case, a person had wadset his lands and taken a back-tack of them, binding himself to pay to the wadsetter a yearly rent,

equal to the interest of the sum borrowed. The wadsetter, considering himself a creditor, brought an action for payment of the back-tack-duty, and added a conclusion for poin ding the ground in time coming. This was refused, "because the pursuer, being infeft in the property, could not ask his own ground to be poin ded for any sum due to him out of the said lands;" *L. Garthland*, March 2, 1632, *M.* 10,545; *Ross's Lect.* ii. 430. The effect of this diligence is to give the user of it a right to the rents; but he cannot, in virtue of it, assume the natural possession of the lands. And not only the tenants, but the proprietors must be made parties in the action. There is no personal conclusion against the defender, the object being to make the goods on the ground subject to the diligence. Hence, when decree is given, and letters of poin ding issued, they are executed without any previous charge against the tenants to make payment; for there being no decree against the tenants, there can be no warrant for a charge. Hence, also, after letters of poin ding are once granted, they may be put in execution as long as the pursuer lives, though the original defender be dead or removed. The goods falling under this diligence must be the goods of the owner or of the tenants; other goods on the land are not subject to the diligence. But by the act 1469, c. 36, the goods of tenants cannot be poin ded for their landlord's debt to any greater extent than the amount of the term's rent due by the tenant, or the arrears which he may be due at the time. In a competition of poin dings of this nature, the superior poin ding the ground for unpaid feu-duties and casualties will be preferred. Where there is no such ground of preference, the process having the first citation is preferred. The sheriff's jurisdiction is cumulative with that of the Court of Session in poin dings of the ground. It has been questioned whether a poin ding of the ground is to be considered of the nature of a diligence or an action. In one case it was laid down that it is a "process of execution;" *Thomson*, Feb. 12, 1828, 6 *S. & D.* 526. In a more recent case it was contended by an heritable creditor, that the raising and executing a summons of poin ding the ground was sufficient to give him a right to the moveables, preferable to that of a trustee subsequently confirmed, on the ground that the creditor's infeftment in the land gives him a real though accessory right in the moveables on the lands. To this the Lord Ordinary, in his note, objected—1st, That the creditor had not, in virtue of his infeftment alone, a right to the moveables preferable to that of a confirmed trustee; and, 2d, That if it required diligence to complete the preference, that diligence must be complete, and not



inchoate merely. The Court concurred with the Lord Ordinary on the first point; but with respect to the second, they held that the accessory real right which a *debitum fundi* confers, is sufficiently preserved by its being exercised *tempestivè*; and that the mere executing a summons of pointing the ground was such a timeous exercise. And this step having been taken before the confirmation of the trustee, they held it to constitute a right preferable to that of the trustee. One of the judges stated it as his opinion, that a pointing of the ground is "not so much a diligence as a declaratory real action." *Campbell's Trustees*, Jan. 13, 1835, 13 *S. & D.* 237; *Ersk. B. iv. tit. 1, §§ 11-13*; *Bell's Com. ii. 58*; *Ross's Lect. vol. ii. p. 392, et seq.*; *Stair, B. iv. tit. 23*; *tit. 47, § 26, et seq.*; *More's Notes, pp. ccv.-xi.*; *Bank. vol. i. p. 648*; *Bell's Princ. §§ 699, 2369*; *Illust. § 699*; *Kames' Stat. Law Abridg. h. t.*; *Hunter's Landlord and Tenant, 818-20*; *Jurid. Styles, 2d edit., iii. 457-61*; *Ross's Lect. ii. 392.*

## 2. PERSONAL POINTING.

Personal pointing—that is, the pointing of moveables for debt—may proceed either in virtue of the ordinary letters of horning issuing from the signet, or on the decrees of inferior courts as to moveables within the inferior judge's jurisdiction. The first step is to charge the debtor to pay the debt; and the days of the charge being elapsed, the pointing may proceed. The necessity of this previous charge was enacted by the statute 1669, c. 4. But there is an exception in the statute in favour of landlords, who are entitled not only to point for bygone rents, on a decree of their own baron-court, without a charge, but even to point *instantè* after pronouncing the decree. There is also an exception in the statute in favour of superiors pointing the effects of their vassals for feu-duties. A debtor's goods may be pointed by one creditor, though previously arrested by another creditor. Growing corn may be pointed; but it has been found that pointing of a growing crop only braided, and of clover-grass, is ineffectual; *Elders, July 5, 1833, 11 S. & D. 902.* The goods of tenants cannot be farther pointed than to the extent and in the manner pointed out in the preceding article; neither can plough-goods (where the debtor has other effects) be pointed during the period of tillage. See *Plough-Goods*. With those exceptions, all moveable goods and effects belonging to the debtor may be affected by this diligence. It is not necessary that the execution of pointing be written on a stamp, or signed by the appraiser. A pointing was held to be inept as to certain trunks containing a variety of articles, where the appraisal was of the trunk and

its contents in a slump sum, without a valuation of the several articles; *M'Knight, Jan. 27, 1835, 13 S. & D. 342.* The goods were formerly adjudged to the creditor by the messenger on appraisements by two valutors chosen by himself, once at the place where they were pointed, and once at the market-cross, whereby great injustice was done to the debtor. But now, in place of the two appraisements, only one is necessary. The goods remain in the hands of the debtor, and a schedule of them, with their appraised values, is also left with him. The messenger then reports his execution of the letters to the sheriff or other judge-ordinary, who grants warrant to sell the goods by public roup, at such time and place, and after such previous advertisements, as circumstances may require. Should any person carry off the pointed goods, or any part thereof, he is declared by the statute liable in double the value of the articles abstracted. The net amount of the sales is directed to be paid over to the creditor; or, if no purchaser appear, the goods are to be delivered at their appraised value. A minute of the transaction is kept by the clerk of court, open to the inspection of all concerned for the fee of one shilling. An erroneous notion prevails, that if a party has betaken himself to the diligence of pointing, he is not also entitled at the same time to follow out personal diligence against his debtor, and to incarcerate him. But there is no foundation in law for this notion. A creditor may point, arrest, inhibit, incarcerate, and adjudge, *unico contextu*, for one and the same debt; the only exception being in the case of a *special* adjudication, as to which the rule is, that the creditor, after he has attained possession under that diligence, shall have no farther execution against his debtor, by arrestment, caption, or otherwise. The special adjudication, however, is never resorted to in practice, and there is no other restraint on the simultaneous use of every legal form of diligence. See *Adjudication for Debt*. In a pointing under letters of horning, the sheriff's powers are merely ministerial, and he cannot inquire into the justness of the debt; *Clerk, June 15, 1824, 3 S. & D. 143.* See *Ersk. B. iii. tit. 6, § 20, et seq.*; *Bell's Com. ii. 60, et seq.*; *Stair, B. i. tit. 9, § 21*; *B. iv. tit. 30*; *tit. 47, § 29, et seq.*; *More's Notes, pp. ccccxxx.-i.*; *Bank. vol. iii. p. 23, et seq.*; *Bell's Princ. p. 673*; *Kames' Princ. of Equity*; *Bell on Leases, ii. 313*; *Ross's Lect. i. 385, et seq.*; *Hunter's Landlord and Tenant, 667*; *Maclaurin's Sheriff-Court Process*; *Jurid. Styles.*

## 3. POINTING OF STRAY CATTLE.

The pointing of cattle found trespassing

on inclosures, or committing depredations on corn, grass, or plantations, is of a different description from the above-mentioned poindings. Such a poinding does not transfer the property, but merely gives a right of detention to the person who seizes the cattle on his grounds, until satisfaction is made to him for the damage. Where the parties do not agree about the amount of the damage, it may be ascertained by the appraisers of the barony, with the expense of keeping the cattle. The statute 1686, c. 11, which confirms this right in the proprietor, gives a penalty of half a merk *toties quoties* for each of the cattle found trespassing, over and above the damage; and for these claims—viz., the damage, penalty, and expense of keeping the cattle—the proprietor is understood to have right. The poinder must take care that the cattle poinded be put into a proper place, where they may have fodder and water. Such poindings may be made *brevis manu*, and without judicial warrant. *Ersk. B. iii. tit. 6, § 28; Bank. vol. iii. p. 27; Hutch. Justice, ii. 513; Tail's Justice, voce Planting. See Brevis Manu.*

**Poison.** By the act 1450, c. 30 and 31, the importers of poison, by which bodily harm may be taken, are, over and above death, to forfeit lands and goods. But this law is in desuetude. Death by poisoning is the most difficult to distinguish from natural death. The best proof is the existence of poison in the body of the deceased; but this is by no means essential, and there have been many convictions of murder by poisoning without such proof. See *Burnett, 546; Alison's Princ. 75, 167; Steele, 89-90.* In Mr Steele's excellent work, a description will be found of the symptoms which the various kinds of poison exhibit.

The sale of arsenic is regulated by the act 14 Vict. c. 13, 1851.

**Police.** This term, in a large acceptation, has been applied to the due regulation and domestic order of the kingdom, though it is more generally applied to the internal regulations for watching, lighting, cleaning, and also for punishing minor delinquencies in great cities. A system of police has been established both in Edinburgh and Glasgow, and in other considerable towns in Scotland, by special statutes, the details of which are foreign to a work like the present. And in 1833 (3 and 4 Will. IV. c. 46) a general statute was passed, enabling burghs in Scotland to establish a general system of police, which however was superseded by the act 13 and 14 Vict. c. 33, 1850. The object of the particular statutes referred to, generally speaking, is to secure the watching, lighting, and cleaning of the streets, and the summary

conviction and punishment of minor offences. The expense of those establishments, where introduced in Scotland, is provided for by an assessment on the inhabitants; and the superintendence of the whole system of expenditure and management is entrusted to certain commissioners chosen by the inhabitants paying assessment. *Ersk. B. iv. tit. 4, § 38, et seq.; Kames' Princ. of Equity (1825), 341; Kames' Stat. Law Abridg. h. t.*

**Policy of Insurance;** is an obligation in writing, specifying the nature of the risk insured against, and the premium of insurance; and in marine insurance the underwriters oblige themselves to warrant the ship and cargo, to the extent of the sums annexed to their names, against all dangers arising from the sea, enemies' ships, pirates, or other misfortunes whatsoever. Those who undertake this obligation put down their names, and the sum for which they respectively become bound; and it is from thus *underwriting* the obligation that they are called underwriters. *Bell's Com. i. 599, et seq.; Bell's Princ. 124; Kames' Princ. of Equity. See Insurance. Open Policy. Wager Policy. Valued Policy.*

**Poll.** See *Deed Poll.*

**Poll;** is the taking of the votes of the electors *per capita*, or individually. For the regulations regarding the polling of electors, see *Reform Act.*

**Poor;** those destitute persons who are able but unwilling to labour, or those who, by reason of age and infirmity, have become a burden on society.

1. *Idle Poor.*—Several acts have been made for the punishment of sturdy beggars and vagabonds—*e. g., 1424, c. 42; 1535, c. 22; 1579, c. 74,* all of which are ratified by the act 1698, c. 21. Under the descriptions in those acts are comprehended all who pretend to tell fortunes, jugglers, minstrels, and all who can give no good account of the manner in which they gain their subsistence, and who, though able-bodied, are idle, and shun labour; those also are included, who, without any sufficient testimonials, allege that they have been shipwrecked, burned out of their houses, or herried. The punishment provided for them by those statutes is whipping and burning in the ear; and by 1579, c. 74, a repetition of the crime is made punishable with death. The execution of those acts is entrusted to magistrates of burghs, and sheriffs, and to justices of the peace; 1661, c. 38; *Ersk. B. iv. tit. 4, § 39.* But, except as to some minor penalties kept up against vagabonds, these statutes may be considered in total desuetude. See *Vagabonds.*

2. *Infirm Poor.*—Those who, from age or infirmities, are unable to maintain themselves, are ordered to be maintained by a tax

levied on the parish (1535, c. 22); and by an act, 1663, c. 16, a power is given to the landholders in landward parishes to assess themselves for the maintenance of such of the poor as cannot fully maintain themselves, and to demand relief of one-half of the sum from their tenants. The acts 1695, c. 43, 1696, c. 29, and 1698, c. 21, which relate to the same subject, ratify the former acts, give directions for carrying them into execution, grant power for that purpose to the Privy Council, and ratify their proclamations. Under this authority, four proclamations were issued by the Privy Council, on August 11, 1692; August 29, 1693; July 31, 1694; and March 3, 1698.

The relief of the poor is now administered under the act 8 and 9 Vict. c. 83, 1848. A general Board of Supervision is established, and assessments are imposed by the parochial boards of the several parishes respectively, according to one or other of the three modes authorised by the statute. By one mode, one-half of the assessment is imposed upon the owner, and the other half upon the tenants or occupants of all lands and heritages within the parish, according to the annual value of the lands and heritages. In estimating the annual value of lands and heritages, the value is taken to be the rent at which, one year with another, the lands and heritages may in their actual state be reasonably expected to let for from year to year, under deduction (1.) of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain the lands and heritages in their actual state; and (2.) all rates, taxes, and public charges payable in respect of the lands and heritages. By another mode of assessment, one-half of the assessment is imposed upon the owners of the lands and heritages in the parish, and the other half is imposed upon the whole inhabitants of the parish, according to their means and substance other than lands and heritages situated in Great Britain or Ireland. By a third mode of assessment, the assessment is imposed as an equal per-centage upon the annual value of all lands and heritages within the parish, and upon the estimated annual income of the whole inhabitants of the parish from means and substance other than lands and heritages situated in Great Britain or Ireland. When the parochial board of any parish has resolved on the manner in which the assessment is to be imposed, the resolution is reported to the Board of Supervision for approval; and if approved of, is adopted and acted upon, and cannot be altered or departed from without the sanction of the Board of Supervision. If the mode of assessment resolved on shall not be ap-

proved of by the Board of Supervision, the parochial board must meet and resolve upon another of the three modes; and the mode so resolved on is reported to the Board of Supervision, and cannot be altered or departed from without the sanction of the board. The property formerly vested in the heritors and kirk-session for behoof of the poor of a parish is now administered by the parochial board of the parish; but church collections continue to be disposed of by the kirk-session of each parish in the same manner as formerly. The assessments may be applied to the relief of the occasional as well as of the permanent poor; but able-bodied persons out of employment have no right to demand relief.

In *Petrie v. Meek*, March 4, 1859, 21 D. 1612, it was found that a parochial board were not entitled to give relief to an able-bodied man out of employment, and that such a person receiving relief was not thereby prevented from acquiring an industrial residence.

It is the parish within which a man has been born, unless he shall have formed a new settlement for himself by residence, which is bound to support him; but where a man has resided five years in another parish, it is the parish within which he has resided for the five years preceding his application for charity which is bound to support him. A woman, by marriage, immediately acquires the settlement of her husband; and she cannot, during the subsistence of her marriage, acquire a settlement independent of him. Children under fourteen years of age cannot acquire a settlement by residence. It is sufficient residence in a parish if the pauper has had his most common resort there, although he may have been absent for a considerable part of each year, and even although he has never had a house in the parish. Where a settlement has once been acquired, it formerly could not be lost but by the acquisition of a new settlement; but now a person loses his acquired settlement if, during any subsequent period of five years, he shall not have resided continuously for at least one year. The settlement of children not forisfamiliarised does not depend upon the place of their birth, but upon the settlement of their parents. Lawful children follow their father's, natural children their mother's settlement. This settlement is lost as soon as the child acquires a settlement by residence or marriage, and it never revives. Paupers cannot come upon the parish of their birth if they have acquired a settlement by residence, or during the subsistence of a settlement by marriage or by parentage.

The subject of poor-laws has been ably treated by Mr Dunlop in his Treatise on Parochial Law, p. 161, *et seq.* See also *Mony-*

penny (*Lord Pitmilley*) on *Poor-Law*; *Caird's Poor-Law Manual*; *Guthrie Smith's Digest of the Poor-Law*; *Ersk. B. i. tit. 7, § 61, et seq., and Notes by Mr Ivory*; *Stair, B. ii. tit. 1, § 6*; *Bank. i. p. 61*; *Bell's Princ. p. 304*; *Kames' Stat. Law Abridg. voce Vagrant*.

In England, the poor-law is principally regulated by 4 and 5 Will. IV. c. 76, commonly called the Poor-Law Amendment Act. This statute authorises the appointment of commissioners (who form a central board of control) and assistant-commissioners, to carry the act into effect. The details of the system are managed by guardians of the poor, churchwardens, and overseers. See *Overseers*. By 3 and 4 Will. IV. c. 40, altered, amended, and continued by 7 Will. IV. c. 10, provision is made for the removal of poor persons born in Scotland and Ireland, and chargeable to parishes in England.

**Poor's-Roll**; the roll of litigants who, by reason of poverty, are privileged to sue or defend *in forma pauperis*. This privilege is conferred by the Court, on being satisfied of the poverty of the applicant, and that he has *probabilis causa litigandi*; and the advantage of being admitted to the benefit of the poor's-roll is, that the party has his cause thereafter conducted gratuitously by the counsel and agents for the poor, and is relieved from the fee-fund and enrolment fees, and from all other Court fees and charges. This being a privilege which exposes the adverse party in the suit to the hardship of litigating with a pauper opponent, the Court has guarded against the abuse of conferring the privilege except upon good grounds. With that view, the A. S. 16th June 1819 provides that the Faculty of Advocates shall appoint six of their number annually to be advocates for the poor; and that the writers to the signet, and agents and solicitors, shall each nominate, in the month of December annually, four of their number respectively to be writers and agents for the poor; and shall immediately after such nomination give in to the senior clerk of each Division of the Court a list of the persons so appointed; which list is entered in the books of Sederunt. No person is entitled to the benefit of the poor's roll, unless he produce a certificate, under the hands of the minister and two elders of the parish where he resides, setting forth his circumstances, according to a formula annexed to the act. The formula states the applicant's age, whether he (or she) be married or not, the number of his children, the length of his residence in the parish, the property of which he is possessed, his trade and earnings, and whether he have any other lawsuit. If the party's health admit of it, he must appear personally before the minis-

ter and elders, to be examined as to the facts required by the formula; and the minister and elders must then certify how far the statement of the party consists with their own knowledge, or that of any one of them, or whether its credit rests solely on the statement of the applicant; in which case they must certify whether he or she be of good character and worthy of credit. Where the clergyman or elders refuse to give a certificate to a party applying for the benefit of the poor's-roll, the Court will cite them to give evidence at the bar as to the applicant's condition; *Craigie*, Feb. 10, 1832, 10 *S. & D.* 315; *Glass*, March 7, 1833, 11 *S. & D.* 543; *Smith*, July 8, 1834, 12 *S. & D.* 890. In several former instances, the Court, on the minister's refusal to give a certificate, remitted to the sheriff of the county to inquire and report; *Rattray*, July 8, 1824, 3 *S. & D.* 232. See also 7 *S. & D.* 301; 9 *S. & D.* 308. This was done in a more recent case, where there were no elders in the parish; *A. B.*, June 30, 1836, 14 *D. B. M.* 1040. In such cases, the sheriff may remit to the procurators for the poor to inquire into the poverty of the party. Where a kirk-session obstinately refuse to take the declaration of an applicant for the poor's-roll, in terms of the Act of Sederunt, and thereby occasion unusual delay and expense to the pauper, the Court will subject them in expenses to him; *Morris*, July 10, 1835, 13 *S. & D.* 1092. A certificate by the minister and elders of a dissenting congregation is not sufficient to support an application for the benefit of the poor's-roll; *Elphinstone*, Feb. 11, 1836, 14 *S. & D.* 463. The subscription of the minister implies his attestation, that the other subscribers designing themselves elders are really so; and a petition was ordered to be remitted to the lawyers for the poor, notwithstanding an allegation that these parties never had been ordained elders; *A. B.*, Nov. 26, 1833, 12 *S. & D.* 127. The kirk-session has nothing to do with the merits of the action; *Smith*, July 8, 1834, 12 *S. & D.* 890. Ten days' previous intimation must be given to the adverse party of the time and place fixed for making the declaration or statement before the minister and elders; and evidence of the intimation must be produced to the minister, under the hands of a notary-public, messenger-at-arms, sheriff or town officer, or other officer of the law. The declaration of the party, and certificate of the minister and elders, and of intimation to the opposite party, are the warrant for a petition to the Court for the benefit of the poor's-roll. The petition need be in writing only, and must be boxed to the Lord President of the Division. A copy of the declaration of the party, and certificate by the minister and

elders, must be appended to the copy so boxed. On moving this petition, if the above requisites have been complied with, the Court pronounce an interlocutor, ordering intimation in the Minute-book, and on the walls for ten days; after which the petition is again moved by the Lord President, and remitted to the lawyers and agents for the poor, to report whether the petitioner has a *probabilis causa litigandi*. It is the exclusive privilege of the counsel for the poor to judge whether there be *probabilis causa*, although the agents may differ from them; *Clark*, July 6, 1833, 11 *S. & D.* 908. And it is incompetent for the Court to review the judgment of the counsel for the poor as to the *probabilis causa*; *Currie*, Jan. 21, 1829, 7 *S. & D.* 302; *A. B.* Nov. 19, 1833, 12 *S. & D.* 58. It is no objection to effect being given to a report by the lawyers and agents for the poor, as to *probabilis causa*, that the Lord Ordinary before whom the cause depended had decided against the applicant; *Gibb*, June 15, 1833, 11 *S. & D.* 132. After a remit to the lawyers for the poor, and a report that there was *probabilis causa*, it was held too late to object that the certificate of poverty was informal, in respect of the ministers and elders omitting to state whether any of the applicant's allegations were within their own knowledge; and that objection was not allowed to be stated; *Oat*, July 9, 1836, 14 *S. & D.* 1120. Besides considering the *causa litigandi*, the counsel and agents to whom the remit is made must hear all objections offered by the adverse party to the truth of the statements contained in the declaration and certificate of poverty, and are entitled to demand additional evidence in regard to any particular which they may require to be proved, and to report thereon to the Court. If the Court find the petitioner entitled to the benefit of the poor's-roll, the counsel and agent who have made the report are appointed to conduct the petitioner's cause, and must continue to do so till its conclusion, or as long as the petitioner remains on the poor's-roll, although they may have ceased to be advocates and agents for the poor. No warrant for the benefit of the poor's-roll remains in force longer than two years from its date, except to the effect of entitling the poor person to a *gratis* extract of any decree which may have been pronounced; and the subsequent renewal, after an interval from the date of expiration, will not draw back in its effects to the intervening period; *A. S.* Aug. 10, 1784, § 5; *Murdoch*, June 3, 1825, 4 *S. & D.* 68. An application for a renewal must be made by note to the Lord President of the Division, accompanied by a report from the counsel in the cause, stating whether it appears that

the petitioner has still a *probabilis causa litigandi*, and giving a concise detail of the steps which have been taken for bringing the process to a conclusion, and the cause which appears to have prevented a final determination. This note must be duly intimated to the agent for the adverse party in common form, before boxing it for the Lord President. On or before the sixth sederunt-day of each winter session, the advocates and agents for the poor must box a report to the Lord President of each Division of the state of the poor's-roll of that Division; the number and names of the persons enjoying the benefit of it, with the dates of their several warrants of admission or renewal, and any special matter relating to that roll generally, or to any particular case, which they may think the Court ought to know. The principal clerks of each Division must, on or before the sixth sederunt-day in each winter session, make up and report to the Lord President of each Division an abstract of the number of applications which have been presented for the benefit of the poor's-roll during the year preceding, with the manner in which they have been disposed of. When the Court remit a petition to the advocates and agents for the poor to consider, it is the duty of the writer to the signet, or agent named in the remit, to procure from the petitioner, or his former agent, information as to the circumstances of the case, and to draw up a full memorial thereof, and lay the same before the advocates and agents named in the remit, for enabling them to make their report; and if further evidence or explanation appear necessary, such agent must direct and assist the petitioner in procuring it. The names of the advocates and agents to whom the cause is remitted must be marked on the margin of the summons or defences, or letters of advocacy or suspension, and on the back of every subsequent paper given in for that party in the cause. No enrolment can be made except by the agent appointed as above, nor in the name of any advocate except of the counsel so appointed. The word "*Poor*" must be prefixed to the name of the party on every paper given into Court. No other advocate or agent than those appointed as above can be employed, or allow their names to be used in any stage of the cause; unless, on application to the Lord Ordinary or the Court, by a note signed by the advocate and agent already appointed, the assistance of one of the other advocates or writers for the poor is specially authorised; in which case, those first appointed, and those so added, shall thereafter act conjunctly in the cause. Notwithstanding this provision, it has been decided, that senior counsel is entitled, on appli-

cation by the counsel for the poor, to act in the poor's cause without the special authority of the Court; *Bell*, Dec. 7, 1833, 12 *S. & D.* 187. In case of neglect or failure in any of the particulars above specified, the Court, on the application of the adverse party, open up and set aside the previous proceedings in the cause, and deprive the party of the benefit of the poor's-roll, or apply such other remedy as the circumstances of the case require. If a party on the poor's-roll gain his cause with expenses generally, this will be held to include the expense of getting on the roll; *Cameron*, June 25, 1814, *P. C.* But if this expense be not charged at the time, and the accounts be audited and decreed for, it cannot be afterwards claimed; *Gentles*, Nov. 15, 1827, 6 *S. & D.* 50. A party on the poor's-roll is liable to be subjected in expenses of process like other litigants. But a party on the poor's-roll residing beyond the jurisdiction of the Court, is not bound to sist a mandatory who shall be liable for expenses. See *Mandatory*. A party on the poor's-roll is equally liable with other litigants to suffer the penalties imposed in consequence of the neglect of agents. Thus, a party on the poor's-roll cannot be reponed against a decree in absence without payment of previous expenses like other litigants, unless it appear, upon investigation, that the decree so pronounced has gone out from the inability of the party to furnish information, and not from any fault or neglect of the agent in the cause, or the wilful neglect of the pauper himself; *A. S. Dec.* 23, 1825, and 11th *July* 1828, § 73. The Court exercise the same discretion in awarding expenses in regard to the causes of parties on the poor's-roll as to those of other litigants.

A further Act of Sederunt concerning the poor's-roll was passed 21st December 1842, by which the procedure is now regulated. By this act, in addition to the counsel and agents appointed for conducting the causes of the poor, two advocates, one writer to the signet, and one solicitor, are directed to be appointed each year to act exclusively as reporters on the *probabilis causa* of the pauper applicants for the benefit of the poor's-roll. This Act of Sederunt also regulates the mode of recovering and accounting for the dues of Court and professional charges, where the adverse party has been found liable in expenses.

The poor's-roll in the Sheriff Court is regulated by the *A. S.* 12th Nov. 1825, part 1, c. 21, which directs the procurators of court annually to appoint one or more of their number to act as procurators for the poor *gratis*, and that the appointment be approved of by the sheriff. Application for the benefit of the poor's-roll is made by petition, along

with which there must be produced a certificate, signed by the minister of the parish, or by the heritor on whose lands the pauper resides, or by two elders, bearing that it consists with their personal knowledge that the person prosecuted, or who means to bring the action, is not possessed of funds for paying the expense thereof. This petition is remitted to the procurators for the poor, who must intimate it to the other party; and after hearing both parties, or inquiring into the case, report their opinion specially to the sheriff, whether the petitioner has a *probabilis causa litigandi*. On considering this report, the sheriff either refuses the petition, or remits to one or more of the procurators for the poor, who must attend to and conduct the cause to its final issue. The pauper is not liable in payment of any of the dues of court, or fees to the procurator, or to the officer, except actual outlay, unless expenses are awarded to him in the process. The Act of Sederunt of the same date (12th Nov. 1825,) relative to Burgh Courts, makes the same provisions with regard to the poor's-roll in such courts. See on the subject of the poor's-roll generally, 1424, c. 45; *A. S. March* 2, 1534; *April* 27, 1535; *Nov.* 20, 1686; *June* 9, 1710; *June* 16, 1742; *Aug.* 10, 1784; *July* 11, 1800; *June* 16, 1819; and *Nov.* 12, 1825; *Bank.* ii. 489; *Ersk. Princ.* 593-6; *Kames' Stat. Law, h. t.*; *Mac-laurin's Sheriff Prac.* 295; *Dunlop's Parish Law*, 279.

In the House of Lords parties are admitted to plead in *forma pauperis*, upon a petition setting forth their poverty, accompanied by an affidavit thereof, and a certificate from the minister and two elders of the parish where they reside; and if the prayer of the petition be granted, the cause proceeds in all other respects like any other cause, except that the fees of office and all other fees are avoided. See the forms of such petition and affidavit, *Smith's Procedure upon Scotch Appeals*, p. 82, *et seq.*

**Pope.** The Pope, before the abolition of Popery in Scotland, exercised an absolute jurisdiction over churchmen, independently altogether of the civil magistrate. In order to check a disposition on the part of the Protestant clergy to claim a similar independence of the Crown, the stat. 1584, c. 129, posterior to the Reformation, declared that the King's authority extended over all the estates, and that he, by himself and his council, should be judge competent to all persons, spiritual and temporal, in all matters on which they might be charged. *Ersk. B. i. tit.* 5, § 6; *Bank.* i. 12; *Kames' Stat. Law Abridg. h. t.*

**Popular Action.** In the Roman law there were certain actions which might have been

insisted in by any person. Hence, an action of this description was termed an *actio popularis*; but in Scotland there is no such civil action, unless the actions competent to the nearest of kin of a minor be so, where the next of kin may pursue in the action of suspect tutory, or in the reduction of such deeds as a minor may have ratified by his oath; 1681, c. 19. There are other actions arising *ex delicto*, where statutory penalties are incurred, which, under special statutes, may be prosecuted by any person, the person availing himself of that privilege being usually called a common informer; to whom a certain share of the penalty is generally allowed by the statute under which the action is laid. *Hume*, ii. 115; *Bank. B.* iv. tit. 24, § 10, *et seq.*; *Ersk. B.* iv. tit. 1, § 17; *Kames' Equity*, 237.

**Porteous Roll.** This was a roll of the names of offenders, which, by the old practice of the Justiciary Court, was prepared by the Justice-Clerk from the informations of crimes furnished to him or his deputies, by the local authorities, in the different districts comprehended within the circuits. The Justice-Clerk in former times seems also to have prepared the indictments, and to have taken the other steps necessary for bringing offenders to justice. See 1487, c. 99. This practice was altered by the statute 8 Anne, c. 16, §§ 3, 4. See *Hume*, ii. 24, *et seq.*; *Ersk. B.* iv. tit. 4, § 86; *Kames' Stat. Law*, voce *Dittay*; *Skene, De verb. sig. h. t.*, and voce *Traistis*. See *Dittay. Criminal Prosecution. Traistis*.

**Porteur of a Bill**; the payee or holder of a bill of exchange. *Ersk. B.* iii. tit. 2, § 25. See *Bill of Exchange*.

**Portioner**; is the proprietor of a small feu or portion of land.

**Portioners, Heirs.** See *Heirs-Portioners*.

**Ports and Harbours.** Free ports are *inter regalia*, or in *patrimonio principis*. The sole right of erecting or of holding public ports and harbours is vested in the Crown; unless when this right is limited by royal or parliamentary grants to communities or subjects. One who obtains a grant of a harbour is bound to keep it in sufficient repair, and is entitled to levy harbour-dues for that purpose. Such dues are leviable as are warranted by immemorial usage. The grantee is not bound to repair or improve the harbour out of his own means; neither is he entitled, without authority of Parliament, to exact additional dues, in order to indemnify himself for any extraordinary expenditure or improvements. The public are entitled to insist that the harbour shall be kept up so far as the means afforded by the dues extend. *Ersk. B.* ii. tit. 6, § 17; *Stair, B.* ii. tit. 1, § 5; *Mr Brodie's Supp.* 949; *Bank.* vol. i. p. 83; *Bell's Com.* i. 506; *Bell's Princ.* § 654; *Illust.* ib.

See also the case of *Officers of State v. Christie*. Mar. 4, 1856, 18 D. 727.

**Positive Prescription.** See *Prescription*  
**Positive Servitude.** See *Servitude*.

**Posse Comitatus**; the power or force of the county, which the sheriff has a right to call out for the enforcement of the diligence of the law.

**Possession**; is accounted the chief test of property; but there is a distinction between the effect of possession in heritable and in moveable property. The title to heritable property must be instructed *scripto*, and regularly by charter and sasine. Without such evidence, possession of heritage will not confer property; neither will the want of possession deprive a person of his property, whose title is founded on charter and sasine; unless prescriptive possession on an adverse title has taken place. Mere possession without a written title confers no right in heritage. The possession of moveables, again, is regulated by a different rule; for where things have never belonged to any one, (*e. g.*, pearls or pebbles found on the sea-shore, or wild fowl, or beasts of the chase,) the possession or occupancy of them creates property. In things, again, which have had an owner, possession has the effect of raising a presumption in favour of the holder, which will require from the former proprietor not only evidence that they were his, but also of the manner in which he came to lose his possession. Hence, where a disputed article has been taken out of the possession of the holder *vi aut clam*—that is, by force or fraud—the judge will first of all restore it to the person who was in possession of it, before he decides the point of right. On this subject, see *Bona Fides* and *Mala Fides*. Possession is divided into natural and civil. **Natural possession** is where the proprietor is himself actually in possession, as of lands by cultivation, and by sowing and reaping the crops; of a house, by inhabiting it; of moveables, by having them in his hand or in his custody. **Civil possession**, on the other hand, is possession not by the owner, but by another in his name, or for his behoof, as of lands by a tenant, the rents of which are drawn by the proprietor or his factor, or of property by a trustee or by a liferenter, or of a pledge by the creditor. There is a further division of possession, into that which is acquired lawfully and that which is acquired *vi aut clam*. But a distinction is taken between force and fraud. Possession attempted to be acquired by force may be resisted by force; but possession, being once obtained in this way, must be reclaimed by the true owner judicially; the party who has ceased to possess being bound to trust to the protection of the law for restitution, and not to the strength of his own arm.

In the case of fraud, there can be no appeal to force; and where possession has been acquired by either of these means, it is the duty of the judge to restore it to him from whom it has been taken, without waiting to settle the question of right; *Ersk. B. ii. tit. 1, § 20, et seq.*; *Stair, B. ii. tit. 1, § 8, et seq.*; *More's Notes, p. cl.*; *Bank. vol. i. p. 510, et seq.*; *Bell's Com. i. 249, et seq.*; *Bell on Leases, i. 52, 60, 88, 124, 185, 303, 323, 451, 472*; *Hunter's Landlord and Tenant, 290, 337, et seq.*; *Brown on Sale, 18, 20-4-6, 537*; *Ross's Lect. ii. 81-8, 383, 488, 506*. See *Delivery. Reputed Ownership. Sasine. Lease. Vesting.*

**Possessione Retenta.** See *Reputed Ownership. Assignation.*

**Possessory Action.** A possessory action is one in which the point of right is not directly concerned, but barely that of possession. Such actions are competent either for attaining, retaining, or recovering possession. An action of molestation, by which a proprietor of heritage complains of being disturbed in his possession, is an instance of this form of action. *Ersk. B. iv. tit. 1, § 47*; *Stair, B. iv. tit. 26*; *Bank. ii. 619*; *Bell's Princ. § 2249*; *Ross's Lect. ii. 279*. See *Ejection and Intrusion. Molestation.*

**Possessory Judgment.** A possessory judgment is one which entitles a person, who has been in uninterrupted possession for seven years, to continue his possession until the question of right shall be decided in due course of law. Thus, for example, a tenant who has been in the peaceable possession of lands for seven years under a written lease of a longer endurance than seven years, is entitled to the benefit of a possessory judgment, whereby he will be maintained in possession until his title, if it be defective, is regularly reduced and set aside in the proper action. It has been held that a party may be entitled to the benefit of a possessory judgment regarding a servitude of fish and entry to a plot of ground, though he held the ground under a bounding charter making no reference to such servitude, and containing no clause of parts and pertinents; *Liston, Dec. 3, 1836, 14 S. & D. 97*. But a party who possessed a piece of ground from 1821 to 1828, under a disposition reserving a servitude of road in favour of a third party, having then got a new disposition from his author (whom he guaranteed against the consequences) omitting the clause of servitude, and having burnt the prior disposition, was found not entitled, in 1831, to a possessory judgment, in a question with the party in whose favour the servitude was reserved; *Ross, Feb. 28, 1833, 11 S. & D. 467*. The origin of this right, according to Erskine, is supposed to have begun, that where there are subaltern rights

of the same lands granted to vassals, and by them to sub-vassals, the vassal or sub-vassal not being master of the original title-deeds, which commonly remain with the highest superior, might be turned out of his possession by one who, though he had no good right at bottom, might yet produce a title prior to any in the hands of the possessor himself. This remedy relieves the proprietor from all risk of being deprived of his possession by one who has no title to his property. If he is dispossessed, it must be by one who, in law, is truly vested with a preferable right. *Ersk. B. iv. tit. 1, § 50, and B. ii. tit. 6, § 28*; *Stair, B. ii. tit. 1, § 25*; *tit. 3, § 73*; *tit. 8, § 29*; *B. iv. tit. 23, § 16*; *Bank. vol. i. p. 513*; *Bell's Princ. § 2251*; *Bell on Leases, i. 89*; *Hunter's Landlord and Tenant, 481, 557*.

**Post Proximum Terminum Minime Valiturus.** Precepts from Chancery for infefting the heir of a deceased Crown vassal must be executed before the lapse of the first term of Whitsunday or Martinmas after the date of the precept; under the sanction of nullity. Such precepts were formerly directed to the sheriff of the county; and the sheriff-clerk only (except under special circumstances) could officiate as notary at giving infeftment. The limitation of the precept in point of time is thus expressed: "*Post proximum terminum minime valiturus.*" The reason assigned for this limitation is, that the casualties are not calculated beyond the term preceding the special service of the heir; and if another term were suffered to elapse before executing the precept, a new precept and an additional calculation of the casualties would be necessary. 1540, c. 77; 1606, c. 15; *A. S. Feb. 15th, 1678*; *Dallas' Styles, folio ed. 883*; 4th edit. ii. 583; *Jurid. Styles, i. 351, 2d edit.*; *MacKay v. Campbell's Trustees, 13th Jan. 1835, 13 S. & D. 246*, not reported on this point, but see it argued in the papers. See *Precept*.

By the act 8 and 9 Vict. c. 35, 1845, precepts from Chancery may be addressed to any notary-public; and by the Titles to Lands Act, 1858, the precept may be recorded in the Register of Sasines, in place of expeding infeftment on the warrant of sasine or the precept. See *Titles to Lands*.

**Posthumous Child;** is a child born after the death of the father. This does not make any difference in the legal rights of the child. A posthumous child cannot be charged to enter heir till a year after his birth; *Livingston, 28th Feb. 1628, M. 6870, Brown's Supp. i. 375*. A bond of provision in favour of two daughters, as the granter's younger children, and executed in virtue of a power given by an entail to provide for younger children, was extended to a posthumous child; *Oliphant, 10th Dec. 1794*; *Bell's Cases, 125*;



*Brown's Supp.* v. 648. See *Conditio si sine Liberis. Ventre inspiciendo.*

**Postliminii Jus.** By the Roman law, when one was taken in war, and made a slave, his rights as a freeman were not entirely destroyed: they were only suspended—and if he made his escape, they *eo ipso* revived; so that he could not be reclaimed, unless again enslaved in the regular way. This right which such slaves enjoyed was called *jus postliminii*; and the term has been employed, in modern times, in questions respecting the right to retake a ship which has been captured and made its escape. *Inst. of Just. B. i. tit. 12, § 5.* See *Slave.*

**Postnatus Filius**; a second son. *Skene h. t.*

**Postnuptial Contract.** See *Contract of Marriage.*

**Post-Office**; the office for the conveyance of letters through the kingdom, both from foreign countries, and from place to place within Great Britain. The existing statutes which relate to the Post-office are—1 *Vict. c. 32, 33, 34, 35, 36*; 3 and 4 *Vict. c. 96*; 10 and 11 *Vict. c. 85*; and 11 and 12 *Vict. c. 88.*

**Potestative Condition.** See *Conditional Obligation.*

**Potior est Conditio Possidentis, vel Defendentis.** See *Pactum Illicitum.*

**Pound**; in England, an inclosed place of strength, in which cattle distrained for rent or for damage feasant are kept until they are redeemed or replevied. *Tomlins' Dict. h. t.*

**Pound Scots.** See *Scotch Money.*

**Power of Attorney**; is a power given by one man to another to act for him. This is properly an English term: the Scotch deed is called a *factory* or *commission*. For the form of a power of attorney; see *Jurid. Styles*, ii. 293, *et seq.* See *Agent. Factor. Procurator. Mandate.*

**Power of Sale.** In heritable securities for debt, whether in the form of heritable bonds, or of bonds and dispositions in security, it is now almost the invariable practice, to insert a clause conferring on the creditor a power to sell the heritable subject of the security, in the event of the debt not being paid within a certain time (commonly six months) after a formal demand of payment. This clause formerly took the creditor bound to make the demand of payment on the debtor personally, or at his dwelling-house, if he were in Scotland, or edictally if he were furth of Scotland. If, after such requisition, and the lapse of the limited time, the debt was not repaid, the creditor was then empowered to sell the subject of the security by public roup, after due advertisement (generally for two months) in certain specified newspapers. The clause conferring this power farther authorised the creditor, in name of the debtor, to enter into

articles of roup, and to grant a disposition or dispositions to the purchasers, containing the usual clauses, and binding the debtor and his heirs in absolute warrandice, as also obliging him and them to corroborate and confirm the sale, and to grant all deeds requisite for rendering it effectual. There was then a declaration, that the sale should be equally good to the purchaser as if the debtor himself had made it—a power to adjourn the roup—to fix the upset price, and so forth; and finally, the debtor bound himself, and his heirs and successors, to ratify and confirm the sale, and to execute and deliver to the purchaser, if necessary, all requisite deeds. As to the purchaser, it was declared that he was to have no concern with the application of the price; while, on the other hand, the creditor, in the event of making a sale, was taken bound to account to the debtor for the surplus of the price, after repayment of the debt, with interest and the necessary expenses of the sale.

In virtue of the act 10 and 11 *Vict. c. 50, 1847*, the clause is now in these terms—"And on default in payment, I grant power of sale;" and the clause so framed has the effect specified in the third section of the act, and which is the same as that authorised by the clause in the old form.

The power of sale is held to be so far of the nature of a mandate; but *quoad* the creditor, he is, as it were, *procurator in rem suam*; and hence the mandate is not revocable by the debtor, nor does it expire either by his death or bankruptcy. Neither can the creditor, when exercising a power of sale regularly and fairly, be interrupted by a process of ranking and sale at the instance of the other creditors of the debtor, or by a mercantile sequestration of his estates. *Simson v. Graham*, 25th Nov. 1831, 10 *S. & D. 66.* But the precautions which are necessary to secure a fair sale, at an adequate price, must be punctually observed; and the Court of Session, at the suit of any party having interest, will interpose and order all reasonable precautions to be taken. It is held, however, that the creditor with a power of sale is, to a certain extent, a *trustee* for the debtor, bound to act with due regard to his reversionary interest; and hence the Court holds that it can competently interfere *ex cequitate*, where the creditor is proceeding unimously, or with undue selfishness, in the exercise of the power of sale. See the case of *Beveridge v. Wilson*, 17th Jan. 1829, 7 *S. 27.* It has been decided, that advertisement of the sale in a newspaper containing advertisements only is sufficient compliance with a general obligation on the creditor to advertise in a newspaper; *Dickson*, 15th Jan. 1831, 9 *S. & D. 282.*

By the act 10 and 11 Vict. c. 50, 1847, a creditor who exercises a power of sale is bound to count and reckon for the surplus of the price, and to consign it in bank in the joint names of himself and the purchaser. On this being done, the disposition by the creditor to the purchaser has the effect of completely disencumbering the lands of all securities and diligences posterior to the security of the creditor, as well as of his own security and diligence. *Bell's Princ.* § 891; *Illust. ib.*; *Jurid. Styles*, 272. 2d edit. See *Burdens*.

**Practicks.** The reported decisions of the Court of Session were anciently called *Practicks*, on account of their authority in fixing and proving the practice and consuetudinary rules of law. See *Decisions*.

**Præceptio Hæreditatis.** See *Passive Titles*.

**Præcipuum.** See *Heirs-Portioners*.

**Prædial Servitudes;** are real servitudes, affecting heritage, and taking the name from *pradium*, a tenement of land or houses. See *Servitudes*.

**Prædial Tithes;** are tithes arising from land, in contradistinction to the tithes arising from animals. See *Teinds*.

**Præmunire;** is the forfeiture of lands and tenements, goods and chattels, and imprisonment during the Sovereign's pleasure. The term is derived from *præmunire*, an ancient English writ, introduced for the purpose of repressing the papal encroachments on the power of the Crown. It was authorised by statutes passed with a view to extinguish that power; and from the first words of the writ, *præmunire facias*, both the writ and the punishment received the name of a *præmunire*. Persons who, by preaching, teaching, or advisedly speaking, maintain that any person has right to the Crown of these realms, otherwise than according to the Act of Settlement, or that the King (or Queen) of this realm, with the authority of Parliament, is not competent to make laws to bind the Crown and the descent thereof, subject themselves to the penalties of *præmunire*; 6 Anne, c. 7. And by c. 23, it is declared to be a *præmunire* for the Peers of Scotland, assembled to elect their representatives, to presume to treat of any matter but the election. It is more than a century since there was an instance of a prosecution for a *præmunire*. *Hume*, i. 523. See *Election Laws*; also *Tomlins' Dict. h. t.*

**Præpositor.** See *Institutor*.

**Præpositura of a Wife.** Where a wife is *præposita negotiis* by her husband—that is, intrusted with the management either of a particular branch, or of his whole affairs—all the contracts she enters into, and even the debts due by her for goods, though not constituted by writing, but arising from furnishings made

to her, are effectual against the husband, though not against herself; for she acts for her husband. This power given to the wife may be constituted either by a written faculty, or tacitly by use, where the husband has seen and approved of her actings. The wife, in domestic matters, is presumed, while she resides with her husband, to be *præposita negotiis domesticis*—that is, invested with the management of the family—in which character she may purchase whatever the family requires; and the husband will be liable for the price, though the article may have been otherwise applied, or although the husband may have given his wife money for the purchase. When money is borrowed by the wife in the character of *præposita negotiis*, the lender must show both that it was needed at the time, and expended on necessary furnishings. The wife's presumed right to superintend her husband's family ceases if she abandon her family, and may be put an end to at the pleasure of the husband by inhibition. *Ersk. B. i. tit. 6, § 26*; *Stair, B. i. tit. 4, § 17*; *More's Notes*, p. xxii.; *Bell's Com. i. 479–90*; *Bell's Princ. § 1565*; *Illust. ib.* See *Inhibition, a Husband against his Wife. Marriage*.

**Præpositus;** was the head of a collegiate church, under whom were canons or prebendaries, so called because they had a stated portion or *præbenda*, each according to his degree in the church. *Ersk. B. i. tit. 5, § 3*.

**Prævento Termino;** an obsolete form of action, formerly in use in the Court of Session, and resorted to by a charger against whom a bill of suspension had been presented. The object of this action was to defeat a device sometimes fallen upon by the suspender, who, in order to obtain delay, got distant day of compareance assigned in the deliverance on the bill of suspension; and as the suspender could not insist to get the reasons of suspension discussed until the day of compareance specified in the deliverance had arrived, the object of the action *prævento termino* was to accelerate the term for discussing the suspension or advocacy, by getting an earlier day fixed. The present forms of the Bill-Chamber supersede the necessity of such an action, and it has been long disused. *Ersk. B. iv. tit. 3, § 21*; *Bank. ii. 623*. See *Suspension*.

**Preamble of Statutes.** The preamble of the statute is the narrative, which recites the inconveniences which it is the object of the new enactment to remedy. In questions of construction of the enacting clauses, inferences drawn from the preamble are exceedingly liable to error. *Ersk. B. i. tit. 1, § 49*; *Stair, B. iv. tit. 45, § 13*. See *Statute*.

**Prebend;** in the Episcopal Church, is a benefice appropriated for the maintenance of

a clerk, or member of a collegiate or cathedral church. The *prebendary* is the clerk or clergyman, and is one of the chapter or council of the dean who enjoys the benefice. *Stair*, B. ii. tit. 8, § 15; *Ersk.* B. i. tit. 5, § 3; *Bank.* i. 558; ii. 6.

**Precarise**; were agreements by which proprietors yielded up their lands to the Church, and received them back on payment of a rent, which varied according to circumstances. The form of a *precaria* is given in *Bell on Leases*, i. 7. See also *Hunter's Landlord and Tenant*, 14.

**Precarium.** The contract of *precarium* is a gratuitous loan, in which the lender gives the use of the subject in express words, revocable at pleasure. In such a loan, the lender is entitled to demand back the subject lent at any time; and as the borrower is thus at all times bound to redeliver it, he is liable for its preservation only *de dolo et culpa lata*—that is, for gross omissions or culpable negligence. But if, after the subject has been demanded, the borrower delays to return it, he must make it good, should it be destroyed even by accident. On the death of the borrower the loan terminates, and his heir must account for the profits while the subject of the loan continues in his possession. But the death of the lender does not put an end to the loan, nor does it terminate until the article is demanded by the heir of the lender. *Ersk.* B. iii. tit. 1, § 25; *Stair*, B. i. tit. 11, § 10; *Bank.* i. 327; *Bell's Princ.* § 196. See *Loan. Mutuum. Commodate.*

**Precentor**; in the Presbyterian Church, is the person whose duty it is to lead the congregation in the singing of psalms. He is, in the ordinary case, appointed by the kirk-session; but this rule may be altered by circumstances conferring the patronage on an individual or a corporation; or it may be otherwise provided by the decree of erection of the parish. Precentors are removeable at pleasure. Although in country parishes, the same individual is frequently precentor, schoolmaster, and session-clerk, there is no necessary connection between these offices; and a party holding one of them cannot be compelled to do the duties of any of the others, unless by special engagement. There is no general provision for the precentor's remuneration, but in practice he usually receives certain fees. As preparatory to a process of augmentation, the precentor must furnish a certificate, that on three several Sundays he announced the minister's intention to raise the process. The form of the certificate is given in *Jurid. Styles*, iii. 488. See *Dunlop's Parochial Law*. See *Church Officers. Augmentation.*

**Precept of Arrestment**; is a warrant issued by the judge of an inferior court, au-

thorising the officers of court to arrest for the amount of the debt contained in the decree to which the precept refers, in the hand of any person residing within the jurisdiction of the judge. See *Arrestment.*

**Precept of Clare Constat.** See *Clare Constat.*

**Precept of Poinding.** See *Poinding.*

**Precept of Sasine.** A precept of sasine is the order of a superior to his bailie to give infeftment of certain lands to his vassal. Prior to the act 1672, c. 7, the precept of sasine was a separate deed from the grant or charter; but that act required, that in all Crown charters the precept should be inserted before the conclusion of the charter; and thenceforward the practice prevailed, of inserting the precept immediately before the testing clause of the charter or other deed in which the grant or conveyance is made. The precept is in the form of a mandate authorising a mandatary, whose name is left blank, and who is appointed bailie in that part, to give infeftment to the vassal in the lands described in the deed. But, as such mandates fell by the death of either the granter or receiver, that great practical inconvenience was removed by the act 1693, c. 35, which declares a precept of sasine to be a sufficient warrant for giving sasine as well after as before the death either of the granter or grantee, or both, provided the sasine taken after the death of either party deduce the title of those in whose favour the sasine is given. The unexecuted precept of sasine may be assigned. *Ersk.* B. ii. tit. 3, § 33. Precepts of sasine are contained not only in original charters and charters by progress, but in dispositions by sellers to purchasers, even though it is not meant that the purchaser should be the vassal of the seller; but this peculiarity in our practice has been explained under the articles, *Disposition; Charter; Confirmation; Consolidation.* There is also another precept of sasine, called a *precept of clare constat*, which is a warrant granted by a superior authorising his bailies, whose names are also left blank, to give infeftment to the heir of his vassal. This precept cannot be transferred or assigned like the precept in a charter or disposition. It necessarily is, by its nature and express terms, a warrant for a sasine in favour of the heir in whose favour it is given, and of no one else. Hence, precepts of *clare constat* are excepted from the act 1693, c. 35. *Ersk.* B. iii. tit. 8, § 71. See *Clare Constat.* See generally, on precept of sasine, *Ersk.* B. ii. tit. 3, § 33; *Stair, App.* § 1; *Bell's Com.* i. 674-5, 696-7; *Bell's Princ.* §§ 764, 876; *Ilust.* 876; *Kames' Stat. Law Abridg.* h. t.; *Bell on Purchaser's Title*, 71-4; *Ross's Lect.* ii. 131, 161. See *Titles to Land. Post Proximum Terminum.*

**Precept of Warning and Removing.** See *Warning. Removing.*

**Precognition;** in criminal law, is an examination by the judge-ordinary or justices of peace, usually conducted under the superintendence of the procurator-fiscal, where any crime has been committed, in order that the facts connected with the offence may be ascertained, and full and perfect information given to the public prosecutor, to enable him to prepare the libel and carry on the prosecution. In this investigation, which is entirely *ex parte*, the witnesses are not usually put upon oath, and they must be examined separately; nor is the accused, or any person on his behalf, admitted to be present when the precognition is taken. It is competent, however, to put the witnesses on oath in their precognition, with the exception of the party accused, or one to whose testimony there is a legal objection. Neither is the accused allowed to cite witnesses in exculpation, or to see a copy of the precognition after it is taken. Those who know anything of the fact may be compelled to come forward; and, for this purpose, the magistrate officiating at the precognition grants a warrant to summon them, which, should they disobey, will be followed by a warrant of imprisonment until they comply. The precognition must be taken prior to the service of the indictment or criminal letters; for after that, communications between the prosecutor and the witnesses are improper. But although this inquiry is *ex parte*, and for the use of the public prosecutor, yet, if the accused make a reasonable suggestion as to the propriety of precognosing any particular individual, the judge-examiner, in the ordinary case, attends to that suggestion, and cites and examines such persons as may be named by the accused as likely to establish his innocence. The precognition should be reduced into writing, and signed by the witnesses, according to their usual mode of spelling; and their correct and full designation should be inserted at the commencement of their declaration. The duty of conducting precognitions now belongs to sheriffs, magistrates of burghs, and justices of peace. Their responsibility is limited by special statute, and they are liable in damages only where they can be proved to have acted maliciously and without probable cause. *Hume*, ii. 78 *et seq.*, and 365; *Alison's Prac.* 134; *Ersk. B.* iv. tit. 4, § 86; *Tait's Justice*, voce *Arrest*; *Blair's Justice*, h. t.; *Hutch. Justice*, x. 257, 450. See *Procurator-Fiscal. Criminal Prosecution.*

In precognosing witnesses preparatory to a proof in a jury trial in a civil cause, the agent ought to avoid everything likely to raise objections against their admissibility. He should

confine himself to the asking of questions, and ought not to give or read to the proposed witnesses any parts of the process, or communicate to them any version of facts of his own, or state to them the nature of the action, the views of it favourable to his client, or the respective pleas of the parties. If the precognition is reduced into writing, it should not be subscribed by or read to the witness, or given him to read. Affidavits should not be taken from witnesses, nor should they be precognosed upon oath. Neither ought one witness to be present at the precognition of another. But it was held not to be a good objection to a witness, that she had been precognosed in presence of her husband, who was also a witness, it having appeared that her presence was accidental. By the act 15 and 16 Vict. c. 27, 1852, no person can be excluded from giving evidence by reason of having appeared without citation, or by reason of having been precognosed after the date of citation. *Macfarlane's Jury Prac.* 114; *MacLaurin's Sheriff Prac.* 158. See *Evidence. Partial Counsel. Citation.*

**Pre-emption, Clause of.** See *Clause of Pre-emption.*

**Preferences;** take place in the different competitions of titles and diligences, as adjudications, inhibitions, arrestments and poidings, which are regulated by certain laws peculiar to each, and by which their priority is determined. *Bank.* iii. p. 34; *Bell's Com.* i. 750, *et seq.*; ii. 201, *et seq.*; *Bell on Purchaser's Title*, 235; *Ross's Lect.* i. 102; ii. 262. See *Competition. Hypothec. Privileged Debt. Retention. Ranking and Sale. Bankrupt. Conjunct and Confident.*

**Pregnancy.** A woman who conceals her pregnancy, and does not call for help in the birth, and whose child is amissing, is held, under the act 1690, c. 21, to be guilty of murder. See *Concealment of Pregnancy.* Where a pregnant woman is convicted of a capital crime, sentence will be delayed; or, if sentence have been pronounced, the execution of it may be suspended until after the birth of the child; *Hume*, ii. 452, *et seq.* Pregnancy, where the child, if born, would be the heir to an estate, will stop a service by a remoter heir; and the child *in utero* will not only be presumed to be in life, but will be presumed to be a male. But the mere possibility that a nearer heir may be begotten will not have this effect: the service of the nearest heir for the time will proceed, though a nearer heir under the destination may possibly come to exist. *Ersk. B.* iii. tit. 8, § 76. See *Ventre inspicendo. Posthumous Child.*

**Prelacy.** See *Episcopacy.*

**Preliminary Defences.** See *Defences. Reduction.*

**Premises**; is properly an English law term, and is said to be "that part in the beginning of a deed the office of which is to express the grantor and grantee, and the land or thing granted." It is further said, that no person not named in the premises can take any "thing by the deed, though he be afterward named in the *habendum*." This term has no such acceptation in the law of Scotland; but, with us, the term *premises* is applied generally to the subject-matter of the deed, and sometimes it is used to signify the lands or houses which are the subject of the right or conveyance. See *Tomlins' Dict. h. t.*; *Ross's Lect. ii.* 141, 231, 344.

**Premium of Insurance.** See *Insurance*.

**Premonition**; is the first step in the order of redemption against a wadsetter or heritable creditor. The premonition is an act of the law, whereby the reverser or his procurator gives notice to the wadsetter, under form of instrument, to appear at the time and place pointed out by the clause of redemption, and then and there to receive payment of the debt. If, on this premonition, the wadsetter accepts of the money and renounces the right, the redemption is said to be voluntary. If he refuse to receive the money, or if he be abroad or incapacitated from acting, it must be consigned in the hands of the consignee pointed out by the clause of redemption; and if no consignee be named, then in the hands of a responsible person; and, in evidence of what takes place, a notarial instrument, setting forth the procedure, called an instrument of consignment, is executed. This stops the currency of interest on the heritable debt against the reverser, and renders the wadsetter or heritable creditor accountable for the rents from the time the order was used, and becomes the foundation of a declarator of redemption of the lands. *Ersk. B. ii. tit. 8, § 17, et seq.*; *Stair, B. ii. tit. 10, §§ 15 and 17*; *B. iv. tit. 5, § 1*; *Bank. ii. 226*; *Jurid. Styles, i. 609*; *Ross's Lect. ii. 362*. See *Wadset. Consignation*.

**Prerogative.** The royal prerogative, in a large acceptation, includes all those rights of which, by law, the Sovereign (as exercising the executive powers of government) is possessed. The Sovereign, by virtue of the prerogative, is exempted from all taxes collected *personally* from the subject, and not mingled with the price of the commodity before it is known by whom it is to be used. Hence, an express sent on Government service is not liable to pay post-horse duty. In like manner, in virtue of the royal prerogative, royal palaces are privileged against the intrusion of the officers of the law, to execute civil process against the effects of persons having the

use of apartments therein. *Tomlins' Dict. h. t.*; *Bank. ii. 666*. See *King. Government. Sanctuary*.

**Prerogative Process.** See *Crown Debt. Extent*.

**Prerogative Court**; is the court in England wherein all wills are proved, and all administrations taken, which belong to the Archbishop of Canterbury by his prerogative; that is, in the case where the deceased had goods of any considerable value out of the diocese wherein he died. The Archbishop of York has also a similar court, termed his *Exchequer*, but inferior to the other in power and profit. *Tomlins' Dict. h. t.* See *Executor. Confirmation*.

**Presbytery**; one of the judicatories of the Church of Scotland. A presbytery includes a number of parishes, the number varying according to circumstances; in some cases there being no less than thirty, in others no more than four parishes in a presbytery. The General Assembly has power to disjoin and erect presbyteries at pleasure. In order to get a new presbytery erected, or to have one or more parishes disjoined from one presbytery and annexed to another, a petition is presented to the General Assembly, or a representation is made to it, setting forth the circumstances which make these objects desirable. The Assembly makes the necessary inquiries, and judges accordingly. There are at present eighty-two presbyteries in the Church of Scotland. Each parish within a presbytery sends a minister and a lay elder to the Presbytery; and the professors of divinity (if ministers) in any university within the bounds of the presbytery, are also members. A moderator of the presbytery, who must be a minister, is chosen twice a year, at which times the roll is made up. The functions of the presbytery are, to judge in the references for advice, the complaints and appeals which come from the kirk-sessions within the bounds, to examine schoolmasters on their appointments, to provide for the annual examination of the parochial and other schools of the district, and to make an annual report on this subject to the General Assembly. It belongs to presbyteries to grant licenses to preach the gospel, and to judge of the qualifications of those who apply for them. It also belongs to presbyteries to receive and investigate charges against the characters of ministers. See *Fama Clamosa*. Presbyteries have the power of meeting when they please; but it is necessary, before the meeting is closed, to resolve when the next meeting is to be held, to enter this resolution in the minutes, and to cause it to be publicly intimated by the officer, otherwise the presbytery is defunct, and, without the interven-

tion of the superior court, has no power to reassemble for business. A *pro re nata* meeting of presbytery is called by the moderator, either *ex proprio motu*, when anything has occurred which appears to him to require the assembling of the presbytery before the time of the ordinary meeting, or on application made to him by some of the members of presbytery, with a statement of the grounds on which the application is made. No other business but that for which the *pro re nata* meeting has been called can be transacted at such meeting. The clerk and officer of the presbytery are of its own appointment. See *Hill's Theological Institute*, 214; *Hill's Church Prac.* 40; *Gillan's Acts of Assembly*, 209; *Cook's Church Law Society Styles*, 52; *Ersk. B. i. tit. 5, § 24*; *Connell on Parishes*, 246, 253. See *Church Judicatories. Minister. Manse. Glebe. Designation. Deposition. Schools.*

**Prescription.** Prescription has been said by lawyers to be a method both of acquiring and of losing a right. Hence it has been divided into *positive* and *negative*; the former being the mode of acquiring property, or rather of protecting the right from farther challenge, by reason of the possessor's having continued his possession for the legal period: the latter, which is the converse of the former, is the loss of a right by neglecting to follow it forth, or use it during the whole time limited by law. In the article *Limitation*, the distinction drawn by some writers between the loss of rights by prescription, properly so called, and the loss by limitation, has been adverted to. In the present article it will be sufficient, with reference to each particular prescription, to state whether it is classed as a prescription proper or a limitation. The subject will be briefly considered here under the following arrangement:—

I. OF THE POSITIVE PRESCRIPTION.

II. OF THE NEGATIVE PRESCRIPTION.

III. OF THE LESSER PRESCRIPTIONS; as,

1. *Of the Vicennial Prescription.*
2. *Of the Decennial Prescription.*
3. *Of the Septennial Prescription.*
4. *Of the Sexennial Prescription.*
5. *Of the Quinquennial Prescription.*
6. *Of the Triennial Prescription.*
7. *Of Prescription of Crimes.*

IV. OF THE CURRENCY OF PRESCRIPTION, AND OF ITS INTERRUPTION.

I. OF THE POSITIVE PRESCRIPTION.

The positive prescription was introduced by the act 1617, c. 12, which, on the pre-amble of the inconveniences arising from the loss of titles, and the danger of forgery, after the means of improbation are lost by the lapse of time, and the numerous lawsuits

which are thus engendered, enacts that, whatever heritages the lieges, their predecessors and authors, have possessed by themselves, or others in their names, lands, annualrents, or other heritages, peaceably, in virtue of infeftments, for the space of forty years, continually and together, from the date of their said infeftments, and without any lawful interruption therein, during the said space, that such persons, their heirs and successors, shall never be troubled, pursued, nor inquired in the heritable right and property of the said heritages, by their superiors or others pretending right to the same by virtue of prior infeftments, or any other ground except forgery; provided they be able to show a charter of the said lands preceding the said forty years, with the instrument of sasine following thereon; or, where there is no charter extant, that they show instruments of sasine, one or more, continued and standing together for the said space of forty years, either proceeding upon retours, or upon precepts of *clare constat*; which rights (being clad with forty years' continual and peaceable possession without interruption) shall be valid and sufficient rights for enjoying the said heritages. Such is the nature of the enactment on which the positive prescription is founded. It extends to all heritable subjects, even to tacks and servitudes, which do not require nor admit of sasine; and as to those rights which do not require sasine, forty years' possession is by itself sufficient. There are certain peculiarities in prescription of the right of patronage, as to which see *Patronage*. The possession must, by the words of the statute, be continued from the date of the infeftments; but practice has explained this to mean possession as far back as memory can go; for where there is evidence of possession, consistently with the terms of a sasine, as far back as memory goes, without evidence of any interruption, the presumption of law is, that it must have reached to the date of the sasine. See *Immemorial*. In this question, the possession of the liferenter is that of the fiar; *Neilson*, Feb. 26, 1823, 2 S. & D. 247. It seems to have been the idea at one time, that the possession must have stood during the whole space of the forty years on infeftments; but that has been explained more consistently with the expressions of the statute in the case of *Caitcheon*, Jan. 22, 1791, *Mor.* 10810, in which it was held that possession by an apparent heir uninfest was possession under the sasine of the ancestor, within the meaning of the statute, and therefore was to be computed as part of the forty years, contrary to the former opinion on that point; *Ersk. B. iii. tit. 7, §*

5. The possession must be uninterrupted; there must be neither an instrument of protest nor an attempt on the part of those claiming the subject to enter into possession; this is expressly required by the act. With regard to the titles to be produced, a distinction is made between the case of an heir and of a purchaser. The purchaser must produce not only a sasine, but the disposition in his own favour, or in favour of his author, on which it proceeds, dated previously to the forty years' possession; the heir is required to produce only sasines, one or more. The forty years being elapsed, it is only requisite that the charter and sasine, or, in the case of an heir, the sasine alone, shall be regular and valid deeds. Whether the title of the grantor was good, or whether a preferable title is not now in competition, are questions which will not be entertained. It is sufficient that the title of possession is *ex facie* regular, and that it has been followed by forty years' possession, to silence all possible objections, save that of fraud in the titles; for where the titles have been forged or fabricated, they cannot be the ground of prescription. An adjudication with sasine is a good title to ground prescription; and if followed by forty years' possession, it confers an effectual and irredeemable right. It is not competent, after forty years' possession has followed upon a title *ex facie* absolute, to allege that the right originally flowed from a title qualified with a power of redemption. See *Adjudication*. A clause of part and pertinent may form a prescriptive title to a subject not specially named in the charter. And titles to a barony form a sufficient title on which to acquire by prescription a right of property in an island situated in a river opposite to it, as part and pertinent, though the island be included *per expressum* as a separate tenement in the titles of a third party; *Magistrates of Perth*, Nov. 19, 1829, 8 S. & D. 82. See also *E. of Fife's Trustees*, Jan. 16, 1830, 8 S. & D. 326, and Jan. 25, 1831, 9 S. & D. 336. See *Part and Pertinent*. Possession on apparency may go to make up the years of prescription: thus, if a party has, by himself and his authors, possessed an estate on a retour, with sasine prior and posterior to a possession on apparency, for a period, including the apparency, of more than forty years, but not so exclusive of the apparency, he has a good prescriptive possession; *Neilson*, Feb. 26, 1823, 2 S. & D. 247. When one has more than one title in his person, it is sometimes of importance to determine on which title he is to be held as having possessed during the years of prescription. This question depends very much upon the circumstances of the case, as whether the

holder of two titles is under any obligation to adopt either of them in preference to the other,—whether he has shown an obvious intention to possess upon one title rather than upon the other,—which of the titles is more beneficial, &c. No invariable rule, therefore, can be laid down upon the point. Cases in which this question has occurred are cited in *Bell's Princ.* § 2020, and *Illust. ib.* See also *Ersk. B. iii. tit. 7, § 6*. A person having more than one title in his person is to be held as possessing on them all, to the effect of preserving his own right. It has been already observed that prescription runs in favour of heritable rights, though not feudal. A party holding a fee-simple assignation of a lease in his own favour, and being also institute under an entailed assignation, granted by the same party of the same lease, and having enjoyed possession of the subjects for forty years, and done certain acts, referring his possession to the fee-simple assignation, was held to have acquired a prescriptive fee-simple right, the entailed assignation being held extinguished. The same party having right in fee-simple, as heir of his father, to the lease of another subject, and also as institute under an entailed assignation made by his father, and having possessed for more than forty years, his possession was imputed to the entailed assignation, and he was held not to have acquired a prescriptive right under the fee-simple title; *Maule*, March 4, 1829, 7 S. & D. 527, and *App.* On the subject of the positive prescription generally, consult the following authorities: *Ersk. B. iii. tit. 7, § 2*; *Stair, B. ii. tit. 12, § 19, et seq.*; *More's Notes*, p. cclxxvi.; *Bank. vol. ii. p. 159, et seq.*; *Bell's Princ.* 554; *Kames' Princ. of Equity* (1825), 35, 355-6; *Kames' Stat. Law Abridg. h. t.*, 239; *Napier on the Law of Prescription. Ross's Leading Cases*, vol. iii. p. 310, *et seq.* See also the case of *M'Neill v. Macneall*, March 4, 1858, 20 D. 735; *Sandford's Heritable Succession*, ii. 124-74.

## II. OF THE NEGATIVE PRESCRIPTION.

The negative prescription of obligations, by the lapse of forty years, was first introduced by the statute 1469, c. 29, which declares that the person having interest in an obligation shall follow the same within the space of forty years, and take document thereupon; and if he does not, that it shall prescribe and be of no avail. This enactment was repeated and enforced by the act 1474, c. 55. These acts were at first confined to simple obligations. Practice, however, extended this prescription to mutual obligations; and the act 1617, c. 12, included heritable bonds and other heritable rights.

The act 1617, c. 12, ordains "that all actions competent by law upon heritable bonds, reversions, contracts, or others whatsoever, either already made or to be made, after the date hereof, shall be pursued within the space of forty years after the date of the same, except the said reversions be incorporate within the body of the infeftments produced by the possessor of the lands, for his title of the same, or registered in the Clerk Registrar's books; in which case, seeing all suspicion of falsehood ceases, the actions on the said reversions should be perpetual, excepting actions of warrandice, which shall not prescribe from the date of the bond or infeftment, but only from the date of the eviction, from which date the forty years shall run." And it is further declared, "That in the course of the forty years' prescription, the years of minority and less-age shall in no-wise be counted, but only the years during which the parties against whom the prescription is used and objected were majors, and past twenty-one years of age." The principle of this prescription is grounded on the same salutary reasons on which the positive prescription is founded; and the object of both is to free parties from the effect of rights which may evict property; and from claims of debt, after such a lapse of time as, from the age of the title or of the voucher, may be likely to introduce fraud or forgery; or where, although the debt may have once existed, yet it may have been discharged, and all traces of the discharge of it lost. The negative prescription does even more; for it not only presumes the debt to have been extinguished, but considers the silence for forty years as a dereliction of the debt on the part of the creditor, and refuses to raise it up, even were the debtor to acknowledge that it never had been paid; or that he did not know whether it had been paid or not. The lapse of the forty years, in short, raises a *præsumptio juris et de jure* against the existence of the debt tantamount to the most formal discharge. The act declares, that the years of prescription shall commence from the date of the obligation; but on the principle that the loss of the debt is the penalty of the creditor's negligence, practice has made the currency of the prescription commence from the term of payment as the period at which the negligence of the creditor commences; and the payment of interest, or even a partial payment of the debt, interrupts this prescription. See *Partial Payment*. In the case of obligations, this produces no difficulty; the debtor is entitled to plead the negative prescription. But as this prescription has been extended so as to strike against actions competent on heritable securities, and

other claims on heritage not sued within the forty years, questions of nicety have arisen as to what persons are entitled to plead the prescription. On more occasions than one, it has been held that actions founded on rights of property in land cannot be lost by the negative prescription, unless they be excluded by a *positive right* in the person who pleads the prescription; because, as the negative prescription confers no right on him who pleads it, but merely extinguishes his adversary's right, so no one but he who has himself acquired a positive right of property in the lands can have an interest to plead that his adversary has lost his right, since that fact is not of itself sufficient to transfer the right to the person pleading it; *Ersk. B. iii. tit. 7, § 8*. This point was again discussed in a recent case respecting a right of patronage; and it was found that the right of patronage could not be lost by the negative prescription unless another acquired it by the positive; *Macdonell, Feb. 26, 1828, 6 S. & D. 600*. The right of setting aside a deed upon objections not appearing on the face of the deed, as a reduction *ex capite lecti*, is lost if not used within forty years. Improbation on the head of forgery is not lost by the negative prescription—neither is the right of blood or title as an heir lost by not using it; and the heir may enter heir forty years after the right has opened to him. See *Jus Sanguinis*. The right to exact feu-duties and casualties of superiority cannot be lost, though all arrears beyond forty years may be lost by silence during that time. A servitude may be lost by the lapse of the forty years. With regard to tithes, vicarage and parsonage tithes are not in similar circumstances; the smaller vicarage tithes are not universally due; the right to exact them is established by usage, and may be lost by contrary usage; and therefore they fall under the negative prescription. But patronage tithes, which are due by law, cannot be lost by a neglect to demand them for any length of time, though the demand, when it is made, cannot extend to arrears beyond the forty years. In the same way, the right to an annuity, whether for life or for a certain period, will not be lost by the negative prescription, though each year's annuity will run the course of the negative prescription. On the subject of the negative prescription generally, see *Ersk. B. iii. tit. 7, §§ 8–15; Stair, B. ii. tit. 12, § 12; More's Notes, p. cclxv.; Bank, vol. ii. p. 165, et seq.; Bell's Com. i. 335; Bell's Princ. p. 157; Kames' Princ. of Equity, 356; Kames' Stat. Law Abridg. h. t.; Napier on the Law of Prescription; Sandford's Heritable Succession, ii. 124, 177 to 186; Ross's Leading Cases, vol. iii. p. 316, et seq.* See also the case



of *Barns v. Barns' Trustees*, March 5, 1857, 19 D. 626.

The case of *Paterson v. Wilson*, Jan. 25, 1859, 21 D. 322, was an action of exhibition of an alleged disposition in favour of the pursuer's grandfather, and of declarator of property founded on the alleged disposition. The action was met by the plea of negative prescription. The pursuer pleaded in reply, that the negative prescription could not exclude a claim of property in an heritable subject. The plea of prescription was sustained. LORD PRESIDENT observed:—"I see no answer to the plea of negative prescription. The action is brought for the purpose of compelling production of an alleged deed, and then for declarator that a certain property belongs to the pursuer. The plea of prescription seems to me a complete answer to the demand for exhibition." LORD IVORY observed:—"The first conclusion is for exhibition of an alleged title. I have no doubt that the personal obligation to make any title forthcoming falls under the negative prescription. I am not so clear as to the declaratory conclusion; but as no title is produced entitling the pursuer to call for production of the document said to exist, I fear the declaratory conclusion, without a title, must fall to the ground as completely as the conclusion for exhibition."

### III. OF THE LESSER PRESCRIPTIONS.

One distinction between the positive and negative prescriptions of forty years and the lesser prescriptions is, that the long prescription is intended to give stability to heritable rights, and to put an end to all questions resulting from obscure and antiquated claims, as well as to sopite all claims which have been neglected for such a length of time; and therefore the principle on which those prescriptions rest is perfectly reconcilable with the idea of a better claim existing in the claimant than in the possessor. The long negative prescription operates as an extinction of the claim, without regard to any offer of proof that the claim is still undischarged. But in the shorter prescriptions, a different rule prevails; and where the existence of the debt or claim can be proved by the writ or by the oath of the debtor, the debtor will be bound. The object of the shorter prescriptions, in truth, is, generally speaking, to protect parties against the consequences of negligence in the preservation of vouchers; and, after the expiration of the period of the prescription, to change the *onus probandi*, and to restrict the mode of proof. But in no case has this been carried so far as to sopite a debt justly due, provided the prescribed mode of proof is followed.

### 1. Of the Vicennial Prescription.

(1.) *Of Retours*.—By the act 1617, c. 13, a vicennial prescription of retours was introduced. Previous to that period, in consequence of the act 1449, c. 57, the right of an heir to reduce an erroneous retour was foreclosed by the lapse of three years; but, by this act (1617), the lawful heir is allowed to bring an action for setting aside an erroneous retour at any time within twenty years after the date of the retour. The words of the act are, "If the saids summons of reduction be not intended, executed and pursued, before the expiring of the saids twenty years, that the said action of reduction of the said retour and service shall prescribe in the selfe, and no party to be heard thereafter to pursue the same reduction." The previous act 1494 is continued by 1617, c. 13, in so far as it affects the inquest, it being declared, that "hereafter it shall noways be lawful to pursue the persons of inquest for wilful error, except they be sued therefor within the space of three years next after the date of the said retour and service." It would appear that the lapse of the vicennial prescription does not protect the true heir against irregularities which may have occurred in his service; *Drummond*, 17th May 1793, *M.* 6936. If the person served heir be styled the second son, the prescription can be of no avail, since the retour is itself a mere nullity, proving *ex facie* that the person retoured cannot be the right heir; *Fullerton*, 12th Feb. 1824, *F. C.*, 2 S. & D. 698; affirmed June 20, 1825, 1 W. S. 410. The vicennial prescription will not free one retoured as heir from his obligation to denude in favour of a nearer heir who subsequently comes into existence; *Macinnons*, 14th Feb. 1765, *M.* 5279. In a recent case, it was pleaded, that the vicennial prescription is no bar to a reduction by a nearer heir, even although he was in existence at the time of the service; but it was found that the act establishes an absolute protection of retours against challenge by parties alleging themselves to be the true heirs, after the lapse of twenty years; *Neilson v. Cochrane's Representatives*, Jan. 17, 1837, 15 S. & D. 365; affirmed March 19, 1840, 1 Rob. 82. See also *Wallace*, Feb. 26, 1835, 13 S. & D. 564. This prescription has no operation against the heir himself; for when he finds it necessary to reduce his own retour, on the head of minority and lesion, he may insist in the reduction after the expiration of the twenty years; *Edinglassy*, 27th July 1700, *M.* 10989.

In the Bargany cause, *Fullerton v. Hamilton*, in the opinion delivered by the consulted judges, they observed: "We are further of

opinion that a retour, though correct and unexceptionable *ex facie*, and therefore sufficient to protect the person served as heir after the vicennial prescription, is only of a personal nature; and though it may protect himself personally, cannot, after his death, affect the right of the true heir, for such was not the meaning of the statute." There is nothing, however, in the statute to sanction such a doctrine. The words of the statute are, "And if the saids summons of reduction be not intended, executed, and pursued, before the expiry of the saids twenty years, that the said action of reduction of the said retour and service shall prescribe in the selfe, and no party be heard thereafter to pursue the said reduction." The *dictum* of the judges in the Bargany cause was merely *obiter*; the ground on which the plea of vicennial prescription was repelled in that case being, that *ex facie* of the retour, the party served was not the heir. In the case of *Neilson v. Cochrane's Representatives*, Jan. 17, 1837, the service of a deceased person was sought to be reduced which had been expedited upwards of twenty years prior to the date of the action of reduction; and founding upon the opinion of the consulted judges in the Bargany cause, the pursuer contended that the vicennial prescription was inapplicable. The plea of prescription, however, was sustained, and the judgment affirmed on appeal; House of Lords, 19th March 1840; 1 *Robinson*, 82. See also the subsequent case of *Campbell v. Campbell*, Jan. 26, 1848; 10 *D.* 461, in which also the service sought to be reduced was that of a deceased person, expedited upwards of twenty years prior to the action. See also *Ross's Leading Cases*, vol. iii. p. 583, *et seq.*

(2.) *Of Holograph Writings.*—This is properly a limitation. By the act 1669, c. 9, bonds or other deeds in the handwriting of the obligant, to which no witnesses are adhibited, as also holograph missives, or books of accounts, prescribe in twenty years from their dates. But, under this statute, the pursuer may competently refer to the debtor's oath, in order to prove that the writing is holograph, and the subscription genuine; and, on his swearing in the affirmative, the obligation will be declared effectual, unless the debtor can prove that it was discharged. The verity of the handwriting may be referred even to the heir of the granter; but the oath of the debtor is the only mode of proof admissible. This prescription runs from the date of the writing, and does not run against minors. Some lawyers extend the vicennial prescription to obligations without witnesses below L.100 Scots. Actions raised within the twenty years are, by 1685, c. 14, declared to fall, if not awakened within five

years from the time of their falling asleep; and these awakenings must be renewed every five years thereafter. *Ersk.* B. iii. tit. 7, §§ 26, 27.

(3.) *Of Crimes.*—Where no sentence of fugitation has been pronounced, and no step has been taken to bring the offender to trial within twenty years after the commission of the crime, it would appear that the right to prosecute falls. See *Hume*, ii. 133. See further, as to the prescription of crimes, Arts. VI. and VII., *infra*.

On the subject of vicennial prescription generally, see *Ersk.* B. iii. tit. 7, §§ 19 and 41; *Mackenzie's Observ.* p. 350; *Stair*, B. ii. tit. 12, § 35; *More's Notes*, p. cclxx.; *Bank.* vol. ii. p. 171; *Bell's Com.* i. 330; *Bell's Princ.* §§ 590, 2024; *Napier on the Law of Prescription*; *Sandford's Heritable Succession*, ii. 37; *Ross's Leading Cases*, vol. iii. p. 583.

### 2. Of Decennial Prescription.

By the act 1696, c. 9, prescription of ten years was introduced in favour of tutors and curators; by which act it is declared, that all actions competent to minors against their tutors and curators, or to them against the minor, shall fall if not prosecuted within ten years from the expiration of the office, whether it has terminated by the majority or by the death of the minor. A curator neglecting to make up inventories does not forfeit the benefit of the decennial prescription; and an extrajudicial consent, after the years of prescription, to afford information respecting the affairs of a curatory, does not bar the plea of prescription; *Gowans*, Dec. 6, 1831, 10 *S. & D.* 144. *Ersk.* B. iii. tit. 7, § 25; *Stair*, B. ii. tit. 12, § 34; *More's Notes*, xlv. cclxxii.; *Bell's Princ.* § 635.

### 3. Of Septennial Prescription.

This prescription applies—1. To the case of *cautioners*; and, 2. to the interruption of prescription.

(1.) *Of Cautionary Engagements.*—A septennial limitation was introduced for the benefit of cautioners by the act 1695, c. 5, whereby it is enacted that no person binding, conjunctly and severally, with or for another in any bond or contract for a sum of money, shall be bound for longer time than seven years after the date of the obligation; and whosoever is bound for another, either as express cautioner or as co-principal, shall have the benefit of the act, provided he has either a clause of relief in the bond, or a separate bond of relief intimated to the creditor at his receiving the bond. These, however, are not required where the cautioner is described in the bond as a *cautioner*. The intimation here spoken of must be a formal regular intimation made to

the creditor. See this prescription fully treated of under the article *Cautionary*.

(2.) *Of the Interruptions of Prescriptions.*—By the act 1669, c. 10, it is declared that all citations which may in future be used for the purpose of interrupting the prescription, either of real or of personal rights, must be renewed every seven years, otherwise they shall prescribe. This applies to mere citations; for, where the action is called in court and parties appear, the action continues in force for forty years, unless it be otherwise ordered by act of Parliament. The executions for interrupting prescription must be made by a messenger-at-arms; and by act 1696, c. 19, it is declared, that all summonses for interrupting the prescription of real rights shall pass on a bill, stating all the grounds on which they proceed, and be registered within sixty days in a register kept at Edinburgh; and that no interruption of the prescription of real rights *via facti* shall be of force unless an instrument be taken on it, and the same be recorded in the same register, and within the same period.

On the subject of septennial prescription generally, see *Ersk. B. iii. tit. 7, § 44*; *Stair, B. ii. tit. 12, § 33*; *B. iv. tit. 35, § 15*; *More's Notes*, pp. cxv. cclxii.; *Bank. vol. ii. p. 170*; *Bell's Com. i. 356*; *Bell's Princ. § 600*; *Ross's Lect. i. 81, 172*.

#### 4. *Of Sexennial Prescription.*

This, which is properly a limitation, extends to bills and promissory-notes only, and was introduced by the act 12 Geo. III. c. 72, rendered perpetual by 23 Geo. III. c. 18, § 55. By those statutes it is declared that bills and promissory-notes shall not be effectual to produce diligence or even action, unless the same shall have commenced or been executed within six years from and after the term of payment of the bills or notes. From this enactment there is an exception of bank-notes and post-bills; and after the expiration of the six years the creditor is permitted to prove the existence of the debt by the writ or oath of the debtor. The years of the minority of the creditors are not computed in the six years. The six years of prescription run from the date at which the bill or note is exigible; that is, when the bill is payable at a fixed term, the last day of grace. When the bill is payable on demand, the prescription runs from its date. In a bill or note payable at sight, the bill is not exigible till presentment, and if, as has been thought to be the rule, days of grace are allowed on such bills, it would appear that the prescription cannot begin till the last day of grace. This is undoubtedly the rule in the case of bills or notes payable at a certain time after sight or presentment. See *Ersk. B. iii. tit. 7, § 29, and notes*; *More's Notes to*

*Stair, p. cccxxiii.*; *Bell's Com. i. 393–5*; *Bell's Princ. § 594*; *Kames' Princ. of Equity, 252, 510*; *Thomson on Bills, 625*; *Napier on the Law of Prescription*. See also the case of *Darnley v. Richmond*, March 6, 1845, 7 D. 595. See *Bill of Exchange*.

#### 5. *Of the Quinquennial Prescription.*

This prescription is extended to the following cases:—

(1.) Arrears of rent in an agricultural lease prescribe within five years from the time of the tenant's removal from the lands; multures prescribe in five years after they become due; so do ministers' stipends; and the same rule is extended to the case of vacant stipend. All bargains concerning moveables, which may be proved by witnesses, as sales, locations, and other consensual contracts, to the constitution of which writing is not necessary, prescribe in five years. But these, even after the five years, may be proved by the writ or oath of the party. In the same manner, arrestments prescribe in five years from the date of the arrestment, unless it has been used on a depending action; in which case the five years begin to run from the date of the decree in the action. All of these prescriptions were introduced by the act 1669, c. 9. See *Ersk. B. iii. tit. 7, § 20*; *Stair, B. ii. tit. 12, § 32*; *More's Notes, p. cclxxiii.*; *Bank. vol. ii. p. 170*; *Bell's Com. i. 330*; *Bell's Princ. pp. 152 and 164*; *Hunter's Landlord and Tenant, 752–4*; *Bell on Leases, ii. 48, 51*; *Ross's Lect. ii. 549*; *Napier on the Law of Prescription*. See *Arrestment*.

(2.) The right of appeal to the House of Lords, formerly prescribed in five years from the time of signing, enrolling, or extracting of the decree, and the end of fourteen days, to be computed from the first day of the meeting of Parliament next ensuing the said five years. This is founded on a standing order of the House of Lords, of date March 24, 1725. But, by the stat. 6 Geo. IV. c. 120, § 25, the time within which an appeal to the House of Lords may be entered is limited to two years from the day of signing the last interlocutor appealed from, and fourteen days as above. See *Appeal*.

#### 6. *Of the Triennial Prescription.*

This prescription extends to several cases, as—(1.) The act 1579, c. 81, has introduced a triennial prescription in actions of spuilzie, which is restricted to the violent profits proveable by the oath of the pursuer; for, in so far as the action concludes for mere restitution, it may be brought at any time within the forty years. By this act, actions of ejection at the instance of the person violently dispossessed, and other actions founded on acts of violence, where the damages may be proved by the pur-

suer's oath *in litem*, are subjected to the same short prescription. *Ersk. B. iii. tit. 7, § 16.*

(2.) By the act 1579, c. 83, a triennial prescription is introduced in all claims for merchants' accounts, servants' fees, house-rents (where the lease is verbal), and men's ordinaries, and such-like debts, under which are comprehended debts due to artificers or tradesmen for their work or wages, accounts to writers, agents, surgeons. But a distinction arises between house-rents, &c. and accounts. Each year's rent runs a separate course of prescription; but, in accounts, the prescription does not begin to run till the date of the last article of the account. Those debts may be proved at any time after the expiration of the three years, by the oath of the debtor, or by any writing signed by him, acknowledging the debt, but not by partial payments. Proof is required, not only of the constitution, but also of the subsistence of the debt.

At one time a distinction was taken between the case of a debtor dying before and that of his dying after the expiration of the three years. In the former case, proof of the constitution of the debt, with the heir's oath, negative of payment, was held sufficient to support the action; in the latter, the heir's oath, negative of payment, did not overturn the presumption that the debt was paid. In the case of *Auld v. Aikman*, July 7, 1842, where a debtor had died within three years of the last article of an open account, it was held that prescription did not apply so as to render it necessary to prove the constitution by the writ or oath of his representative. This case, however, was overruled by the whole Court, in the case of *Cullen v. Smeal*, July 12, 1853, 15 D. 868; and it was decided that the rule by which it was necessary to prove, not merely the constitution, but the resting-owing of the debt, by the writ or oath of the debtor, was applicable to the case of the debtor's representatives as well as to that of the debtor himself.

(3.) By the act 1573, c. 82, actions of removing prescribe within three years from the term at which the tenant has been warned to remove.

(4.) By the act 1663, c. 6, it is declared, that where houses within a royal burgh have gone to ruin, and been uninhabited for three years, the magistrates may warn the proprietors to rebuild or repair them within a year; and on failure, the magistrates may value them by sworn appraisers, sell them by public roup, and deliver the price to the proprietors.

(5.) By the act 1701, c. 6, no person can be prosecuted for wrongous imprisonment after three years, computed from the last day of the prisoner's confinement. *Hume*, ii. 113.

(6.) By 7 Will. III. c. 3, § 5, high treason committed within the Queen's dominions suffers a triennial prescription, if indictment be not found against the offender by a grand jury within that time; *Ersk. B. iv. tit. 4, § 110.*

On the subject of triennial prescription generally, see *Ersk. B. iii. tit. 7, § 16*; *Bell's Com. i. 331*; *Stair, B. ii. tit. 12, § 30*; *Morr's Notes*, p. cclxxiv.; *Bank. ii. p. 169*; *Bell's Princ. p. 162*; *Kames' Princ. of Equity*; *Napier on the Law of Prescription (1825)*, 254; *Hunter's Landlord and Tenant*, pp. 751-2. See also the case of *Alcock v. Easson*, Dec. 20, 1842, 5 D. 356.

#### 7. Of the Prescription of Crimes.

All actions upon penal statutes, where the penalty is appropriated to the Crown, must be brought within two years from the time of committing the offence; and where the penalty goes to the Crown or other prosecutor, the prosecutor must pursue within one year, and the Crown within two more; 31 *Eliz. c. 5, § 5*. This limitation has been held to apply, in so far as regards the *treble penalties*, to prosecutions for usury, but not to the action for setting aside the usurious transaction; *Hume*, i. 499. See also *Paul*, Jan 20, 1824, 2 S. & D. 626. Prosecutions on the Riot Act cannot be prosecuted after the lapse of one year; 1 *Geo. I. c. 5, § 8*. Treason inferred by statute from making certain instruments employed in coining, must be prosecuted within six months; 7 *Anne, c. 25, § 2*. To maintain, by advised speaking, that the Pretender has any right to the Crown of these realms, is an offence which must be prosecuted within three months; 6 *Anne, c. 7, § 3*; *Ersk. ib.* By an old law, now obsolete, the crimes of rape, robbery, or hamesucken were not heard after a silence of twenty-four hours; *Hume*, i. 304, *et seq.* See *Rape*. Petty riots and slighter delinquencies, when not prosecuted immediately, must, at the discretion of the judge, be held to prescribe; *Ersk. B. iv. tit. 4, § 110*. See *Penal Actions*.

#### IV. OF THE CURRENCY OF PRESCRIPTION, AND OF ITS INTERRUPTION.

Prescription runs continually from its commencement to its close, disregarding holidays and times when there is no court sitting. Even those times when, from public disorder, there is a total surcease of justice, will not be deducted from the years of prescription, unless under the authority of a particular statute. The whole period of the prescription must have elapsed in order to give it effect. Hence, an interruption on the last day of the forty years will be effectual. From the currency of the long positive and negative prescriptions, the years of minority are deducted; but, with regard to the lesser

prescriptions, the years of minority form no exception, unless where this is expressed in the act constituting the prescription. A remote heir-substitute under an entail is not entitled to have his minority deducted during the part of the prescriptive period during which he had no immediate right to the estate; *Mauls*, March 4, 1829, 7 *S. & D.* 527, and *App.* As the loss arising from the currency of prescription is considered as the penalty of negligence, the period of prescription does not run against one under a legal incapacity to sue, neither can prescription have its course against one who can, at the time, have no benefit by the suit. The currency of prescription may be interrupted in various ways; as by any act by which a proprietor asserts his right to property in the possession of another, or by which a creditor prosecutes for payment of a debt due to him, or where the debtor promises payment. It is interrupted by citation on an action, or by a charge on letters of horning, and by every diligence used on the debt. In the same manner partial payments interrupt the long prescription, which proceeds on a presumed dereliction of the debt, which is not reconcilable with a partial payment. But partial payments strengthen the shorter prescriptions, which proceed on a presumption of payment, which is strengthened instead of being weakened by the partial payment; *Ersk. B. iii. tit. 7, § 39.* Independently of these interruptions, there is an interruption termed civil interruption, because it is attended with no violence. It is also called interruption *via facti*, because founded on the extrajudicial deed of him who interrupts. This interruption is made by a protest or notarial instrument, where the person protests that the possession shall not hurt the interest of the protester. But prescription is not interrupted by the registration of an obligation, nor by its transmission from one hand to another: even intimation does not interrupt the prescription. Where possession has been abandoned by the person claiming on a prescriptive title, or where possession has been taken from him, although he has a second time acquired possession, he cannot connect the two periods; his prescriptive possession must run a new course. Formerly, all citations on actions had the effect of interrupting the course of prescription; but, by the act 1669, c. 10, citations for this purpose must be renewed every seven years; and, by 1676, c. 19, they must be recorded. This applies to citations only; for where the parties have appeared in court, or where any judicial act has been performed, the process becomes a depending action, which may be awakened at any time within forty years, if the particular

action be not otherwise limited. A submission applicable to the claim in question will operate as an interruption; *Vans*, 14th June 1816, *Fac. Coll.* The septennial limitation of cautionary engagements is not affected by a mere citation. See *Citation. Cautionary.* Production of the ground of debt or certified account, with the oath of verity as required by the Bankrupt Statute, in the hands of the interim factor, sheriff-clerk, or trustee, or in the Court of Session, has the same effect in interrupting prescription of every kind, from the period of such production, as if a proper action had been raised against the bankrupt and against the trustee. The same effect is given to the lodging of a claim in a process of ranking and sale. The effect of an interruption of prescription is to make it begin a new course, commencing from the date of the interruption in the negative prescription, and from that of the recovering of possession in the positive. Where diligence is done within the forty years against one of two co-obligants, that is, where two or more are bound jointly and severally, or as co-obligants, it saves the obligation against the whole. But where the right of the creditor is divided, either by succession or assignation, the obligation may be prescribed as to one part of the debt in the person of the one creditor, while it may be effectual as to the other part of the debt in the person of the other creditor. See *Ersk. B. iii. tit. 7, § 33, et seq.*, and the authorities cited in the article *Interruption.* See also *Napier on the Law of Prescription*, and the case of *M'Neill v. Macneal*, Mar. 4, 1858, 20 *D.* 735.

**Presentation**; the act by which the patron of a church appoints the minister, and presents him to the presbytery for induction. Patrons are required by statute, at or before signing a presentation, to take the oaths appointed to be taken by persons in public trust; and those suspected of Popery must purge themselves, by subscribing the formula introduced by 1700, c. 3 (see *Oath*); otherwise the presentation is void, and the right of patronage devolves for that *vice* upon the Crown; and failing the Crown's presenting within six months, from the neglect or refusal of the patron, on the presbytery *jure devoluto*; 10 *Anne*, c. 12; 5 *Geo. I.* c. 29. See *Roman Catholics.* It is not the law, as the terms of the act seem to import, that the granting a presentation, without having taken the necessary oaths, implies an absolute forfeiture to the Crown of the right of presentation for that *vice.* In one case, the Court overruled the objection to the exercise of the right of patronage, that the patron had granted and lodged a prior presentation without taking the necessary oaths; *Presbytery of Paisley*, August

10, 1770, *M.* 9966. A patron may delegate the power of presentation to a commissioner; and in a late case, the General Assembly sustained a presentation by a commissioner, where only the commissioner had qualified, and not the patron himself. The soundness of this determination has been doubted, on the ground that it would open a way of evading the enactments against presentations by unqualified patrons; and the matter has never been decided in the civil court. A presentation to a church, of which the Crown is patron, is obtained by a letter passing under the Privy Seal, in consequence of a warrant superscribed by her Majesty, and subscribed by the Secretary of State for the Home Department. Along with the presentation, there should be laid before the presbytery a certificate of the patron's having qualified by taking the oaths to Government; an extract of the presentee's license, unless already an ordained minister of another parish; a certificate of his having taken the necessary oaths; and his letter of acceptance. As to the requisite qualifications of a presentee, see the articles *Minister. Admission. License to Preach.* According to Erskine, no patron can present to the expectancy of a benefice; his power of presentation depending on the vacancy, whether that be produced by the death, translation, deprivation, or resignation of the former incumbent; *Ersk. B. i. tit. 5, § 11.* A practice has, however, long subsisted, of presenting assistants and successors to incumbents who are incapable, on account of old age, or of permanent ill health, of discharging all the duties of their office. The legality of this practice, and the validity of such presentations, have been sustained by a decision of the Court of Session, affirmed on appeal; *Luke, Feb. 10, 1832, 10 S. & D. 307, affirmed August 14, 1832.* The patron must present within six months from the vacancy, otherwise the presbytery, on the expiration of the six months, may, in virtue of the *ius devolutum*, supply the vacancy by presenting to the charge. If the patron, within the six months, present a person qualified in terms of 5 Geo. I. c. 29, who accepts the presentation, but is afterwards rejected on good grounds by the church courts, the time occupied in judging of his eligibility is not reckoned, and the patron is allowed a period equal to that part of the six months which was unexpired at the time of the presentation. *Stair, B. ii. tit. 8, § 27; More's Notes, ccxli.; Ersk. B. i. tit. 5, § 16; Bank. ii. pp. 23, 31; Dunlop on Patronage, § 86, et seq.; Church Law Society Styles; Cook's Styles.* See *Admission. Patronage. Jus Devolutum.*

**Presentation, Bond of.** See *Bond of Presentation.*

**Presentment of Bills.** See *Bill of Exchange. Protest. Noting of Bills. Place of Payment.*

**Preses of Meeting.** The business of a meeting of creditors cannot proceed without a preses; and although the person first elected cannot dissolve the meeting by leaving the chair, the creditors must elect another preses, to make their further proceedings valid; *Anderson, 12th Dec. 1827, 6 S. & D. 235.* The preses has no power beyond that of constituting the meeting, and preserving order in it. His vote is only that of a single creditor. This rule is not confined to meetings of creditors; it has been held to be a general rule, that the preses of an ordinary meeting is not entitled to a double vote; *Campbell, March 4, 1813, F. C., affirmed on appeal.* He superintends the making out of the minutes, and his veracity is pledged for the truth of the record. It is his duty to see whether the advertisements have been duly published, in terms of the statute; *Bell's Com. ii. 352, 365.* See *Majority.*

**Prestation; payment, performance.**

**Presumed Payment.** See *Payment.*

**Presumption of Death.** Human life is presumed in law to last until the age of 100 years; to the effect of laying the burden of proving the death on him who alleges it. The *onus probandi* is transferred to the other party where the alleged deceased, if alive, must be upwards of 100 years of age. In one case, a petition, proceeding upon the assumption that a party abroad was dead, was refused, it being observed by the Court, that where an absent party of middle age is shown to have been alive in 1819, and to have then had two sons, the mere lapse of time and want of further intelligence concerning them will not afford a presumption *per se*, either that the party or his children are dead; and that a service being an *ex parte* proceeding, does not raise the presumption of death in these circumstances; *Reid, Jan. 14, 1834, 12 S. & D. 278.* A sailor, in the prime of life, who suddenly disappeared at a seaport-town in England, about four months prior to his father's death, was presumed to have survived his father; *Bruce, Feb. 25, 1834, 12 S. & D. 486.* See also *Lapsley v. Grierson, Nov. 19, 1845, 8 D. 34.* See, for circumstances held to amount to a proof of death, *Campbell's Trustees, Feb. 1, 1834, 12 S. & D. 382.* See also *Life, and authorities there cited.*

**Presumption of Survivorship.** When two or more persons have died within a very short period of each other, and no witnesses have been present to note the exact instant of dissolution, it is necessary to have recourse to presumptions, in order to determine which of them survived the others. Writers on medical jurisprudence lay it down, that the pre-

sumption of survivorship is with the mother, where she dies in childbed, and her child is also found dead. By the Roman law, where two persons above the age of puberty perished by the same accident or fatality, the younger was presumed to have been the survivor; but if one was under the age of puberty, the other was presumed to have been the survivor; *Digest*, B. 34, tit. 5, §§ 9, 22, and 23. The rules of the Code Napoleon (now the civil code), which have been considered very equitable, are, 1. "If those who perished together were under fifteen years of age, the eldest shall be presumed to have been survivor. 2. If they were all above sixty years, the youngest shall be presumed to have been survivor. 3. If some were under fifteen, and others above sixty, the former shall be presumed to have been the survivors. 4. If those who have perished together had completed the age of fifteen, and were under sixty, the male shall be presumed to have been the survivor, where the ages are equal, or where the difference does not exceed one year. 5. If they were of the same sex, that presumption shall be admitted which opens the succession in the order of nature—of course, the younger shall be considered to have survived the elder;" *Civil Code*, §§ 720–1–2. To these rules, although in general founded on correct physiological principles, two objections have been made: 1st, That the third is imperfect, since a man, even although above sixty years of age, must be held to have survived a mere infant; and, 2d, That no provision is made for the case of persons under fifteen years of age, and under sixty, perishing together. See *Beck's Medical Jurisprudence*, p. 208, and authorities there cited. See *Evidence*.

**Presumptions.** Presumptions are either *juris et de jure*, or *juris*, or *hominis vel judicis*. The *presumptio juris et de jure* is that where law or custom assumes the fact to be so, on a presumption which cannot be traversed by contrary evidence. Thus, a minor, with curators, cannot legally act without their consent, on a presumption of incapacity, which cannot be traversed by proof of his ability. So also the law of deathbed rests on a presumed incapacity in the deceased, which cannot be redargued by proof that he was of a disposing mind. The *presumptio juris* is a presumption established in law, until the contrary be proved; as the presumption that possession of moveables proves property in them—that he who pays interest is due a capital corresponding to it, and the like. These, and every presumption of the same kind, of which there are many, may be elided by contrary proof. The *presumptio hominis vel judicis* is that conviction which arises from the circumstances of a case; and it is some-

times of sufficient force to overcome the *presumptio juris*. *Ersk.* B. iv. tit. 2, § 35, *et seq.*; *Stair*, B. iv. tit. 45, § 9, *et seq.*; *Bank* ii. pp. 667–9; *Bell's Princ.* p. 656; *Kames' Stat. Law Abridg.* h. t.; *Tait on Evidence*, 3d edit., 447 to 491. See *Evidence*.

**Pretium Affectionis**; is the imaginary value put upon a subject by the fancy of the owner, or by the regard in which he held it. Damage is never estimated by this standard, when the injury has been done without fraud or dole. *Stair*, B. i. tit. 9, § 4; *Ersk.* B. iii. tit. 1, § 14; *Bank* i. 408; *Kames' Equity*, 65. See *Evidence. Price*.

**Pervarication.** Pervarication upon oath is the wilful concealment or misrepresentation of truth, by giving evasive and equivocating evidence. It is in practice dealt with as a contempt of court, and is cognisable summarily by any judge before whom it is committed. The proper punishment is imprisonment. *Stair*, B. iv. tit. 86, § 8; *Hume*, i. 374; *Blair's Justice*, h. t.; *Alison's Princ.* 484; *Prac.* 549.

**Prevention.** See *Jus Præventionis*.

**Price**; the equivalent paid for a thing purchased. A price is an essential of the contract of sale; *sine pretio nulla venditio est*. The price must be an onerous price, and not merely elusory. If the buyer is, by the contract of sale itself, discharged from paying the price, it is no sale. The same rule holds if the price bear no reasonable proportion to the value of the thing sold, as if a valuable estate should be sold for a crown. But it is not necessary, by the law of Scotland, as it was by the Roman law, that the price should be just, that is, that it should correspond with the value of the thing sold. Where the form of a sale has been gone through, without a price being exigible, or with a merely elusory price, the contract resolves into a donation. The price must be certain—*i. e.*, it must either be fixed at a certain sum, or it must be referred to a certain standard, or to the judgment of referees, so that it may be capable of being ascertained; *certum est quod certum reddi potest*. The price must consist of current money. The price of land sold may be retained until the seller is ready to give a good title. *Stair*, B. i. tit. 9, §§ 11; tit. 14, § 1, *et seq.*; *More's Notes*, lxxxiv.; *Ersk.* B. iii. tit. 3, § 4; *Bank* i. 407; *Bell's Com.* i. 169, 222, 437; *Bell's Princ.* §§ 11, 92, 100, 103, 127; *Brown on Sale*, 147; *Bell on Completing Titles*. See *Excambion. Sale*.

**Primage.** See *Hat-Money*.

**Primate.** During the times of Episcopacy there were two Archbishops: the Archbishop of St Andrews, who had the title of the *Primate of all Scotland*; and the Archbishop of Glasgow, who was styled the *Primate of Scotland*. *Ersk.* B. i. tit. 5, § 7.

**Primogeniture**; is the name given to the rule of law, whereby the eldest son is preferred to the younger ones in the succession to heritage. This rule was introduced by the feudal law. It does not appear to have been the rule in socage land; neither does it take place in female succession to heritage, nor in the succession to moveables. In all of those the rule of the Roman law prevails, and an equal succession amongst those in an equal degree of relationship takes place. *Ersk. B. iii. tit. 8, § 6; Stair, B. iii. tit. 4, § 22; Bank. ii. 4293; Sandford on Entails, 18. See Succession. Executors. Heir.*

**Primus Actus Judicii est Judicis Approbatorius**; a maxim importing, that if one take any judicial proceeding before a judge, such as proposing defences, he will not afterwards be entitled to decline the jurisdiction of the judge. If, however, the declinature be proposed simultaneously with other defences (which, under the Judicature Act, is now required), the judge's jurisdiction will not be thereby prorogated. *Stair, B. iv. tit. 37, § 12. See Defences.*

**Prince of Scotland**; was the title given to the eldest son of the King of Scotland. *Ersk. B. i. tit. 4, § 12.*

**Principal and Accessory.** See *Accessory.*

**Principal and Agent.** Under this title are classed the various questions which occur between mercantile agents and their employers, as to the extent of their duties and responsibilities. Indeed, all cases of delegated powers, as well in mercantile as in other matters, may be included under this general head; and hence, any summary even of the general doctrines would exceed the proper limits of an article in this work. Besides, the details of the subject have been considered in a variety of separate articles, and therefore it is enough here to refer to those articles, and to the following list of authorities:—*Ersk. B. iii. tit. 3, § 34, et seq.; Bank. i. 392, et seq.; Bell's Com. i. 476, et seq., 183, 200, 275; Bell's Princ. §§ 216, 1445; Illust. ib.; Hunter's Landlord and Tenant, 146, et seq.; Bell on Leases, i. 134; ii. 61; Brown on Sale, 184, et seq.; Thomson on Bills, 721; Shaw's Digest, voce Agent and Principal; Brown's Synop, h. t. See Factor. Procurator. Mandatary. Del Credere. Trust. Agent and Client.*

**Principality.** The principality or appanage of the Prince of Scotland consisted of lands in the shires of Ayr, Renfrew, and Ross, which had been erected into a principality so early as the reign of Robert III. Lands holding of the Prince afforded, under the old election law, a freehold qualification, in the same manner with lands held of the Crown; and as the right of the Prince, on his succession to the Crown, continues to be vested in

him until the birth of a son, the vassals during those intervals may be said to hold of the Crown; and the rents of the principality are then levied for the use of the Sovereign. *Ersk. B. i. tit. 4, § 12; Bank. i. 539; ii. 430; Bell's Princ. § 674; Swint. Abridg. h. t.; Kames' Stat. Law, h. t.*

**Printers.** A printer has no right to publish a work in his hands. He has, however, a lien on the printed sheets for the price of his labour, and on the last sheets undelivered for the price of the whole. It has even been decided in England, that his lien extends over subsequent volumes or numbers for the price of those which have already been printed and delivered. *Bell's Com. i. 118; ii. 104.* In order to repress seditious publications, the statute 39 Geo. III. c. 79, § 25, provides that every typesetter and printing-press maker must, under a penalty of L.20, before commencing business, give notice to the clerk of peace, who grants him a certificate. Such persons must also, under the same penalty, keep and produce to any justice, on his written demand, an account in writing of the buyers of their types or presses. Any person (except the Queen's printers) who gets a printing-press or types, must, under like penalty, give similar notice, and must use the press or types only in the place named in the notice. The printer must, under a penalty of L.20, print his name and residence on every paper or book, and on both the first and last leaf, if there be more than one: he must write upon one copy of every paper he prints the name and residence of his employer; and keep that copy for six months, to be shown to any justice of peace requiring it. The same penalty is incurred by persons dispersing papers not having the printer's name and residence. Whoever sees any paper offered for sale, or gratis, or exposed to view, with no printer's name, or with a false one, may seize the offender, and carry him, or deliver him to a constable to be carried, before a justice, who may determine respecting him. The same person is not liable in above twenty-five forfeitures on account of the same paper or book, printed or dispersed without the printer's name; 51 Geo. III. c. 65, § 1. Certain papers are exempted from the operation of the act, such as papers printed for the use of Parliament, by their authority; or by authority of any public board or officer; or law proceedings, bankrupts' bills, receipts, securities for money, policies of insurance, letters of attorney, deeds of agreement, bills of lading, impressions of engravings, advertisements of tradesmen, or of sales, &c. On cause of suspicion, from sworn information, that any press or types are illegally used, being shown to any one justice, he may issue a war-



rant to search the premises in the day-time, and seize such press, types, and furniture, with all printed papers found in the premises. There are directions for prosecution, the levying of penalties, &c., for which reference is made to the act itself. Abstracts are given of the act in *Tait's Justice*, p. 343; *Blair's Justice*, p. 293.

**Prior.** The prior under the Popish system had the charge of the monastery in the absence of the abbot (who was the head or governor), or while the office of the abbot was vacant. *Ersk. B. i. tit. 5, § 4.*

**Prior Tempore, Potior Jure;** a maxim, importing generally, that priority in time or in date affords the criterion of preference in competitions. *Stair, B. iv. tit. 35, § 8; Bank. iii. 37.*

**Prisae;** a French word, signifying caption, pawning, distress, or moveable goods taken for execution of a decret. *Skenz, h. t.*

**Prison.** Formerly, it was the duty of the magistrates of a burgh to render the prison for the reception of debtors sufficient for its purpose; and if a debtor escaped from the insufficiency of the prison, the magistrates were held liable for the debt. In case of an escape, the burden of proving security and vigilance lay upon the magistrates. They were not liable where the prison was opened by superior external force, and the debtor made his escape. *Ersk. B. iv. tit. 3, § 14, and B. i. tit. 4, § 28; Bell's Com. ii. 545; Swint. Abridg. h. t.; Kames' Stat. Law Abridg. h. t.; Blair's Justice of Peace, h. t.; Ritchie, June 27, 1817, 5 Dow, 87. See Escape. Baron. Imprisonment. Breaking of Prisons. Act of Grace.*

By act 2 and 3 Vict. c. 42, the management of prisons was transferred to a "General Board of Directors of Prisons for Scotland;" and this act was extended and amended by two subsequent acts—7 and 8 Vict. c. 34, 1844, and 14 and 15 Vict. c. 27, 1851. By these acts it is provided, that the general board shall have "full power of administration and management of all prisons in Scotland;" but all rules made by them must be submitted to, and approved by, the Secretary of State, to whom also the board must render annual reports of all their proceedings. It is further enacted that, with the exception of the general prison at Perth, each prison shall be under the immediate superintendence and management of a county board, to be appointed annually by the commissioners of supply for the county, but subject to the control of the general board. The obligations on magistrates, in respect of prisons and prisoners, are now removed; and all fees payable to keepers or officers of prisons are abolished. The expense of building and maintaining prisons is defrayed by assessment on counties and burghs in manner provided by the before-recited statutes.

**Prisoner.** See *Liberation.*

**Private Acts of Parliament.** The private acts of the Scotch Parliament were not, properly speaking, laws; but might have been reduced in the Court of Session at the instance of any third party whose interest suffered from them. Indeed, posterior to the year 1606, there was passed at the end of each session of Parliament an act, *salvo jure cujuslibet*, for the purpose of saving third parties against the effect of these private acts of Parliament. *Ersk. B. i. tit. 1, § 39.*

**Private Bills, or Acts of Parliament.** Under this title are comprehended those measures in their progress through Parliament which relate to private and personal interests, such as naturalisation, restitution of honours, change of a family name and arms, exchange or sale of entailed property, and the like; or to private or public local interests, such as making, maintaining, or repairing roads, bridges, canals, railways, gaols, harbours, and similar objects of a public, local, or municipal nature. Of the bills for these objects, some originate in the House of Lords, and some in the House of Commons, exclusively. The Lords claim the introduction of those in any way partaking of a judicial character. Hence, bills for restitution of honours or blood, estate bills, and (in England) divorce bills, originate in the Lords, while all bills which in any way can be construed as imposing a pecuniary tax, of whatever description, or in whatever shape, originate exclusively in the Commons. Those partaking of neither of those characters originate indiscriminately in either House, at the option of applicants. All private bills must be introduced upon petition, "truly stating the case," and the reasons of the application, signed by the parties who are suitors for the bill. [Lords' Standing Orders, 7th December 1669; Commons' do. No. 2. "*Private Bills in general.*"] Petitions for estate bills (almost the only private personal bills now required in Scotland), are referred to two of the judges of the Court of Session, who are forthwith to summon before them all parties concerned in the bill, and, after hearing them, are to report to the House the state of the case, and their opinion thereon, under their hands, and to sign the proposed bill. [Lords' Standing Orders, 16th May 1792, and amendments.] The consent of all persons concerned in the consequences of such private bills is required to be given in person, by signing a copy either before the judges in Scotland, or the committee on the bill; but such consents shall be sufficient in the following proportions, in the cases specified, viz.—"Four-fifths of the ten next in succession to the person or persons applying for such private bill, provided it is satisfactorily

proved to the committee that those of this, the first ten, whose consent has not been obtained, are absent, abroad, or cannot be found in the kingdom of Great Britain; two-thirds of the next twenty in succession after the said ten; one-half of the twenty next in succession after the said twenty; and one-third of all the other persons concerned in the said bill, without prejudice, nevertheless, as heretofore, to every person concerned to petition against the said bill, and to be heard for his interest therein." [Lords' Standing Orders, 5th May 1818.] The report of the judges being returned, and a copy of it and of the petition delivered to the Chairman of the Lords' Committees, the bill is read a first time, and thereafter proceeds as other bills through both Houses. See also additional Standing Orders made by the House of Lords, 6th July 1837. Evidence of compliance with the whole orders applicable to the particular case is given by production of such documents as are producible, and *parole* testimony (except in some few stated instances, where written affidavits will suffice) is required of fulfilment of the other requisites, such as lodging papers, affixing notices, or seeing them affixed, application to owners and occupiers, &c. The allegations of the petition must also be proved by a witness or witnesses; and upon satisfactory proof, the committee reports that the Standing Orders have been complied with, and the petition proved. Upon such report, leave is given to bring in the bill, which has, of course, been previously prepared in MS. according to the forms of the House; and it must now be printed and delivered to members (unless a naturalisation or name bill), and it may be read a first time on the following day. It is then taken to the Private Bill Office, where it remains till the second reading, seven clear days afterwards, if a bill for navigations, railways, tunnels, ferries, or docks, and three clear days if any other bill. But no private bill can be read a second time until the expiration of two calendar months from the day of the last notice given in the newspapers. The bill, if unopposed, is read a second time on the appointed day, and referred to a committee similar to that upon the petition. Seven clear days must intervene between the second reading and the meeting of the committee on the bill. At this committee, proofs of compliance with such Standing Orders as have not been necessarily exhausted in the committee on the petition, of consents not yet signified, and of allegations of the preamble of the bill, are given, and, if satisfactory, the committee discuss its provisions, and make any amendments, or listen to any opposition that may be offered by counsel or otherwise.

One clear day must intervene between the last day of sitting of the committee, and the report being made; and, when relating to navigations, railways, tunnels, ferries, and docks, seven clear days must intervene between its being presented and being taken into consideration. The bill, as amended, is printed and delivered to members as before; and upon the report being agreed to, the bill is ordered to be engrossed on parchment and examined, and it may be read a third time as soon as ready. It is immediately afterwards passed, and carried by the member who has conducted it to the House of Lords. The procedure in the House of Lords, as well upon bills originating there as in those sent from the Commons, is very nearly similar to that above described, with some difference as to intervening periods. Notices in newspapers, application to owners and occupiers, plans, &c., and perhaps a little more security of ultimate completion of the undertaking, and evidence of amounts subscribed, where subscribers are contemplated, are required by the Standing Orders, compliance with which, and the truth of the allegations of the bill, must be proved in committee by witnesses upon oath. Amendments made by the Lords must be returned to the Commons for assent or dissent; and in the event of non-agreement, a rare occurrence in a private bill, the proposed measure is either entirely abandoned or renewed, upon permission, in a way that can be agreed to by both Houses. It is competent to any person having interest to offer opposition to any private bill in whole or in part, and at any stage of the procedure; but as Parliament does not admit private parties to oppose in committee on the petition, and as the merits of the measure cannot fairly be judged of in the first stage, it is usual to defer opposition till the motion for second reading, and generally till the committee on the bill; when, under due restriction as to grounds and principles, every opponent is heard, and, if possible, consistently with good policy, his objections removed, or his interests reconciled with the declared purposes of the bill. The royal assent, from the date of which the act commences, unless otherwise provided in the act itself, is the concluding ceremony of private, as of all other legislation.

**Privateers;** private ships of war commissioned by the Admiralty, and fitted out by the owners at their own expense. Instead of receiving pay, the owners are allowed to keep what they take from the enemy, giving the Admiral his share. Privateers must find caution for good behaviour to the amount of £1500, or £3000 if the crew exceed fifty men. Besides these private commissions, there are special commissions for privateers, granted

to commanders of ships, who take pay, and are under marine discipline. *Stair*, B. ii. tit. 2, § 4; *Bank*. i. 524; *Tomlins' Dict. h. t.* See *Prize-Law. Letters of Marque.*

**Privative Jurisdiction.** A court is said to have privative jurisdiction in a particular class of causes, when it is the only court entitled to adjudicate in such causes. *Ersk.* B. i. tit. 2, § 7.

**Privies**; in English law, those who partake or have an interest in any action or thing: thus, every heir in tail is privy to recover the land entailed. There are five kinds of privies: of blood, as the heir to the ancestor; in representation, as executors or administrators to the deceased; in estate, between donor and donee, lessor or lessee; in respect of contract; and on account of estate and contract. There is another division—into privies in estate, in blood, and in law. *Tomlins' Dict. h. t.*

**Privilege, Personal**; against imprisonment for civil debt. *Minors within the years of pupilarity* are not liable to imprisonment for debt; 1696, c. 41. Lunatics, idiots, and all who are incapable of acting for themselves, have a similar exemption; *Bell's Com.* ii. 567. *The privilege of Parliament* protects all peers of the realm and all members of the House of Commons from arrest for debt. Members of the House of Commons are free from arrest during the sitting of Parliament, and for forty days after every prorogation, and forty days before the next appointed meeting. Formerly, the domestics, lands, and goods of the members enjoyed a similar exemption; but this was abolished; 10 *Geo. III.* c. 50. See *Parliament.* A married woman not being capable, in the ordinary case, of contracting a personal obligation, cannot be subjected to personal diligence, unless her husband has abandoned the country, and left her in a state of constructive widowhood. See *Husband and Wife.* Persons who have been sequestered, under the Bankrupt Statute, may obtain a personal protection, renewable during the subsistence of the sequestration, by consent of the creditors. And, finally, immunity from personal diligence may be obtained by taking refuge within the precincts of the sanctuary of Holyroodhouse. *Ersk.* B. iv. tit. 3, §§ 24, 25; *Brown's Synop.* pp. 1547, 1557. See also *Sequestration. Personal Protection. Sanctuary.*

**Privilege of Speech.** See *Libel. Defamation.*

**Privileged Debts**; are those which humanity has rendered preferable on the funds of a deceased person, and which an executor may pay without decree; as—1. Sickbed and funeral expenses, consisting of physicians' fees, medicines, and surgeons' accounts, with the expense of such decorations and state in the funeral as the rank and circumstances of the deceased

warrant. 2. Mournings for the widow and such of the children as are present at the funeral. 3. A year's rent of the house, and servants' wages since the last term. See *Executor. Mournings. Funeral Expenses.* On the death of a clergyman of the Church of Scotland, the sums due by him to the Widows' Fund form a privileged and preferable debt; 19 *Geo. III.* c. 20. *Ersk.* B. iii. tit. 9, § 43; *Bank.* ii. p. 399; *Bell's Com.* ii. 156–9; *Bell's Princ.* p. 386; *Illust.* i. 445; *Kames' Stat. Law Abridg. h. t.* See *Widows' Fund. Friendly Society.*

**Privileged Deeds.** A legal deed requires certain statutory solemnities; but from this rule exceptions have been made in favour of certain deeds and writings on grounds of necessity or expediency. Of these exceptions the following are examples:—(1.) *Holograph deeds*, which are deeds in the handwriting of the grantor, do not require witnesses, on account of the difficulty in forging the handwriting of a whole deed. But such deeds do not prove their own dates; *Ersk.* B. iii. tit. 2, § 22. See *Holograph Deeds.* (2.) *A deed subscribed by a number of persons* has been sustained, though wanting witnesses. But if this decision be an authoritative precedent, it ought to apply only in the case where all the parties have signed the deed at one and the same time, and in presence of each other; *Ersk.* ib. § 23. (3.) *Testaments.* Where the testator cannot himself execute the deed, one notary and two witnesses are sufficient to authenticate it, whatever extent of property may be conveyed by it, although the general rule is, in all deeds of importance where notarial subscription is resorted to, to require two notaries and four witnesses. See *Testing Clause.* (4.) *Receipts and discharges to tenants* for rent need not be signed in the presence of witnesses. See *Discharge.* (5.) *Missive letters in re mercatoria* are valid though not holograph; and mercantile commissions are effectual though they want witnesses. See *Letters.* (6.) *Accounts amongst merchants* may be effectually docketed, though neither the writer's name be mentioned, nor witnesses adhibited; *Ersk.* B. iii. tit. 2, § 24. (7.) *Bills and promissory-notes* neither require witnesses nor that they should be holograph; *Ersk.* ib. See *Bill of Exchange. Deed. Evidence.* See generally, *Ersk. ut supra; More's Notes on Stair*, p. ccccv.; *Bell's Princ.* § 21.

**Privileged Summonses.** This name is given to a class of summonses in which, from the nature of the cause of action, the ordinary *inducia* are shortened. Such summonses formerly required a bill to be passed in the Bill-Chamber, but this was altered by the act 13 and 14 *Vict.* c. 36, 1850. The privileged summonses formerly were sum-

monses of removing, recent spuilzies, and recent ejections (where the summons was executed within fifteen days after committing the deed), intrusions, and succeeding in the *vice*, causes alimentary, exhibitions, summonses for making arrested goods furthcoming, transferences, poindings of the ground, wakenings, special declarators, suspensions, preventors, and transcripts. Of those, recent spuilzies, ejections, intrusions, and succeeding in the *vice*, were directed, by an old Act of Sederunt, to be executed on a diet of fifteen days, and all others upon two diets of six days each: *A. S.* 21st June 1672. Besides the summonses above enumerated, summonses of multiplepoinding and of *cessio bonorum* may, by practice, be executed on one diet of six days, as also wakenings, where not combined with a transference. Where the defender resides in Orkney or Shetland, or where he is furth of the kingdom, the privilege does not apply; *Ivory's Form of Process*, vol. i. p. 167, *et seq.* By the stat. 6 Geo. IV. c. 120, § 53, it is enacted, that after the 11th November 1825, the practice of citing defenders on two diets shall in all cases cease; and that privileged summonses against defenders within Scotland shall proceed on one diet of six days; other summonses against defenders residing in Orkney and Shetland, on a diet of forty days; and for all other persons within Scotland, a diet of twenty-seven days; and for defenders out of Scotland, one diet of sixty days. By the act 13 and 14 Vict. c. 36, 1850, all summonses may proceed on fourteen days' warning where the defender is within Scotland, unless in Orkney and Shetland; and on twenty-one days when in either of these places, or furth of Scotland. But privileged summonses, which formerly proceeded on shorter *inducia* than these, continue to do so. *Stair*, B. iv. tit. 3, §§ 4 and 32; *Ersk.* B. iv. tit. 1, § 6, and *Note by Mr Ivory*; *Bank.* vol. ii. p. 600; *Shand's Prac.* 230; *Jurid. Styles*, 2d edit. iii. 3, 4, 8, 971-2; *Brown's Synop.* p. 1033; *Ross's Lect.* ii. 519. See *Citation. Edictal Citation. Bills of Signet Letters.*

**Privy Council.** The *Privy Council* of Scotland was so termed, in contradistinction to the Parliament, which was the King's *Great Council*. The Privy Council consisted of persons chosen by the King to advise with in matters of government and police. They had also a supreme jurisdiction in all questions of wrong which were found to be beyond the cognisance of the courts of common law, and in all cases where the public peace was concerned. These powers remained with the Scotch Privy Council until, by the act 6 Anne, c. 6, that council was absorbed in the British Privy Council, who are by that act declared

to have no other or higher powers than were possessed by the English Privy Council at the time of the Union. *Ersk.* B. i. tit. 3, § 9; *Kames' Stat. Law*, h. t.

**Privy Council of Great Britain;** the principal council of the Queen, the members of which are chosen at her pleasure. It is from them that the Ministers of State forming the Cabinet are selected. They hold their offices for life, but are subject to removal at the Queen's pleasure. The Privy Council has power to inquire into all offences against the Government, and to commit the offenders to prison, to be dealt with according to law. *Tomlins' Dict.* h. t.

**Privy Seal.** This seal is used in authenticating royal grants of assignable or personal rights. The rights which a subject transmits by assignation, the Sovereign transmits by the Privy Seal. The writs which pass the Privy Seal are of two classes: such as pass by warrants superscribed by the Sovereign, and such as pass by warrants signed by the Baron of Exchequer. Of the first kind are all gifts of pensions, presentations to churches and professorships of which the Crown is patron, commissions to inferior officers, and the like. Of the second kind are precepts directed to the Keeper of the Great Seal for expediting tacks of teinds belonging to the Crown. *Ersk.* B. ii. tit. 5, § 84; *Jurid. Styles*, i. 430; *Muirhead*, 16th May 1809, *F. C.*; *Brown's Synop.* p. 386.

**Prize-Law.** The jurisdiction of all matters relative to prize and capture in war is now vested exclusively in the High Court of Admiralty of England. (See *Capture*.) The rules of proceeding in prize causes, as stated in a report by Sir Geo. Lee to the King in 1753, are as follow: Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, in which both parties may be heard, and condemnation may follow thereupon as a prize, in a Court of Admiralty. The proper court for these condemnations is the court of that state to which the captor belongs. Every ship ought to be provided with complete and genuine papers, and the master at least should be privy to the truth of the transaction. And if there be false or colourable papers—if any papers be thrown overboard—if the master and officers examined in *præparatorio* grossly prevaricate—or if there be other suspicious circumstances, the law of nations allows, according to the different degrees of misbehaviour or suspicion, costs to be paid, or not to be received by the claimant, in case of acquittal and restitution. But if a seizure is made without probable cause, the captor must pay costs and damages, for which purpose privateers are obliged to find caution.

See *Privateers*. If the sentence of the Court of Admiralty is thought to be erroneous, there is in every maritime country a superior court of review, to which the parties who think themselves aggrieved may apply. *Stair*, B. ii. tit. 2; *More's Notes*, clii., where the report of Sir Geo. Lee is quoted at length; *Bank*. i. 520-3; *Bell's Princ.* § 1295; *Brown's Synop. h. t.*, and 483. See *Capture. Letters of Marque. Privateers*.

**Prize-Money.** The payment of army prize-money has been the subject of several statutory enactments. These are consolidated and amended by 2 Will. IV. c. 53. It is provided that all captures made by the army shall be disposed of as the Sovereign thinks fit. Deserters are not entitled to prize-money. Provision is made for the sale of prizes, for the assignment of shares, &c., for the details of which reference is made to the act itself. See *Soldier*.

**Pro Confesso.** Where a party in a cause is cited to appear and give his oath on the reference of his adversary, or where the judge, *ex officio*, has required his oath, it is under certification that, if he fail to appear and depone, he will be held as confessed, and decree pronounced as if he had admitted the fact referred to his oath. But a summons, containing a reference to oath, and on which decree in absence was pronounced, was not held to be a judicial reference on which the party could be held conclusively as confessed; *Nicolson*, 23d Nov. 1810, *F. C.* Against this certification the party will be reponed, upon his showing good reason why he did not appear. If there was any irregularity in the citation, the party is said to be reponed *ex justitia*, and the effect of the holding as confessed is then as completely at an end as if it never had been pronounced. But where the party is reponed *ex gratia*, and dies without having deponed on the reference, his heir will not be relieved from the holding as confessed. *Ersk.* B. iv. tit. 2, § 17; *Thomson on Bills*, 658. *Shand's Prac.* 388. See *Evidence*.

**Pro Rata.** See *Solidum et Pro Rata*.

**Pro Re Nata.** A *pro re nata* meeting or proceeding, is a meeting called or a proceeding taken on the emergence of some occurrence or circumstance requiring it. As to *pro re nata* meetings of presbytery, see *Presbytery*.

**Probabilis Causa.** See *Poor's Roll*.

**Probable Cause.** In actions of defamation, the justification, or plea in defence, that the defender had probable cause for what he stated, is founded on the necessity which sometimes exists, that persons should, in the exercise of official, professional, or personal duty, give information, or state facts not yet absolutely certain. In such circumstances it

will be a sufficient justification if the defender be able to show that he had probable cause for believing and making his accusation. This defence is not competent in cases of ordinary or popular scandal, where nothing short of *veritas convicii*, and sometimes not even that, affords a defence. See *Veritas Convicii*. But a statement made by an advocate at the bar, by a master in giving the character of a servant, or by any one in the performance of a duty in a like privileged situation, may be justified by the defence of probable cause. Probable cause is auxiliary to the defence of privilege. Even in a privileged situation, if the accusation turn out to be false, malice will be presumed, or, at all events, the defence of privilege will be neutralised, and the malice will be doubtful. But the allegation and proof of probable cause removes the presumption of an intention to defame. Probable cause may be proved either upon a separate issue taken by the defender, or upon the general issue. In practice, a separate issue is seldom taken. *Borthwick on Libel*, 311; *Macfarlane's Jury Prac.* 222. See *Defamation. Damages. Injuries. Libel. Veritas Convicii*.

**Probate of Testaments;** in English law, the exhibiting and proving of wills and testaments before the ecclesiastical judge, delegated by the bishop, who is Ordinary of the place where the party dies. See *Testament. Prerogative Court. Ordinary*.

**Probatio Probata;** proof which is not permitted to be impugned or redargued. The verdict of a jury is in some cases not liable to review, and it is then called *probatio probata*. *Ersk.* B. iv. tit. 2, § 33.

**Probation.** See *Evidence*.

**Probationers.** See *License to Preach*.

**Process.** *Stair* defines a process to be "an action sustained by a judge, that thereupon either an act or definitive sentence may follow;" and he adds, that an action not sustained is *no process*. (*Stair*, B. iv. tit. 3, § 21.) But under this term, in a larger acceptance, may be comprehended all those writs, forms, and pleadings, whereby an action or a prosecution, whether criminal or civil, is brought under judicial cognisance, including all that takes place from the first step down to the final decree in a civil action, and to the conviction or acquittal in a criminal prosecution. *Bank*. ii. 598; *Kames' Stat. Law, h. t.* This comprehensive subject is necessarily treated of in a variety of separate articles in this Dictionary. Thus, under the articles *Criminal Prosecution—Criminal Letters—Indictment—Concourse—King's Advocate—Justiciary Court—Circuit Court—Dittay—Bail*—and some others, all that relates to criminal process, in so far as thought

suitable for the present work, will be found. In regard to civil process, in like manner, the following articles may be consulted: *Actions—Summons—Privileged Summons—Calling of a Summons—Defences—Exceptions—Edictal Citation—Diet—Advocation—Suspension—Wakenings—Transference—Condescendence—Pleas in Law—Record—Diligence—Hearing—Cases—Interlocutor—Prorogation—Decree—Protestation—Appeal—Jury Trial—Issues—Evidence—New Trial—Exceptions, Bill of—Replies—Duplies—Session, Court of—Bill-Chamber—College of Justice—Advocate—Clerk to the Signet—Admiralty—Reduction—Ranking and Sale—Adjudication—Multiple-pounding—Divorces—Desertion—Teind Court—Augmentation—Locality—Commissary Court—Sheriff—Justice of Peace—Dean of Guild—Registration—Horning—Caption—Hypotheec—Sequestration.* These articles, if read in their order, and others which will readily suggest themselves, will convey to the reader some idea of the course of procedure, and of the multifarious details of a suit or process.

**Prochein Ami**; in English law, the next friend; a term used for the next of kin who sues for an infant in any suit affecting the infant's rights. *Tomlins' Dict. h. t.*

**Procurator to Subscribe Bills.** A party is said to draw, indorse, or accept a bill by procurator, when it is done by his agent acting under his authority. Procurator may be constituted by a written mandate, and in England by a verbal mandate; or by delivering to any person a blank bill-stamp subscribed, which may be considered as a mandate to fill up the blank in any way he pleases; or *rebus ipsis et factis*, as it is expressed—that is, by acts of the principal, implying his authority, such as allowing a person to sign instruments habitually for him, or in his name, though his approbation should not be directly proved; or by subsequent assent to the agent's subscription. Procurator may also be conferred by an express faculty, either general, or implying the power of signing bills. The procurator does not bind his principal, unless he write his principal's name *per* his procurator, or sign his name as agent for the principal, or in some other way indicate his character of agent. When the principal is bound, the agent is not personally liable; but he may be liable when the principal is not bound. Thus, one who subscribes *per* procurator, without authority from the principal, is personally liable. Policies of insurance are sometimes subscribed by procurator. *Bell's Com. i. 399, 479, 600; Bell's Princ. §§ 321, 357; Thomson on Bills, 220; Davidson, 19th April and 4th July 1815, 3 Dow, 218.*

**Procurator**; a general term for a person who acts for or instead of another, and under

his authority. Thus, the person whom the vassal directs to make resignation in the hands of the superior is termed his procurator. Agents practising before the inferior courts are also called procurators. When the Admiralty Court was abolished, the Admiralty procurators were allowed, during their respective lives, to conduct, as agents, before the Court of Session, any causes competent to that Court; *1 Will. IV. c. 69, § 28.* In cases under the Small Debt Act, no professional man is allowed to appear for a party. Ordinary procurators may be suspended or struck off the list for improper conduct. *Stair, B. i. tit. 12, § 12; Ersk. B. iii. tit. 3, § 33; Macleaurin's Sheriff Prac. 73; Bank. ii. 492; Blair's Justice, h. t.; Ross's Lect. ii. 136, 245; Brown's Synop. h. t. See Agent.*

**Procurator-Fiscal**; is the officer appointed by the sheriff, magistrates of burghs, or justices of peace, at whose instance criminal proceedings before such judges are carried on. The procurator-fiscal may prosecute in his own name, and for the public interest, all crimes which such tribunals may competently try; but where he has reason to suspect that any complaint made to him tends more to vindicate the private than the public interest, his duty is to decline giving his instance, and to offer his concurrence. This last he is bound to give to all applications or libels, at the instance of the private party aggrieved; every party being, by the law of Scotland, entitled to sue not only for his private interest, whether to the effect of restitution of his stolen property or reparation of damage sustained by any crime committed against him, but also for the public interest, to repress crime by punishment of the delinquent. And to this effect the procurator-fiscal's concurrence must be given, if the complaint be regularly drawn. Where the procurator-fiscal gives his concurrence, and even acts as the informer's agent, he is not liable to an action for malicious prosecution; *Arbuckle, 27th April 1815, 3 Dow, 160.* All precognitions as to persons accused of crimes are now taken by the procurator-fiscal, either before the sheriffs or sheriff-substitute, or the magistrates of the different counties. But when declarations of accused parties are taken before the justices of peace, the proceedings should be remitted to the sheriff, and completed by the procurator-fiscal in that judge's court. By the Jurisdiction Act, which abolishes the mode of taking precognitions by the Porteous Roll clerk, sheriffs, exclusively, are required to exercise the duty, when crimes are committed, or reported to them. The sheriff and his procurator-fiscal, therefore, should immediately, or as soon as the exigency of the case permits, take and report precogni-

tions. In all cases where information as to any crime has been lodged with the procurator-fiscal, it is his duty immediately to ascertain the truth or falsehood of the information given; to obtain correct evidence; to secure the accused; to prevent the oppression of the innocent, and the escape of the guilty; to preserve from corruption the sources of evidence, and to make a true report to the judge; and the officers of the Crown. There being no coroner in Scotland, it is the duty of the sheriff and his procurator-fiscal, in cases where there is reason to suspect that any individual has met his death by violence, or from other than natural causes, immediately to have the body examined by medical men, and to take a precognition regarding the circumstances of the case. And where murder, fire-raising, or any of the greater crimes have been committed, these officers frequently repair to the spot, for the purpose of better ascertaining, and of being able to report upon the different circumstances and appearances which the case may exhibit. Of late, it has been the practice of Crown counsel to send many cases of a description which were formerly tried in the Court of Justiciary to be tried before the sheriff with a jury; and in these cases the procurator-fiscal is the prosecutor. Although appointed by the sheriffs, the procurators-fiscal of counties, from their cumulative and extensive jurisdiction over the whole county, are accountable to the Crown counsel for the proper discharge of the criminal duties; and in all cases of difficulty, it is their duty to communicate with the Crown-agent, for the advice of the Crown counsel; all the correspondence of the fiscals being through the Crown-agent. The procurators-fiscal are now paid by salaries. To sustain an action of damages against a procurator-fiscal, malice must be averred. *Munro v. Taylor*, Feb. 25, 1845, 7 D. 500. All the fines imposed by the court as punishments are payable to the fiscal, who is bound to account for them to the Exchequer in cases which have been reported to the Crown counsel; and to the county and sheriff in other cases. *Bank*. ii. 492; *Hutch. Justice*, i. 96; *Tait's Justice*, voce *Parties*; *Tait on Evidence*, 272. *McGlashan's Prac.* 88.

**Procuratory of Resignation.** A procuratory of resignation is a written mandate or authority, granted by a vassal, whereby he authorises his feu to be returned to his superior, either to remain with the superior as his property—in which case it is said to be a resignation *ad remanentiam*—or for the purpose of the superior's giving out the feu to a new vassal, or to the former vassal, and a new series of heirs; which is termed a resignation *in favorem*. The procuratory of resignation is usually inserted as a clause in the deed of

conveyance; or, with the addition of a testing clause, a procuratory of resignation may constitute the entire deed. The procuratory authorises a certain person or persons (the name being left blank) to appear in presence of the superior or of his commissioners, authorised to receive resignations, and there, as procurators for the granter of the procuratory, to resign the subject into the hands of the superior, by delivery of staff and baton, and that either *ad remanentiam* or *in favorem*; and for new infeftments to be given in favour of the disponent or of the vassal himself, and a new series of heirs. Hence, entails are frequently executed in the form of procuratories of resignation. The procuratory of resignation is the warrant to the superior to give out of new the property of the vassal. On the death of the vassal, the superior may voluntarily renew the right in favour of the heir of investiture by a precept of *clare constat*; or, under statutory authority, he may be required to grant a charter of adjudication, or a charter of sale. But, with those exceptions, the resignation made under authority of the procuratory of resignation is the only form by which the superior is vested with any title to give out a new right. Prior to the passing of the act 1693, c. 35, procuratories of resignation, as being mandates to the procurators of the vassal, fell by the death either of the granter or receiver. But by that statute, it was declared that the procuratory of resignation might be the warrant of resignation, after the death either of the granter or of the receiver. The procuratory of resignation necessarily forms part of the disposition of sale, because it is requisite that the purchaser should be enabled to enter with the seller's superior by resignation. It is inserted also in a disposition by a superior to his vassal; and in a disposition of the feu by a vassal in favour of his superior, the procuratory of resignation is the regular form by which the restoration of the property to the superior is authorised. See *Ersk. B. ii. tit. 7, § 17, et seq.*, and *B. iii. tit. 3, § 42*; *Bell's Princ.* p. 288, *et seq.*; *Bell on Purchaser's Title*, 35, 42; *Jurid. Styles*, i. 211; *Ross's Lect.* ii. 223, 234, 245. See *Resignation. Charter. Disposition.*

By the act 10 and 11 Vict. c. 48, 1847, the procuratory of resignation in a disposition is now framed in these terms: "And I resign the said lands and others for new infeftment;" and the clause so framed is equivalent to a procuratory of resignation in the old form, and, in the case of conveyances by a vassal to his superior, is equivalent to a procuratory of resignation *ad remanentiam*. See *Titles to Land*.

**Prodigals;** are those of a profuse and

facile disposition—the fit subjects of voluntary, or of legal interdiction. See *Interdiction. Curatory.*

**Production.** In judicial proceedings, written documents produced in process, *in modum probationis*, or in support of the action or defence, are technically called *productions*. So also in an action of reduction, the writ, or deed, or decree, called for, in order to its being judicially set aside or reduced, is called *the production*; which, unless the defender have a good objection to the pursuer's title, or some other valid preliminary defence, he must satisfy (as it is expressed), that is, judicially produce. See the practical rules on this point explained, *voce Reduction.*

Documents intended to be founded on by a party must be produced before the record is closed, if in his possession, or within his power. This rule, however, does not apply to productions at a jury trial. See the case of *Cameron v. Cameron's Trustees*, Dec. 21, 1850, 13 D. 412.

**Production of articles at criminal trial.** Writings and other articles, such as the prisoner's declaration, the forged writings, the stolen goods, the instruments of murder, &c. produced at a trial, do not constitute evidence, unless authenticated by the testimony of witnesses. In theft, the goods stolen ought to be described by the owner before being put into his hands to be sworn to by him; and he must state his reasons for certain knowledge, if he identify the goods absolutely. It must likewise be proved that the goods produced were found upon the prisoner. Where the articles are of such a nature that they cannot be produced, the question of identity must rest on the description given by the owner and witnesses, of the property said to have been stolen, and of that found on the prisoner. In forgery, the forged writing must be produced, if in existence. If destroyed by the panel, the trial may proceed, proof, of course, being rendered more difficult. If lost or destroyed, but not by the panel's fault, it is a question undecided, whether the trial may proceed; but it is settled, that the trial cannot proceed if the non-production is in any way owing to the prosecutor. Notice must be given to the panel of the articles to be produced, that he may examine them. Sometimes a particular description is necessary, which, if erroneous, bars their production. Sometimes, as in the case of stolen goods, general mention is sufficient. A witness, to illustrate his evidence, may produce an article unnoticed in the libel; but such an article cannot be left to become part of the process, and to be sworn to by the other witnesses. *Hume*, i. 164; ii. 349, 388, 535; *Burnett*, 200, 506, 558; *Skeele*, 21-6, 128, 150; *Alison's Prac.* 588.

**Profanity.** The profanation of the Sabbath by any occupation of labour, business, or sport, or other secular employment, has been prohibited by several statutes, from 1503, c. 83, to 1672, c. 22. Justices of the peace are charged with the execution of these laws, and any person may prosecute. *Blair's Justice, h. t.*; *Tait's Justice, h. t.* See *Blasphemy. Sunday.*

**Profits, Violent.** See *Violent Profits.*

**Progress of Titles.** A progress of titles, in its most ordinary acceptation, signifies such a series of the title-deeds of a landed estate, or other heritable subject, as is sufficient in law to constitute a valid and effectual feudal title thereto. In the case of a sale at a full price, the seller is bound, unless it be otherwise stipulated, to give the purchaser not only a disposition, or other effectual deed of conveyance, but also to give him a sufficient progress of titles. And in practice, the seller usually comes under an express obligation to that effect; the legal import of which is, that he must deliver to the purchaser, along with his disposition, a progress of deeds, showing that the seller has in his person, by inheritance or otherwise, an unimpeachable feudal title. But where the seller is able to show an unencumbered title complete in his person, and that of his predecessors or authors, extending backwards for forty years, and standing on charter, or disposition and sasine, the purchaser is bound to accept of this as a sufficient progress, unless he can point out specific objections. Where, however, the title rests mainly on mere possession for forty years, such a progress will not amount to implement of the seller's objection. Thus, where a seller had possessed during the long prescription, but there were the following objections to his title:—that a charter confirmed by the superior was wanting in the progress; that some charters had no sasines following on them; while the warrants of certain sasines were wanting; it was held that this was a title which a purchaser was not bound to accept; *Nairn*, June 13, 1676, *M.* 14, 169. Where the expositor in articles of roup has taken the purchaser bound to satisfy himself with the progress, but, at the same time, has bound himself to give a “*valid disposition*,” it seems to be settled that the purchaser is not barred from pleading that the title offered is legally objectionable. See *Waddell v. Pollock*, 19th June 1828, 6 *S. & D.* 999. But, on the other hand, and in connection with the same subject, see also *Rouand*, 24th Nov. 1769, *Mor.* 14, 178; *Hay*, 10th July 1783, *Mor.* 14, 183; *Anderson*, 4th Dec. 1818, *F. C.*; *Caruthers*, 26th May 1825, 4 *S. & D.* 34; *Dick*, 12th Dec. 1826, 2 *W. & S.* 522. Questions frequently arise on the effect of minority, and



other interruptions, of prescription on a progress of titles. *Stair*, B. iv. tit. 38, § 19; *Ersk.* B. ii. tit. 3, § 20; *Bank.* ii. 218, 688; *Bell on Completing Titles*, 154; *Ross's Lect.* ii. 296. See *Disposition. Sale. Search of Incumbrances.*

**Prohibition.** See *Tailzie.*

**Promise and Offer.** An offer is a proposal made by the offerer to the person to whom the offer is addressed, to give or to do something, either gratuitously, or on an onerous consideration. A promise is an offer, with this addition, that the promiser, from the nature of his proposal, thinks it unnecessary to wait for the other party's assent, which he takes it for granted will be given as soon as the offer is known. In the case of an offer, therefore, there is no *consensus in idem placitum* until the offer is expressly agreed to. But as soon as a promise is made, there is *consensus in idem placitum* implied, although not expressed. An offerer is not bound until his offer is accepted. A promiser is bound as soon as the promise reaches the party to whom it is made. According to *Stair*, the necessity of acceptance in the one case and not in the other is to be accounted for in this way—that an offer accepted is the deed of two, while a promise is but the deed of one, and has not implied in it, “as a condition,” the acceptance of another; *Stair*, B. i. tit. 10, §§ 3 and 4. Whatever supposition is adopted, the practical result is the same; but it seems more in accordance with the general doctrine of agreements to hold, that obligation can only spring from consent; and that this consent exists in the case of a promise, as well as of an accepted offer. The presumption does not always hold, that a person in whose favour a proposal is made to give or to do something gratuitously, is willing to accede to that proposal. And when the proposer expresses any doubt upon this point, he is not bound, unless by the express acceptance of the other party. Thus, a person offered by letter to become debtor for a sum due by his mother, but requested to know whether the creditor agreed to this. The creditor did not expressly accept the offer, and the offerer was held, after his mother's death, not bound to implement it; *Allan v. Colzier*, June 25, 1664, *M.* 9428. But a letter, in which a brother promised to give a bond of provision in favour of his sisters, and two bonds for L.250 each in favour of his brother, was held binding; *Maclachlan*, June 1, 1821, 1 *S. & D.* 45. A promise does not require writing for its constitution: it may be either verbal or by letter. It cannot, however, be proved by witnesses: the writ or oath of the debtor is necessary. Formerly, a promise might be proved by witnesses, if it was of the nature of a cautionary engage-

ment, and was entered into at the same time with a principal obligation, proveable by parole testimony; but by the Mercantile Law Amendment Act, 19 and 20 Vict. c. 60, 1856, all guarantees and cautionary obligations must now be in writing.

A simple offer may, in ordinary cases, be accepted at any time, if not withdrawn. But in mercantile transactions, on account of the danger of delay, and the risk that the market may alter, there is an implied condition in an offer to buy or sell that it be accepted immediately, or at least without undue delay, and while there is no change injurious to the offerer. If a time be fixed within which acceptance must be made, it must be attended to. An offer, bearing that an answer is expected in course of post, is not binding after the arrival of that post without an acceptance. A letter by the first mail-packet from abroad is held to be in course of post, though private ships may have sailed previously. An acceptance making a change upon the proposed bargain is equivalent to a new offer, and must, in its turn, be agreed to by the offerer. An order for goods must either be complied with, or rejected without delay; but in this case, a formal acceptance is not necessary to bind the person sending the order. A lady wrote to another to engage a servant, and thereafter not to do so; the two letters were delivered through the post-office simultaneously to the servant. It was held that there was no completed contract, and that the servant was not entitled to wages; *Countess of Dunmore*, Dec. 15, 1830, 9 *S. & D.* 490. Where the acceptance of an offer and the retraction of an offer are posted on the same day, and both letters are delivered on the following day, there is a completed contract. See the case of *Thomson v. James*, July 12, 1855, 1 *D.* 1. *Ersk.* B. iii. tit. 2, § 1; tit. 3, § 88; *Stair*, B. i. tit. 3, § 9; tit. 10, §§ 3-6; *More's Notes*, p. lxxii.; *Brodie's Sup.* 907; *Bank.* vol. i. pp. 98, 323-5; *Bell's Com.* i. 326, 397; *Bell's Princ.* §§ 73-82; *Il-lust.* ib.; *Kames' Princ. of Equity* (1825), 127, 316-8, 53; *Hunter's Landlord and Tenant*, 276, 327, 444; *Bell on Leases*, ii. 115-7; *Thomson on Bills*, 6, 336, 524. See *Obligation. Contract. Locus Pœnitentiæ. Evidence.*

**Promissory-Note.** A promissory-note is a written obligation by one person to pay to another a certain sum of money on demand, or at a specified time after the date of the note.

The following is an example of the ordinary form of such a promissory-note:—

“L.100 sterling. *Edinburgh, (date).*  
Three months after date, I

promise to pay C. D. or order, at (specify a place) the sum of One Hundred Pounds sterling, value received."

(Signed) "A. B."

Such a note must be written on the proper stamp, any error in that respect not being suppliable afterwards; and the note, when completed, possesses all the privileges of a bill of exchange as regards authentication, negotiation, and diligence; 23 *Geo. III. c. 18, § 55*. See *Bill of Exchange*. An acknowledgment for the receipt of money, "for which I shall account," is not a promissory-note. See on this subject generally, *Pirie v. Smith*, 23th Feb. 1833, *S. & D. 473*; *Thomson on Bills*, p. 35, 2d edit.; *Ross's L. C. C.*, p. 52.

**Promulgation.** The acts of the Scottish Parliament were promulgated by proclamation in all the county towns in the kingdom. They were afterwards ordered to be printed; 1540, c. 127; and the proclamation of them fell into disuse. But, by the act 1581, c. 128, they were ordered to be published at the market-cross of Edinburgh. British statutes come into operation from the date of their receiving the royal assent, unless it be otherwise provided in the act. *Ersk. B. i. tit. 1, § 37*; and *stat. 33 Geo. III. c. 13*. See *Assent, Royal*.

**Promutuum.** One is said to have a *quasi* loan, or *promutuum*, of a sum which has been paid to him when it was not due, and which he is therefore bound to restore. *Stair, B. i. tit. 7, § 9*; *tit. 2, § 5*. See *Condictio Indebiti*.

**Proof.** See *Evidence*.

**Proper Jurisdiction.** Proper jurisdiction, as contradistinguished from delegated jurisdiction, is that which belongs to the judge or magistrate himself, in virtue of his office; whereas delegated jurisdiction is that which is communicated by a judge to another who acts in his name, called a depute or deputy; *Ersk. B. i. tit. 2, § 13*. See *Delegated Jurisdiction*.

**Property;** is the exclusive right of using and disposing of a subject as one's own. Hence, the proprietor of a subject, whether heritable or moveable, may give it away, or sell, or burden, or pledge it, or create a servitude over it. So also the same subject may belong to two equally, which is termed *joint property*, or *common property*. Moveable property once vested in a person must remain his until it ceases to be so by his voluntary act, by delinquency, or by dereliction. But heritable property is not lost by dereliction alone. In order to give effect to the dereliction of heritage, there must be a title in another founded in the positive prescription. See *Dereliction. Prescription*. Occupancy is

admitted by the law of Scotland as a mode of acquiring property as to those subjects only which have continued in their original state unappropriated, whether the subject be animate or inanimate, as precious stones which never have had an owner, wild beasts, fowls, or fishes. But with this exception, property, both heritable and moveable, is regulated by the rules of law in its constitution and transmission. Difficult questions sometimes occur as to the right of conterminous proprietors to make alterations upon their own property, which may affect the property of their neighbours. Some of these questions have been already considered under the articles *Common Property*, and *Common Interest*. A proprietor has the exclusive right to the occupation and use of his property, *a celo usque ad centrum*. He may therefore prevent any encroachment, however inoffensive, and on whatever pretence. Contrivances have been employed for the purpose of preventing encroachments, as to the legality of which see *Spring-guns*. Every proprietor may do what he likes with his own, provided that he does not thereby injure the property of another; the remedy to the sufferer being damages for an injury inflicted, and interdict against any injury threatened. Neither is a proprietor entitled to exercise his right of property solely for the purpose of incommoding his neighbour. See *Emulatio vicini*. But one cannot be restrained in the beneficial or legal use of his property, merely because inconvenience may result to a neighbour. A proprietor may build to the very verge of his ground, even though he should stop all his neighbour's lights. See *Light*. Land locally inferior must receive the water of the superior land; but the inferior proprietor is not entitled to dam up the water so as to send it back upon the higher ground. A proprietor may dig his ground and remove the earth to the very verge of his property; but if his operations injure a neighbouring property, or remove the support from a neighbouring tenement so as to cause it to fall, or put it in danger of falling, he may be interdicted from proceeding, or made liable for the loss. This matter must necessarily depend upon the circumstances of each particular case. A proprietor who, in digging up an old wall, went lower than the foundation of his neighbour's house, which was thereby injured, was found liable for damages; *Robertson, May 12, 1825, 4 S. & D. 6*. Damages were awarded in the Jury Court for injury done to a house by improperly excavating the foundation of an adjoining one; *Callender, July 19, 1826, 4 Mur. 108*; and *Douglas, Sept. 19, 1826, 4 Mur. 130*. A person who had purchased a building-stance adjoining a tenement which

had no sunk storey, intimated his intention of excavating his ground for the purpose of having a sunk storey. This was resisted, and interdict against it granted by the Lord Ordinary, and his judgment adhered to by the Court, on the ground that the excavation would endanger the safety of the neighbouring tenement, and that the buildings in that street all wanted sunk areas; *Murray*, Dec. 4, 1834, 13 *S. & D.* 119; *Ersk. B. ii. tit. 1. § 1, et seq.*; *Bell's Princ.* § 938; *Illust.* 940; *Bank.* vol. i. pp. 10, 84, 504, 529; iii. 51; *Brown's Synop. h. t.* and p. 357; *Shaw's Digest, h. t.* See *Jus in Re. Common Property.*

**Property Tax.** The income or property tax was first imposed by 39 Geo. III. c. 13 (9th January 1799); and after having been the subject of various statutes, it finally expired on 5th April 1816. See 56 *Geo. III.* c. 65. An income tax was again introduced by the act 5 and 6 Vict. c. 35, and still continues. The last act on the subject is 22 and 23 Vict. c. 18, 1859.

**Proximity.** See *Kindred. Succession. Executors.*

**Proposed and Repelled.** Pleas proposed and repelled are those pleas which have been stated in a court and repelled previous to decree being given; and in the Court of Session no reduction of a decree on such grounds will be allowed. *Stair, B. iii. tit. 1, § 46*; tit. 52, § 7; *Ersk. B. iv. tit. 3, § 3*; *Bank.* vol. ii. p. 679; *Bell's Princ.* p. 665. See *Competent and Omitted. Decree.*

**Proporcitas; proportatio assisæ;** "the report, report, declaration, deliverance, verdict, or suithsaying of an assize." *Skene, h. t.*

**Prorogation.** In judicial proceedings, a prorogation is a prolongation of the time appointed for reporting a diligence, lodging a paper, or obtempering any other judicial order. By the act 13 and 14 Vict. c. 36, 1850, prorogations may always take place by the written consent of parties, either before or after the lapse of the period appointed for lodging any paper. A prorogation may also be granted by the Lord Ordinary once without the consent of parties, on special cause shown, and the nature of the cause must be set forth in the interlocutor granting the prorogation; but the Lord Ordinary cannot grant prorogation oftener than once, even upon cause shown, unless such course shall have been allowed by the Inner House on the report of the Lord Ordinary.

**Prorogation of Jurisdiction;** is that jurisdiction which is, by the consent of the parties, conferred on a judge otherwise incompetent. The consent may be either express or implied, as by proposing defences *in causa*, or the like. But a clause consenting to registration in a particular judge's court-books, does not imply

a prorogation of that judge's authority as to questions afterwards arising concerning the legal import of the writing so registered; and in general, in order to render prorogation effectual, the judge must have a jurisdiction susceptible of prorogation. Thus, it is inadmissible where his jurisdiction is excluded by statute; or when the judge's judicial commission is vacated or has expired; or where he is acting *extra territorium*. A defender, however, whose domicile is beyond a particular judge's territory, may, if cited within that territory, subject himself to the jurisdiction by appearing in court and offering peremptory defences. Prorogation of jurisdiction from causes of one description to those of a totally different description is inadmissible. Yet, where the cause is of the same nature with those to which the judge is competent, prorogation is admitted. Thus, where the proper jurisdiction of the judge is confined to causes amounting to a certain value, parties may prorogate the jurisdiction to causes above that value, unless the statute conferring the jurisdiction prohibits it, or expressly limits the jurisdiction. Prorogation is not admitted in the Queen's causes, lest the Crown should suffer by the negligence of its officers. *Ersk. B. i. tit. 2, § 27, et seq.*; see *Ivory's Notes*; *Bank.* ii. 471. See also *Declinature. Justices of Peace.*

**Prorogation of a Lease;** is the extension of it. In strict phraseology, a prorogation has been said to differ from a renewal in this, that the former is simply an extension of a lease which has expired, and which it ought to recite; while a renewal commences prior to the expiration of the old lease, and makes some alteration on it. This distinction has not been observed in practice; and prorogation and renewal are used indiscriminately. The same legal requisites are necessary to constitute a prorogation as to constitute the original lease. *Stair, B. ii. tit. 8, § 12*; *Moré's Notes*, p. ccxlv.; *Ersk. B. ii. tit. 6, § 25, Note*; *Bank.* ii. 52, 64, 72; *Bell's Com.* i. 68; *Ross's Lect.* ii. 500; *Bell on Leases*, i. 55, 60, 88, 117, 284; *Hunter's Landlord and Tenant*, 341, 391. See *Lease.*

**Prorogue.** The Parliament is said to stand prorogued when it is continued from one session to another. The prorogation is made by the royal authority, either by royal commissioners, who, in the Sovereign's name, prorogue the Parliament, or the prorogation may be made by royal proclamation. See *Parliament.*

**Prosecution, Criminal.** See *Criminal Prosecution.*

**Prospect.** See *Light.*

**Protection against Personal Diligence.** This is given by the law in the following cases:—1. The persons of peers, and of the

widows of peers, are exempted from diligence. 2. Members of Parliament are protected against personal execution by privilege of Parliament. 3. Married women for civil debts. 4. Minors under the age of pupillarity. The Palace of Holyrood House and its precincts afford a sanctuary to debtors. Besides the protection against arrest for civil debt thus obtained, the execution of a caption may be stayed by the judge, whenever it is necessary to call the person against whom such a diligence has issued or may issue to give his evidence in a cause. For this purpose the judge may, under the acts 1663, c. 4, and 1681, c. 9, grant a personal protection for such time as may be requisite—the same not exceeding a month; and as a safeguard against fraud, the party calling the witness must, by the act 1681, c. 9, make oath that he believes the witness to be a material one, and the creditor must also be called to object to the protection if he sees proper. Under the Bankrupt Statute, a personal protection may be given by the Court on awarding sequestration until a meeting of creditors, and a majority in number and value of the creditors may afterwards renew the protection. *Lastly*, Decree in an action of *cessio bonorum* may be regarded as a protection to the debtor who has made the *cessio*, until his circumstances improve. *Ersk. B. iv. tit. 3, §§ 24–25; Ross's Lect. i. 329. See Cessio Bonorum. Privilege. Personal Protection. Sanctuary.*

**Protest, Notarial.** Requisitions and intimations are often made under form of notarial instrument; in which the notary protests that the party against whom it is directed shall be liable to certain effects set forth in the instrument; but all those notarial instruments which are not held in law to be requisite as legal solemnities require to be supported by the parole evidence of the notary and witnesses present. *See Evidence.*

**Protestation.** Where a pursuer, advocator or suspender, after having raised an action, fails to insist in it, his opponent, by means of protestation, may compel him either to proceed or to suffer the action to fall. After the lapse of the *induciae* of a summons, if the pursuer does not proceed to call and enrol it, the defender, if he pleases, may put up protestation, which is done by delivering to one of the Outer-House clerks a note for insertion in the Minute-book of the Court of Session, specifying the names of the parties and the date of the summons, with the names of the defender's counsel and agent. This note, which is called a protestation, and which must be dated on a sederunt-day, is then inserted in the Minute-book by the keeper, and thus published or notified to the profession. If, within nine free days after its date, a certifi-

cate is produced to the Minute-book Keeper, from a deputy-clerk of Session or his assistant, that the summons, suspension, or advococation in question (as the case may be), has been duly lodged with him for calling, the Minute-book Keeper is bound to *score* the protestation, as it is expressed, and the clerk issuing the certificate is bound to call the summons, &c., regularly and immediately. But if no such certificate is produced within the nine days, the Minute-book Keeper, on the application of the party putting up the protestation, will give it out to be extracted, after which it cannot be scored. When the extract is signed, unless the defender chooses voluntarily to pass from his protestation, the action is at an end, and the defender cannot be called on to answer till cited on a new summons, or until a new advococation or suspension has been raised. The same course may be followed when the pursuer, after calling the summons, fails to enrol it. Where the summons has not been called, the protestation must be put up within year and day of the diet of compearance; for after that period the instance falls, and protestation is unnecessary. But where the summons has been called and not enrolled, the protestation may be put up at anytime within forty years;—attending to this, however, that after the lapse of one year from the date of the calling the process is asleep, and before putting up protestation a summons of wakening must be raised against the pursuer, the protestation in that case being called a “protestation upon a wakening.” The difference in this respect between a summons and a suspension or advococation is, that, until called, a summons, although it may fall, cannot fall asleep; whereas letters of suspension or of advococation, whether executed or called or not, within a year after the date of signing or compearance, may fall asleep. There were formerly technical differences between protestations in ordinary actions and in suspensions and advococations; but now the procedure in both cases is very much alike. See the subject learnedly expounded by Mr Beveridge, *Form of Process*, i. 270–81. See also *A. S. 11th July 1828, §§ 30, 24; A. S. 8th July 1831, and Shand's Prac. i. 172, et seq.*

By the act 13 and 14 Vict. c. 36, 1850, the extract protestation contains a decree for L.3, 3s. of protestation-money, if it is a protestation for not calling. If it is a protestation for not enrolling, but after the calling and return of the summons or other initial writ, with or without defences or answers, as the case may require, the defender or respondent is entitled to his just expenses as between party and party. A pursuer may be reoponed against a protestation for not calling at any time not later than ten days after the same has been given out for extract, whether ex-

tract has been issued or not, by lodging with the clerk, in order to calling, the summons or other writ, with the relative documents, accompanied by the receipt of the agent for the defender for the sum of L.3, 3s. of protestation-money, or consigning the money itself in the hands of the clerk for the use of the agent, and payable to him on demand. A pursuer may also be reponed for not enrolling and insisting, by enrolling his summons and other writ in the Outer-House Roll, and forthwith lodging the writ, with the enrolling clerk's certificate of enrolment annexed, in the hands of the clerk, accompanied by the receipt of the agent for the defender for the total amount of the protestation-money and expense of extract, or consigning the money itself in the hands of the clerk for the use of the agent. Whenever a summons or other writ shall have been duly enrolled by the pursuer in the Outer-House Roll, whether protestation shall have been put up or not, it becomes to all intents and purposes a depending process, under control of the Lord Ordinary and of the Court, until finally disposed of by interlocutor. In the inferior courts, the defender, on the day of compareance, or on any subsequent court-day within the year, may produce the copy summons and citation served on him, and, by motion minuted in the roll-book of the court, crave protestation. On this, the inferior judge admits the protestation, and assoilzies the defender with a certain sum in name of costs; and after the lapse of seven free days (or of forty-eight hours, where arrestments have been used), the defender may extract the protestation, and the action falls. But, at any time before extract, the pursuer may produce the summons, and get it called, on payment of the expenses decreed for; *A. S. 12th Nov. 1825*; *Maclaurin's Form of Process*, p. 109. See, on protestation under the former law, and generally, *Ersk. B. iv. tit. 1, § 7*, and *tit. 3, § 21*; *Ivory's Form of Process*, p. 185; *Stair, B. iv. tit. 1, § 52, et seq.*; *Bank. ii. 513, 615*; *Bell's Princ. 664*.

**Protesting of Bills.** The protest of a bill is the notarial evidence of a demand for payment having been made, by a notary, in presence of witnesses, at the place where the bill is payable. In order to preserve recourse against the drawer and indorsers, this protest must be taken on the last day of grace. See *Days of Grace. Noting a Bill*. But as against the acceptor, the bill may be protested at any time within six months of the term of payment, to the effect of recording such protest, and expediting summary diligence against the acceptor. Where there is no place of payment, the demand must be made in presence of the acceptor, or at his dwelling-house. A bill may also be protested for non-acceptance.

A copy of the bill is prefixed to the protest; and the notary, in his instrument, states the proceedings, and the protest against the acceptor, and all concerned, for payment, damages, &c. This protest may be recorded within six months, and become the warrant of letters of horning, &c. *Ersk. B. iii. tit. 2, § 33*; *Stair, B. i. tit. 11, § 7*; *Bell's Princ. p. 91*; *Illust. 236*; *Thomson on Bills, 442, 786, et seq.*; *Tait on Evidence, 3d edit. 22, 33-4*; *Jurid. Styles, 2d edit. ii. 10, et seq.* See *Bill of Exchange. Decree of Registration. Noting a Bill. Diligence. Days of Grace*.

**Protocol.** On the admission of a notary, he receives from the clerk-register a book, marked by the clerk, called a protocol, in which the notary is directed to insert copies of all the instruments he may have occasion to execute, to be there preserved as in a record. These protocols were at one time attempted to be made serviceable as records of sasines; but this, from many causes, failed, and their principal use was to supply the loss of any instrument, which they were allowed to do where the protocol had been regularly kept; but the protocol was seldom regularly kept, and is now entirely in disuse. *Ersk. B. ii. tit. 3, § 39, et seq.*; *Ross's Lect. vol. ii. p. 201, et seq.*; *Stair, B. ii. tit. 3, § 25*; *Bank. ii. 501*; *Tait on Evidence, 35*. See *Notary-Public*.

**Pro-Tutor.** Pro-tutors and pro-curators are those who act as tutors or curators to a minor without having a regular title to the office. By Act of Sederunt, June 10, 1665, such persons are declared liable not only for their actual intromissions as tutors or curators, but for what they ought to have intromitted with; and they may at any time be called to account by the minor. Those acting with them, or making payment to them, of the minor's money, do so at their peril, and are not released by such payment, unless in so far as the money has been *in rem versum* of the minor—i. e. profitably expended for his use. And the same principle regulates the claim of a pro-tutor or pro-curator against the minor for reimbursement of money expended for the minor. It must have been profitably expended, otherwise no action lies for reimbursement. *Ersk. B. i. tit. 7, § 28*; *Stair, B. i. tit. 6, § 12*; *More's Notes, xlv.*; *Bank. vol. i. p. 168*; *Bell's Princ. 584*. See *Curatory*.

**Prout de Jure.** A proof *prout de jure* is a proof by all the legal means of probation—viz., writ, witnesses, and oath of party; although, in practice, the phrase is usually applied to a proof of facts and circumstances by parole, in contradistinction to a proof limited to writ or oath of party. *Ersk. B. iv. tit. 2, § 1*; *Maclaurin's Sheriff Prac. 157*. See *Evidence*.

**Proven Rental.** When the heritors, in a process of augmentation, do not admit the

accuracy of the minister's rental, and take a commission for deponing on the actual rental of their several lands, the scheme of the rental, prepared under a judicial remit from the Lord Ordinary, according to the proof which has been led, and the certificates of rental and decrees of valuation produced, is called the proven rental. *A. S. 5th July, 1809, § 4. See Augmentation.* So also the rental of the subjects of a judicial sale, proved in the manner explained under the article *Ranking and Sale*, is called the *proven rental*.

**Proving of the Tenor.** The terms of a deed which has been lost or destroyed may be proved in an action peculiar to the Court of Session, called an *action of proving the tenor*. In this action it is necessary to prove the accident by which the deed was lost, or the *casus amissionis*, as it is termed; and this is more requisite in such deeds as remain private, or where the destruction of the deed is usually relied on as a discharge. The tenor of the deed must be proved to the Court by writing, or by the oath of the granter, or by witnesses; but where parole proof is resorted to, there must be adminicles in the general case—that is, relative writings. Where, from the circumstances of the case, no adminicle is to be expected, the Court will give to the evidence that degree of credit to which it may appear to be entitled. As drafts or scrolls are received as adminicles, it is proper for every man of business to preserve the drafts of the deeds he may have prepared, as well as to mark on the draft the date of the execution of the deed, and the circumstances attending it. He ought also to fill up the testing clause in the draft as it is actually filled up in the engrossed deed. The carelessness of practitioners in this respect, and where they make copies of deeds, cannot be too severely reprobated. A very common practice, in copying a deed, is to stop short at the testing clause, and thereby, in the event of the loss or accidental destruction of the principal deed, to deprive the party of very valuable evidence, in case a proving of the tenor should become necessary. This action is chiefly necessary where the deed to be proved is part of a progress of title-deeds; *Ersk. B. i. tit. 3, § 19, and B. iv. tit. 1, § 54.* As to the action of proving the tenor of a lost bill or note, see the article *Lost. Bank. vol. ii. p. 641; Bell's Princ. § 883; Thomson on Bills, 319; Darling's Prac. 505; Tait on Evidence, 203 to 214; Jurid. Styles, 2d edit. iii. 207–8, 521. See Casus Amissionis.*

**Provisions to Widows, Husbands, and Children.** On this subject, the following articles in this work may be consulted:—*Contract of Marriage. Terce. Courtesy. Jus Relictæ. Legitim. Conjunct Rights. Con-*

*dition, si sine liberis. Conditional Obligation. Donation. Destination. Tailzie.*

**Provost.** The chief magistrate of a royal burgh; *Bell's Princ. § 2176.* As to the election of the provost, see *Burgh-Royal*.

**Provosts of the Church.** Before the Reformation, when a collegiate church was founded and endowed, the head of the collegiate church was termed *praepositus*, or provost. *Ersk. B. i. tit. 5, § 3; Stair, B. ii. tit. 8, § 15.*

**Proxy.** Members of the House of Lords, and the electors of the sixteen representative peers of Scotland, may vote by proxy. See *Election Laws, 343–4; Parliament, 704.* Neither members of the House of Commons nor their electors can vote by proxy.

**Puberty;** is the interval between the age of fourteen years in males, and of twelve years in females, and majority. In questions as to crime, the age of puberty in females as well as males is fourteen; *Ersk. B. i. tit. 7, § 1. See Infants. Minor. Crime.*

**Public Burdens.** Public burdens affecting land may be defined generally as all taxations or assessments imposed in respect of the property or possession of land, including the land tax or cess, minister's stipend, manse and glebe assessments, schoolmaster's salary, poor's rates, rogue-money, road and bridge assessments, and others the like public and county burdens. Feu and blench duties, though sometimes erroneously so described, are not public burdens. In the disposition to a purchaser, a clause is usually inserted, binding the seller to pay the feu-duty and the public burdens up to a certain date (generally the term of entry), and the purchaser to pay them thenceforward. Independently of stipulation, public burdens fall upon the landlord, and not upon the tenant, except in the case of the schoolmaster's salary, which is payable one-half by the landlord and the other half by the tenant. A stipulation is sometimes introduced into a lease, declaring the lessor or the lessee liable for the public burdens. If the landlord be bound to pay them, and if the tenant pay them in the first instance, he may claim a corresponding deduction from the rent. The tenant ought to deliver the receipts; and the discharge for the rent ought to specify that so much was paid in money, and so much accounted for by those receipts. Under an agreement between a landlord and tenant, that the latter should pay public burdens, the income-tax, as having been a personal tax, was held not to be included; *Wilson, Feb. 15, 1828, 6 S. & D. 551.* A general clause of exemption from taxations in favour of heritors does not embrace an exemption from the burden of manse and glebe; *Nicol, Feb. 27, 1829, 7 S. & D. 479.* A public burden must be constituted

either by a statute or an uninterrupted uniform practice for a sufficient time; *Scott*, Feb. 4, 1829, 5 *Mur.* 57. It is provided by statute, that no one shall, in virtue of any diligence, take away the goods of another, unless he pay, or see paid, all the public taxes to which the proprietor of the goods is liable; 43 *Geo. III.* c. 150. Conveyancers usually employ the expression *public and parochial burdens*, but the general expression "*public burdens*" is sufficient to cover local as well as general taxes and assessments; although it does not follow that the expression "parochial burdens" includes general or national taxation and assessments. *Stair*, B. ii. tit. 6, § 20; *Ersk.* B. ii. tit. 6, § 42; *Bank.* i. 666; ii. 576; *Bell's Com.* i. 700; ii. 40; *Kames' Stat. Law*, h. t.; *Bell on Leases*, i. 321; ii. 129; *Hunter's Landlord and Tenant*, 640; *Ross's Lect.* ii. 495; *Bell on Completing Titles*, 61; *Brown's Synop.* h. t., and p. 1185; *Shaw's Digest*, h. t. See *Land-Tax*.

By the act 10 and 11 Vict. c. 48, 1847, a clause binding the disposer to relieve the disponent of all feu-duties, casualties, and public burdens, imports a relief of duties payable to the superior, and of all public, parochial, and local burdens due from or on account of the lands disposed, prior to the date of entry.

**Public Carriages.** The responsibility of persons engaging to carry goods for hire is treated of under the articles *Carrier*; and *Nauta*, *Caupones*. Under the present article will be considered the obligations of such as engage to convey passengers by land or water. The proprietors of stage-coaches, hackney-coaches, or post-chaises, and all masters and owners of ships, ferrymen, bargemen, and other carriers by water, are liable for any injury which passengers sustain from the insufficiency of the vehicle, or the carelessness or unskilfulness of the driver or other person employed. With regard to the vehicle, it will exonerate the owner if it can be proved to have been sufficient, so far as the human eye could discover. Yet in one English case, where an iron axletree was so imbedded in wood that it could not be inspected without removing certain iron clamps, the proprietor was held liable, the axletree having been defective in the part which was hidden, and having broken on the journey. By the nature of the contract, ordinary care must be bestowed by those employed. But in the case of stage-coaches, the responsibility extends to accidents arising even from the slightest fault—*culpa levissima*; neglect of the rules of the road (see *Furious Driving*); going too near any obstruction, or the edge of the road; want of skill in driving; racing against other coaches; taking up more passengers than the law allows, where the injury arises from over-

loading; will all make the principals responsible for injury sustained by any accident thereby occasioned. But, strict as the responsibility is, it differs from the liability of carriers of goods under the edict *Nauta*, *Caupones*, in not being absolute. It requires some fault, however slight; and an accident which human care and foresight could not have prevented will not subject the owner. In England, when injury is occasioned, neglect is presumed; and it is necessary for the owner to redargue this presumption, by proving that it was a mere accident. A passenger getting alarmed and leaping from the coach when truly there was no danger, has no claim for damages against the coach proprietor. But if such a step was a natural and prudent precaution against real danger, the owner is liable. A shipmaster has been found to have a lien for passage-money, not on the passenger or his wearing apparel, but on his luggage; and it is thought that a similar lien would be admitted for the fare of a land passenger. *Bell's Com.* i. 462; ii. 102; *Bell's Princ.* § 170; *Illust. ib.*; *Hutch. Justice of Peace*, ii. 480. For the special regulations as to stage-coaches, see that article. See also *Nauta*, *Caupones*. *Carrier*. *Steam-boats*.

**Public Market.** See *Market Overt*.

**Public Officer.** See *Offices*.

**Public Property**; consists of such things as belong to the State, as navigable rivers, with their banks, in so far as navigation is concerned, highways, bridges, harbours,—the sea-shore, in as far as it can be of service to trade and navigation. *Ersk.* B. ii. tit. 1, § 5. See *Regality*. *Sea*. *Highways*.

**Public Right**; is the technical name given in feudal law to an heritable right granted by a vassal to be held not of himself but of his superior. *Ersk.* B. ii. tit. 7, § 9; *Ross's Lect.* ii. 259. This subject has been fully treated of under the following articles:—*Base Rights*. *Charter*. *Disposition*. *Confirmation*. *Consolidation*.

**Publication of Inhibition.** The publication of an inhibition is the intimation made to all and sundry by the messenger, prohibiting them from dealing with the inhibited person. This execution or intimation must be made by a messenger at the head borough of the debtor's domicile. It is from the date of the publication that the litigiousness of the inhibition commences. *Bell's Com.* ii. 142; *Ross's Lect.* i. 478. See *Inhibition*. *Litigiousness*.

**Publication of Interdiction.** An interdiction, to have full effect against the lieges, must be duly published; which is done by letters of publication, proceeding on a bill, the warrant of which is the decree pronounced in the action in the case of a judicial interdiction; or the registered bond, in the

case of a voluntary interdiction. For the styles of these letters, see *Jurid. Styles*, iii. 544. See *Interdiction*.

**Puffer.** See *White-Bonnet*.

**Punishment.** The punishment of crimes is intended not only as a penalty on the transgressor, but to operate so as to deter others from committing the like crimes. Punishment is either capital, which reaches the life of the criminal, or it consists in imprisonment, transportation, whipping, or fine. The extent of the punishment is sometimes regulated by statute; at other times the punishment is what is termed arbitrary—that is, in the discretion of the judge. But an arbitrary punishment can never reach the life of the criminal—it is in no case a capital punishment. It is a necessary consequence of a capital conviction and sentence, that the single escheat of the criminal falls. See *Escheat*. See *Ersk. B. iv. tit. 4, § 2, et seq.*; *Alison's Prac.* 664. *et seq.*; *Bank. i. 242*; *Kames' Equity*, 40, 227, 302, 491. See *Criminal Prosecution*.

**Pupillarity**; is the interval between the birth and the age of fourteen in males and twelve in females. See *Tutor. Minor. Curatory*.

**Pupillary Substitution.** See *Substitution*.

**Pupils' Protection Act.** The act 12 and 13 Vict. c. 51, 1849, was passed for the better protection of the property of pupils, absent persons, and persons under mental incapacity. By this act, every judicial factor must find caution for his duly accounting for his intrusions, and for the proper performance of every duty incumbent on him as factor. He must also, within six months at farthest from the date of his appointment, lodge with the Accountant of Court a distinct rental of all lands committed to his management, and a list of all moneys and funds belonging and debts due to the estate, and also an inventory of all moveables forming part of the estate. He must close his account of charge and discharge once in every year, and must lodge his account in the office of the Accountant, with the vouchers, mentioned and referred to in the accounts by number. He must lodge the moneys in his hands in some one of the banks of Scotland established by act of Parliament or royal charter, in a separate account or on deposit, the account or deposit being in his own name as judicial factor on the estate committed to him. The duty of the Accountant of Court is to superintend generally the conduct of all judicial factors, and tutors and curators, coming under the provisions of the act, and to see that they duly observe all rules and regulations affecting them for the time. His duty also is to audit the accounts of factors on the general principles of good ordinary management for

the real benefit of the estate and of those interested therein, and to consider the investments of the estate and the sufficiency thereof. The provisions of the act relating to judicial factors, except as to the mode of appointment and caution, or relating to the office, powers, and duties of the Accountant, apply, in so far as they can be applied, to every person who after the passing of the act shall be served tutor of law to any pupil, or appointed tutor-dative to any pupil or insane person or idiot, or served curator to any insane person or idiot. Tutors and curators served or appointed before the passing of the act may place themselves under the provisions of the act. The rental, list, and inventory lodged with the Accountant in terms of the act by any tutor or curator is equivalent to the tutorial or curatorial inventory directed to be given up by the act 1672 concerning pupils and minors, and their tutors and curators. The Court is empowered to remove or accept the resignation of any tutor or curator coming under the provisions of the act, and to appoint a *factor loco tutoris* or *curator bonis* in his room.

**Purchaser**; the buyer or onerous acquirer of a subject, whether heritable or moveable. See *Sale. Singular Successor*.

**Pure Obligation**; an unconditional obligation. A condition is said to be *purified* when it is fulfilled. See *Obligation. Conditional Obligation*.

**Purging an Irritancy.** Where a penal irritancy is incurred by the performance of a prohibited act, or by the failure to perform some act which is enjoined, an action of declarator of the irritancy must be raised; and when the action comes into Court, the defender may appear at the bar, and pay or perform, in terms of his obligation, whereby he will avoid the irritancy. This is called *purging the irritancy*. *Stair, B. i. tit. 17, § 16*; *Mor's Notes*, exc.; *Ersk. B. ii. tit. 5, § 27*; tit. 6, § 44; *Ivory's Notes*; *Hunter's Landlord and Tenant*, 524; *Ross's Lect. ii. 497*. See *Irritancy. Clauses Irritant*.

**Purpresture**; is a feudal delinquency, inferring a total forfeiture of the fee. It was incurred by the vassal encroaching on the streets, highways, or commonies belonging to the superior. *Ersk. B. ii. tit. 5, § 52*, and tit. 6, § 17; *Stair, B. ii. tit. 11, § 30*; *Bank. vol. ii. p. 149*; *Bell's Princ. § 730*; *Kames' Stat. Law, h. t.*; *Brown's Synop. h. t.*

**Purpresture, or purprision**; according to Skene, is the wrongous usurpation, taking, or occupation of another man's lands. There are three kinds. The first affects the King,—as unjustly occupying any part of his domains, stopping the highway or King's causeway, diverting the course of a running stream, &c.;



the second kind affects the interest of the offender's superior; and the third, those of any other besides the King or the superior. *Skene, h. t.*

**Pursuer**; the party who institutes and insists in an ordinary action. Except in the case of copartnerships, the general rule is, that two or more persons cannot sue in the same summons for enforcement or vindication of their separate rights, or for sums due to them severally. But they may sue jointly, when they have been injured by the same act, or have a joint interest in the matter libelled. Where an action has been improperly raised by several pursuers, it is not *funditus* void, but may be held good as the summons of one of them, for his particular interest. In jury trials, the party ordered by the Court to condescend is held to be pursuer; *A. S. 29th Nov. 1825, § 1.* Where both parties have been ordered to condescend, the Court has a discretion in the matter; §§ 12 and 13. But it is the party on whom the *onus probandi* at the trial is laid who is made to stand as pursuer in

the issues. Sometimes it is necessary to declare a party pursuer in one, and defender in another issue, or set of issues. The Court may decide this matter at any time before the trial; and the mode of having it settled is by a motion on behalf of either party. *Shand's Prac. 124; Macfarlane's Jury Prac. 100, 281; Maclaurin's Sheriff Prac. 77; Tait's Justice, voce Parties in an Action.* See *Defender. Title to Pursue.*

**Pursuivants**; are officers under the Lyon King-at-Arms, by whose authority they are appointed. *Ersk. B. i. tit. 4, § 32.* See *Arms. Lyon Court.*

**Purview**; the body, or that part of an act of Parliament which begins with "Be it enacted." *Tomlins' Dict. h. t.*

**Put Away**; in deeds of entail is equivalent to "alienate." *Hunter's Landlord and Tenant, p. 76, and authorities there cited.* See *Tailzie.*

**Putagium**; whoredom or fornication. This offence was anciently, in a female unmarried or without children, punished with forfeiture of her heritage. *Skene, h. t.*

## Q

**Quadriennium Utile**; are the four years allowed after majority, within which an action of reduction of any deed done to the prejudice of a minor may be instituted. *Ersk. B. i. tit. 7, § 35; Stair, B. i. tit. 6, § 44; B. ii. tit. 12, § 31; More's Notes, p. xlviii; Bank. i. 184; Bell's Com. i. 135; Bell's Princ. § 2099.* See *Minor.*

**Quæquidem.** In charters by progress, the clause which immediately follows the dispositive clause is called the *quæquidem*, from the words with which it commences. This clause deduces the fee from the vassal who stood last publicly infeft, specially mentioning the progress by which it came into the person of the present vassal, whether by resignation or by whatever form of conveyance. The progress ought to be distinctly set forth, so as to show that the charter has been properly expede, and that the progress is complete. *Ersk. B. ii. tit. 3, § 24; Jurid. Styles, vol. i. p. 438; Bell's Princ. § 799; Bell on Completing Titles, 278; Ross's Lect. ii. 288.* See *Charter. Progress.*

**Quakers.** Quakers, in consequence of religious scruples, are permitted, when examined as witnesses in civil or criminal cases, instead of taking an oath, to make a solemn affirmation in these terms: "I do solemnly, sincerely, and truly declare and affirm." See *Affirmation.* A quaker wilfully making a false affirmation incurs the pains of perjury. See the act 22 *Vict. c. 10, 1859.*

**Qualification to Vote.** See *Reform Act.*

**Qualified Oath**; is the oath of a party on reference, where circumstances are stated which must necessarily be taken as part of the oath, and which therefore qualify the admission or denial. *Stair, B. iv. tit. 44, § 14; More's Notes, p. ccccxviii; Ersk. B. iv. tit. 2, § 11; Bank. ii. 659; Tait's Justice of Peace, voce Proof.* See *Evidence. Extrinsic.*

**Quanti Minoris Actio**; was a Roman law action, by which, when the buyer discovered a shortcoming of no great importance in the subject purchased, he sued for repetition of as much of the price as exceeded what he might have reasonably given for the subject, had he been previously aware of the deficiency. It would appear that the *actio quanti minoris* is not admitted in the law of Scotland. At all events, where there has been no fraud on the part of the seller, and where the purchaser receives all the land which he actually purchased, it has been found that he can claim no abatement because the number of acres is found to fall short of what was stated in the description; *Hannay, 26th Jan. 1785, M. 13334; Inglis, June 27, 1788, M. 13335; Gray, 23d Jan. 1801, M. voce Sale, App. No. 2.* Where, however, he does not receive all that he actually purchased, he is entitled either to have abatement or to have the contract reduced; and generally, wherever there is *error in essentialibus*, the sale may be reduced. See *Error in Essentialibus.* It may be doubted,

supposing land were sold as containing so many acres, at so much per acre, and it turned out that there were not as many acres as had been stated, whether the purchaser would not be entitled to refuse payment beyond the price of the actual number of acres at the specified price per acre. A case something similar to this, but in which the advertised fell short of the actual measurement, has been decided. In that case, which was a judicial sale by an apparent heir, the lands exposed were limited by a specification of their proven rental to  $2\frac{1}{2}$  acres, and the upset price was fixed accordingly. After the sale, however, it having been discovered that the lands specially enumerated extended to 7 acres, it was held that no more was sold than  $2\frac{1}{2}$  acres, but that the purchaser might either hold or reject the sale; *Hepburn*, 4th July 1781, *M.* 14168. In another case, where lands formerly burdened with a feu-duty, but which feu-duty had been redeemed, were sold as if still burdened, the purchaser claimed to possess the lands free of the feu-duty. It was held that the purchaser must either give up the purchase of the lands, or pay an additional price, corresponding to the value of the feu-duty; *Blair*, 16th July 1790; *Bell's Com.* ii. 283. This question was again discussed in another case. There a tenant took a lease of a farm, which was represented as containing a few acres more than it actually contained. He brought a reduction of the lease on the ground of fraud, which he failed to prove. The case was appealed, and the Lord Chancellor (Brougham) was inclined to restrict the lease to the actual number of acres; but finding some difficulties from the objection that this would sanction the *actio quanti minoris*, he recommended a settlement, which was accordingly effected on the principle suggested by the Lord-Chancellor; the counsel for the parties having directed an abatement proportioned to the deficiency. See *Balmer v. Hogarth*, 11th March 1830, 8 *S. & D.* 715; 10 *S. & D.* 862. See also the case of *Gordon v. Hughes*, June 15, 1815, *F. C.*; reversed, March 25, 1819, 1 *Bligh*, 287. See *Measurement*. The cases already noticed refer only to land; and the question does not seem to have occurred, whether the *actio quanti minoris* is recognised in the law of Scotland in the case of moveables; an article of merchandise for instance, sold as of a certain weight or measure, and discovered to be less. *Stair*, B. i. tit. 9, § 10; tit. 10, § 14; *Ersk.* B. iii. tit. 3, § 10, *Ivory's Notes*; *Bank*, B. i. tit. 19, § 3; *Brown on Sale*, 316, *et seq.*; *Kames' Equity*, 175. See *Actio Redhibitoria*.

**Quantum Meruit.** If one employs another to do work for him, without any certain agreement, there is an implied obligation on the

employer to pay the person who has performed the work as much as he deserves, or can reasonably ask for his services. See *Tomlins' Dict.* h. i.

**Quarantine;** the term of forty days, during which persons coming from parts infected with the plague are not permitted to land or come on shore. The regulations on this subject in former acts have been superseded by those of 6 Geo. IV. c. 78.

**Quarentena Viduarum;** according to Skene, a space of forty days, during which a widow might tarry and remain in the chief dwelling-place of her husband, and be sustained upon the profits of the heritage until her dowry be assigned to her. *Skene*, h. i.

**Quarry.** See *Mines. Minerals*.

**Quarter Seal.** The seal is kept by the director of the Scottish Chancery. It is in shape and impression the fourth part of the great seal, and is in the older statutes called the testimonial of the great seal. Commissions of tutory and brieves issuing from the Chancery, pass by the quarter seal; so do all gifts and presentations to land, of bastardy, forfeiture or *ultimus hæres*, where the lands hold of a subject. *Ersk.* B. ii. tit. 5, § 85; *Brown's Synop.* 2649. See *Seals*.

**Quarter Sessions of Justices of the Peace.**

By the act 1661, c. 38, the justices of the peace are directed to meet four times in the year, at the county town,—that is, on the first Tuesdays of May, August, and March, and the last Tuesday of October; with power to adjourn these quarterly meetings to any other day or place they may judge proper. At these quarterly courts the justices have the power of reviewing the sentences pronounced at the occasional meetings of justices, called special or petty sessions, when the sentence is of a nature subject to review. *Ersk.* B. i. tit. 4, §§ 15, 18; *Tait's Justice*, *voicibus Sessions, Review*; *Dunlop's Parochial Law*, 305, 317, 321, 332. See *Justice of Peace*.

**Quasi-Contract.** A *quasi-contract* differs from a proper contract in this, that it is not constituted by express consent, but *ex re*—that is, by one of the parties doing deeds which import an obligation on him in favour of the other party, or *vice versa*. Thus, a person contracts a *quasi-contract*, which infers an obligation to account, by entering on the office of tutory; from serving heir; from *negotiorum gestio*; *jactus mercium*, and the like. A *quasi-delict* is a term applied to that degree of culpable negligence, amounting almost to crime, and inferring an obligation to repair the injury, although there may be no ground for a criminal prosecution. *Ersk.* B. iii. tit. 3, § 51; *Bell's Princ.* §§ 525, 531–8–9. See *Delict. Damages*.

**Queen.** The Queen of England is either

**Queen-Regnant, Queen-Consort, or Queen-Dowager.** The Queen Regnant is she who holds the Crown in her own right, and with the same powers, prerogatives, rights, dignities, and duties which belong to the Sovereign. The Queen-Consort is the wife of the reigning King; and, by virtue of her marriage, she possesses various prerogatives. Thus, she is a public person, distinct from the King, with power to acquire land by purchase, and to convey it, and the like, without her husband's concurrence. She has a separate court, and officers distinct from the King's. She may sue and be sued alone; and, in England, her Attorney and Solicitor General (there are no such officers in Scotland) are entitled to places within the bar, as King's counsel. The Queen-Consort has also some minor immunities. Thus, she pays no toll; nor is she liable to any amerceiament in any court. But, in general, unless where expressly exempted, she is on the same footing with other subjects of the King; for she is to all intents and purposes the King's subject, and not his equal. Yet it is high treason to compass or imagine her death. The husband of a Queen-Regnant is her subject, and may be guilty of high treason against her. See *Tomlins' Dict. h. t.* See *Dowager, Queen.*

**Queen's Bench.** See *King's Bench.*

**Querela Inofficiosi Testamenti;** an action given by the Roman law to such as were disinherited on just grounds, falsely alleged. This action was given on the assumption that the testator was of unsound mind at the date of the testament. *Inst. of Just. B. ii. tit. 18; Heinec. Elem. § 579; Stair, B. iii. tit. 4, § 15; B. iii. tit. 8, § 10; Bank. ii. pp. 301, 384.*

**Quhatcus;** a kind of bread. *Skene, h. t.*

**Qui Tacet, Consentire Videtur;** silence implies consent. See *Taciturnity.*

**Qui Tam.** In England, the plaintiff in a penal action describes himself as one who sues *as well for himself as for the Queen*, for any penalty half of which is given to the Crown and half to the informer. Hence such actions are called *qui tam*; scil. "*Qui tam pro seipso quam pro Dom. Reg.*" &c. *Tomlins' Dict. h. t.; Tail's Justice, vocibus Excise; Parties. Game.*

**Quia Emptores.** The English statute, West. 3, 18 Ed. I. st. 1, is so called from the introductory words. Its intention was to put a stop to subinfeudations, by declaring that a vassal might sell his lands, provided he sold them to be held of his superior by the tenure and services due. This statute was at one time thought to have been introduced into Scotland by Robert I. stat. 2, c. 24, § 2; and there have been speculations as to the causes of its not having produced the same effect in Scotland as in England, where feudal forms

were, by the statute, rendered no longer necessary. But it is very doubtful whether the statute ever was really enacted or in observance in Scotland—the general understanding of modern lawyers being, that the *Regiam Majestatem* is not an authentic collection of our ancient laws. See *Regiam Majestatem*. A quotation, however, of part of the *Regiam Majestatem*, containing a *verbatim* transcript of the English statute, will be found in *Bell on Purchaser's Title*, p. 282. See also pp. 8 and 377 of the same work. *Tomlins' Dict. h. t.; Bell's Princ. § 676.*

**Quinquennial Prescription.** See *Prescription, Quinquennial.*

**Quo Warranto;** in English law, a writ brought against any person, or corporation, usurping a franchise or liberty against the Sovereign, calling on the usurper to show by what right or title he holds or claims such franchise or liberty. This writ has now fallen into disuse; but its purpose is served by the Attorney-General filing an information in the nature of a *quo warranto*. *Tomlins' Dict. h. t.*

**Quod Fieri Non Debet, Quandoque Factum, Valet.** In a few instances in the law of Scotland, contrary to the rule of the Roman law, an act done contrary to law has been found not to be null. See *Pactis Privatorum.*

**Quoniam Attachiamenta;** one of the old books of the law of Scotland. *Ersk. B. i. tit. 1, § 36.* See *Regiam Majestatem.*

**Quorum.** A quorum, strictly speaking, is that number of the judges of a court, consisting of a plurality of judges, before whom the judicial business may be competently transacted. But the term is also applied to that number of a nomination of persons (*e. g.* tutors or curators, or interdictors or trustees, or the like) who are authorised, by the deed of nomination, to exercise the functions vested generally in the nominees. The quorum of the Court of Session, in all cases where meetings of the judges are necessary for passing Acts of Sederunt or the like, or where they sit as Commissioners of Teinds, consists of nine judges; 1587, c. 44. The quorum of each Division of the Court is three—50 *Geo. III.* c. 112, § 32; and it seems to be settled, that if the quorum be present, the judgment of the Court will be valid, although some of the judges composing the quorum should decline to vote; *Robertson*, 21st June 1809, *Fac. Coll.* In the Court of Justiciary, three judges constitute a quorum; 1681, c. 22; 23 *Geo. III.* c. 45. Two justices of the peace are a quorum, both under the small-debt acts and for ordinary judicial business; *Ersk. B. i. tit. 3, §§ 16, 26, and tit. 4, § 18; Hutch. Justice, i. 40; Darling's Prac. 34.* In every case where the performance of a duty or the exercise of a power is committed to several

persons, a quorum consisting of a majority ought to be nominated, in order to prevent the possibility of a subdivision into two parties, each claiming the power of the whole nomination. Where a quorum is named, the concurrence of the quorum is necessary; and in no case ought a quorum to be appointed consisting of a smaller number than the majority of the nominees, unless where one is declared *sine quo non*, otherwise it might be in the power of the majority not concurring to overrule the former proceedings of the minority. Generally speaking, where the quorum fails by death or otherwise, the nomination falls. *Ersk. B. i. tit. 7, § 15; Bank. B. i. tit. 7, §§ 21, 63, 132; Stair, B. iv. tit. 20, § 31; Kames' Equity, 468; Brown's Synop. 2282, 2292. See Curatory. Tutor. Interdiction. Justice of Peace. Small Debt. Sine quo non.*

**Quot;** was the proportion of the moveable

estate of a deceased person due to the bishop of the diocese within which the person resided. This quot was a twentieth part of the moveables without deducting the debts, even where the effects were not more than sufficient to answer the debts, and consequently the quot was paid to the injury of the creditors. This injustice was remedied by 1669, c. 19, which gave the quot from the free estate only; and at last, by the act 1701, c. 14, the quot was prohibited. Still, however, certain compositions continued to be exacted by the commissaries, varying according to the extent of the sums confirmed. But by the stat. 4 Geo. IV. c. 97, § 1, all compositions in respect of confirmation, and all fees termed consignment and fee and sentence money, were abolished, and certain other regulations substituted. See *Ersk. B. ii. tit. 9, § 28; Bank. ii. 388; Ross's Lect. i. 185; Kames' Stat. Law, h. t. See Confirmation. Executor.*

## R

**Rabbits.** It is usual in charters of landed estates to convey to the vassal the right of rabbits and rabbit-warrens. Craig is of opinion that warrens require to be enclosed, in order to protect the fields of neighbouring proprietors; but Erskine maintains a contrary doctrine, founding on the act 1503, c. 74, which enjoins proprietors to make warrens; although cases may easily be figured in which this power would require to be exercised with some degree of caution; *Ersk. B. ii. tit. 6, § 7.* Under special statutes of the Scotch Parliament, it is accounted theft to take rabbits from a warren, or to shoot them without the proprietor's consent; *Hume, i. 80.* In a farm where rabbits were numerous, the tenant was found entitled to destroy them in order to preserve the crops, and an interdict was refused to the landlord, rabbits not being game; *Moncrieff, 13th Feb. 1828, 6 S. & D. 530.* Devastation committed by rabbits, encouraged by the landlord, has been held relevant to entitle the tenant to abandon his farm, where he alleged that in consequence the crop did not yield sufficient to pay seed and labour; *Richmond, May 27, 1829, 7 S. & D. 664.* This case was subsequently settled extrajudicially, the landlord allowing the tenant to give up the farm. Some proprietors, with the view of protecting their game, are in the custom of inserting a clause in the lease, prohibiting their tenants to kill rabbits. See *Hunter's Landlord and Tenant, 554, 745, 831; Hutch. Justice, ii. 537, 546; Tait's Justice, vocibus Pigeons, Theft; Blair's Justice, h. t.*

**Rachotum;** "from the French, ransom." *Skene, h. t.*

**Rack-Rent;** is a term of English law, and means the full yearly value of land let on lease. *Tomlins' Dict. h. t.*

**Rag-Faugh;** applied to cropping under a lease; signifies ploughing the ground twice or thrice after cutting hay. *Wood's Parish of Cramond, p. 102.*

**Ragman's Roll.** See *Bagimont's Roll.*

**Railway.** Railways are generally projected and executed by joint-stock companies; and in order to incorporate the company and to enable it to acquire, if necessary by compulsory purchases, the requisite ground along the line of the railway, and otherwise to facilitate the progress of the work, as well as to provide for the management of the railway and the levying of dues after its completion, a private act of Parliament is required. The details of the act will depend on the special circumstances of the particular case; but as to private acts of Parliament generally, see *Private Bills.* See *Joint-Stock Companies.*

Railways are regulated by the acts 3 and 4 Vict. c. 99, 1840, and 5 and 6 Vict. c. 55, 1842. The act 7 and 8 Vict. c. 85, 1844, attaches certain conditions to the construction of future railways. The Companies Clauses Consolidation Act is 8 Vict. c. 17, 1845; the Lands Clauses Consolidation Act is 8 Vict. c. 19, 1845; and the Railways Clauses Consolidation Act is 8 and 9 Vict. c. 33, 1845.

**Ranking and Sale.** The action of ranking and sale is the process whereby the heritable

property of an insolvent person is judicially sold, and the price divided among his creditors, according to their several rights and preferences. This is the most complex and comprehensive process known in the law of Scotland; and both in libelling the summons and in following out the action, much professional circumspection and vigilance are indispensable. The following practical directions deserve attention: The pursuer of the action must be either a creditor holding a real security over the debtor's estate, or the debtor's apparent heir; 1695, c. 24. See *Apparent Heir*. But the security of the real creditor need not have been actually completed by infeftment. A decree of adjudication against the debtor is a sufficient title to pursue the action, although the decree has not been followed by a charge against superiors, or a charter and sasine, or other step to make the adjudication complete or effectual. It is further requisite that the pursuer or some other of the creditors should be in possession of the debtor's heritage or of some part of it; 1681, c. 17. But real or natural possession is not necessary: civil possession is enough. The right to possess, along with possession of a part, will do. So a decree of mails and duties without actual intrusion, or a sequestration of the rents by the Court of Session, and the appointment of a judicial factor, will warrant the process; and it would seem, on the same principle, that a pointing of the ground by a real creditor will have the same effect. Another preliminary requisite is, that the debtor (except in the case of a ranking and sale by an apparent heir) should be bankrupt; the test being, that the interest of the debts and the other annual burdens exceed the yearly income of the subject under sale. The whole heritable estate of the debtor must be included in the summons, whether it be held by a complete title in his own person, or on apparency merely; and so strictly was this rule followed at one time, that an omission of any portion of the estate was fatal to the proceedings; although now the difficulty is obviated by specifying the property in the summons, so far as known, and adding a general clause, under which, any property belonging to the debtor which may be afterwards discovered may be brought (in the manner afterwards explained) within the operation of the process. The debtor, and all his real creditors in the known actual possession of his estate, by labouring the ground or uplifting the rents, must be called in the action; and where two or more creditors are conjunctly and severally bound in one bond or bill, the estates of all the co-obligants who are insolvent may be brought to sale under one and the same summons. But this is not competent where the grounds of debt are se-

parate and the obligations distinct. It is no bar to the action that the debtor has executed a trust-deed conveying his heritage for behoof of his creditors—that is, provided the pursuer is a non-acceding creditor. If, however, the trustee has been in the undisturbed management, he will have a preference on the price for the sums beneficially expended by him; nor is it necessary, in such a case, to reduce the trust-deed; *Cruttenden*, 2d Dec. 1824, 3 *S. & D.* 347. In addition to calling the debtor and all his real creditors, there must also be an edictal citation of all the creditors, and of all others having or pretending interest, and this edictal citation required to be at the market-cross of Edinburgh and the pier and shore of Leith, as well as by copies left at the Record Office; because the edictal citation sanctioned by the Judicature Act was limited to the case of parties furth of Scotland, whereas the edictal citation in a ranking and sale is intended for parties whether within or furth of Scotland; 6 *Geo. IV.* c. 120, § 51. See *Edictal Citation*. Hence, both forms of edictal citation, or one or other, were formerly observed in this process. This, however, was altered by 13 and 14 *Vict.* c. 36, § 22, 1850.

The process itself, as now known in practice, is a concentration of various actions. At one time, a summons of sale was required to warrant the sale; a multiplepointing for dividing the price amongst the creditors and claimants; a reduction-improbation to reduce the securities and diligences of creditors having or pretending claims on the estate, the grounds of which they had failed to produce; and an adjudication by each individual creditor, to entitle him to his share of the price. All these objects are now embraced by the summons, the purposes of which, generally speaking, are—1st, To declare the bankruptcy of the debtor; 2d, To rank the creditors; 3d, To sell the debtor's heritage; 4th, To reduce all securities which are either objectionable or which have not been produced; and, lastly, The decree of sale operates as a decree of adjudication in favour of all the creditors included in the ranking. In furtherance of these objects, the conclusions of the summons, which are not arranged very consistently or with much logical precision, are, that a proof be led of the value of the whole lands and heritages belonging to the debtor; of the holding thereof; of the rental and deductions; and that all persons possessed of writs or titles necessary for instructing these facts shall produce them; that all persons having claims against the debtor's estate shall lodge them along with the vouchers, first and second diets for this purpose being assigned; with certification that the writs not produced shall

be held as false and feigned as in a reduction-improbation, *quoad* the debtor's estate and his creditors; that a term be assigned to the creditors for deponing as to the verity of their debts, with certification that no one shall be ranked until he has deponed; that the creditors be ranked on the price and rents according to their several rights and preferences, with certification to those who shall not be ranked that they shall not be afterwards entitled to call the ranking in question; that on any other lands or heritages belonging to the debtor being discovered, they may be included in the proceedings; that the debtor be found bankrupt; that the upset price be judicially fixed, and the subjects sold by public roup, and warrant granted for letters of publication to intimate the sale; that the subjects be adjudged to the purchaser on payment or consignment of the price; and that the decree of sale may be as effectual to the purchaser as a disposition signed by the debtor and the creditors would be; that it be declared that the purchaser, on making payment or consignment of the price, be discharged thereof, and his bond of caution delivered up, and the lands declared free of all incumbrances; that the purchaser be infeft, and warrant granted for letters of horning against superiors for that purpose; and that the real creditors, on receiving payment of their several shares of the price, shall convey their debts to the purchaser, in farther security of his purchase, allenarly, with warrandice to the amount of the sums received. The summons formerly required a bill; and in respect of the conclusion for reduction-improbation, the concurrence of the Lord Advocate is necessary. The *inductiæ* against all parties called *nominatim* as defenders, if resident within Scotland, is the ordinary *inductiæ* of fourteen days; if in Orkney or Shetland, or forth of Scotland, twenty-one days. The edictal citation against all parties interested is also twenty-one days. A short copy is sufficient for service; but a full copy is occasionally used. If appearance be made for the defender, the summons must be printed; although this is clearly one of the summonses which ought to have been excepted from the regulation as to printing. The statutes and Acts of Sederunt regulating the form of the summons are, 1681, c. 17; 1690, c. 20; 1695, c. 6; 26 *Art. of Regulations*, 29th April 1695; 54 *Geo. III.* c. 137; *A. S.* 31st March 1685; *A. S.* 23d Nov. 1711; *A. S.* 10th Aug. 1754; *A. S.* 17th Jan. 1756; *A. S.* 13th Nov. 1793; *A. S.* 11th July 1794. See also *Jurid. Styles*, iii. 435; *Shand's Prac.* ii. 964, *et seq.* See *Judicial Sale*.

The action comes into Court in the usual way; but being what is technically called an Inner-House process, the power of the Lord

Ordinary, before whom the action is called in the course of the Outer-House Roll, is so far limited. Thus, he may judge of the pursuer's title, and of the competency and relevancy of the action; as also whether the parties have been properly brought into Court. But all questions as to the bankruptcy, the value, the possession and the holding, are proper for the consideration of the Inner-House after probation. As to the procedure in the action generally, the Act of Sederunt 11th July 1828, § 103, directs that it shall be accommodated as far as practicable to the new forms of process; but that, in so far as compliance with the new forms shall not be specially required, the old forms shall continue, except as to the power and mode of review of interlocutors, as to which the new regulations are to be the rule. All the requisite forms, however, must be rigidly observed; because the slightest deviation (*e.g.*, the omission of a single advertisement) may be fatal to the whole proceedings.

If there be no objection to the citations, the relevancy, or competency, and no other dilatory defence, the first interlocutor is an interlocutor by the Lord Ordinary sustaining the libel, and allowing a proof of the bankruptcy, of possession by the creditors, of the holding, rental, and deductions, of the value of the property, and of the number of years' purchase at which it may be sold; and for taking this proof, commission and diligence is granted. The same interlocutor assigns a first term at the distance of five or six weeks for the creditors to lodge their grounds of debt, and grants commission to the judge-ordinary, or any justice of the peace within the bounds, to take the deposition of the creditor; and if, during the currency of this term, any creditor requires a diligence for the recovery of his grounds of debt, it will be granted by the Lord Ordinary on application; *A. S.* 17th Jan. 1756, § 1. The interlocutor must be inserted once a week, for three successive weeks, in the *Edinburgh Gazette*—*A. S.* 11th July 1794; and also published in the *Minute-book*. On the action coming into Court, it is usual to apply to the Court for the appointment of a judicial factor to manage the estate.

The limits of this work do not admit of anything more than the following summary of practical points connected with this important process:—(1.) Under the commission and diligence a proof of the rental of the subjects under sale is led, by examining the tenants, and by recovering their leases; or if there be no leases, by the examination of farmers or land-valuators acquainted with the property. Servitudes, thirlages, services, &c., are valued and deducted, also liferents and teinds, according to rules to be found in all practical books;

vide *Beveridge*, ii. 533, *et seq.*; *Shand's Prac.* ii. 871, *et seq.* (2.) The title-deeds of the subjects may be recovered under the diligence; and if hypothecated in the hands of a law-agent, they are usually delivered under a reservation of his hypothec, in virtue of which he will be ranked *primo loco* on the price, or may obtain a warrant on the judicial factor. If the title-deeds be in the repositories of a deceased person, warrant will be granted by the Court for opening such repositories at the sight of the judge-ordinary of the bounds. The title-deeds will show the holding and the state of the teinds and feu-duties, and the valued rent will be proved by a certificate from the clerk to the commissioners of supply. (3.) The deductions and annual burdens may be proved by the factor on the estate, or the agent or other person who has been accustomed to pay them, and the teind, minister's stipend, schoolmaster's salary, cess, poor's-rates, &c., will be sufficiently proved by the receipts for these payments. (4.) It may be necessary to prove the bankruptcy by a search of the records; but in general the claims lodged prior to the expiration of the first term will be sufficient for this purpose. (5.) No farther proof can be led under the commission; the proof of the value must be taken before the Lord Ordinary, the usual witnesses being professional men, or land-valuators in Edinburgh, who in general depon as to the number of years' purchase of the proven rental which they consider the lands to be worth. This proof is conducted by the common agent, who is appointed immediately after the lapse of the first term assigned for lodging claims. See *Common Agent*. (6.) The next step in the process is to have a second term assigned to the creditors for lodging their claims and grounds of debt; which is done by an interlocutor of the Lord Ordinary, intimated in the Minute-book, and once every week, for three weeks, in the Edinburgh Gazette. All claims must be accompanied by an oath of verity, if the creditor be in Great Britain, or by an oath of credulity by his agent or factor, if he be abroad; and the grounds of debt must also be produced—the effect of such production being to interrupt prescription. (7.) On the lapse of the second term for lodging claims, the case may be enrolled and decree of certification pronounced, as in a reduction-improbation for reducing all claims not produced. This decree, however, is qualified with the condition that claims lodged within ten days thereafter will be received, and sometimes a longer period is allowed—*e.g.*, the box-day in a vacation then ensuing. The effect of such a decree of certification is to cut down all claims against the estate in questions between the claimant

against whom the decree strikes and the purchaser at the judicial sale; but without prejudice to the creditor's claim against the separate estate, if any (*e.g.*, the moveable estate), of the common debtor; or against the other creditors who may have received their share of the price, for repetition of a rateable proportion; 1695, c. 6. (8.) Where a creditor has omitted to lodge his claim until the lapse of the time allowed by the interlocutor, he may apply to the Court to be reponed on cause shown, but only on condition of paying the expense occasioned by the delay, and by the production of his claim. Such an application to be reponed may be made at any time prior to the final division of the funds, even although the debt of the claimant should have arisen after the action came into Court. (9.) After the decree of certification has been pronounced, the Lord Ordinary remits to the common agent to prepare a state of the interests and a scheme of ranking. This state contains a complete vidimus, embracing the extent of the lands or other subjects under sale, the amount of the funds in the hands of the factor, and an enumeration of the claims and vouchers, with the objections. See the form of such a state in *Bell's Styles*, vii. 229. The state is signed by the common agent, and allowed to be seen by all concerned, and objected to if they see cause; and if questions arise in the competition, they will be discussed with reference to the common agent's state by the several creditors *inter se*, and determined by the Lord Ordinary. The state is then ordered to be printed and boxed for the Inner-House, and also distributed among the creditors or their agents, except in cases of small importance, and where there are few creditors, when the state is lodged in MS. and intimated to the agents of the creditors, who may borrow it, or see it in the clerk's hands. (10.) After all objections to the state have been decided, the common agent prepares the draft of an interlocutor of ranking, which is usually circulated or allowed to be seen for eight days, before being written out and signed by the Lord Ordinary. (11.) It was formerly necessary that the ranking should be concluded by a decree, before the lands were exposed to sale; but by 54 Geo. III. c. 137, § 6, the sale proceeded whether the ranking is concluded or not. Hence, while the ranking is in progress, the sale may also go on; and in that view, the common agent, as soon as the proof is concluded, may enrol the cause for circumduction and great avizandum. A memorial and abstract of the proof is then prepared, printed, and boxed by the common agent, and thereafter remitted by the Court to the Lord Ordinary to revise; who, after having obtained the necessary explanations

from the common agent, and from the clerk of the process, reports it to the Court as correct. The Court then grants warrant for letters of publication and sale, which being extracted, are executed by a messenger-at-arms at the Record Office, and also at the market-cross of Edinburgh, and pier and shore of Leith. (12.) When a warrant of sale has been obtained, the creditors are entitled to proceed with the sale, unless the whole of their debts are paid off, and even although the price of the property should exceed the amount of the debts. In practice the sale is advertised in the newspapers; and due care must be taken to procure evidence, that all the statutory and necessary notices have been given, which will be done by producing in process the Gazettes and letters of publication, and the executions by the messenger. (13.) The day of sale is always a Wednesday (the market-day in Edinburgh), during the sitting of the Court of Session; and the letters of publication must be executed edictally at least twenty-one days before the day of sale. The articles of roup and the inventory of the title-deeds ought to be prepared by the clerk to the process, and are always authenticated by the signature of the Lord Ordinary on the Bills, who officiates as judge of the roup. But if any unusual conditions are to be inserted in the articles of roup, or any alteration made thereon, after they have been signed by the Lord Ordinary, this must be done by the authority of the Court, as the Lord Ordinary on the Bills, who acts merely ministerially in carrying through the sale, has no power. The sale must take place in the Parliament House at Edinburgh, between the hours of two and four P.M. The clerk to the process acts as clerk to the sale, and one of the macers acts as auctioneer. It seems to have been thought that the Court have power to authorise the sale to take place elsewhere than in Edinburgh; but in the only instances in which such applications were made they were refused; and in the last case on the subject, it was expressly held to be incompetent to authorise a sale at Glasgow; *Kenay and Cruttenden & Co.* 22d Feb. 1834, 12 S. & D. 479; and 17th May 1834, 12 S. & D. 602. (14.) The Lord Ordinary officiating at the sale has power to adjourn it, without exposing the subjects; and neither the common agent, nor the judicial factor, nor the Lord Ordinary to the process, nor the Lord Ordinary officiating at the sale, is entitled to purchase; although the mere signing of petitions or other papers in the cause as counsel will not bar the counsel from purchasing. The leading case on this subject is that of *The York Buildings Company v. Mackenzie*, 8th March 1793, *Mor.* 13367;

reversed on appeal, 4 *Dow*, 379. See also *The Earl of Wemyss*, 25th Feb. 1824, 2 *Show's Appeals*, p. 1. (15.) If no offerers appear, the sale will be adjourned; and instead of the former practice of then allocating the property among the creditors, the Court now lowers the upset price, upon a petition duly intimated to the agents of all the creditors who have claimed; and the property is afterwards re-exposed at a reduced upset price, after advertisements in the newspapers, and the necessary alterations on the articles of roup. As to the clause of devolution in the articles, see *Clause of Devolution*. (16.) The offerer who is preferred must find caution, the bond of caution being prepared by the assistant of the Inner-House clerk to the process; and it is the duty of the principal clerks of Session to satisfy themselves as to the sufficiency of the caution. The common agent is not bound to express any opinion on this point; and if the principal clerks accept of insufficient caution, they will be personally liable. Where the purchaser, after finding caution, and before decree of sale, has sold to another, the new purchaser must apply to the Court by petition, for authority to the clerk to receive a new bond of caution, and to deliver up the former one, and also that the decree of sale may be issued in favour of the new purchaser. (16.) After caution has been found, the sale is reported to the Court, and decree of sale pronounced, which may be extracted, and the extract delivered to the purchaser, in order that he may complete his title; and after such extract, that part of the process which relates to the sale is sent to the general record, while the ranking remains in the hands of the clerk—a severance of the process which is attended with some practical inconveniences. (17.) The next step in the procedure is a remit by the Lord Ordinary to the common agent, or to an accountant, to prepare a scheme of division, showing the rule according to which the purchaser and the judicial factor are to pay the funds in their hands; which scheme having been prepared and lodged, and allowed to be seen for eight days, will be approved of if not objected to, and decree of division and for payment against the purchaser pronounced. It is now settled that claims ranked, principal and interest, are to be accumulated into a capital as at the date of the payment of the price. (18.) The original rule as to the expenses of the process was, that they were to be borne by the postponed creditors. Afterwards it was held, that as the process was a procedure in which the whole creditors were interested, each ought to pay in proportion to the sum he drew; *A. S.* 23d Nov. 1711. But it being plainly *ultra vires* of the Court



to make such a rule, that Act of Sederunt was repealed by A. S. 10th August 1754; and now the whole expense is paid out of the funds in the hands of the factor, or out of the price, and thus falls exclusively on the postponed creditors. This expense includes that of extracting the decree of sale in favour of the purchaser, and also the expense of the dispositions and assignments by the creditors in his favour. (19.) When there has been a judicial factor appointed, it is necessary, before preparing a scheme of division, to apply to the Court by petition for his discharge. This petition is intimated to the agents of the creditors, and also in the minute-book, and on the walls of the Parliament House, and thereafter remitted to the Lord Ordinary in the ranking, who in his turn remits to the clerk to the process, or in complicated cases to an accountant, to audit the factor's accounts. Avizandum with the report thus obtained is made to the Lord Ordinary, who makes a report to the Court, and decree of exoneration is then pronounced by the Inner-House. Sometimes the common agent concurs in the factor's petition, and also prays for a remit to audit his accounts. But in the ordinary case, a simple remit to the auditor to tax the common agent's accounts is made on a motion to the Lord Ordinary, and the auditor's report, when returned, approved of in common form. (20.) If, in the course of the process, the pursuer should die, or cease to insist, or if his debt should be extinguished, the judicial factor, or any real creditor, may, on special warrant from the Court, take up the process where it was left, and carry it on till its final issue. So also, if the common debtor or any of the creditors die, the process only stops until their apparent heirs are cited on a diligenee, without waiting the lapse of the *tempus deliberandi*, or transferring the process against them; and whether the heir appear or not, the process proceeds; A. S. 23d Nov. 1711, §§ 4 and 5. And any creditor who is in a situation to adjudge is entitled to carry on the action of sale to a conclusion, although deserted or abandoned by the original pursuer; 54 Geo. III. c. 137, § 10. (21.) If any lands not specially described in the summons be discovered, in the course of the process, to belong to the bankrupt, the rental and value of such lands may be proved, and the lands themselves included in the sale, in virtue of the general clause in the summons above referred to. On such discovery, an application is made to the Lord Ordinary, in the form of a minute, who directs notice of the fact to be given in the Edinburgh Gazette, after which the proof of the rental and value, and the sale, proceed precisely as if the subjects so discovered had been specially

described in the summons. It is too late, however, to include a discovery of this kind in the process after the lands specially libelled on have been sold, and the decrees of sale and division extracted. See *Rennie*, 5th Feb. 1828, 6 S. & D. 488. (22.) Where, again, subjects have been included in the summons which do not belong to the bankrupt, the course is for the proprietor of such subjects to apply to the Court by petition, to have them struck out of the sale; which petition will be either advised by the Court on answers by the creditors, or remitted to the Lord Ordinary to be disposed of. See *Cruttenden, Mackillop, and Company*, 17th May 1834, 12 S. & D. 602. (23.) When the price is paid, or consigned in the manner explained *voce Consignation*, the purchaser may apply to the Court by petition for delivery of his bond of caution. If there be several purchasers, a separate application from each is necessary; and the petition, which must be previously intimated to the agents of the creditors who have lodged claims, is also intimated upon the walls and in the Minute-book for eight days; after which it is remitted to the Lord Ordinary in the ranking, or to the Junior Lord Ordinary, to ascertain whether the price has been paid or consigned. On ascertaining the fact, by a remit to the clerk or otherwise, the Lord Ordinary makes a report to the Court, and the prayer of the petition will then be granted by the Inner-House. (24.) It is competent to the creditors or their agents, at the election of the common agent, to nominate three of their number as a committee, to watch the progress of the proceedings; and if they are not terminated within two years after their commencement, to inquire the reason. And it is the duty of the common agent, after the lapse of two years, to print and give in to the Court a minute explanatory of the situation of the process, and of the cause of delay; and a similar minute must be lodged yearly thereafter, unless dispensed with by the Court; A. S. 11th July 1794, § 14. (25.) It is competent to preferable creditors to apply for interim warrants on the judicial factor, or on the purchaser, or on the bank where the money is consigned. But before drawing any sum out of the common funds by interim warrant, sufficient cause must be shown to the Court. Nor will any such warrant be granted, except as to interest or annuities, before decree of certification is pronounced; and no petition for a warrant of this kind will be received after 20th Feb. for the winter session, or 25th June for the summer session; or during the five sederunt-days preceding the rising of the Court for the Christmas recess; A. S. 17th July 1764; 21st Dec. 1765; 5th June 1790; 11th July 1794.

The common agent is also entitled to an interim warrant on the judicial factor to account for the expenses of the process. See *Interim Warrant*. (26.) Sometimes, where a class of creditors are proferable on a particular subject which has been sold, and where the remainder of the property remains unsold, an interim scheme of division among these proferable creditors is prepared. But the expense of interim warrants, as well as interim schemes, must be borne by the creditors benefited thereby. See, however, *Wood's Trustees and Others*, 7th March 1835, 13 *S. & D.* 645. (27.) The rule as to imputing such interim payments, in questions among the creditors, is, that the debt due to the creditor receiving the interim payment is to be stated as accumulated as at the term of payment of the price by the purchaser, and that the partial payments are to be deducted from this accumulated sum. In this way all the creditors stand on an equal footing; and the difficulties about imputing partial payments to account of interest, and not of principal, are avoided. The rule now uniformly observed is, that principal and interest are to be accumulated as at the term of payment of the price. (28.) Adjudications, during the dependence of a process of ranking and sale, which were at one time thought necessary in order to secure the benefit of the *pari passu* ranking, are prohibited by 54 Geo. III. c. 437, § 10; whereby it is enacted, that the decree of sale is to be held as a general decree of adjudication in favour of every creditor who shall afterwards be included in the decree of division; and the effect of such general decree, in all competitions or questions of ranking and preference, is declared to be the same as if it had been pronounced and extracted of the date of the first calling of the process of sale, before the Lord Ordinary in the Outer-House; and no "separate adjudication shall be allowed to proceed during the dependence of a judicial sale;" the process not being held in dependence until it is called in Court. The statutory rule, however, does not apply to adjudications in implement, which may proceed notwithstanding the dependence of the ranking and sale:— See *Bell's Com.* ii. 262; *Mackintosh*, 26th May 1829, 7 *S. & D.* 649; *Hutchison*, 26th June 1830, 8 *S. & D.* 982; *Wood*, 5th Feb. 1833, 11 *S. & D.* 355. (29.) In rankings and sales at the instance of apparent heirs, it has been the practice to require creditors whose debts are illiquid to constitute them before drawing their shares of the price; and in one case the same rule was extended to an illiquid debt, in a judicial sale at the instance of creditors. But this decision has been thought extremely questionable, and certainly is not

easily reconcilable with sound principle:— See, on this subject, *Scott Moncrieff*, 16th June 1821, 1 *S. & D.* 73; *Bell's Com.* i. 740, and ii. 277 and 281; and *Shand's Prac.* ii. 566, *et seq.* (30.) The production of the grounds of a moveable debt, as the foundation of a claim on a ranking and sale, does not make the personal debt heritable, or liable to be affected by inhibition. It is still arrestable; *Henderson*, 14th Dec. 1796, *Mor.* 1534. (31.) Notwithstanding the clause in the articles of roup binding the purchaser to accept of the title as it is, the purchaser cannot be forced to pay the price if it turns out that the bankrupt had no title whatever to the subjects sold. See *Progress, and authorities there cited*. But it will obviate any objection to the title if it be possible to complete a title in the bankrupt's person; see *Shand's Prac.* ii. 571. (32.) In order to strengthen the purchaser's title, the creditors who receive any part of the price are bound to assign their debts, rights, and diligences to the purchaser, with absolute warrantance to the extent of the sums received. Hence, in case of eviction, the creditors are bound to refund what they have received, with interest from the date of the decree evicting the subjects from the purchaser, provided intimation of the action of eviction be made to the creditors before litiscontestation. These assignments, which are paid for by the creditors, being merely corroborative of the purchaser's right, cannot be assigned by the purchaser, or made a separate fund of credit, but, except in so far as corroborative of his title, are extinguished. (33.) If there be any reversion of the price after satisfying the claims of the creditors, the common debtor is entitled to it without making up any title. But in the event of his death, his heir must make up a real title to the heritage, in order to entitle him to discharge the reversion; in which respect there is a difference between an ordinary process of ranking and sale and a process when pursued by an apparent heir. In this last case the apparent heir does not require to make up any title in order to entitle him to receive the reversion. The preceding analysis of the procedure in the process of ranking and sale has been abridged from the following practical works: *Jurid. Styles*, iii. 435–55; *Ivory's Form of Process*, i. 317–43; *Beveridge's Form of Process*, ii. 513–48; and *Shand's Prac.* ii. 528–73, in which work, in particular, there is a valuable digest of the rules of practice in this important process, accompanied by a very able commentary on the adjudged cases. See also *Bell's Com.* ii. 250; *Stair*, B. iii. tit. 2, § 55; B. iv. tit. 35, § 26; tit. 36, § 2; tit. 51, § 4; *More's Notes*, cccvi.; *Ersk.* B. ii. tit. 12, § 59, *et seq.*; *Bank.* vol. iii.

p. 37; *Bell's Princ.* §§ 2263, 2419, 1486; *Bell on Leases*, i. 113; *Hunter's Landlord and Tenant*. See *Judicial Sale. Apparent Heir. Schemes of Division.*

**Ranking and Sale, by an Apparent Heir.** This action, which is in almost all respects analogous to the action of ranking and sale at the instance of creditors, is founded on the act 1696, c. 24, which declares that an apparent heir may bring the estate of his ancestor to roup, whether it be bankrupt or not. It is no good objection to the heir's title to sue this action that he has behaved as heir, and thereby incurred a passive title, or even that he has been served heir in general, *cum beneficio inventarii*; provided that his title has not been feudally completed. Neither is it any objection that the heir has renounced, in an action of constitution. Where the apparent heir dies during the dependence of the action, the next apparent heir, without making up any title, or the purchaser, if the lands have been sold, may carry on the sale. In this proceeding, the apparent heir is held to be acting for behoof of all the creditors; and therefore, the decree of sale, if pronounced within year and day of the first effectual adjudication, brings in all the creditors *pari passu*, whether they have adjudged or not. And it seems to be thought, that no adjudication can be proceeded with after the summons at the heir's instance has been called in Court. As to the form of the summons, it differs very slightly from that in a judicial sale by creditors, and must be executed in the same manner against the real creditors in possession, and edictally against all concerned. It is not necessary, however, to prove bankruptcy, or that the creditors are in possession. If there be any reversion, the expenses of the process must be paid from it; but if not, then from the price; and if the proceeds of one or more lots be sufficient to satisfy the debts claimed, the sale of the remainder will be stopped. If the pursuer himself desires to purchase any part of the lands, he may do so by means of a trustee, who will find caution in the ordinary form. And although it is usual in this particular process to allow the pursuer's agent to conduct it without naming a common agent, yet, if there be any improper delay, the Lord Ordinary, on the application of any creditor, will appoint a meeting to be held for choosing a common agent. If there be any reversion, the heir is entitled to it, and may validly discharge it without making up any title, the decree of sale being a sufficient title for the heir to receive the reversion. The heir incurs no passive title by pursuing such a sale; and this seems to be one of the reasons why he is entitled to receive the reversion without making

up a title; since, by so doing, he might incur a universal liability for his predecessor's debts. The summons by the heir sometimes contains a conclusion for cognoscing the amount of the personal property of the predecessor, especially where the heir-apparent is a pupil. The object of this is to preserve evidence of the necessity of the sale; and hence, in such cases, it is proper to have a tutor-at-law or a tutor-dative appointed before raising the action. In all other respects, the procedure in this process resembles that which has been explained in the immediately preceding article. See *Shand's Prac.* ii. 864; *Ivory's Form of Process*, i. 343; *Beveridge*, ii. 548-51. See *Cognition and Sale. Apparent Heir.*

**Ransom**; a sum of money paid for redeeming any capture. Average is leviable on the goods in a ransomed ship, for the sum paid as ransom; and if any one belonging to the ship be detained as a hostage for payment of the ransom, he must be set free at the joint expense of the owners of the ship and cargo. *Tomlins' Dict. h. t.*; *Ersk. B.* iii. tit. 3, § 55; *Kames' Equity*, 99, 120; *Brown's Synop.* 319, 2082. See *Captive. Average.*

**Rape**; one of the four pleas of the Crown. It consists in carnal knowledge of a woman's person against her will, and by force. Forcible abduction is no longer, as it once was, essential to the crime. The crime is the same whatever the age of the female may be, and whether she be maid, wife, or widow. A rape may even be committed on a strumpet; though, in such a case, the presumption of the woman's assent will require to be overcome by very clear proof of violence. The crime may be completed by penetration without emission. See the case of *Robertson*, March 12, 1836, 1 *Swinton* 93. The crime is not altered although the woman's resistance has ceased through violence, threats, or the effects of stupifying drugs. In the case of females under twelve years of age, rape is committed though actual violence has not been used. All those who assist in subduing the sufferer, or who are present at the time, and approve of the deed, are held equally guilty with the principal perpetrator. The chief witness in such cases, usually, is the injured female herself; but her testimony must in all cases be corroborated as to the using of violence, which will be best done by the signs of injury on her person; the circumstances and situation in which the alleged offence took place; the testimony of those who heard her cries for help; and evidence of her subsequent disclosure of the crime to her relations, or to the public authorities. It is not now, as formerly, the law, that the prosecution cannot be carried on unless the con-

plaint is made the same day on which the crime is committed. See *Raptus*. The punishment of rape is death, unless the woman shall acquiesce in her condition, and declare that she went off with the panel of her own free will; in which case the woman's kinsfolk may insist for an arbitrary punishment to the extent of fine, imprisonment, or escheat of moveables. *Hume*, i. 297; *Ersk.* B. iv. tit. 4, § 55; *Burnet*, 103; *Alison's Princ.* 208; *Steele*, 110; *Kames' Stat. Law. h. t.*; *Tait's Justice, h. t.*; *Shaw's Digest*, p. 152. See *Abduction*.

**Raptus**; rape, ravishing or deforcing of women, one of the four pleas of the Crown. Ravishing is a crime of which a woman accuses a man, alleging she is oppressed or defiled by him against the King's peace. "The quibk complaint sulde be maid the samin day and night in the quibk the crime is committed—*quia lapsu diei hoc crimen præscribitur*," *Skene, h. t.* See *Rape*. Some authors believe that the crime of *raptus*, in the Roman law, was not rape, but abduction.

**Ratification by a Minor.** A ratification by a minor, made after majority, has the effect of discharging all claim of restitution on lesion; but ratification during minority has no such effect, and the act 1681, c. 19, declares those who persuade minors to ratify their engagements by oath infamous. *Ersk.* B. i. tit. 7, § 39; *Bell's Com.* i. 143; *Bank.* vol. i. p. 182.

**Ratification by an Heir**; bars him from challenging his ancestor's settlement, on the ground of its being reducible *ex capite lecti* or otherwise, provided the heir be of age, and in such circumstances that the ratification cannot be ascribed to his peculiar situation. *Ersk.* B. ii. tit. 8, § 39; *Bell's Com.* i. 148.

**Ratification by a Wife.** This is a declaration on oath, made by a wife, in presence of a judge (her husband being absent), that the deed she has executed has been made freely, and that she has not been induced to make it by her husband through force or fear. There are also present a notary-public and two witnesses; instruments are taken on what passes by the attorney of the person receiving the right; and the whole is reduced to the form of a notarial act, and attested by the subscription of the wife, the judge, the notary and witnesses. It is indorsed on the deed. The use of this ratification is, to bar actions of reduction at the instance of the wife, on the pretence that she had been compelled by her husband to execute the deed. But the want of a ratification by the wife does not render the deed null, although, where it has not been ratified, it may be reduced on special proof of force or fear, or of undue influence on the part of the husband; *Buchan v. Risk*, 1st March 1834, 12 S. & D. 511, and authori-

ties there cited. See also the case of *Priestnell v. Hutchison*, 20th Feb. 1851, 19 D. 495. By special statute, ratifications by married women are excepted from the operation of the statute cited in the article *Oath*, which substitutes declarations for oaths and affidavits; and it is provided, that such ratifications be taken on oath as heretofore; but all ratifications taken by declaration instead of oath, since the passing of that act, are declared to be valid, and of the same force and effect as if they had been taken on oath; 6 and 7 Will. IV. c. 43. *Ersk.* B. i. tit. 6, § 33; *Bank.* i. 132; *Bell's Com.* i. 142; *Bell's Princ.* § 1615; *Tait's Justice*, voce *Marriage*; *Jurid. Styles*; i. 103.

**Ratio Decidendi**; the reason or ground on which a judgment is rested. Every sheriff ought to give his *rationes decidendi*, except in the case of mere interlocutory orders. *Mac-laurin's Sheriff Prac.* 132. See *Judgment*.

**Re Mercatoria**, writings in; are privileged in so far as that they do not require to be authenticated with all the solemnities of a formal deed. *Bell's Com.* i. 324. See *Deed. Evidence. Privileged Deeds*.

**Reading of Deeds.** A deed ought to be read over in the presence of the grantor, or, at all events, some means should be taken to make him acquainted with its contents before he subscribes it. If, however, the deed be regularly subscribed and executed, it will not, in the ordinary case, be necessary for the party maintaining the validity of the deed to show that it was read over, or that the subscriber was acquainted with its contents. The *onus*, on the contrary, will lie upon the opposite party, to show that the subscriber was ignorant of the contents, and was deceived in the execution of the writing which he signed. As it is not a necessary solemnity that the deed should be read over to the grantor at all, so neither is it indispensable that the witnesses should be present when it is read; but if it can conveniently be done, it would be prudent to have them present, as they will then be ready, in case fraud be alleged, to prove that the subscriber knew what was in the deed. In reducing a will, it is frequently an important element in the proof of fraud that the testament was not read to the testator. *Stair*, B. i. tit. 9, § 11; *More's Notes*, p. cccxl.; *Ersk.* B. iii. tit. 2, § 8; *Ivory's Notes*; *Tait on Evidence*; *Ross's Lect.* i. 150, 201, 488; ii. 183; *Dickson on Evidence*. See *Deed. Testing Clause*.

**Real Action.** A real action is founded on a right of property in a subject, the object of the action being the recovery of the property. It is so termed in contradistinction to a personal action, which is founded only on a personal obligation, and the object of which is to enforce implement of the obligation. *Stair*, B. iii. tit. 4, § 32; tit. 5, § 24; B. iv. tit. 3,

§ 45; *Ersk. B. iv. tit. 1. § 10*; *Bell's Com. ii. 152*; *Darling's Prac. 127*. See *Actions*.

**Real Burden.** See *Burdens. Incumbrances. Search of Incumbrances*.

**Real Right;** means a right of property in a subject, or, as it is termed, a *jus in re*, in virtue of which the person vested with the real right may pursue for possession of the subject; whereas a personal right, or *jus ad rem*, entitles the person merely to an action for performance of the obligation. *Ersk. B. iii. tit. 1, § 2*. See *Real Action. Jus in Re, and authorities there cited*.

**Realty.** See *Personalty and Realty*.

**Reapers.** Even though hired by the day or week, reapers, like other farm-servants, have a preference for their wages over the crop raised or secured by their labour. Their claim is preferable to the hypothec of the landlord. *Hutch. Justice, ii. 174*; *Hunter's Landlord and Tenant*. See *Farm Servant. Hypothec*.

**Reasonable Cause.** A reasonable cause for granting a deed, according to Erskine, is one which is a good ground for executing the deed, though not one which could have been used to compel the grantor to execute it. See *Consideration*.

**Reasons of Advococation.** In every advococation where the record had not been made up in the inferior court, or where the advococation was of an interlocutory judgment, or where it had been brought on the ground of contingency, or on some other of the statutory grounds (with the exception of advococations under 6 Geo. IV. c. 120, § 40, which are in this respect analogous to advococations against final judgments); and in general, wherever the record in the inferior court was not to be held as the record in the Court of Session, reasons of advococation were lodged at the lodgment of the letters for calling. These reasons of advococation, like reasons of suspension, resembled a condescendence in an ordinary action, with a note of pleas in law subjoined; and this pleading having been followed by answers, and both papers having been revised, the record was closed, and the case disposed of in the usual way. The form of advococations is now regulated by the act 1 and 2 Vict. c. 86, 1838, and relative Act of Sederunt, 24th Dec. 1838. See *Advococation*.

**Reasons of Suspension.** In every suspension in which the letters had been expedite, at the lodgment of the letters for calling, reasons of suspension were lodged therewith; which, so far as depending on matter of fact, were stated in an articulate form, with a note of pleas in law subjoined; and if not so lodged, the letters could not be called. This pleading was substantially a condescendence; and in framing it, the correct practice was to assimilate it as far as possible to a condescendence in an ordinary action. The reasons of suspension were followed by answers in a corresponding form; and these papers having been revised, the record was closed, and the case disposed of in the usual manner. *A. S. 11th July 1828, §§ 25, 49, 56, 57*; *Stair, B. iv. tit. 52, § 4, et seq.*; *Bank. vol. iii. p. 11*; *Ross's Lect. i. 373*. The form of suspensions is now regulated by the act 1 and 2 Vict. c. 86, 1838, and relative Act of Sederunt. See *Suspension*.

**Rebellion;** a levying of war, or forcible opposition made by a subject against his Sovereign. A debtor who disobeys a charge on letters of horning, to pay or perform in terms of his obligation, is accounted in law a rebel, in respect of his disobedience to the Sovereign's command, contained in the *will* of the letters; and it is upon this basis that imprisonment for civil debt in Scotland chiefly rests—the act of warding in royal burghs, and the statutory authority given to justices under the small-debt acts, being the only exceptions. This disobedience to the royal command is termed *civil rebellion*; and denunciation on letters of horning was formerly followed with the penal consequences of actual rebellion. Thus, the debtor's single escheat fell, burdened, however, with the debt on which the horning proceeded; and the rebel was in many other respects put beyond the protection of the law. These highly penal consequences were taken away by the act abolishing wardholding (20 Geo. II. c. 50). *Ersk. B. ii. tit. 15, § 60*; *Bank. ii. 260*; *Bell's Princ. § 730*; *Jurid. Styles, 2d edit. iii. 569*; *Ross's Lect. i. 242, 273–9, 323*. See *Denunciation. Escheat*. As to the effect of denunciation on account of crimes, see *Fugitation*. See also *Act of Warding. Small Debts*.

**Receipt.** See *Discharge. Evidence*. And as to the effect of a receipt for the premium in a policy, see *Insurance, p. 508*.

**Receiving Stolen Goods;** the English term for reset of theft. It is punishable with transportation for not more than fourteen nor less than seven years, or imprisonment not exceeding three years. *Tomlins' Dict. h. t.* See *Reset of Theft*.

**Recess.** See *Christmas Recess*.

**Reclaiming Bill.** See *Petition*.

**Reclaiming Days.** The period within which all interlocutors of a Lord Ordinary might formerly be submitted to review of the Inner-House was twenty-one days; or where these days expired in the vacation or Christmas recess, until the first box-day in either vacation; and if the twenty-one days had expired before the box-day in the recess, they ran until the box-day; if they expired after the box-day, they ran to the first sederunt-day in January; 6 Geo. IV. c. 120, § 18;

A. S. 11th July 1828, § 79. By the act 13 and 14 Vict. c. 36, § 11, 1850, the reclaiming days are limited to ten days, except in the case of interlocutors disposing in whole or in part of the merits of the cause, and also in the case of decrees in absence. A decree on failure to lodge any paper ordered by the Lord Ordinary is a decree disposing of the merits. See the cases, *Falla v. Graham*, Jan. 14, 1851, 13 D. 482; *Thomson v. Innes*, July 1, 1851, 13 D. 1266; *Arnold v. Winton*, March 11, 1852, 14 D. 768; also the same case, May 25, 1852, 14 D. 769; and *Anderson v. Brown*, Jan. 20, 1854, 16 D. 367. In the Bill-Chamber, interlocutors passing or refusing bills take effect as soon as the clerk of the bills delivers up the passed bill to have the letters expedite, or issues a certificate of refusal. But the Lord Ordinary on the Bills, either in his interlocutor passing or refusing, or subsequently on cause shown in a note, may prohibit the delivery of the bill, or the issue of a certificate, during such a time as he may think reasonable, to enable the party to submit the interlocutor to review. Fourteen days is the period allowed in the Bill-Chamber for reclaiming; *Beveridge on Bill-Chamber*, 113. See also *Bill-Chamber*. In the inferior courts, the reclaiming days in ordinary actions are fourteen, and in actions of removing and aliment, and in all summary cases, six; A. S. 12th Nov. 1825. The reclaiming days cannot be competently prorogated even of consent of parties. See *Reclaiming Note. Reclaiming Petition*.

**Reclaiming Note.** The judgment of a Lord Ordinary in the Court of Session, either in the preparation or final decision of a cause, has all the efficacy of a judgment of either Division of the Court. But the Lord Ordinary's judgments or interlocutors are subject to the review of the Division of the Court to which the cause belongs; and such review is prayed for by a *reclaiming note*, the requisites of which are partly statutory and partly regulated by Act of Sederunt. The statutory rule is, that when either of the parties is dissatisfied, he may apply for review of the interlocutor, provided that, within twenty-one days from the date of the interlocutor, he prints and puts into the boxes for receiving the papers, to be perused by the Judges, a note reciting the Lord Ordinary's interlocutor, and praying the Court to alter the same in whole or in part. If the interlocutor has been pronounced on cases, the reclaimer, along with his note, must print and box not only the closed record, but also the cases which have been before the Lord Ordinary; if without cases, the closed record must be printed and boxed. And notice of this application for review must be given, by delivery of six co-

pies of the reclaiming note to the known agent of the opposite party; 6 *Geo. IV. c. 120*, § 18. In addition to the above statutory requisites, the Act of Sederunt 11th July 1828 provides—1st, That where the twenty-one days allowed for reclaiming against an interlocutor of a Lord Ordinary in the Outer-House expire during vacation or Christmas recess, they shall continue open till the first box-day in the vacation or recess; and if they expire after the box-day in the recess, they shall continue open until the first sederunt-day after the recess; A. S. § 79. 2d, That the interlocutor complained of shall be *prefixed* to, and not embodied in, the note; and that in addition to the record and cases (if any), copies of the summons and defences, letters of suspension or advocacy (excepting summonses of multiplepointing, adjudication, and the like), shall be appended to the note; the respondent being entitled, at the moving of the note in Court, to ask leave to print such additional documents as he may think necessary, provided those documents are in process, and have been before the Lord Ordinary; A. S. §§ 77, 110. 3d, That where the reclaiming note is against an interlocutor pronounced in absence or by default, it must have the summons appended, and must be accompanied by defences, or with the paper ordered, the failure to lodge which led to the interlocutor; A. S. §§ 74, 69, 112. And other regulations of minor importance will be found in the Act of Sederunt. As to Bill-Chamber interlocutors, the statute (§ 46) enacts that they may be reviewed, in like manner, by a reclaiming note; and the Act of Sederunt requires the reclaimer to append to his note a copy of the bill, or of the bill and answers, which have been before the Lord Ordinary on the Bills; A. S. § 75. But where the Lord Ordinary on the Bills reports the case to the Court, the interlocutor pronounced on such report is to be held as the judgment of the Inner-House, not of the Lord Ordinary; A. S. § 76. So also an interlocutor of the Lord Ordinary on the Bills, pronounced on a remit from the Inner-House, after considering a reclaiming note, and directing him to pass or refuse a bill, is final; A. S. § 46. See *Bill-Chamber. Reclaiming Days*. Reclaiming notes, after being boxed, are set down and moved in what is called the roll of *Single Bills* of the Division of the Court to which they are presented; and (except in the case of notes praying to be reponed against decrees in absence, or by default, which are disposed of in that roll) are forthwith ordered to the Long or to the Summar Roll, as the case may be. And when they afterwards appear in this roll, the counsel for the reclaimer and respondent must be

mutually prepared to argue the case, after which it will be disposed of by the Court, either by affirming or altering the interlocutor reclaimed against, or by ordering cases or minutes of debate, or making such other order as the justice of the case requires; 6 *Geo. IV.* c. 120, §§ 18 and 46; *A. S.* §§ 77, 78. A simple remit to the jury-roll, unaccompanied by findings, cannot be brought under review by reclaiming note, nor even by appeal to the House of Lords; 59 *Geo. III.* c. 35, § 15. See, on the subject of this article, *Shand's Prac.* i. 192; ii. 585, *et seq.*; *Macfarlane's Jury Prac.* 39, *et seq.* The reclaiming days are now limited to ten days, except in cases disposing in whole or in part of the merits, and in decrees of absence. See *Process. Inner-House. Reclaiming Days.*

**Reclaiming Petition.** Reclaiming petitions were, prior to the Judicature Act, 1825, a well-known mode of submitting the interlocutors of Lords Ordinary to the review of the Inner-House, and also of submitting the interlocutors of the Inner-House to their own review. In the Court of Session, this form of process is now unknown; but it still prevails in the sheriff and other inferior courts. Any interlocutor pronounced in a sheriff-court may be brought under review by a reclaiming petition, except interlocutors simply repelling dilatory defences, or disposing of objections stated in the course of leading a proof or ordering papers. The reclaiming petition recites *verbatim* the interlocutor reclaimed against, and, after a written argument, concludes with a prayer for the recall or alteration of the interlocutor in whole or in part. In ordinary actions, these petitions must be presented within fourteen days (exclusive of the day on which the interlocutor is dated) after the date of the interlocutor; and in actions of removing and aliment, and where against interlocutory orders, and in all summary cases, the reclaiming petition must be lodged within six free days. These reclaiming days cannot be prorogated of consent of parties. When answers are ordered, they are usually ordered to be lodged within a corresponding period; and the interlocutor pronounced on considering the reclaiming petition, with or without answers, is not subject to farther review in the inferior court, except that where such interlocutor has been pronounced by the sheriff-substitute, an appeal to the sheriff may be made within six days. See *Appeal*. No reclaiming petition is competent against the judgment of the sheriff pronounced on appeal, whether he affirms or alters that of his substitute; *A. S.* 12th Nov. 1825; *Dick*, 14th Dec. 1836, 15 *S. & D.* 256. Petitions against decrees in absence may be received at any time before

extract, but only on consignment of the previous expenses, and on being accompanied with defences. No new production can be received with a reclaiming petition, except in the case of *res noviter veniens ad notitiam*. Similar regulations are in force in other inferior courts. See *A. S.* 12th Nov. 1825, *as to inferior courts*. See also *Maclaurin's Form of Process*, p. 229, and *Barclay's Notes on A. S.* p. 48, *et seq.*

**Recognition;** according to Skene, derives its name from the superior, who is presumed formerly to have been proprietor of the lands, recognising them once more as his property, when they fall to him by the fault of the vassal. In this sense, recognition may be taken generally for any return of the feu, from whatever ground of eviction that has happened. But the term was formerly applied specially to a casualty abolished along with wardholding, by which, when any vassal or free tenant, holding his lauds by the tenure of ward, sold and "annallied all and hail his landes, with their pertinents, or the maist part thereof, without license, consent, or confirmation of his overlord," the lands, both those which had been alienated and those which the vassal had retained, fell to the superior as a satisfaction for the contempt shown him, and to prevent vassals from impoverishing themselves, and so rendering themselves unfit to perform their feudal services. *Skene, h. t.*; *Stair, B. ii. tit. 11, § 10*; *B. iv. tit. 14*; *Ersk. B. ii. tit. 5, §§ 10-17*; *Bank, ii. 148*; *Bell's Princ. § 730*; *Kames' Stat. Law Abridg. h. t.*; *Brown's Synop. 360, 2074*; *Ross's Lect. ii. 255, et seq.* See *Wardholding*.

**Recognisance;** is an English law term signifying a judicial bond, whereby one or more persons become bound to forfeit a certain sum, on failure to perform a specified act or deed. See *Tomlins' Dict. h. t.*; *Blair's Justice, h. t.*; *Tait's Justice, h. t.* For the form of a recognisance, see *Appendix to Blair's Justice*. See also *Bail*.

**Recommendation, Letters of;** letters recommending a third party to the favour or notice of the party addressed. Amongst merchants such letters may be attended with serious consequences to the writer. Thus, if a man spontaneously give letters of recommendation to another, and if in them he convey any assurance of pecuniary safety to his correspondent in his mercantile dealings with the party recommended, he thereby incurs an obligation of the nature of guarantee. But if one's opinion of another be asked, and if in reply a mere *bona fide* recommendation for general respectability and good conduct be given, this is no letter of credit, and infers no responsibility against the writer. *Bell's Com. i. 371, et seq.*; *Ersk. B. iii. tit. 3, § 61, Ivory's*

*Note; Brodie's Sup. to Stair, 924; Bell's Princ. § 280. See Guarantees.*

**Recompense;** equivalent remuneration. This is due by one who has been made richer by another, without the purpose of donation. Thus, where one builds upon another's ground in the belief that it is his own, the property of the builder goes to the proprietor of the ground; but he is liable in recompense so far as *lucratus*. One possessing a subject temporarily is presumed to improve it for his own convenience, and is not entitled to recompense. *Stair, B. i. tit. 8; More's Notes, p. liv.; Ersk. B. iii. tit. 4, § 19; Bank. i. 226, et seq.; Bell's Princ. § 538, et seq.; Illust. ib.; Kames' Equity (1825), 113-4-7. See Negotiorum Gestor. Contribution. Adjunction. Commisition.*

**Recompensation.** Where one pursues for a debt and the defender pleads compensation, to which the pursuer replies by pleading compensation also, this is termed recompensation. The different conditions under which recompensation may occur have been stated and resolved by Stair. He says,—1. Where A. contracts a debt to B., and subsequently at different times B. contracts two debts to A.: If B. pursue for the second of these two, and is answered by the plea of compensation with the debt which he owes, he is entitled to plead recompensation with the first debt due to himself. But, on the other hand, if he pursue for the first debt, he is not entitled to answer the plea of compensation by pleading recompensation with the second. A case occurred in which the first debt due to A. was secured on the debtor's life rent echeat; he subsequently purchased other debts due by B., for which he had no other security than B.'s other creditors had. The other creditors, to diminish A.'s credit upon the echeat, pleaded compensation on a debt due by A. to B., anterior to both of B.'s debts to A.; A. pleaded recompensation on the last of B.'s debts to him, and the Court found generally that he might recompense on any other debts in his person prior to the proponing of the compensation; *Maxwell, Jan. 2, 1739, Elchies, voce Compensation, No. 6, M. 2550.* This doctrine is contrary to that laid down by Stair. 2. If the debt due by A. be posterior to both the debts due by B., the concurrence takes place between the second debt due by B. and the debt due by A.; but on the ground that compensation, as pleaded by B. in such a case, would be a kind of indefinite payment which he might ascribe to either of the debts he chose, A., whether he insist on his first or second debt, cannot recompense with the other. 3. If the debt due by A. be in the middle between the two debts due by B., A., insisting on the last debt, may plead recompensation on the first; but if he insist for the first, he cannot plead

recompensation on the last. These two last rules are laid down by Stair; but there seems to have been no decision where the debts were in such relative positions as to time. It would appear, however, that the doctrine laid down in the case of *Maxwell, supra cit.*, is not limited in its application, but would embrace these cases likewise. If such be the case, the operation of the compensation does not depend upon the situation of the debts when contracted; but a creditor pursuing for a debt may answer the plea of compensation by pleading recompensation "on any other debts in his person prior to the proponing the compensation." Indeed, the whole course of decisions runs counter to the notion that compensation operates *ipso jure*, on which Stair's rules are founded. It has been found a good answer to the plea of compensation on a sum due by bill, that the debtor in that sum was cautioner for the creditor, and might therefore retain the sum in relief although not yet distressed; and thus the debt due to the cautioner was left uncompensated; *Irvine, 10th July 1711, M. 2686.* Compensation being pleaded against an assignee, he may recompense by debts due to his cedent, though not assigned to him; *Kinstorie's Creditors, 7th Dec. 1742; Elchies, voce Compensation, No. 8, M. 2563. See Stair, B. ii. tit. 3, § 20; Ersk. B. iii. tit. 4, § 19; Bank. vol. i. p. 494. See Compensation, and authorities there cited. See also the case of Thomson v. Stephenson, Mar. 10, 1855, 17 D. 739.*

**Reconvention.** Where an action is brought in Scotland by a foreigner, over whom the courts of this country have otherwise no jurisdiction, his adversary in the suit is entitled by *reconvention* to sue the foreigner on a counter claim, in compensation or extinction of the demand. The principle of this is, that a party is not entitled to avail himself of the jurisdiction of the Scotch courts, without subjecting himself in these courts to all incidental claims. In such cases the foreigner himself, and not his mandatary merely, must be cited, and the actions must be between the same parties, or connected with each other; for the raising of the action by the foreigner does not subject him generally to the jurisdiction of our courts. *Bell's Princ. p. 624; Sland's Prac. i. 103, and cases there cited.*

**Record.** Prior to the Judicature Act, 1825, great inconvenience was experienced in the progress of a cause, from the introduction of new averments at all stages of the process, and sometimes even at the close of a protracted litigation. To remedy this evil, certain statutory regulations were made for the purpose of compelling the parties to exhaust their averments and pleas, before any judgment on the merits of the cause was pronounced. The pleadings are called the *record*,



and form the basis of the future argument, and of the decision of the cause. In ordinary actions, the record may be closed on the summons and defences, where the parties consent. But that rarely happens, and a revision of the condescendence and defences is generally ordered. Judicial procedure in the Court of Session is now regulated by the act 13 and 14 Vict. c. 36, 1850.

In suspensions, the record is usually closed on revised reasons of suspension and answers. In advocations of final judgments, where the inferior court record is not objected to, the record in the inferior court, with the additional pleas in law lodged in the Court of Session (where any such pleas have been lodged), is held as the record in the Court of Session; while in advocations of interlocutory judgments, or in cases where the inferior court record is objected to as improperly made up, or where no record has been made up in the inferior court, the record in the Court of Session will be closed on revised reasons of advocacy and answers; and in multiplepointings, so far as regards the competition, the record is closed on the revised condescendences and claims. Where a party in the Court of Session vexatiously or unreasonably refuses to close the record, the Lord Ordinary may pronounce such judgment against him as the other party may crave, and as the shape and nature of the action will admit; against which he can be reponed only on a reclaiming note to the Inner-House, presented within the reclaiming days, and upon payment of such expenses as shall be thought reasonable, and on consenting to close the record immediately; *A. S. 11th July 1828*, § 60. In the inferior courts, again, if the parties do not, within the time specified by the judge, state whether they are willing to close the record, the inferior judge is entitled to close the record, in the same manner, and to the same effect, as if the parties had agreed; *A. S. 12th Nov. 1825*. So also, in an inferior court, after a condescendence and answers have been lodged, and where no revisal is asked, the judge may close the record without again asking the parties to state whether or not they are willing to close. In all ordinary cases, whether in the supreme or inferior courts, where the defender makes appearance, and neither party abandons the cause, no judgment can be pronounced on the merits until the record is closed; and as this is a statutory requisite (§ 4 of stat.), any such judgment, pronounced before closing the record, is null and void. But, on the other hand, all dilatory defences and pleas ought to be decided before closing the record; e.g., objections to the form of the summons, to the title of the party, and, in general, all pleas

which go to exclude the particular *instance*, without affecting the cause of action, or the right of the party to raise a new action. All these dilatory or preliminary pleas, except such as require probation, must be either decided or reserved before closing the record—6 *Geo. IV. c. 120*, § 5; and it is the interest of the parties, and particularly of the pursuer, that they should be so decided, since otherwise they may have the effect of excluding the action after the expense of preparing a useless record on the merits has been incurred. So also a decree transferring *in statu quo*, or a decree of constitution, reserving objections *contra executionem*, may be pronounced without closing the record. After a record has been closed, it may, in certain circumstances, be opened up and amended by authority of the judge, and on payment of costs, at his discretion. This may be done in the case of *res noviter veniens ad notitiam*, or where some irregularity has been committed in closing the record, and in certain other special cases; although, generally speaking, the inclination of the Court is not to permit this, except upon payment of the whole previous expenses, and sometimes not even on that condition. Prior to closing the record, the parties respectively must have lodged in process all the writings within their power, on which they mean to found; although it is competent, after the record is closed, “to apply for a diligence for the recovery of writings *in modum probationis*, or to produce such writings previously in their power, as may be rendered necessary by the production of papers made by the other party after the record is closed;” *A. S. 11th July 1828*, § 55. The record thus made up and closed is usually disposed of in the Court of Session, in the first place, by an order for debate before the Lord Ordinary; although it is competent, where both parties are anxious for a decision, and think it unnecessary to debate the case, for the Lord Ordinary to make *avizandum* with the record, and to decide the cause without a previous debate. The ordinary course, however, is to appoint the cause to be debated; and with that view, a copy of the closed record is delivered to the Lord Ordinary by the party making the enrolment for debate; *A. S. 11th July 1828*, § 21. Parties are then heard by their counsel; and after that debate, the Lord Ordinary either decides the cause, or makes an order for *cases*, or remits it to the jury-roll, or takes such other step towards a decision as to him may seem proper—his interlocutor being subject to review, in the manner elsewhere explained. See *Reclaiming Note*. See, on the subject of this article, 6 *Geo. IV. c. 120*; 1 and 2 *Vict. c. 86*; 13 and 14 *Vict. c. 36*, 1850; *Shand's*

*Prac.*; *Macfarlane's Jury Prac.* 31, *et seq.* See also *Cases. Hearing. Res Noviter.*

**Record.** In England, courts of record are the Sovereign's courts, in right of the crown and royal dignity. A court not of record is the court of a private person. None but courts of record have authority to fine or imprison. *Tomlins' Dict. h. t.*

**Recorder.** In English cities or towns corporate, the recorder is a person whom the mayor and other magistrates, having jurisdiction, associate with them for their direction in matters of law and justice. The recorder of London is one of the justices of Oyer and Terminer, and a justice of peace of the quorum for putting the laws in execution for preservation of the peace and government of the city. Being the mouth of the city, he delivers the sentences and judgments of the courts in it, and certifies and records the city-customs, &c. He is chosen by the Lord Mayor and Aldermen. *Tomlins' Dict. h. t.* This office seems to be somewhat analogous to that of assessors in Scotland. See *Assessors.*

**Recorder of the Great Roll.** See *Clerk of the Pipe.*

**Records;** the contents of any register. In Scotch law language the term is usually applied to the public register for deeds, instruments, and probative writings of every kind. The Scottish system of public records and registration merits particular attention, as affording the means whereby publicity is given to the state of the titles to heritable property, and as being productive of other important practical benefits. The subject may be digested as follows:—

1. *Of Royal Grants.*—All royal grants derive their effect from the appending of the seal, set apart for the different species of deeds (see *Seals*); and at the office where each of the seals is appended, the precepts or warrants of the grant are left to be preserved. In some of these grants of greater importance, as the crown charter, there are several records. Thus, the first warrant is a signature authorised in the Exchequer, which becomes a warrant for a precept under the signet, directed to the keeper of the privy seal, who again issues a precept for a charter to the keeper of the great seal; and at the office where each of those seals is attached, the warrant is left; and the charter being completed, and the seal appended, the privy seal warrant remains as the authority on which the charter is given out. In this manner there are passed, and preserved at the different offices, the warrants of all grants from the Crown. See *Charter.*

2. *Decrees of Court.*—The proceedings in the different courts are preserved by the clerks of court, and become the warrants of the decrees which are issued, and which con-

tain a warrant for the diligence or execution of the law to enforce the decree of the judge. See *Evidence. Decree. Diligence.*

3. *Of Deeds.*—All deeds may be recorded in virtue of the clause of registration, whereby the grantor consents to the deed being registered, and to judicial authority being interponed, as if a decree in terms of the deed had actually been pronounced; for which purpose he also grants a mandate to persons whose names are left blank, to act as his procurators in this matter. See *Decree of Registration.* Even where a deed does not contain a clause of registration, as it is called, it may be recorded as a probative writ, under authority of the act 1698, c. 4. See *Evidence.* Where there is a clause of registration, the principal deed is retained in the record, and an attested copy or extract, as it is called, authenticated by the clerk, and authorising diligence (when the clause of registration authorises diligence), is given out. There is besides a copy of the deed entered in a book, to which there is an index. Where the deed has no clause of registration, it is recorded as a probative writ merely, and the principal deed marked by the clerk, and returned with a certified copy, as well as a copy kept in the record. See *Extract. Evidence. Registration.*

4. *Of Diligence.*—The diligence of the law may be directed against the heritage or the person of the debtor. In the former case it is necessary to show the burdens affecting land; and accordingly the diligences affecting that species of property are carefully recorded, and the validity of the diligence made to depend on the regularity of the registration. The adjudication is recorded in what is termed the Register of Abbreviates. See *Abbreviate.* The inhibition has a register peculiar to itself. Personal diligence is also recorded, because formerly the escheat fell on denunciation; and the form is still continued, although the principal reason no longer exists. See *Diligence. Adjudication. Inhibition. Horning. Denunciation.*

5. *Of Heritable Rights.*—The registration of heritable rights was, after several unsuccessful attempts, at last established by the act 1617, c. 16, which provides for the registration of "reversions, sasines, and other writs." By this statute a public register for those deeds is established; and it is thereby expressly enacted, that all instruments of sasine shall be registered within sixty days after their date, otherwise they are to make no faith in judgment against third parties; but without prejudice to their being used against the sucken and his heirs. This act does not extend to instruments of sasine, &c., in burgage property, which are regulated by the statute 1661, c. 11. See *Burgage. Doquet.*

Instruments of resignation *ad remanentiam* must also be recorded within sixty days of their date; 1669, c. 3. As to the use of the minute-book as part of the record of heritable rights, see *Minute-Book*. The instrument, after being recorded, is returned with a certificate by the keeper of the record, specifying the book and page of the register where it is to be found. And extracts from this record make faith in all cases, except where the writs so registered are offered to be *improven*; 1617, c. 16. In competitions, the date of the registration, not of the instrument, is the criterion of preference. This record shows the extent of the burdens or limitations on heritage; and the minute-book facilitates a search for the contents of the record. In this way, and by the records of real diligence, the commerce of land is rendered secure. *Ersk. B. ii. tit. 3, §§ 39, 40; Stair, B. iv. tit. 33, § 4; More's Notes, p. li.; Bank. ii. 496, et seq.; Bell's Princ. §§ 67, 772, 843, 879, 1741; Illust. § 1772; Kames' Stat. Law. Abridg. voce Registration; Watson's Stat. Law, voce Registration; Hunter's Landlord and Tenant; Sandford on Entails; Bell on Purchaser's Title, 70-1, 234, et seq.; Hutch. Justice of Peace, i. 73; Tait on Evidence, 160-1, 173, 184, 192, et seq.; Brown's Synop. voce Registration, and pp. 1173, 1717, 2338, 2742; Bell on Leases, i. 267-9; ii. 20; Shaw's Digest, pp. 487, 560; Ross's Lect. i. 92, et seq. See Sasine. Minute-Book, and authorities there cited. Search of Inrocurances. Erasures. Doquet.*

6. *Of Entails*.—Deeds of entail are, by the act 1685, c. 22, ordered to be recorded in a special register, at the sight of the Court of Session, who are to interpose their authority; and this recording is necessary in order that the deed may have the benefit of the statute. A new register was accordingly established, in which the whole deed of entail, with all its conditions and restrictions, is ordered to be engrossed. There is no time prescribed within which this registration must be made; but without such registration, the deed has not the privilege of an entail; and the most remote heir in the substitution is allowed to insist for having the deed recorded. See *Tailzie*.

**Recordum**; *recordatio*; according to Skene, a report. "*Recorda summonitionis* signifies the rehearse, report, or testification of the execution of the summons, brieve, or other precept, which execution is now called indorsation. *Recordum curiæ* signifies the report, rehearsal, or minute of that which is done in court, or the interlocutor of the court." *Skene, h. t.*

**Recourse**; is the right competent to an assignee or disponee, under the warrandice of the transaction, to recur on the vendor or

cedent for relief, in case of eviction or of defects inferring warrandice. See *Warrandice. Actio Redhibitoria. Excambion*. The term *recourse* is also applied to the right which the holder of a bill of exchange has to recur on the drawer and indorsers, should the drawee fail to make payment. *Ersk. B. iii. tit. 2, § 27; Bank. i. 365, 407, 578; Bell's Com. ii. 404, 424-7; Bell's Princ. § 339; Thomson on Bills, 162, 442, 459. See Bill of Exchange.*

**Recovery**. In the English law, a recovery is the effect of a sentence by which, in a suit instituted for the recovery of an estate claimed by the party, judgment is given that he shall recover it according to his claim. This was an expedient formerly resorted to in England, in order to get rid of the fetters of an entail. A fictitious process was instituted against a tenant in tail, in which the demandant or recoverer obtained judgment for the lands, upon a secret confidence that, on the recovery being completed, he would reconvey them to the party in fee-simple. By a recent statute, fines and feigned recoveries are abolished, and tenants in tail are enabled to make an effectual alienation by any deed to be enrolled in Chancery, by which a tenant in fee can convey; 3 and 4 Will. IV. c. 74. See also *Tomlins' Dict. h. t.; Sandford on Entails, 28. See Fine.*

**Recrimination**. Bankton, B. i. tit. 5, § 128, and Balfour in his *Practicks*, hold the plea of recrimination—viz., that the pursuer also has been guilty of adultery—to be a good defence against an action of divorce for adultery; but the contrary doctrine is now established in the law of Scotland. Recrimination, however, may be made the ground of a counter action, in which case it only affects patrimonial interests. The Court, before pronouncing judgment, generally allows the defender a reasonable time for insisting in a counter action, when an act of adultery is alleged to have been committed by the pursuer. When both parties are found guilty, both are divorced; but there is no such thing as allowing the guilt of the one party to stand as a compensation for that of the other. *Ersk. B. i. tit. 6, § 45, Note by Mr Ivory; Bell's Princ. § 1535; Illust. § 1533; Lothian's Consistorial Prac. 166. See Divorce.*

**Rector**; in the Episcopal Church, one who has the charge and cure of a parish church. *Ersk. B. i. tit. 5, § 9; Tomlins' Dict. h. t. See Vicar.*

**Reddendo**; is the technical name of a clause indispensable to an original charter, and usually inserted in charters by progress. It takes its name from the first word of the clause in the Latin charter, *Reddendo inde annuatim, &c.*; and it specifies the feu-duty or other services which have been stipulated to

be paid or performed by the vassal to his superior. *Ersk. B. ii. tit. 3, § 24; Stair, B. ii. tit. 3, §§ 15 and 29; tit. 4, § 7; Bank. i. 548; Bell's Com. ii. 272; Bell's Princ. § 762; Bell on Purchaser's Title, 278; Bell on Leases, i. 9, 22; Ross's Lect. ii. 160, 290. See Charter.*

**Redeemable Rights;** are those conveyances, in property or in security, which contain a clause, whereby the grantor, or any other person therein named, may, on payment of a certain sum, redeem the lands or subjects conveyed. It is in this form that securities for debt are usually given.

1. *Redeemable Rights.*—Prior to the Reformation, at which time the taking of interest was unlawful, all loans of money, and the like transactions, were conceived in the form of temporary sales of land, or purchases of rent; the former were termed *wadsets*, the latter *annualrent rights*. The wadset was a fair exchange of the estate for the use of the money; and where the estate and the money advanced were commensurate in value, and the creditor took the lands in return for the advance, it was termed a proper wadset. Where, again, the creditor was secured in the full amount of his debt, whatever the return of the estate might be, it was termed an improper wadset. The proprietor, during the possession of the wadsetter, was feudally divested; and his only way of returning to his possession was by redeeming the wadset, in terms of the clause of redemption which the deed contained. This form of security is now hardly known in practice. See *Wadset*. The annualrent right was a sale of a certain annual rent out of the estate, secured by sasine; in which last respect chiefly it differed from the English rent charge. It was redeemable on payment of a certain sum. See *Annualrent Right*. After the Reformation, when the taking of interest was made lawful, a personal obligation was inserted in the annualrent right, and, in security of the debt, the creditor was infest in an annualrent. This led to the introduction of the modern heritable bond, consisting of a personal obligation of an annualrent right, and of an infestment in security of the principal sum, interest and penalty. The superiority of the heritable bond to the annualrent right is obvious; since, under the annualrent right, nothing could be drawn from the estate but the interest of the debt, while the heritable bond covers not only the interest, but all the remainder of the rents, in payment of the principal. Hence, the annualrent right was superseded in practice by the heritable bond. The most remarkable difference between the wadset and the modern right in security is, that the wadset divests the proprietor, whereas the right in security leaves the right of property in the debtor; in so much, that an herit-

able bond may be granted by a superior over his feu-duties without his being held to have thereby interposed a superior between himself and his vassal. Hence, the discharge of the debt, thus heritably secured by the modern right in security, puts an end to the security, and disencumbers the lands of the debtor. See *Burdens*.

2. *Rights of Reversion.*—These rights must be exercised within forty years from the term at which the proprietor is allowed to redeem; unless the right of reversion enters the sasine as a qualification of the right of property. This power has been used to complete the right of an heir. When, for example, one member of a series of heirs has disappeared, and it is uncertain whether he be still in life, in place of inserting his name in the destination, a power of redeeming may be given to him, in the event of the succession opening to the heir he is meant to precede; and by this means the confusion and uncertainty which would arise, were he called in as an heir, is avoided. *Stair, B. ii. tit. 3, § 22; tit. 10, § 15; B. iv. tit. 5; More's Notes, p. cclxii.; Ersk. B. ii. tit. 8; Bank. ii. 122; Bell's Com. i. 705; Bell's Princ. §§ 900–5, 1131, 1774; Kames' Princ. of Equity (1825), 243–8; Kames' Stat. Law Abridg. voce Redemption; Brown on Sale, 429; Bell on Purchaser's Title, 159; Brown's Synop. voce Redemption; Ross's Lect. ii. 359, et seq.; Jurid. Styles, 4th ed. i. 590; Dundas, June 11, 1836, 14 S. & D. 951. See Adjudication. Poinding the Ground.*

**Redemption.** The order of redemption is prescribed by the clause of redemption in the redeemable right. See *Premonition*.

**Redhibitoria Actio.** See *Actio Redhibitoria*.

**Reduction, and Reduction-Improbation.**

The action of simple reduction and the action of reduction-improbation are the two varieties of the rescissory actions of the law of Scotland. The object of this class of actions, which are peculiar to the Court of Session, and cannot be competently sued in an inferior court, is to reduce and set aside deeds, services, decrees, and rights, whether heritable or moveable, against which the pursuer of the action can allege and instruct sufficient legal grounds of reduction. In the simple reduction the summons, like all rescissory summonses, commences with the Will, whereby the messenger-at-arms is authorised to summon the defender to appear in Court at the instance of the pursuer, and to bring with him the deed, writing, or decree sought to be reduced, in order to its being set aside by a decree of the Court. The summons then sets forth, articulately, the several reasons of reduction; and as the document called for is assumed to be in the hands of the defender, or at least not in those of the pursuer, who cannot therefore be supposed to be fully aware of all its defects, the first reason

of reduction sets forth that the document is vitiated and erased *in substantialibus*, that it is not duly stamped or authenticated, and so forth, and that it is otherwise defective in the legal solemnities. The object of this reason of style is to cover any defects or informalities which may be found to exist when the document is judicially produced by the defender. But in the ordinary case, the other reasons of reduction are those on which the judicial contest is to turn; and they necessarily depend on the special circumstances of each particular case. The conclusions of the summons are, that for the reasons therein stated, and for others to be proponed at the discussion, the document called for ought to be reduced and declared, by decree of the Court, to have been *ab initio*, and to be now, and in all time coming, void and null, and that the pursuer should be restored thereagainst *in integrum*. The summons in the ordinary case also contains the proper petitory conclusion consequent on success in the reductive conclusions—*e.g.*, repetition of sums intromitted with in virtue of the reduced deed; or mails and duties of lands wrongfully possessed; or count and reckoning, or the like. And the certification is, that if the defender fail to appear and to produce the document called for, or to assign a sufficient reason to the contrary, the Court will reduce, decern, and declare in conformity with the conclusions of the summons. The summons of reduction-improbation, in its general structure, does not differ essentially from a simple reduction. But the action being appropriated to cases where falsehood and forgery are alleged against the deed or document called for, and the conclusion in point of form being not only that the writ should be reduced and “improven” as false and forged, but that the forgers and users thereof should be punished, the action must be raised with the Lord Advocate’s concurrence; which is obtained as a matter of course. See *Concourse*. Where falsehood and forgery are alleged, the action must be an action of reduction-improbation; but in other cases it is frequently optional to the pursuer to proceed by simple reduction or by reduction-improbation. One advantage of the reduction-improbation is, that if the defender fail to appear, and decree of certification *contra non producta* be pronounced, the effect of that decree will be to hold the writ as forged and fabricated, and this decree will hardly be recalled, even although it has been pronounced in absence; whereas in the simple reduction, the certification is merely that the deed called for will be held as void, until produced; so that at any time before extract, this last decree of certification may be opened up by the defender presenting a reclaiming note, in consequence of

which he will be reponed, on payment of the usual trifling sum of expenses. On account of this difference between the certification in the one action and in the other, decree of certification *contra non producta*, even in absence, is not pronounced *de plano* in a reduction-improbation. Where the defender does not appear, the case is first continued for a week; and then, when decree of certification is at last pronounced, it cannot be extracted for four weeks. But the defender may reclaim to the Inner-House within twenty-one days after the date of the interlocutor thus pronounced, and may be reponed in the usual way, if he accompany his reclaiming note with the writs called for, or be in circumstances to account for his failure to appear sooner to plead some valid defence. See *Certification*.  
*Reponing.*

There is nothing peculiar in the *inductia* or execution of the summons, either of simple reduction or of reduction-improbation. These summonses are called in the usual manner (*vide Calling of a Summons*); but, according to the former practice, actions of this class were what were called Inner-House processes; and hence, as soon as the writ or document called for was judicially produced, the Lord Ordinary made great avizandum with the process to the Inner-House. A petition was then presented to the Division of the Court to which the cause belonged, praying for a remit to the Lord Ordinary to discuss the reasons of reduction. This circuitous process, however, was put an end to by the Judicature Act, 6 Geo. IV. c. 120, § 27, whereby it was enacted, that all rescissory actions, except reductions of decrees of the Court of Admiralty (now abolished), in maritime causes, should, from and after 11th November 1825, be enrolled and continue before the Junior Lord Ordinary, without being taken by avizandum to the Inner-House, and thence remitted for discussion; the Lord Ordinary having power, however, to remit such actions *ob contingentiam* to another process depending before the Inner-House, or before any other of the Lords Ordinary. Where the defender, in an action of reduction, takes out the summons to see, he is entitled, as in other cases, to retain it for thirteen days, as explained (*voce Calling of a Summons*); but if he mean to defend the action on its merits, it is not necessary for him to lodge defences at this stage of the cause. On the contrary, he merely returns the summons, which implies that he means to *satisfy the production*, as it is expressed; *i. e.*, to produce the document called for, and to contest the reasons of reduction. In that case, the pursuer enrols the action in the weekly printed roll; and, on its being called, the defender, in the ordinary case, takes a day to satisfy the production, usually

at the distance of ten or fourteen days; and on the production being satisfied, the case is again enrolled, and an interlocutor pronounced, holding the production as satisfied, and appointing the defender, at the distance of eight or ten days, or at such other time as the Lord Ordinary may appoint, to lodge his defences on the merits. In these defences, the reasons of reduction will be met; and thereafter the record is made up, in the ordinary case, in the usual manner. By appearing and taking a day to satisfy the production, the decree of certification, pronounced on his failing to satisfy the production, is held as a decree *in foro*, against which the defender cannot be reponed except by a reclaiming note within twenty-one days, as in other cases of Outer-House interlocutors *in foro*. Where, however, the defender satisfies the production and then withdraws and lodges no defences on the merits, the decree of reduction is held as a decree in absence. See the case of *Macdonald v. Brown*, March 3, 1835, 13 S. 594.

Where, again, the defender means to object to the pursuer's title, or to plead an exclusive title, or to maintain any other defence in bar of satisfying the production, he must return *preliminary defences* confined to these points alone; which defences will be disposed of either by making up a record (*Clyne*, 20th Nov. 1835, 14 S. & D. 31), or by reserving them for consideration along with the defences on the merits, as the case may be. The provision in the Act of Sederunt 11th July 1828 is, "that if the defender is to object to the title of the pursuer, or to plead on an exclusive title, or to state any other objection against satisfying the production, he shall return defences confined to these points; but if otherwise, no defences shall be given in at this stage of the proceedings; declaring always that it shall be competent to the Lord Ordinary, on cause shown, though no defences should be given in at this stage, to reserve all objections to the title till the cause shall be heard on the merits, and the Lord Ordinary shall dispose of such objections in terms of the act" 6 Geo. IV. c. 120, § 5; *A. S. 11th July 1828*, § 36. In the case where no preliminary defences have been returned, it shall then "be held, unless in the particular cases where the pursuer himself must produce the writs called for, that the defender is to satisfy the production; and he shall be bound to take a day to satisfy accordingly, unless he shall be reponed by the Court on producing his (preliminary) defences;" and as "soon as the production is satisfied, the Lord Ordinary shall prepare the cause for disposing of the reasons of reduction, by appointing defences, after which the record shall be made up as in the case of an

ordinary action;" *A. S. 11th July 1828*, § 51. The remaining regulations of the same Act of Sederunt are, that a printed copy of the defences on the merits must be delivered by the defender's agent to the Lord Ordinary's clerk at the first enrolment of the cause after the lodgment of the defences (§ 37), and that "if the pursuer finds it necessary to add any further reasons of reduction to those contained in the libel, it shall be competent for him, before the record is made up, to state the same as an amendment of the libel; but in that case he shall furnish the opposite party with a copy of the amendment forty-eight hours before giving it into process, and pay such expenses as the Lord Ordinary shall think reasonable, and the defender shall give in defences applicable to the said amendment;" *A. S. § 61*. Such rescissory actions as must be sent *de plano* to the Jury Court are enrolled in the regulation-roll only; and every process of reduction belongs to that Division of the Court to which the clerk is attached in whose office the process is lodged; *A. S. § 35*. As to the regulations in those cases where articles improbatory and approbatory were required by the former practice, see *Articles Improbatory and Approbatory. Abiding by*.

The provision in the Court of Session Act, 13 and 14 Vict. c. 36, 1850, is, that if the defender is to object to the title of the pursuer, or to plead an exclusive title, or to state any other objection against satisfying the production, he shall in the first instance lodge defences confined to those points, and the form of such defence in the procedure thereon shall be the same as in the case of peremptory defences in an ordinary action; and if the defences so lodged shall be repelled, the defender, after the production has been satisfied, shall give in defences applicable to the grounds of reduction, and upon the merits of the reduction, and a record may be made up as in any ordinary action.

Some practical points connected with actions of reduction deserve attention. (1.) As to the *title to pursue*, it seems to be settled that a pursuer cannot call for production and reduction of any writings except those flowing from himself, or from his predecessors or authors with whom he can connect a title, although it is not invariably necessary that he should be served heir. Apparency is a sufficient title to pursue an action of reduction on the head of deathbed, whether the pursuer be heir of line, or heir-male, or heir of tailzie or provision; and apparency is also a good title, where, from the nature of the subject, there can be no general service. The creditors of an apparent heir may also pursue a reduction on the head of deathbed, and even,

as it would seem, without previously adjudging the right to reduce. The Crown's donor, as *ultimus hæres*, is also entitled to pursue such a reduction; but it has been held that the creditors of a defunct cannot pursue a reduction of a discharge granted by the deceased debtor on the ground of fraud and circumvention, without having first vested themselves with the *jus actionis* competent to the deceased; *Rodger*, 2d June 1831, 9 *S. & D.* 671. See the cases on this subject digested in *Shand's Prac.* ii. 619, *et seq.* See also *Adjudication on Trust-Bond.* (2.) It is sometimes difficult to determine in what cases an action of reduction is necessary, as to which the only general rule seems to be, that where the deed is *ipso jure* null, that nullity may be pleaded by way of exception, as in the case of a deed by a pupil, or by a minor having curators without their consent, or where the deed of the minor is in favour of his curator, who cannot be *auctor in rem suam*. On the other hand, where there is no *ipso jure* nullity, but where the deed is merely *voidable*, an action of reduction is necessary; as, for example, in the case of all deeds executed by a minor, even with consent of his curators, which, within the *quadriennium utile*, are reducible on the head of minority and lesion. So also the deeds of an interdicted or inhibited party, or deeds flowing *a non habente potestatem*, or executed on deathbed to the prejudice of the heir, or deeds voidable as frauds against creditors under the bankrupt statutes or at common law, all require to be reduced. And, generally speaking, all deeds, writings, instruments, or executions *ex facie* formal and regular, must be set aside by way of reduction, however pregnant the proof of error may be. In the case, however, of informal executions and the like, where the objection is apparent *ex facie* of the document, it is pleadable by way of exception. See on this subject, *Sommerville and Co.*, 26th Nov. 1829, 8 *S.* 136; *Russell*, 27th Nov. 1827, 6 *S. & D.* 133; *Gibb and Macdonald*, 1st June 1827, 5 *S.* 739; *Ramsay*, 13th Dec. 1828, 7 *S.* 193. (3.) It is now a settled rule, that the pursuer of an action of reduction, or of reduction-improbation, is entitled to sue the party in possession under, or availing himself of, the deed or right under reduction, without calling his author, "leaving it to the defenders to cite their authors, or to intimate to them their distress, as they think fit;" *A. S.* 15th Feb. 1723, made perpetual by *A. S.* 19th Feb. 1742. See also *Elliot v. Wilson*, 9th Feb. 1825, as reported in *Fae. Coll.* (4.) Final decrees of inferior courts, where not protected by statute, are reducible even before extract. In like manner, the interlocutors of an inferior judge may be reduced,

although the merits of the case have not been exhausted; *Boyd*, 19th Jan. 1825, 3 *S.* 444; *Campbell*, 3d Dec. 1825, 4 *S. & D.* 264. So where an inferior court decree can be put in execution without being extracted, reduction has been held a competent form of review, though no extract be taken; *Jack*, 11th March 1837, 15 *D.* 883; but see *Couitts*, 5th Dec. 1835, 14 *S.* 110; *Buchanan*, 20th May 1837, 15 *D. B. & M.* 958, and *Brown*, 23d May 1837, 15 *D.* 977. Where a defender has been assoltized in an inferior court, and the decree has been extracted, the pursuer has no means of redress except a reduction. In some cases, however, the pursuer was not allowed to reduce such a decree, except upon payment of the previous expenses; *Smith*, 9th March 1826, 4 *S.* 538; although this rule is not invariable. See *Kirk*, 6th July 1827, 5 *S.* 905. (5.) Certain actions of reduction are appropriated for trial by jury; such are, reductions on the head of furiosity and idiocy, of facility and lesion, or of force and fear—6 *Geo. IV.* c. 120, § 28; and such actions, on coming into Court, are enrolled in the regulation-roll only—*A. S.* 11th July 1828, § 35. (6.) As to satisfying the production, the general rule is, that the defender must produce the writings called for; but to this rule there is an exception, where the defender has not and never had the writings, and where he does not represent one bound to have produced them. Where, again, the writings are *in publica custodia*—*e. g.*, of the Court itself—the defender is required to do no more than lodge a note of the dates of the decrees, or of recording the writs. He is not bound to procure extracts at his own expense; but if the defender be in possession of an extract of the deed or decree called for, the production of such extract will satisfy the production, even in a reduction-improbation. If, however, the deed has not been recorded until after the raising of the action, an extract, although sufficient in a simple reduction, will not suffice in a reduction-improbation; and if the original deeds be required from the record, it is the duty of the pursuer to make the requisite application to the Court to have them transmitted, although, in a simple reduction, such an application will not be granted *in initio litis*; *Alison*, 5th March 1829, 7 *S.* 552. Where the deed is recorded in the books of an inferior court, an extract does not satisfy the production. Indeed, it is only where the deeds are recorded in the books of Council and Session that an extract or a note of the dates of recording will satisfy the production. The register of the great seal, or of Chancery, has no such privilege; and if the deed be recorded in the register of *probative*

writes merely, the original, which in that record is not retained by the keeper, but returned to the party, must be produced to satisfy the production. The warrants of a decree cannot be called for after twenty years; but within that time the defender must produce these warrants, even although in *publica custodia*. These warrants consist of the various steps of process which remain in the clerk's hands, and letters of general and special charge, where such have been required. See *Grounds and Warrants*. A decree of proving the tenor obtained *in foro* will satisfy the production; and it appears formerly to have been the practice to allow actions of proving the tenor to be repeated *incidentor*, in order to stop decree of certification. See *Shand*, ii. 632, and cases there cited. Where, from the nature of the case, there is actually no production to satisfy—*e. g.*, where a reduction is brought of a transaction which has been carried through verbally—the defender satisfies the production by lodging an inventory, giving a short narrative of the transaction sought to be set aside; *Beveridge*, i. 396. And where the reduction is of a service, in which the question is whether the inquest did right in serving the defender, it is competent to him to lead evidence in addition to the *ex parte* evidence originally laid before the inquest; *Cochrane*, 17th Dec. 1824, 3 S. & D. 411. (7.) The rules as to abiding by a deed against which forgery is proposed are explained under the articles *Abiding by*, and *Articles Improbatory*. But improbation may also be proposed in certain cases by way of exception—*e. g.*, where forgery is pleaded in defence, or as a reason of suspension. In that case, a minute signed by counsel, alleging forgery, and proposing improbation, is lodged in process, accompanied by an offer to consign L.40 Scots, to be forfeited if the allegation prove groundless. The pursuer or charger is then ordained to appear and abide by the deed, *sub periculo falsi*, as elsewhere explained (voce *Abiding*); and although the rule as to consignation is not observed where improbation is proposed in a reduction, it is still in observance where it is pleaded by way of exception. After the minute is lodged, an interlocutor will be pronounced, ordering consignation of the L.40 Scots in the clerk's hands, and granting commission to take the party's abidance, and in other respects the action will proceed as when forgery is pleaded in a reduction. And here the maxim *exceptio falsi est omnium ultima* applies; the import of which is, that if falsehood or forgery be once proposed, no other nullities—*e. g.*, extortion, want of statutory solemnities, or the like—are pleadable. This rule has no place, however, where improbation has been unsuc-

cessfully proposed by way of action; for if a party be afterwards sued on the document which he has failed in "*improving*," he may plead other defences without being met by the plea of competent and omitted. See on this subject generally, *Shand*, ii. 651, and cases there cited. See also *Articles Improbatory*. (8.) Where a reduction is to be insisted in by one of the parties to a depending litigation against the other, in aid of a plea in the suit, it is sufficient to repeat a reduction *incidentor* by lodging a signeted summons of reduction in the depending process. But a summons thus repeated *incidentor* can go no farther than to affect the claim of the party in the particular action in reference to which it has been repeated; *Shand*, ii. 652. See *Repeating a Summons*. (9.) The effect of a decree of reduction is, that the deed thereby reduced ceases to be of any effect against the party who has obtained it. But no party not in right of the party who has obtained the decree can found on it. Hence, where, either in a simple reduction or in a reduction-improbation, a deed has been found null, the Court will not order it to be cancelled. Where, however, it has been found false or forged, it is cut down to all intents and purposes, and will be ordained to be destroyed, as soon as the forger or user has been tried and convicted; *Shand*, ii. 654. (10.) Inferior courts can only judge incidentally, in the improbation of writs or executions, in processes there depending; and that only where the objection is pleaded by way of exception or reply. And even to this extent, it is only where the writings are challenged by direct proof that inferior courts can entertain the exception of improbation. Indirect proof is the proper subject of an action in the supreme civil or criminal court; *Shand*, ib. 655, and authorities there cited. See on the subject of this article generally, *Stair*, B. iv. tit. 20; *App.* § 8; *More's Notes*, p. xlv., cccxiii.—xxiii.—lxxx.; *Ersk.* B. iv. tit. 1, § 19; *Bank.*, ii. 637, et seq.; *Bell's Com.* i. 134; ii. 205, 476, 252; *Bell's Princ.* § 2255; *Kames's Stat. Law Abridg.* h. t.; *Darling's Session Prac.* ii. 373, et seq.; *Macfarlane's Jury Prac.* 26, 72; *Brown's Synop.* h. t., and pp. 360, 1547, 2551; *Tait on Evidence*, 196, 201; *Jurid. Styles*, iii. 11, 211, 244, 252; *Thomson on Bills*, 199, 613, 683, 716; *Ross's Lect.* i. 488.

**Reduction Reductive.** An action of reduction reductive, is an action in which a decree of reduction, which has been erroneously or improperly obtained, is sought to be reduced. In such actions, the decree of reduction and its grounds and warrants are usually called for, in order that, when the decree of reduction *reductive* has been pronounced, the parties "may join issue upon the original



proceedings, just as if the decree reduced had never been pronounced or extracted." The procedure in such actions is in all respects similar to that in ordinary actions of reduction. *Beveridge's Form of Process*, i. 393; *Shand's Prac.* ii. See *Reduction*.

**Re-Exchange.** See *Exchange*.

**Reference.** See *Arbitration*.

**Reform Act.** The following are the principal provisions of the act 2 Gul. IV. c. 65, intituled, "An act to amend the representation of the people in Scotland," and of 4 and 5 Will. IV. c. 88, and 5 and 6 Will. IV. c. 78, introducing certain amendments upon the Reform Act. That there shall be fifty-three representatives of Scotland in the House of Commons, instead of forty-five—thirty for counties, several or conjoined, and twenty-three for burghs and towns; § 1. Directions for the combination of certain burghs and towns, and of certain counties with each other, or parts of each other, and a description of the boundaries of the several towns, are contained in the following sections and schedules therein referred to; §§ 2, 3, 4, 5. No one can acquire the right to vote in the election of members of Parliament who does not possess the qualifications required in the act, except those who, on 17th July 1832, were entitled to be put upon, or were already lawfully upon, the roll of freeholders of any shire in Scotland, or who, before March 1831, had become owners or superiors of lands affording the qualification to vote; in which case there is an alternative vote to a liferenter and fiar so qualified; § 6. The act 5 and 6 Will. 4, c. 78, § 10, provides, that the vote of any fiar of a freehold qualification whose rights are here preserved to him, shall be taken by the sheriff on a paper apart; and shall not be reckoned in casting up the votes where the liferenter has voted. The following classes of persons are under legal incapacity to vote, a personal disqualification which extends both to county and burgh claimants: Scotch peers, minors, lunatics, idiots, women, aliens, &c.; but the eldest sons of Scotch peers, who were formerly under disability, may now both vote and be elected, if otherwise qualified. Sheriffs, sheriff-substitutes, sheriff-clerks, depute sheriff-clerks, town-clerks, and depute-town-clerks, can neither vote nor be elected, nor act as agents for the candidates in their respective counties and burghs; §§ 36, 37.

**County Qualifications.**—The act declares the following persons qualified to be registered and to vote in the election of members for counties: Every one not under legal incapacity, who has been, for at least six calendar months previous to the last day of July in the year in which his claim of registration is to be

determined, the owner (though not infest) of any lands, houses, feu-duties, or other heritable subjects (except heritable securities) within the shire, yielding or capable of yielding to the claimant, after deducting feu-duty, ground-annual, or other consideration burthening his right, the yearly value of L.10, provided he is in actual possession of the subject, or in receipt of the profits and issues thereof to the said extent, although payable at longer intervals than once a year. Every one acquiring within the said six months, by inheritance, marriage, marriage-settlement, or *mortis causa* disposition, or by appointment to any place or office, property which would qualify as above, is entitled to be registered on the first occasion after his acquisition; § 7. This clause as to property acquired "by appointment to any place or office" has given rise to considerable doubt. See *Minister's Right to Vote*. *Schoolmaster's Right to Vote*. *Fiar*s are not entitled to vote, but liferenters and every joint proprietor, whose interest is worth L.10 a year, are qualified; § 8. A tenant in lands, houses, or other heritable subjects, may be registered, who has held during the said twelve months previous to the last day of July, whether in his personal possession or not, on a lease, missive, or other written title, for not less than fifty-seven years, exclusive of breaks at the option of the landlords, or for the lifetime of the said tenant, subjects of L.10 clear yearly value after payment of rent; or on a lease of not less than nineteen years, subjects of value to the tenant, after payment of rent of L.50 a year; or where the rent is L.50, and the tenant in the personal occupancy; or where the tenant has paid a grassum of not less than L.300; the value of grain rents to be estimated by the average fiar prices of the county for the three preceding years, or the average market prices for three years where payable in other produce. Tenants succeeding to any such lease within the said twelve months are entitled to registration on the first occasion after their succession. But no sub-tenant or assignee to any fifty-seven or nineteen years' lease is entitled to be registered, unless in actual occupation of the premises; § 9.

**Burgh Qualification.**—The right of election of the members for burghs is taken from the town-councils, in whom it was formerly vested, and conferred on individuals, qualified according to the following provisions: Every person not subject to any legal incapacity is entitled to be registered, who shall have been for not less than twelve months previous to the last day of July in the occupancy as proprietor, tenant, or liferenter of any house, warehouse, counting-house, shop, or other building within the limits of the burgh or

town, separately or jointly with any other house, shop, or other building of the yearly value of L.10; or shall, though not the occupant, have been the true owner, or husband of the owner, of such premises. Provided, 1. That he shall, on or before the 20th of July, have paid all assessed taxes payable in respect of such premises, previous to 6th April then preceding. 2. That he shall have resided for six calendar months previous to the last day of July within the burgh, or seven miles of it. 3. That he shall not have received parochial relief for twelve calendar months previous to the said term; § 11. The voter's having been, during the requisite twelve months, in possession of different premises in succession, is a sufficient title of occupancy, provided he has paid the assessed taxes for them all. Every joint-occupant, whose share is of the yearly value of L.10, is entitled to vote; §§ 10, 12.

*Registration.*—No one can vote without registration, which takes place, in the case of those on the old roll of freeholders, by the sheriff-clerk transferring their names to his register of voters on the new constituency, without requiring any claim to be made; § 20. In the county registration, any other besides old freeholders must, on or before 20th July, give in a claim, subscribed by himself or his agent, to the schoolmaster of that parish of the county in which the property, or the greater part of the property on which he claims, is situated, according to a form contained in schedule (F), to be furnished for sixpence each by the schoolmaster. The time of lodging the claim to be filled up by the schoolmaster on his receiving it. Each schoolmaster makes up, immediately after 20th July, an alphabetical list of names, designations, and places of abode of claimants; and before 24th July he is to affix a copy of it to the church-door of the parish (with certain exceptions), with a notice annexed of the time at which the sheriff is to commence the examination of claims, and a requisition on those intending to object to lodge a note of objections on or before 5th August. Any one registered, or claiming to be registered, is entitled to object; and all persons, whether registered or claimants, may be objected to. The objections to be in a certain form, prescribed in schedule (H); and the objector is bound to give notice to the person to whom he objects by a copy of the objection. On or before 8th August, the schoolmaster transmits to the sheriff-clerk the whole claims and objections, with a duplicate of the list of claimants affixed to the church-door. And any claimant who thinks that his right to be registered is established by a written title, may, at any time after giving in his claim,

and previous to the 10th day of August, transmit said title, or an extract thereof, to the sheriff-clerk. On or before 12th August, these are all laid before the sheriff; and he appoints open courts to be held, between 12th August and 15th September, for deciding on claims; §§ 13 and 22. Section 13 contains the annexation of certain parishes to other counties than their own. The sheriff disposes first of the claims to which no objections have been lodged, and which have been supported by production of a written title. When satisfied, on *prima facie* evidence, of the validity of the claim, he marks upon it "Admit," with his initials, and delivers it to be entered in the register. When not so satisfied, he marks upon it "Reject," and delivers it to be kept till applied for. He next considers the claims which are objected to; and on hearing parties, or their agents, admits or rejects in like manner. No written pleadings are allowed upon claims.

By the act 19 and 20 Vict. c. 58, 1856, amending the law for the registration of parliamentary voters in burghs, the assessors of every burgh are directed to make out and publish a list of all persons entitled to vote in the election of a member for the burgh. The list contains the Christian name and surname of any such person written at full length, together with his occupation, the place of his abode, the nature of his qualification, and the name of the street and number of the house (if any), or other description of the place where the property in right of which he is entitled to vote is situated. Persons omitted from the list, or who are desirous of being registered for a different qualification than that for which his name appears in the list, may lodge a claim with the assessor, who makes up a list of such claimants. Objections to persons included in the list may be lodged by any one on the list of voters, and the assessor must make up and publish a list of the persons objected to. The sheriff holds courts for correcting and revising the lists before the 1st of September and the 1st of October, which courts may be adjourned from time to time, but no adjourned court can be held after the 30th of September in any year. The valuation-roll, made up by the assessor under the act 17 and 18 Vict. c. 91, is *prima facie* proof that the gross yearly rent or value of any subjects specified in the valuation-roll is, and has been for the year from the 15th of May in such year, of the amount set forth for the term in such valuation-roll, and also as *prima facie* proof that the persons therein set forth as proprietors, tenants, and occupants respectively, have, for the period to which the valuation applies, been such proprietors, tenants, and

occupants respectively, as therein stated. It is competent, however, to prove to the satisfaction of the sheriff or court of appeal, that the subjects are of a greater or of a less annual value than that stated in the valuation-roll. At every future election, the register of voters is conclusive evidence that the persons therein named continue to have the qualifications which are annexed to their names in the register in force at the election, and the oath of possession cannot be put to such persons. The expenses of the registration are defrayed by a rate levied along with the assessment for the relief of the poor.

*Appeals.*—The sheriff's judgment is subject to appeal, notice being lodged in writing with the sheriff-clerk to a court of the sheriffs liable to attend at the circuit of the district, or three of them—the court of appeal to be held between 15th and 25th September, and the appeals to be determined before 20th October. The Reform Act directs that the sheriffs shall remain at, or return to, the circuit-town of the district after the autumnal circuit in each year, and there hold the appeal court. But as there was a danger that the right of appeal might be defeated in consequence of the circuit-courts not being terminated in time to enable the sheriffs to hold the court, it is enacted, by 4 and 5 Will. IV. c. 88, that the sheriffs shall hold their courts without relation to the holding or duration of the Court of Justiciary. It is further enacted, by 5 and 6 Will. IV. c. 78, § 12, that the sheriffs composing the court of appeal may assemble at the different circuit-towns on such day as they shall fix between September 15th and 25th, whether the circuit-courts have been held prior to these dates or not. Where the court consists of four sheriffs, the sheriff against whose judgment an appeal is brought has no voice in its determination. In the event of the incapacity or absence of any of the sheriffs, any judge or judges appointed to the autumnal circuits in the district in which the vacancy occurs may, and are required, on the motion of any appellant or respondent in an appeal in the district, to nominate some other sheriff, or advocate of three years' standing, to attend and officiate in room of the sheriff incapacitated or absent; 4 and 5 Will. IV. c. 88, § 1. Where a sheriff is necessarily absent from any place where any duty other than that of acting as a judge of appeal is required of him, he may appoint a special substitute to act for him at such place; failing which appointment, his ordinary substitute at the place is entitled and required to act in his room. And if the office of sheriff at any time be vacant by death or resignation, when any of the duties in connection with elections (other than those im-

posed upon him as a judge of appeal) are required to be performed, the ordinary substitute at the head burgh of the shire appointed by the former sheriff is entitled and required to act until a successor be appointed and be in a capacity to act; 5 and 6 Will. IV. c. 78, § 11. The judgment of this court of appeal is final, but has no effect on any election that may have taken place before it has been pronounced, unless in so far as a committee of the House of Commons shall give effect to it; *Reform Act*, §§ 23, 25. The list, as settled by these judgments, composes the register; and only those who are upon the register can vote at an election. No oath or affirmation is necessary, except that the sheriff will, if required on behalf of a candidate, put the oath against bribery to any voter. See *Bribery Oath*. Any one whose claim has been rejected may tender his vote, which shall be entered, being distinguished from the registered votes, so that an election committee may give effect to it in a disputed election; but no scrutiny is allowed respecting votes before the returning officer; § 26.

*Polling.*—Sheriffs and town-clerks are directed to appoint polling-places, such that not more than 600 may poll at each. Voters must poll in the district where the property which gives the qualification lies. The act 5 and 6 Will. IV. c. 78, § 9, provides, that any freeholder whose rights are preserved by section 6 of the Reform Act shall be entitled to make application to the sheriff of the county, and, upon one month's notice thereof being published on the doors of the sheriff-court, to poll at all times thereafter at the polling-place for the district within which the county-town is situate. The sheriff then deletes his name from the district list, and inserts it in that for the district in which the county-town is situate. Where a far and liferenter are registered in respect of the same freehold qualification, they must both concur in the application. After such application being made, and notice published, a freeholder cannot poll in any other than the county-town district. At any contested election, the sheriff must, if required by any of the candidates, direct two or more booths, &c. for polling, to be provided at each polling-place. All polls must be taken, both at burgh and county elections, under the superintendence of the sheriff, or of a substitute or substitutes named by him; whom the sheriff is empowered to name at his own discretion, without observing the forms necessary in the appointment of ordinary substitutes receiving salaries. Each superintending substitute has the assistance of a clerk or clerks, appointed by the sheriff, with the concurrence of the candidates, if they can agree, and by the

sheriff-clerk of the county in case of their not agreeing. Each poll-clerk must have with him at the polling-place an authenticated copy of the register for that district of the shire, or of the burgh or burghs attached to each such polling-place, entitled to share in the election, alphabetically arranged; and according to this copy the votes must be taken; § 27 of *Reform Act*. By 5 and 6 Will. IV. c. 78, the sheriff may, if required by or on behalf of any candidate, or if it appear expedient, increase or alter the number, situation, or arrangement of the existing polling-places and districts, so that not more than 300 electors shall be allotted to poll in each booth or compartment, for any of the cities, burghs, or towns within his shire. And in case of such alterations, the town-clerk must forthwith make up a list of the polling-places, and cause copies to be affixed to the doors of all the parish or town churches within the town; § 3. On the requisition of any candidate, or of any elector the proposer or seconder of a candidate, the booths or compartments at each polling-place must be divided and arranged by the sheriff or his substitute, duly authorised by him, so that not more than 100 electors shall poll in each booth or compartment. The person making the requisition must pay all expenses incident to such division or arrangement. Writs are directed to the sheriff, who must, within three days, fix a day for the election, which must, in county elections, be not less than ten nor more than sixteen days after the writ has been received. The sheriff must give due intimation of the day for the election, by notices affixed on the doors of all the parish churches in the county, or burgh or burghs, according as the election is for one or other, and also, where he thinks it expedient, by advertisement in the newspaper or newspapers of greatest circulation in the county or district; 2 and 3 Will. IV. c. 65, § 28. On the day named, the writ is, in county elections, proclaimed at the market-cross of the county-town; and if there be only one candidate, the sheriff, on a show of hands, proclaims the candidate duly elected. If there be more than one, and a poll is demanded, the sheriff orders it to proceed within two days, exclusive of Sundays and Saturdays; § 29. The proceedings are nearly the same in the burgh elections under the principal Reform Act; but the act 5 and 6 Will. IV. c. 78, introduces the following modifications in the case of burghs:—Every sheriff to whom a writ for a burgh election is directed must indorse on the back of the writ the day on which he received it, and (except in the cases undermentioned) within two days must announce a day for the election, which must

be not less than four, nor more than ten days after the writ was received. But in the districts comprehending Kirkwall, Wick, Dornoch, Dingwall, Tain, Cromarty, Ayr, Irvine, Campbelton, Inverary, and Oban, the provisions of 2 and 3 Will. IV. still apply, in so far as they relate to the announcement of the day of election, and the interval to elapse between the receipt of the writ and its proclamation; that is to say, in these districts of burghs the rules are the same as those mentioned above as applying to counties. The time between the proclamation and polling in Orkney is extended to from ten to fourteen days, on account of the difficulty of communication; 2 and 3 Will. IV. c. 55, § 31. The statute 5 and 6 Will. IV. c. 78, § 5, enacts, that no poll at any burgh election shall be kept open for more than one day, between eight in the morning and four in the afternoon. Formerly, in the case of counties the polling continued for two days; but by the act 16 Vict. c. 28, 1853, it was limited as in the case of burghs to one day, from eight in the morning to four in the afternoon, except in the case of Orkney and Shetland. It is enacted by the Reform Act, that each sheriff in each polling-place take care that the attending clerk have a certified copy of the alphabetical register, and receive and record, and progressively number, the votes for each candidate, in a poll-book. The sheriff and clerk must subscribe their names to each page, before an entry is made in the succeeding one. The poll-book or books must be publicly sealed up by the sheriff and clerk, and taken charge of by the sheriff; and (in the case of a county election) on the commencement of the poll of the second day, he must publicly break the seals, and proceed as formerly. Immediately on the final close of the poll, the officiating sheriff must seal up and transmit the poll-books to the returning sheriff; § 32. The returning sheriff must, on the day next but one after the close of the poll (unless such day shall be Sunday, and then on the Monday following), openly break the seals, and cast up the votes, and openly declare the state and result of the poll; and make proclamation of the member or members chosen not later than two o'clock P.M. He must forthwith make a return, in terms of the writ, under his hand and seal, to the clerk of the Crown in England; and if the votes be equal, he must make a double return; § 33. Where the election is for one burgh sending a member or members by itself, or for a district of towns lying wholly within one shire, the poll-books are transmitted to, and the return made by, the sheriff of the shire within which the town or district is situated. Where the election is for a district or set of towns lying in

different shires, the poll-books are transmitted in the first instance to the sheriffs of the several shires, and afterwards to the returning sheriff for the district. The latter part of the 5th section of 5 and 6 Will. IV. c. 78, leaves it doubtful whether it applies exclusively to burghs, or to counties likewise; but although that the section commences with a provision exclusively applicable to burghs, the general terms of the remainder, and the fact that it is little more than a re-enactment of the 32d section of the Reform Act, seem to lead to the conclusion that its provisions apply to counties as well as to burghs—viz., that at any time after a poll has been demanded, the poll at any one place may be closed if all the candidates or their agents, and the sheriff or his substitutes, so agree; and after the poll has been closed at all the polling-places, the sheriff or his substitute may forthwith, upon receipt of the whole poll-books, and after having summed them up, make proclamation of the member chosen, at any hour not later than two o'clock P.M., without waiting for the day appointed for the declaration. Where the proceedings at any election are interrupted or obstructed by riot or open violence, the sheriff or his substitute, where it occurs, may adjourn the nomination, or the taking the poll, at the particular place or places, from time to time, until the obstruction cease, always giving notice of such adjournment to the sheriff or his substitute who is to make the return. The state of the poll cannot be finally declared, nor the result of the election proclaimed, until the poll so interrupted be closed, and the books transmitted to the returning sheriff or substitute. Where a poll takes place for a district of burghs situated in different counties, the poll-books, at the final close of the poll, must be forthwith sealed up and delivered, or transmitted by the sheriffs in charge of the polls to the returning sheriff. In case any of the poll-books of any county or burgh be not received by the returning sheriff in time to cast up the votes, and declare the election within the period prescribed by this act (5 and 6 Will. IV.), the declaration of the election must be postponed till they be received. On the day after the receipt of the poll-books (but on Monday, if they be received on Saturday), and before four o'clock P.M., the sheriff must declare the result of the election, and make proclamation accordingly.

No one not on the roll of freeholders when the Reform Act passed can vote for the county in respect of a subject within burgh, nor for a burgh in respect of a subject beyond its bounds; *Reform Act*, § 35. Provision is made for the penalties on officers acting in the execution of the statute, for breach of

duty, for the registration fee, for the expenses of clerks, booths, &c., the remuneration of sheriffs for registration, &c.; §§ 38 to 44. The functions of meetings of freeholders are transferred to the commissioners of supply; § 45. See on this subject, a useful "*Analysis of the Reform Act*," with the decisions of the Courts of Appeal, by Mr Cay, sheriff of Linlithgow; also *Swinton's Digest of Registration Appeal Cases at Glasgow*. The election of peers, and also the old law of election of members of the House of Commons, are treated of in the article *Election Law*.

**Reformation.** The change in the religious establishment of the country from Popery to the Protestant Church took place in Scotland in 1560; and, by the act 1567, c. 2, the papal jurisdiction was abolished, and the Reformed Church legally established. *Ersk. B. i. tit. 5, § 5.*

**Regalia**; are the rights enjoyed by the Sovereign. They are divided into *majora* and *minora*. Under the former are included the several branches of the royal prerogative which are absolutely incommunicable to a subject; the latter are those which the Queen may convey to any person at pleasure, as rights arising from forfeitures, bastardy, or feudal casualties. There are also certain *regalia* connected with the right of land, as forests, salmon-fishings, gold and silver mines, navigable rivers, &c. *Ersk. B. ii. tit. 6, § 13, and tit. 1, § 6; Stair, B. ii. tit. 1, § 5; tit. 3, § 60; More's Notes, p. cci; Bank. i. 546, 566, et seq.; Bell's Princ. § 748; Brown's Synop. h. t., and p. 1624; S. & D. xv. 490. See Dereliction. King. Crown Lands.*

**Regalia.** The crown, sceptre with the cross, sceptre with the dove, St Edward's staff, four several swords, the globe, the orb with the cross, and other articles used at the coronation of the kings of Great Britain, are called the *regalia*; *Tomlins' Dict. h. t.* The *regalia* of Scotland, consisting of the crown used by the Scottish kings, the sceptre, the sword of state, and a mace, supposed to have been the treasurer's mace, are deposited within the Crown Room in the Castle of Edinburgh, where they have remained ever since the union of the kingdoms of England and Scotland. They are under the charge of certain of the Officers of State appointed by the Sovereign as commissioners for keeping the *Regalia*. *Kames' Stat. Law, h. t.*

**Regality**; was originally a territorial jurisdiction conferred by the King. The lands were said to be given *in liberam regalitatem*; and the persons receiving the right were termed *Lords of Regality*. The civil jurisdiction of a lord of regality was equal to that of the sheriff; but his criminal jurisdiction was much more extensive, as he was compe-

tent to judge in the four pleas of the Crown, and possessed the same criminal jurisdiction with the Justiciary, excepting in the case of treason. An offender amenable to a court of regality might have been repledged from the sheriff, or even from the Court of Justiciary. Their jurisdictions were abolished by the 20 Geo. II. c. 50. *Ersk. B. i. tit. 4, § 7; Bank. i. 569; Bell's Princ. § 749, 2191; Kames' Stat Law, h. t.; Brown's Synop. 1144.*

**Regiam Majestatem**; the title given to a collection of ancient laws, bearing to have been compiled by the order of David I. King of Scotland. There has been a controversy about the authenticity of this work. By some it is held to be a mere compilation from the *Regiam Potestatem*, or a collection of the old laws of England, by Glanville—Craig and Stair denying that it is of Scottish origin, while Erskine differs from them; and Ross, again, maintains its authenticity. Sir Walter Scott characterises it as a treatise “compiled with the artful design of palming upon the Scotch Parliament, under the pretence of reviving their ancient jurisprudence, a system as nearly as possible resembling that of England.” And the prevailing opinion among legal antiquaries seems now to be, that as a Scottish compilation it is spurious; and that the artifice was devised by Edward I. in furtherance of his design to assimilate the laws of the two countries, and so to facilitate his conquest of Scotland. See, in connection with this subject, *Ersk. B. i. tit. 1, § 32; Stair, B. i. tit. 1, § 16, and B. iii. tit. 4, § 27; Craig, l. i. dieg. 8, § 11; Hailes' Annals, iii. 275; Ross's Lect. ii. 60, et seq.; Scott's Border Antiquities, Prose Works, vii. 30; Mr Thomson's Reports on the Records, &c.*

**Registration.** This applies properly to the registration of deeds, which may be either in virtue of a clause of registration, or under the act 1698, c. 4, as a probative writ. The clause of registration owes its origin to the churchmen, who, in order to bring causes arising from contract under the cognisance of the church courts, inserted a clause by which the party was made to consent that his whole effects should be placed under the jurisdiction of the church courts, to the effect of forcing implement of the obligations undertaken in the deed. Those clauses were so conceived, that the effects of the grantor were declared to belong to the creditor, the terms of payment of the obligation being first arrived; and as those deeds were executed before a judge, they contained from the first a decree which authorised diligence *de anno in annum* on the very term-day, should the debtor fail to implement his obligation. It is this form on which the clause of registration is modelled; it appoints a procurator,

whose name is left blank, to appear in presence of the judge, and consent to decree proceeding in terms of the obligation. Formerly, on the death of the creditor an action of registration, as it was called, was carried on at the instance of the heir; but by the act 1693, c. 15, and 1696, c. 39, summary registration was allowed on the death either of the grantor or receiver of the deed; *Ersk. B. iv. tit. 1, § 63. See Records. Decree. Diligence. Horning. Decree of Registration.*

**Registry Acts**; that body of enactments dictated by the naval policy of Great Britain, as to the enregistering of all ships which are to have the privileges of British vessels. See *Ship*. The requisites of a legal register are various, consisting, generally speaking, of proofs of the build and ownership of the vessel; of a survey of the ship by the officers of the customs; of the registry, certificate, and bond for the faithful keeping thereof.

The ownership, measurement, and registry of ships is now regulated by the Merchant Shipping Act 1854, 17 and 18 Vict. c. 104; and the numerous acts on the subject are repealed by the Merchant Shipping Repeal Act 1854, 17 and 18 Vict. c. 120. See *Bell's Com. i. 152, et seq.; Bell's Princ. §§ 1325-8; Brown on Sale, 62; Thomson on Bills, 127; Tait on Evidence, 220-8; Jurid. Styles, 2d edit. ii. 506-10; Brodie's Sup. to Stair, 948; Inglis, Nov. 19, 1833, 12 S. 67; Leslie, June 23, 1836, 14 S. 994; Abbott's Law of Shipping. See Ship. Vendition. Delivery. Navigation Acts. Mortgage.*

**Regius Professorship**; in a university, is a professorship founded by the Crown.

**Regrateris**; one who buys any merchandise or other thing, and takes “unlesumlie” greater price for the same afterwards. *Skene, h. t.*

**Regrating.** See *Forestalling. Engrosser.*

**Regress**; re-entry. Letters of regress were granted by the superior of a wadset to the wadsetter. By the wadset, the wadsetter was completely divested, and, when he redeemed the subject, he claimed an entry from the superior as a stranger—the superior being no more bound to receive the wadsetter than he could have been to receive any third party. To remedy this, letters of regress were granted by the superior, under which he became bound to re-admit the wadsetter at any time when he should demand an entry. *Ersk. B. ii. tit. 8, § 18; Stair, B. ii. tit. 10, § 12; Bank. ii. 134, et seq.; Bell's Princ. § 904; Jurid. Styles, iii. 123; Brown's Synop. 1557; Ross's Lect. ii. 334. See Wadset.*

**Rehabilitation**; *reCAPACITATION*; the restoration of a power or capacity to a person who had been previously denuded. Thus, *infamia juris* formerly disqualified a person for being

admitted as a witness; but a pardon from the King rehabilitated him in so far as concerned his admissibility. See *Infamy*. So also one who has been outlawed has no *persona standi in judicio*; but the reponing of him against the sentence of outlawry rehabilitates him in all the rights and privileges of a free subject, including the right to have a fair trial. *Hume*, ii. 264, 344; *Bank*, ii. 275. See *Fugitation*. *Evidence*.

**Re-Insurance.** An insurer or underwriter is entitled to protect himself against the dangers of his own engagement by what is termed a re-assurance, in which he insures himself against the risk he runs by his own original insurance. In this transaction, in the event of the original insurer's insolvency, the person originally insured has no interest, and he cannot recover from the last insurer in any other way than in common with the other creditors of the first insurer. A double insurance differs from re-insurance in this, that it is made not by the insurer but by the insured. Its effect is not to give a double indemnification to the insured, who can claim his actual loss only, but to give him a claim for this loss against all the underwriters on both policies, to the extent of the sums for which each is bound. The underwriters, on the other hand, are entitled to a recourse against each other, whereby the loss is allocated proportionally on the whole underwriters in both policies. A party may re-assure his policy by expressing it to be a re-assurance, provided the former insurers are insolvent or dead, but otherwise such re-assurance is prohibited by statute; 19 *Geo. II. c. 37*; *Bell's Illust.* § 503, Nos. 8 and 9.

**Rei Interventus**; is the occurrence of some circumstance on the faith of a bargain, such as the performance of an act in implementation of the bargain, or the *non-performance* of an act which, but for the bargain, one or other of the parties would have performed, whereby matters do not remain entire—*i. e.*, as they were before the bargain was made—in consequence of which the law holds that neither party is entitled to resile. To give *rei interventus* these effects, it must be known to the party against whom it is pleaded, and must have been permitted by him as flowing from the contract. *Rei interventus* may exist although *restitutio in integrum* be practicable. *Ersk. B. ii. tit. 6, § 21*; *B. iii. tit. ii. § 3, and Notes by Mr Ivory*; *Bell's Com. i. 328-9*; *Bell's Princ. § 26*; *Illust. ib.*; *Bell on Leases, i. 285*; *Hunter's Landlord and Tenant, 283-4, 337-40-41*; *Tait on Evidence. See Homologation. Lease.*

**Reif**; or robbery, is one of the four pleas of the Crown. Robbery, according to Skene, is when a man lies by the King's highway,

passing to market towns, in woods, ditches, for any other secret place where people pass, and robs and spuilzies them; and "albeit he take away but the valour of a penny or less, it is felonie; for the malapertness of the deed, breaking of the King's peace, and the danger in the quhilk a man is of his life, causes the offence to be greater than gif the geir so robbed or spuilzied had been thieftuously stolen." *Skene, h. t.* See *Robbery*.

**Rejection in Transitu.** A buyer of goods who finds himself unable to pay the price, but is not yet a bankrupt, has the power, and ought to reject, goods offered to him by a carrier or other person to whom they have been delivered for transmission; and such rejection will have the effect of restoring the goods to the seller, provided he agree to rescind the contract. The buyer, in contemplation of bankruptcy, cannot reject the goods after they have ceased to be *in transitu*, and are identified with his stock. Re-delivery, in such circumstances, would be a fraudulent preference of the seller over the purchaser's other creditors. What shall amount to delivery, to the effect of completing the transit, depends a good deal upon circumstances. It is not delivery if the goods are still on the carts at the buyer's cellar-door. It has even been decided that the buyer may take the goods into his warehouse *custodiæ causa*, and yet validly reject them, by writing to the seller that they have been taken in for his behoof. If the goods be taken only by a clerk, without special authority, they may still be rejected by his principal. It has been decided in England that an actual bankrupt has no power of rejecting goods even *in transitu*; but in Scotland it has been repeatedly said from the bench, that a bankrupt may reject goods *in transitu*, and that it would be fraud in the bankrupt and his creditors to take delivery of such goods. *Ersk. B. iii. tit. 3, § 8, Ivory's Note*; *Bell's Com. i. 232*; *Bell's Princ. § 1310*; *Illust. ib.* See *Stoppage in Transitu. Delivery*.

**Rejoinder**; in English law, the defendant's answer to the plaintiff's replication. *Tomlins' Dict. h. t.*

**Relationship.** See *Consanguinity. Cognate. Agnate.*

**Relaxation**; were letters passing the Signet, whereby a debtor was relaxed from the horn, that is, from personal diligence. They proceeded either upon errors in the diligence or on the consent of the debtor. But the necessity of letters of relaxation is superseded, as to civil debts, by the act 20 *Geo. II. c. 50*. In criminal prosecutions, one who has been outlawed may apply to the Court of Justiciary for letters of relaxation, reponing him against the sentence. *Ersk. B. ii. tit. 5, § 65*;

*Hume*, ii. 264; *Stair*, B. iii. tit. 2, § 14; B. iv. tit. 47, § 10, *et seq.*; tit. 32, § 22; *Bank*. i. 633; ii. 259; iii. 3; *Bell's Princ.* § 735; *Brown's Synop.* p. 586; *Ross's Lect.* i. 346. See *Denunciation*. *Escheat*. *Outlaw*.

**Release**; the gift or discharge of a right or action which any one has, or claims, against another or his land.) See *Tomlins' Dict. A. t.* The term is also applied to liberation from prison. See *Liberation*. *Bail*.

**Relevancy**; fitness and pertinency. The relevancy of the libel is the justice and sufficiency of the matters therein stated to warrant a decree in the terms asked. The relevancy of the defence is the justice of the allegation therein made to elide the conclusion of the libel, and to warrant a decree of absolvitor. In criminal trials, an interlocutor finding the libel against the accused to be relevant is invariably pronounced before the facts charged are admitted to proof before the jury. In civil cases the rule is different, it being frequently necessary in such cases to have the facts in question ascertained *before answer*, as it is technically expressed—that is, before determining as to the relevancy of the respective averments of the parties. *Stair*, B. iv. tit. 39, § 4; *Bank*. B. iv. tit. 25, § 4; *Ersk.* B. iv. tit. 4, § 91. As to the disposal of questions of law and relevancy in jury trials, see *Macfarlane's Prac.* 47. See *Criminal Prosecution*. *Jury Court*. *Defences*. *Record*.

**Relievium**; according to Skene, is a French word from the Latin *relevare*, to relieve or take up that which is fallen. For it is given by the tenant or vassal, being of perfect age, after the expiring of his ward, to his overlord, of whom he holds his lands by knight service—that is, by ward and relief; and by payment thereof he relieves, and as it were raises up again, his lands after they were fallen down in his superior's hands by reason of ward. *Skene, h. t.* See *Relief*.

**Relict**; a widow. A widow has a claim against the representatives of her husband for aliment corresponding to her husband's rank and fortune from the first day of her viduity to the first term at which her legal or conventional provisions are payable. She may also claim from her husband's representatives the expense of suitable mournings, and the expense attending the birth and baptism of a posthumous child. But these claims for aliment, mournings, &c., are postponed to the claims of the husband's creditors. *Ersk.* B. i. tit. 6, § 41, and B. ii. tit. 9, § 45; *Stair*, B. iii. tit. 11, § 24; tit. 8, §§ 43 and 47; *More's Notes*, cxv., cxv.; *Bank*. ii. 379; *Bell's Com.* i. 632. See *Marriage*. *Jus Relictæ*. *Terce*. *Contract of Marriage*. *Tailzie*. *Divorce*.

**Relief**; has in the law of Scotland various acceptations; as, 1. *The Casualty of Relief*; 2.

*Relief of Cautioners*; and, 3. *Relief between Heir and Executor*.

1. The *casualty of relief* is a sum exigible from an heir on his entry with the superior. It has been doubted whether this casualty be exigible from an heir in a feu-holding. But *Erskine* shows it to be a casualty common to every feudal tenure. The term "relief" is applied to this exaction, because the feu is thereby relieved or recovered from the superior by the entry of the heir. And it is the established practice to hold the heir, both in feu and blench holdings, liable in relief-duty equal to one year's feu or blench duty over and above the ordinary annual duty. *Ersk.* B. ii. tit. 5, § 47, *et seq.*; *Stair*, B. ii. tit. 4, § 26, *et seq.*; *More's Notes*, p. cviii.; *Bank*. i. 628, *et seq.*; *Bell's Princ.* §§ 715–16. See *Relievium*. *Composition*.

Where an entail has been recognised by a superior, and a composition paid by the vassal, each substitute is liable in relief only, and not in composition, on his succeeding to the estate. See the case of *Stirling v. Ewart*, Feb. 18, 1842, 4 D. 684; House of Lords, 4th Sept. 1844, 4 Bell, 128; 2 *Ross's L. C.* 340. See also the case of *Advocate-General v. Swinton*, in Exchequer, Jan. 30, 1854, 17 D. 21. When the party requiring a recognition of the entail is the heir *alioqui successorum* under the existing investiture, he is liable only in relief; but the superior is entitled to insert in the charter granted by him a reservation of his right to exact composition on a substitute requiring an entry under the entail who is not the heir *alioqui successorum* under the former investiture. See the case of *Mackenzie v. Mackenzie*, 4th July 1777, *Mor.* 15503; also *App. voce Superior and Vassal*, No. 2; also, 2 *Hailes*, 760, and 2 *Ross's L. C.* 398. See also the recent case of the *Marquess of Hastings v. Oswald*, 27th May 1859, 21 D. 871.

2. *Relief of Cautioners and of Obligants generally*.—The cases in which a cautioner is entitled to sue his principal for relief are stated in the article *Cautionary*, p. 143. The cautioner may be infest in relief of his obligation, but he is not entitled to enter into possession till he either pay the debt or be distressed for payment. An infestment in relief, or any other security, granted to the cautioner, accretes to the creditor, so that he may demand the benefit of it for the payment of his debt. A cautioner's claim of relief has been held a good warrant for arrestment. It may be stated as a general rule, that any one who warrantably takes upon himself the fulfilment of another's obligation is entitled to relief from the party for whom he interposes. Thus, if one of two co-obligants, bound only *pro rata*, pay the whole debt, he is



entitled to be relieved to the extent of the other's share. And where both are bound in *solidum* as regards the creditor, they are entitled to proportional relief *inter se*. The obligation to relieve holds in those cases likewise where a party is rendered liable to pay expenses or damages through the negligence, fault, or delict of a third party. For it frequently happens that, although the injured party may be entitled to come against the principal in the first instance, yet the principal is not bound to suffer for another's fault. *Stair*, B. i. tit. 8, § 9; tit. 15, § 8; tit. 17, § 13; *More's Notes*, p. cxiii.; *Mr Brodie's Supp.* 944; *Ersk. B. iii. tit. 3, § 65, et seq.*; *Bank. i. 463-4*; *Bell's Com. i. 347, et seq.*; *Bell's Princ. §§ 62, 255, 267, 272*; *Illust. ib.*; *Kames' Princ. of Equity (1825), 75*; *Ross's Lect. i. 77, 161, 171*; *St Ann's Distillery Company*, Feb. 7, 1834, 12 S. 407; *Coventry*, July 8, 1834, 12 S. 895. See *Cautionary. Beneficium Divisionis. Beneficium Ordinis. Discussion. Bond of Relief. Infegment of Relief.*

**3. Relief between Heir and Executor.**—This claim of relief arises where either the heir pays a debt legally payable by the executor, or where the executor pays a debt in which the heir is the proper debtor. Thus, if the heir pay a personal debt, he has relief against the executor; and should the executor have paid an heritable debt, he has relief against the heir. This reciprocal relief is not affected although the last will or other settlement of the deceased should contain a clause burdening the heir or executor with certain debts; unless such appear clearly to have been the intention of the testator, and that he has taken the legal means of expressing his intention. Otherwise, such a clause is understood to have been introduced merely in favour of the creditor, but as in no shape intended to affect the mutual rights of heir and executor. *Ersk. B. iii. tit. 11, § 48*; *Stair*, B. iii. tit. 5, § 13; tit. 8, § 65; B. iv. tit. 23, § 22; *More's Notes*, ccclix.; *Bank. ii. 293*; *Bell's Princ. § 1936*; *Illust. § 715*; *Jurid. Styles*, 2d edit. iii. 67-8. See *Discussion.*

**Religion.** Courts of justice cannot take notice of religious opinions, in order to decide whether they are right or wrong; but they may take cognizance of them as facts, with a view to determine the ownership of property; *Craigdallie*, Dec. 21, 1812, and Feb. 5, 1813, 1 Dow, 1. All persons are now admissible as witnesses, whatever their religious principles may be, provided they believe in a God and a future state of retribution. *Ersk. B. iv. tit. 2, § 23.* See *Blasphemy. Violating Sepulchres.*

**Relocation, Tacit**; is the tacit or implied

renewal of a lease, inferred where the landlord, instead of warning the tenant to remove at the stipulated expiration of the lease, has allowed him to continue without making any new agreement. This is termed *tacit relocation*. This renewal is held to be for one year; and either party may put an end to the tacit relocation by taking the requisite steps forty days before Whitsunday of any year in which the parties, or either of them, desire to bring the contract to a termination. *Ersk. B. ii. tit. 6, § 35*; *Bell on Leases*, ii. 132, *et seq.*; *Bank. ii. 103, 112*; *Bell's Princ. §§ 173, 1265*; *Illust. § 1265*; *Hunter's Landlord and Tenant*; *Hutch. Justice of Peace*, ii. 440; *Tait's do.*, *vocibus Tack, Servants*; *Ross's Lect. ii. 641.* See *Lease.*

**Remainder.** In English law, an estate in remainder is an estate limited to take effect and be enjoyed after another estate is determined. Thus, if lands be granted to A. for twenty years, and after that term to B. and his heirs for ever, A. is tenant for years, remainder to B. in fee; *Tomlins' Dict. h. t.* The distinction is somewhat analogous to that which exists between fee and liferent in the law of Scotland. See *Fee and Liferent.*

**Remembrancers**; officers of the Exchequer, whose duty it is to remind the Lord Treasurer and Court of Exchequer of such things as are to be called on, and dealt in, for the Queen's benefit. *Tomlins' Dict. h. t.*

**Remissio Injuris.** In an action of divorce for adultery, the plea of *remissio injuria*—i. e., that the pursuer has already forgiven the injury—affords, when established, a good defence. Forgiveness may be declared expressly, or by fact and deed—e. g., by the injured party cohabiting with the defender after his or her guilt was known. In order to support this defence, it is necessary to aver and to instruct that the specific guilt libelled was known to the pursuer, and that it was pardoned. Mere suspicion will not be sufficient; there must be a complete and perfect belief derived from what is considered satisfactory evidence of the guilt. If the *remissio* occurred during the course of the process, the oath *de calumnia* is complete evidence of the belief of the guilt libelled, whether it actually existed or not. The raising of the process, or the giving of instructions to counsel to prepare the summons, is also complete evidence. Personal detection or confession, or the conducting of a precognition, in consequence of which the spouses separate, affords direct evidence of the belief. Facts inferential of belief may be established *prout de jure*. A written pardon by either husband or wife is sufficient. The requisite circumstances implying pardon must be stronger on the part of the woman than of the man. Being

*solus cum sola*, or open cohabitation as man or wife, after belief in the guilt, infers forgiveness, unless the pursuer can show that the belief was destroyed by false or fraudulent representations on the part of the defender. The plea of *remissio* is not incompatible with that of innocence. It is also competent to creditors to urge this plea. *Ersk. B. i. tit. 6, § 44; Bell's Princ. § 1533; Illust. § 1531; Lothian's Consistorial Prac. 157; Shand's Prac. See Divorce. Condonation.*

**Remission.** A crime may be extinguished by a pardon or remission from the Sovereign, or it may be extinguished by an act of indemnity given by Parliament. These remissions do not prevent a private party from pursuing for damages. *Ersk. B. iv. tit. 4, § 105; Stair. B. i. tit. 9, § 7; Bank. i. 247; ii. 275. Kames' Stat. Law, h. t. See Pardon.*

**Remit.** In judicial procedure, the term remit is applied to an interlocutor or judgment transferring a cause, either totally or partially, or for some specific purpose, from one tribunal or judge to another, or to a judicial nominee, to execute the purposes of the remit. Such remits are made under various circumstances: *e. g.*, on the ground of contingency, a cause may be remitted by one Division of the Court of Session to the other, or by one Lord Ordinary to another, before whom the contingent process is in dependence. *See Contingency.* So certain proceedings which originate in the Inner-House, such as petitions and complaints, petitions for exoneration, and the like, are remitted for preparation, or in order to ascertain the facts, generally speaking, to the Junior Lord Ordinary in the Outer-House. In the Bill-Chamber, where a note of advocacy or of suspension, complaining of a judgment of an inferior court, whether interlocutory or on the merits, has been competently presented, the Lord Ordinary, on hearing parties, or on considering an answer to the bill, may remit, with instructions to the inferior judge. *See 1 and 2 Geo. IV. c. 38, 1821. See also Beveridge on Bill-Chamber, p. 70, et seq.; and the articles Advocation. Suspension.*

In addition to these remits, there are, in practice, various incidental remits made in the course of a process; such are remits to accountants to prepare states of accounts, in actions of count and reckoning, and other processes involving accountings between the parties; remits to persons of science, or of skill, to report on disputed matters of science, or as to the usage in particular trades and professions, the execution of work, and so forth; remits in rankings and sales, in multiplepointings, in teind processes, and the like, to the common agent, or to the clerk of Court, and in some cases to accountants, to prepare

states of ranking and schemes of division, or of locality; remits to the auditor of Court to tax accounts of expenses; remits to a commissioner to take a proof, or to examine havers; and, finally, remits to a judicial referee, mutually chosen by the parties, to determine the whole matters in dispute, and to report his opinion to the Court, in order that decree may be pronounced in terms of his award. In the inferior courts, as well as in the Court of Session, remits, particularly to accountants, and to persons of science or skill, are frequent; and with respect to all such remits, whether in the supreme or in inferior courts, it seems desirable that the record should be closed before the remit is made. At the same time, this rule is not inflexible, nor in all cases expedient; and hence, particularly in accountings, and similar complicated investigations, it is often of mutual advantage to the parties that the remit should be made before the record is closed. Where that course is followed, the remit is made "*before answer*," as it is expressed—that is, before pronouncing any judgment on the legal questions at issue; seeing that, before the record is closed, it is not competent to pronounce any judgment on the merits. Remits to scientific or skilled persons are frequently made on the joint nomination or suggestion of the parties; and in such cases, or where the parties make no objection to the judge's nominee, or where such objections are overruled, the report obtained on the disputed point will be held almost tantamount to the award of a judicial referee, and will not be opened up unless the objector can instruct specific errors or irregularities. *Finlay, 3d Dec. 1828, 7 S. & D. 130; Rowat, 17th Nov. 1826, 5 S. & D. 19; Dixon, 16th Nov. 1821, 1 S. & D. 145, affirmed 29th June 1825, 1 W. & S. 636; Meason, 22d Dec. 1827, 6 S. & D. 326; Halkett, 9th Feb. 1831, 9 S. & D. 412; Muir, 26th Nov. 1833, 12 S. & D. 129; Mackintosh, 1st March 1834, 12 S. & D. 518; Grant, 11th June 1834, 12 S. & D. 717. See Shand's Prac.; Macfarlane's Jury Prac. 39, et seq.; MacLaurin's Sheriff-Court Prac. 224, et seq. See Auditor. Contingency. Commission. Judicial Reference. Judicial Factor. Ranking and Sale. Locality. Report.*

**Removing of Tenants.** After the expiration of the stipulated endurance of a lease, the tenant is notwithstanding entitled to continue his possession on tacit relocation from year to year, until legally removed by the landlord. In order to authorise judicial removing, the tenant, where the lease does not provide otherwise, must be warned by the landlord to remove. The warning or notice to quit must be given forty days before the term of Whitsunday at which the removal is

to take place; or, if the term of removal be any other than Whitsunday, then forty days preceding the term of Whitsunday of that year in which the term of removal occurs. The form of the warning, and the manner of ejecting the tenant, are regulated by the statute 1555, c. 39, and by the Act of Sederunt 14th December 1756. Warning and removal under the statute is effected by a succession of cumbersome forms, commencing with a precept of warning, executed forty days before Whitsunday, against the tenant personally, or at his dwelling-place, and on the grounds of the land, and published at the parish church; which is followed by an action and decree of removing. But this form of removal is in practice almost entirely superseded by the forms prescribed by the Act of Sederunt 14th December 1756, which, where the lease contains no obligation on the tenant to remove, authorises citation to be given in an action of removing, raised before the judge-ordinary; which is a sufficient warning for a decree of removing and ejection, provided such action be called in the inferior court forty days preceding the term of Whitsunday of the year in which the removal is to take place. Where, on the other hand, the lease contains an obligation on the tenant to remove, the Act of Sederunt holds a charge on letters of horning on the registered lease, given in like manner forty days preceding Whitsunday, to be sufficient to authorise ejection within six days after the term of removal in the tack. These forms of removing are proper, according to the statute, against tenants of "lands, mills, fishings, and possessions whatsoever." But, under these expressions, urban tenements, houses in the country to which no land is attached, coal-works, mines, &c., and grass parks let from year to year, are not included—as to all of which the agreement of parties, or common law, qualified to a certain extent by consuetude, as to reasonable notice, affords the rule. *Ersk. B. ii. tit. 6, § 45, et seq.; Bell on Leases, ii. 51 and 118, in notes. See, generally, on Removing, Ersk. B. ii. tit. 6, § 45; Stair. B. ii. tit. 9, § 38; B. iv. tit. 26; More's Notes, p. cclvi.; Bank. ii. 111, et seq.; Bell's Princ. § 1267, 1278; Illust. ib.; Kames' Stat. Law Abridg. h. t.; Hunter's Landlord and Tenant; Darling's Prac. 331-5, 682; MacLaurin's Sheriff Process, 13, 78; Jurid. Styles, 2d edit. i. 675-80; iii. 14, 117-9; Bell on Leases, i. 259-65; ii. 51 to 128, 333-52; Ross's Lect. ii. 509, et seq. See Ejection. Lease. Door, Chalking of.*

By the act 16 and 17 Vict. c. 80, 1853, it is competent to raise a summons of removing at any time, provided there be an interval of forty days between the date of the exe-

cution of the summons and the term of removal. Other alterations of this law of removing are also regulated by this statute. See *Lease*.

**Remuneration.** See *Recompense*.

**Renconter; Rencontre;** a meeting. The term is applied, however, chiefly to a hostile meeting between two individuals. Erskine distinguishes a rencounter from a duel; holding the former to be a meeting without a previous challenge, which is not accounted a capital offence unless death ensues; whereas, prior to the statute 59 Geo. III. c. 70, the offence of fighting a duel on a previous challenge, although death did not follow, was accounted a capital crime. *Ersk. B. iv. tit. 4, § 49. See Duelling. Challenge.*

**Rent;** the consideration given to the landlord by a tenant for the use of the lands or subjects which he possesses under lease. See *Hypothec. Lease*. Where rents are assigned, if by a simple assignation, due intimation, or a decree of maills and duties following thereon, renders the right effectual against singular successors; and if by disposition or heritable bond, the sasine completes the creditor's right to the rents as an accessory to the real right to the lands. A decree of adjudication, even without a sasine on a charter of adjudication, as being a judicial disposition, carries right to the rents falling due after its date; and, like a judicial conveyance, it requires no intimation. But no right to rents alone, however complete, can compete with the right to the rents as an accessory to a real right in the lands. *Bell's Com. i. 71; ii. 8, et seq.; More's Notes to Stair, pp. cxxxix., cxlvi., cclxiv.; Ersk. B. ii. tit. 6, §§ 40-1-3; tit. 9, § 64, et seq.; B. iii. tit. 2, § 23; tit. 5, § 5; tit. 6, § 9; tit. 7, §§ 12 and 20; Bank. i. 386; ii. 101, 198, 324; Bell's Princ. § 634, 1047, 1197 et seq., 1228 et seq., 1479-84-99 et seq.; Illust. §§ 1197, 1499; Bell on Leases, i. 20, 35, 87, 125, 219, 232, 253, 263, 403; ii. 45, 51, 276; Hunter's Landlord and Tenant; Bell on Purchaser's Title, 64, 70; Jurid. Styles, 2d edit. ii. 44, 325; Ross's Lect. i. 454; ii. 235, 381, 437, 453, 494. See Lease. Terms, Legal and Conventional.*

**Rental] Bolls;** were a stated quantity of corn paid yearly by the heritors to the titular of tithes, who accepted of them in place of drawing the teinds. The quantity was regulated either by a written rent-roll, or by mere use of payment. When this mode of payment was once established, it could be interrupted on the part of the titular only by inhibition of tithes, and on the part of the heritor only on his offering the tithes in kind. *Ersk. B. ii. tit. 10, § 25; Bank. ii. 57; Bell's Princ. § 1157. See Teinds. Inhibition.*

**Rental Right.** See *Kindly Tenant*.

**Renunciation.** See *Discharge. Implied Discharge.*

**Renunciation**; the act of renouncing a right. It may be considered under the following heads:—1. *Renunciation by an Heir.* 2. *Renunciation of Redeemable Rights.* 3. *Renunciation of a Lease.*

1. *Renunciation by an Heir.*—Where an heir is charged to enter, he must either renounce, or he will be rendered personally liable for the debt. If it be a debt of the ancestor, decree *cognitionis causa*, as it is termed, is pronounced, for the purpose of enabling the creditor to attach the estate. Where the debt is due by the heir himself, the estate to which he has succeeded may be attached by the heir's creditors, whether the heir renounce his ancestor's succession or not. *Ersk. B. ii. tit. 12, §§ 13, 14; Stair, B. iii. tit. 2, § 45; tit. 5, § 24; B. iv. tit. 51, § 10; Bank. ii. 232, 357; Bell's Com. i. 710–13.* See *Heir. Apparent Heir. Adjudication contra hæreditatem jacentem.*

2. *Renunciation of Redeemable Rights.*—Redeemable rights may confer either a right of property or a right in security. Where the deed conveys a right of property, as in wadsets, a renunciation of the right is not sufficient unless the right has remained personal, on which no sasine has followed; for in that case a renunciation will sufficiently extinguish the right. Where, again, the deed conveys a right in security only, as in the case of an heritable bond, a simple discharge and renunciation is sufficient to extinguish the creditor's sasine. *Ersk. B. ii. tit. 8, §§ 17, 18, and 34, et seq.; Stair, B. ii. tit. 10, § 13; Bank. ii. 132; Jurid. Styles, i. 595–8, 601–6; Ross's Lect. ii. 259, 378, 389.*

3. *Renunciation of a Lease.*—This renunciation may either be verbal or by a written deed. In the former case it may be resiled from; in the latter it cannot. But it requires acceptance by the landlord to give it effect; and therefore it is usual to take a notarial instrument on the acceptance in evidence of the fact. It would seem that the voluntary renunciation of a *current* written lease must be in writing; and hence, that a mere verbal renunciation of such a lease may be resiled from. But, on the other hand, there are several decisions which go to support the doctrine that a verbal renunciation is binding, and may be proved by oath of party. Yet it would rather appear that these decisions were pronounced in cases where the stipulated term of removal had expired, and the tenant was in possession on tacit relocation. See this subject considered in *Bell on Leases, i. 524, et seq.*; and consult the following authorities, *Stair, B. ii. tit. 9, § 35; Bank. B. ii. tit. 9, § 37; Ersk. B. ii. tit. 6, § 44; Edmonston, 28th*

*July 1744, Mor. 12,415; Gordon, 19th Dec. 1776, Mor. App. voce Tack, No. 2; Tait on Evidence, p. 325, 3d edit.; Balfour's Practicks, voce Probation by Writ; Bell's Princ. § 1271; Bell on Leases, i. 172, 272, 524; Shaw's Digest, 289; Ross's Lect. ii. 506, 523; Hunter's Landlord and Tenant; Jurid. Styles, i. 542.*

**Repairs of a Ship; hypothec for.** See *Hypothec.*

**Repairs by a Tenant.** The general doctrine of the liability for meliorations and repairs is stated in the article *Meliorations.* Independently of stipulation, the landlord is bound to make all necessary repairs; and in default of his doing so, the tenant may make them himself, and deduct the amount from his rent. In tenements within a royal burgh, where a considerable sum is required for the necessary repairs, which the landlord is unwilling to grant, it is customary for the tenant to apply to the Dean of Guild, whose warrant, proceeding on the estimate of tradesmen, is evidence both of the necessity and amount of the expense of repairing. The tenant must repair injuries occasioned by his own fault or negligence; the landlord must repair injuries occasioned by any extraordinary cause, even where, by the lease, the tenant is allowed a sum for preservation. *Ersk. B. ii. tit. 6, § 43; Bank. i. 430; Bell on Leases, i. 74; Hunter's Landlord and Tenant. See Dean of Guild.*

**Reparation; indemnification.** The obligation to repair a damage is a necessary consequence of the rule *Uterum non lædere*; and damage may arise from positive acts of trespass, or from blameable omission or neglect of duty. *Ersk. B. iii. tit. 1, § 12. See Damages. Delict. Relief.*

**Repeating a Summons.** This expression is applied to the case where it is necessary to support a defence by a counter action, at the instance of the defender against the pursuer. In such cases, instead of raising and executing a summons, and sisting the other action until the counter action comes into court, and then having it remitted *ob contingentiam*, and conjoined with the former process, the signeted counter summons is produced, and an interlocutor pronounced, holding it as repeated. This is called repeating a summons *incidenter*. But it is not competent to a third party to appear in a depending action as a pursuer, and to get a separate action at his instance repeated. Some formalists also hold that a summons cannot in any case be repeated, except of consent of the opposite party, although this seems to be doubtful; but it is settled that a summons so repeated operates merely as a defence against the original action, and that if it is intended to have any farther effect, the regular forms must be gone

through. *Shand's Prac.* i. 503, and authorities there cited.

**Repetition**; repayment of money erroneously paid. *Thomson on Bills*, 402, 529; *Jurid. Styles*, iii. 72; *Shaw's Digest*, h. t. See *Conditio Indebiti*.

**Repetundarum Crimen**; the crime of receiving a bribe to pervert judgment. *Ersk.* B. iv. tit. 4, § 30. See *Baratry*.

**Replegiare**; in old law language, to repledge; that is, "when any man, by virtue of his own jurisdiction, brings back again, or reduces to his own court, his own man, from any other man's court, and leaves a pledge or cautioner behind him for administration of justice." *Skene*, h. t.

**Repledging**; a power formerly competent to certain private jurisdictions to demand judicially the person of an offender accused before another tribunal, on the ground that the alleged offence had been committed within the repledger's jurisdiction. *Ersk.* B. i. tit. 4, § 8; *Stair*, B. iv. tit. 37, § 4; *Bank*, i. 570.

**Replevin**; in English law, a re-delivery to its own owner of a thing distrained, on his finding security that he will abide the trial. *Tomlins' Dict.* h. t.

**Replication**; in English law, an exception or answer made by a plaintiff to a defendant's plea. *Tomlins' Dict.* h. t.

**Replies**. In inferior court processes, the defences or answers to the summons or original petition were formerly followed by replies, in which paper the pursuer met each averment in the defences by an explicit admission or denial, in so far as not already admitted or negatived in the summons. Under the Sheriff Court Act, 16 and 17 Vict. c. 80, 1853, the record is made up on revised concordances and defences. *M'Glashan's Sheriff Court Prac.* § 251; *Maclaurin's Form of Process*, 119, et seq.

**Reponing**. Under the form of process in the Court of Session prior to the passing of the Judicature Act, 1825, if the reclaiming or representing days, against an interlocutor of a Lord Ordinary, had, from mistake or inadvertence, expired without a petition or representation, it was competent, with the leave of the Lord Ordinary, to submit the interlocutor to review of the Court by petition, on condition of the petitioner paying to the other party the whole expenses previously incurred by him in the process—48 *Geo. III.* c. 151, § 16; and this enactment seems to be still in force. According to the existing form, a party may be reponed against a decree in absence, or by default in lodging papers, obtempering orders of Court, or the like, by presenting a reclaiming note to the Court, before extract, accompanied by defences, or with the other paper, whatever it may be;

when the Court will remit to the Lord Ordinary to repone him, on payment of such expenses as to his Lordship may seem reasonable, the usual sum being L.2, 2s. But where the Lord Ordinary has pronounced an interlocutor on the merits of the case, which, whether through inadvertency or otherwise, has not been submitted to review within the reclaiming days, he cannot be so reponed—6 *Geo. IV.* c. 120, §§ 18, 29; *A. S.* 11th July 1828, §§ 45, 46, 72, 73; although it is understood that he may be reponed under the above-cited statute, 48 *Geo. III.* c. 151. Similar regulations are in force in inferior courts; except that, where there is no statutory finality, the interlocutor of the inferior court, which has become final, may be submitted to the review of the Court of Session in one or other of the ordinary methods; *A. S.* 12th Nov. 1825. See *Reclaiming. Advocation. Suspension. Reduction.*

**Reponing in Assignation**. See *Assignation*.

**Report**; in judicial procedure is usually applied to the report or return made by a judge or a judicial nominee, to whom a remit has been made. In the Court of Session, where a proof has been allowed on commission, or a diligence granted for examining havers, the interlocutor fixes a day for reporting the proof to the Lord Ordinary or to the Court, as the case may be, the day so fixed being a sederunt-day; and where a prorogation of the time for reporting the proof, or a renewal of the diligence is required, it must be applied for or arranged in the manner explained *voce Prorogation*. If the proof has been ordered to be reported to the Court, the application for prorogation or renewal must be made to the Division of the Court to which the report was directed to be made. Analogous rules are in observance in the inferior courts; *A. S.* 11th July 1828, § 108; *Darling's Prac.* i. 223; *Maclaurin's Sheriff-Court Prac.* 154, et seq. See *Evidence. Commission*. In cases of importance or difficulty in the Court of Session, the Lord Ordinary, instead of deciding the cause himself, may report the case, as it is expressed, to the Inner-House; § 64. See *Cases*. So also, where an incidental point of difficulty arises before a Lord Ordinary, he may report it verbally to the Court, on intimating his intention to the parties by interlocutor, pointing out the incidental matter; and if judgment shall be pronounced by the Court, or an order made in respect of the matter so reported, that judgment or order shall be final; 6 *Geo. IV.* c. 120, § 19; *A. S.* 11th July 1828, § 66. In practice, however, and independently of the above regulations, a Lord Ordinary occasionally reports a point incidentally to the Inner-House for advice, on the emergence of

the difficulty; and then, after advising with the Court, pronounces an interlocutor, which however is accounted the interlocutor of the Lord Ordinary merely. But in Bill-Chamber cases, where the Lord Ordinary on the Bills takes a case to report to the Inner-House, the interlocutor then pronounced is considered as a judgment of the Inner-House, and signed by the Lord President of the Division accordingly; *A. S. 11th July 1828, § 76*. Other incidental reports are made by Lords Ordinary to the Inner-House, as in various steps of the procedure in rankings and sales, and other Inner-House processes—see *Ranking and Sale*; in applications by judicial factors and other officers of Court for exoneration and discharge; in various statutory proceedings, and so forth; as to all which the usual form is for the Lord Ordinary to come to the foot of the clerk's table in the Inner-House and make a verbal report, which is the warrant for a corresponding judgment or interlocutor by the Inner-House. With regard to other reports made on judicial remits, the most important are the reports of accountants, as to which the regulation of the Act of Sederunt is, that "when, in any cause, a report has been obtained from an accountant or other professional person, and the parties, or either of them, shall be dissatisfied with the report, the same shall be enrolled before the Lord Ordinary for debate on the report, and a note of the objections shall be furnished to the opposite party forty-eight hours before the enrolment, and at the time of enrolling the cause a copy of the note of objections shall be furnished to the Lord Ordinary's clerk for his Lordship's use, and upon hearing parties the Lord Ordinary may order cases, or otherwise dispose of the note of objections as he sees cause;" *A. S. 11th July 1828, § 67*. The weight attached to the report of persons of skill is very great. See the cases on this point cited, *voce Remit*. And with respect to the fees due to accountants and other reporters, the rule formerly was, not only that the parties, but also their agents, were conjunctly and severally liable personally for the whole fees; *Milne, 31st May 1825, 4 S. & D. 45*. But this rule, so far as regards the agents, has been altered, and now "the agent is not, without special agreement, to be held personally responsible to an accountant, engineer, or other reporter to whom a remit may hereafter be made by the Court, on matters of fact in a depending process, where the agent has authority to bind the party;" *A. S. 19th Dec. 1835*. The parties to the suit, however, are conjunctly and severally liable to the accountant or other reporter for his whole fees; and he is not bound to wait the issue of the cause, but as soon as his report is

lodged, he may enrol the case, and ask decree for his fees against either, or both parties, leaving the question of relief to be afterwards adjusted between them, and without prejudice, of course, to the right of the Court or of the Lord Ordinary to lay the expense of the report, along with the other expenses of the process, on either of the parties, as they may think just; with which, however, the reporter has no concern. It has been further held that an accountant is entitled to retain the documents which have been put into his hands under the remit, until the fees of his report are paid; *Stewart, 23d Feb. 1828, 6 S. & D. 591*. In jury trials, reports are not held as evidence of the facts therein set forth, although admissible to prove that, *de facto*, such reports were made. See on the subject of this article, *Shand's Prac.; Macfarlane's Jury Prac. 182, et seq.*

**Representation.** Whatever infers the substitution of one person in the room and place of another, so as to identify the rights and obligations of the person substituted with those of the principal, falls under the general denomination of representation; but the term in the law of Scotland is usually applied to the obligation incurred by an heir to pay the debts and perform the obligations incumbent upon his predecessor. See *Passive Titles*. In the law of heritable succession, the term *representation* is applied not only to the above identification of the heir-at-law with his predecessor, but in a peculiar manner to the *jus representationis*, whereby a grandson by an elder son deceased, as representative of his father, succeeds as heir-at-law to his grandfather in preference to all the grandfather's immediate descendants. *Stair, B. iii. tit. 4, § 4, et seq.; tit. 8, § 32; Ersk. B. iii. tit. 8, § 50, et seq., and § 12; Bank. ii. 294; Bell's Princ. § 1660; Kames' Princ. of Equity (1825), 505; Sandford's Herit. Succes. i. 2*. See *Jus Representationis*.

**Representation in insurance.** See *Insurance. Warranty*.

**Reprive.** See *Remission. Pardon*.

**Reprisals;** letters of marque granted by princes or states to seize upon the goods of all persons under the dominion of any foreign state which refuses satisfaction for injuries done by its subjects to the subjects of the state issuing the reprisals. See *Tomlins' Dict. h. t.* See *Letters of Marque. Capture. Prize-Law. Privateer*.

**Reprobator.** When a witness was offered, to whose admissibility there were objections which could not be immediately verified, it was formerly the practice for the party making the objection to protest for reprobator before the examination of the witness was proceeded with—i. e., to protest that it should

be afterwards competent for him, in an action of reprobator, to prove that the witness was liable to the objections of agency, enmity, partial counsel, or the like. This action, latterly, was not admitted where reprobator had not been previously protested for; but when such a protest had been made, the action was competent even after decree in the principal cause, although the decision in the principal cause was usually superseded until the action of reprobator should be disposed of. The concurrence of the Lord Advocate was required in this action, because the libel concluded that the witness was guilty of perjury; hence it was necessary that the alleged inhabitable witness should be made a party to the suit. The ground of reprobator might have been proved by the oath of the party who had adduced the witness objected to, and by the testimony of other witnesses *omni exceptione majores*. There is no recent example of an action of reprobator. The objections which were formerly the subject of this action were afterwards allowed to be proved by the testimony of witnesses adduced when the objectionable witness was tendered. *Ersk. B. iv. tit. 2, § 29; Bank. B. iv. tit. 31; Hutch. Just. of Peace, i. 158; Maclaurin's Sheriff Process, 167.* See *Evidence*.

By the present law, however, interest, agency, and partial counsel, are no longer objections to a witness.

**Reputation, injuries to.** See *Defamation. Libel*.

**Repute.** See *Habit and Repute*.

**Reputed Ownership.** The false credit raised by a person exercising all the rights of ownership over a subject not his own has led to the adoption of the rule, that the creditors of the apparent or reputed owner may take the subject as if it were his own. In England this rule is enacted by statute; 21 *James I. c. 19; 6 Geo. IV. c. 16, § 72*. In Scotland it has been supposed to exist at common law. It is necessary to the creditors having this right, that the reputed owner should appear to be uncontrolled in the disposal of the subject. Reputed ownership from possession properly applies only to moveables, and not to heritable estates. The presumption of collusion is much stronger when the reputed owner has been left in possession of the subject than when he has acquired it on what is asserted to be another title than that of ownership. Indeed, by the law of Scotland, where there has been no delivery, it would be unnecessary to allege collusion, since the buyer would be merely a creditor for the delivery. It is only where possession is retained after the ownership is said to be passed by constructive delivery or otherwise, that recourse must be had to the doctrines of re-

puted ownership. In a case where goods were conveyed merely in security, but the possession of them was retained by the debtor, another creditor doing diligence against them was preferred to him to whom they were conveyed; *Boys, 27th July 1708*. In like manner, an assignation to a trustee for behoof of creditors, *retenta possessione*, is no bar to the diligence of creditors; *Borthwick, Feb. 17, 1829, 7 S. 420; Fraser, June 26, 1830, 8 S. 982*. An assignation in security of a lease intimated to the landlord, and followed by a sublease by the assignee to the cedent, was found ineffectual against creditors; *Brock, March 5, 1838, 8 S. & D. 647*; affirmed, *Sept. 23, 1831, 5 W. & S.* See *Assignation*. A conveyance in relief of a cautionary obligation is ineffectual if possession be retained. In cases of temporary possession, if the thing be of a kind usually let out and held separately from the ownership, such usage may be admitted to counteract the reputed ownership. But the presumption is very strong for ownership in the case of furniture or implements of trade. There are certain contracts possession in virtue of which is held to raise no credit—such as commodate, location, deposit, pledge, factory where the principal's and factor's goods are distinguishable, sale and return, consignation for advances and sale. The liferenter of furniture does not, by possession of it in virtue of his liferent, subject it to the diligence of his creditors on the ground of reputed ownership; *Scott v. Price, May 13, 1837, 15 D. 916*. See *Bell's Com. i. 248; More's Notes on Stair, xlvi.;* *Brodie's Sup. 850, 896; Brown on Sale, 19 et seq., 537; Bell's Princ. §1315; Illust. ib.* See *Possession. Delivery. Sale*.

By the Mercantile Law Amendment Act, 19 and 20 *Vict. c. 60, § 1, 1856*, it is declared, that goods sold, but not delivered, shall not be attachable by the creditors of the seller, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods, from and after the date of the sale, is discovered to be attachable by a transference to the creditors of the purchaser.

**Requisition;** a demand made by a creditor that a debt be paid or an obligation fulfilled. In certain cases, requisition is necessary to put the debtor *in mora*, and then the proper way of proving requisition is by a notarial instrument. It is competent, however, to prove requisition by writ or oath of party, but not by witnesses. In the case of a wadset, if the reverser, after requisition, fail to pay the wadset sum, the wadsetter may proceed to adjudge the right of reversion. Forms of the procuratory of requisition and attend-

ance, of the instrument of requisition and of the instrument of attendance, are given in *Jurid. Styles*, i. 750. And an analogous proceeding takes place where the creditor in an heritable bond or disposition in security demands payment, usually in contemplation of exercising a power of sale. See *Power of Sale*. See, on the subject of this article generally, *Stair*, B. ii. tit. i. § 4; tit. 10, § 22; *Ersk.* B. ii. tit. 2, § 16; *Bank.* i. 515; ii. 218, 380; *Tait on Evidence*, 314; *Ross's Lect.* ii. 348, 358. See *Wadset*.

**Res Alienas**. By the Roman law there might be a valid sale by one person to another of what belonged to a third, and the seller was bound to procure and deliver the subject or pay damages. *Brown on Sale*, 111. As to *legatum alieni*, see *Legacy*.

**Res Communes**; are things which are in their nature incapable of appropriation, as the light, the air, running water. *Ersk.* B. ii. tit. i. §§ 5, 6.

**Res Furtivas**; things stolen, and thereby tainted with a *vitium reale*, which attaches to them in all their transmissions until they are restored to their rightful owner, who is entitled to reclaim them at any time within the period of the long prescription, even from a *bona fide* possessor who may have paid a full price for them. *Ersk.* B. iii. tit. 7, § 14; *Brown's Synop.* 292. See *Lost. Labes Realis*.

**Res Futuras**. There may be a sale of a thing which may exist at a future time; and if the thing does not come into existence, the contract falls. *Brown on Sale*, 111. But see *Spei Emptio. Sala*.

**Res inter alios acta, aliis neque nocet, neque prodest**; a maxim of very general application in the law of Scotland. In conformity with this maxim, acts and decrees of Court cannot be adduced against persons who were not parties to the suit. Interruptions of prescription by protestation, or even *via juris*, by process not followed forth to a sentence, are of no avail to any other person than him who uses them. The writ or oath of one obligant in a bill will not infer the liability of another for the debt, although the latter do not allege payment; *Hannay's Trustees* (McNeill), 31st Jan. 1823, 2 S. 174. See *Stair*, B. iv. tit. 42, § 13; *Ersk.* B. iii. tit. 3, § 69; tit. 7, § 42; *Bank.* vol. ii. p. 626. See *Res Judicatae*.

**Res Judicatae**; are those judgments of the Supreme Courts which have become final, and which are held conclusively to settle the question discussed, so as to prevent the parties or their representatives from afterwards raising an action founded on the same *medium concludendi* or cause of action. The judgment of an inferior court does not fall under the description of *res judicatae*; for, in inferior

courts, a *copia peritorum* is not presumed, and parties ought not to suffer from employing ignorant procurators when perhaps no better are to be had. In like manner, a party who brings a case under review of the Supreme Court will not be barred from pleading a defence, or from urging any other plea, although it may have been omitted in the inferior court. When decree is pronounced in terms of the libel, the whole conclusions of the libel are held to be *res judicatae*, even although some of them have never been adverted to or discussed; *Glendinning*, 27th Dec. 1699, *Fount.* ii. 76. *Ersk.* B. iv. tit. 3, §§ 1 and 7; *Stair*, B. iv. tit. 40, § 16; *App.* § 8; *More's Notes*, p. cccxciv.; *Bank.* ii. 625; *Bell's Princ.* § 2346; *Illust.* § 1536; *Kames' Stat. Law Abridg.* h. t.; *Shand's Prac.*; *Henderson*, May 18, 1814, 2 *Dow*, 285; *Graham*, May 20, 1814, 2 *Dow*, 314; *Graham*, 1820, 2 *Bligh*, 126. See *Competent and Omitted. Res Noviter Veniens. Decree in Absence. Compareance. Decree. Exceptio Rei Judicatae*.

**Res Noviter Veniens ad Notitiam**. In judicial procedure, this phrase is applied to matters of fact pertinent to the cause of which the party acquires the knowledge pending the process, which he was unavoidably ignorant of before, and which, by due previous investigation or inquiry, could not have come to his knowledge. The rule of the Judicature Act is, that it shall be competent to either party, in the course of a cause, to state matter of fact *noviter veniens ad notitiam*, or emerging since the commencement of the action, if, on cause shown, leave shall be obtained from the Lord Ordinary or the Court—the party always paying such expenses as the Lord Ordinary or the Court may deem reasonable. If leave be granted, the new matter must be stated in a condescendence, accompanied by a corresponding plea in law, to be answered by the other party, and made part of the record; 6 *Geo. IV.* c. 120, § 10. And the relative Act of Sederunt enjoins, that, after closing the record, where a party wishes to state on the record matter of fact *noviter veniens ad notitiam*, or emerging since the commencement of the action, he shall enrol the case, and furnish the opposite party, at least forty-eight hours before the enrolment, with a condescendence of the new matter. And a new plea in law must be notified in the same manner; *A. S.* 11th July 1828, § 59. Papers *noviter venientes, &c.*, or *noviter reperta*, may also be produced after the record is closed; *A. S.* § 55. Regulations similar in principle are in force in inferior courts; the rule there being, that, at any time before final judgment, either party may give in a short note, stating, without argument, any matter of fact *noviter veniens ad*



*notitiam*, or emerging since the commencement of the action; and in other respects, the regulation is *verbatim* the same with that in the Supreme Court; *A. S. 12th Nov. 1825*. In jury causes, *res noviter veniens ad notitiam* is a relative ground for an application for a new trial; but the new trial will not be granted if it appear that, by due preparation and proper inquiries, the new matter could have been made available at the trial. An application for a new trial on this ground must be supported by affidavit. See *Shand's Prac. i. 485*; *Macfarlane's Jury Prac. 267*; *MacLaurin's Form of Process, 272*; *Bell's Com. ii. 279, 288*.

**Res Nullius**; things in which no one can have any property, as sacred things dedicated to the service of God. See *Res Sacra*.

**Res Perit suo Domino**; a maxim importing that the owner of a subject must bear the loss, if it perish, unless its destruction can be ascribed to another's fault. In the House of Lords this maxim was explained to mean, that the interest which each has in a subject perishes to the *dominus* of that interest, as well as the corporeal thing to its *dominus*; *Bayne v. Walker, 22d March, 12th May, and 3d July 1816, 3 Dow, 233*. See *Ersk. B. iii. tit. 1, § 19*; *Bell on Leases, i. 240, note*; *Hunter's Landlord and Tenant*. See *Periculum*.

**Res Publicæ**; are things exempted from commerce, and which belong to the public, or to the Sovereign as trustee for the community, as navigable rivers, highways, harbours, bridges. *Ersk. B. ii. tit. 1, §§ 5, 6*; *Bell's Princ. § 638*; *Brown on Sale, 115*. See *Regalia*.

**Res Sacrae**; by the Roman law, were the property of none. By the law of Scotland, things appropriated to the service of God, as churches, church-bells, communion-cups, &c., may be disposed of or sold on proper occasions, and others substituted in their room. *Ersk. B. ii. tit. 1, § 8*; *Bank. vol. i. p. 84*; *Brown on Sale, 113*. See *Church. Church-yard. Burying-place. Gravestone*.

**Res sua Nemini Servit**; a maxim importing that no one can have a servitude over his own property, since every use to which he applies the subject may be ascribed to his paramount right of property. Accordingly, when the proprietor of the dominant becomes proprietor also of the servient tenement, the servitude is said to be extinguished *confusione*. Professor Bell objects to this doctrine being adopted without limit, and says, "If, in the exercise of the right or otherwise, the owner has indicated no intention of extinguishing the servitude, it would, on separation of the tenements, revive;" *Bell's Princ. § 997*. See also *Ersk. B. ii. tit. 9, § 36*; *Stair, B. iv. tit. 15, § 3*; *Bank. vol. i. p. 684*;

*Stewart's Answers to Dirleton, voce Servitude, p. 383*.

**Res Universitatis**; are things belonging to a corporate body. *Ersk. B. ii. tit. 1, § 7*. See *Community*.

**Rescissory Action**. Rescissory actions are those actions whereby deeds, &c., are declared void. Under this class are included actions of improbation, actions of reduction, and actions of reduction-improbation; all of which are competent only before the Court of Session. *Ersk. B. i. tit. 3, § 19*. See *Reduction*.

**Rescue**. The rescuer or recapturer of vessels or goods is entitled to salvage. See *Salvage*.

**Rescue**. According to Bankton, any one accessory to the escape of a prisoner from the messenger will be liable for the debt; *Bank. iii. 5*. In England, rescuing a person in custody of a sheriff's officer on his way to jail is punishable as a misdemeanour; so likewise is the rescue of a felon from a constable. *Tomlins' Dict, h. t.* See *Deforcement*.

**Resciantia**; sickness or infirmity. *Skene, h. t.*

**Reserved Power**. Reserved powers are of different sorts; as a reserved power of burdening a property, or a reserved power to revoke or recall a settlement or other deed. See *Burdens. Delivery. Deathbed. Faculty*.

**Reset of Theft**; is the offence of receiving and keeping goods, knowing them to be stolen, and with an intention to conceal and withhold them from the owner. It is immaterial how short the offender's possession may have been; or whether it was only for the sake of temporary concealment. Harboursing a thief with stolen goods in his custody does not constitute reset, unless the goods are in some way committed to the entertainer's care. It is of no consequence on what footing the goods are received, and whether immediately from the thief, or from one who received them from the thief. But it is believed that the receiving of goods sold by way of decoy by the thief, at the instigation of the officers of law who apprehended him, will not constitute reset. The punishment of reset varies from a few months' imprisonment to transportation for life. The thief may be adduced as a witness, but his evidence is received with caution. *Hume, i. 110*; *Alison's Princ. 328*; *Steele, 137*; *Ersk. B. iv. tit. 4, § 33*; *Tait's Justice, voce Theft*; *Blair's Justice, voce Theft*; *Shaw's Digest, 154*.

**Residuary Legatee**; is he to whom a testator bequeaths the residue of his moveable estate, after the legal claims thereon and other legacies have been paid. Where the *universitas* of the moveable estate is conveyed to one by a settlement or general disposition, the donee is usually called *universal legatee*

or *legatary*, or general donee; and where his universal right is burdened with the payment of debts and legacies to others, he is in effect a residuary legatee, since he is entitled to the whole estate after paying the testator's debts and legacies. *Ersk. B. iii. tit. 9, § 6; Jurid. Styles, ii. 472-81.* See *Legacy. Disposition, General.*

**Residue Duties.** See *Legacy and Residue Duties.*

**Resignation**; is the form by which a vassal returns the fee into the hands of a superior. It is of two kinds—*resignation ad remanentiam*, and *resignation in favorem*. *Resignation ad remanentiam* is made where it is intended to return the property permanently to the superior; it is then resigned into his hands *ad perpetuam remanentiam*, and for the purpose of consolidating the property and superiority. *Resignation in favorem*, again, is the form where the object is to transfer the property to a third party; in which case the resignation is made in favour and for new investment to be given to the new donee. Resignation is made in virtue of a *procuratory of resignation*; under which warrant a procurator for the resigner, with a notary-public and two witnesses, appears in presence of the superior or of his commissioners, and, in virtue of the procuratory, makes the resignation. Where it is a resignation *in favorem*, the procurator also acts for the donee, and receives the symbols by which he is invested; and on this procedure instruments are taken in the hands of the notary-public. Where the resignation is *ad remanentiam*, a notarial instrument is drawn up and attested by the notary and witnesses; and that being a transmission of property to the superior, it requires to be recorded in the Register of Sasines within sixty days; 1669, c. 3. Where it is a resignation *in favorem*, the act of resignation is recited in the charter of resignation, which must be granted by the superior to the new vassal, in virtue of the resignation *in favorem*, on which charter investment follows, and completes the right of the donee. And as the instrument of sasine following on the charter of resignation is of course recorded in the Register of Sasines within sixty days after the date of the investment, the requisite publicity is given to the transfer, and the requisite evidence of it preserved, without the necessity of an instrument of resignation, which in practice is not used in the case of resignations *in favorem*. *Ersk. B. ii. tit. 7, § 17, et seq.; Stair, B. ii. tit. 3, § 21; tit. 11, §§ 1-7; B. iii. tit. 2, § 8; Moré's Notes, pp. xcvi., cclxiii., ccxciv.; Bank. ii. 143-4; Bell's Com. i. 683, 674; Bell's Princ. § 786; et seq.; Illust. ib.; Kames' Princ. of Equity (1825), 452; Bell on Purchaser's Title, 255, et*

*seq.; Ross's Lect. ii. 79, 215, et seq.* See *Charter. Procuratory of Resignation. Cognition and Sasine. Disposition.*

By the Titles to Land Act 1858, an entry by resignation may be completed by recording in the Register of Sasines a writ of resignation, written on the deed containing the warrant of resignation along with such deed itself. See *Titles to Land.*

**Resolutive Clause.** See *Clauses Irritant and Resolutive. Irritant Clause. Tailzie.*

**Resolutive Condition**; a condition in a sale, which does not suspend the completion of the contract, but which resolves the sale, if the condition be purified at the time specified. *Ersk. B. iii. tit. 3, § 11; Bell's Com. i. 239.* See *Pactum Legis Commissoriae. Suspensive Condition.*

**Respite of Sentence**; is the delay of a capital punishment; as in the case of a pregnant woman who has been condemned, and pleads her pregnancy, the Court, for the sake of the child, are in use to respite the sentence. See *Pregnancy.*

**Responds Book, in Exchequer**; is a book kept by the Directors of Chancery, in which are entered all non-entry and relief duties payable by heirs who take precepts from Chancery. Those duties are payable by the heir, although he may not have used the precept; and the Crown may compel him, by an action, to pay, as the sheriff, if he has paid the duties, has his action of relief against the heir. *Ersk. B. ii. tit. 5, § 50; Stair, B. ii. tit. 4, § 28; Bank. ii. 497; Kames' Stat. Law, h. t.; Skene, h. t.*

**Respondentia**; a loan upon the cargo of a ship, made in contemplation of a particular voyage, on the condition that, if the subject on which the money is advanced be lost by sea-risk, or superior force of the enemy, the lender shall lose his money; and that if the voyage be successful, the sum advanced shall be repaid with a greater than ordinary rate of interest, called marine interest, which may be lawfully taken in consideration of the risk incurred by the lender who ventures on the voyage. If the ship be lost under any of the risks which would render an insurer liable, the claim of the lender is extinguished. In foreign countries, the contract of *respondentia* creates a real security over the cargo; but in this country it for the most part affords personal security only to the lender. *Bell's Com. i. 530, et seq.; Bell's Princ. § 453; Illust. ib.; Jurid. Styles, ii. 533.* See *Bond of Respondentia.*

**Restitution**; is an obligation incumbent on the person in possession of a moveable, where that moveable is truly the property of another, even although the possessor should have obtained it by purchase; nor will the owner,

in that case, be bound to pay the price which the holder may have given. Where a person has had an article of this kind in his possession, but has sold it before any demand has been made by the true owner, he is liable no farther than as he has received more than he paid for it; for this surplus is clearly the property of the owner, to whom it is justly due; *Ersk. B. iii. tit. 1, § 10*. An action lies for restitution of money paid through mistake or ignorance, or of money paid in contemplation of an event which, through the fault of the receiver, has not happened. *Stair, B. i. tit. 7; More's Notes, p. xlviii.; Bank. i. 208, et seq.; Bell's Com. i. 132, et seq.; Bell's Princ. § 526 et seq., 1320; Illust. ib.* See *Condictio Indebiti. Condictio Causa Data*.

**Restitution of Minors.** See *Minor. Quadrannium Utile. Curatory*.

**Retenta Possessione.** See *Possession. Reputed Ownership*.

**Retention.** The distinction supposed to exist between the lien of the English and the retention of the Scotch law, has been already noticed in the article *Lien*. As a real distinction, however, between these rights, it deserves attention, that the right of retention may be exercised over a subject which is the retainer's own property, but which, were it not for the right of retention, he would be bound to deliver to another, as in the case of goods sold, but not delivered, which remain the property of the seller; whereas it is an essential characteristic of lien, that the subject over which it extends is the property of another. Retention is a right of withholding a debt, or retaining moveable property, until a debt due to the person claiming the right of retention shall be paid. The right of retention differs from hypothec in this, that retention depends entirely upon possession, while the right of hypothec may exist over a subject not in the possession of him who has the right. Thus, an agent has a right of *hypothec* over the expenses in which the opposite party is found liable; he has a right to *retain* the title-deeds, &c., of his own client in security of his account. See *Hypothec*. It would appear, as stated in the article *Lien*, that there is not in the law of Scotland any general right of retaining, in all circumstances, whatever belongs to a debtor in security of his debt. In the ordinary case, there must be something to connect the thing retained with the debt in security of which it is retained, so as to give room for the presumption of an express or implied agreement that the creditor should have such security for his debt. Thus, a ship may be retained in security for repairs, whether executed at home or abroad. There is also a right of retention over goods aboard ship, for the freight and

passage-money; and a similar lien over goods in land carriages, and over the goods, horses, and carriages of travellers, for their entertainment in inns. Retention is also competent to workmen of the articles put into their hands to make or to repair, for the price of the article made, or the expense of repairs. There is a kind of retention, which has been called general retention, in which the right extends not only over the individual article on which the debt has been contracted, but also over other articles of the same kind, sent in regularly in a course of dealing. There are also classes of individuals, exercising certain professions or trades, who have a right to retain, in security of their general balance, the goods and effects of their debtor which have come into their hands in their professional character. The law-agent's right of retention has been considered under the article *Hypothec*. The factor's lien entitles him to retain, in security of his advances, the property of the principal which has come into his hands as factor. When he has sold the goods, he is not entitled to retain them against the purchaser, on account of the balance due by the principal; but his lien in such a case extends over the price of the goods when paid to him. Specific appropriation excludes the factor's lien. A banker has a right of retention, in security of the general balance, over unappropriated paper belonging to customers, but not over bills discounted, or appropriated. A policy-broker's lien entitles him, on his principal's bankruptcy, to retain the policy and sums paid to him for a loss. A trustee has a right of retention over the trust-property in security of his advances, and in relief of his responsibility—that is, he may refuse to reconvey until such claims are satisfied. But if the subject be heritage, no one can retain it against the owner without a written title of possession. Even in the case where a party, by mistake, had built on the ground of another, and where the builder's claim for the value of the building, in so far as it was a melioration, was not disputed, the Court held that he was not entitled to retain possession until repaid the expense of building; but, on the contrary, they decreed him to remove, with a mere reservation of his claim for the money *bona fide* expended in erecting the house; *Beattie, 27th May 1831, 9 S. & D. 639*. It would appear that the cautioner's right of retention is the only case in which a proper general lien exists. A cautioner may retain, in order to secure his relief, the goods or money of his principal, whether acquired before or after his becoming bound. Possession is necessary to every right of retention. And the possession must be lawful and actual possession, not civil, nor

confidential, nor for a specific purpose. The right of retention ceases on the loss of possession (unless possession has been lost by mistake), and does not revive on recovery of possession. According to Professor Bell, the factor's lien forms an exception to this rule, and "the regaining of possession by fair means, in the course of the factory, will restore the lien;" *Bell's Princ.* § 1449. See on this subject generally, *Stair*, B. i. tit. 18, § 7; B. ii. tit. 3, § 27; *Moré's Notes*, pp. lxx., lxxvii., cxxxi., cxlvi.; *Mr Brodie's Sup.* 913; *Ersk. B. iii.* tit. 4, § 20; *Bell's Com.* ii. 91; *Bell's Princ.* § 1411; *Illust. ib.*, where several cases are cited; *Bank. i.* 388; *Bell on Leases*, i. 229, 370-8; ii. 25; *Hunter's Landlord and Tenant*; *Brown on Sale*, 13, 210, 436, 452-60; *Thomson on Bills*, 376, 584, 736, 763; *Ross's Lect.* ii. 414; *Kames' Equity*, 344, 563. See *Lien Hypothec.*

By the law of Scotland, formerly, the seller of goods paid for but not delivered, might, on the bankruptcy of the purchaser, in virtue of his undivested right of ownership, retain the goods in satisfaction of a previous debt due to him by the purchaser. See the cases *Mein v. Boyle*, Jan. 17, 1828, 6 S. 360, and *Melrose v. Haisie*, March 7, 1851, 13 D. 880. By the Mercantile Law Amendment Act, however, a seller is not entitled to a right of retention generally against a second purchaser, but he may arrest or poind the goods at any time prior to the sale of the goods to a second purchaser being intimated to him.

In the case of *Brown v. Sommerville*, Jan. 13, 1844, 6 D. 1267, it was found that a printer had no right of retention over stereotype plates put into his hands for the purpose of his printing from them, for payment of his account. See on the subject of retention, *Hamilton v. Western Bank*, Dec. 13, 1856, 19 D. 152; *Gardiner v. Milne & Co.*, Feb. 13, 1858, 20 D. 565; and *National Bank of Scotland v. Forbes*, Dec. 3, 1858, 21 D. 79.

**Retentis**; *proof to lie in.* See *Evidence*, pp. 373-4.

**Retour.** This name is given to an extract from Chancery of the service of an heir to his ancestor. The brief of inquest, after the jury have pronounced their verdict, is retourable to Chancery, whence it issued; and it is the duty of the judge to whom it is directed to return it, nor is the service complete until this be done. The extract or copy of the retour to Chancery is, in practice, termed the retour. *Ersk. B. iii.* tit. 8, § 61; *Stair*, B. iii. tit. 5, § 42; B. iv. tit. 3, § 5; *Moré's Notes*, p. cclxxi.; *Bank. ii.* 327; *Bell's Princ.* §§ 1831-47-53, 2024; *Kames' Stat. Law Abridg. h. t.*; *Sandford's Heritable Succession*, i. 314, 376; ii. 37; *Sandford on Entails*, 282, 319, 333; *Tait on Evidence*, 3d edit. 187, 194;

*Jurid. Styles*, i. 347-54, 385. See *Briefes. Service. Prescription, Vicennial.*

By the act 10 and 11 Vict. c. 47, 1847, the practice of issuing briefes from Chancery for the service of heirs is abolished, and the procedure is now by way of petition before the sheriff of the county in which the deceased was domiciled, or before the sheriff of Chancery.

**Retoured Duties.** The *retoured duty* is the *new extent* which is inserted in retours, and by which the non-entry duties before citation are regulated. Blanch-holdings, substituted for ward-holdings by 20 Geo. II. c. 50, are liable in a retour duty of one *per cent.* of the valued rent according to which the land-tax is paid. Feu-holdings are retoured to the feu-duties specified in the charter; and thus, in a feu-holding, the non-entry duties are the feu-duties, so that the superior claims nothing *eo nomine* before citation which he would not be entitled to claim under the *reddendo* of his charter. Where there is no retour of lands, and no means of proving their retoured duties, the superior is entitled to the valued rent before citation. In tithes, when they are held blanch, the superior is entitled to the fifth part of the retoured duty of the lands; but where they are held in feu, the superior is entitled to the feu-duty payable for them as their non-entry duties. Infestments of annual rent are by the act 1692, c. 42, retoured to the blanch, or other duty contained in the infestment. There is, besides, a clause in the heritable bond obliging the debtor, when the right is held of him, to assign all the casualties, and to give an entry gratis. *Ersk. B. ii.* tit. 5, §§ 36-38; *Stair*, B. ii. tit. 4, § 21; B. iv. tit. 8, § 3; *Bank. ii.* 332. See *Non-Entry*.

**Retractus Feudalis**; is the power which a superior formerly exercised of paying off a debt due to an adjudging creditor, and taking a conveyance to the adjudication. Where the amount of the debt exceeded the value of the estate, the superior was bound to pay only to the extent of the value. No such power is now exercised by superiors. *Ersk. B. ii.* tit. 12, § 37; *Bank. ii.* 235; *Kames' Stat. Law*, voce *Jus Retractus*.

**Retrocession**; a term signifying the reconveyance of any right by an assignee back into the person of the cedent, who thus recovers his former right by becoming the assignee of his own assignee. *Ersk. B. iii.* tit. 5, § 1; *Bank. ii.* 192; *Hunter's Landlord and Tenant*; *Jurid. Styles*, ii. 351, 352; *Scott's Digest*, p. 43; *Thomson on Bills*, 566, voce *Assignment*.

**Return**; the certificate of a sheriff to whom a writ, warrant, or precept is directed, setting forth what has been done by virtue of such

writ, precept, or warrant; *Tomlins' Dict. h. t.* As to the returns to writs of election. see *Reform Act. Clerk of Crown.*

**Return, Clause of.** See *Clause of Return.*

**Return Premiums.** In insurance, return premiums are due where the contract is voided; as where the risk has never been begun, or sometimes in consequence of express stipulation—as in the event of a ship's sailing with convoy, of her arriving safe, or the like. *Bell's Com. i. 599, ii. 135.* See *Insurance.*

**Reverser.** The reverser is the proprietor of an estate who has granted a wadset of his lands, and who has a right, on repayment of the money advanced to him, to be replaced in his right. See *Wadset.*

**Reversion;** as applied to heritage, is a right of redemption, and is either legal or conventional. The legal reversion is that which is provided by the operation of the law itself; as in an adjudication, where the law gives a power to the debtor to redeem within the legal. The conventional reversion is that of a wadset, or of an heritable bond, where the reverser or the debtor in the heritable bond is entitled to disencumber the estate, or to redeem it under the clause of reversion in the deed. *Stair, B. i. tit. 14, § 3; B. ii. tit. 10, § 3; Ersk. B. ii. tit. 8, § 2, et seq.; Bank. i. 416, ii. 128; Bell's Com. i. 757; Bell's Princ. § 902; Kames' Princ. of Equity (1825), 281; Bell on Purchaser's Title, 158, 374; Ross's Lect. ii. 331 et seq., 351.* See *Redeemable Rights. Legal Adjudication. Wadset.*

**Review;** revision. In the phraseology of the law of Scotland, this term is chiefly applied to the reviewing of any interlocutor, or decree, or sentence against which a party has reclaimed or appealed. No judge in the Court of Session is now authorised to review his own decrees or interlocutors; *6 Geo. IV. c. 120; Bank. ii. 516, 539, 627.* See *Appeal. Reclaiming Note. Advocation. Suspension.*

**Revocation;** is a deed recalling some former deed; or a clause of revocation may form part of another deed; as where it is introduced into a settlement for the purpose of recalling a former settlement. Where a donation between husband and wife, or a deed executed during minority, is meant to be recalled, it is usually done by an express revocation, although, where the power to revoke is indisputable, revocation may also be inferred from posterior deeds irreconcilable with the subsistence of the former. But on the principle that rights are dissolved in the same manner in which they are constituted, where a donation between husband and wife has been constituted by writing, it must be revoked either expressly or by implication, by a written deed—*e. g.*, a posterior deed defeating the

effect of the former by a new gift. The consent or knowledge of the other spouse is not requisite; and it has even been held that the posterior contraction of debt by the husband is tantamount to a revocation of a previous donation to his wife. See *Donatio inter Virum et Uxorem.* Where, again, a minor means to recall a deed executed during minority, it is by an action in a court, and by reducing the objectionable deed, that he accomplishes his object. The action of reduction may be preceded by a revocation; but this is not indispensable as a preliminary, nor will a revocation within the four years after majority supply the want of an action within that time. *More's Notes on Stair, p. cxcii.; Ersk. B. iii. tit. 3, § 90, et seq.; Bank. i. 180, 240, 468; Sandford on Entails; Bell's Princ. § 1617; Illust. ib.* See *Quadriennium Utile.*

**Rhind Mart;** a word which sometimes occurs in the *reddendo* of charters in the north of Scotland. It is applied to any species of horned cattle—*e. g.*, oxen, cows, &c., given at Martinmas as a *reddendo.*

**Rhodia Lex de Jactu.** See *Contribution.*

**Jactus Mercium.**

**Rider.** See *Traveller.*

**Riding Interests.** Where any of the claimants in an action of multiplepounding, or in a process of ranking and sale, have creditors, these creditors may claim to be ranked on the fund set aside for their debtor; and such claims are called *riding interests.* If there be more than one rider claiming upon the share of a single claimant, and that share is insufficient to pay them all, a competition may incidentally ensue among these riders without any separate process of multiplepounding in the name of the claimant whose share is thus *in medio.* *Shand's Prac. 602 and 908; Beveridge, i. 384, ii. 545; Maclaurin's Sheriff Prac. 258.* See *Multiplepounding. Ranking and Sale.*

**Rief;** an obsolete term, synonymous with robbery; hence *Rievers* (1477, c. 78). *Stouthrief* is a term still known in criminal law, and importing masterful theft or depredation; *Hume, i. 101.* See *Robbery. Reif. Stouthrief.*

**Rights;** properly speaking, may be opposed to *things* or *subjects*, as rights of property, of possession, of servitude, &c. But the distinction between corporeal and incorporeal things (to the latter of which divisions rights more properly belong) have been absorbed in the division into heritable and moveable; *Ersk. B. ii. tit. 1.* See *Corporeal and Incorporeal. Heritable and Moveable. Jus in re and ad rem. Obligation. Jus Crediti.*

**Riot Act.** See *Mobbing.*

**Rivers.** Navigable rivers are *inter regalia*, and are held by the Sovereign, as trustee for the community; but the river, including the

*alveus* or bed, and the banks (for the purpose of tracking or of navigation), is public property; *Ersk. B. ii. tit. 6, § 17.* Rivers also may be private property, in so far as the use of the water belongs to those through whose property the stream passes; but although a proprietor may employ the water while it is within his own grounds, he must allow it to pass onwards to the inferior heritors, in its original channel, and cannot alter its level, either where it enters or leaves his property. Where a river divides two properties, neither proprietor can carry off any part of the stream from the bed of the river without the consent of the opposite heritor; nor can he obstruct or dam it up so as to cause the water to re-gurgitate on the lands of the superior or upper heritor. The bed of the river belongs to the proprietor through whose grounds the river runs; and where it divides adjoining properties, one-half of it belongs to each. It is in the power of a proprietor, either in a public or a private river, to protect his banks by bulwarks; but he can construct them only for defence, and not in such a manner as to throw the stream on the opposite banks. *Ersk. B. ii. tit. 1, § 5; Bank i. 507; Bell's Princ. § 648-50, 971; Illust. § 648; Kames' Princ. of Equity (1825), 33. See Property. Loch. Salmon-Fishing.*

**Road or Way; as a servitude.** The rural servitude of *passage or way*, is (like the Roman law servitudes, *iter actus et via*) of three degrees—*foot-road, horse-road, and cart or carriage-road*; and to these may be added the servitude of a way or loaning, or *drove-road* for cattle. In the Roman law, the servitude *iter*, gave right to a horse or foot-passage; but in Scotland, a servitude of a *foot-road* does not comprehend a horse-road. This class of servitudes imports no obligation on the servient proprietor to maintain the road. He is not even prevented from changing the direction of the road, provided the new one be equally convenient for the dominant proprietor; and, on a foot-road, he may place gates or styles of easy access, and on a cart-road, swing-gates. One important distinction between servitude-roads and public-roads is, that a public-road may be used by all the Queen's subjects, whereas a servitude-road can be legally used only by the dominant proprietor and his family, and the tenants in the dominant lands. The right to a servitude-road, eighteen feet wide, subject to be used for carts and led cattle, implies a right of driving loose cattle along it; *Swan, Jan. 21, 1834, 12 S. & D. 316.* See also *Marshall, July 21, 1834, 13 S. 701; Cruikshanks, July 17, 1835, 13 S. 1136; Gibb, Dec. 1, 1837, 16 S. 169; Marquis of Breadalbane v. M'Gregor, July 14, 1848, 7 Bell 43; Ersk. B. ii. tit. 9, § 12; Stair, B. ii. tit. 17,*

*§ 10; Bell's Princ. 274 and 268. See Highways. Drove-Road. Church-Road. Iter. Actus. Via.*

**Road, Public.** See *Highways.*

**Road Act.** See *Highways.*

**Road Trustees.** The General Turnpike Act, 1 and 2 Will. IV. c. 43, provides, that the qualification of a road trustee shall be such as is required by the local act for the county or district. No one can act as trustee before he has made oath or affirmation that he possesses the required qualification. No person appointed a trustee by any road act, is capable of acting as such, while he holds any place of profit under such act, or under the general act, or is a tackman of the tolls on any turnpike-road. Persons acting without being qualified are liable to a penalty of L.20 forfeited to the prosecutor, and recoverable by summary action before the sheriff of the shire, or in the Court of Session. Trustees appointed under a turnpike act are not disqualified from acting as sheriffs or justices in the execution of such act. Lenders of money on the credit of tolls, or their assignees, are not disqualified from acting as trustees, sheriffs or justices. Trustees meeting under authority of any local act may from time to time adjourn, to meet at such place and time as they shall appoint. At all their meetings they must defray their own expenses. There must be present at each meeting the quorum appointed by the local act, and their powers are exercised by the major part of the trustees present. A preses must, in the first place, be appointed at every meeting, who, in case of an equal number of votes (including the vote of the preses), has a casting or double vote. No order or determination made or agreed upon at a meeting can be revoked or altered at any subsequent meeting, unless notice of the intention to propose such revocation or alteration shall have been given at a previous meeting holden for the same road, and entered in the book of proceedings of such meeting, and have been transmitted by post to every trustee not present at such previous meeting, who was present at the meeting where the order or determination was made. Notice must also be published by two several advertisements in some paper usually circulated in the shire in which the road, or the principal part of it, is situated, at least ten days previous to the subsequent meeting, or by affixing it for two consecutive Sundays on the church-doors of the parish or parishes within which the road is situated. Any two trustees of a turnpike-road may at any time call, or require their clerk to call, a meeting of the trustees of the road, provided notice of the meeting, and of the purpose of it, be published by two advertisements, or be affixed as afore-

said. The trustees may, at any general meeting, divide the roads into districts, and name committees for their management, of which three are a quorum. They may appoint clerks, collectors, treasurers, superintendents, surveyors and other officers, with reasonable salaries or allowances for trouble; and provision is made to prevent these officers from misconducting themselves. None of them can, in any way, be concerned in any contract entered into by the trustees.

The trustees of every turnpike-road may sue and be sued, in all actions or processes, in the name of their clerk or treasurer for the time being; but it has been found that this provision is not applicable to district clerks, but only to the clerk under the general trust; *Williamson*, March 2, 1832, 10 *S. & D.* 413. In a subsequent case, however, the clerk of a committee of district road trustees was held entitled to pursue a cautioner for the balance due by the treasurer, having received special authority for that purpose by a minute of the trustees; but it was questioned whether, without such authority, he would have been entitled to pursue; *Creighton*, Feb. 6, 1838, 16 *S. & D.* 447. No action or process brought or commenced by or against any trustees of any turnpike-road, in the name of their clerk or treasurer, ceases by the death or removal of such clerk or treasurer, or by the act of such clerk or treasurer without the consent of the trustees, but the clerk or treasurer for the time to the trustees is always deemed the pursuer or defender. All expenses of process or proceedings incurred by the clerk or treasurer, are reimbursed and paid out of the trust-funds of the road. The trustees may accept subscriptions for any sum of money requisite for making or maintaining any part of the road, and may, in security of repayment, assign the tolls leviable on the road. Payment of subscriptions may be enforced after forty days' notice to the subscribers, in any court competent in Scotland. The trustees may borrow money and assign the tolls in security. The form of the assignation is given in the act. The trustees may borrow money on annuity, but they must not give more than 10 per cent. on any sum of money so borrowed, or grant an annuity on any life under fifty years of age. A party who lends money to road trustees, is entitled to rely on the terms of the bond granted to him, and of the statute under which they act; and if by these he be entitled to look to the tolls of a whole district for his security, he will not be affected by previous resolutions of the trustees not communicated to him, subdividing the district; *Threshie*, Nov. 21, 1833, 12 *S. & D.* 105. The trustees will not incur a personal liability for the repayment of any money borrowed, or interest, by having signed

any securities in pursuance of any turnpike act, the tolls being held the only security. Nor is any trustee or subscriber personally liable, upon any pretext, for payment of any sum, or performance of any obligation to which he has not bound himself personally as an individual, independent of his office as a trustee under any turnpike act; § 24. Lands, buildings, or other heritable subjects required for turnpike-road purposes, become the property of the trustees by simple discharge, or consignation of the price in certain specified banks, as completely as if the respective proprietors had executed in favour of the trustees regular dispositions of the same, and infeftments had followed thereon; § 67. The procurator-fiscal and trustees of any turnpike-road, or any person authorised by them, or any one of their number, may prosecute for any expenses, toll-duty, penalty, &c., and the trustees may allow the expenses of such prosecutions to be defrayed out of the funds of the trust; § 109.

In one case, road trustees were found liable for loss of life and injury from a gig being overturned by stones left on the road in the course of an operation, although they alleged that they had no knowledge of the obstruction, and had employed a contractor, habit and repute competent for the operation, and who had been specially charged to be careful; *Findlater*, July 18, 1837, 15 *S. & D.* 1304. The judgment however was reversed in the House of Lords, August 23, 1839; *M. & R.*, 911. The local turnpike acts are adapted to the special circumstances of the particular district or county. See also the general *Statute Service Act*, 8 and 9 *Vict.* c. 81, 1845. See *Highways*.

**Robbery.** The crime of depriving a person of his property by violence offered to his person. By this violence is meant any overmasterful constraining of the person's will to whom it is offered; and wherever this sort of intimidation is resorted to, whether by the mere show of weapons, or by the actual employment of them, or by blows or threats, followed by the taking of the property, the crime is completed. It is not necessary that the property taken be taken from the person of the man invaded. If it be taken from under his immediate charge or custody—*e. g.*, a horse which he leads, or a packet from his cart—it constitutes robbery. The crime is perfected by the carrying away of the thing taken, however trifling its value may be; and provided it has been thus taken, and in the robber's complete and exclusive possession for however short a period, the robbery is held to be fully perpetrated. This crime is one of the four pleas of the Crown, and it is punishable capitally. *Hume*, i. 101, *et seq.*

*Ersk. B. iv. tit. 4, § 64; Alison's Princ. 227; Bank. i. 274; Bell's Com. i. 469; Swint. Abridg. h. t.; Tail's Justice, voce Theft. See Reif. Stouthrief.*

**Robes.** The costume worn by certain persons in respect of the dignities or offices held by them, or of the profession to which they belong. So early as 1455 (long before the institution of the Court of Session), the Scottish Parliament enacted, "That all men of law that are forespeakers for the coat [hired advocates] have habits of green of the fashion of a tunykill, and the sleeves to be open as a tabart."—(1455, c. 12; 2 *Thomson's Acts*, p. 43). The matter remained without any farther regulation for nearly 200 years. In 1609, it appears that Judges even wore no professional costume, and the same may be inferred as to advocates. By the act 1609, c. 8, the whole matter was referred to King James VI. by the Scottish Parliament; thus—"And because a comelie, decent, and orderlie habite and apparrell in the Judges of the land is not onely ane ornament to themselves (being a badge and marke for distinguishing them from the vulgar sort), but the same also breeds in common people that reverence and regard that is due and proper for men in these places. And this being a custome universallie observed almaist through all Europe, the want whereof is greatlie censured by strangers resorting in these parts. The saides Estaites, therefore, upon infinite proves they have of his Majestie's maist singular wisdome in all his directions, and of his gracious love and affection to this his native kingdom, have, in all humilitie, referred to his Highness' awne appoyntment the assigning of any sik severall sort of habite and vestement as shall be in his Majestie's judgment maist meet and proper, as well for Lords of Session, being the supreme judges in civill actions, as for all other inferior judges of the lyke causes. As also for the criminall and ecclesiasticall judges, and for *advocats, lawyers, and all others living by law and practice thereof*, that sa every ane of these people may be known and dignosed in their place, calling, and function, and may be accordinglie regarded and respected. Attour, his Majestie and Estaites foresaids, considering what slander and contempt hes arisen to the ecclesiasticall estate of this kingdome by the occasion of the light and undecent apparrell used by some of that profession, and cheeflie those having vote in Parliament: It is therefore statute that everie preacher of God's word shall hereafter wear black, grave, and comelie apparrell besseeming men of their estate and profession; as lykewyse that all pryors, abbots, and prelates, having vot in Parliament, and especiallie bishops, shall weare grave and

decent apparrell agreeable to their function, and as appertaines to men of their rank, dignitie, and place. And because the haill Estaites humble and thankfullie acknowledges that God of his great mercy has made the people and subjects of this countrie sa happie as to have a King raigne over us wha is maist godlie, wyse, and religious, hating all erroneous and vaine superstition, just in government, and of lang experience therein, knowing better than any king living what apperteins and is convenient for every estate in their behaviour and dustie: Therefore it is agreed and consented to by the said Estaites, that what order soever his Majestie in his great wisdome shall think meet to prescribe for the apparrell of kirk-men, agreeable to their estate and moyen, the same being sent in writ by his Majestie to his Clerk of Register, shall be a sufficient warrant to him for inserting thereof in the buikes of Parliament, to have the strength and effect of ane act thereof."

Following up this statute, the King sent a letter to the Privy Council, dated 16th January 1610, which will be found printed in the first volume of the "*Miscellany of the Maitland Club*," p. 149. A proclamation was thereafter issued, dated 30th January 1610, which acknowledges the King's "singular wisdome in all his princelie directionis, and his gracious love to this his antient and native kingdome," in reference to the apparel, "alswele for the Lordis of Sessioun, being the supreme judgis in civile actionis, as for all utheris inferior judges in the lyke causes, as also for the criminal ecclesiasticall judges, and for advocats, lawyris, and all utheris loving by law and practice thair of, as also for churche men." His Majesty, it was stated, had sent certain directions, but reserved to himself to add thereto on more due consideration, and when he had more leisure. The directions as to the lawyers were—

"That the President and remanent ordinarie Lordis of Sessioun sall weare a purpoure (purple) cloath gowne, faced all about with red crimson satyne, with a hood of purple lyned with crimson satyne also, according to the model and forme of a gowne send downe be his Majestie to be a pattern for all gownes of ordinarie sessionis, onlie the Presidentis gowne sall be faced with red crimson velvet, and the hood lynit with red crimson velvet." This seems to be the gown at present worn by the Judges.

With regard to the bar, clerks of Session and writers to the Signet, the regulation was, "that the advocatis, clerkis of the Session and Signet, sall haif their gowis of black lyned with some grave kind of lyning or furring."



Regulations are also made as to the gowns of the Justiciary Judges; but these were ultimately settled by the subsequent act 1672, c. 16, which enacts, "That for the splendour of that Court, all the Judges sit in red robes faced with white—that of the Justice-General's being lined with ermine for distinction from the red."

No notice is taken of procurators before inferior courts.

The gown of the advocate was to be lined. An idea of what it was may be obtained from drawings in the Lyon Office, representing the order of the funeral of the Chancellor Rothes in 1681. Representations are given in the drawings of all who attended in their robes. The gowns of the Judges appear to have been the same then as now. The Lord Advocate also appears in the same full dress gown as worn by him, on important occasions, at present. The Dean of Faculty and Solicitor-General are not distinguished as wearing any different gowns from the ordinary bar; and at what time this latter officer assumed a silk gown cannot be ascertained. The gowns of the outer bar are represented in the drawings as having ornaments down the front, very much like the braiding on the gown of the Lord Advocate. The whole bar wore *bands and full-bottomed wigs*. The bands went out of general use in the course of the succeeding half-century; and in the Faculty minutes on 19th June 1766, there appears a notice of motion to this effect, "That for the more decent habite and apparel of the advocates, and to distinguish them from others who wear either the same apparel or very little different from it, that it should be resolved that the advocates shall wear bands as a part of their formalities; that the Dean and his council shall wait on the Lord President and lay before his Lordship this motion, and pray his Lordship's and the Court's approbation. The Faculty delayed the consideration of this affair till some after meeting." Nothing farther was done in the matter by the Faculty, and the delayed motion has yet to be taken up. At what time bands were entirely given up cannot be traced. In Crosbie's picture, which hangs in the library entrance, he is represented as wearing bands. And at present, when a member of the Outer Bar pleads before the House of Lords, the bands are resumed.

The only body that seem to have worn, at the funeral of the Chancellor, the plain stuff gown now worn by advocates, were the Professors in the University; and it is probable that convenience and considerations of economy may have recommended it to the bar in later times. See *Report of Faculty of Advocates*, 1859. See also *Solicitor-General*.

**Rogue-Money.** The freeholders of every county in Scotland are directed annually to assess the county or stewartry at any of the head courts, in such sums as they judge necessary, for defraying the expense of apprehending offenders, subsisting them in jail, and prosecuting them. This assessment is called *rogue-money*; it is exclusively appropriated to the above purpose, and collected and accounted for by a person appointed by the freeholders. See *stat. 11 Geo. I. c. 26, § 12*; *Kames' Stat. Law, voce Delinquency*; *Hutch. Justice*, ii. 257; *Tail's Justice, h. t.*; *Blair's Justice, h. t.* See *Justice of Peace*.

**Rolls, Master of.** The Master of the Rolls is a patent officer for life, who has the custody of the rolls and patents which pass the great seal, and of the records of the Chancery. In the absence of the Lord Chancellor or Lord Keeper, he also sits as Judge in the Court of Chancery, and is by Coke called his "assistant." At other times he hears causes in the Rolls' Chapel, and makes orders and decrees. He is also the first of the Masters of Chancery, and has their assistance at the rolls; but all hearings before him are appealable to the Lord Chancellor; *Tomlins' Dict. h. t.* The Master of the Rolls has, by prescription, a general authority to keep the peace throughout the realm; but so far as he is merely an English officer, he has no such authority in Scotland; *Hutch. Justice, i. 2.*

**Rolls of Court.** In the Court of Session, the rolls or lists of depending causes are called and regulated in a manner which requires a short explanation. What regards the *calling lists* has been explained, *voce Calling a Summons*. But after a cause has been called, and has come to be a process, it is set down in order to be brought under judicial cognisance in one or other of certain rolls of Court. These rolls are divided generally into the *Inner* and the *Outer House Rolls*. The latter comprehend what are called the weekly printed rolls of the Court, which exhibit all the new causes coming weekly into Court, and also the hand-rolls of each Lord Ordinary. After a cause has been once called in the weekly printed roll and disposed of, it appears no more in that roll; but while it remains in the Outer-House it is enrolled in the *Hand-roll* of the particular Lord Ordinary before whom it depends. In these hand-rolls, as occasion requires, any case depending before a Lord Ordinary may be enrolled. The hand-rolls are divided into motion-rolls and debate-rolls; and both the weekly roll of new causes and the hand-rolls are made up and placarded in the Outer-House by the clerks of the Judges, according to certain regulations elsewhere explained. The roll itself is a list of the several causes, containing

the surnames of the parties and of the counsel, and in the weekly printed rolls the name of the agent also is given; and in all the rolls the initial letter of the clerk to the process is prefixed to the names of the parties. The ordinary Inner-House rolls of the Court of Session are—1st, The Single Bill Roll; 2d, The Summar or Summary Roll; 3d, The Long Roll; and, 4th, The Short Roll. In the *Single Bill Roll* are inserted all petitions, reclaiming notes, and other notes or applications to either Division of the Court, whether written or printed; and this roll is daily put out and called during the sitting of the Court. It is kept by the keeper of the Inner-House Roll. See *A. S. 11th March 1791*. By the act 20 and 21 Vict. c. 56, 1857, all summary petitions and applications to the Court are now brought before the junior Lord Ordinary officiating in the Outer-House. The *Summar Roll* is appropriated to such causes as require despatch, including cases where the Court act ministerially, or decide by virtue of special statute, or exercise their *nobile officium*, as in the appointment of judicial factors and the like. Applications under the Bankrupt Statute, petitions and complaints, and so forth, after having first appeared in the Single Bill Roll, are, where no ulterior steps in the Inner-House are necessary, enrolled in the Summar Roll. So also reclaiming notes against Bill-Chamber interlocutors, or interlocutors pronounced in the preparation of a cause, are put out to be advised in the Summar Roll. And in addition to these, any case which, on special grounds, can be shown to the Court to require despatch, will be enrolled with the leave of the Court in this roll. In disposing of the business, the Court first calls the Single Bill Roll and then the Summar Roll. The *Long Roll* is the roll for all Inner-House causes, which, after having come into the Inner-House rolls through the Single Bill Roll, or by a warrant to enrol granted by an Outer-House Judge, are not appropriated to the Summar Roll. This long roll is put up only at the end of the session, and exhibits the entire list of causes depending in either Division of the Inner-House. The *Short Roll*, again, is merely a section of the long roll, generally consisting of two or three cases taken in the order of the long roll and put down for advising daily during the session. In the daily order of business, this roll is taken last, unless when special circumstances render a deviation necessary. The only other rolls which it is necessary to notice are the *Teind Rolls*, as to which the rule is, that the teind ordinary action roll of new causes, coming before the Commission of Teinds, is kept by the Teind Clerk, and called once a fortnight during the session—

*i. e.*, on the Teind Court day, being Wednesday of every alternate week. The depending teind causes and localities are enrolled before the Junior Lord Ordinary, and called weekly on Saturday morning; *Beveridge's Form of Process*, ii. 727. See *Augmentation. Locality. Teind Court*. In the inferior courts there are also rolls analogous to those in the Court of Session, but of course not so complicated or various. See, on the subject of this article, *Beveridge*, i. 292, ii. 277; *Shand's Prac.* i. *et seq.*; ii. 458, *et seq.*

**Roman Catholics.** Very severe laws were formerly in force against Roman Catholics; but these are now entirely abolished. See *Papists*. By 31 Geo. III. c. 32, all the severe restrictions and penalties of the former laws were removed from those Roman Catholics, who should make and subscribe a declaration of their professing the Roman Catholic religion, and take an oath of allegiance to the Sovereign, abjuration of the Pretender, renunciation of the Pope's civil power, and abhorrence of the doctrine imputed to them, of destroying and not keeping faith with heretics, and depositing or murdering princes excommunicated by the See of Rome. But the most important measure of relief to the Catholics was the statute 10 Geo. IV. c. 7, commonly called the Catholic Emancipation Act. On the preamble that, by various acts of Parliament, restraints and disabilities are imposed on Roman Catholics to which other subjects of the realm are not liable; and that it is expedient to discontinue these; and that certain oaths and declarations, commonly called the declaration against transubstantiation, and the invocation of saints, and the sacrifice of the mass, as practised in the Church of Rome, formerly required as qualifications for sitting and voting in Parliament, and for the enjoyment of certain offices, franchises, and civil rights, should be dispensed with; it is enacted, that the provisions of the acts requiring these declarations shall be repealed, save as afterwards excepted in the act. It is then provided, that Roman Catholics may sit and vote in either House of Parliament, on taking the following oath, in lieu of the oaths of allegiance, supremacy, and abjuration:—"I, A. B., do sincerely promise and swear, that I will be faithful, and bear true allegiance to her Majesty, Queen Victoria, and will defend her to the utmost of my power against all conspiracies and attempts which shall be made against her person, crown, or dignity; and I will do my utmost endeavour to disclose and make known to her Majesty, her heirs and successors, all treasons and traitorous conspiracies which may be formed against her or them: And I do faithfully promise to maintain, support, and defend, to the utmost of my

power, the succession of the Crown, which succession, by an act entitled An Act for the further limitation of the Crown; and better securing the rights and liberties of the subject, is and stands limited to the Princess Sophia, Electress of Hanover, and the heirs of her body, being Protestants; hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the Crown of this realm: And I do further declare, That it is not an article of my faith, and that I do renounce, reject, and abjure the opinion, that princes excommunicated by the Pope, or any other authority of the See of Rome, may be deposed or murdered by their subjects, or by any person whatsoever; and I do declare, that I do not believe that the Pope of Rome, or any other foreign prince, prelate, person, state, or potentate, hath, or ought to have, any temporal or civil jurisdiction, power, superiority, or pre-eminence, directly or indirectly, within this realm. I do swear, That I will defend, to the utmost of my power, the settlement of property within this realm, as established by the laws: And I do hereby disclaim, disavow, and solemnly abjure, any intention to subvert the present Church Establishment, as settled by law within this realm: And I do solemnly swear, that I never will exercise any privilege to which I am or may become entitled to disturb or weaken the Protestant religion or Protestant government in the United Kingdom: And I do solemnly, in the presence of God, profess, testify, and declare, that I do make this declaration, and every part thereof, in the plain and ordinary sense of the words of this oath, without any evasion, equivocation, or mental reservation whatsoever. So help me God."

Roman Catholics may vote at elections, and be elected, on taking and subscribing this oath, and the other oaths lawfully tendered to electors; § 5. No Roman Catholic priest can sit in the House of Commons; § 9. Roman Catholics may hold and enjoy all civil and military offices and places of trust or profit under her Majesty, and exercise any other franchise or civil right, except as excepted in the act, upon taking and subscribing the above oath; § 10. But the act is declared not to exempt Roman Catholics from taking the oaths required from other persons on their admission to such offices; § 11. A Roman Catholic cannot be a guardian and justice of the United Kingdom, in absence of the Sovereign, or Regent of the United Kingdom, or Lord High Chancellor, Lord Keeper or Lord Commissioner of the Great Seal of Great Britain or Ireland; or Lord-Lieutenant, or Lord-Deputy, or other chief governor or governors; or High Commissioner to the

General Assembly of the Church of Scotland; § 14. Roman Catholics may be members of any lay body corporate, and hold any civil office or place of trust or profit therein, and do any corporate act, or vote in any corporate election, or other proceeding, upon taking and subscribing the above oath; and other oaths required from members; § 14. But such members cannot vote in ecclesiastical appointments; § 15. The act is declared not to extend to offices in the Established Church, or ecclesiastical courts, universities, colleges, or schools: And it is likewise provided, That nothing contained in the act shall be held to enable any person, otherwise than he is now by law enabled, to exercise any right of presentation to any ecclesiastical benefice whatsoever; or to repeal, vary, or alter in any manner, the laws now in force in respect to the right of presentation to any ecclesiastical benefice; § 16. Where any right of presentation to any ecclesiastical benefice belongs to any office in the gift or appointment of the Crown, and such office is held by a Roman Catholic, the right of presentation devolves upon the Archbishop of Canterbury; § 17. No Roman Catholic, directly or indirectly, can advise the Sovereign, or guardian, or regent of the kingdom, or Lord-Lieutenant of Ireland, &c., respecting appointments in the Church of England and Ireland, or of Scotland, under pain of being deemed guilty of a high misdemeanour, and disabled for ever from holding any office, civil or military, under the Crown; § 18. Provision is made for the time within which the above oath must be taken by persons appointed to offices. Persons entering on any office without having taken the oath are liable to forfeit L.200, and the appointment is void; § 21. Titles to sees, &c., must not be assumed by Roman Catholics; § 24. Judicial or other officers must not attend at any place of worship other than the established church, under a penalty of L.100; § 25. Roman Catholic ecclesiastics officiating, excepting in their usual places of worship, are liable to a penalty of L.50; § 26.

By 2 and 3 Will. IV. c. 115, passed for the purpose of securing the charitable donations and bequests of Roman Catholics, they are declared to be subject to the same law, in respect to their schools, places of worship, education, and charitable purposes, in Great Britain, and the property held therewith, and the persons employed in or about the same, as the Protestant Dissenters are subject to in England. Roman Catholic schoolmasters, when required to take an oath as a qualification, are directed to take the above-cited oath, prescribed by 10 Geo. IV. c. 7. With regard to the laws formerly or still affecting

Roman Catholics, the following authorities may be consulted: *Ersk. B. ii. tit. 3, § 16, in note*; *More's Notes to Stair*, p. xlv.; *Bank. vol. i. p. 49*; *Kames' Stat. Law Abridg. h. t.*

By the act 7 and 8 Vict. c. 102, 1844, various penal enactments anent to Roman Catholics are repealed. The act 7 and 8 Vict. c. 97, (1844), regulates the application of charitable donations and bequests in Ireland; and the act 14 and 15 Vict. c. 60, 1851, prevents the assumption of ecclesiastical titles in respect of places in the United Kingdom.

**Roman Law.** The Roman law, the principles of which are so remarkably incorporated with those of the law of Scotland, was founded originally upon the constitutions of the ancient kings of Rome; next upon the twelve tables of the decemviri; then upon the laws or statutes enacted by the senate or by the people; the edicts of the prætor and the *Responsa Prudentum*, or the opinions of learned lawyers; and, lastly, upon the imperial decrees or constitutions of the emperors. Authority was also given in the Roman, as in most other systems, to what is called customary or unwritten law. Those materials were first reduced into a *Code* by the order of the Emperor Theodosius, A.D. 438, which, under the name of the *Theodosian Code*, continued for several centuries to be the only authoritative compilation recognised in the western part of the empire. Justinian's body of the Roman law, the authority of which was confined to the eastern division of the empire, was compiled and finished by Tribonian about the year 529. It consists, 1. Of the *Institutes*, containing the elements or first principles of the Roman law, in four books. 2. Of the *Digest* or *Pandects*, in fifty books, containing the opinions and writings of eminent lawyers. 3. Of a new *Code*, or collection of imperial constitutions, in twelve books—the *Theodosian Code* having been, by the lapse of a century, rendered imperfect. 4. Of the *Novels*, or new constitutions posterior in time to the other books, being a supplement to the *Code* containing the new decrees of successive emperors. These form the *Corpus Juris Civilis*, as published about the time of Justinian, and which soon afterwards fell into oblivion, until about the year 1130, when a copy of the *Pandects* is said to have been found at Amalfi, in Italy; after which the study and authority of the Roman law was revived and adopted as the foundation of most of the European codes. The story of the finding of the *Pandects* at Amalfi, however, is considered a mere romance, or, at all events, quite inadequate to account for the revival of the civil law after it had been altogether extinguished. The opinion now generally adopted is, that the Roman law was never altogether extinguished, and that the

extraordinary influence which it has exerted over every system of jurisprudence in Europe is to be accounted for not only by its wisdom and general agreement with the law of nature, but also by the systematic manner in which the Romans completed their conquests, and communicated their arts, language, and manners to their new subjects. The *Digest* or *Pandects* is divided into seven parts: the first containing the elements of law, as what is justice, right, &c.; the second part treats of judges and judgments; the third of personal actions, &c.; the fourth, of contracts, pledges, &c.; the fifth, of wills and testaments, &c.; the sixth, of the possession of goods; and the seventh, of obligations, crimes, punishments, &c. The *Institutes* are an epitome of the *Digest*, divided into four books, correcting the *Digest* in some respects, and arranged more systematically. The *Novels* were published at several times, without any method. They are also termed *Authenticæ*, as having been authentically translated from Greek into Latin; and they are divided into nine collations, constitutions, or sections; and these again into 168 *Novels*, which are distributed into certain chapters. The first collation relates to heirs, executors, &c.; the second to the state of the Church; the third is against bawds; the fourth concerns marriages, &c.; the fifth forbids the alienation of the possessions of the Church; the sixth treats of the legitimacy of children, &c.; the seventh of witnesses; the eighth ordains wills to be good, although imperfect; and the ninth relates to succession in goods, &c. To this body of the civil or Roman law is added the *Book of the Feus*, explanatory of the customs and services due by subjects or vassals to princes or superiors, for feus held of them. The *Constitutions* of the emperors were promulgated either by *rescript*, which was the letter of the Emperor in answer to those who inquired the law of him; or by *edict*, which the Emperor issued of his own accord; or by *decree*, which was pronounced judicially in a particular cause. The Emperor possessed the power of issuing *rescripts*, *edicts*, and *decrees*, under the *lex regia*, which not only empowered him to make laws, but exempted him individually from their coercive power. See on the subject of this article, *Blackst. vol. i. p. 80, et seq.*; *Ersk. B. i. tit. 1, § 27, et seq.*; *Stair, B. i. tit. 1, § 12*; *Taylor's Introduction to the Study of Civil Law*; *Gibbon's Decline and Fall of the Roman Empire*, vol. vii. c. 44; *Taylor's Elements of Civil Law*. See also *Law*.

**Rood.** See *Particulate*.

**Roof.** In Edinburgh and other towns in Scotland, where there are numerous tenements or *lands* (as they are called), consisting of

several storeys or floors, belonging to different proprietors, questions sometimes arise as to the burden of supporting the roof, which in one sense may be said to be common to the whole tenement. This burden is usually regulated by an express clause in the title-deeds of the several parties interested; but in absence of such special covenant, the burden of supporting and upholding the roof lies *de jure* on the proprietor of the garret or upper floor. *Ersk. B. ii. tit. 9, § 11; Nicholson, 19th Feb. 1708, M. 14516; Luke, 1st Feb. 1690; Brown's Supp. iv. 258. See Common Interest.*

**Rotation of Crops.** See *Cropping*.

**Roup.** See *Articles of Roup. Auction.*

**Royal Burghs.** A royal burgh is an incorporation created by a royal charter, giving jurisdiction to the magistrates within certain bounds, and vesting certain privileges in the inhabitants and burgesses. See *Burgh-Royal. Burghage-Holding.*

**Rubric of a Statute.** The rubric of a statute is its title, which is so termed because anciently it was written in red letters. The rubric may be accounted part of the statute, and *in dubio* an argument may be legitimately deduced a *rubro ad nigrum*—*i. e.*, from the rubric to the body of the statute. *Ersk. B. i. tit. 1, § 49.*

**Running Days;** a term in the contract of charter-party used in contradistinction to *Working Days*, and referring to the ship's lay-

*days*, or days of demurrage. In computing by running days, they are reckoned as days in a bill of exchange; while in computing by working days, all Sundays and Custom-house holidays are excluded. *Bell's Com. i. 577. See Charter-Party. Demurrage.*

**Running Letters.** See *Liberation.*

**Running Ship;** a vessel which in time of war does not sail with convoy, is technically said to *run* the voyage. In an insurance on a running ship, if the underwriters are given to understand that there is even a chance of convoy, while the owners have already resolved to run, the contract is void. *Bell's Com. i. 620. See Convoy. Insurance.*

**Runrig-Lands;** are lands where the alternate ridges of a field belong to different proprietors. By the act 1695, c. 23, a division of such lands was authorised to be made between the different proprietors according to their respective interests, with the exception of lands belonging to burghs or incorporations. This division may be insisted in before the judge-ordinary or justices of the peace. Under the description of runrig-lands are comprehended lands where the portions consist not of ridges only, but of alternate portions of several acres each. *Ersk. B. iii. tit. 3, § 59; Bank. i. 220; Bell's Princ. § 1098; Illust. ib.; Kames' Stat. Law Abridg. h. t.; Tai's Justice of Peace, and Blair's do., voce Planting; Shand's Prac.; Jurid. Styles, 2d edit. iii. 151. See Burgh Acre.*

## S

**Sabbath.** See *Sunday.*

**Sacraments.** The act 1617, c. 6, lays the burden of providing necessaries for the administration of the sacraments upon the parishioners. But this has been interpreted to mean the heritors. In practice the expense of providing communion elements falls on the teinds, and the Court of Session have always been in use, in augmentations, to decern for a special sum for this purpose. When this burden is laid on the titular, he is entitled to have the amount allocated on the proprietors of the several lands over which his titularity extends. L.8, 6s. 8d. is usually awarded, but in populous parishes L.10 is sometimes given. *Ersk. B. ii. tit. 10, § 50; Bank. ii. 69; Dunlop's Parochial Law, 289; Church Law Styles, 313.*

**Sacreborgh;** or sickerborgh, a "sicker, sure, sufficient cautioner, a kind of caution found more especially in actions or pleyes." *Skene, h. t.*

**Sacrilege;** is any violation of things dedicated to the offices of religion. Theft be-

comes more heinous when sacred things are its subjects; but in Scotland there is no express enactment which declares the punishment more severe. There are instances, however, of capital punishment having been formerly inflicted on persons convicted of stealing chalices, priests' ornaments, and the like; *Hume, i. 108. See Violating Sepulchres.* Capital punishment for sacrilege in England was abolished by 5 and 6 Will. IV. c. 81; explained by 6 and 7 Will. IV. c. 4.

**Sak;** in old law language, the unlaw or americiament paid by him "who denies that thing which is proven against him to be true, or affirms that thing whereof the contrary is of verity." *Skene, h. t.*

**Salaries.** The salaries of the Judges of the Court of Session have been found not to be arrestable; and according to Erskine pensions from the Crown are not arrestable because they are alimentary, and indeed all salaries annexed "to offices, in so far as they amount to no more than a reasonable allowance for the decent support of those who are

named to them, though they be granted not by the King but by subjects, whether communities or private donors, ought on the same ground to be accounted alimentary;" *Ersk. B. iii. tit. 6, § 7*. It has been found that arrears due to officers in the army (but not on half-pay), ministers' stipends, macers' fees and dues payable to the principal keepers of the Parliament-House, are arrestable *quoad excessum*. *Bell's Com. i. 126-31; Ersk. B. iii. tit. 6, §§ 7, 8; Stair, B. iii. tit. 1, § 37; Bank. i. 159; Swint. Abridg. vocibus Courts—King; Brown on Sale, 129; Darling's Session Prac. 41, 64; Macfarlane's Jury Prac. 5, 7, 8; Brown's Synop. p. 101. See Offices.*

**Sale.** In the law of Scotland, sale is a consensual contract, by which one party, called the seller or vendor, agrees to transfer the property of a subject, in consideration of a price to be paid by the other party, called the purchaser or vendee. In the law of England sale is defined to be a contract, by which the seller at once transfers the property of a subject, in consideration of a price paid or to be paid. There is this difference, therefore, between the laws of the two countries, that, according to the English law, a thing, when sold, immediately becomes the property of the purchaser; whereas, by the law of Scotland, the seller does not, by the completion of the contract, alienate the subject—he only becomes bound to alienate it—the alienation being completed by delivery. This distinction in principle between the laws of two countries is important; although certain peculiar provisions of the law of England render the practical differences between the two systems less prominent than might have been anticipated. Among what may be called the equalising peculiarities of the English law may be mentioned:—1. The qualified nature of the right of property in certain cases—while, in Scotland, property never signifies anything but the *jus in re*. 2. The English law doctrine, that the contract is not completed without payment of the price, unless credit has been expressly given, or unless the subject has been delivered unconditionally, or unless earnest has been paid—although payment of earnest does not entitle the buyer to take away the goods without paying the price. 3. The doctrine that a sale of goods in *market overt* is good, though the goods should turn out not to have been the property of the seller; see *Market Overt*. And, 4. The doctrine of reputed ownership, which secures the creditors of those who retain the possession of goods which they have sold. See *Reputed Ownership*.

In the law of Scotland the contract of sale is completed by simple consent. But in England, by the statute of frauds, no contract for the sale of goods, for the price of L.10 or

upwards, is good, unless the buyer accept and actually receive part of the goods; or give something as earnest; or unless some note or memorandum in writing be made, and signed by the parties to be charged by such contract, or their agents thereunto authorised; 29 Car. II. c. 3, § 17. The doctrine, that consent alone is sufficient to complete the contract of sale in the law of Scotland, is subject, however, to certain exceptions. Thus, writing is necessary to prove the consent, wherever the parties stipulate that writing shall intervene; and in the sale of heritable property and of ships, writing is legally indispensable. See *Sale of Land. Ship. Vendition of Ship. Evidence*. The parties may make the purification of a condition essential to the completion of the contract, and such a condition is called a suspensive condition, or a condition precedent—until the fulfilment of which there is no proper sale. It has been found in England, that a condition adjoined to a sale of goods, that they shall be approved of by the buyer, within a certain time, is intended for the benefit of the buyer only, and that the sale becomes absolute on the lapse of the specified time, without intimation of the buyer's approbation. *Humphries, 16 East. 45, cited in Brown on Sale, 36*. It is sometimes agreed by a retailer, that if he do not sell goods within a certain time, he shall be entitled to return them to the wholesale dealer from whom he had them. See *Sale and Return*. A sale on arrival is a sale of goods coming from abroad: if the goods do not come, there is no sale. In conditional sales, while the condition is pendent, neither party is at liberty to resile; and the accomplishment of the condition has a retrospective effect to the date of the contract, so that if either should die in the interim, his rights under the contract would pass to his heir. If the seller, *pendente conditione*, sell the goods to a third party, the buyer will be entitled to damages. See *Conditional Obligation. Suspensive Condition*. By the Roman law, and also by the law of England, where any operation of weighing, measuring, or the like, remains to be performed, the contract of sale is incomplete. There do not appear to be any adjudged cases establishing this rule in the law of Scotland; nor, according to the principle of the Scotch law, is such a rule necessary, because, while, by the law of England, the completion of the contract transfers the property (which is irreconcilable with the notion that the subject is not yet known or defined), in the law of Scotland the contract may be completed without transferring the property. In such cases, by the law of Scotland, the seller, and not the buyer, has the risk of the subject not yet separated from the mass. See *Periculum and infra*.

If it be found that the subject of the sale has previously perished, there is no sale. There may, however, be the sale of something which has not yet come into existence. See *Res Futuræ. Spei Emptio*. And there may be a sale of what belongs to another. See *Res Alienæ*. As a general rule, everything adapted to the purposes of commerce may be sold, except where the sale is prohibited by law. But, there are certain things which, from their nature, are held to be placed *extra commercium*. See *Res Publicæ. Res Sacræ*. The contracts which are prohibited on account of their opposition to law or public morals are considered in the articles *Pactum Illicitum. Smuggling. Offices, &c.* As to the requisite qualities of the price, which is another essential of the contract of sale, see the article *Price*. The consent of the parties, which is the third essential of the contract, means the co-existence of a mutually expressed purpose to buy and to sell. If, therefore, a merchant makes an offer by letter to buy goods, and, before the letter reaches its destination, sends another letter recalling his offer, there is no sale, even although the party to whom the offer is made, before receiving the second letter, should have sent off an acceptance; for in such a case there is no co-existence of a reciprocal wish to buy and to sell. Of course, if the party to whom the offer is made suffers any loss in consequence of the offer, the other party will be bound to make reparation. The parties must also be agreed as to the subject of the sale. If they differ *in corpore—i. e.*, if the seller agrees to sell one thing, and the buyer to buy another—there is no sale. By the Roman law, if they agreed *in corpore*, but differed as to something accessory to it, the sale was valid. If there be no error *in corpore*, but if there be error as to the substance of the thing, or any of its essential qualities, without which it would not be entitled to the name under which it is sold, there is no sale. See *Error in Essentialibus*. If there be error only as to some accidental quality, the sale is good. The parties must be agreed as to the price; but if the buyer's price be larger than the seller's price, the sale is good at the seller's price, since both have consented to that price. The parties must agree that the contract shall be sale, and no other contract.

No one can be a party to the contract of sale who is not capable of consent. See *Idiot. Pupil. Minor. Marriage. Alien*. A wife may sell any subject belonging to herself, provided her husband, as her legal curator, give his consent. Debts due by a constituent, purchased by his factor or agent, are held as purchased for behoof of the constituent, and no claim can be sustained but for the trans-

acted sum. If, therefore, factors, agents, trustees, and others in similar circumstances, purchase debts due by their constituents for a sum less than they will bring, they can only claim the sum which they have actually paid, and not the full amount of the debt, or the dividend which may be paid upon it; and this, even although the factory should contain a clause expressly authorising the factor to make such acquisitions for his own behoof. A common agent in a process of ranking and sale was found disqualified from purchasing the estate exposed under his direction; *York Buildings Co.*, 8th March 1793, *Mor.* 13,367, and 4 *Dow*, 379. See *Ranking and Sale*. Factors appointed by the Court in a sequestration of a land estate are prohibited by Act of Sederunt from buying in and compounding the debts affecting it; *A. S.* 25th Dec. 1708.

The obligations which the seller incurs by the completion of the contract are, 1. The delivery of the thing sold, where it is not already in the possession of the buyer. The seller must, at his own expense, take the steps necessary for implementing this obligation, and freeing the subject, if it be in the possession of a third party. He is likewise bound to free the subject from all burdens or incumbrances. In the sale of heritage, this is a doctrine of great importance; and the records furnish the means of discovering the incumbrances which exist. See *Incumbrances. Search of Incumbrances*. In absence of express stipulation, the seller is bound to deliver the subject as soon as the buyer demands it; provided the latter has paid, or offers to pay, the price. Where nothing has been stipulated as to the place of delivery, the seller is bound to deliver the subject only in the place where it was at the time of the sale. If the sale has not been upon credit, the buyer cannot demand delivery of any part of the subject, without payment of the whole price. And even when the sale is upon credit, the seller is not bound to deliver, if, after the contract, the seller has become insolvent, and unable to pay the price. But even in this case, if the buyer or his creditors be willing to pay the price where the sale has been for ready money, or to give security where it has been upon credit, the seller is bound to deliver in like manner as if the buyer were solvent. It has been questioned, whether the seller may be compelled to make delivery, or whether he is entitled to be relieved of his obligation on paying the *damnum et interesse*. See this question discussed in the article *Factum Præstandum*. If the seller unduly delays, or altogether fails, to make delivery, he must make up the loss thereby occasioned to the buyer. See *Mora. Damages*. It has been

questioned, whether the seller's obligation is fulfilled by his merely making delivery, or whether he is also bound to make the buyer proprietor of the thing sold. By the Roman law, if the seller sold the subject believing it to be his own, the buyer could not reject it on the ground of defect in the title, or make any claim for indemnification, before he was actually disturbed in the possession. But if the seller knew it not to be his own, he might be sued even before eviction. Stair adopts this rule in its full extent; B. i. tit. 14, § 1. The question, however, does not seem ever to have been tried in the Scotch courts in the case of a sale of moveables; and, perhaps, were such a question to occur, the rule of the Roman law might be followed. But it is certain that, by the law of Scotland, the buyer, when there is no stipulation to the contrary, is entitled to reject any title to heritage which is not sufficient securely to convey the property. See *Sale of Land. Progress of Titles*. The seller is not only bound to deliver the subject, but is also bound to warrant the buyer against eviction. See *Warrandice*.

By the Roman law, if the buyer found that the subject was so deficient in either quantity or quality as that, had he known the deficiency, he would not have entered into the contract, he was entitled to sue for repetition of a part of the price corresponding to the deficiency; but this rule does not appear to have been adopted in the law of Scotland. See *Quantis Minoris Actio*.

The obligations of the buyer are—to pay the price, and to take possession of the thing sold. Where no term is agreed upon, the seller may demand payment of the price immediately upon offering sale of the thing sold. If, after the sale, the seller, without any fault of his own, has become unable to make delivery, the price is, notwithstanding, due by the buyer. See *Periculum*. But the buyer cannot demand payment of the price while he is himself in *mora* in delivering the subject. With regard to the cases in which interest is due on account of *mora* in paying the price, see the article *Interest*. When no special agreement has been made as to assuming possession or carrying away the subject, or when a certain time is not allowed by the custom of the country, or of a particular trade, the buyer may be called upon to do so immediately. If he unduly delay, he will be liable, in the case of moveables, for warehouse rent or other expenses in keeping the subject. But it has been decided in the English courts, that the neglect of the buyer to carry away the subject does not entitle the seller, of his own authority, to annul the contract, and resell the goods. With regard to the risk of a subject sold, but still

undelivered, see the article *Periculum*. As soon as the subject is delivered, it becomes the property of the buyer, provided it belonged to the seller at the time of the sale. The right of property is not, as it was in the Roman law, in dependence until the payment or securing of the price; the buyer being uncontrolled in the use of the subject as soon as it is delivered to him, whether the price has been paid or not; *Stair*, B. i. tit. 14, § 2.

The contract of sale may be brought to an end without being implemented; and its dissolution is distinguished from its original nullity. Dissolution may take place either by consent, or in consequence of certain circumstances attending the formation of the contract, which may entitle one of the parties to rescind. Constraint, or fraud inducing the contract, are grounds of dissolution. One great distinction between a contract void *ab initio* and one only voidable is, that, in the former, everything following upon the contract partakes of its nullity, and the buyer acquires no property in the thing sold; in the latter, the contract is good until challenged. The buyer, therefore, in such a case acquires a property in the thing sold, which he may transfer to a third party, whose title, if he be in *bona fide*, will not be affected by the vices of the former contract. See *Force and Fear. Fraud. Error in Essentialibus*. When the contract is dissolved by mutual consent, things are restored to the situation in which they were previous to the sale. It is equivalent to a consensual dissolution; if the parties enter into a second contract concerning the same thing; as, for example, when it is resold for a greater or smaller price. In Scotland there can be no *rescindere* by one who has no property in the thing sold. See *Labes Realiis. Market Overt*. The contract may be dissolved in consequence of the purification of a resolutive condition—*i. e.*, on the arrival of an event at which it was previously agreed that the contract should determine. See *Resolutive Condition. Pactum de Retrovendendo. Pactum Legis Commissoriae*. A sale on trial is an example of such a condition. By such a contract the property and the risk are transferred, but under the condition that, if the subject does not please, the buyer may return it.

The supervening insolvency of either party has very important effects on the contract of sale. And the law provides various remedies to prevent loss to either party. See *Lien—Stoppage in Transitu—Retention*—for the seller's remedies. Should the seller become bankrupt after the completion of the contract, the buyer is merely a personal creditor for the delivery of the thing sold; nor is this rule in any way affected by the circumstance of his having or



not having paid the price. In either case, he is in no better situation than the seller's other creditors. Where, again, the subject has been delivered before the seller's failure, it is placed entirely beyond the diligence of his creditors. In certain circumstances the buyer, when aware that he will not be able to pay the price, is entitled and bound, with the seller's consent, to rescind the contract and refuse to take delivery of the goods. See *Rejection in Transitu*. Where, however, the seller refuses his assent, or where there are circumstances inferring that he has made his election not to rescind the contract, he will not be entitled, on the buyer's bankruptcy, to demand the goods.

Peculiar rules are sometimes brought into operation in consequence of sale being combined with other contracts; as where the thing sold is something which the seller, in the exercise of his art, agrees to manufacture for the buyer—*e. g.*, where one buys a carriage, or a ship, to be built by the seller. In England, such contracts are not within the statute of frauds, and the property does not pass until the thing is finished, although the price may have been paid. In a Scotch case, however, where the price of a ship was to be paid by instalments, at laying the keel, at planking to the top of the gunwale, and at launching, there was held to be an appropriation to the buyer from the time of laying the keel; *Simson*, 2d August 1786, *Mor.* 14,204. And the doctrine of this case was afterwards adopted in the English courts; *Woods v. Russell*, 1822, 5 *Barn.* and *Ald.* 942. See *Bell's Illust.* i. 384. See the subject of *Sale* very ably treated in the late Mr Mungo Brown's "Treatise on Sale." See also *Stair*, B. i. tit. 14; *Mor's Notes*, p. lxxxv.; *Mr Brodie's Supp.* 849; *Ersk.* B. iii. tit. 3, § 3; *Bell's Com.* i. 434; *Bank.* i. 407, *et seq.*; *Bell's Princ.* § 85, *et seq.* 889; *Illust. ib.*; *Hunter's Landlord and Tenant*; *Bell on Purchaser's Title*, ii. 142; *Ross's Lect.* ii. 65.

In the case of *Hansen v. Craig*, Feb. 4, 1859, 21 *D.* 432, a cargo of oil prepared for sale, weighed and lying ready for delivery, was sold. In the notes of sale which were exchanged the number of tons was stated, and a lump price per ton for the whole cargo. By the usage of the trade, the purchaser had right, either before or after delivery, to check the quantity and quality of the oil, and was entitled to a deduction for any sediments or "foots" that might be found in the casks. Before the delivery the greater part of the oil was burned. The Court held that the bought and sold notes afforded the means of ascertaining the price, and that the right to check the quantity and quality not being a suspensive condition, the contract of sale was

complete, and the risk transferred to the purchaser. Lord Justice-Clerk INGLIS observed—"I hold that the sale of a mass of fungibles, certain and known by general description, but of unascertained extent, at a rate of price according to measure, weight, or number, is not a complete personal contract of sale, such as will operate a transfer of the risk to the buyer, until the mass shall have been measured, weighed, or counted, and so the price ascertained. It is the non-ascertainment of the price by the contract that makes the contract incomplete. How far, then, is this principle applicable to the case in hand? Does the statement of the quantity in the contract remove that uncertainty of the price which alone, in the case supposed, derogated from the completeness of the contract? I am of opinion that it does, and that the price in the case before us is not uncertain, because there is within the contract itself not a statement of the *cumulo* price certainly, but a statement of particulars which enables any man, without going beyond the contract, by simple arithmetical process, to ascertain the *cumulo* price for himself."

By the Mercantile Law Amendment Act, 19 and 20 Vict. c. 60, 1856, it is declared that goods sold, but not delivered, shall not be attachable by the creditors of the seller. When, also, the first purchaser, before delivery, sells to another, the original seller is not entitled to retain the subject in a question with the second purchaser, or other in his right, for any debt or obligation due by the original purchaser, but only for the price of the subject, or for performance of the obligations or conditions of the contract of sale. It is further declared, however, that any seller of goods may arrest or poind the goods sold while in his possession at any time prior to the date of the sale to a second purchaser being intimated to the original seller; and such arrestment or poinding has the same operation and effect in a competition as an arrestment or poinding by a third party. By the same Act, a seller is not now held to warrant goods unless he shall have given an express warranty of the quality or sufficiency of the goods, or unless the goods have been expressly sold for a specified and particular purpose.

**Sale of Land.** In Scotland, every proprietor of heritage must have a written title; and that legal rule, combined with the peculiarities connected with the Scotch system of records, renders the doctrine as to the sale of land, in some particulars, different from that as to the sale of moveables. In so far as this subject is connected with feudal conveyancing, see *Disposition*. *Confirmation*.

*Resignation. Sasine. Precept of Sasine. Instrument of Sasine. Apparent Heir. Bounding Charter. Burgage. Charter. Charge. Cognition and Sasine. Consolidation. Conveyancing. Heir. Liferent. Missives. Prescription. Progress of Titles. Quæquilem. Redeemable Rights. Search of Incumbrances. Testing Clauses. Titles to Land. Warrandice.* And, in addition, the following rules as to the contract itself are important:—In the sale of heritable property writing is absolutely required, not only as a means of proof, but also as a solemnity without which the contract is not binding, although its existence be admitted, or offered to be proved *alimunde*, or even by oath of party. Even where the contract has been reduced into writing, it is not binding, *rebus integris*, if the writing be defective in the solemnities required by law, although the subscription should be acknowledged. Where the contract is in the form of an offer and acceptance, or of mutual missives, both writings must be probative. See *Missives*. There may, however, be an effectual bargain for the sale of heritage in the form of a unilateral obligation—*e. g.*, of a promise or obligation to sell. In such cases, it is enough that the promise be contained in a probative writing binding the seller. *Rei interventus* may also bar the right of resiling from an informal written contract. See *Rei Interventus*. The completion of the contract raises an obligation on the seller's part to transfer the property of the subject to the purchaser, and to establish it in his person by a valid title. Until, therefore, such a title is offered to the purchaser, he is not obliged to pay the price. This right of the purchaser to object to a defective title may be renounced; and it is frequently agreed between the parties that the purchaser shall be satisfied with the title as it stands. The effect of such an agreement is to bar the purchaser from objecting to the title, or refusing to pay the price, on the ground of its being defective. See *Progress of Titles*. But it does not discharge the seller's obligation under the warrandice in case of eviction. In absence of such an agreement, where the seller's title is defective, the buyer is not entitled both to retain the price and the subject until a good title is offered. He must make his election either to pay the price or to renounce the bargain altogether. See, as to the sale of land, and the completion of titles, *Bell on Purchaser's Title*; *Stair*, B. i. tit. 10, § 9; *Ersk. B. iii. tit. 2, § 2*; *Brown on Sale*, 54, 232; *Bell's Princ.* § 889; *Bell on Deeds*, i. 144.

**Sale and Return**; is a contract by which goods are delivered by a wholesale dealer to a retailer, to be paid for at a certain rate, if

sold again by the retailer; and if not sold, to be returned to the vendor. When no time is specified for the return, if the goods are not returned within a reasonable time, the contract becomes absolute, and the price may be recovered from the retailer as from a buyer. In a case of this kind in England, where the goods had not been returned within six months, the judge expressed his opinion that the sale had become absolute. *Bailey, Peake, N. P. C. 56*; *Brown on Sale*, 37; *Bell's Com. i. 269*; *Bell's Princ.* § 109; *More's Notes on Stair*, lxxxviii.

**Sale, Power of.** See *Power of Sale*.

**Salmon-Fishing.** The right to fish for salmon in rivers and estuaries, within sea-mark, or where the sea ebbs and flows, otherwise than with the rod, is *inter regalia*, and cannot be exercised by a subject without a grant from the Crown. A grant is made either by an express conveyance of a salmon-fishing, *cum piscatione salmonum*, or by the conveyance of lands *cum piscationibus*, or *cum piscariis*, followed by forty years' possession of salmon-fishing; or by the erection of lands into a barony. It has even been found that possession on a grant *cum piscationibus* by a subject-superior, himself entitled to salmon-fishing, followed by possession, is sufficient to establish the right. It has been repeatedly decided that following up a conveyance *cum piscationibus*, by fishing salmon with the rod or spear, is not sufficient to establish a title to salmon-fishing. A right of salmon-fishing may be given to one who has no right to the lands on either side of the river; and the right to the fishing necessarily implies a power of dragging the fishing-nets to the adjacent banks; but it will not confer the right of constructing towing-paths on the banks of the river, or of making any erections *in alveo fluminis*. If a river should change its course, the right of fishing in this river will not be lost to the heritor entitled to it; but he may follow the river in its new course, and his exclusive right of fishing will remain so long as the water of the river can be distinguished from the water of the sea. Certain mechanical contrivances for taking salmon are prohibited by law, in rivers where the sea ebbs and flows, and in estuaries; and no practice, however long continued, will justify any illegal mode of fishing. See *Staknets*. The right of cruive-fishing may be granted by the Crown, even though previous rights of fishing have been granted to other heritors, provided the cruive-fishing will not materially interfere with those rights. The form of the cruives and cruive-dikes, and various regulations as to this mode of fishing, are settled by statutes and decision. The act 9 Geo. IV. c. 39, directs that Saturday's slop, and

the width of the hecks or bars, as regulated by 1477, c. 73, shall be observed, under a penalty of from L.5 to L.20 for each offence. The old appointment for Saturday's skop is, that in all cruives the hecks be raised to the breadth of a Scotch ell (three feet one inch), from six o'clock on Saturday evening till sunrise on Monday; and the old breadth of the space between the bars or hecks is three inches. No contrivance, by covering the hecks with sheets or otherwise, whereby the passage of fish between them would be stopped, is lawful.

During a certain period of the year, called *close-time*, salmon-fishing is altogether prohibited. By the act 9 Geo. IV. c. 39, the close-time is, between the 15th October and 15th February succeeding for all but rod-fishing, and between 1st November and 15th February for rod-fishing; but the fishings in the Tweed and the Solway Firth are excepted from the operation of the act. The Tweed Fisheries Act, 1857, 20 and 21 Vict. c. 148, was amended by 22 and 23 Vict. c. 70, 1859; and by it the annual close-times are declared to extend from the 14th of September to the 15th of February for net-fishing, and from the 20th of November to the 1st of February for rod-fishing. The Tay Fisheries Act is 21 and 22 Vict. c. 26, 1858, and by it the annual close-time for net-fishing is declared to be from the 26th of August to the 1st of February; and for rod-fishing, from the 20th of September to the 1st of February. It is understood, however, that alterations of these acts are in contemplation.

In the case of *Gammell v. the Commissioners of Woods and Forests*, March 6, 1851, 13 D. 854, it was held that the salmon-fishings around the sea-coast of Scotland belong exclusively to and form part of the hereditary revenues of the Crown of Scotland, in so far as they may not have been specially the subjects of grants by charter or otherwise. This judgment was affirmed in the House of Lords, March 28, 1859. Lord CRANWORTH had great difficulty in concurring from the impossibility of defining the extent to which the claim could go in regard to the sea. Lord WENSLEYDALE thought that it would be hardly possible to extend the subject seawards beyond the distance of three miles from the coast, which, by the law of nations, belonged to the country.

**Salterns.** See *Colliers and Salters*.

**Salvage**; is a reward or compensation given to those by whose labors or assistance a ship or goods, or any part thereof, have been saved from shipwreck, or from any other peril, or from loss, which would otherwise have been sustained.

property saved or recovered; and founds an action in the Court of Admiralty *in rem*, and at common law by *lien*; or a personal action or claim against the owner to whom the property is restored. The claim for salvage is not competent to the master or crew, however extraordinary their exertions may have been. But when their duty as seamen is over (as by capture), any successful effort thereafter made by them to recover, recapture, or rescue the ship, entitles them to salvage. The amount of salvage is fixed in some cases by statute, in others it is left to the discretion of the judge; and it is due by those who receive benefit by the exertions of the salvors. See *Bell's Com.* i. 592, *et seq.*; *Bank.* i. 209, 211, 235; *Bell's Princ.* §§ 443-6, 1427; *Illust. ib.*; *Kames' Princ. of Equity* (1825), 4, 112, 418; *Shaw's Digest*, p. 576; *Brodie's Supp. to Stair*, 1009. See also *Contribution*.

**Sample, sale by.** When goods are sold by sample, there is an implied warranty that the bulk is of equal quality with the sample, otherwise the buyer is not bound to take it. The mere circumstance of a sample having been exhibited at the time of the sale, will not make it a sale by sample; because a sample may be produced, not as a warranty that the bulk corresponds to it, but to enable the purchaser to form a reasonable judgment of the commodity. The contract, therefore, must expressly refer to the sample, in order to raise the warranty that the bulk is equal to it. Sale by sample is not good against the landlord's hypothec. *Brown on Sale*, 337; *More's Notes on Stair*, lxxxii., cccvi.; *Brodie's Supp.* 912; *Bell's Princ.* § 93; *Bell on Leases*, i. 375; *Hunter's Landlord and Tenant*; *Brown's Synop.* 2184. See *Market Overt*.

**Sanctuary.** The Abbey of Holyrood House, as having been a royal residence, has the privilege of giving sanctuary to debtors in civil debts. To retire to the Abbey is, by the act 1696, c. 5, made one of the circumstances which, combined with insolvency, constitutes legal bankruptcy. The precincts of the palace, to which the privilege belongs, are extensive; and the whole are placed under the direction of a bailie, appointed by the Duke of Hamilton, as heritable keeper of Holyrood House. When a person retires to the sanctuary, he is protected against personal diligence from the instant he passes the confines, and this protection continues for twenty-four hours; but, in order to enjoy it longer, he must enter his name in the books kept by the bailie of the Abbey. This sanctuary affords no protection to a criminal; nor does it protect a Crown debtor, nor a bankrupt, nor a person under an obligation to perform an act within his own power; nor does it protect the debtor against

diligence for such debts as he may have contracted during his residence within the sanctuary. For personal execution on debts contracted within the sanctuary, there is a prison within the precincts. Where a person claims the benefit of the sanctuary who has no title to it, he may be taken into custody by an officer of the law, to which act the bailie of the Abbey gives his concurrence. The privilege of giving sanctuary was anciently enjoyed by many other places, as the Mint or "cunzie-house." The Castle of Edinburgh seems also to have been at one time considered as a sanctuary. The Palace of Holyrood House, however, and its precincts, are now the only sanctuary which the law of Scotland recognises. *Bell's Com.* ii. 570, *et seq.*; *Bell's Princ.* p. 682, and authorities there cited; *Ersk.* B. iv. tit. 3, § 25, and note by Ivory; *Bank.* iii. 14, *et seq.*; *Ross's Lect.* i. 331. See *Bankrupt.*

**Sasine.** This term may signify either the act of giving legal possession of feudal property, or, colloquially, the instrument by which that fact is proved. The act of giving infestment consisted in the grantor and receiver of the right, or rather, as generally happened, the bailie of the superior, and the attorney of the vassal, appearing on the ground of the lands or other subject in which the infestment is to be given, in presence of a notary-public and two witnesses. The attorney took with him the charter or other warrant containing the precept of sasine, which he presented to the person who was to act as bailie, and required him to exercise the powers thereby committed to him: the bailie received the deed, and delivered it to the notary-public to be published to the witnesses present, which he did by giving a short explanation of the nature of the deed, and, strictly speaking, it was his duty to read the precept of sasine. The bailie then proceeded to the execution of his office, by delivering earth and stone of the ground to the attorney in name of his constituent, on which the attorney took instruments in the hands of the notary-public. This ceremony proceeded in presence of at least two male witnesses, and the whole was reduced into the form of a notarial instrument, describing the subject of the infestment, and detailing the ceremony, and thus defining not only the nature and extent of the estate, but affording evidence of all the requisite forms having been complied with. This instrument was signed by the notary and by the two witnesses, and was the only evidence which the law recognised to prove that legal possession of feudal property had been taken. The instrument required to be recorded within sixty days after its date, either in the General Register of Sasines at Edinburgh, or in the

Particular Register of that district within which the lands are situated; and in competitions, it is by the date of the registration that its preference is regulated. See *Registration. Disposition. Instrument. Notary. Evidence.* Where lands were discontiguous, or, though contiguous, had descended from different authors, or from the same author by different titles, or were held by different tenures, or passed by different symbols, different acts of infestment, or of delivery of sasine, were required to take place on each separate or discontiguous parcel. In property held burgage, the magistrates received resignation and gave sasine by one act, and one instrument was evidence of both, the town-clerk being notary. The sasine was then recorded in the books of the burgh within sixty days; 1681, c. 11. The provisions of 10 Geo. IV. c. 19, requiring that the notary's doquet should be recorded, are stated in the article *Doquet.* See *Burgage. Cognition and Sasine.* See generally, on the subject of *Sasine, Stair*, B. ii. tit. 3, § 16; *Ersk.* B. ii. tit. 3, §§ 17, 34, *et seq.*; *Bank.* B. ii. tit. 3, § 39, *et seq.*; *Bell's Com.* i. 21, 211, 670, *et seq.*; *Bell's Princ.* §§ 807, *et seq.*, 842, 870; *Illust.* §§ 768, 872; *Kames' Stat. Law Abridg.* h. t.; *Bell on Leases*, i. 23; ii. 59, 85; *Sandford on Entails*; *Bell on Purchaser's Title*, 3, 186, 217, 227, 244; *Ross's Lect.* ii. 190, 178, *et seq.*, 272, 352.

By the act 8 and 9 Vict. c. 35, 1845, a valid infestment may be obtained without proceeding to the lands, or performing any act of infestment thereon. All that is necessary is to produce to a notary-public the warrants of sasine and relative warrants, and to expedite and record, in the General or Particular Register of Sasines, an instrument of sasine, setting forth that sasine had been given in the lands contained in the warrant of infestment, and subscribed by the notary and witnesses in the form annexed to the act. Such form of infestment is effectual, whether the lands lie contiguous or discontiguous, or are held by the same or different titles, or of one or more superiors, and may be recorded at any time during the life of the party in whose favour the instrument has been expedite; but the date of the presentment and entry set forth in the instrument by the Keeper of the Record, is the date of the instrument. Where there is any error or defect in the instrument, a new instrument may be made and recorded; or where there is any defect in the recording of the instrument, it may be recorded anew; and in either case the instrument has effect from the date of the recording, as if no previous instrument had been made or recorded. Forms of the precept and the instrument of sasine are given in the schedule annexed to the act. No change was made

on the form of burgage sasines, excepting only that they were made valid and effectual if attested by the town-clerk as a notary, without the addition of his doquet, and by the witnesses, and that the delivery of symbols might be given either on the ground of the subjects, as formerly, or within the council-chamber of the burgh, by delivery of a pen. By the act 10 and 11 Vict. c. 49, 1849, however, the ceremony of the giving of pens was dispensed with.

By the Titles to Land Act, 21 and 22 Vict. c. 76, 1858, it is no longer necessary to expedite any instrument of sasine, but the conveyance may be recorded instead in the Register of Sasines. See *Titles to Land*.

**Sasine Ox**; was a perquisite due to the sheriff when he gave infetment to an heir holding Crown lands. It was afterwards converted into a payment in money, proportioned to the value of the estate, and is now done away with. *Ersk. B. iii. tit. 8, § 79*.

**Sasine, Precept of.** See *Precept of Sasine*.

**Saturday's Slop.** See *Cruiva. Setterdayis Slop*.

**Savings Banks.** Previous to the year 1828, various statutes had been passed relative to savings banks in England, which were in that year consolidated and amended by 9 Geo. IV. c. 28. This was followed by 3 Will. IV. c. 14, respecting savings banks' annuities, and both of those acts were extended to Scotland by 5 and 6 Will. IV. c. 57. There was formerly a statute as to such banks peculiar to Scotland; 59 Geo. III. c. 62. But that act is repealed in so far as relates to any savings banks to be established in future, and only remains in force as to all savings banks established under it, until they conform to the provisions of the English statutes. Such banks already existing are authorised to conform to the English acts in preparing and depositing their rules. The principal provisions of 9 Geo. IV. c. 28, are the following:—The institutions entitled to the benefits and privileges of the act are, any in the nature of a bank established by any number of persons in the kingdom forming themselves into a society to receive deposits of money for the benefit of the depositors, to accumulate the produce of so much as is not required by the depositors, their executors or administrators, at compound interest, and to return the whole or any part of the deposit and produce to the depositors, their executors or administrators (deducting the expenses of management), but without deriving any benefit from the deposit or its produce. No savings bank is entitled to the benefits of the act unless sanctioned by the justices of peace at the General Quarter Ses-

sions, and by the Commissioners for the Reduction of the National Debt, or by their comptroller-general or assistant-comptroller on their behalf; § 2. The rules and regulations must be entered in a book or books to be kept by an officer appointed for the purpose, and open at all reasonable times for the inspection of depositors. They must likewise be fairly transcribed on parchment, and the transcript deposited with the clerk of the peace for the county, who is directed to file it with the rolls of the sessions, and sign a certificate of its enrolment on a duplicate copy, to be provided by and returned to the savings bank on payment of a fee of ten shillings, provided it be returned within ten days. Alterations on the rules are not prohibited, but such alterations are not of force until entered in the aforesaid book or books, and enrolled and certified as above, on payment of a fee of five shillings; § 3. The rules, before being deposited with the clerk of the peace, must be submitted to a barrister appointed by the Commissioners for the Reduction of the National Debt, who certifies in how far they are consonant, and in how far repugnant to law. The barrister's fee must not exceed L.1, 1s. The justices may reject any of the regulations, notice of which must be sent by the clerk of peace to two of the trustees; § 4. The rules, when entered and deposited, are binding on members and depositors, and a copy of the transcript may be received as evidence; § 5. The treasurer, trustee, or manager, or person having any control in the management of the bank, must derive no benefit from any deposit except the salaries and allowances provided by the regulations for the charges of management, and for remuneration to the officers, exclusive of the treasurer, trustees, managers, or other persons having direction in the management, who must not, directly or indirectly, have any allowance beyond their actual expenses; § 6. The treasurer and other officers in the receipt or custody of money must give security; § 7. The effects of the institution are vested in the trustees for the time being; § 8. No trustee or manager is personally liable except for his own acts, nor for anything done by him in virtue of his office in the execution of the act, except where guilty of wilful neglect or default; § 9. All persons who have received money or effects must, on demand made, in pursuance of an order of at least two trustees and three managers, or at any general meeting of trustees or managers, account for, and deliver up, the money and effects; § 10. Money, when invested by the trustees, must be invested in the Bank of England or Ireland. Provision is made for investing money to the account

of the Commissioners for the Reduction of the National Debt, &c.: §§ 11 to 16. The managers and trustees of any savings bank may, if they think fit, direct all interest due and payable to depositors to be calculated yearly, or twice a-year, and carried to the credit of the depositors, after which it becomes principal, and carries interest; § 17. Various provisions are made for the trustees of savings banks drawing money placed to their account in the National Debt Commissioners' books, for the appropriation of surplus funds, &c.; §§ 18 to 23. The interest payable to depositors must not exceed 2½d. *per cent. per diem*; § 24. Minors may deposit, and their receipt is declared to be a sufficient discharge; § 25. Where deposits are made by married women who have given no notice of their being such, or by women who have afterwards married, money may be paid to them in respect of such deposit, unless the husband or his representatives give notice of the marriage to the trustees, and require payment to be made to him or them; § 26. Charitable societies may invest their funds in a savings bank to the amount of L.100 in any one year, provided the whole amount invested never exceed L.300, exclusive of interest; § 27. Friendly societies may subscribe any portion of their funds into savings banks, except that no more than L.300, principal and interest, can be received, nor any interest paid; nor can interest be paid when the sum amounts to or exceeds L.300; § 28. The receipt of the treasurer, trustee, or other officer of a friendly or charitable society, is held a sufficient discharge; § 28. Members of friendly or charitable societies are not liable to penalty or disability in those societies by subscribing to any savings bank, even though the rules of such societies declare them to be so. Nor is any depositor subject to any penalty by reason of belonging to, or being interested in, the funds of any friendly or charitable society deposited in any other savings bank; §§ 30 and 31. No sum can be received without the name, employment, and residence of the depositor, which are entered in the books of the institution; § 32. Persons are empowered to subscribe as trustees on behalf of others; § 33. Subscribers to one savings bank cannot subscribe to any other, and a declaration to this effect must be made at the time of the deposit. The penalty of contravening this provision, or making a false declaration, is forfeiture of all the deposits to the sinking-fund. A printed notice of this regulation and prohibition must be affixed in the office for receiving deposits; § 34. More than L.30, exclusive of compound interest, cannot be received from depositors in one year, nor any sum or sums whatever

making the sum to which the depositor is entitled exceed L.150 in the whole. In such questions the year is reckoned forwards from the 20th of November; and whenever the sums standing in the name of the depositor amount in the whole to L.200, principal and interest included, no interest is payable on such sum so long as it continues to amount to L.200; § 35. No fresh deposit can be received so long as the sums to which the depositor is entitled amount to or exceed L.150; § 37. The provisions of § 38, relative to re-deposits, are repealed by 3 Will. IV. c. 14, § 29. Provision is made for the granting of certificates, in case of deposits being withdrawn from one savings bank and placed in another; § 39. If a depositor die, leaving any sum in a savings bank exceeding L.50, it cannot be paid but upon the probate of the will or letters of administration. No duty is paid on the probate, or legacy, or residue of a deceased depositor, where his whole estate did not amount to L.50; and a certificate of his interest in the savings bank is taken as evidence thereof; § 40. Administration bonds, &c., for effects under L.50, are exempted from stamp-duty. Where the effects of persons dying intestate do not exceed L.50, they may be divided according to the rules of the savings bank; and if there are no rules made in that behalf, the trustees or managers may divide them according to the statute of distributions; § 41. It is enacted by 5 and 6 Will. IV. c. 57, § 4, that where the English acts provide for payment made to any of the relations of any deceased intestate depositor, such provisions shall be held to apply to the next of kin according to the law of Scotland; and where they refer to probate of the will of the deceased, or letters of administration of his or her effects, and provide that they shall or shall not be received in the cases therein provided, the provisions shall be held to apply to confirmation by the law of Scotland, which shall be required or dispensed with as therein provided. Payment to persons appearing to be entitled to receive it as representatives, or under a probate, are declared to be valid as regards the liability of the savings bank; but the persons really entitled to payment have their recourse against the persons who have received the money; §§ 42 and 43. Powers of attorney, &c., given by trustees or depositors, are not liable to stamp-duty; § 44. Where disputes arise, they are directed to be referred to arbitrators, and in case of their not agreeing, to be settled by a barrister, whose fee must not exceed L.1, 1s.; § 45. Various provisions are made with respect to the making up accounts of progress, the computation of interest, the purchase of Exchequer bills, and

other matters calculated to carry the purposes of the act into execution; §§ 46 to 62.

The act 3 Will. IV. c. 14, was passed with the view of enabling depositors in savings banks, and others, to purchase Government annuities through the medium of savings banks; and it also makes some amendments on the above act, 9 Geo. IV. c. 92.

The act 16 and 17 Vict. c. 45, 1853, entitled, "An Act to consolidate and amend the laws, and to grant additional facilities in relation to the purpose of Government Annuities through the medium of Savings Banks, and to make other provisions in respect thereof," repeals so much of 3 and 4, c. 14, and 7 and 8 Vict. c. 83, as relates to the purchase of Government annuities through the medium of savings banks. This act, among various other provisions, empowers the Commissioners for the Reduction of the National Debt to grant to or for the benefit of any depositor in a savings bank, or other person whom the Commissioners may think entitled to be or to become a depositor in a savings bank, an immediate or deferred life annuity, depending on single lives, or immediate annuities, depending on joint lives, with benefit of survivorship, or on the joint continuance of two lives, to any amount not less than £4, nor more than £30 in the whole, to or for the benefit of any one person, and to receive payment for such immediate life annuities in one sum, and for such deferred life annuities, either in one sum, or in annual sums, payable for fixed periods; but no such annuities can be granted to or for the benefit of any person under the age of ten years. Life annuities purchased under this act are free from all taxes, charges, or impositions whatever, and are deemed personal estate. See also the acts 19 and 20 Vict. c. 41, 1856, and 22 and 23 Vict. c. 53, 1859.

Savings banks for seamen are regulated by the Merchant Shipping Act, 1854, and by 19 and 20 Vict. c. 41, 1856, and military savings banks by the act 22 and 23 Vict. c. 20, 1859. By the act 22 and 23 Vict. c. 53, 1859, the trustees or treasurers of any penny savings bank, charitable or provident institution or society, or charitable donation or bequest for the maintenance, education, or benefit of the poor, are empowered to invest, with the approval of the Commissioners for the Reduction of the National Debt, the funds of such bank, institution, or society, or the funds of any savings bank, without restriction as to amount.

**Scaccarium**; according to Skene, the checker, in French, "Echiquier," the place where the King's rent and patrimony, as well rents as casualties, and the profits of all lands fallen into the King's hands by reason of ward, are

"inbrocht, compted, and received." *Skene, h. t. See Exchequer.*

**Scandal**; an injurious report circulated, or printed and published, which may be the foundation of either a criminal prosecution, or of a civil action of damages, or of a combination of both. All actions upon scandal, or verbal injuries for damages, although competent in inferior courts, may also be brought before the Court of Session. *Ersk. B. i. tit. 3, § 21; Bank. B. iv. tit. 13, § 12; Stair, B. i. tit. 9, § 3. See Defamation. Libel. Injuries.*

**Scandalum Magnatum**; words spoken in derogation of a peer, a judge, or other great officer of the realm. These words, although they would not be actionable in the case of a common person, yet when spoken in disparagement of persons of rank and station, are accounted criminal. In England, scandal of this description may be the ground of an action both for punishment and for damages. In Scotland, this offence is called *leasing-making*, the punishment of which has been greatly mitigated by the two recent statutes, 6 Geo. IV. c. 47, and 7 Will. IV. c. 5. *Hume, i. 337, et seq.; Bank. B. i. tit. 2, § 33; tit. 10, § 36; and Tomlins' Dict. h. t. See Leasing-making.*

**Schaffa Sagittarum**; according to Skene, is a sheaf of arrows, containing twenty-four. (See *Garba*.) A sheaf of arrows contains sixteen "gades;" a sheaf of steel contains fourteen "gades." *Skene, h. t.*

**Schedule of Poinding**. When a poiding is completed, the messenger or officer who executes it leaves a schedule for the debtor of the particulars of the effects taken in virtue of the diligence, together with a copy of the letters and executions, signed by himself and the witnesses; and this serves for a discharge of the debt to the value of the poided effects. *Bell's Com. ii. 61; Ross's Lect. i. 437; Bell on Leases, ii. 313; Hunter's Landlord and Tenant.*

**Scheme of Division**; in judicial procedure, is the name given to the state or cast, according to which it is proposed to divide a common fund amongst the several claimants thereon, or to allocate any fund or burden on the different parties liable. Such schemes of division are required in processes of competition; the most important being the action of ranking and sale. See *Ranking and Sale. Multiplepoinding. Sequestration.*

**Scheme of Locality**. See *Locality.*

**Schireff**. See *Sheriff.*

**Schools**. By the act 1696, c. 26, the heritors of parishes where no parochial school has been before established, are ordered to provide a schoolhouse, and to modify a salary to the schoolmaster, not under L.100, and not above 200 merks Scots, to be proportioned accord-

ing to the valued rent of the parish. If the heritors should neglect this duty, the presbytery are directed to apply to the commissioners of supply of the county, who, or any five of them, have power to establish a school, and settle a salary, in terms of the statute; and by 1693, c. 22, the sufficiency and qualification of the parochial schoolmasters, as well as their conduct after their admission, are to be judged of by the presbytery. The schoolmaster's salary and the poor's rates are divided equally between the heritor and the tenant; 1696, c. 26; 1663, c. 16; *Kames' Abridg., voce Vagrant; Frsk. B. i. tit. 5, § 24; B. ii. tit. 6, § 42; Bank. B. i. tit. 6, § 16.* Parochial schools, so far as regards parishes not entirely comprehended in royal burghs, are now regulated by the statute 43 Geo. III. c. 54, whereby it was enacted, that, within three months after 11th June 1803, the salaries of the schoolmasters were to be fixed at from 300 to 400 merks Scots, by the minister, and by the heritors of lands in the parish of L.100 Scots valued rent in the cess-books. In twenty-five years after that date, the heritors and minister were in like manner to modify a new salary according to the average price of oatmeal, to be ascertained by Exchequer, of the value of from one and a half to two chalders; and so on periodically, at intervals of twenty-five years. In case of neglect or wrong by the heritors and minister, application by the aggrieved party is made competent to the quarter sessions, within three months after such meeting ought to have been held, or such determination has been made. In extensive districts, the heritors and minister may appoint two masters, with an increased allowance, subject to appeal to the quarter sessions as to the division of the allowance. And where there is not a proper schoolhouse, a house for the schoolmaster, and a garden, containing at least one-fourth of a Scotch acre, the heritors of the parish must provide them; or, in certain cases, an equivalent for the garden, by authority of the quarter sessions. But the quarter sessions cannot legally alter the situation of a schoolhouse formerly established; *Dawson, 18th Feb. 1809, Fac. Coll.* The choice of the schoolmaster is vested in the minister and heritors; the person elected being found qualified by the presbytery as to morals, religion, and literature, and signing the Confession of Faith and Formula of the Church of Scotland. The determination of the presbytery as to the qualifications of the presentee (where they have proceeded in terms of the statute) is not subject to review in any court, civil or ecclesiastical. Their determination in cases of complaint against the schoolmaster, even if it should end in his dismissal, is also

final, and not subject to review in any court; and, in general, the presbytery has an absolute control over the schoolmaster, with respect to the hours of teaching, the length of the vacation, and the like. But the presbytery has no superintendence of private schools. By 19 Geo. II. c. 39, however, no person can keep a private school for teaching English, Latin, Greek, or any part of literature, until the description of the school has been registered, and the master has qualified himself by taking the oaths to Government, under the pain of transportation. See also 21 Geo. II. c. 34, § 12. The law respecting schools and schoolmasters has been digested in *Dunlop's Parish Law*, 292, 321. See also *More's Notes to Stair*, p. lxxv.; *Bell's Princ. § 41, 1133-5; Hust. § 1113; Church Law Styles*, 67, 181, 370; *Swint. Abridg. h. t.; Kames' Stat. Law Abridg. h. t.; Watson's Stat. Law, h. t.; Hill's Church Prac.* 145; *Bell on Leases*, i. 321; *Hunter's Landlord and Tenant; Hutch. Justice*, ii. 286; *Tait's Justice of Peace, h. t.; Blair's do. h. t.; Connell on Parishes, See Presbytery.*

The payments of the salaries of schoolmasters, from Martinmas 1855 to Martinmas 1859, has been regulated by the act 20 and 21 Vict. c. 59, 1857. And the same act provides that, after Martinmas 1859, the salaries shall be fixed according to the average fars prices of a chaldar of oatmeal in each county for the twenty-five years preceding and including the year and crop of 1858, the average being determined by the sheriff on or before the 1st of July 1859. See also 17 and 18 Vict. c. 78, 1854.

**Schoolmaster's Right to Vote.** The Reform Act, 2 and 3 Will. IV. c. 65, § 7, provides, that when any property which would entitle the owner to be registered, and to vote, shall come to any person within the said period of six months before the making up of the lists, by appointment to any place or office, such person shall be entitled to be registered on the first occasion of making up the list of voters next following such acquisition. In virtue of this provision, many claims have been made by parochial schoolmasters; to whose office the right to a dwelling-house and garden is by law attached; and where the induction to the office and value of the property have been established, such claims have been admitted. If any person other than a parochial schoolmaster appointed in virtue of the acts of Parliament mentioned in last article claim on premises which he occupies as a schoolmaster, he must show a right for life. A schoolmaster appointed by a society, who can remove him at pleasure, was rejected. It has even been doubted whether any other than a parochial



schoolmaster can be said to be a person holding a place or office, in the sense of the Reform Act. Claims have been made by parochial schoolmasters on the schoolhouse, on the play-ground, on the salary, and on the allowance made when there is no garden. But the majority of the appeal courts have found that these subjects are not to be taken into account, and that the only subjects on which the schoolmaster can claim, as attached to his office, are the dwelling-house and garden. See *Cay's Reform Act*, 98. See also *Reform Act*.

**Scire Facias**; in English law, a writ to enforce the execution of judgments, patents, or matters of record, or to vacate, quash, or annul them. *Tomlins' Dict. h. t.*

**Scotia**; was, according to Skene, used sometimes in ancient charters and acts to signify that part of Scotland which is on the north part of the Water of Forth, as distinguished from the part on the south, which was called Lodoneium or Lothian. *Skene, h. t.*

**Scots Money**. When money is mentioned in the acts of the Scots Parliaments, or in public or judicial proceedings prior to the Union, and even for a considerable time thereafter, Scots money is meant, unless the contrary be expressed. Sterling money is twelve times the value of the same denomination of Scots money. The following table of the relative values of Scots and sterling money may be of service:—

	Scots.	• Sterling.
A doyt or penny, is - -	L.0 0	0 $\frac{1}{12}$
A bodle, or twopence, - -	0 0	0 $\frac{1}{6}$
A plack, groat, or fourpence, 0 0	0 0	0 $\frac{1}{3}$
A shilling, - - - - -	0 0	1
A merk, or 13s. 4d. (two-thirds of a pound), - - - - -	0 1	1 $\frac{1}{3}$
A pound, - - - - -	0 1	8

A table will be found at the end of the article *Money*, in the *Enc. Brit.*, containing the comparative value of Scotch coin, at various periods in our early history. See also *Tait's Justice, h. t.*

**Scrutiny**. No scrutiny is allowed by or before any returning officer with regard to any votes given or tendered at any election. But persons whose claims to be registered have been rejected may tender their votes, which are entered by the sheriff, being distinguished from the votes of registered persons, so that an election committee may have it in their power to give effect to such votes, in deciding upon the validity of a disputed election; 2 and 3 *Will. IV. c. 65, § 26*. See *Reform Act*. In the election of a trustee in a sequestration, the judgment of the sheriff is final, and in no case subject to review. See the act 19 and 20 *Vict. c. 79, 1856*. See *Votes*.

**Sculpture**; is protected by the copyright acts. See *Literary Property*.

**Sea and Sea-shore**. It is a question which has been frequently discussed, whether the sea is open to all, or whether it may not be appropriated by particular nations. In this country, while it has been admitted that the ocean is incapable of appropriation, it has, on the other hand, been maintained that the seas which wash the coast of any state may be appropriated. The seas and sea-shores of Great Britain are *inter regalia*; that is, they are held by the Crown for the behoof of the public. This right of lordship comprehends the right to free navigation, to fishing, to taking wrecks, to forbid passage to enemies, the right of flag, of jurisdiction, &c. The shore comprehends all between high and low water mark. It has been decided in England, that land gained from the sea by sudden recess goes to the Crown; but that what is gained by imperceptible addition becomes the property of the neighbouring proprietor. In Scotland, the shore is presumed to be part and pertinent of the adjacent land, under the burden of the right of the Crown, as trustee for the public uses. Accordingly, where lands are described as bounded by the sea or sea-shore (between which there is no substantial distinction), the grantee has an absolute right of property down to the shore or high-water mark, and the above modified right of property in the shore, or down to the low-water mark. No one can, on any pretence, interpose between such a grantee and the shore. In the case of *Macalister v. Campbell*, Feb. 17, 1837, 15 *S. 490*, it was found not necessary to the possession of the shore, as part and pertinent, and to the exclusive use of the wreck, shell-sand, sea-ware, &c., which such possession confers, that the titles of the proprietor of the contiguous lands should describe them as bounded by the sea or sea-shore. It was held sufficient that, *de facto*, the lands were notoriously part of the coast, and washed by the sea; *Stair, B. ii. tit. 1, § 5*; *Ersk. B. ii. tit. 2, § 6*; *tit. 6, § 17*; *Bank. i. p. 82*; *Bell's Princ. § 641*; *Illust. ib. Hutch. Just. ii. 377*; *Brown's Synop. 1892*. See *Kelp*.

In the case of *Paterson v. Marquis of Ailsa*, March 11, 1846, 8 *D. 752*, it was held that a proprietor of lands, *de facto* bounded by the sea, with a clause of parts and pertinents in his Crown title, although there was not a sea boundary expressed in it, was entitled to resist an action of declarator by a proprietor of lands lying near the sea-shore, of his right to gather sea wreck and ware on the shore. Lord MONCREIFF observed, "I think it clear that the defender has a title abundantly sufficient to enable him to secure by prescriptive possession an exclusive right

to gather the wreck and sea-ware on the sea-shore opposite to his own lands. My opinion on the case goes further than this, for I think that he would have that right independent of any prescriptive possession, at least if no adverse possession could be proved." In the case of *Officers of State v. Smith*, March 11, 1846, 8 D. 711, affirmed July 13, 1849, 6 Bell, 487, it was held that the Crown had a title to prevent any encroachment by the proprietors of ground adjoining the sea-shore upon the enjoyment of the shore by the lieges for the purpose of passage or relaxation. In the case of *Sir John Hall v. Willis*, Jan. 14, 1852, 14 D. 324, it was held that a proprietor of lands adjoining the sea, and erected into a barony, with a clause of parts and pertinents, and a general grant of fishing, had not a sufficient title to exclude the public from taking limpets and other shell-fish adhering to the rocks below high-water mark or the shore of his lands, provided these rocks were accessible without trespass.

**Sea-Greens**; are those grounds which are overflowed in spring-tides. These, on the assumption that the sea-shore comprehends that over which the tide flows, have been supposed to be *inter regalia*. But, by the custom of Scotland, the shore is not held to extend further than to that point which the sea reaches in common tides; and, therefore, sea-greens are held to be private property. *Ersk. B. ii. tit. 6, § 17*; *Bank. B. i. tit. 3, § 4*; *Bell's Princ. § 644*; *Bell on Leases, i. 357*; *Hutch. Just., ii. 379, 450*; *Brown's Synop. 797, 2249*. See *Ware*.

**Seal of Cause.** Most royal burghs, and many superiors of burghs of barony, have conferred upon them in their charters the power of constituting subordinate corporations or crafts. The grant or charter by which such a constitution is given, and which defines the privileges and powers to be possessed by the subordinate corporation, is called the *seal of cause*. A seal of cause cannot be rescinded or infringed by the corporation in whose favour it was granted, without consent of the magistrates and council who granted it; *Crooks, Dec. 4, 1776, M. 2007*. If a seal of cause granted to the corporation B. refer to and bestow the exclusive privileges contained in the seal of cause granted to the corporation A., it has been decided, where one of the seals of cause had been lost, that the seal of cause of A. forms a good title for B. enjoying these privileges; *Mowat, June 1, 1825, 4 S. & D. 52*. In the report of this case, a verbatim copy of the seal of cause is given. See *Ersk. B. i. tit. 7, § 64, note by Ivory*; *Bell's Princ. § 2185*; *Brown's Synop. 315, 404*. See *Community. Burgh Royal*.

**Seals.** Anciently, when writing was not a

common accomplishment, deeds were executed by sealing; which, however, came to be superseded by subscriptions. See *Deed. Testing Clause. Subscription*. And now, royal grants are the only deeds which, in Scotland, are authenticated by means of seals. There are different seals, which, in practice, are applied to different purposes. As, 1. The Great seal, which, since the Union, has been altered, and a new Great seal for the private affairs of Scotland introduced. By the articles of Union, it is declared to come in place of the former Great seal; but no change has been made on the other seals. Under the Great seal are authenticated charters and grants of lands, and gifts when the lands hold of the Crown, as also the commissions to the principal officers of the Crown, as to the Lord Justice-Clerk, King's Advocate, Solicitor, &c. 2. The Privy seal is used for grants and presentations to lesser offices and to the transference of moveables, and whatever rights a subject may transmit by assignation; but moveables may be conveyed under the Great seal, if conveyed along with some feudal subject. 3. The Quarter seal is so called from its having been originally the quarter, and merely the testimonial of the Great seal. Under this seal commissions of tutory, gifts of bastardy, forfeiture, or of *ultimus hæres*, where the lands hold of a subject superior, are passed; for, where the lands hold of the Crown, these gifts pass the Great seal. By 1587, c. 82, commissions to the justice-depute pass this seal. 4. The Signet; for although *Erskine (B. i. tit. 4, § 39)* considers it as the seal of the Court of Session, yet this is obviously a mistake. The Signet existed before the Court of Session was established; the writs which passed under it were the private letters or orders of the King, directed "*to sheriffs in that part*," authorising them to summon parties before the King's Court, or to execute the diligence of the law. It is more than probable that, when the briefs and forms of the old law came to be disused Signet Letters, as they are termed, succeeded them; and that the orders of the King were given to the sheriffs in that part (that is, to messengers-at-arms, who were, for the special purpose mentioned in the letters, invested with the powers of the judge ordinary), so as to supply all that was requisite for calling parties before the King's Court, or for carrying its sentences into execution. In this way, the Letters passing the Signet, for the purpose of judicial procedure, received the warrant of the King's Court; and it has been inferred that the Court of Session, on its institution, continued the practice which had been previously established. Hence the Signet is not properly the seal of a court, though it answers the purposes of one; but a seal ori-

originally intended to authenticate the King's warrants connected with the administration of justice. Formerly, in expeding Crown charters, the signatures passed in Exchequer were the warrants of precepts under the Signet, which were directed to the Great seal, for the purpose of completing a royal grant. *Ersk. B. ii. tit. 5, § 82, et seq.*; *B. iii. tit. 2, § 7*; *Bank. B. iii. tit. 3, § 39*; *Stair, B. iv. tit. 42, § 5*; *Hope's Minor Practicks*, pp. 86-9; *Jurid. Styles*, i. 341; *Ross's Lect.* i. 109, 123-30. See *Signet. Privy Seal. Quarter Seal. Great Seal.*

By the act 10 and 11 Vict. c. 51, 1847, signatures and precepts to Chancery, as preliminary to the granting of charters, are abolished.

**Seamen**; are either sailors in the royal navy, or in the merchant or fishing service. All persons using the sea (as it is expressed) are liable to be impressed for the navy, by authority of impress warrants from the Admiralty. There are, however, certain exceptions to this rule. Thus, generally, all persons under eighteen or above fifty-five years of age; all persons during two years after beginning to use the sea; apprentices to the sea service during three years from the dates of their indenture, unless they formerly used the sea; and seamen who have *bona fide* retired from the sea service. There are also certain particular exemptions, such as the masters of fishing vessels, having at least one apprentice under sixteen years, bound for five years and fishing; other persons connected with the fishing and coal trade are exempted; 13 *Geo. II. c. 17*. A seaman of the navy cannot be taken out of the service by any process or execution, unless for some cause criminal, or unless the plaintiff, or some one for him, makes affidavit before a judge of the court out of which the process issues, or before some person authorised to take affidavits in such courts, that the cause of action amounts to £20; a memorandum of which oath must be marked on the back of the process or writ, without fee. A seaman cannot be arrested otherwise; but a plaintiff, on giving notice to the seaman personally, or leaving it at the place where he resided before entering into the navy, may have judgment and execution other than against the person of the seaman; 31 *Geo. II. c. 10, §§ 28-9*. A petty officer or seaman who has been arrested for debt or crime is not discharged on payment of the debt, or termination of the imprisonment; but is delivered to the commander-in-chief of some of the royal ships, or some commissioned officer authorised to raise seamen, or some principal regulating officer of the impress, whichever is nearest; 44 *Geo. III. c. 13*. Provision is made by several statutes to enable petty officers of the navy, seamen, non-commissioned officers of marines, boatswains,

gunners, and carpenters in the navy, to allot part of their pay to their wives, mothers, or children. The statute 5 and 6 Will. IV. c. 24, was passed with a view of encouraging the voluntary enlistment of seamen, and making regulations for manning the navy. By this act the term of service in the navy is limited to five years. If the ship be abroad when the term of service of seamen expires, provision is made for their being sent home by the earliest opportunity. The admiral, or commanding officer of the squadron or fleet in which a seaman whose term has expired is serving, is empowered, in case of emergency, to detain him six months longer, with one-fourth increase of pay. Seamen under arrest for trial, when their service expires, cannot be discharged till after their trial. Seamen, though entitled to be discharged, must perform their duties, and be amenable to naval discipline until actually discharged. Seamen, when discharged after a service of five years, are entitled to receive protections from service in the navy for two years. Provision is made by the same statute for bounties and other privileges to volunteers.

*Merchant Seamen*; have been the subject of various statutory regulations; but these have all been repealed by 17 and 18 Vict. c. 104, 1854, and 18 and 19 Vict. c. 91, 1855, which consolidates the law as to this matter.

**Search of Incumbrances.** It is of importance for a lender or a purchaser to discover the burdens which affect the borrower's or seller's estate. The system of records in Scotland furnishes the most advantageous means for this purpose, which is effected by what is technically called a *Search*. A search of the records comprehending a period of forty years is supposed to give sufficient security. But to render the search complete, it ought to be continued down to the date of the recording of the purchaser's sasine, for, without this, the purchaser is exposed to the risk of a new sasine being recorded between the date of signing the disposition and the registration of the sasine following on it. In practice, however, purchasers generally trust to the execution of the disposition, and pay the price on the delivery of that deed; and there is no known instance of the seller taking advantage of this opportunity to defraud the purchaser. A search embraces the following particulars: 1st, A search of the General and Particular Register of Sasines; 2dly, A search of the Record of Abbreviates of Adjudications; and, 3dly, A search of the General and Particular Register of Inhibitions. If the property consist of burgage subjects, a search of the Record of Sasines kept in the burgh must be produced; and a search of the Dean of Guild Record of Jédgés and Warrants is sometimes

demand; for by these a preferable security over burgage subjects may be created, discoverable from no other record. But there are certain dangers against which a search, even for the whole period of the long prescription, affords no protection, and others against which it affords only a partial protection. Thus, against litigiosity, a search furnishes no protection. This is a legal restraint imposed on a debtor for the benefit of those creditors who have commenced diligence for attaching his heritage. The diligences by which heritage is affected are inhibition and adjudication; and in both of these litigiosity takes place. In executing the inhibition, there are three stages: 1. The execution of the diligence against the debtor; 2. Its publication against the lieges, prohibiting them from taking any right from the debtor; and, 3. The act of registration in the county within which the lands lie, or in the General Register at Edinburgh. Litigiosity commences at the completion of the second stage, and a sale by the debtor after that period will be struck at by the inhibition. The security thus afforded to creditors against all voluntary deeds granted after publication, is conditional on their perfecting their diligence by registration; hence, during the forty days within which the inhibition may be recorded, there is a risk against which a search affords no protection. In the case of adjudications, litigiosity commences from the date of citation. Litigiosity strikes against voluntary deeds only; and a deed granted in implement of a previous obligation is unchallengeable. Delay or *mora* in the completion of the diligence constitutes another exception to the doctrine of litigiosity. Thus, in one case, a delay of four, and in another of two, years in completing an adjudication was held sufficient to take off the effect of litigiosity, and render the deeds of the debtor binding. There are other dangers to the purchaser which cannot be discovered from the records. The plea of deathbed, and the fraud or forgery of the author, are each a ground of reduction of a deed, and constitute a *labes realis* even in the hands of an onerous holder. The act 1661, c. 24, declares, that no right or disposition granted by the apparent heir of a deceased proprietor shall be valid, in so far as it prejudices the creditors of the deceased, unless granted a full year after the defunct's death. A purchaser, therefore, from the heir within the year, is exposed to this risk. The granting of a deed gratuitously in favour of conjunct and confident persons, is a ground of reduction which follows the subject into a purchaser's hands. (See *Conjunct and Confident*.) Servitudes enter no record, and are yet effectual against a purchaser. The legal liferents of terce and

courtesy are burdens affecting heritage in the hands of a purchaser, wherever the marriage has been dissolved before the purchaser has been infest. Such are the burdens which do not enter the records, and against which a search has no protection. To ascertain them, therefore, inquiries must be made in other quarters. There is also a class of dangers discoverable from the records, but which may escape notice in a search for forty years. The minority of the parties entitled to challenge the right of the party in possession, is deducted in reckoning the years of the long prescription; and if it appears from the progress of the seller's or borrower's titles that there is any reason to apprehend such an interruption, the search ought to be extended farther back than the forty years. Yet the purchaser is bound to accept of a feudal title standing in the seller or his predecessors for forty years, unless he can show a precise burden still subsisting. See *Progress*. Prescription may be interrupted by the raising of an action, and there is a register where citations for interrupting prescription are recorded which ought to be examined, although it is seldom done. Prescription begins to run against heritable securities, not from the date of the security, or its entering the record, but from the time that no demand has been made by the creditor, or no interest paid; so that the fact, that no sasine on an heritable bond appears on record for forty years back, is not sufficient evidence that the land is unaffected by heritable debts. Prescription against an inhibition raised on a depending action begins to run, not from the date of the inhibition, but from the date of the decree in the action. Prescription on an infestment in real warrandice does not begin to run until eviction has actually taken place. These burdens, like the former, are here adverted to, in order that conveyancers, in conducting a search, may have in view the dangers against which the usual search of the records is no guarantee, and, according to circumstances, direct such farther inquiries as prudence may suggest. *Ross's Lect.* ii. 384; *Bell on Purchaser's Title*, 365; *Jurid. Styles*, i. 301. See *Burdens. Incumbrances. Record*.

**Seats in Churches.** In landward parishes in Scotland, the area of the church is divided among the heritors according to their valued rents. The area of a parish partly landward and partly within a town ought to be apportioned, like the expense of building the church, according to the real rents of the owners of lands and houses. Where part of the parish is within a burgh, if the burgh, as a community, bear the expense of building in proportion to the rent of the property within burgh, it would seem that they are entitled to a share of the

area in the same proportion, which they may let or dispose of to the inhabitants. The patron of the parish, at least, if likewise an heritor, is entitled to a family-seat for himself, in the choice of which he has a preference over all the heritors. See *Patronage*. The Court, in one or two cases, have recognised a species of right to church-seats, of the nature of private property, in parties neither heritors nor inhabitants of the parish. The minister is entitled to a seat for his family; and seats are generally set apart for the poor. Each heritor is entitled to have a seat for his family, which is taken into account in making up his share of the area. The right of priority of choice after the patron is determined by the amount of valuation of the several heritors. After all the heritors have selected their family-seats, they choose, in the same order, each as much of the area as will make up the share to which he is entitled; and it would appear, that what he chooses ought to be all in one place. An heritor not satisfied with the division made by the other heritors may challenge it, and insist in a process of division before the sheriff. The sheriff's judgment is subject to the review of the Court of Session. The area assigned to each landward heritor does not become his private property; it is merely an inseparable pertinent of the lands, for the accommodation of his family and of his tenants, and others dwelling on his property. An heritor may sell the materials of a seat which he has erected upon his area at his own expense. Although there does not seem to be any restriction of the heritor's right to dispose of his title to sit in his family-seat, he cannot exclude his tenants and others dwelling on the property from occupying his portion of the area; and suitable accommodation in that part of the area of the parish church which belongs to the landlord is held to be included in a lease of lands. In town churches, or in that part of a church in a parish partly landward and partly in a town which has been assigned to the community generally, the magistrates may let the seats; and it is the practice for them to make them a source of revenue. In the case of *Clapperton v. Magistrates of Edinburgh*, July 14, 1840, it was held that the magistrates were not entitled to levy seat rents for the purpose of increasing the revenue of the burgh. Where a parish is partly within burgh and partly landward, and the community has a share assigned to them, they would appear to be entitled to a seat for their magistrates. The law with regard to the division of church areas has been clearly stated by Mr Dunlop, *Parochial Law*, 30. See also *More's Notes on Stair*, cc.; *Bell's Princ.* §§ 774, 836; *Illust. ib.*; *Hunter's Landlord*

and *Tenant; Hutch. Just.* ii. 467; *Brown's Synop.* 1456, 2334. See *Church. Burying-Place. Church-Yard.*

**Seaworthiness.** Questions frequently arise relative to the implied condition of seaworthiness, both in the contract of affreightment and of insurance. The obligation is, "that the ship shall be tight, staunch, and strong, properly manned, and provided with all necessary stores, and in all respects fit for the intended voyage." A distinction, however, must be taken between the condition of seaworthiness in insurance and in affreightment. In the former, it is a warranty, the breach of which voids the contract; in the latter, it is only part of the contract of the shipowners, and the want of it gives relief from the hire, or grounds a claim of damages. In affreightment, ignorance of the defect does not avail the owners; nor will the most regular and formal survey at setting out on the voyage have any other effect than to strengthen the evidence in their favour, should the vessel be wrecked in questionable circumstances. In insurance, in like manner, no ignorance or innocence on the part of the insured will be an answer to the fact that the ship was unfit for the voyage. Seaworthiness is presumed; and it is not sufficient for the underwriter to prove that the ship became unseaworthy after the risk began, but if the ship spring a leak, or go down, or become unnavigable without adequate cause, unseaworthiness will be inferred. The opinion of the carpenters who repaired a vessel, although it strengthens the presumption, is not conclusive proof of seaworthiness. Disrepair of any kind left in the hull, rigging, sails, ground-tackling, &c. of a vessel, is a breach of this warranty. Overloading may make a vessel unseaworthy. The policy is binding if the defect have been discovered and remedied before any harm is done, provided this occasions no delay or deviation not authorised by the underwriters. See *Bell's Com.* i. 550, and *Bell's Illust.* § 477, for cases as to what amounts to a breach of the warranty of seaworthiness. See *Abbott's Law of Shipping*. See also *Brodie's Supp. to Stair*, 950, 981; *Bell's Com.* i. 534, 617; *Bell's Princ.* §§ 165, 408, 477; *Illust.* § 165; *Shaw's Digest*, 247; *Parker*, Feb. 15, 1815, 3 *Dow*, 23; *Wikie*, Feb. 27, 1815, 3 *Dow*, 57; *Douglas*, May 17, 1816, 4 *Dow*, 269. See *Insurance. Affreightment.*

**Seceders.** See *Religion. Society.*

**Second.** See *Duel. Challenge.*

**Secondary Creditor;** is an expression used in contradistinction to *catholic creditor*. Thus, a creditor who has an heritable security over two estates, for the same debt, is a catholic creditor; and a creditor who has a postponed heritable security over one of those estates, is

technically called a secondary creditor. *Bell's Com.* ii. 523. See *Catholic Creditor*.

**Sectator**; "a seytor in court." *Skene, h. t.* See *Sot*.

**Securities, Heritable.** See *Heritable Securities. Burdens.*

**Sederunt, Acts of.** See *Acts of Sederunt.*

**Sedition**; consists in attempts made, by meetings, or by deed, word, or writing, of whatever kind, to disturb the tranquillity of the State, to produce public trouble or commotion, and to excite the subjects to the dislike, resistance, or subversion of the established government. Sedition is distinguished from *leasing-making* in this respect, that the object of *leasing-making* is to disparage or prejudice the private character of the Sovereign, whereas sedition is directed against the order and tranquillity of the State; and although the two offences may be combined, yet the great distinction seems to be, that the offence against the Sovereign, in the former case, is of an individual nature, extending no farther than to the person of the King; whereas sedition, by whatever means it may attain its object, is an attack upon Government and the constitution of the State. Where this offence is carried the length of tumultuous meetings for the professed purpose of altering the constitution, it assumes a different character, and becomes treason. The punishment of sedition was formerly arbitrary; but by 6 Geo. IV. c. 67, it was restricted to fine and imprisonment, with an alternative of banishment on a second offence. This alternative, however, was taken away by 7 Will. IV. c. 5. See *Hume, i. 544*; *Ersk. B. iv. tit. 4, § 29*; *Hutch. Justice, i. 357*; *Alison's Princ. 581*; *Tait's Justice, h. t.*; *Blair's Justice, h. t.* See *Treason. Debating Societies. Drilling.*

**Seduction.** An action of damages is competent at the instance of a husband against the seducer of his wife; and that although the husband have not previously raised an action of divorce against his wife. In like manner, the seduction of an unmarried woman may be the foundation of a similar claim of damages at her own instance against her seducer. *Ersk. B. iii. tit. 1, § 13, in notes*; *Bell's Princ. § 2033*; *Brown's Synop. 2132*. See *Damages. Delict. Jury Trial.*

**Seignory**; in English law, a manor or lordship. *Tomlin's Dict. h. t.*

**Sek.** See *Serplath*.

**Self-Defence.** Homicide in self-defence is justifiable. *Hume, i. 212*. See *Homicide. Murder. Chaud Melle. Justifiable Homicide. Culpable Homicide.*

**Semiplena Probatio**; has been defined, "something less than proof, and more than suspicion; per Lord Gillies in *M'Crone*, 9th June 1831, 9 S. & D. 692. It has also been

said, "that a *semiplena probatio* does not mean merely a suspicion: That suspicion depends merely on the turn of mind of the person who suspects; some persons suspecting merely where there is possibility; but that a *semiplena probatio* must amount to such evidence as induces a reasonable belief, though not complete evidence;" per Lord President Blair in *Craig v. Creighton*, June 14, 1809, *Flac. Coll.* In *M'Laren v. M'Culloch*, June 12, 1844, 6 D. 1133, Lord MACKENZIE defined *semiplena probatio* to be such a measure of probation as, taken along with what is to be added to it, viz., the oath of the pursuer, makes a *plena probatio*—such an amount of proof, that when to it shall be added the oath of the pursuer, it will be reasonable to be satisfied that the case is established against the defender; and in this definition Lord JEFFREY concurred. Whenever *semiplena probatio* is made out (which is in all cases a question of evidence), the pursuer is entitled to the oath in supplement. When a merchant's books are regularly kept, there is *semiplena probatio* that they are correct, and his oath in supplement is competent to prove the truth of what is contained in them; *Ivory, Feb. 21, 1816, 4 Dow, 467*. But the most frequent cases in which questions of *semiplena probatio* occur are actions of filiation, or for the aliment of bastard children. Whenever the pursuer is able to make out acts of indecent or suspicious familiarity on the part of the putative father, or other the like circumstances, inducing a reasonable belief that he is the father of her child, she is entitled to her oath in supplement to that effect. Such cases necessarily depend entirely upon specialties; but the inclination of the Court may be gathered from such as have been decided, several of which are noted in *Macglashan on Aliment*, p. 80. See also *Stair, B. iv. tit. 44, § 9*; *tit. 45, § 17 (2)*; *Ersk. B. i. tit. 6, § 50, and note by Mr Ivory*; *B. iv. tit. 2, § 14*; *Bank. ii. 630*; *Bell's Princ. § 2061*.

Since the passing of the act 16 Vict. c. 20, by which parties are made admissible as witnesses, it may be doubted whether an oath in supplement would now be allowed, as the reason for allowing such evidence no longer exists. In the case of *Scott v. Chalmers*, Dec. 2, 1856, 19 D. 119, which was a case of filiation, Lord Justice-Clerk HORN observed,— "I do not think, though it is not necessary to determine that in the present case, that the provisions of the former law are still in force, allowing to the pursuer in those actions the benefit of giving an oath in supplement if the case made out a *semiplena probatio*. Her oath in supplement was allowed because she could not be a witness, while the nature of her case, implying secret matters, required that her oath should be allowed. But now she is al-

lowed to be a witness, and what can she require more?" Lord Wood observed,—“There may perhaps be reason to doubt whether the old law of *semplena* has been wholly abrogated. If the pursuer do not offer herself as a witness, and the defender does not put her into the witness-box, I am not sure that we might not have to proceed upon the old law, and to consider whether or not a *semplena probatio* had been made out without her evidence, and if satisfied that it had been, to admit her oath in supplement. But upon such a state of the case I give no opinion now, it not being necessary for the decision of that which is before the Court.”

**Senators of the College of Justice.** By the act 1540, c. 93, the Judges of the Court of Session are styled *Senators of the College of Justice*. See *Session, Court of. College of Justice. Council and Session*.

**Sentences.** See *Summons. Judicial Procedure. Decree. Criminal Prosecution. Execution of Sentences. Appeal*.

**Separation of Married Persons;** may be either the act of the law, or it may proceed on a voluntary contract. 1. Where a husband deserts his family, turns his wife out of the house, or abuses her “*in such a manner as to render her condition quite uncomfortable*,” she may apply to the Court of Session either for a separate aliment, or to the same Court, as coming in place of the Commissaries, for a decree of separation, finding her husband liable to support her during her continuing to live as his wife separate from him. 2. An agreement to live separate may be entered into extrajudicially between husband and wife. But if the husband express his readiness to receive his wife again into his family, or if the wife consent to return to it, the contract of separation is at an end; although a judicial separation may notwithstanding be applied for by either party. The wife cannot sue her husband for aliment during voluntary separation; and although, at the time of entering into the contract of separation, the husband may have assigned her an aliment, he is entitled to recall it at any time, if he, at the same time, offer to receive her back. The wife’s only remedy is to return to his house, or to obtain a judicial separation, which, if there be good grounds for it, is competent, notwithstanding the voluntary separation. *Bank. B. i. tit. 5, § 136; Ersk. B. tit. 6, §§ 19, 30; Lothian’s Consistorial Prac. 194; More’s Notes on Stair, p. xxvii.; Bell’s Com. i. 643; Bell’s Princ. § 1539, et seq.; Illust. ib.; Fraser on Domestic Relation. See Marriage. Desertion. Divorce. Husband and Wife.*

**Separatists;** a sect of religious dissenters, who, from conscientious scruples, refuse to take an oath in courts of justice and other

places. By statute 3 and 4 Will. IV. c. 82, the members of this sect are permitted to make a solemn affirmation in all cases where by law an oath may be required. See *Affirmation*.

**Septennial Prescription.** See *Prescription*.

**Sepulchres, Violating.** Although the abstraction of a corpse before interment may be prosecuted as theft, yet the violation of a sepulchre is not considered as such, but as an indecency and a crime *sui generis*. The offence is committed by raising the body, though ever so little, from the shroud. The body raised must be identified with that set forth in the libel. The punishment varies from imprisonment for a short period to transportation. *Hume, i. 85; Syme, 321; Steele, 158; Alison’s Princ. 461. See Dead Body.*

**Sequels;** in thirlage, are the small allowances of meal, or of manufactured victual, or of money composition, made to the servants at the dominant mill for their real or implied trouble in grinding the victual of the servant lands. *Stair, B. ii. tit. 7, § 21; Ersk. B. ii. tit. 9, § 19; Bank. i. 684; Bell’s Princ. § 1018; Hunter’s Landlord and Tenant; Hutch. Justice of Peace, ii. 400. See Thirlage.*

**Sequestration.** Under this name are comprehended two proceedings of characters very different—the sequestration of land estates; and the sequestration, in a mercantile bankruptcy, of the whole estate, both heritable and moveable, of a bankrupt. The former is intended to preserve a disputed property from dilapidation or waste; the latter to convert into money, and distribute the estate equitably amongst the creditors of the bankrupt.

1. *Sequestration of land estate.*—During the dependence of a process of ranking and sale, or where two or more creditors are in competition for the property of a land estate, the owner of which is bankrupt, or nearly so, and none of the competitors has attained possession, or where the right to a land estate is the subject of litigation, the Court may, if they think proper, sequester the rents, and appoint a judicial factor, to preserve the estate, collect the rents, and manage or dispose of the whole, under the authority of the Court, for behoof of those in whose favour the Court shall in the end decide. But where one of the competing parties is in possession, under a title which is the subject of an action of reduction, the Court will not sequester the rents, or appoint a factor on the application of one of the competitors; *Ralston, June 18, 1831, 9 S. & D. 766.* By Act of Sederunt, it is not competent to present a petition praying for the sequestration

of a land estate after 27th Feb. in the winter, or 25th June in the summer session; *A. S. 17th July 1764; A. S. 5th June 1790.* The judicial factor must find caution for his intrusions and actings; and within six months after his appointment, he must make up a rental of the estate, and a list of arrears, which he must deposit with the clerk to the process, as forming the charge against him. The judicial factor must also, under penalties prescribed by Act of Sederunt, make up and lodge with the clerk annually a scheme of his accounts, showing the charge and discharge; *A. S. 22d Nov. 1711; 13th Feb. 1730.* By another Act of Sederunt, July 31, 1690, the judicial factor is liable for the interest of the rents recovered, or which might have been recovered, from a year after the term they fell due. The factor-fee is settled by the Court, and is fixed commonly at five per cent. on the amount of the intrusions. See *Commission. Judicial Factor.* A judicial factor can make no payment, and carry through no sale, without the warrant of the Court; and when he acquires right to any debt affecting the subject, it operates as a complete discharge of the debt. The judicial factor is discharged of his office by the Court, and he accounts to the party found to have the best right, or to the preferable creditor; and upon paying over the balance in terms of the order of Court, his bond of caution is given up. The cautioner may at any time apply to have his bond of caution delivered up, when the Court will order new caution; and the factor's proceedings may at all times be brought under review of the Court by petition and complaint at the instance of those having interest therein. *Bell's Com. ii. 262; Ersk. B. ii. tit. 12, § 55, et seq.; Stair, B. i. tit. 13, § 5; B. iv. tit. 41, § 7; tit. 50, § 27; Mor's Notes, pp. lxxviii. cccxciv.; Bank. i. 377; ii. 312, 239; Bell's Princ. §§ 2418-22; Shand's Prac. 980. See Judicial Sale. Factor. Trustee. Judicial Factor. Petition and Complaint.*

2. *Sequestration in a mercantile bankruptcy.*—This sequestration is awarded under the statute 19 and 20 Vict. c. 79, 1856, on an application to the Court of Session by the bankrupt himself, with the concurrence of one or more creditors having the undermentioned qualification, or, where the bankrupt does not concur, on the application of one creditor of L.50, or of two creditors whose aggregate debt is L.70, or of three or more creditors whose aggregate debt amounts to L.100 and upwards. Sequestration may also be awarded of the estate of a deceased debtor on the petition of a mandatory to whom he had granted a mandate to apply for sequestration, or on the petition of a creditor or

creditors who have the above qualification. The general provisions of this statute have been already given in the article "*Bankrupt.*" See *Alexander's Digest of the Bankrupt Act, Kinnear's Law of Bankruptcy. M'Brair's Practice in Bankruptcy.*

**Sequestration for Rent.** Sequestration is the judicial means by which the landlord makes his right of hypothec effectual. Sequestration is obtained on a summary petition to the sheriff, setting forth the arrears, and praying for a warrant to sequester the crop and other articles subject to the hypothec, and for warrant to sell to the extent of the arrears. The first deliverance on this petition is a warrant to sequester as prayed, and an appointment on the tenant to answer the petition. The application may be made both where there are arrears due, and where the landlord has reason to apprehend that the tenant is endeavouring to deprive him of his hypothec by displenishing the farm or removing his effects, or where the credit of the tenant is suspected. The sequestration renders special the landlord's right, which was before general, and makes it attach to each individual article sequestered, so as to entitle the landlord to recover the property or the value of the cattle, &c., into whose hands soever they may have gone. The regular issue of the application for a sequestration is a roup and sale of the goods for payment of the rent. See the form of the petition, of the sheriff's deliverance, and of the inventory of the goods sequestered, in *Bell on Leases, ii. 318.* See also same work, i. 369, 389; ii. 30; *Hunter's Landlord and Tenant; MacLaurin's Sheriff Prac.; Boyd's Judicial Proceedings, 302.* See *Hypothec and authorities there cited.*

**Seranterie;** was, according to Skene, a tenure common in England. "Grande seriantye," was where a man held his lands of the King, with the *reddendo* of passing with him in his host, or bearing his banner with him in his wars, or leading his host or army. "Petit seriantye" was when one held his lands of the King, paying a knife or buckler, a sheaf of arrows, or the like service; 18 *Edw. I.; Skene, h. t.*

**Seriant;** according to Skene, serjeant is he who, at the command of the magistrate, encloses or locks in prison guilty persons delated, or suspect of any crime. *Serianus curia,* the serjeant of the court, the officer or executor of letters or summonses; *Skene, h. t. See Recordum.*

**Serjeant-at-Law;** is, in England, the highest degree in the law except the judges, who are chosen from the serjeants. *Tomlin's Dict. h. t.*

**Serplath;** in the old Scottish computation



of weights and measures, contained fourscore stones, a term chiefly used in the accounts of merchants and shipmasters (skippers). A "sek" (sack) of wool contained 24 stones, and by the daily calculation of merchants, 40 stones Troy, although this was not invariable. Each stone Troy contained 16 pounds Troy, and each pound 16 ounces. Each "tunne" contained 6 cwt. Troy, and each cwt. five-score pounds, or 6½ stones Troy. "A last of gudes fured hame" (imported), commonly contained 12 barrels, or half a serplath. A last was two packs, and each pack was as great as half a sack of wool-skins, and contained in weight 36 "Sprusse" stones. A Sprusse stone contained 28 pounds Troy. For every last of wax imported by strangers there were 14 ship pounds, and imported by Scotch shipmasters, 12 ship pounds. There were 12 great or 14 small barrels for the last of tar, pitch, and such-like wares. By strangers, 24, and by Scotch "skippers," 18 barrels of rye-meal were imported for the last, and a last of rye was sometimes 18 and sometimes 19 bolls in measure. Ten packs of wool made a last of wool. Ten hides made a daiker, and 20 daikers made a last; 12 dozen of gloves or "ledder peyntes" made a gross, and a great gross contained 12 single gross. Ten stones of brass made a barrel. Six barrels of English drinking bear made a tun. Twelve barrels of salmon were bought for the last; but in "furing" them over the sea, skippers counted only 9 barrels for the last. The fiddler of lead contained nearly 6 score and 8 stones. A "schip pound" contained 16½ stones of Scotch Troy weight. Six score skins or ells of woollen cloth were counted to the hundred. *Stone, h. t. See Weights and Measures.*

**Servant;** is one who hires his service at a certain rate. See *Location. Master and Servant.*

**Servants' Wages.** See *Wages. Farm Servants' Wages.*

**Service of an Heir.** Before an heir can regularly acquire a right to the estate of his ancestor, he ought to be served heir, which formerly proceeded upon a brieve, and included in it the verdict of a jury, fixing the right and character of the heir to succeed to the estate of the ancestor. An heir before his entry is termed apparent heir, and as such possesses certain rights. See *Apparent Heir.* The heir, who desires to complete his title, may proceed either by a service; or, where he holds of a subject, he may, on satisfying the superior of his propinquity and of his right to receive an entry, obtain from him a precept of *clare constat*, infestment on which will complete the heir's title. See *Clare Constat.* Or the heir may grant a trust-bond to a confidential friend, who,

having charged him, as his debtor, to enter, may adjudge, and in that way acquire a title by an adjudication, which will enable the heir, by means of his trustee, and without incurring a representation, to try the effect of any right the ancestor may have given. And if the estate be in this way cleared of any claims, the confidential adjudger may transfer to the heir the whole right under the adjudication. See *Adjudication on Trust-Bond.*

Where the title is to be completed by service, the form of the procedure will be affected by circumstances. Where the ancestor has died feudally vested in the estate, the heir must complete his title by a special service; and on a precept following on this special service, he must be infest; for if he should die after being served heir in special, but without being infest, the whole procedure falls, and the next heir who enters disregards the special service, and enters to the person last infest, as if no such service had been expedie by the person who died uninfest. Where, again, the ancestor was not infest, but held personal rights to the subject, as dispositions with unexecuted procuratories or precepts, the heir, in place of a special service, expedes a general service, in virtue of which he acquires a complete right to the unexecuted procuratories and precepts, and may be forthwith infest on them precisely as his predecessor might have been. And should he die without being infest, still the personal rights are thus completely transferred to him, and will pass to his own heir-at-law, who, in order to acquire right to the unexecuted procuratories and precepts, must be served heir in general to him, and not to the former proprietor. Where, again, the estate is burdened with the debts of the ancestor in such a manner as to render it hazardous for the heir to enter and incur a universal representation, it is competent for him, within the *tempus deliberandi*, to enter by an inventory, and he will be liable no further than to the value of the subjects contained in the inventory. See *Inventory. Beneficium Inventaris.*

A general service formerly proceeded on a brieve issuing from Chancery. A note was given in to Chancery stating the nature of the brieve required, and that it must be a brieve directed to such a judge ordinary (and any judge ordinary was competent in the general service) for serving the claimant heir in general to his ancestor—care being taken to describe the heir in his proper character. A brieve was then issued from Chancery and delivered to the claimant's agent, containing all the heads of the brieve in a special service, for there was no distinction in the terms of the brieve farther than in the character

of the heir, as described in the brieve. This brieve was proclaimed and published at the head burgh of the jurisdiction within which the heir was to be served, which superseded the necessity of any personal service. It was not necessary to summon a jury; any fifteen persons (the number of which the jury consists) who might be in Court, or who might be selected by the claimant's agent, were allowed to act as jurors. See *Inquest*. At the distance of fifteen days after the publication, the service proceeded before the judge. The inquest was sworn by the judge to act faithfully. The heir, or one acting for him, then produced his claim, which stated his relationship, and claimed that he might be served heir under the character stated in the brieve. Evidence was also produced in support of the claim. Under the general service there were only two of the heads of the brieve inquired into, viz., 1. Whether the deceased died at the faith and peace of the Queen, which was presumed, unless the contrary be asserted; and, 2. Whether the claimant be the real and lawful heir. The propinquity must be proved; but where a degree of propinquity was proved, it was presumed to be the nearest; and, in the same way, the person was presumed a lawful heir, unless the contrary was asserted. The jury, if satisfied on these heads with the evidence laid before them, served the claimant, and their sentence was attested by the judge and retoured to the Chancery, whence the brieve issued. From the Chancery a certified copy was given out which was called a retour. A general service established the right of the persons served to the character of heir, and also vested those rights which did not require infestment. It was, for the former purpose, considered at one time merely as a kind of declarator of propinquity; and in conformity with this idea, it was held in the Court of Session, after a consultation of the whole judges, that a general service was competent, although there had been a prior general service to the same person, without the necessity of serving through the party who had obtained the prior service; *Cochrane*, March 11, 1828, 6 *S. & D.* 751. This decision, however, was reversed April 29, 1830, 4 *W. & S.* 128. Where a party infest in fee-simple executed an entail, not disposing in favour of himself, but reserving a power of revocation, and died leaving the deed unrevoked and undelivered, a general service as heir-substitute of entail to the entailer is inept to take up the procuratory or precept granted by him; *Colquhoun*, July 8, 1831, 9 *S. & D.* 911. See *Retour. Brieves*. *Ersk.* B. iii. tit. 8, §§ 63, et seq., 75, 78; *Bank.* B. iii. tit. 5, § 14, et seq.; *Stair*, B. iii. tit. 4,

§ 33, et seq.; *More's Notes*, p. cccxxiii.; *Bell's Princ.* § 781, 1848, et seq.; *Sandford on Heritable Succession*, i. 287, 290-6; *Sandford on Entails*, 318, 339, 347; *Jurid. Styles*, i. 280.

The special service includes not only a title to a special estate in which the ancestor died infest, but also a title to all personal rights which were vested in the ancestor, and which are descendible to the heir in the character described in the special service. In other words, the special service embraces a general service to the same heir. The special service also formerly proceeded on a brieve issued from Chancery, but directed not to any judge ordinary, as in the former case, but to the sheriff of the county within whose territory the lands lay to which the heir was to be served. The brieve was published at the head burgh of the jurisdiction, and the service might proceed fifteen days after the publication. The jury, consisting of the same number (fifteen), was selected or taken *ex assistantibus*, in the same manner as in the general service; and the claim was made, and the evidence in like manner laid before this jury or inquest. The heads of the brieve in the special service were—1. That the deceased died at the faith and peace of the Queen: This was presumed. That he died infest: This was proved by production of the investiture of the estate. The precise period of the death required also to be proved, to show how long the lands had been in non-entry. 2. That the claimant was the next and lawful heir: This required to be proved by parole evidence, the testimony even of the jurymen being admitted; and propinquity being proved, the degree was presumed to be the nearest in existence; but where the propinquity was remote, ancient deeds, specifying the relationship, were received in evidence. 3. Of whom the lands are held: This was proved by the ancestor's charter. 4. By what tenure they were held: This was also proved by the charter. 5. What was the *extent* of the lands *old* and *new*: This was proved by the production of a former retour, or, where there was none, by the report of an accountant, stating the extent at the same rate with the neighbouring lands in the same county, in proportion to the valued rents of the said lands, of which the cess-books afford sufficient evidence. 6. That the claimant was of lawful age: This was affirmed by the jury, whatever the age of the claimant might be. 7. In whose hands the fee had been since the death of the ancestor: This was no further answered than to prove liferents where they had existed, as they excluded non-entry while they lasted. These heads being proved, the jury served the heir, and the judge retoured the service to Chan-

cery; an extract from which, as in the case of the general service, was called the *retour* of the heir's service. *Ersk. B. iii. tit. 8, § 67; Bank. B. iii. tit. 5, § 24, et seq.; Stair, B. iii. tit. 5, § 25, et seq.; More's Notes, p. cccxxvi.; Bell's Princ. §§ 780, 1826 et seq., 1841 et seq.; Sandford on Herit. Success. i. 273; Sandford on Entails, 318, 335-8; Jurid. Styles, i. 280, et seq.*

A service *cum beneficio inventarii* is authorised by the act 1695, c. 24. The service differs in no respect from the ordinary service of an heir, further than that he is said in the service to be heir *cum beneficio inventarii*. *Ersk. B. iii. tit. 8, § 68, et seq.; Bell's Princ. §§ 781, 1926, et seq.; Jurid. Styles, i. 361. See Beneficium Inventarii. Inventory.*

The general service was completed as soon as it was retoured; and all the right which a general service can give was thenceforward vested in the person served. The special service, as already observed, carried no right to the heir served, until his title was completed by sasine. Where the lands held of the Crown, the heir applied to the Chancery; and, upon production of his *retour*, a precept was issued of course, directed to the sheriff of the county, requiring him to infeft the heir, and to take security for the non-entry and relief duties; and the precept required to be executed before the next term, or it could not be executed at all, and a new one had to be applied for. On this precept the heir was infeft, and his title to the estate of his ancestor thereby completed. See *Post Proximum Terminum*. Where the lands held of a subject, the heir must obtain a precept of *clare constat* from the superior, proceeding on a narrative of his special *retour*, and infeftment on that precept completed his title; but should the superior refuse, the heir might under the act 20 Geo. II. c. 50, upon production of his special *retour* to the Court of Session, obtain a warrant to charge the superior to receive him within fifteen days; and on payment of the non-entry and relief duties, and production of the ancient titles, the superior was bound to give his precept in terms of the ancient rights. See *Charge to Enter. Charter*. But, should the superior still delay, a precept might be obtained from Chancery for infefting the heir. Where the superior was unentered, he must, in place of being charged under the 20 Geo. II., be charged to enter himself heir, and thus to complete his title to the superiority, in terms of the act 1494, c. 58, within forty days, that he may be in a situation to receive his vassal's heir; and should he fail so to do, he loses the casualties which he might have claimed. But he does not lose the feu-duties: these remain due to the immediate superior; and the heir pro-

ceeds against the higher superiors, successively, on their respective refusals, until he arrives at the Crown, from whom a precept is obtained without the necessity of a charge. In one or other of these ways is the title of the heir holding of a subject-superior completed. On the subject of service generally, see *Ersk. B. iii. tit. 8, § 59, et seq.; Stair, B. iii. tit. 5, § 28, et seq.; Bank. B. iii. tit. 5, § 14, et seq.; Bell's Com. i. 659; Bell's Princ. § 779; Kames' Stat. Law Abridg. h. t.; Sandford on Herit. Success. i. 265 et seq., 280, 326, 338, 380, 402; Macfarlane's Jury Prac. 42, 72. See Brieve. Apparent Heir. Succession. Clare Constat. Error, Summons of.*

*Alterations in the Forms of Service.*—By the act 10 and 11 Vict. c. 47, 1847, the practice of issuing brieves from Chancery for service of heirs is abolished. A general service now proceeds by petition to the sheriff of the county within which the deceased had his ordinary or principal domicile at the time of his death, or, in the option of the petitioner, to the Sheriff of Chancery. Where the deceased had no domicile in Scotland, the petition must be presented to the Sheriff of Chancery. When a special service is desired, the petition must be presented to the sheriff within whose jurisdiction the lands comprehended in the petition are situated, or, in the option of the petitioner, to the Sheriff of Chancery. Where the lands are situated in different counties, the petition must be presented to the Sheriff of Chancery. A petition of service is equivalent to a brieve and claim under the former law, and an extract decree of service is equivalent to an extract *retour*. A decree of special service, besides operating as a *retour*, has the operation and effect of a disposition from the deceased to the heirs served. Such decree of service, however, cannot be transmitted for the purpose of completing the title of the heir or assignee of the party served. No person is entitled to appear and oppose a service proceeding before the sheriff who could not competently appear and oppose such service proceeding under a brieve of inquest under the former law. In cases of competition the proceedings may be advocated to the Court of Session, in order that the case may be tried by a jury. Where, also, the sheriff refuses to serve the petitioner, his judgment may be brought under review of the Court of Session by a note of advocacy. A special service does not now infer a general representation, either active or passive, but only a limited passive representation to the extent and value of the subjects embraced in the special service. In a petition for a special service, an heir of line or heir-male may also apply for a general service in the same character. A general service may be applied for,

and obtained to a limited effect, by annexing a specification setting forth the particular subjects to which the service is limited, and the service obtained infers only a limited passive representative to the extent of the subjects contained in the specification.

**Services, Personal.** See *Personal Services*.

**Serviens Curis.** See *Seriant*.

**Servient Tenement;** is the tenement over which a servitude has been granted or acquired in favour of a dominant tenement. See *Servitudes*.

**Servitudes;** are either predial or personal. A predial servitude is a servitude constituted over one subject or tenement, in favour of the proprietor of another subject or tenement. It is only in virtue of his property that a person enjoys a predial servitude; and when he transfers the property to another, the servitude passes along with it. The tenement over which a predial servitude is constituted is called the servient tenement, and its proprietor the servient proprietor: that in favour of which the servitude is constituted is called the dominant tenement, and its proprietor the dominant proprietor. Personal servitudes are those constituted over a subject in favour of a person, without reference to his possession of another subject. In the Roman law there were four classes of personal servitudes—*usufructus, usus, habitatio* and *operæ servorum*. In Scotland the only rights which have been classed under personal servitudes are the different kinds of usufruct;—*lifereut*, by reservation or constitution, *terce*, and *courtesy*. See *Liferent*. *Terca*. *Courtesy*. And it has been doubted whether *lifereut* would not with more propriety be considered as limited property than as a servitude. Those who adhere to the Roman law classification maintain that servitude is the category to which *lifereuts* are most conveniently referred. But this is merely a matter of arrangement. Predial servitudes are either rural or urban. This distinction has no reference to the circumstance of the tenements being within or beyond the limits of a town. A rural servitude is a servitude which does not affect houses or other edifices, but which is constituted over fields, inclosures, &c., though in a town: to this class belong the servitudes of passage, road, way, pasture, feal, and divot, aqueduct, watering, or *aquæhaustus, thirlage*. See these articles, and also *Actus*. *Iter*. *Via*. An urban servitude is in some way connected with houses: to this class belong support, *oneris ferendi, tigni immittendi, stillicide, flumen, altius tollendi*, light, prospect. See these articles. Predial servitudes are either positive or negative. A positive servitude is one in virtue of which the dominant proprietor is

entitled to perform some act affecting the servient tenement, which, but for the servitude, the servient proprietor would be entitled to prohibit: thus, a proprietor is not entitled to rest his house upon another proprietor's pillar; but if the servitude *oneris ferendi* be constituted in his favour, he may do so. A negative servitude is one in virtue of which a servient proprietor is prohibited from performing some act, which, but for the servitude, he would be entitled to perform. Thus a proprietor is entitled to build his house as high as he chooses; but if the servitude *altius non tollendi* be constituted in favour of a neighbouring tenement, he will be restricted from building it higher than it is when the servitude is constituted. A positive servitude is constituted either by grant or by prescription. When it is constituted by grant, it must be followed by possession, either actual, as by use, or civil, by the recording of a sasine containing the grant. Charter and sasine in the dominant subject, with use of the servitude for forty years, completes the right to a positive servitude. A negative servitude can only be constituted by grant. It does not admit of possession, and therefore cannot be acquired by prescription. For the same reason, the grant alone, without use, is sufficient for its constitution. A distinction between such services as are, and such as are not, known and recognised, has been considered in the article *Nominate and Innominate*. Servitudes are extinguished, 1. *Confusione*; that is, by the dominant and servient tenements becoming the property of the same person. Professor Bell's doubt, whether such extinction is permanent, has been stated in the article *Res sua nemini servit*. 2. By renunciation. 3. By the extinction of either the dominant or servient tenement; or by a change of circumstances rendering the servitude no longer available. Sometimes, however, where such change is only temporary, the servitude may be merely suspended until matters are restored to their former state. 4. By prescription; and this applies both to positive and negative servitudes. A servitude only creates an obligation *ad patiendum*; and therefore the servient proprietor cannot be called on to do anything, such as to repair his wall for the purpose of giving better support for the dominant proprietor's roof. A stipulation that the servient proprietor be bound *ad agendum*, imposes merely a personal obligation. A servitude is intended for the benefit of the dominant tenement; and the dominant proprietor, therefore, is not entitled to exercise his right merely to distress the servient proprietor, where it is productive of no benefit to himself. The benefit is confined entirely to the

dominant tenement. The servient proprietor must do nothing to diminish the use or convenience of the servitude. See *Ersk. B. ii. tit. 9, § 1, et seq.*; *Bank. B. ii. tit. 6, § 1, et seq.*; *tit. 7, § 1, et seq.*; *Stair, B. ii. tit. 7, § 1, et seq.*; *B. iv. tit. 45, § 17*; *Morr's Notes, p. ccx.*; *Bell's Com. i. 757*; *Bell's Princ. § 979, et seq.*; *Illust. ib.*; *Bell on Leases, i. 210*; *Hunter's Landlord and Tenant*; *Bell on Purchaser's Title, 44, 372*; *Dempster, Nov. 26, 1813, 2 Dow, 40.*

**Session, Court of.** The Court of Session is the supreme civil court of Scotland, and was instituted in the year 1532. This Court formerly consisted of fifteen Judges, who sat all in one court. But by 48 Geo. III. c. 151, the Judges were required to sit in two Divisions; and by 1 Will. IV. c. 69, their number was reduced to thirteen—the Lord President, the Lord Justice-Clerk, and eleven Ordinary Lords. The Lord President and three Ordinary Lords form the First Division, and the Lord Justice-Clerk and other three Ordinary Lords the Second. There are five permanent Lords Ordinary, the last appointed of whom officiates on the Bills during session. The jurisdiction and other powers of the Court of Session are necessarily treated of in many separate articles throughout this work. They have a privative jurisdiction in competitions relative to heritage and declarators of the right to it. But actions respecting moveables, and other rights to which their privative jurisdiction does not extend, cannot be brought in the Court of Session in the first instance, where the subject of the action does not exceed the value of L.25. This rule is, however, modified in certain cases. Many classes of cases have been appropriated to the Court of Session by statute. Their jurisdiction as a court of review is treated of in the articles *Appeal*. **Advocation. Suspension.** In cases where the power of review is excluded, the Court of Session may nevertheless interfere wherever any inferior court exceeds its powers or deviates from statutory regulations. The Court have a criminal jurisdiction (which however is seldom exercised) in certain cases in which the civil question at issue implies crime in one of the parties. See *Fraudulent Bankruptcy. Forgery. Fraud, &c.* The Court has power to punish contempts of its authority, and to control the conduct of the members of the College of Justice. They have the right of passing Acts of Sederunt for the regulation of judicial procedure. See *Acts of Sederunt.* The Judges of the Court of Session hold their office *ad vitam aut culpam.* Their nomination and appointment is in the Crown. No one can be appointed who has not served as an advocate or principal

clerk of Session for five, or as a writer to the Signet for ten years. Certain forms are prescribed for ascertaining the qualifications of the nominee. By 10 Geo. I. c. 19, if the presentee be found duly qualified, he must immediately be admitted; but if he be found unqualified, the whole matter must be certified to the Sovereign; and if the Sovereign, notwithstanding, desire that he be admitted, he must be admitted forthwith. For the quorum of the Court, and of each Division, see *Quorum.* Upon a vacancy occurring in the Inner-House of either Division, any one of the Inner-House Judges of the other Division may, if he desire it, be removed to the Division in which the vacancy has occurred; and the vacancy thus created in the Division which the Judge has left is supplied by the senior permanent Lord Ordinary. If no Inner-House Judge, not in the Division in which the vacancy has arisen, desire to be transferred, the vacancy is supplied by the senior permanent Lord Ordinary, whether he belongs to the Division in which the vacancy has occurred or not. Upon a vacancy among the permanent Lords Ordinary of the Second Division, the junior or last appointed Ordinary of the First Division is appointed to sit as junior of the two permanent Lords Ordinary of the Second Division; 59 Geo. III. c. 45, §§ 1 and 2. In case of equality of votes of the Judges of either Division, the cause is directed to remain for a subsequent discussion and decision. In all cases, upon report of the Lord Ordinary on the Bills, where there is an equality, the Lord Ordinary on the Bills is called in to vote; and in all other cases, where, in consequence of equality, the cause remains for subsequent discussion, if the question have previously depended before any Lord Ordinary of the same Division, being at the time of the discussion one of the permanent Ordinaries, such Lord Ordinary, without regard to rotation, is called in to be present at the discussion and vote in the case; but when one of the Inner-House Judges is absent at the first advising when the equality takes place, but is present when the consideration of the case is resumed, the Lord Ordinary is not called in; 1 and 2 Will. IV. c. 38, § 3. The Judges of either Division may, in every cause in which they are equally divided in opinion, direct the cause to be judged either by the Inner-House Judges of both Divisions, or by the whole Court, including the Lords Ordinary; 13 and 14 Vict. c. 46, 1850. See *Consultation of Judges.* Provision is made, by 2 Will. IV. c. 5, for carrying on the business in case of the death or sickness of any of the Judges. See *Death.* On the subject of this article, and for a history of the origin

of the Court of Session, the following authorities may be consulted: *Laing's Scotland*, i. 446; *Robertson's Scotland*, i. 45; *Tyler's Scotland*, vol. iii. p. 241; vol. v. pp. 24 and 237; *Maitland's History of Edinburgh*, p. 423; *Stair*, B. iv. tit. 1; *Ersk. B. i. tit. 3*; *Bank. vol. ii. p. 508*; *Ivory's Forms of Process*, i. 3 to 80; *Beveridge in Introduction*; *Shand's Prac. See College of Justice.*

**Session, Kirk.** See *Kirk-Session. Church Judicatories. Elder.*

**Set-off**; is the English law term corresponding to compensation. Where there are mutual debts due by the plaintiff and defendant, the debts may be set off against each other; that is, they may be allowed to extinguish each other. Like compensation, set-off must be pleaded, and is only allowed in liquidated money debts. *Tomlins' Dict. h. t.*; *Bell's Com. ii. 124*; *Bell's Princ. § 572*; *Thomson on Bills, 762*; *Shaw's Digest, p. 70. See Compensation.*

**Sett, Action of.** Where the owners of a ship disagree as to the manner in which the vessel is to be employed, or where one of the owners is desirous to sell his share, he usually offers it at a certain price to the other owners; and failing an extrajudicial arrangement, an *action of sett* is competent. This action is an Admiralty process. It is directed by the owner who wishes to be free against the other owners; and the conclusions of the summons are, that the defenders shall be decreed either to take his share at a certain price, or to let him have their shares at the same rate; or otherwise, that the vessel shall be sold by public roup, and the price divided amongst the owners according to their respective shares. If, when the action comes into court, either of the parties agree to take the shares of the others at the price put on them, an interlocutor is pronounced decerning and adjudging accordingly; but if not, a judicial sale is ordered, and the price divided, in terms of the conclusions of the summons. The jurisdiction in this matter, formerly exercised by the High Court of Admiralty, was transferred to the Court of Session and to the Sheriff Courts, by 1 Will. IV. c. 69, whereby the High Court of Admiralty was abolished. *Ersk. B. iii. tit. 3, § 56*; *Bank. B. i. tit. 22, § 21*; *Boyd's Judicial Proceedings, 8vo, p. 26*; *Darling's Prac. i. 262*; *Stair, B. i. tit. 16, § 4*; *Smith's Maritime Prac. 48. See Common Property. Admiralty.*

**Sett of a Burgh**; is its constitution. The setts are either established by immemorial usage, or were at some time or other modelled by the Convention of Burghs. There is an instance of a new sett being granted to the burgh of Montrose by royal warrant;

*Mill, Jan. 28, 1824, 2 S. & D. 652*; appealed, June 28, 1825, 1 *W. & S. 570. See Ersk. B. i. tit. 4, § 20*; *Bank. B. iv. tit. 19, § 4*; *Shaw's Digest, p. 96.*

**Setterdayis Slop**; according to Skene, is a space of time within which it is not leasum to take salmon fish, i. e. from the time of "even-sang" after noone on Setterday, until the rising of the sun on Monoday. *Skene, h. t. See Saturday's Slop. Cruive.*

**Settlement.** See *Testament Disposition and Settlement.*

**Settlement of Poor.** See *Poor.*

**Settlement with Creditors.** See *Composition by a Bankrupt. Discharge.*

**Sexton.** See *Church Officers.*

**Shares.** As to the transference of shares in a company, see *Joint Stock Company.* For the form of the transference of a share in a theatre, see 2 *Jurid. Styles, 241.*

**Sheep.** According to Professor Bell, the circumstances which constitute delivery of sheep, sufficient to pass the property, depend entirely on usage. *Bell's Com. i. 176.*

**Sheriff**; the chief local judge of a county. According to Skene, the name is derived from his jurisdiction, extending over a "schire, that is, a cutting or section, like as we say, a pair of scheirs, quairwith claiith is cutted;" *Skene, voce Schireff.* The institution of this office is very ancient. The first notice of it appears in the beginning of the twelfth century, in the reign of Alexander I. But the institution was at that time but imperfect; regular sheriffdoms having been established somewhat later. The appointment of sheriffs properly belonged to the Crown; but the great barons frequently assumed the right of naming them. The term "schire," was anciently given to districts of much smaller extent than the sheriffdoms of the present day, each of which, however, had not a sheriff. Previous to the year 1296, these smaller divisions had disappeared, and the enactments of Edward I. give an exact enumeration of thirty-four sheriffdoms, over most of which a separate sheriff had jurisdiction. The jurisdiction of this judge, civil as well as criminal, was anciently very extensive, and within his own district nearly as unlimited as that of the great justiciars throughout the kingdom. See *Tyler's History of Scotland, vol. ii. p. 244.* In Skene, *De verborum significatione, voce Schireff,* a very full account is given of the institution of the office of sheriff, and the purposes it was intended to serve. According to him, the sheriff had for his fee of the escheat, ten pounds, paid when he accounted to the Exchequer for his intronissions. He was bound to have a good and sufficient bailie, for whom he was answerable. He was obliged to hold a sheriff-court for the execution of justice

after every forty days; and afterwards, all sheriffs, stewards and bailies, were bound to hold three head courts in the year "by themselves in proper person, at which all barons and freeholders who owed suit and presence in the said courts compared personally. The sheriff had no jurisdiction beyond his own sheriffdom, in which he was bound to take all means to have the laws proclaimed, that no one might pretend ignorance. It was his duty also to be present in all courts of bishops, abbots, earls, barons and freeholders, who could not hold their courts unless the sheriff or his deputies were present, or had been summoned.

By 20 Geo. II. c. 43, the sheriff must be an advocate of at least three years' standing at the bar. He is disqualified to act as counsel in any cause from the county of which he is sheriff. He holds the office *ad vitam aut culpam*, except when nominated merely *pro tempore* by the Court of Session, in the event of a vacancy; and he may be removed for misconduct in his office, on a complaint presented by the Lord Advocate, or by four freeholders of the county, to the Court of Session. The Court, on the presentation of such a complaint, judge of the sheriff's conduct, and decide accordingly. The sheriffs have a power of appointing substitutes, who receive stated salaries from Government for performing the duties of their office. The substitutes must be advocates, or writers to the Signet, or solicitors before the Supreme Court, or Sheriff-court procurators of at least three years' standing, and certified by the Lord President and the Lord Justice-Clerk to be duly qualified; and they must not act, directly or indirectly, as procurators in any court within their bounds; 6 Geo. IV. c. 23. For the appointment of substitutes to perform particular duties at elections, see the article *Reform Act*. The Crown may still appoint a high-sheriff, but he must not (by the foresaid act, 20 Geo. II. c. 43) be appointed heritably, or for life, or for any longer time than for one year, and cannot judge in virtue of such appointment.

The civil jurisdiction of the sheriff extends to all personal actions on contract, bond, or obligation, to the greatest extent; to actions for rent—furthcomings—poundings of the ground—and even adjudications, though that is now little more than a nominal jurisdiction, as actions of adjudication are seldom brought before the sheriff. In all possessory actions, as removings and spuilzies, &c.; in all briefs issuing from Chancery, as of inquest, terce, division, tutory, &c.; and generally in all civil matters not specially committed to other courts, the sheriff may judge. By 1 Vict. c. 41, he has a summary jurisdiction in all causes not exceeding L.8, 6s. 8d. sterling ex-

clusive of expenses and extract. See *Small Debts*. By 4 Geo. IV. c. 97, the sheriff-depute of each county is also commissary. He may appoint his substitute to be commissary substitute also. See *Commissary Court*. The jurisdiction of the sheriff has been extended to *cessio bonorum*, and certain Admiralty cases. See *Cessio Bonorum. Admiralty*. The judgments of the sheriff in civil causes are reviewable by the Court of Session only; except that, where the case embraces matters partly civil and partly criminal, the Court of Justiciary is the proper court of review; and in civil causes, where the sum in dispute does not exceed L.25, there is a statutory appeal to the Circuit Court; and in small debts, an appeal to the Circuit Court is made competent in certain circumstances. See *Small Debts. Appeal to Circuit Court*.

By 16 and 17 Vict. c. 80, 1853, the summary jurisdiction of sheriffs in small debts is extended to L.12.

The sheriff's criminal jurisdiction extends, generally speaking, to the trial of all crimes which do not infer death, or banishment from Scotland, and also to murder (though seldom thus prosecuted), bigamy, sedition, theft, robbery (if not from the person); and he may fine, imprison, banish from the county, and, in the general case, even inflict corporal pains, without a jury. Of late, however, the criminal jurisdiction of the sheriff without a jury has been considerably restricted; and a prosecutor who proceeds without a jury may be made liable in damages. See *Jury*. He may take cognisance of theft, either at the instance of the private prosecutor or by indictment; and all offences against the police are cognisable before the sheriff. He likewise possesses a cumulative jurisdiction with the justices of peace in all riots and breaches of the peace. He is authorised to apprehend rebels and offenders; and where it is necessary, in prosecution of this duty, he may call out the *posse comitatus*, or force of the county, to his assistance. He may give warrant to arrest for any crime, even treason. He has the charge of taking all precognitions; is answerable for the accuracy of the copies served on panels; he had the charge of the Porteous Roll for the Circuit Court under the old practice; and he is bound to attend on the judges, and to answer to any complaint made against him there. His decision may be appealed from to the Court of Justiciary. *Hume*, i. 494; ii. 22 *et seq.*, 57 *et seq.*, 139 *et seq.*, 241; *Alison's Prac.* 35, *et seq.* See *Precognition. Porteous Roll. Criminal Prosecution. Delegated Jurisdiction. Procurator-Fiscal. Appeal to Circuit Court*.

Sheriffs act also ministerially in returning juries to serve on trials. They execute all

writs from Exchequer; and for the blanch and feu-duties, and other casualties due to the Crown, they are bound to account in Exchequer; and they annually, in the month of February, strike the fiars, with the assistance of a jury. Writs for electing members of Parliament are directed to the sheriffs, to be executed and returned to the Crown Office. The procedure in Sheriff Courts is treated of in separate articles throughout this book. See on the subject of sheriffs, and their jurisdiction generally, *Ersk. B. i. tit. 4, § 1, et seq.*; *Bank. ii. 551, et seq.*; *Bell's Com. i. 713; ii. 389, 398, 481; Bell's Princ. §§ 2207-9, 2227; Swint. Abridg. h. t.; Kames' Stat. Law Abridg. h. t.; Watson's Stat. Law, h. t.; M'Glashan's Notes; MacLaurin's Sheriff-Court Process, 1, et seq.*

**Sheriff-Clerk**; is clerk to the sheriff's court. He alone could be notary in those sasines which were given by the sheriff, proceeding on precepts, for infesting heirs holding of the Crown. The act 6 Geo. IV. c. 23, made provision for the regulation of his fees, by the appointment of a commission, consisting of five sheriffs-depute, to examine and report. The report having accordingly been given in, the Act of Sederunt 7th July 1836 was passed, by which the fees of the sheriff and steward clerks are regulated. See *MacLaurin's Sheriff Prac. 59, 322; Jurid. Styles, ii. 502; Stone, voce Schireff.*

**Sheriff in that Part**; is a person appointed by the Queen, in Signet letters, to supply the place of the sheriff. He was termed the sheriff in that part from being appointed to execute a particular duty, which previously had been in use to be performed by the sheriff. By uniform and immemorial custom, all the diligences of the law are directed to "messengers-at-arms," as sheriffs in that part. *Stair, B. ii. tit. 38, § 10; Ersk. B. i. tit. 4, § 38; Ross's Lect. i. 286, 418. See Adjudication. Poincing.*

**Sheriff**; in England, an officer appointed by the Crown to execute process, preserve the peace, and give assistance to justices and others in doing so. During his office, he is the first man in his county. The sheriffs of London and Middlesex are chosen by the citizens of London. The office of sheriff in England is entirely different from that which goes under the same name in Scotland. See *Tomlins' Dict. h. t.*

**Showers**; in jury causes, are the persons named by the Court, usually on the suggestion of the parties, to accompany the six jurors when a view is allowed. See *Viewers.*

**Shewing of Holding**; an action formerly competent to the superior, to have a deed granted to his vassal judicially exhibited to him, that its validity or import might be ascertained. It is now long since this action

was laid aside; but its purpose is answered by an action of reduction-improbation. *Ersk. B. ii. tit. 5, § 3; Bank. l. 616; Kames' Stat. Law Abridg. h. t.*

**Ship**. Property in ships differs from ordinary moveable or personal property in several respects; and the form of the title, as well as the mode of transferring or burdening this species of property, has been the subject of statutory enactments. *British ships* have a monopoly of the British trade with the colonies and settlements of this country; and of the importation of many articles; and of fisheries for importation. *Foreign Ships* are also privileged to share with British ships in the importation of commodities grown or manufactured in the country to which the vessel belongs. But in order to confer this privilege, the foreign vessel must be built in that country; or prize of war there; or condemned under the slave-trade laws; or British built, not captured from a British subject; and, finally, in all those cases, the ship must be owned by subjects of that country, and three-fourths of the crew must be subjects of that country. In order to confer the privilege of a *British ship*, the vessel must be of the build of this country, or her colonies; or condemned in the Court of Admiralty as a prize; or forfeited under the slave-trade acts, excluding ships, although built in Great Britain, if repaired in a foreign country at an expense exceeding 20*l.* a ton, unless such repair has been occasioned by damage on the voyage, and to enable the vessel to return home. British ships, if captured, and sold to foreigners, are excluded. See on this subject, *12 Charles II. c. 18; 1661, c. 45; 26 Geo. III. c. 60; 4 Geo. IV. c. 41; (consolidating prior statutes), repealed 6 Geo. IV. c. 105, and re-enacted 6 Geo. IV. c. 104; 6 Geo. IV. c. 109; 6 Geo. IV. c. 110; 3 and 4 Will. IV. c. 54 and 55; Bell's Princ. § 1322 et seq., § 1379, and authorities there cited.*

By the act 17 and 18 Vict. c. 104, 1854, foreign ships are admitted to the coasting trade, and all matters in regard to merchant shipping are now regulated by the acts 17 and 18 Vict. cc. 104 and 120, 1854, and 18 and 19 Vict. c. 91, 1855.

Where the owners of a ship cannot agree how she is to be employed, or if one or more of the owners wish to sell the vessel, the remedy is by the process of *sett and sale* (see *Sett*); and where the vessel has been arrested by creditors, instead of the usual process of *furthercoming*, an action of *arrestment and sale* is raised by the creditor, setting forth the ground of debt and the arrestment, and concluding that the ship should be sold and the proceeds made furthercoming to the pursuer, at least to the amount of his debt. When the action is



called in court, if there be no opposition, the pursuer lodges a minute, praying the Lord Ordinary to name a person to make on oath an inventory of the ship, and to give his opinion as to the upset price. Commission will be granted to any justice of the peace to take the valuator's oath, and on the oath being reported, another minute is lodged, craving warrant to expose the vessel to sale, at the upset price so fixed, after due advertisement, and to consign the price in the hands of the clerk of Court. Articles of roup are then prepared by the clerk, who officiates as clerk at the sale; and when the sale is made, a third minute is lodged, reporting the proceedings, and praying for decree of sale in favour of the purchaser, and that his bond of caution for the price may be delivered up. The same minute may also pray, that as much of the proceeds as may be necessary to pay the pursuer's debt should be paid over to him. Where the debt has not been previously constituted, the summons in this action may also conclude for decree constituting the debt, and in that case the action will be called an action of *constitution and sale*. Where there is a shortcoming in the proceeds, the expense of the sale will be deducted in the first place; and if there be competing claimants on the residue, the competition will be disposed of precisely as in a process of multiplepointing. Condescendences and claims will be lodged by the several claimants, and the competition will be closed by an interlocutor of ranking and preference, and a warrant to the clerk to pay the competitors as ranked. If, pending this process, the vessel is to be dismantled, a petition ought to be presented for authority to that effect. This process was formerly competent only in the High Court of Admiralty, and the forms of procedure will be found in *Boyd's Judicial Proceedings*, 8vo. edit. p. 29, *et seq.* The jurisdiction is now transferred to the Court of Session and Sheriff Courts; 1 *Will. IV. c. 69, § 22*. See, on the subject of ships generally, *Stair, B. ii. tit. 1, § 42; tit. 2, § 20, et seq.; More's Notes, p. cclxxxvii.; Mr Brodie's Supp. 94; Ersk. B. iii. tit. 1, § 34; tit. 6, § 3, et seq., and Notes by Ivory; Bank. i. 86, 220, 448; iii. 26; Bell's Com. i. 151 et seq.; 502 et seq.; ii. 512 et seq., 527-8; Bell's Princ. §§ 1322 et seq. 1379; Shand's Prac. i. 417; Brown on Sale, 55, et seq.; Jurid. Styles, 2d edit. ii. 506 to 523; Stewart, Nov. 10, 1813, 2 Dow, 29*. See also *Admiralty*. See also *Nautæ, Caupones, Stabularii. Average. Insurance. Jactus Mercium. Contribution. Vendition. Exercitor. Master of a Ship. Bottomry. Hypothec. Respondentia. Fœnus Nauticum. Abandonment. Registry Acts. Navigation Acts. Ship's-Husband. Supercargo.*

**Ship-Carpenter**; has a lien on the ship for

repairs, which appears to be preferable to all other securities over the ship. *Bell's Com. ii. 97, 512; Brodie's Supp. to Stair, 953; Jurid. Styles, ii. 520*. See *Lien. Vendition of a Ship*.

**Ship's-Husband**; the person whose duty it is to arrange everything for the outfit and repair of the ship, to enter into the contract of affreightment and superintend the papers of the ship. The ship's-husband cannot, as such, bind the owners to the expenses of a lawsuit; *Campbell, March 2 and June 6, 1818, 6 Dow, 116*. He cannot delegate his authority; *Bell's Com. i. 503; Bell's Princ. § 449; Illust. ib.; Brodie's Supp. to Stair, 969; Brown's Synop. 2262; Shaw's Digest, 573*.

**Shipmaster**. See *Master of a Ship*.

**Shooting or Stabbing**; with intent to murder, or to injure, is a statutory offence. See *Attempt at Murder*.

**Shops**. As to the landlord's hypothec over goods in shops. See *Hypothec*.

**Shopman**; the person who has the management of a shop, sells and receives the price, or buys articles in the course of the trade, so as to bind his master. *Bell's Com. i. 480; Bell's Princ. § 231*.

**Shore**. See *Sea, and Sea Shore*.

**Short-Entry**; of a bill in a banker's books, is done by stating the amount in an inner column, and carrying it out into the account between the parties, only when the bill is paid. Such an entry forms the best evidence that the banker has got the bills merely as an agent to recover payment, subject to a lien for his indemnity against his own acceptances. *Bell's Com. i. 271; Thomson on Bills, 731*.

**Short-Hand Notes**. Notes taken by a short-hand writer, when sworn to by himself, are considered the best evidence of what occurred at a former trial. A party himself is the best evidence of what he said in a speech; but failing him, any short-hand writer who was present, and took notes, may be adduced. The evidence of witnesses at a former trial can be proved only by themselves; but where the witnesses are dead, or where their evidence is otherwise unattainable, their previous evidence may be proved by the notes of a short-hand writer, or of the judge, or from the bill of exceptions, when the evidence has been engrossed in it from the judge's notes. *Macfarlane's Jury Prac. 180, 282*. See *Evidence*.

**Si Sine Liberia**. See *Condition si sine Liberia*.

**Sink Bill**. See *Bill of Health*.

**Side Bar**; the name given to the bar in the Outer Parliament House, at which the Lords Ordinary were in use to call their hand-rolls. *Bank. ii. 510*. See *Rolls of Court*.

**Side-Scription**. Before the introduction of the present system of writing deeds "book-

wise," the sheets were pasted together at length; and in order to authenticate them, the party was required to sign his name at each junction, half on the one sheet and half on the other. This was called side-scription. See *Testing Clause*.

**Signatures.** A signature was a writing prepared and presented by a writer to the Signet to the Baron of Exchequer, as the ground of a royal grant to the person in whose name it is presented; which having, in the case of an original charter, the sign-manual of the Sovereign, and in other cases the cachet appointed by the Act of Union for Scotland attached to it, became the warrant of a conveyance, under one or other of the seals, according to the nature of the subject or the object in view. Every Crown charter was preceded by a signature containing the principal clauses of the charter, and specifying the seal or seals through which it was to pass, and required to be revised and authorised by the Baron of Exchequer, who acted ministerially in this, and in the character of Crown commissioner, in the same way with the commissioner of any private superior, who may have granted a commission for receiving resignations and renewing the titles of his vassals. In every feudal conveyance from the Crown, requiring charter and sasine, the precept required to pass the Privy Seal and the Great Seal, and to be registered in their respective registers before passing; 1672, c. 7. Signatures and charters of the vassals of kirk lands within L.10 Scots valuation, and all commissions to the principal Crown officers, passed the Great Seal alone. *Ersk. B. ii. tit. 5, § 82, et seq.*; *Bank. B. iv. tit. 4, § 10*; *tit. 11, §§ 12, 13*; *Jurid. Styles, i. 432 to 511*. See *Seals*.

By the act 10 and 11 Vict. c. 51, 1847, signatures and precepts to Chancery, as preliminary to the granting of charters, are abolished.

**Signet**; the seal by which the Sovereign's letters for diligence are authenticated. See *Seals. Clerks to the Signet*.

**Signet, Writers to.** See *Clerks to the Signet*.  
**Silver and Gold Plate.** The act 6 and 7 Will. IV. c. 69 fixes the standard qualities of gold and silver plate in Scotland, and provides for the assaying and marking of it. Goldsmiths and silversmiths must not work plate inferior to certain standards specified in the act; § 1. Persons following the trade of silversmith, goldsmith, or plateworker, before sending their names, descriptions, and marks to the Goldsmiths' Incorporation of Edinburgh, or the Goldsmiths' Company of Glasgow, forfeit L.100; § 2. Goldsmiths, &c., must strike their mark on the plate, and send it to the assay-office to be assayed, where, if

it is found to be standard, it is marked with certain marks; § 3. Assayers are empowered to levy specified rates upon plate sent to be assayed; § 4. Plate of objectionable manufacture is returned without assay; but if it is found unobjectionable, a few grains are scraped from it to be assayed; § 5. If the assayer suspects that too great a quantity of base metal, or solder, is contained or concealed in the plate, he must test; but if it is found that his suspicions are groundless, compensation must be made for the damage done the plate in testing. Disputes are settled by two justices or magistrates; § 6. The scrapings are assayed, and if found inferior to the standard, the plate is defaced; if equal to standard, it is marked; § 7. The assayer weighs and sells the scrapings for the behoof of the assay-office; § 8. Provision is made for the accuracy and faithful administration of the assayers, &c.; §§ 10 to 15. Certain small gold and silver articles require no marks or stamp, such as rings, chains, necklace beads, filigree work, pencil cases, &c.; §§ 16 and 17. Selling or exporting plate not duly marked, subjects the offender to a penalty; § 18. Forging or imitating dies or marks, stamping with forged dies, &c., and fraudulently using the lawful dies, is felony; § 19. Members of the incorporation or company are competent witnesses in prosecutions; § 23. The act is declared not to affect the act 59 Geo. III. c. 28, for establishing an assay-office in Glasgow, except in so far as alterations are expressly made upon it, nor to affect any other acts for granting duties on plate, or on dealers' licences; § 24.

**Siminellus**; white bread or "maine" bread. *Skene h. t.*

**Simony**; an unlawful contract, for the presenting of a clergyman to a benefice, or procuring him a presentation; so called from its supposed resemblance to the offence of Simon Magus. Simoniacal practices afford a ground for deposing a clergyman who has been guilty of them, or for depriving a probationer of his license; and the same penalty is imposed where clergymen or probationers do not divulge such practices to the presbytery of the bounds, as soon as they come to their knowledge. By the canon law, the party who took benefit by a simoniacal paction, even without his knowledge, was declared incapable of holding that or any other benefice. *Bank. B. iv. tit. 8, § 2*; *Act of Assembly 30th May 1759*; *Stair, B. ii. tit. 8, § 35*; *B. iv. tit. 1, § 30*; *More's Notes, p. lxxv.*; *Kames' Stat. Law Abridg. h. t.*; *Connell on Parishes, 539, et seq.*; *Dunlop on Patronage, § 172*. See *Hill's Theological Institutes, p. 442*. See *Minister. Deposition*.

**Simple Contract.** In England, a debt by

simple contract is where the contract is ascertained neither by matter of record, nor by deed or special instrument, but by mere oral evidence, or notes unsealed. *Tomlins' Dict. h. t.*

**Sine Quo Non.** It frequently happens, that in nominations of curators, tutors, trustees and the like, one of the nominees is named *sine quo non*; and the legal construction of such a nomination is, that by the death or non-acceptance of the *sine quo non* the nomination falls. So also the *sine quo non* has a negative on the acts of the rest. *Bell's Princ.* §§ 1993, 2074, and authorities there cited. See *Curatorum. Quorum.*

• **Single Escheat.** See *Escheat.*

**Single Combat;** was admitted in the law of Scotland as a species of evidence, in the case of capital crimes, where the accusation was supported by presumptive evidence only. This mode of proof was in use in the reign of Robert III. *Ersk. B. iv. tit. 2, § 2; Ross's Lect. i. 121.* See *Combat.*

**Singular Successor.** A purchaser, or other donee, or acquirer by titles, whether judicial or voluntary, is called a singular successor, in contradistinction to the heir, who succeeds by a general title of succession or universal representation. A singular successor, on the other hand, acquires right solely by the singular title acquired from the former proprietor. *Ersk. iii. 81; Bell's Com. i. 23; Bell's Princ. §§ 719, 783-6, 990.* See *Heir. Service.*

**Sist on a Suspension;** is the order or injunction of the Lord Ordinary prohibiting diligence to proceed, where relevant grounds of suspension have been stated in the bill of suspension. *Stair, B. iv. tit. 52; Ersk. B. iv. tit. 3, § 18, and note by Ivory; Bank. iii. 9; MacLaurin's Sheriff Prac. 17.* See *Suspension.*

**Skat-Land.** See *Udal Rights.*

**Skeleton Bills;** signed blank papers stamped with a bill stamp. The subscriber will be held the drawer or acceptor, as it may be, of any bill afterwards written above his name, for any sum which the stamp will cover. *Ersk. B. iii. tit. 2, § 28, note by Ivory; Bell's Com. i. 390; Bell's Princ. § 321.*

**Slains, Letters of;** were letters subscribed by the relations of a person who had been slain, declaring that they had received an assythment, and concurring in an application to the Crown for a pardon to the offender. These or other evidences of concurrence were necessary to found the application; 1457, c. 74, and 1528, c. 7; 1592, c. 155, No. 1; 1593, c. 174; so far at least as to prevent a pardon from being pleaded without them. *Hume, i. 280; ii. 478; Ersk. B. iv. tit. 4, § 105; Bank. i. 247.* See *Assythment. Pardon.*

**Slavery;** the condition of human beings,

when, without their consent, they are subjected to the will of another human being, whom they are in all things compelled to obey. In the Roman law, slaves were things, not persons; and at first they were placed entirely at the disposal of their masters, who had the power of life and death over them. By the later law, however, many regulations were made to protect them from the cruelty or caprice of their masters. See an excellent work on the subject of Roman slavery by William Blair, Esq. advocate. Slavery existed in Scotland at an early period, as indeed it did in all the nations of Europe. See *Nativi. Colliers and Salters. Adscripti Glebæ.* The general character of slavery was different among the Romans under the feudal system. Almost all the Roman artificers and domestics were slaves; while the bondsmen of the feudal ages were labourers perpetually attached to the soil which they cultivated. A slave is free whenever he touches British ground, or goes on board a ship belonging to the British navy. But it is said, that if he return to the country of his former master, he may be reclaimed. The acts passed with a view to abolish slavery in the British colonies, and to suppress the slave-trade, are 3 and 4 Will. IV. c. 72 and 73; 5 and 6 Will. IV. c. 45; 6 and 7 Will. IV. c. 5, 16, 81, and 82.

**Sleeping Partners;** are partners of a company, not proclaimed or known as such. There may be dormant partners where the trade is apparently carried on either by one individual, or by fewer individuals than the company consists of. Dormant partners differ in no respect from ordinary partners; they are equally liable for the debts of the company. The steps to be taken for discovering and proceeding against the latent partners in a sequestration of a company are suggested in *Bell's Com. ii. 673.* See also *Ib. 622, 643; Bell's Princ. § 359; Thomson on Bills, 250.* See *Society.*

**Sleeping of Process.** In the judicial procedure of the Court of Session, a process, in the Outer-House, is said to be asleep when a year and day have elapsed without any judicial order or interlocutor having been pronounced therein. See *Wakening.*

**Slip.** In the contract of insurance, the policy is preceded by a note of the contract, made out for the purpose of asking the consent of underwriters to the proposed policy. This is called a *slip*. It is merely a jotting or short memorandum of the terms, to which the underwriters subscribe their initials, with the sums for which they are willing to engage. It has no force as a contract of insurance; it cannot be received in evidence to contradict the policy; and it is ineffectual to show even

priority of subscription. Whether it might ground an action to compel the signing of a policy, has never been tried. The form of a slip will be found in *Jurid. Styles*, ii. 564. See also *Bell's Com.* i. 608; *Bell's Princ.* § 469; *Illust. ib.* See *Insurance. Policy.*

**Small Debts.** 1. *Justices.*—The statute 39 and 40 Geo. III. c. 46, commonly called the *Small-Debt Act*, conferred a summary civil jurisdiction on justices of the peace in small debt causes. This statute was superseded by 6 Geo. IV. c. 48, of which the following are the principal provisions: It is made competent for any two or more justices of the peace to hear and determine all causes and complaints brought before them concerning the recovery of debts, or the making any demand effectual, provided the debt or demand do not exceed L.5 sterling, exclusive of expenses; § 2. All such causes proceed upon a complaint, agreeably to a form (A) subjoined to the act, stating shortly the ground of action, and concluding against the defender; to which complaint, and on the same paper, the clerk of the peace adjects a warrant signed by him, agreeably to the form subjoined to the act, containing authority to cite the defender to appear at the next meeting of the justices in the district within which he resides, or where the meetings of the court are held weekly; then, in the option of the pursuer, at the second or third diet of court from the date of the warrant, the diet not being sooner in either case than the sixth day after the date of citation, and for summoning witnesses at either party's instance to the same day and place. A copy of the complaint and warrant, with a citation annexed, and also a copy of the account or other ground of action, is delivered by a constable or peace-officer to the defender personally, or left at his dwelling-place; in which latter case, if the defender do not appear, he must be cited again, either personally or at his dwelling-place, upon the words *de novo* being signed and subjoined to the original complaint, or signed and inserted in the procedure book kept by the clerk, to appear either at the next stated meeting, or at a meeting to be held by adjournment for that purpose, not sooner than three days from the date of the first meeting, with certification that if he do not then appear he shall be held as confessed. If the defender have been cited at first to a diet of court not sooner than twelve free days from the date of citation, the officer, in case the defender have not been found personally at the time of the first citation, may cite him a second time, either personally or at his dwelling-place, to the same diet of court, on the original warrant, and without previously reporting an execution of the first citation to

the court. Such second citation must not be given sooner than the sixth day after the first, nor later than the sixth day before the diet to which the defender is cited for the second time: if the defender do not then appear, he is held as confessed. The constable must in all cases return an execution of citation signed by him, or appear and make oath that he cited the defender in manner foresaid; § 3. Where a constable is required by either party to cite witnesses, he must lodge in the clerk's hands a written execution of every such citation at or before the diet to which the defender is cited, or otherwise verify in court the execution of citation, as the justices see fit. And if the witnesses cited do not appear, a new warrant may be obtained to compel their attendance at next stated or adjourned meeting, under a penalty not exceeding twenty shillings, to be awarded by the justices, in case a sufficient excuse be not offered and sustained. This penalty is payable to the party at whose instance the witness was cited, and may be recovered in the same manner as other small debts. Or, in the option of the justices, the witness failing to appear, without a sustained excuse, may be imprisoned for any time in the county jail not exceeding ten days. But the penalty is not exigible, nor the witness liable to imprisonment, unless the second citation have been given, not later than the sixth day before the diet of court to which he has been cited; § 4. When the parties appear, the justices hear them *viva voce*, and examine witnesses upon oath, and also the parties by declaration or upon oath; but no practitioners of the law are allowed to plead for them either *viva voce* or in writing; and the pleadings must not be taken down in writing or entered on record; § 5. If a defender, who has been duly cited anyhow, do not appear by himself, or a substitute not a practitioner, he is held as confessed, unless he send an excuse by one of his family, satisfying the justices that delay ought to be granted; in which case, or for some other good reason, the justices may adjourn the cause to the next stated meeting, or other day to be specially appointed; § 6. A pursuer or defender, if the justices see cause, may be heard by one of his family; or if the pursuer be not resident within twenty miles of the place where the court is held, the justices, if they see fit, may hear him by a person holding a written mandate for that purpose, the said mandatory not being a legal practitioner; § 7. Where decree has been pronounced in absence of the defender, he may, upon consigning the sum decreed for in the clerk's hands, obtain warrant under the clerk's hands at any time before the days of the charge are

expired, sisting execution until the next court-day, and containing an authority to cite the pursuer and witnesses. This warrant being served on the pursuer in the manner already pointed out, is an authority for having the matter reheard at next court-day, provided it be not sooner than the sixth day after personal citation, or the second citation left at his dwelling-place, or, if so, at the next court-day thereafter. The justices may delay such rehearing to such time as may be thought fit. In like manner, where decree of absolvitor has passed in absence of the pursuer, he may at any time, within one calendar month thereafter, upon consigning two shillings and sixpence to be paid to the defender, obtain a warrant for citing the defender and witnesses; which being served on the defender in manner foresaid, is an authority for having the matter reheard, as is pointed out in the case of a rehearing at the defender's instance; § 8. The constable, in the event of his returning a false execution, or otherwise neglecting his duty, is punishable by fine not exceeding 20s., or imprisonment for not more than ten days. Recourse against the constable at common law is reserved to the party injured; § 9. The clerk must keep a book in which must be entered the names and designations of the parties, and whether present or absent at the calling of the cause—the nature and amount of the claim and date of in-giving—the mode of citation—the several interlocutors of the justices—and the decree dated and signed by the justices or by the preses, if more than two, agreeably to the form annexed to the act. A copy of the decree, containing warrant for arresting, or pointing, or for imprisonment, together with a note of the expenses awarded, is annexed to the complaint. And this copy of decree, signed and delivered, is a warrant for execution after ten free days from the date of pronouncing the decree, if the party against whom it has been given was present, by himself or family, when it was pronounced; or if he was not present, execution only proceeds after a charge of ten free days, given in common form by the constable; § 10. The justices, if they see fit, may direct sums found due to be paid by instalments; § 11. The execution of the pointing by the constable is summary, by carrying the pointed effects to the nearest market town, kirk town, or village in the parish; and after their being appraised, and after one hour's notice, selling them by auction at the cross, or other most public place, between the hours of eleven and one, or any other later hour fixed by the justices. The overplus of the price, after payment of the debt and expenses of process, if any, and of the expense of carrying the

pointing into execution, is delivered to the owner; or the effects, if not sold, delivered to the creditor at the appraised value, to the amount of his debt, &c. If the place of sale is not a market town, but only a kirk town or village, two days' previous notice must be given at the parish-church door on Sunday after the forenoon service; § 12. In all cases of execution by pointing or imprisonment, the constable employed must, on or before the next court-day thereafter, make a return, either verbally or in writing, to the clerk, of the date and manner of the execution, the number of assistants employed, and the sum, if any, recovered; and in the case of a pointing, stating farther the value at which the goods were appraised—the time and place of sale—the charges paid for conveying or warehousing goods, where such have been incurred—and the price for which the goods sold where a sale was made. If the execution was by imprisonment, he must state the jail in which the debtor was incarcerated. These particulars are entered by the clerk in the procedure book, or other book kept for the purpose, and laid before the justices at next meeting, and exhibited to any person desiring inspection of them; § 13. Decrees pronounced by the justices under authority of this act are not subject to advocacy, suspension, appeal, or other stay of execution, except in the case of consignation for a rehearing, as before provided; nor can they be set aside by reduction before the Court of Session, except on the ground of malice and oppression on the part of the justices. Even such reduction is incompetent unless brought within a year after the date of the decree of the justices; § 14. When a reduction is brought, the pursuer must, before the summons of reduction is called, find caution for the expenses which may be awarded against him; § 15. One justice, in case no more be present, may hold a court for the purpose of calling the roll of causes—of pronouncing decrees in absence—receiving returns of execution of citations—and granting warrants of citations *de novo*, but for no other purpose; § 16. Provision is made respecting the fees payable to the clerk, the officers or constables, and the crier; § 17. An abstract of the table of fees must be printed on the complaint, and copy thereof for service; and a copy of the table, signed by two justices and the clerk, is hung up in the court-room and the clerk's office. The fees are subject to modification by the justices; § 18. Where the clerk or other officer of court exacts any fee not authorised by the act, the person so offending shall be liable to a penalty not exceeding, if he is a clerk or depute-clerk, L.5, if a constable or other officer, 20s. for each

offence. These penalties are awarded by the justices on complaint from the party aggrieved, and satisfactory proof, and are paid to the party complaining, or to the poor, or partly to both, as the justices see fit. The justices may further punish their officers by suspension or dismissal for this and other offences; § 19. An account must be kept by the clerk of all court-fines awarded by the justices, which, where not otherwise provided for by the act, are paid to the poor as the justices direct; § 20. The justices of each county are empowered, at quarter sessions, to make suitable divisions of the county into districts, or to alter the divisions already made; within which they are directed to meet at such time and place as they may fix at quarter sessions, in order to carry the purposes of the act into execution. These meetings may be adjourned to any other lawful day at the same place. Of these divisions into districts, and of the stated times and places of meetings so to be appointed, or of the alterations of such divisions or stated meetings, the justices, at their quarter sessions, must order due notice to be given, by advertisement at the church-doors of every parish in the county, at least two Sundays previous to the first stated meeting so appointed or altered; § 21. Where the clerk fails to attend personally, or by depute, at any of the district meetings of which he has had due notice, the justices present at the meeting may name an interim-clerk, who may be removed by subsequent quarter sessions, and another clerk appointed from time to time; § 22. The justices are empowered, at their quarter sessions, to make from time to time such rules and orders as may be thought necessary for carrying the provisions of the act into effect; such rules not being inconsistent with the conditions of the act itself or contrary to law. These rules and orders remain in force until repealed by the justices at their quarter sessions, or by the Court of Session or Justiciary at Edinburgh, or by the Circuit Court of Justiciary, on the application of two or more justices; § 23. No person is exempt from the jurisdiction of the court under this act, on account of privilege, as being a member of any other court; § 24. The act does not extend to any debt where the title to land or other heritable right is in question, nor to any debt or matter arising upon or concerning the validity of wills or contracts of marriage, although such debts do not amount to L.5; nor to gaming debts, or debts contracted for spirituous liquors; § 25. The constables or officers of the peace are declared exempt from the penalties for selling goods or effects under authority of the decree and warrants of the justices by public

sale or auction, although such constables or officers be not licensed auctioneers; § 26. Solicitors or procurators in inferior courts, or the partners of such solicitors or procurators, are prohibited from acting as justices of the peace while they continue to be legal practitioners; § 27.

The act 12 and 13 Vict. c. 34, 1849, amends the previous act, and gives the form of complaint on which the claim is to proceed.

2. *Sheriffs*.—The sheriff's exclusive jurisdiction in small debts was introduced by 6 Geo. IV. c. 24. This was repealed by 10 Geo. IV. c. 55, which has in its turn been repealed by the existing act, 1 Vict. c. 41. The chief provisions of that statute are the following: Sheriffs are empowered to determine civil causes, prosecutions for statutory penalties, and maritime civil causes, where the debt, demand, or penalty does not exceed the value of L.8, 6s. 8d., exclusive of expenses and fees of extract, the pursuer or prosecutor being held to have passed from all claim beyond the sum concluded for; § 2. All such causes, unless otherwise provided in the act, proceed upon summons or complaint, according to the form in schedule (A.) annexed to the act, and containing warrant to arrest upon the depending action, stating shortly the origin of debt or ground of action, and concluding against the defender. This summons or complaint being signed by the sheriff-clerk, is a warrant to a sheriff's officer to summon the defender to appear at the time and place mentioned in it; not being sooner than upon the sixth day after the citation; and the same, or the copy thereof, served on the defender, is a sufficient warrant for summoning such witnesses and havers as either party requires. A copy of the summons or complaint, with the citation annexed, and also a copy of the account, if any, must be served at the same time on the defender, personally, or at his dwelling-place, or in case of a company, at their ordinary place of business. The summoning officer must, in all cases under the act, return a signed execution of citation, or appear and give evidence on oath of the citation having been duly made; and citations given by an officer alone, without witnesses, and executions subscribed by the officer, are good and effectual; § 3. Any cause before the sheriff's ordinary court, in which the debt, &c., did not originally exceed L.8, 6s. 8d., or in which, by an interim decree or otherwise, it has, previous to the closing of the record, been reduced to that sum, may, with the pursuer's consent, be remitted to the small-debt roll by the sheriff, either *ex proprio motu*, or on the motion of a party. If the pursuer do not consent, the provisions of the act as to the fees or expenses to be allowed in causes

below L.8, 6s. 8d., brought not according to the summary form provided in the act, are applied to such causes subsequent to the proposition for remit, if the sheriff think fit so to modify the expenses; see § 36. When a case has been remitted by the sheriff-substitute from the ordinary court to the small-debt court, an appeal is competent to the sheriff against the remit, but no reclaiming petition is allowed against the remit; § 4. The sheriff may try, in his small-debt court, in the above summary way, applications by landlords or others, having right to the rents and hypothec, for sequestration and sale of a tenant's effects for recovery of rent, provided the rent or balance claimed do not exceed L.8, 6s. 8d. The summons and warrant of sequestration and procedure must be according to the forms directed in schedule (B). Provision is made respecting the appraisal, the inventory and other procedure, in carrying the sequestration into effect; § 5. The pursuer of any civil cause may use arrestment, on the dependence of the action, of any money or effects to the amount of L.8, 6s. 8d., owing or belonging to the defender, in the hands of any third party. The arrestment ceases by the mere lapse of three months, unless it be renewed by a special order or warrant intimated to the arrestee, in which case it continues in force for the like period and under the same conditions; or unless an action of furthcoming or multiplepounding have been raised before the end of the three months, in which case the arrestment continues in force until the termination of the action; § 6. Wages of labourers and manufacturers, so far as necessary for their subsistence, are deemed alimentary, and, in like manner as servants' fees and other alimentary funds, not liable to arrestment; § 7. Arrestment may be loosed, on the defender's lodging with the sheriff-clerk a bond of caution by one or more sufficient cautioners, to the satisfaction of the sheriff-clerk, agreeably to the form in schedule (C); or on his consigning in the hands of the clerk the amount of the debt or demand, with 5s. or 10s. for expenses, according as the action was for a sum above or below L.5; or on his producing evidence of having obtained decree of absolvitor, or having paid or consigned the debt. A certificate of the sheriff-clerk operates as a warrant of loosing the arrestment; § 8. Provision is made for rendering arrestment effectual by furthcoming summarily, and the forms of the summons and complaint are given in schedule (D); § 9. An action of multiplepounding may be raised in the same summary way, in name of the holder of a fund not exceeding L.8, 6s. 8d.; see § 10, and relative schedule. Where the defender intends to plead a counter account

or claim against the debt, he must serve a copy of such counter account or claim, by an officer, on the pursuer, in the form set forth in schedule (A), or to the like effect, at least one free day before the day of appearance, otherwise it cannot be heard except with the pursuer's consent, but action is reserved for it; § 11. Provision is made for compelling the attendance of witnesses, by imposing penalties in case of their neglect; § 12. When the parties appear, the sheriff hears them *viva voce*, and examines witnesses or havers upon oath. He may also examine the parties, and put them or any of them upon oath, in case of oath in supplement being required, or a reference made; and if he see cause, he may remit to persons of skill to report, or to any person competent to take and report in writing the evidence of witnesses or havers unable to attend, upon special cause shown. Such cause must, in all cases, be entered in the book of causes kept by the sheriff-clerk. Due notice is given of the examination to both parties. Thereupon the sheriff may pronounce judgment. The decree, stating the amount of expenses (if any) found due to any party (which may include personal charges if the sheriff think fit), and containing warrant for arrestment, and for pointing and imprisonment, when competent, is directed to be annexed to the summons or complaint; and on the same paper with it, agreeably to the form in schedule (A), or to the like effect. The decree and warrant being signed by the clerk, are a sufficient authority for instant arrestment, and also for pointing and sale and imprisonment, where imprisonment is competent, after the lapse of ten free days from the date of the decree, if the party against whom it has been given was personally present when it was pronounced; but, if he was not present, pointing and sale and imprisonment can only proceed after a charge of ten free days, by serving a copy of the complaint and decree on the party personally or at his dwelling-place. If any decree be not enforced by pointing or imprisonment within a year from its date, or from a charge for payment given upon it, the decree cannot be enforced without a new charge given as aforesaid; § 13. No procurator, solicitor, or legal practitioner is allowed to appear or plead for any party without leave of the court, on special cause shown. Nor can any of the pleadings be reduced to writing, or entered on any record, unless with leave of the court, obtained in consequence of any difficulty in point of law, or of the special circumstances of any particular case. When the sheriff orders pleadings to be reduced to writing, the case is thenceforth conducted according to the ordinary forms and proceedings in civil causes,

and in prosecutions for statutory penalties ; § 14. A defender not appearing personally or by one of his family, or by such person, not being an officer of court, as the sheriff shall allow, is held as confessed, and the other party obtains decree against him. In like manner, if the pursuer fail to appear, personally or otherwise, the defender obtains decree of *absolvitor* ; unless, in either case, a sufficient excuse for delay be stated ; on which account, or on account of the absence of witnesses, or any other good reason, the sheriff may adjourn any case to the next or any other court-day, and ordain the parties and witnesses then to attend ; § 15. Where a decree has been pronounced in absence of a defender, he may, on consigning the expenses decreed for, and the sum of 10s. to meet further expenses, in the hands of the clerk, at any time before a charge is given, or in the event of charge being given before implement of the decree has followed on it (provided, in the latter case, the period from the date of the charge does not exceed three months), obtain from the clerk a warrant, signed by him, sisting execution till the next court-day, or to any subsequent court-day to which the same may be adjourned, and containing authority for citing the other party, and witnesses and havers for both parties ; and such warrant being served upon the other party, is an authority for hearing the cause. In like manner, where *absolvitor* has passed in absence of the pursuer or prosecutor, he may, at any time within one calendar month, on consigning in the hands of the clerk the sum awarded by the sheriff, as the expenses of the defender and his witnesses, with 5s. to meet further expenses, obtain a warrant, signed by the clerk, for citing the defender and witnesses for both parties ; and this warrant, being served upon the defender, is an authority for hearing the cause. The sum of expenses awarded by the sheriff, and consigned as aforesaid, is in every case paid over to the other party, unless the contrary be specially ordered by the Court. All such warrants for hearing are in force, and may be served by any sheriff-officer in any county, without indorsation, or other authority than this act ; § 16. The sheriff-clerk is directed to keep a book, in which must be entered all causes conducted under the authority of the act, &c. ; § 17. The sheriff may, if he think proper, direct the sums found due to be paid by instalments weekly, monthly, or quarterly, according to the circumstances of the party found liable, and under such conditions and qualifications as he thinks fit to annex ; § 18. A decree may be enforced in any other county besides that in which it is issued, provided it, or an extract of it, be endorsed by the sheriff-clerk of such other

county ; § 19. Provision is made, in detail, for carrying into effect the sequestration, or pointing and sale, in a summary way, by appraisalment, &c. ; § 20. In all charges and arrestments, and executions of charges and arrestments under this act, one witness is sufficient ; § 21. Action of damages for loss or injury by riots, authorised by 3 Geo. IV. c. 38, where the sum concluded for does not exceed L.8, 6s. 8d., may be heard and determined in the summary way provided by this act ; as likewise actions for recovery of assessments, by virtue of 9 Geo. IV. c. 39, although the amount of the assessments exceeds L.8, 6s. 8d. ; § 22. The sheriffs must, in addition to their ordinary small-debt courts, by themselves or their substitutes, hold circuit courts for the purposes of the act. Provision is made for the times and places at which such courts shall be held, the attendance of sheriff-clerks, by themselves or deputies, &c. ; §§ 23, 24, 25. The sheriff is directed, three months before holding a circuit court, to apportion the parishes to be within the jurisdiction of the court. And all causes are brought before the ordinary small-debt court, or any circuit court within the jurisdiction of which the defender resides, or to the jurisdiction of which he is amenable. But if there be more defenders than one, in one cause of action, amenable to the jurisdiction of different courts, or if, from any other cause, the sheriff think it just, he may, on summary application in writing, made by or for any pursuer, lodged with the sheriff-clerk, or on verbal application made by or for the pursuer in open court, order a summons or complaint to be issued, and the cause to be brought before his ordinary small-debt court, or any of his circuit courts ; § 26. The sheriff may adjourn causes from one court to another ; § 27. Provision is made for accounts being given in to Exchequer of the expenses of sheriffs and of sheriff-clerks at circuit courts ; § 29. No decree given by any sheriff, in any cause decided under authority of this act, is subject to reduction, advocacy, suspension, or appeal, or any other form of review, or stay of execution, other than provided by this act, either on account of any omission or irregularity, or informality in the citation or proceedings, or on the merits, or on any other ground ; § 30. Any one thinking himself aggrieved by a decree of a sheriff under this act, may bring the case by appeal before the next Circuit Court of Justiciary, or, where there are no circuit courts, before the High Court of Justiciary at Edinburgh, in the manner directed by 20 Geo. II. except in so far as altered by this act. (For this mode of appeal, see the article *Appeal to Circuit Court*.) Such appeal is only competent when founded on the ground of malice and oppression on the part



of the sheriff; or on such deviations, in point of form, from the statutory enactments, as the Court may think took place wilfully, or as have prevented substantial justice from having been done; or on incompetency, including defect of jurisdiction of the sheriff. Such appeals are heard and determined in open courts; and the Court may correct such deviation in point of form, or remit the cause to the sheriff, with instructions, or for rehearing generally. It is not competent to produce or found upon any document, as evidence on the merits of the original cause, which was not produced to the sheriff when the case was heard, and to which his signature or initials were not then affixed, which he only does if required; nor to found upon or refer to the testimony of any witness not examined before the sheriff, and whose name is not written by him, when the case is heard, upon the record copy of the summons; which he does when specially required to that effect. No sist or stay of the process and decree, and no certificate of appeal, can be issued by the sheriff-clerk, except upon consignment of the whole sum, if any, decreed for by the decree, and expenses if any, and security found for the whole expenses which may be incurred and found due under the appeal; § 31. Provision is made for the fees payable under this act to the clerk, officer, and crier; § 32. It is enacted, that a copy of section 32, containing the fees, be printed on each summons or complaint, and on each service copy, and hung up in every sheriff-clerk's office, and in every sheriff-court place, &c.; § 33. Provision is made for fining officers who neglect their duty, reserving all further claim of damages against them; § 34. No person is exempt from the jurisdiction of the sheriff in any cause raised under this act, on account of privilege, as being a member of the College of Justice, or otherwise; § 35. In all causes and prosecutions in which the demand or penalty does not exceed L.8, 6s. 8d., brought before any court not according to the summary form provided in this act, it is made lawful to the judge to allow no other or higher fees or expenses to be taken or paid than those above mentioned; § 36. On the construction of the Sheriffs and Justices Small-Debt Acts generally, the following authorities may be consulted: *Ersk. B. i. tit. 4, § 13, et seq., and notes by Mr Ivory; Bell's Com. Bell's Princ. §§ 2206-7; Maclaurin's Sheriff-Court Process, 6.*

By the act 16 and 17 Vict. c. 80, 1853, the small-debt jurisdiction of sheriffs is extended to causes not exceeding L.12, and parties may agree by minute to have actions for a larger amount than L.12, tried in the small-debt form.

3. *Imprisonment.*—The following are the provisions of 5 and 6 Will. IV. c. 70, for the

abolition of imprisonment for civil debts of small amount. It is declared unlawful to imprison any person on account of a civil debt not exceeding L.8, 6s. 8d., exclusive of interest and expenses. But it is lawful to imprison debtors on debts incurred, or which may become due under contracts made before the passing of this act, in like manner as if it had not passed, provided imprisonment for such debts commences before 1st January 1840; § 1. It is unlawful for a magistrate, or for any person having the charge of a prison in Scotland, to receive into prison, or for any messenger-at-arms, or other officer of the law, to apprehend, or detain in custody, the person of any debtor for a civil debt not exceeding L.8, 6s. 8d., exclusive of interest and expenses, in virtue of letters of caption, or other warrant, unless in the case of debts contracted before the passing of the act as aforesaid; § 2. On application made to the sheriff of the county in which the prison is situated, or to the magistrates having charge of a prison, by any person incarcerated in it, showing that he is imprisoned or detained in jail, for a civil debt or debts, contrary to the provisions of this act, the sheriff or magistrates must cause intimation to be made to the incarcerating creditor or creditors, upon *inducia* of six days after intimation; and on being satisfied that the statement of the prisoner is true, the sheriff or magistrates must grant warrant for his liberation, in so far as regards the debt due to such creditor; § 3. It is unlawful for any person to acquire from third parties, by assignation or otherwise, except by marriage or inheritance, one or more civil debts, of or below the amount of L.8, 6s. 8d., against one individual, to the effect of accumulating such debts into one decree, or warrant, or writ, or of adding the same to debts previously due to him, for the purpose of defeating this act, by imprisoning the debtor for such accumulated debts; § 4. The act is declared not to extend to obligations *ad facta prastanda*; nor to affect the right of the Sovereign, or the Crown officers, or the fiscals of courts of law, or others, to imprison as formerly, or on account of taxes or penalties due to the revenue, or on account of any fines or forfeitures imposed by law; or apply to imprisonment for poor-rates, or local taxation, or to imprisonment for sums decreed for aliment; § 5. See *Cessio Bonorum*.

**Small Stipends.** By 50 Geo. III. c. 84, and 5 Geo. IV. c. 72, the *minimum* stipend to be modified to ministers having a right to stipend from the teinds of their parishes is fixed at L.150 per annum, with L.8, 6s. 8d. for communion elements; and where there is not a sufficient amount of teinds in the parish, the sum is to be made up by a payment from

Exchequer. In addition to their stipend, these ministers have right to a manse and glebe, or a provision of L.50 *per annum*, in lieu of both. Under these statutes the Teind Court has a ministerial jurisdiction; *Beveridge*, ii. 739. See *Teind Court. Locality, &c. Glebe*. As to what are called Government or Parliamentary churches in the Highlands of Scotland, and the stipend and accommodations of the ministers, see 5 *Geo. IV. c. 90*.

**Smith's Forge.** The right of forges is given by the clause in the Crown charter, *cum fabricibus*, &c. Anciently the right to have a forge for making plough-irons, or shoeing horses, could not exist in the vassal's person without a special clause in his grant; but modern practice has rendered this unnecessary. *Ersk. B. ii. tit. 6, § 8*.

**Smuggling**; is the making, transferring, importing or exporting, of goods without paying the duties to Government, and with the intention of defrauding the revenue. If a merchant sells smuggled goods, knowing them to be so, he cannot sue for payment of their price, in a transaction entered into in this country, and no action lies for delivery of them, if purchased as such; the maxim as to all illegal contracts being, *Potior est conditio possidentis et defendentis*. Where an action is brought for the price of smuggled goods by a foreign merchant, the determination seems to depend a good deal on the question, whether the foreign merchant was accessory to, and aiding in, the plan of smuggling the goods into this country; for where he has had no accession to the fraud, but merely sells the goods, and the merchant in this country takes upon himself all the risk of importing them contrary to the revenue laws of this country, an action may competently be brought by the foreign merchant in the courts of this country. A bill for smuggled goods cannot be charged on by one aware of its character; and a debtor, whose losses have arisen from such illegal transactions, will not obtain the benefit of the *cessio*, even if he might otherwise have obtained it, until the Court conceive that the length of his imprisonment has atoned for his fault. Many statutes have been passed with a view to prevent smuggling. These have been consolidated by 3 and 4 Will. IV. c. 53, amended by 4 and 5 Will. IV. c. 13. These acts make many important provisions respecting the management of vessels and boats, the licensing of ships, the delivery of goods, &c. *Ersk. B. iii. tit. 3, § 3, vide note; Kames' Eluc. Art. 23; Bell's Com. i. 306; ii. 588; Stair, B. ii. tit. 2, § 9; More's Notes, p. lxiv; Bank. i. 94; Bell's Princ. §§ 42, 460; Kames' Princ. of Equity, 223, 231 (1825); Brown on Sale, 131. See Contraband Goods. Excise. Defrauding Revenue. Pactum Illicitum.*

**Socage**; an ancient tenure, under which the vassal performed exclusively agricultural services to the superior in the lands which the vassal occupied, a tenure which is said to have prevailed at one time in Scotland, but which is now unknown. It would appear that in soccage tenures, the right of primogeniture did not originally hold; on the contrary, all the children succeeded equally, according to the principles of the civil law; *Bank. B. iii. tit. 4, § 17; Ersk. B. i. tit. 1, § 35; B. ii. tit. 4, § 5; Ross's Lect. ii. 322; Kames' Stat. Law, h. t.; Tomlins' Dict. h. t.*

**Society**; or *partnership*, is a consensual contract, by which the parties, either in writing or *rebus ipsis et factis*, agree to conduct a certain business, trade, or manufacture, under certain conditions, and by the aid of a certain capital, dividing the profits and suffering the losses arising in the course of the connection, according to certain proportions stipulated in the contract. Where the proportions are not previously arranged, the presumption is for equality of rights and of liability; but this presumption may be overcome by contrary proof or presumption. This contract does not differ essentially from *joint adventure*, in which the partners are liable *singuli in solidum* for the obligations contracted in reference to the adventure, and warranted by the terms of the contract. See *Joint Adventure*. See *Peacock v. Peacock, 2 Campbell, 45; and Campbell's Trustees v. Morrison, 7 S. 650; and in House of Lords, 5 W. & S. 15*. See also 3 *Ross's L.C.C. 381*. Partners, even if lending their names merely, and whether ostensible or not, are liable for the company debts *singuli in solidum*, to the extent of their whole estates. See *Sleeping Partner*. Persons are also made responsible to third parties, by receiving a share in the profits, or by an agreement entitling them to share in the profits. But wages may be paid to clerks and other servants, rateably according to the profits; or a third person may, by private agreement with one of the partners, get part of his share, without such responsibility being incurred. When the partner of a company acquires a right in name of the company, the property belongs to the company; or where the partner acquires a right in his own name, with the money of the company, he lies under an obligation to communicate the benefit to the company. Every member of a company is understood to have the power of using the company firm; and in every act of ordinary administration, in the line of the company's trade or employment, he may bind the company by the use of that firm. But he cannot use it to execute a deed which is not an act of ordinary administration—to execute a submission, for example, or to grant a bond; nor would his giving the com-

pany's firm for a private debt, where the party receiving it was aware of the fraud, be effectual to the person receiving it. A guarantee is implied by each of the partners of a company to third parties, of all the engagements legally undertaken in the name of the company. The partners are even liable in restitution of what one of their number has obtained by fraud in the line of the company's trade.

Where there is no special agreement on the subject, a partner's share cannot be transferred, either by conveyance or by succession, except to the amount of his claim on the company at the time of their dividend. Any partner whom he may, independently of the company, assume, continues to be his partner, not the company's, on the maxim, *Socius mei socii non est meus socius*. But one company may become, as it were, an individual partner of another company, and thus subject to the obligations of partnership in a variety of companies. The stock of the company is liable, in the first place, to the company's debts; and the company debts rank on the private estate of the partners of the company, or of the survivors, or of those remaining solvent; who, however, have their recourse. The debts or losses of a private partner cannot come upon the company's funds until all the company's debts are paid. His creditors cannot transfer his share by pouncing, though they may attach it prospectively by arrestment. The death of a copartner dissolves the company, unless the contrary be provided for in the contract, or where the survivors tacitly or expressly agree to continue. The death of one of the partners does not dissolve the company, if it be expressly provided that heirs shall become partners; or if the right of heirs be necessarily implied, as in a contract exceeding the term of human life. Thus, a partnership in a coal concern for 124 years was binding on the heirs taking up the succession; and while the concern was prosperous, and there was no reasonable apprehension of loss, the heir of one of the parties was not entitled to a dissolution of the partnership, to the prejudice of the other party; *Warner*, Jan. 24, 1798, *M.* 14603; *affirmed*, April 25 and May 19, 1815, 3 *Dow*, 76. Although the contract be declared to endure for a certain time, a partner may judicially dissolve the partnership upon good grounds. Insanity, insolvency, or bankruptcy, under 1696, c. 5, of one of the partners, is a ground of dissolution. Sequestration is *eo ipso* dissolution. Where no term of endurance has been agreed upon, any of the partners may retire whenever he chooses, and so dissolve the partnership. In order that a partner who has once appeared in a concern may not mislead the public into

a belief that he remains a partner, after he has withdrawn, and thus give greater credit to the company than they would otherwise have received, he and the remaining partners must be at great pains, by public advertisements, and even by circular letters to the correspondents of the company, to notify his retirement from the company. The partnership continues to subsist even after dissolution, for the purpose of winding up the concern. During this period no new debts can be contracted. Special stipulations, as to the winding up, are effectual; but if no arrangements have been made in that manner, the surviving or solvent partners are entitled to take the management; or, in case of dispute, a neutral person is judicially appointed to wind up. An agreement to refer disputes to arbitration is effectual only if the arbiter be named. See *Arbitration*.

Questions occasionally occur respecting the rights and obligations of an association for religious purposes, or other similar voluntary association. It was at one time held that such societies could not hold lands or tenements even by the intervention of trustees; but it is now settled, by a long course of decisions, that they may hold property in the name of trustees. In such cases, the trustees may maintain action respecting the property; and the purposes of the trust, where not expressly declared, may be inferred from circumstances. Thus, it was decided, that where a schism takes place among a religious society, the use of the meeting-house remains with the members who adhere to the religious principles of those by whom it was erected; *Craigdallie, &c. v. Aikman*, 27th June 1805, *M.* 14,584; appealed in 1813, 1 *Dow*, 1; in 1829, 2 *Bligh*, 529. The members of a religious association are not bound to pay the stipend of the minister whom they have called and appointed, longer than they adhere to the congregation; *Hyslop v. Nairn*, 14th June 1825, 4 *S. & D.* 84. A number of persons having formed themselves into a society for religious purposes, under the denomination of Bereans, purchased a piece of ground to build a meeting-house, in the name of certain persons, as trustees for the congregation, who were infest. A schism happening in the congregation, one party seceded, and pursued the trustees for their share of the property. It was held that the trustees were bound to denude in favour of the majority of the contributors for purchasing the ground and building the meeting-house; *Allan v. Macrae*, 25th May 1791, *M.* 14,583; *Bell's Cases*, 538. A question respecting the possession of a meeting-house arose out of a dispute between two sections of a Relief congregation. The meeting-house was vested in trustees for behoof of the

congregation. One section adhered to the Relief Synod, who declared the minister out of connection with the Relief body, and appointed the church to be preached vacant; the other section adhered to their minister. In the circumstances, and until the question of right was settled, the interim possession was divided between the two sections, each having the meeting-house half of the day, forenoon and afternoon, on alternate Sundays; *Galbraith v. Smith*, Mar. 10, 1837, 15 *D. B. M.* 808. In the same case it was subsequently held, that the pursuers had failed in proving that the principle of Establishments was held originally as a fundamental and essential tenet of the Dissenting body in question, and the defence was sustained, that the chapel, being held in trust for a Relief congregation, can be enjoyed and occupied only by a congregation and minister in communion with the Relief Presbytery and Synod, and that this was an essential condition of the trust. *Smith v. Galbraith*, Feb. 21, 1843, 5 *D.* 665. See generally, on the subject of Society, *Ersk. B.* i. tit. 7, § 64; *B.* iii. tit. 2, § 18; *Bell's Com.* ii. 611; *Stair*, *B. i.* tit. 16; *More's Notes*, p. xviii.; *Bank.* i. 443, et seq.; *Bell's Princ.* § 350, et seq.; *Illust. ib.*; *Thomson on Bills*, 234, 554; *Ross's Lect.* i. 83. See *Joint Stock Companies*.

**Socius Criminis**; an accomplice or associate in the commission of a crime. See *Accomplice. Evidence. King's Evidence*.

**Sodomy**; the crime of carnal copulation against nature. The punishment is death. An attempt to commit this offence is punishable arbitrarily. *Hume*, i. 465; *Alison's Princ.* 566.

**Sok** (*secta de hominibus suis, in curia, secundum consuetudinem regni*); was an old word used in charters and infeftments. According to Skene, he who was infeft with sok or soyt had the right of holding courts within his own barony or lands, at which "*homines sui*," or his vassals, gave "*soyt*," according to the tenor of their infeftments. *Skene, h. t.* See *Heritable Jurisdictions. Furca et Fossa*.

**Sokmanria**; or soccage, according to Skene, was a kind of holding of lands, when any man was infeft freely without any service, ward, relief, or marriage, and paid to his master the duty called "*petit serantie*." *Skene, h. t.* See *Soccage. Seranteria*.

**Solatium**. It is a principle of the law of Scotland, not recognised in English law, that one who injures another is bound, not only to repair the actual loss suffered, but also to give a *solatium* for wounded feelings. Thus *solatium* for wounded feelings is allowed in cases of breach of promise of marriage. And where a father, husband, or near relative is killed through negligence, a *solatium* will be given

even where the death of the sufferer might be regarded as a benefit instead of a loss to his family. *Ersk. B.* iii. tit. 1, § 14, note by *Ivory*; *Kames' Equity*, 305. See *Damages. Defamation*.

**Soldiers**; all persons in her Majesty's land forces, except militia, yeomanry, or volunteers, if these be not expressly included. With regard to the enlisting of soldiers, see the article *Enlisting*. The annual act for the government and regulation of the forces is called the *Mutiny Act*. See *Mutiny Act*. This act declares soldiers exempt from personal arrest for debt, unless it be sworn to amount to L.30. As to the question whether an officer or soldier can be arrested in *meditatione fugæ*, see *Meditatio Fugæ*. No soldier can be reclaimed from the army, on the ground of breach of contract, except an apprentice indentured for not less than four years. See *Apprentice*. Soldiers are liable to trial by the ordinary courts, for crimes or offences not of a military kind; and when accused of such offences, their officers must aid in delivering them up to the civil power. Soldiers are billeted or quartered on all the inhabitants in royal burghs, burghs of regality, or chief market towns, except schoolmasters, widows, unmarried women, and paupers. But it is customary to pay a composition instead of actually giving the soldiers quarters. *Ersk. B.* i. tit. 2, § 21; tit. 3, § 36; *B.* iv. tit. 4, § 29; *Bank* vol. p. 70, et seq.; *Bell's Com.* ii. 563; *Swint. Abridg. h. t.*; *Alison's Princ.* 39, et seq.; *Prac.* 3, 13; *Hutch. Justice*, ii. 25; *Tait's Justice, h. t.*; *Blair's Justice, h. t.* p. 183. See *Mutiny. Desertion. Furlough. Martial Law. Court-Martial. King's Freeman. Militia*.

**Solicitor-General**, of Scotland; one of the Crown counsel, next in dignity and importance to the Lord Advocate, to whom he gives his aid in protecting the interests of the Crown, in conducting prosecutions, &c. Like the Lord Advocate, the Solicitor-General has precedence and the privilege of pleading within the bar. Formerly, the Solicitors used to get a special letter to that effect; but now, when there is only one Solicitor, it is held to be a privilege of his office,—not when there are two, as there sometimes have been. The Solicitor has been held not to be a *calumniator publicus*: he cannot therefore concur in or authorise a complaint as such, except in his character of advocate-depute; *Complainer v. Kelties*, 18th Nov. 1775, *Tait's Cases*, in *Brown's Supp.* v. 602. All proclamations for observance of days of public fasting or thanksgiving are directed to the Solicitor-General. See *Bank* vol. ii. p. 492.

The right of the Lord Advocate to plead within the bar has the authority of statute. By the Act 1537, cap. 57, it is enacted,

“that nane advocate nor procurator *within the bar* stand to pley, bot passe outwith, with the partie, except the Kingis Advocat.” And the King, on 20th January 1538, sent a letter to the Court, recorded in the Acts of Sederunt, directing them to allow the Lord Advocate to remain during the advisings of the Bench, which then took place in private. The Lord Advocate also acted judicially, and had a vote with the Judges in the decision of causes. See *Acts of Sederunt 17th Nov. 1610*, p. 69. In those cases where he himself was counsel, his vote was rejected. “Mr James M’Gill allegit that the Advocate sulde nocht remain and vote on the mater forsaide, becaus the accione is persecuit be him, and at his instance as Advocate, and therfor sulde nocht vote. The Lords be sentence interlocutour findis that the Advocate sulde ryse, and pass to the Bare, and nocht vote thereon. See *Acts of Sederunt, 4th Feb. 1564*, p. 47.

With regard to the Solicitor-General, there is the following provision in an Act of Sederunt, 28th February 1662:—“The macers are authorised to remove all persons, of whatsoever quality who shall be found within the innermost bar, where the Ordinary, Lords, and Clerks do abide, except the Keeper of the Minute-book, the *King’s Solicitor*, and one servant appointed by his Majesty’s Advocate.” But this privilege was soon taken from the Solicitor, and the old practice returned to, of allowing only the Lord Advocate and Clerks to be within the bar. On 16th December 1686, the Court, without any instructions from the Crown, and upon their own authority, issued the following declaration in regard to the parties who had right to come within the bar:—

“The Lords of Councill and Session considering, That by the ancient custome, no persons, of whatsoever quality, were permitted to come within the bar of the Inner House durning the time of debateing causes, except his Majesty’s Advocat, the Clerks of Session, the Clerk of the Bills and his deput, and one macer: They do revive that custome, and ordain the same to be duely observed in time comeing, discharginge hereby the macers to permitt any persnes, except those above exprest to come within the said bar, as they will be answerable on their perill: And in case any person be desyreous to speak with any of the Lords while they are upon the Bench, that he call for a macer at the door, and give notice thereof by him: It is always hereby declared, that the Lord Thesaurer, and Thesaurer-depute, or the Commissioners of his Majestie’s Thesaurary, not being of the Bench, shall be allowed to be within the bar when the King’s causes are called and debated, and no otherways.”

In 1713, when Forbes published his collection of Decisions, he describes the Lords as sitting at a semicircular bench: “the bar, like a diameter line, at which the advocates, *even the King’s Solicitors*, stand and plead uncovered, is opposite to the Bench. Her Majesty’s Advocate sits in chair within this bar, and pleads always with his hat on.” The practice of the Advocate pleading with his hat on was introduced in the time of Sir Thomas Hope, who was Advocate to King Charles I. “This indulgence he owed to his having two sons on the Bench, Sir John, his eldest, and Sir Thomas, Lord Kerse.”—*Notes to Tait’s Index*, p. 500.

The Crown, however, interfered on behalf of the Solicitor-General. When Charles Areskine, afterwards Lord Tinwald, was appointed sole Solicitor on 10th June 1725 (it being the practice both then and afterwards to have more Solicitors than one), he produced a letter to the Court from the King in the following terms:—

“George R.—Right trusty and well-beloved, we greet you well: Whereas, we have appointed Mr Charles Areskine, advocate, to be sole Solicitor for that part of Great Britain called Scotland, and we being pleased to show him a farther mark of our royal favour, it is our will and pleasure that a seat be placed for him within the bar of your Court, where and from whence he may be at liberty to plead cases in your presence; and we do hereby direct you to cause such to be placed accordingly. Given at our Court at St James, this 2d day of June 1725, in the 8th year of our reign. By his Majesty’s appointment, sic subscribitur, ROXBURGH.”—*MS. Records of Privy-Council*.

The entry in the Book of Sederunt bears that the letter was read and ordered to be recorded, that the Solicitor took the oaths, “and that the Lords appointed a seat for him within the bar.”—*MS. Books of Sederunt*. When Mr Robert Dundas was appointed Solicitor in 1742, he produced a similar letter, and the entry in the Books of Sederunt is in the same terms. But when Mr Henry Dundas was appointed Solicitor in 1766, no letter appears granting him this privilege, and the Minute in the Sederunt Book does not confer it.

From Tait’s Reports, it would appear that the privilege thus granted by the Crown to the Solicitor had come to be recognised, in 1775, as one he was entitled to claim irrespective of express grant. Tait states that “when Mr Montgomery presented his commission as sole Solicitor, with the whole privileges of his office as enjoyed by his predecessors, the Lords understood one of them to

be his being allowed to sit and plead within the bar; therefore he was admitted to do so. Formerly the Solicitors used to get a special letter to that effect; but now, when there is only one Solicitor, it is held to be a privilege of his office, not when there is two."—5 *Brown's Sup.* p. 603. Apparently it was upon some idea of this kind that the two Solicitors in Bankton's time acted: "The Solicitor takes care of the King's interest as assistant to the Advocate. Both have the privilege of pleading within the bar; at least the Solicitor formerly enjoyed it, though now the two gentlemen joined in the commission as Solicitors do not use such privilege."—*Bank.* vol. ii. p. 492.

In modern times the practice is for the President of the Court to direct the Solicitor to take his seat within the bar, after he has taken the oaths.

From the above account it would appear that the Lord Advocate has right to sit within the bar in virtue of a statute; and the Solicitor's admission to the same privilege may be said to have originated with the Crown, since the Act of Sederunt of 1662 was repealed in 1686. At the same time, the Court seem to have asserted the right to admit such parties as they pleased within the bar. By the Act of Sederunt of 16th December 1686, above quoted, they permitted the Lord Treasurer, or the Commissioners of the Treasury, to be within the bar when Crown causes were heard. And by Act of Sederunt of 7th July 1763, "this day the Lords resolved to admit all the members of His Majesty's Most Honourable Privy Council, whether Peers or Commoners, within the bar, and to have a seat in this house" (p. 541). This was a decided alteration of the old rule and practice. Fountainhall reports a case where the practice was thus stated: "The Marquis of Montrose compearing to choose his curators *in presentia*, the Lords, by the fault of their macers, suffering the Lady Marchioness, his mother, and many with her, to enter within the Inner Bar, were necessitated to desire her to remove; and then cause signify it was the privilege of none to stand within *but Dukes and Duchesses*—which my lady obeyed."—*Marquis of Montrose*, 8th Nov. 1695, 4 *Brown's Sup.* 277.

It would thus appear that both the Crown and the Court have the right to authorise any parties they please to come within the bar. See *Report of Faculty of Advocates*, 1859. See also *Robes*.

**Solicitor-General**, of England; is one of the officers of the Crown, next in rank to the Attorney-General. *Tomlins' Dict. h. t.*

**Solicitors before the Supreme Court.** The solicitors or agents practising before the Su-

preme Court of Scotland were formed into a society in the year 1784, and incorporated by royal charter in 1797, with the usual powers, and with the liberty of holding lands to an amount not exceeding L.500. They are empowered to hold certain annual meetings, to elect office-bearers, on the 1st of June in each year, and to make bye-laws, subject to the review of the Court of Session, on the summary application of any one interested. The office-bearers are a president, vice-president, treasurer, and secretary. They have also two censors, two auditors, and a librarian. The qualifications of agents in the Supreme Courts are regulated by A. S. 10th August 1754, 11th March 1772, and 13th February 1787; and these are all ratified by 21st December 1833, which makes certain regulations for checking irregularities and abuses in conducting the business of the Court. Among other provisions, it is enacted, that each person entitled to act as agent or solicitor, shall give in to each of the Clerk's offices, and to the Bill-Chamber, a signed list of the names of his clerks and apprentices, for whom he is answerable. And when any of those contained in the list leave his service, he must, within three days at farthest, notify the fact at the above places, that their names may be expunged from the list. By a bye-law, 1st December 1808, no solicitor can enter into an indenture with an apprentice for a shorter period than five years. The apprentice must attend the Humanity or Greek class in a university, either two sessions before the commencement of his indenture, or one previous to, and one during his apprenticeship. Previous to his admission into the society, he must have attended the Scots Law class in the University of Edinburgh, at least one session. The society possess a library and a widows' fund. They are members of the College of Justice; *Bruce*, Jan. 24, 1833, 11 *S. & D.* 313. See *Swint's Abridg. h. t.*; *Kames' Stat. Law, h. t.*; *Shand's Prac.* i. 61; *Alexander's Abridg. of A. S.* pp. 67, 86, 423. See *Attorney's Licences. Agent.*

**Solicitors at Law**; a society of law-agents in Edinburgh, incorporated by royal charter, and entitled to practise before the Sheriff Court of Edinburgh, and other inferior courts.

**Solidum.** To be bound *in solidum* is to be bound for the whole debt, although only one of several obligants. In order to constitute an obligation of this kind, the person must be taken bound, conjunctly and severally, with the others, or as principal and full debtor; except in bills of exchange, where simple acceptance by one of several acceptors imports a joint and several liability. Where several debtors are bound each for his own share, they are said to be bound *pro rata*.

*Ersk. B. iii. tit. 3, § 63; Stair, B. i. tit. 9, § 5; More's Notes, xviii; Kames' Stat. Law, h. t.; Brown's Synop., h. t.; Shaw's Digest, 313. See Correi Debendi. Conjunctly and Severally. Joint Obligant. Beneficium Divisionis.*

**Sorners.** A person is guilty of *sorning* who takes meat and drink from others by force or menaces, without paying for it. This practice had formerly prevailed to such an extent in Scotland, that the most vigorous measures were requisite for its suppression; in so much, that the offence was punishable with the severest penalties, and at one period with death. *Robert II. c. 12; 1449, c. 22; 1455, c. 45; 1477, c. 77; Hume, i. 471; Ersk. B. iv. tit. 4, § 64; Bank. i. 274; Hutch. Justice, ii. 75.*

**Soundness, Warranty of, in Horses.** See *Horses.*

**Sowming and Rowming;** are two old law terms, now applied to the action whereby the number of cattle to be brought upon a common, by the persons respectively having a servitude of pasturage, may be ascertained. The criterion is the number of cattle which each of the dominant proprietors is able to fodder during winter. This action (which is competent before the Judge Ordinary) lies against such of the claimants on the common as have had indefinite promiscuous possession for forty years; such possession being contrary to the nature of the right, and calculated to injure the other parties interested. But the action does not lie against the proprietor of the servient tenement himself, who, it is presumed, will not overstock his property so as to impoverish it. A *sowm* of land is as much as will pasture one cow or ten sheep (*Hutchinson, ii. 412*); and strictly speaking, to *sowm* the common, is to ascertain the several *sowms* it may hold; and to *rowm* it, is to portion it out amongst the dominant proprietors. But to such apportionment the parties interested cannot be compelled by this particular process, which is confined to the ascertainment of the numbers each may pasture. *Ersk. B. ii. tit. 9, § 15; Stair, B. ii. tit. 7, § 14; Bank. B. ii. tit. 7, § 32. See Pasturage. Commonly.*

**Special Case.** In civil jury causes, a special case differs from a special verdict only in this, that the special verdict is returned by the jury, whereas the special case is adjusted by the parties themselves, or by their counsel, and sets forth the special facts on which they are agreed, without the evidence. On the case thus adjusted, the Court decides the points of law raised by the facts as admitted. *Macfarlane's Jury Prac. 243, and authorities there cited. See Special Verdict.*

**Special Charge.** Letters of special charge were letters passing under the Signet, charging the heir of one who has died infert in

lands, to enter heir to him, under certification, that, if no entry take place, the complainant shall have the same execution against the lands as if the heir had entered. They are now abolished. See *Charge. Adjudication. Hereditas Jacens. Annus Deliberandi.*

**Special Jury Book;** a book kept by the sheriff, and prepared by copying from the general jury book the names of those qualified to serve as *special jurors*, i. e., persons possessed of heritable property yielding L.100 of yearly rent, or personal property to the amount of L.1000; *6 Geo. IV. c. 22, § d 4 Geo. IV. c. 8; Alison's Prac. 377; Stehere See General Jury Book. Jury.*

**Special Service;** is that form of seigney by which an heir is served to his ancestor a special feudal subject, and under a special character. See *Service of Heirs. Brieve.*

**Special Verdict.** In civil causes tried by jury, where it happens that the facts proved raise difficult questions of law, a special verdict may be returned by the jury, under direction of the judge at the trial. The usual course is for the judge to state the facts in detail to the jury, and to ask them how they find as to each of them; and the facts so found having been taken down by the clerk of Court, the special verdict is afterwards transmitted to the Division of the Court to which the cause belongs, in order to have the law applied. It is also competent for the judge to retire, and draw up the special verdict, and afterwards to return to Court and read it to the jury for their assent, subject to the observation of the counsel in the cause. Or the counsel may themselves agree on the special findings in point of fact, and lead evidence only as to those facts with respect to which they are not agreed. The special verdict must be confined to specific findings of fact, with no detail of the evidence on which the verdict rests. See on this subject *Lord Chief-Commissioner Adam's Treatise on Jury Trial, and Macfarlane's Jury Practise, 242, and App. 349. See also Issue. Jury Trial. Exceptions, Bill of.*

**Special Verdict, in a criminal trial;** is a return of certain facts or circumstances as proved, without any general conclusion from them as to the panel's guilt; the conclusion being left to be made by the judge, according to his opinion of the lawful construction of the facts so laid before him. *Hume, ii. 439; Alison's Prac. 647; Steele, 213. See Verdict. General Verdict. Issue.*

**Specification;** is the formation of a new property from materials belonging to another. In this manner of creating property, a transference of the right, with indemnification, however, to the owner of the materials, is

made wherever the materials cannot be reduced to their original state. Thus, wine, as it cannot be again reduced into grapes, belongs to the maker. But silver plate, formed from bullion, may be reduced to its original state, and therefore still belongs to the person to whom the bullion belonged. *Ersk. B. ii. tit. 1, § 16; Bell's Com. i. 276, et seq.; Stair, B. ii. tit. 1, § 41; Bell's Princ. §§ 1298, 1350; Jurid. Styles, ii. 515. See Adjunction. Contestura. Commiztion.*

**Spei Emptio**; the sale of the hope or expectation of a thing's existence; e. g., the draught of a lot, or the hope of a succession. Different from the sale of a *res futura*, such a sale is good though the thing never exist. *Gale, 111; Bell's Princ. § 91. See*

**Goodwill of a Shop.** The right or hope of a succession by the law of Scotland, a *spes successiois* may be sold, but it cannot be adjudged; *7th June 1821, 1 S. & D. 49.* In rights taken to parent and child, unless very strong terms are used to limit the father's right to a mere liferent, he is understood to have the fee, and the child's right is merely a *spes successiois*. See *Ersk. B. iii. tit. 8, § 23; Bell's Com. i. 56; Bell's Princ. §§ 1954, 1964. See Pactum de Hereditate Viventis.*

**Spirituality of Benefices**; the tithes of all lands; used in contradistinction to the temporality of benefices, which consisted of the property of such lands as had been gifted to the Church. *Ersk. B. ii. tit. 10, § 4; Stair, B. ii. tit. 8, § 35; Bank. ii. 50. See Teinds.*

**Splitting of Superiority.** A superior cannot split the superiority into parts, where there is one fee and one *reddendo*, so as to compel the vassal to seek his entry from more than one superior; *Bell's Princ. § 859; Illust. ib. See Superiority.*

**Spoliatus Ante Omnia Restituendus**; a maxim importing that spuilzied goods must be restored, immediately on the pursuer proving that he was in lawful possession of them, and that the allegation of a preferable right, though instantly verified, will not be received as an answer to this demand. *Ersk. B. iv. tit. 1, § 15; Bank. B. i. tit. 10, § 148. See Spuilzie.*

**Sponsalia.** See *Espousals.*

**Sponsio Ludicra**; an agreement, in which the contracting parties are held not to be serious in their intention of binding themselves. *Kames' Equity, 22; Brown's Synop. p. 1438. See Gaming. Wager. Pactum Illicitum.*

**Spring-Guns**; and similar engines, are thought to be justifiable when employed to ward off attacks on houses. Their legality is very doubtful when placed in enclosed grounds, even with notice; and they are cer-

tainly illegal when employed to protect unenclosed grounds. It was thought unnecessary to extend to Scotland the English statute 7 and 8 Geo. IV. c. 18, prohibiting such engines, as the evil was already provided for by the common law. See *Bell's Princ. § 961.*

**Spuilzie**; corresponding to ejection and intrusion in heritage, may be defined, the taking away of moveable goods in the possession of another, against the declared will of the person, or without the order of law. In consequence of this unlawful act, an action lies not only for restoring the goods, but for all the profits which it was possible for the owner to have made of the goods, as these profits shall be proved by his oath *in litem*, which, by 1503, c. 65, the sheriff may administer. This action must be brought within three years, in order to entitle the pursuer to the violent profits, and will be elided by any probable ground of excuse, or by the spoliator's voluntary restitution *de recenti*. But an action for recovery of the goods carried off illegally, and for ordinary damages, may be brought at any time within forty years, not against the spoliator alone, but against all abettors, who are liable *singuli in solidum*, and against his heirs, who are liable in violent profits also, if litigation took place with the ancestor. The spuilzied property may be evicted from bona fide purchasers, for spuilzie *inurit laborem realium*. *Stair, B. i. tit. 9, § 16, et seq.; Ersk. B. iv. tit. 1, § 15, and B. iii. tit. 7, § 16; More's Notes to Stair, p. lxi; Bank. i. 274, et seq.; Kames' Stat. Law Abridg. h. t.; Blair's Manual, h. t.; Jurid. Styles, ii. 337; iii. 85, 130-2, 654; Brown's Synop. h. t., and pp. 454, 1541. See Violent Profits.*

**Spunging-Houses.** In England a bailiff must detain persons arrested for debt for twenty-four hours in a private house, before lodging them in prison. They are usually carried to taverns kept by the bailiff; and such taverns, on account of the extortion often practised in them upon the prisoners, are called spunging-houses. *Ross's Lect. i. 340.*

**Squalor Carceris.** This term means merely the strictness of imprisonment which a creditor is entitled to enforce, with the view of compelling the debtor to pay the debt, or disclose any funds which he may have concealed. It does not imply (as it did with the ancient churchmen, from whom the term is derived) anything loathsome or unhealthy in the imprisonment in Scotland, which is indeed less close than in England. *Squalor carceris* is not necessary in imprisonment on a *meditatio fugæ* warrant, security being all that is required in such cases. See *Stair, B. iv. tit. 47, § 22; Bell's Com. ii. 547, 565; Hutch. Justice, ii. 277. See Imprisonment.*



**Stabbing**; is indictable at common law, either as a species of assault, or under the general head of *stellionate*; and nothing will excuse such intentional stabbing but the plea of self-defence, not *ultra moderamen inculpatae tutelæ*, in an affray not begun by the individual accused; for if the affray was begun by him, he will hardly be exculpated even on that plea. The ordinary punishment for stabbing, is whipping and banishment. *Hume*, i. 322, 324, *et seq.* See *Assault. Stellionate*. With regard to cutting or stabbing with intent to murder or injure, see *Attempt at Murder*.

**Stablers**; are liable under the edict *Nautæ, Caupones*. See *Innkeeper. Nautæ, Caupones*.

**Staff and Baton**. These were the usual symbols of resignation when the vassal resigned his feu into the hands of his superior, either *ad remanentiam* or *in favorem*. *A. S.* 11th Feb. 1708; *Ersk. B. ii. tit. 3, § 36*; *Ross's Lect. ii. 216, 229*; *Ersk. Princ. p. 210*; *Bell on Completing Titles, 136*. See *Resignation*.

**Stage-Coaches**. The owners and drivers of stage-coaches are liable for the safety of the passengers and goods, as has been explained in the articles *Nautæ, Caupones. Public Carriages. Driving, Careless*. The licensing and duties for stage-coaches have been the subject of several statutes, the most recent of which are 2 and 3 Will. IV. c. 120, and 6 and 7 Will. IV. c. 65. The act 2 and 3 Will. IV. in addition to the duties, contains certain general provisions respecting the conduct of stage-coaches, and in this respect it has been amended by 3 and 4 Will. IV. c. 47. These provisions are too minute and numerous for insertion in this work. They will be found well abridged in *Blair's Justice, h. t.* The following may be noticed: A stage-carriage is defined by the older act to be any carriage employed to convey passengers for hire, to or from any place in Great Britain, and which, when passing along any highway or other road, travels at the rate of three miles or more in the hour, whatever be its form or construction, provided the passengers, or one or more of them, pay separate and distinct fares for their respective seats. The term stage-carriage is not applied to carriages employed wholly upon any railway, nor to any carriage drawn by steam, or otherwise than by animal power; § 5. The later act provides, that not above a certain number of passengers shall ride on the outside; and this number varies according to the number the coach is licensed to carry. If this provision is contravened, the driver forfeits £.5; § 2. The driver, guard, and children in the lap, are not counted as passengers; and two children under seven years of age are reckoned

as one passenger; § 3. No person must sit on the luggage on the roof, nor more than one, besides the driver, on the box, under a penalty of £.5, forfeited by the driver; § 4. See, on the law as to stage-coaches, *Ersk. B. iii. tit. 1, §§ 13 and 29, notes by Ivory*; *Bell's Com. i. 462, et seq.*; ii. 104; *Bell's Princ. § 236*; *Hutch. Justice, ii. 373*; *Blair's Justice, h. t.*; *Tait on Evidence, 283-6*. See *Nautæ, Caupones. Innkeepers. Damages. Lien. Solatium*.

The act 3 and 4 Will. IV. c. 47, of amended by 5 and 6 Vict. c. 79. See 4 11 and 12 Vict. c. 118, 1848.

**Stake-Nets**. Some years ago a copied cated machine, for the capture of sa they known under the name of the stake-net, the introduced, the use of which, on accou stage the success attending it, and on accou of its falling under the prohibitions of va of Scotch statutes against particular modes of fishing, has been obstinately resisted by the upper heritors, and has consequently led to much litigation. The stake-net consists of a sheet of net-work, stretched upon stakes fixed into the ground, generally in rivers or friths, where the sea ebbs and flows, with contrivances for entangling and securing the fish. The result of the numerous questions which have been tried is, that stake-nets, and other contrivances, of the nature of fixed machinery, for capturing the fish, or detaining or interrupting them in their free passage up the river, are illegal, and may be put down, whether they are expressly prohibited by any statute or not. This illegality, however, only applies to stake-nets, and other such contrivances, when made use of in rivers where the sea ebbs and flows, or in estuaries, and not in the sea itself, or on the proper shore of the sea. It is generally, therefore, a question of evidence, whether the prohibition applies to any particular spot or not; and there has been much curious inquiry as to where the precise position of the *fauces terræ* is. In granting execution, pending appeal of a judgment decerning for the removal of a stake-net fishing, the Court have repeatedly allowed the stakes to remain. In *Mr Buchanan's Remarkable Cases, p. 254*, will be found a full and excellent report of the case the *Duke of Athole v. Maule*, in which the principles of the law as to stake-nets are well brought out. See also *More's Notes on Stair, cci*. See *Salmon-fishing. Fishing. Cruives. Yairs*.

**Stallangiatores**; according to Skene, were persons who, in a market or fair within burgh, kept stalls, for which they paid duty. *Skene, h. t.*

**Stamp-Laws**. These are laws enacted with a view to provide a revenue to the Crown, by requiring that all contracts, bills of ex-

change, bonds, deeds, and many other writings of a similar nature, should be written upon stamped paper, a duty being payable to the Crown on every stamp. The stamp-laws, in addition to serving the purpose for which they were enacted, have been of considerable use in checking fraud, and rendering forgery difficult, and supplying means of detecting the one or the other. The revenue collected in this way was first granted to the Crown by ConWill. and Mary, c. 21. By several acts of

the same and of the subsequent reign, these duties were continued; extended to various towns not included in the above act; and Soli (Geo. I. c. 12, they were made perpetual. vol. 18 duties imposed for England did not apply to Scotland previous to the union of the Kingdoms. By the 10th article of the Act of Union, it was stipulated that Scotland should be charged with the duties on stamped paper, &c., granted by the acts then in force in England. But, by 6 Anne, c. 5, the stamp-duties then payable in England were expressly extended to the whole kingdom; and since that time Scotland has been subject, in common with England, to the several charges and regulations imposed by the various acts of Parliament relating to this branch of revenue, unless when specially exempted. By 5 Will. and Mary, c. 21, the Crown is authorised to appoint commissioners of stamps; and these commissioners are enjoined to observe and perform the rules and orders of the Treasury. The commissioners are appointed during pleasure; and when a vacancy in their number is to be supplied, new letters-patent issue, by which the preceding patent is revoked, and the former members are re-appointed in conjunction with the new commissioner. There were formerly separate boards for England and Ireland; but by 7 and 8 Geo. IV. c. 55, these boards were consolidated. And by 4 and 5 Will. IV. c. 60, the Boards of Stamps and Taxes are consolidated. The duties of the board consist in carrying into effect the several acts of Parliament and letters-patent which relate to this branch of revenue. They have a general superintendance of every department, both at the head office and elsewhere; they report to the Treasury upon references, or make representations on matters which require it; carry on the whole correspondence with the officers of the establishment, and the public; order prosecutions for offences against the stamp-laws; and consider the propriety of mitigating the penalties, on the petition of the parties; make the regulated allowances for spoiled stamps, and cancel those allowed; and, generally speaking, nothing is done, except the receipt of money, the keeping accounts, and the stamping instruments, in the common course of daily business, which does

not, or may not, require the intervention of the board, either collectively, or by some one of its members. See the 13th Report of the Commission appointed to inquire into the Stamp Establishment.

Before the passing of 44 Geo. III. c. 98, much confusion existed on this subject, on account of the numerous statutes requiring to be referred to. That statute, which was intended to remedy the evil by consolidating the acts, in so far as regards the amount of stamp-duties on writings, was repealed by 48 Geo. III. c. 149, which again was superseded by 55 Geo. III. c. 184. The recent Stamp Acts are 13 and 14 Vict. c. 97, 1850; 16 and 17 Vict. cc. 69 and 63; 17 and 18 Vict. c. 83, 1854; 18 and 19 Vict. c. 78, 1855; and 23 Vict. c. 15, 1860.

*Forgery; and Licenses to Sell Stamps.*—Many acts make provision against the forgery of stamps, and a special statute was lately passed upon the subject; 3 and 4 Will. IV. c. 97. By this act, the commissioners are empowered, by writing under the hands of any two or more of them, to grant a license, free of expense, to any person whom they think fit (not being a distributor appointed by themselves, nor a sub-distributor appointed by a distributor), to vend and deal in stamps at any place in Great Britain named in the license, each licensed person entering into a bond, in a penal sum of L.100, not to sell, or offer for sale or exchange, or keep or have in his possession for sale or exchange, any stamps not procured at the head office for stamps in Westminster or Edinburgh, or from a duly appointed distributor, or from a person licensed under the act; § 1. Any person, except distributors or sub-distributors, dealing in stamps without a license, or in a place not specified in his license, forfeits L.20; and if any proceedings be had for recovery of this penalty, and it appear that any of the stamps so dealt in were false, forged, or counterfeit, although this may not have been alleged in the information or pleading, the penalty is doubled, the reason for the increase of penalty being stated in the judgment; and in any issue relating to the vending of stamps, the jury are required to say whether or not they are forged. These provisions are declared not to exempt any person from the legal consequences of uttering or having in his possession stamps, knowing them to be forged; § 3. Any person employed to prepare, write, or engross a deed or instrument liable to stamp-duty, may charge his employer with the amount of the stamp without obtaining a license; § 4. Licensed persons are required to paint their names, and the words "*Licensed to sell Stamps*," in front of their houses or shops; and unlicensed persons are prohibited

under a penalty, to paint anything importing that they are dealers in stamps; §§ 5 and 6. Allowance is made for stamps in the possession of unlicensed vendors, dying or becoming bankrupt or insolvent, or whose licenses are revoked; § 8. The commissioners are empowered to grant warrants to search and inspect the stocks of stamps of distributors and licensed dealers, with power to break open doors if necessary; § 9. The person executing the warrant must, if required, give an acknowledgment for the stamps which he seizes. A licensed vendor is entitled to be paid the amount of the genuine stamps seized, or to have them returned to him; § 10. Licensed vendors having counterfeit stamps in their possession, are liable to the penalties of vending forged stamps, unless it be proved that they were procured from some distributor or licensed vendor; § 11. If any person, knowingly and without lawful excuse (the proof of which lies on the accused), have in his possession any counterfeit die, plate, &c., or any vellum, parchment, or paper, having thereon an impression of any such counterfeit die or plate; or fraudulently use, join, fix, or place, for, with, or upon one vellum, &c., any stamp or impression cut from another; or erase from any stamped vellum, &c., any name, sum, date or other thing, with the intention of using the stamp for some other instrument, &c., on which a stamp duty is payable; or knowingly use, utter, sell, or expose to sale, or knowingly and without excuse have in his possession, any stamped vellum, &c., so erased, he, and all who aid and abet in such offences, shall be adjudged guilty of felony, and shall be liable, at the discretion of the Court, to be transported for life, or for any term not less than seven years, or to be imprisoned for not more than four, nor less than two years; § 12. On the information given before a justice, upon the oath of one or more credible persons, that there is just cause to suspect any one of being concerned in the forging of dies or stamps, or in the commission of other felonious acts therewith connected, and specified at length in the act, the house of such suspected person may be ordered to be searched; § 13. Hawkers of stamps are liable to a penalty of L.20; and may be apprehended by any person, and taken before a justice; § 14. Justices may issue warrants for seizing stamps suspected to be stolen or fraudulently obtained; § 15.

*Legacy-Duties.*—The act 55 Geo. III., from § 38 to § 51, enacts certain regulations respecting the duties on probates of wills and on letters of administration in England. The analogous instruments in Scotland are testaments-testamentary and testaments-dative. See *Confirmation*. The duties on probates and

letters of administration were exigible in England upwards of a century before the duties on confirmation were introduced in Scotland. These were first charged by 44 Geo. III. c. 98, § 23, but were payable only in the case of actual confirmation, which was generally optional. A new system was introduced by 48 Geo. III. c. 149, §§ 38 to 42, which transfers the duties to inventories; and these inventories must be given in whether a confirmation be obtained or not. The act 16 Geo. III. c. 184, increased the duties, of made a distinction between testate and intestate succession; see Part III. of the *scryhere*. The only clause in this act, applicable especially to Scotch confirmations and inventories is the 51st, which is considered defective the further, on this subject, the articles *Confirmation. Inventory. Legacy and Residue Dues of Duties on Succession.*—The act 16 and 17 Vict. c. 51, imposes duties on succession property not charged under the Legacy-duties Acts. See *Succession Duties*.

*Denomination of Stamps.*—It is provided by 43 Geo. III. c. 127, § 6, that if the stamp be of a proper denomination, it shall not be ineffectual from its being of greater value than the Stamp Act requires. And by 55 Geo. III. c. 184, § 10, all instruments for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole, with or than the stamp or stamps which ought regularly to have been used thereon, the same shall be held valid and effectual in law, except in cases where the stamp or stamps used on such instruments shall have been specially appropriated to any other instrument, by having its name on the face thereof. As to such special appropriation, see 55 Geo. III. c. 184, §§ 3, 4, and 5, *supra*, p. 936.

*Number of Stamps required.*—It is provided by 44 Geo. III. c. 98, that no single instrument, article, matter, or thing liable to only one specific duty, is chargeable under any two or more separate and distinct heads or denominations. A deed executed and indorsed on a former deed, as a further security for advances made and to be made under the first deed, is exempted, by 48 Geo. III. c. 49, from the *ad valorem* duty, provided the first deed be stamped with a proper *ad valorem* stamp. But, in general there must be distinct stamps for each distinct contract, instrument, or transaction. Thus, in a case where three several infeftments were taken under three several charters, and included in one instrument written on a 9s. stamp, it was held, in a question as to a claim of enrolment as a freeholder, that the instrument afforded no legal evidence of the infeftment, and therefore that the claim was properly dismissed; *Mackintosh*, May 12,

1831, 9 S. & D. 163. Several subjects of contract may, however, be included in one instrument impressed with one stamp. And where the interest of all the parties relates to one subject-matter, one stamp is sufficient, however numerous the parties may be. Thus, it was found that an obligation in security granted by several persons, for payment of the sums due to the creditors of a common debtor, may be executed upon a single stamp, whatever be the number of creditors; *Johnston*, 7th March 1801, *M. App. voce Writ*, 5. It has been held in the English courts, that several persons bind themselves in a contract by one bond, agreeing to the performance by each of them of the same matters, and requires only one stamp. Where there are several transactions, distinct as to several parties, and on a paper stamped with only one stamp, action may be maintained on it against one party if the stamp be affixed, or in "juxtaposition to" his signature; and, in general, the stamp will be held to apply to the person first executing the instrument; *Chitty on Stamps*, 21; *Bell's Com.* i. 322. Where various letters are offered in evidence to prove any agreement between the parties who have written such letters, it is sufficient if one of them be stamped with a duty of L.1, 15s., though the same, in the whole, contain more than twice the number of 1080 words; 55 *Geo. III.* c. 184, sch. tit. *Agreement*. To explain this, it is necessary to state, that in ordinary agreements a duty of L.1, 15s. is payable for the first 1080, and a progressive duty of L.1, 5s. for every additional 1080 words. Before an instrument is completed, an alteration may be made without rendering a new stamp necessary; but, in general, any material alteration or qualification of a deed or contract, after it is complete, requires a new stamp.

*When and how Writings should be Stamped.*—

In general, writings may either be executed on paper previously stamped, or they may (with the exception of policies of insurance, indentures of apprenticeship, receipts, bills of exchange and promissory-notes) be stamped after execution, on payment of a penalty of L.10, whether they have originally had an insufficient stamp or no stamp at all, without any re-execution by the parties. The proper stamp, when added, gives effect to the instrument from its date. For an instance of this, see *Creditors of Kingstorie*, competing, 12th Jan. 1743, *Elch. voce Writ*, 14. An unstamped writing may be stamped even after an adjudication has been deduced upon it; *Lamont*, 4th Dec. 1789, *M.* 16,945 and 5494. The excepted articles are, for the most part, declared absolutely null and void, if not properly stamped at the time they commence operation. When

deeds are stamped after execution, a receipt for the penalty is indorsed at the office, which is considered as valuable in evidence as the stamp itself. Where an executor-creditor, in confirming to a defunct, stated that he could put no value on one item till the claim was constituted, this was held no objection, under the Stamp Acts regarding inventories, to his title to pursue for it, it being sufficient to add the amount to the inventory when constituted before extract; *Williamson*, Nov. 13, 1832, 11 S. & D. 7. Where an unstamped writing is founded upon, it is customary for the Court of Session to sist process until the stamp is affixed. The competency of this has, however, been occasionally called in question; and it has been pleaded that the action ought to be dismissed, leaving it to the pursuer to bring another action when the writing has been stamped. In a case, in which the competency to sist process was maintained, the LORD JUSTICE-CLERK said, "Our practice has been invariable to sist process, and we will adhere to it till corrected elsewhere;" *Hutton*, June 15, 1833, 11 S. & D. 727.

By the act 13 and 14 Vict. c. 97, 1850, the penalty exacted for stamping a document after it has been signed is L.10; but the Commissioners of Inland Revenue may remit the penalty, in whole or in part, if the document is brought within twelve months after being signed, provided it is proved to their satisfaction that it was not previously stamped by reason of accident, mistake, inadvertency, or urgent necessity, and without any wilful design to evade or delay the payment of the duty. If a deed is executed by any one abroad, it may be stamped without payment of any penalty, if brought for that purpose within two calendar months from the time of being received in the United Kingdom.

*Setting out the true Consideration.*—It is enacted by 48 Geo. III. c. 149, §§ 22, 23, that in sales, the consideration-money, directly or indirectly paid, or secured or agreed to be paid, be truly expressed in words at length in the conveyance; and in default, the purchaser and seller forfeit L.50, and are charged with five times the amount of the excess of duty due beyond what was actually paid. Parties liable to such penalties informing against others, are indemnified and rewarded. Further, where the consideration is not truly set forth, the purchaser may recover back as much as is not truly set forth; see also note to 55 Geo. III. c. 184, sch. voce *Conveyance*. Penalties are also imposed upon attorneys or other persons preparing deeds in which the consideration is not truly set forth; 48 Geo. III. c. 149, §§ 30 to 34.

*Evidence in Connection with the Stamp-Laws.*—No deed is effectual in any court unless

stamped with the duties imposed by the existing acts. Previous to admitting secondary evidence of the contents of a writing, lost or destroyed, there must be positive or presumptive evidence that it was properly stamped. Although it is *pars judicis* to refuse sanction to any evasion of the act, yet it is incumbent on the party who relies on the objection that a writing is not stamped, to show that it is within the operation of the law, unless in the case of exemption, when the party producing the instrument must establish the exemption. It has been questioned whether an unstamped instrument, when judicially founded on, is or can be at all recognised in law, or read in a court of justice. Such an instrument, however, may be adduced in proof of fraud, and for certain collateral or extrinsic purposes; *Erskine*, July 16, 1819, 2 *Mur.* 184. In some cases (*e. g.* a receipt), an unstamped writing may be shown to a witness to refresh his memory. And a witness was allowed to look at an unstamped contract between a collier and coalmaster, to refresh his memory as to its contents; *Dickson*, Nov. 1, 1816, 1 *Mur.* 142. If an agreement be written on unstamped paper, it cannot be proved by parole evidence. The want of the stamp voids the instrument merely, leaving the party to resort to other evidence. It is therefore sufficient, in the ordinary case, if the opposite party, on a reference to his oath, admit the fact, which, in absence of such admission, the instrument might have been necessary to prove; *Bell's Com.* i. 322.

In the case of *Matheson v. Ross*, June 25, 1847, 9 *D.* 1366, an unstamped receipt was tendered in evidence, not for the purpose of proving the receipt of the money for which it was granted, but for the purpose of showing the state of an account as it stood before the receipt was granted. The Court, by a majority of *nine to four*, were of opinion that the receipt could not be received; but in the House of Lords this judgment was reversed; *House of Lords*, March 27, 1849, 6 *Bell*, 374.

**Spoiled Stamps.**—All who have stamped paper or parchment written or engrossed upon, and undesignedly spoiled, or by any means rendered unfit for the purpose intended, and which has not been used, may, on oath of the circumstances, to the satisfaction of the commissioners, obtain an equal supply of fresh stamps, either in one or several stamps. If the writing has been executed, the stamp is held to have been used, and is not considered a spoiled stamp entitling the party to an allowance, though circumstances should render it useless. It is, however, provided by 50 *Geo. III.* c. 35, § 14, that allowance may be made for stamps used upon any instrument which has been executed, but

which, by some mistake, is found unfit for the purpose, or which, by the death of any party thereto, cannot be executed, provided such fact be proved by affidavit or otherwise. In general, no allowance is made for a spoiled or misused stamp after six calendar months from the time it is spoiled or misused. The commissioners are directed to make rules and orders for the regulation of the allowance for spoiled stamps. This allowance is not paid in money, but a ticket is given, transferable without indorsement, for an equal number of stamps. It is, however, enacted, by 3 and 4 *Will. IV.* c. 97, § 19, that in any case where the commissioners make allowance for spoiled stamps, they may, if in their discretion they think fit, instead of giving stamps, refund the amount in money, deducting the percentage allowed by law on the purchase of stamps of the same description as those in respect of which the allowance is made. They are also empowered to refund money for stamps not spoiled, but for which the possessor has no immediate occasion, if applied for within three months after being purchased.

**Exemptions from Stamp-Duty.**—There are exemptions from payment of stamp-duty in favour of certain transactions and writings. If the agreement do not admit of pecuniary estimation (*e. g.*, a promise of marriage), it may be proved by unstamped letters. On the same principle, a missive containing a consent to remove without warning does not require to be written on stamped paper; *Maclaren*, Dec. 17, 1831, 10 *S. & D.* 163. A holograph letter by a party arrested on a *medietatio fugæ* warrant, to his cautioner *de judicio sisti*, that he will not leave the country, is admissible as evidence without a stamp; *Clark*, Jan. 9, 1817, 1 *Mur.* 180. All proceedings under the Scots statutes relative to the alimment of poor prisoners are exempted from stamp-duty; and it has been held that a disposition *omnium bonorum*, executed under an application for the benefit of the Act of Grace, falls within the exemption; *Rae*, Feb. 23, 1837, 15 *S. & D.* 653. An agreement for the hire of a servant or labourer requires no stamp; but an agreement for the assignment of an apprentice from one master to another must be stamped. A memorandum, letter, or agreement, the primary object of which is the sale of goods or merchandise, requires no stamp. The following writings are also exempted: 'Bills for payment of officers of the navy drawn in pursuance of 57 *Geo. III.* c. 20; see § 11. Bills, &c., for pay and allowance to local militia or volunteers; 57 *Geo. III.* c. 41, § 8. Proceedings connected with savings banks and friendly societies. See *Savings Banks. Friendly Societies.* Proceedings relating to charitable

funds under 59 Geo. III. c. 91; see § 3. Insurances on farming stock, and implements of husbandry; see 3 and 4 Will. IV. c. 23, § 5, 1853. See *Insurance*. See also *Chitty on Stamps*, *Coventry on Stamps*, *Tilsley's Stamp-Laws*, and *Supplement to do*.

**Draft and Receipt Stamps.**—All drafts or orders for the payment of any sum of money to the bearer or order, on demand, are liable to a stamp of *one penny*, and there is now no exemption in favour of drafts drawn upon a banker residing within *fifteen miles* of the place where the draft was issued. All receipts or discharges given for or upon the payment of money amounting to L.2 or upwards are also liable in a stamp of *one penny*. These stamps may be either impressed or affixed. Where adhesive stamps are used, the party who makes, signs, or issues the document, must, before he deliver the same out of his hands, affix the proper adhesive stamp, and must effectually cancel and obliterate the same, by writing upon it his name, or the initials thereof, and the date of the day and year in which he shall so write the same, and in such manner as clearly and distinctly to indicate that the stamp has already been used, and so that it cannot without fraud be again made use of. In doing this, the grantor and receiver of the document are liable in a penalty of *twenty pounds*. See *Act 23 Vict. c. 15, 1860*.

**Heritable Bonds chargeable with Probate and Inventory Duties.**—By the act 23 Vict. c. 15, 1860, all personal estate appointed or disposed of by will under any power authorising the disposal, is chargeable with probate and inventory duties, and these duties are made chargeable on such estate. Money secured on heritable property, and by heritable bonds in Scotland, are also made chargeable with those duties. No will, testamentary instrument, or disposition *mortis causa* is chargeable with any stamp-duty.

**Doubts as to Sufficiency of Stamp.**—By the act 13 and 14 Vict. c. 97, § 14, 1850, it is provided that the opinion of the Commissioners of Inland Revenue, as to what stamp-duty is chargeable on any deed, may be obtained by presenting the deed, whether previously stamped or not, to the commissioners at the office, and paying a fee of *ten shillings*. The opinion of the commissioners may be appealed from to the Court of Exchequer at Westminster. By the act 16 and 17 Vict. c. 59, § 13, 1853, the opinion of the commissioners may also be obtained in the same manner as to whether a deed is not chargeable with any stamp-duty.

**Stamping of Executions.** The executions of messengers were formerly allowed to be authenticated by being stamped—1540, c. 74; but by 1686, c. 2, this practice was abolished,

and the subscription both of messengers and witnesses required. See *Execution*.

**Standing Orders;** are the orders made by either House of Parliament respecting the manner in which business shall be conducted in it. The orders of the General Assembly, respecting the management of business there, have also been called standing orders; *Church Law Styles*, 270. Clerks of the peace and others are, by express statute, ordered to take the custody of documents directed to be deposited with them under the standing orders of either House of Parliament; 1 *Vict. c. 83*. See *Parliament. Private Bills*.

**Status;** a Roman law term, signifying a quality attaching to persons, in virtue of which they differed in the eye of the law. Thus, a Roman citizen differed in *status* from a stranger, a *paterfamilias* from a *filiusfamilias*. A change of *status* was called *capitis diminutio*, which was called *maxima*, *media*, or *minima*, according to the rights lost or acquired. See *Heinoc. Elem.* §§ 76 and 224; *Bant.* i. 45.

**Statute Labour;** is the amount of work appointed by law to be furnished annually for the repair of highways not turnpike. Formerly the persons liable to give statute labour were tenants, cottars, and labourers, including inhabitants of royal burghs, artificers, &c.; but sailors employed in distant or coasting voyages, colliers, and others engaged in collieries, were exempted. Heritors do not furnish statute labour, but may be called on to supply its insufficiency. The number of days of work is six a year for the first three years, and four for each year thereafter. The labour is divided between two seasons—any time before the last of June, not being seed-time; and any time after harvest. Those having carts and horses must bring them; and others must bring the requisite implements. The call to perform statute labour must be intimated in the parish churches on the Sunday preceding the proposed working days. The penalty for default of attendance, or finding a substitute, is 1s. 6d. for each day's non-attendance of a man, and 2s. 6d. for each day's non-attendance of a man and horse. The joint board of justices of peace and commissioners of supply has full powers in determining the roads to be repaired, and in apportioning and commuting statute labour. *Ersk. B. i. tit. 4, § 14, notes by Ivory; Hunter's Landlord and Tenant; Blair's Justice, voce Highways; Hutch. Justice, ii. 471, et seq.; Cleland, July 21, 1835, 13 S. & D. 1143.*

The act 8 and 9 Vict. c. 41, 1845, is entitled "An Act for Amending the Laws concerning Highways, Bridges, and Ferries in Scotland, and the making and maintaining

thereof by Statute Service, and by the conversion of Statute Service into Money." By this statute, it is provided that no person shall be liable to perform statute service, or be assessed for the same, who is not a proprietor or occupier of lands, buildings, or other heritable subjects, of the yearly value of *Two Pounds*, or more. See the various provisions of the statute.

**Statute Law.** The proper statute law of Scotland commences with those acts which were passed in the reign of James I. of Scotland, continuing from that period down to the union of the kingdoms. After the Union, the Scotch statute law is to be found in those British statutes which extend to Scotland. A statute is held to be published by being printed and circulated. It may be subdivided into the rubric or title; the preamble, which states the reasons and grounds on which the new enactment has been made, and the other statutes to which it refers; and the statutory part, by which the enactment is actually made. In explaining the statutory part of a law, the following rules are received: That no sense is to be taken which implies injustice or absurdity: That there is place for interpretation only where the words admit of two different meanings: That where they do not admit of a double meaning, the words must be explained in that sense only which they can bear, whatever hardship may be the consequence: That the interpretation of laws, where they admit of it, ought not to depend on critical refinement or subtle distinctions; since, being directed to the great body of the people, they ought to be interpreted in that sense which the words most obviously bear: That, when a law term of known legal signification occurs in a statute, it is to be understood, not in its popular, but in its legal sense: That private statutes are not to be applied at large: That, when the words of a statute are obscure, their meaning may be sought in a comparison of them with other parts of the same statute, or by a reference to former statutes, or by the usage of the country: That doubtful laws ought to receive that interpretation which suits best with the avowed intention of the Legislature; and that restrictive statutes are always to be strictly interpreted. Until the year 1793, all acts of the same session of Parliament were held to commence their operation on the same day; and as, in ancient times, the royal assent was reserved till the end of the session, the whole enactments of each session were considered as one statute. The Chancery enrolment of acts specified no date except that of the commencement of the session, and accordingly all acts were, in legal construction, held to have been in force from that day. The incon-

venience and injustice of this construction, which made every statute an *ex post facto* law, led to the act 33 Geo. III. c. 13, directing the clerk of Parliament to indorse on every act the date when it receives the royal assent, and declaring that this indorsement shall be taken to be a part of the act, and the date of its commencement, where no other commencement is provided therein. Since that time, the date of the royal assent is printed under the title of every act. In November 1797, a standing order was made, that the duration of every new temporary act should be expressed in the title and last clause of the act; and another order requires distinct acts for the revival and for the continuance of expiring laws; but these, which were called "hotch-potch acts," and until 1806 were usually founded upon successive reports of the Expiring Law committee, have been superseded by a separate act for reviving or continuing each expiring law thought fit to be continued. It was enacted by 48 Geo. III. c. 106, that when a bill is introduced for the continuance of any act expiring within the session, and such act expires before the continuing bill has received the royal assent, the continuing act shall be held to have effect from the date of the expiration of the act intended to be continued. In the end of the session in which Geo. III. died and Geo. IV. succeeded, an act was passed continuing till the next session such acts as should expire within a limited period; but this was not done at the death either of George IV. or William IV. Soon after the union with Ireland, it was enacted by the last session of 41 Geo. III. c. 90, that the publications of statutes by the King's (Queen's) printer should be deemed legal evidence in Great Britain and Ireland respectively; and this law is retrospective with regard both to British and Irish Acts of Parliament, as well as prospective with regard to the statutes of the United Kingdom. On the subject of statute law generally, as well as for the construction of particular statutes, consult the following authorities: *Ersk. B. i. tit. 21, § 37*; *Bank. B. i. tit. 24, § 60*; *Stair, B. i. tit. 1, § 16*; *Bell's Princ. §§ 1701, 2035*; *Kames' Equity, 220, 235, 250*; *Blair's Manual, h. t.*

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*Sheriff Court.*

1 and 2 Vict. c. 119, 1838.

16 and 17 Vict. c. 80, 1853.

*Shipping. (See Merchant.)**Small Debts.*

1 Vict. c. 41, 1837.

12 and 13 Vict. c. 34, 1849.

*Stamps and Taxes, Consolidation of Boards.*

12 Vict. c. 1, 1849.

*Stamp Duties.*

13 and 14 Vict. c. 97, 1850.

16 Vict. c. 5, 1853.

16 and 17 Vict. cc. 59 and 63, 1853.

17 and 18 Vict. c. 83, 1854.

18 and 19 Vict. c. 78, 1855.

19 and 20 Vict. c. 81, 1856.

21 and 22 Vict. c. 20, 1858.

22 and 23 Vict. c. 24, 1859.

23 Vict. c. 15, 1860.

*Statute Labour.*

8 and 9 Vict. c. 41, 1845.

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*Succession, Duties on.*

16 and 17 Vict. c. 51, 1853.

*— Moveable.*

18 Vict. c. 23, 1855.

*Supply, Commissioners of.*

19 and 20 Vict. c. 93, 1856.

20 Vict. c. 11, 1857.

*Superannuation Act.*

22 Vict. c. 26, 1859.

*Tariff, Consolidation of Customs Duties Act.*

16 and 17 Vict. c. 106, 1853.

18 and 19 Vict. c. 97, 1855.

*Taxes, Assessed.*

13 and 14 Vict. c. 97, 1850.

16 and 17 Vict. c. 90, 1853.

17 Vict. c. 1, 1854.

20 and 21 Vict. c. 28, 1857.

*Tea, Duties on.*

18 Vict. cc. 9 and 21, 1855.

20 Vict. c. 15, 1857.

*Titles of Religious Congregations.*

13 Vict. c. 13, 1850.

*— to Lands.*

21 and 22 Vict. c. 76, 1858.

*Towns, Police and Health of.*

13 and 14 Vict. c. 33, 1850.

19 and 20 Vict. c. 103, 1856.

*Trade and Commerce.*

19 and 20 Vict. c. 60, 1856.

*Transportation.*

16 and 17 Vict. c. 99, 1853.

20 and 21 Vict. c. 3, 1857.

*Treating at Elections.*

17 and 18 Vict. c. 102, 1854.

*Trials by Jury, Verdicts on.*

17 and 18 Vict. c. 59, 1854.

*Turapike Roads.*

12 and 13 Vict. cc. 31 and 87, 1849.

*Tay Fishery.*

21 and 22 Vict. c. 26, 1858.

*Tweed Fishery.*

20 and 21 Vict. c. 148, 1857.

*Universities, Admission of Professors to Lay Chairs.*

16 and 17 Vict. c. 89, 1853.

*— Government of.*

21 and 22 Vict. c. 83, 1858.

*Usury.*

1 Vict. c. 65, 1837.

2 and 3 Vict. c. 37, 1839.

13 and 14 Vict. c. 56, 1850.

17 and 18 Vict. c. 90, 1854.

*Vagrant Children. (See Industrial and Reformatory Schools.)**Valuation of Lands and Heritages.*

17 and 18 Vict. c. 91, 1854.

20 and 21 Vict. c. 58, 1857.

*Verdicts by Jury.*

17 and 18 Vict. c. 59, 1854.

22 and 23 Vict. c. 7, 1859.

*Windows, Repeal Duties on Dwelling-Houses.*

14 and 15 Vict. c. 36, 1851.

*Witnesses out of Jurisdiction.*

17 and 18 Vict. c. 34, 1854.

22 Vict. c. 20, 1859.

*Wages, Arrestment of.*

1 Vict. c. 41, 1837.

8 and 9 Vict. c. 36, 1845.

*Workmen, Combination of.*

22 Vict. c. 34, 1859.

*Weights and Measures, Amendment of.*

5 and 6 Will. IV. c. 63.

22 and 23 Vict. c. 56, 1859.

*Steam-Power, Lease of.* See *Manufactories.*

**Steam-Vessels.** Steam-boats fall under the edict *Nautæ Caupones*; *Bell's Com.* i. 467; *Brown's Synop.* 1412, 2307. It is culpable homicide when death is occasioned through want of caution or neglect of the rules in managing a steam-vessel. The master must have one or more persons constantly on the look-out, so as to have a clear view of the vessel's course. At night, or in hazy weather, a light must be kept burning in a conspicuous part of the vessel, and in a crowded channel a bell must be rung or a horn sounded, if customary. Vessels meeting, steer each to the left; and where one overtakes another sailing in the same direction, the one which proposes to pass steers to the right, the other to the left. The vessel having the advantage of wind and tide makes way for the one beating up against it, and the vessel in motion is bound to avoid the one stationary or at anchor. The man at the helm is bound to obey the orders of the captain; and the man on the look-out is exonerated if he gives the due notification to the former of these parties. When a pilot is taken on board for a particular piece of navigation, he is, for the time, responsible for the navigation of the vessel. *Alison's Princ.* 122; *Steele*, 77.

**Steelbow Goods;** consist in corn, cattle, straw, and implements of husbandry delivered by the landlord to his tenant, by means of which the tenant is enabled to stock and labour the farm, and in consideration of which he becomes bound to return articles equal in quantity and quality at the expiration of the lease. *Stair*, B. i. tit. 11, § 4; B. ii. tit. 3, § 81; B. iii. tit. 8, § 58; *More's Notes*, p. cccii.; *Ersk.* B. ii. tit. 6, § 12; B. iii. tit. 1, 18; *Bank.* i. 355; *Bell's Princ.* §§ 208, 1264; *Illust.* 1264; *Bell on Leases*, i. 335; *Hunter's Landlord and Tenant*; *Brown's Synop.* h. t. See *Lease. Dung. Fodder.*

**Stellionate;** is a term applied, in the law of Scotland, either to any crime which, though indictable, goes under no general denomination, and is punishable arbitrarily, or to any civil delinquency of which fraud is an ingredient. Those, *a. g.*, who grant double conveyances of the same subject, are guilty of

this crime—1540, c. 105; 1592, c. 140; and are punishable arbitrarily in their persons and goods, besides becoming infamous. The cognizance of fraudulent bankruptcy, one kind of stellionate, is competent to the Court of Session, who may inflict any punishment for it short of death, though a remit to the Justiciary is the usual practice; 1696, c. 5; 1621, c. 18; 33 *Geo.* III. c. 74; 54 *Geo.* III. c. 137; *Ersk.* B. iv. tit. 4, § 79; *Hume*, i. 322; *Alison's Princ.* 624; *Bell's Com.* i. 288; *Kames' Equity*, 305; *Kames' Stat. Law*, h. t.; *Brown's Synop.* 532.

**Stent and Stentmasters.** Stent is an old word for a tax, impost, or duty, and a stentmaster is a person named to allocate the stent on the persons liable. In the case of *Winter v. Magistrates of Edinburgh*, Dec. 21, 1837, 16 *S.* 276, the validity of the appointment of the stentmasters, who allocate the annuity-tax and impost in Edinburgh, was questioned. The act directed that three stentmasters should be "chosen and sworn by the Town-Council." It was objected that the Magistrates, and not the Town-Council, had chosen them, and that they had not been duly sworn; and on these grounds it was pleaded, that the nomination was invalid, and that therefore the stenting and collection of annuity and impost following on it were illegal. In pursuance of these views, a bill of suspension and interdict against the collection of arrears was presented, and after a full discussion on cases, passed unanimously by the First Division—the opinion of the Court being, that the duties were incompetently stented for. See, on Stent generally, the cases cited in *Brown's Synop.* pp. 302–3, 2023.

**Sterility; barrenness.** Where, from the effects of inundation, the devastation of a foreign enemy, or from any other inevitable accident, lands possessed by a tenant do not yield a crop sufficient to pay the expense of seed and labour, no rent is payable to the landlord; *Stair*, B. i. tit. 15, §§ 2 and 3. But, although such extraordinary sterility may relieve the tenant from payment of rent, it will not lay the landlord under any obligation to indemnify him for the expense of seed and labour. The landlord loses his rent, and the tenant the expense of cultivation, unless he can show that the accident has arisen from some fault of the landlord. The tenant will not be relieved from payment of rent if the loss has arisen from his having used bad seed, or from the natural exhaustion of the land; neither will he be relieved from the effects of accidents befalling the crop after the growing or reaping. *Ersk.* B. ii. tit. 6, § 41; *Stair*, B. i. tit. 15, § 2; *More's Notes*, p. xcvi.; *Bank.* i. 432; *Kames' Princ. of Equity* (1825), 216; *Bell on Leases*, i. 431; *Hunter's Land-*

*lord and Tenant; Shaw's Digest*, pp. 290-1. See *Lease*.

**Sterlingus**; a kind of weight, containing thirty-two corns or grains of wheat. According to Skene, the expression "sterling," as applied to money, comes from its weighing a certain number of grains; the sterling penny in England having weighed thirty-two grains. *Skene, h. t.*

**Steward—Steward of Scotland.** The steward was an officer appointed by the King, with jurisdiction over Crown lands, and with the same power as that of a lord of regality; 1540, c. 97. His jurisdiction, which varied with circumstances, was generally heritable, until the 20 Geo. II. c. 43, which abolished all minor stewardries, and annexed the remainder. The judicial office of steward is the same in everything but name with that of sheriff. It is declared by express statute that the words sheriff, sheriff-clerk, &c., in any existing or future statute, shall be held to apply to steward, steward-clerk, &c.; 1 *Vict.* c. 39. See *County*. The *Steward of Scotland* was an officer of the highest dignity and trust. He administered the Crown revenues, superintended the affairs of the household, and possessed the privilege of holding the first place in the army next to the king in the day of battle. From this office the royal house of *Stewart* took its surname. But the office was sunk on their advancement to the throne, and has never since been revived. *Bank. B. ii. tit. 3, § 18; B. iv. tit. 14, § 4; B. iv. tit. 15, § 2; B. iii. tit. 10, § 28; Ersk. B. i. tit. 4, §§ 7, 10, 11.*

**Stewartry.** See *County*.

**Stillicidii Servitus**; a Roman law urban servitude, whereby a proprietor was obliged to permit the drop from the roof of his neighbour's house to fall into his ground. By the law of Scotland, a proprietor who has no right of servitude cannot, without permission, build so as to throw either the eaves-drop, or the rain water from his roof collected in a spout (called *flumen* in the Roman law), on the property of a neighbouring proprietor. *Stair, B. ii. tit. 7, § 6; More's Notes, lxxxiv., xciii., cccxxvii., cclxxiv.; Ersk. B. ii. tit. 9, § 9; Bank. B. ii. tit. 7, § 12; Bell's Princ. § 1004; Illust. ib.; Brown's Synop. 2256.* See *Eaves-Drop. Flumen*.

**Stingiadint**; a "dint or straike with a sting or batton." *Skene, h. t.*

**Stipend.** The stipend is the provision made for the support of the parochial ministers of the Church of Scotland. It consists of payments in money or grain, or both, varying in amount according to the extent of the parish and the state of the free teinds, or of any other fund specially set apart for the purpose. (See *Teinds*.) The exclusive powers

of the Court of Session, as Commissioners of Teinds, in assigning, modifying, and localising stipends, are not infringed by the Judicature Act. All stipends which come short of L.150 per annum are made up to that sum from Government funds—50 *Geo. III.* c. 84; and the act 5 *Geo. IV.* c. 72, allows to those clergymen of town parishes who have neither manse nor glebe, nor allowance for them, L.50 per annum; to those who have no manse, L.30; and to those who have no glebe, L.30 per annum; to be paid by Exchequer, according to a schedule. The Commission of Teinds cannot decree for a stipend where there are no teinds, as in burghs, or exhausted teinds; or in parishes where a second church is required;—a stipend being, in these cases, derived either from royal or parliamentary grant, or from voluntary burgh or private contributions. By act 48 *Geo. III.* c. 138, no augmentation can be applied for within twenty years after the last augmentation (the provision as to the fifteen years' interval being now, by lapse of time, inoperative). See *Augmentation*. Whitsunday and Michaelmas are the two terms at which the stipend is held to fall due to incumbents. Where the incumbent is admitted before Whitsunday, he is entitled to the whole year's stipend, because his entry is considered as prior to the sowing of the corn; and, for the same reason, if his interest has ceased before that term, he has right to no part of the fruits of that year. If he has been admitted after Whitsunday, and before Michaelmas, he is entitled to the half of that year's stipend; and in the same way the incumbent, whose interest ends before Michaelmas, has a right to the half-year's stipend. The reason why Michaelmas is taken in preference to Martinmas is, that all stipends are held to come in place of the tithes, which were due at the separation of the crop from the ground. These are the terms by which the interests of the executors are regulated, as regards stipend due to the minister at the time of his death, whether it consists in money or victual. See *Widows' Fund. Ann.* Ministers' stipends prescribe in five years. As to the disposal of stipends during a vacancy, see *Vacant Stipend. Patronage. Ersk. B. i. tit. 5, §§ 13, 14, 21, et seq.; B. ii. tit. 10, § 46; B. iii. tit. 7, § 20; Bank. B. ii. tit. 8, §§ 138, 165, et seq.; Stair, B. ii. tit. 8, § 29, et seq.; Bell's Com. i. 128; ii. 595; Bell's Princ. §§ 634, 836, 1162-4; Kames' Stat. Law Abridg. vocibus Parish, Kirk-Patrimony; Bell on Leases, i. 321; Hunter's Landlord and Tenant; Bell on Purchaser's Title, 49; Hutch. Justice of Peace, ii. 451, 464; Connell on Parishes, 120, 129, 149, 182.*

In the case of the *Earl of Kinnoull v. Gor-*

don, it was held on appeal (4 *Bell*, 126), that the vacant stipend, caused by the presbytery refusing to take a presentee on his trials, belonged to the trustees of the Ministers' Widows' Fund, and not to the patron. In a competition between these trustees and a minister on whom sentence of deposition had been pronounced in 1842, but of which extract had been delayed till 1850 by interdicts which were afterwards recalled as unfounded, the claim of the minister for the vacant stipend between the date of the sentence and date of extract was sustained. See the case of *Livingstone v. Grant*, Dec. 20, 1850, 13 *D.* 394; affirmed May 3, 1860.

**Stipulation**; a Roman form of agreement, attended with solemnities, unknown with us. *Stair*, B. i. tit. 10, § 9; *Bank*. i. 329.

**Stirpes**; *succession per*; succession by the right of representation, so called because the *hereditas*, instead of being divided among the individuals, is divided among the different stocks or stirpes. *Ersk.* B. iii. tit. 8, § 12. See *Representation. Capita*.

**Stoppage in Transitu**. The right to stop *in transitu* is possessed by the seller of goods who has committed them to some middleman, such as a carrier, shipmaster, &c., to be conveyed to the buyer. As long as they are in the hands of the middleman, if the buyer becomes insolvent and unable to pay the price, the seller may remand them, and retain them in security. The doctrine of stoppage *in transitu* is the same in its practical operation in the laws of England and Scotland. Goods are *in transitu* not only while in possession of the carrier, by water or land, but also while in any place of deposit connected with their transmission and delivery, until they come into the consignee's possession. The *transitus* is terminated not only by delivery into the buyer's own hand or repositories, or, as it is called, by his actual possession, but also by his constructive possession of them. The *transitus* is ended by the goods arriving in the warehouse of a wharfinger, packer, &c., which the buyer is in the habit of using as his own. The *transitus* is terminated by the goods being deposited in a warehouse which the buyer's agent has hired for the purpose, and by the buyer exercising any act of ownership upon them, though it is intended that they shall afterwards be forwarded from the first place of deposit to the buyer's abode. When goods have been delivered to the buyer's agent at a seaport, with whom they are to remain until the buyer sends orders for shipping them to a foreign country, the *transit* is at an end, and does not recommence on the goods being sent on their new destination. Delivery into a general ship, or into a ship chartered for the voyage wholly

by the buyer, does not end the *transit*; but it would appear, that a ship hired on time by the buyer, and fitted out by him, is held as his own, and that delivery into it ends the *transit*. Where goods are ordered to be sent by sea from a distance, if the shipmaster give a receipt to the buyer, bearing that the goods are received from him, the right of stoppage is lost to the seller. The right of stoppage may be lost through certain acts of the buyer, while the goods are still *in transitu*. Thus, where goods are sent by sea, and an indorsed bill of lading has been transmitted to the buyer, the seller loses his right of stoppage, if, before he exercises it, the bill of lading has been assigned to a *bona fide* onerous indorsee. After the seller, by notice to the carrier, has stopped the goods *in transitu*, his right is not injured by the goods being delivered by mistake. In such a case, he may not only bring an action against the carrier, but may also recover the goods from the buyer. The right of stoppage *in transitu* may be made effectual by any means short of actual violence. Actual repossession is not necessary to cause the property to revert to the seller. Thus, a claim made to wine lodged in the King's cellar, was held to be a sufficient stoppage. It is settled in the law of England, that the mere bankruptcy of the buyer does not of itself operate as a countermand of his previous order, without some act of stoppage on the seller's part. But Professor Bell says that there is, "in Scotland at least, a bias in an opposite rule;" *Bell's Princ.* § 1309; *Com.* i. 229. See generally, *Ersk.* B. iii. tit. 3, § 8, *note by Ivory*; *Bell's Com.* i. 205, *et seq.*, *Add.* xi.; *Brown on Sale*, 432 to 537; *Moré's Notes on Stair*, lxxxix.; *Brodie's Supp.* 859; *Bell's Princ.* §§ 71, 1307; *Illust.* ib. *Paton on Stoppage in Transitu*. See *Sale*.

In the case of *Morton v. Abercromby*, Jan. 7, 1858, 20 *D.* 362, goods were shipped by the sellers for Australia by directions of the purchaser in Glasgow, and the bills of lading were taken in name of the purchaser. It was held, that when the goods were shipped the purchase was complete, and that the principle of stoppage *in transitu* was not applicable. See 2 *Ross's L. C. C.*, p. 92 *et seq.*, and p. 585 *et seq.*

**Stouthrief**; masterful theft or depredation. The term is usually applied in cases in which robbery is committed within a dwelling-house. *Hume*, i. 101; *Alison's Princ.* i. 227; *Steele*, 121, 134; *Ersk.* B. iv. tit. 4, § 64; *Kames' Stat. Law*, h. t. See *Robbery*.

**Stowage**. Under the contract of affreightment, the shipmaster, and the owners, as his constituents, are bound to make up the damage arising to goods from unskilful stow-

age. In insurance, the damage occasioned by bad stowage does not fall on the underwriter. *Ersk. B. iii. tit. i. § 28; Bell's Com. i. 548; Brodie's Sup. to Stair, 985. See Loading. Ship. Affreightment.*

**Straighting of Marches.** This is a power given to sheriffs by the act 1669, c. 17. See *Marches.*

**Stranding of Ships.** Under the contract of insurance, questions have frequently arisen as to whether or not a ship has been stranded. A ship is stranded, in the sense of an insurance policy, when, by accident or unforeseen event, and not in ordinary circumstances to be expected from the nature of the voyage, the ship is rendered immovable on the strand. Several English cases, illustrative of this principle, will be found abridged in *Bell's Illust. § 489. See also Shaw's Digest, 248.* By statute, all sheriffs, justices, &c., on application from those in danger of being, or who have actually been, stranded or run on shore, are required to call together as many men as may be necessary, and demand aid from the Queen's ships, or those of her subjects in the neighbourhood, under a penalty of L.100 on the superior officer who refuses to obey the call. The master of the stranded ship is entitled to repel by force all who intrude without leave of the officer of customs, &c.; and provision is made for the orderly proceedings of salvors, and for the settling of the salvage; 12 *Anne*, stat. 2, c. 18; 1 and 2 *Geo. IV. c. 75, § 37.* Under these statutes it has been decided, that the officers of excise and customs have, for behoof of the owners, the right of custody of all vessels, goods, and merchandise on board of vessels stranded or cast on shore, without any person on board; but the Vice-Admiral (and the principle of the decision extends to the officers of excise and customs) has no power to interfere with the management of goods saved from stranded vessels, where the masters or owners have themselves given sufficient authority for taking charge of them, and damages were accordingly awarded in a case of such interference. *Ersk. B. ii. tit. 1, § 13, note by Mr Ivory; B. iv. tit. 4, § 65, note; Bell's Com. i. 595, 610-11; Bell's Princ. § 489; Illust. ib. See Ship. Insurance. Wrecks.*

**Stratagem;** a *dolus bonus*, allowed by the law of nations. See *Dolus Bonus.*

**Straw.** See *Fodder and Straw. Dung.*

**Streets.** The streets of burghs are held by the magistrates for the public behoof, and under burden of the public use. The magistrate who has more particular jurisdiction with regard to the streets is the Dean of Guild. The Dean of Guild Court has the regulation of all buildings within the royalty, and the power of preventing obstructions in

the streets, and of removing old and ruinous tenements. See *Dean of Guild.* The streets of burghs cannot be encroached on by individuals, nor can they be appropriated by the magistrates either for public buildings or by feuing. Private property cannot be encroached on for the purpose of widening or otherwise improving the streets, without the authority of Parliament; and even when power is given under police acts to regulate the line of houses about to be rebuilt, full indemnification must be made for the damage thereby occasioned to individuals. The passage between the kennel of the street and the houses is part of the street or highway; and it was found that a house, the bounds of which were the highway, could not be built so as to encroach on this passage. Although the magistrates have no power to encroach on the street, yet in some cases they have been found entitled to exercise discretion in allowing one street to be shut up, on condition that another, equally or more commodious for the public, should be opened. Thus, on the petition of an individual in Dunbar, the magistrates of that town, by act of council, allowed the petitioner to shut up a narrow street or lane, on his becoming bound to open a new and more commodious street in another direction, and it was found that they had not exceeded their powers. So also the magistrates of a town, where the inhabitants are supplied with water by means of public wells in the streets, have a discretionary power to place these wells in such parts of the streets as are best suited for the accommodation of the public. *Bell's Princ. § 650; Illust. ib.; Brown's Synop. 2039, 2099. See Dean of Guild. Highway. Judge and Warrant. Houses. Nuisance. Property.*

**Sturdy Beggar.** See *Vagabond.*

**Style;** is the particular form of expressions and arrangement necessary to be observed in formal deeds and instruments. See *Deed. Conveyancing.*

**Style, New and Old.** See *Calendar.*

**Subaltern Rights.** See *Base Rights.*

**Subinfundation.** See *Infestment. Base Rights.*

**Submission;** is a deed by which parties agree to submit a disputed point to arbitration. See *Arbitration.*

**Submission and Surrender of Tithes.** See *Tithes.*

**Subornation of Perjury;** is the successful tampering with those who are to give their evidence on oath, in any way causing, or inducing, or directing them to perjure themselves. This crime is, by the act 1555, c. 47, punishable in the same way with perjury itself (especially with infamy), and may, in some cases, be summarily tried, in the course of proceedings, either on complaint or *ex*

*proprio motu* of the Court. The attempt to suborn, and even all practices for the obtaining of false evidence and the preventing of a fair trial, are indictable. *Hume*, i. 375; *Alison's Princ.* 486; *Ersk. B. iv. tit. 4, § 75*; *Tait's Justice, voce Perjury*; *Blair's Justice, voce Perjury*; *Shaw's Digest*, 148. See *Perjury*.

**Subpoena**; in English law, a writ by which common persons are called into Chancery, in cases where the common law has provided no ordinary remedy. Also, the writ for calling a witness to bear evidence, whether in the Court of Chancery or in any other court, called the *Subpoena ad testificandum*. And where the witness is required to bring with him books or writings, to be produced in *modum probationis*, it is called a *subpoena duces tecum*. The party, or witness, is called to appear *sub poena centum librorum* (under penalty of L.100); hence the use of the word. *Tomlins' Dict. h. t.*

**Subreption**; the obtaining gifts of escheat, &c., by concealing the truth. *Obreption*, obtaining them by telling a falsehood. *Bank. jii. 39.*

**Subscription of Deeds.** The subscription of deeds consists not only in the subscription of the grantor, but in the subscriptions of two witnesses specially named and designed. The subscriptions of parties and witnesses are regulated by the acts 1540, c. 117; 1579, c. 80; 1593, c. 175, and 1681, c. 5. See *Obligation. Evidence. Testing Clause. Holograph Deeds. Mark. Deeds. Designation. Seal. Ersk. B. iii. tit. 2, § 7, et seq.*; *Bell's Com. i. 323, et seq.*; *Bell's Princ. § 19, et seq.*; *Bank. B. i. p. 11, § 330, et seq.*; *Stair, B. i. tit. 3, § 9*; *tit. 10, §§ 5, 8*; *More's Notes, pp. lxxvii., cccxlv., cccc., et seq.*; *Ross's Lect. i. 122, et seq.*; *Thomson on Bills, 43, 336, 554.*

**Subsidy**; a casualty now unknown, which the King or other superior levied for his eldest daughter's portion. *Reg. Maj. i. 2, c. 73*; *Craig, lib. ii. dieg. 11, § 22.*

**Substantialia**; those parts of a deed which are essential to its validity as a formal instrument. See *Deed. Error in Essentials.*

**Substitutes in an Entail**; are those heirs who are called failing the institute, whether donee or grantee. All the substitutes, even the most remote, have an interest in supporting the entail, and will be allowed to apply for having it recorded, and to take other steps requisite to defend themselves against either the institute or third parties. *Sandford on Entails. See Tailzie.*

**Substitution.** A substitution is an enumeration of a series of heirs described in proper technical language. The substitution may be either *simple*, calling certain heirs in their order, which the person in possession may at any time put an end to, even by a

gratuitous deed; or it may be a substitution with prohibitory clauses, which will have the effect of guarding the destination against the gratuitous deeds of the person in possession, but will not defend it against his onerous deeds; or, lastly, the substitution may be guarded by irritant and resolute clauses, whereby it becomes a statutory entail, which, being completed by sasine and by registration, secures the estate against even the onerous debts or deeds of the person in possession. Questions of great nicety have arisen as to whether or not the party called, or named in a destination, is to be considered as a substitute or as a conditional institute. See *Tailzie. Destination. Institute. Conditional Institute.*

There are substitutions also in moveables, as in bonds of provision, legacies, &c., and these substitutions receive effect in the general case only in so far as not defeated by the deeds of the person in possession; for he may, by discharging the debt, or assigning the claim, or receiving and disposing of the subject in whole or in part, to that extent exclude the substitution. A conveyance burdened with sums to others, in favour of an heir-at-law, and failing him to substitutes, will not be voided by his repudiating it and serving as heir-at-law, in so far as concerns those in whose favour the burdens existed. Heirs substitute in bonds cannot be liable for the grantor's debts *ultra valorem*. Where children are substituted to each other in a bond of provision by a father, the child deceasing cannot give away his right to the prejudice of the other children; and where a bond is taken to two brothers or sisters, excluding assignees, neither of them can defeat the succession of the other by a transference of the right. *Ersk. B. iii. tit. 3, § 44*; *Bank. B. ii. tit. 3, § 130*; *B. iii. tit. 5, § 87*; *Stair, B. ii. tit. 3, § 43*; *B. iii. tit. 5, §§ 5, 16, 50, et seq.*; *More's Notes, pp. cccxxvii. et seq., cccxlix.*; *Bell's Princ. §§ 1693-4, 1704-8, 1716, 1720, 1878*; *Illust. § 1693*; *Sandford on Entails, 6, 9, 12, 15.* See *Heir. Legacy. Provision. Destination. Discussion. Condition.*

**Substitution**; in the Roman law, was of two kinds. The one, called vulgar substitution, was where the testator apprehended that his heir would not be able to enter, from death or other disqualification, and named another to enter in default of his heir. The other was properly a *fideicommissum*, by which the testator directed that the inheritance should be transferred from one to another in a certain order. See *Fideicommissum*. Pupillary substitution, which was allied to both of these kinds, was where the testator had a pupil son, and named



another to succeed if the son should not be able or inclined to do so, or should die before he came of age to make a testament. The substitute had no right of succession if the child survived the age of puberty, even though he did not make a testament. *Inst. of Just.* B. ii. tit. 15 and 16; *Heinec. Elem.* § 550. The Roman law doctrine of substitution was taken notice of in the case of *Morton*, Feb. 11, 1813, *F. C.*

**Subsumption of Libel**; is a narrative of the alleged criminal act, which, to be good, must narrate facts amounting to the crime charged. The subsumption must specify the manner, time, and place of the crime libelled, the person injured, &c. *Hume*, ii. 192; *Steele*, 192. See *Alibi. Locus Delicti.*

**Sub-Tack.** See *Tack. Lease.*

**Sub-Vassal.** See *Vassal. Superior.*

**Succession**; is the term applied to the taking of property by one party in the place of another. Where this happens in consequence of a conveyance from the proprietor, the acquirer is said to be a *singular successor*, because he takes what he acquires in virtue of the single title by which he holds. But where a person dies intestate, his heir succeeds to the whole of his heritage by the *universal* title of heir. In this sense the two terms of *singular successor* and *universal successor* are opposed to each other. In the law of Scotland a proprietor is allowed to dispose both of his heritage and of his moveables by gratuitous deeds, under certain restrictions, resulting from the interests of his widow or children. See *Deathbed. Jus Relicti. Terce. Legitim.* But when the proprietor has neglected to use this privilege, the law supplies his omission, and disposes of his estate and effects in the way in which it is presumed that he would have himself disposed of them; and the rule being once established as law, the presumption is strengthened where a person has executed no settlement, since that is equivalent to a declaration that he means to allow the law to take effect. It becomes, therefore, important to know what those rules of law are, according to which the property of a person dying intestate will descend; and this leads to a necessary distinction in regard to succession in heritage and succession in moveables, neither of which, however, admits of the Roman succession *in capita*; *Stair*, B. iii. tit. 4, § 1, *et seq.*

1. *Of the Succession in Heritage.*—In heritable succession, the law of Scotland gives the preference to *descendants*, giving the succession to the eldest son, to the exclusion of all the other sons; and failing him or his issue, to the next eldest son; and so on in succession to the other sons, in the order of seniority. Failing the sons, the succession opens

to daughters, all the daughters succeeding equally as heirs-portioners, the eldest only enjoying the advantage over her sisters of possessing the mansion-house, garden, orchard, and heirship moveables, as her *præcipuum*. See *Præcipuum. Heirs-Portioners.*—2. Where there are no descendants, *collaterals* succeed: thus the brothers and sisters of the deceased succeed; the brothers succeeding each by himself, in a certain order, and the sisters, failing the brothers, succeed as heirs-portioners. The order in which brothers succeed, though corresponding in principle, does not correspond in appearance with that which is followed in the succession of sons; for among sons, the succession descends in the order of seniority; while among brothers, although, where the succession is that of an eldest brother, it follows the same order, yet, where the deceased leaves brothers both older and younger than himself, the succession goes to the next younger brother, and not to the eldest, according to the maxim, that *heritage descends*. If, again, the deceased happens to be the youngest brother, the succession goes to his immediately elder brother, that it may deviate as little as possible from the descending line.—3. There being neither descendants nor collaterals, the succession opens to ascendants; but in this succession, as in every other, the mother is excluded, so that the father alone succeeds as the nearest to the deceased in the ascending line; failing him, the uncles and aunts in their order (that is, the father's collateral line of succession) come in; and failing them, the paternal grandfather, and then his collateral line of succession succeed, and so on upwards as far as propinquity can be traced; and failing of any proof of propinquity, the Crown succeeds as *ultimus hæres*. These are the lines of succession in heritage; but they are modified by circumstances, to which it is necessary to advert more minutely. 1. In heritable succession there is a right of *representation*, by which the children of any deceased heir in the above lines of succession take, in their order, the share of their parents, to the exclusion of heirs in the line in which their parents stood, and therefore of all ulterior heirs also. This succession, so taken up, passes to the children of the deceased heir, under the same rules by which the original succession of descendants is regulated. 2. The mother, and of course all who can claim through her, are excluded by the law of Scotland, though her children succeed to her and through her. 3. Brothers and sisters *consanguinean* (that is, by the father only) succeed after brothers and sisters *german*, in the same order as above explained, and in preference to the full blood of a more remote line of succession. But bro-

thers and sisters *uterine* (that is, children by the same mother, but not by the same father) do not succeed at all, there being no succession through the mother. See *Half-Blood*.

4. In collateral succession, a distinction also holds between the property which the deceased *inherited*, and that which he had acquired by *conquest*, i.e. by a singular title. As to all heritage which has descended to the deceased as heir, the above rules take place; but in *conquest*, a different rule is followed—which has place, however, only in the case where a *middle* brother deceasing had acquired an estate by *conquest*;—that is, by purchase or by donation, or even by excambion. On his death, his estate by inheritance will descend to his next younger brother; but his estate by *conquest*, on the contrary, will ascend to his immediate elder brother, as heir of conquest. The distinction between heritage and conquest has no practical application when the property, the succession to which has opened, was vested in a *youngest* brother deceased; for then the immediate elder brother is both heir of conquest and heir of line; and the rule itself has no place in the succession of heirs-portioners. See *Conquest*. The heirs who succeed under these rules succeed only where there has been no valid conveyance by the proprietor; for his conveyance may alter the legal line of succession. They are termed *heirs-at-law*, or often *heirs* simply, because they are heirs who, by law, are called to the succession, in contradistinction to disponees. They are also termed *heirs of line*, because they succeed in certain known lines of propinquity; *heirs-general*, because they may enter by a general service, as nearest and lawful heirs to the deceased, whom they represent generally; and *heirs whomsoever*, in contradistinction to *special heirs*, called by particular destination. In connection with the subject of heritable succession, it may be remarked, that the heir in heritage, in certain circumstances, has right to heirship moveables. See *Heirship Moveables*. On the subject of heritable succession, see an able work by Mr Sandford (1830). *Ersk.* B. iii. tit. 8; *Stair*, B. iii. tit. 5, 6, 7; *Bell's Com.* i. 83.

2. *Of the Succession in Moveables*.—The order of succession in moveables is the same as in heritage; first, descendants; failing them, collaterals; and last of all, ascendants succeeding. But a very material distinction formerly existed between the succession in heritage and that in moveables. In moveable succession there was no preference of males to females, and an equal admission of all who stand in the same degree of kindred by full blood. Formerly, too, there was no representation in moveable succession. Thus, where there were a brother and a sister

nearest heirs of the deceased, and the children of a brother or sister deceased, the surviving brother and sister succeeded to the moveables equally, to the exclusion of their nephews and nieces, the children of the deceased brother. See *Executors*. This, however, has been altered to a certain extent by the act 18 Vict. c. 23, 1855. See *infra*. This equal succession in moveables of all equally near in degree to the deceased takes place only where there is no heritage in addition; for where one of the nearest of kin takes the heritage as heir, he has no title to any share of the moveables unless he chooses to collate; that is, to mass his heritage with the moveable property, and allow an equal division of the whole to take place amongst all the nearest in kin. See *Collation*. On the subject of moveable succession, see a very valuable and useful treatise on the rules of the law of personal succession by Mr Robertson of the Middle Temple (1836). *Stair*, B. iii. tit. 8; *Ersk.* B. iii. tit. 9; *Bell's Com.* i. 141.

By the act 18 Vict. c. 23, 1855, the issue of a predeceasing next of kin take the place of their parent in the succession to an intestate. This representation, however, in the case of collaterals, is limited to the descendants of the brothers and sisters of the intestate. The issue of a predeceasing heir in heritage of an intestate, may collate the heritage to the effect of claiming for himself if there is no other issue of the predeceaser, or for himself and the other issue if there be any, the share of the moveable estate of the intestate which the predeceaser might have claimed if he had survived the intestate. If, however, the heir of the predeceaser does not collate, and there are other issue of the predeceaser, his brothers and sisters, and their descendants in their places, are entitled to claim a share of the moveable estate equal in amount to the excess in value over the value of the heritage, of such share of the whole estate, heritable and moveable, as the predeceasing parent would have taken on collation, had he survived the intestate. The father of an intestate who leaves no issue is entitled to *one-half*; and in the event of his father having predeceased him, his mother is entitled to *one-third* of his moveable estate. Brothers and sisters *uterine* of an intestate, who is not survived by either father or mother, or brothers or sisters *german*, are entitled to *one-half* of his moveable estate. Where the wife predeceases her husband, her next of kin, executors, or other representatives, whether testate or intestate, have no right to any share of the goods in communion. The dissolution of a marriage before the lapse of a year and day

from its date by the death of one of the spouses, does not affect the rights of the survivor, or the representation of the predecessor. The provision in the act 1617, c. 14, allowing executors-nominate to retain to their own use *one-third* of the dead's part undisposed of, is now abolished.

It has been said generally, that a proprietor has the entire power of disposal of his property, both heritable and moveable; but, 1st, A proprietor cannot, while on deathbed, dispose of *heritage* to the prejudice of his heir. See *Deathbed*. 2d, He cannot, by any *mortis causa* deed, deprive his widow of her *terce* or of her *jus relictæ*, unless, in antenuptial contract of marriage, she has accepted conventional instead of her legal provisions. See *Terce. Jus Relictæ*. And, lastly, he cannot defeat the right of *legitim* competent to his children, unless, in the same manner as in regard to the *jus relictæ*, by substituting for it a provision which the children choose to accept, and to discharge their *legitim*. The extent of his obligations in favour of his widow and children respectively, depends on circumstances; and the following articles may be consulted:—*Marriage. Husband and Wife. Contract of Marriage. Goods in Communion. Legitim. Forisfiliation. Jus Relictæ. Jus Mariti. Terce. Courtesy. Children. Divorce*. And, on the subject of succession generally, see *Stair*, B. iii. tit. 4, 5, 8, *et seq.*; *Ersk.* B. iii. tit. 8, 9, 10; *Bank.* B. iii. tit. 4; *More's Notes to Stair*, viii., cxlvii., ccxii., ccxxxviii.; *Bell's Princ.* § 1637; *Kames' Stat. Law Abridg.* h. t.; *Sandford on Entails*. See *Heir. Executor. Legacy. Testament*.

**Succession, Duties on.** By the act 16 and 17 Vict. c. 51, 1853, certain duties are charged upon all property, heritable and moveable, passing by the death of persons dying after the 19th May 1853. The interest of a successor in heritable property is considered as an annuity on his life, and tables are annexed to the act for valuing the annuity. The duty chargeable on lineal issue or lineal ancestors of the predecessors is *one per cent.*; on brothers and sisters, and their descendants, *three per cent.*; on brothers and sisters of the father and mother of the predecessor, and their descendants, *five per cent.*; on brothers and sisters of a grandfather or grandmother of the predecessor, and their descendants, *six per cent.*; and on any other person, *ten per cent.* Persons who would not have been chargeable for legacy-duty on a legacy bequeathed by the predecessor, are exempt from the duties on succession imposed by the act. The husband or wife of the predecessor is thus exempted. If the husband or wife of the successor shall be of nearer consanguinity than the successor, the duty is

charged according to the nearer relationship. Any succession of less value on the whole than L.20 is exempt. When the whole succession or successions derived from the same predecessor, and passing upon any death to any person or persons, shall not amount in money or principal value to L.100, no duty is chargeable. No duty also is chargeable upon any succession which, as estimated according to the provisions of the act, shall be of less value than L.20 in the whole, or upon any moneys applied to the payment of the duty on any succession, according to any trust for that purpose. No person, also, who is charged with legacy-duty in respect of any property subject to said duty, is also chargeable with the duty imposed by the act in respect of the acquisition of the same property. Leasehold property is no longer chargeable with legacy-duty as personal estate.

In the case of *Lord Advocate v. Robert's Trustees*, 26th Jan. 1858, 20 D. 449, a father, in the antenuptial contract of his daughter, had obliged himself to pay L.2000 to trustees, at the first term after his death. The interest of the sum was to be paid to the wife during her life, and to the husband on her death; and the fee was to be paid to the children of the marriage, payable on their majority. His executors paid L.1800 to the trustees, but retained L.200 to meet the succession-duty on L.2000, in case it should be found exigible. It was held by the Lord Ordinary in Exchequer that this was a succession within the meaning of the act, and that the succession-duty was chargeable upon it.

In the case of the *Lord Advocate v. Lord Saltoun*, Dec. 16, 1858, 21 D. 124, the question was raised, Whether the maker of an entail, or the last heir in possession, was the predecessor of the existing heir. The heir in possession happened to be more nearly related to the maker of the entail than to the last heir, and he contended that the maker of the entail must be considered his predecessor. The contrary was contended for on the part of the Crown; and the Court, by a majority, decided in favour of the Crown. This judgment was reversed, June 7, 1860.

Heritable bonds are now chargeable with probate and inventory duties. See *Stamps*; also the Act 23 Vict. c. 15, 1860.

**Sucken.** The *sucken* consists of the whole lands which are astricted to a mill. The possessors of these lands, *quoad* the mill, are termed the *suckeners*. *Ersk.* B. ii. tit. 9, § 20; *Bank.* i. 684; *Bell's Princ.* § 249; *Ross's Lect.* ii. 170. See *Thirlage*.

**Suicide.** *Self-murder* draws after it the falling of the single escheat, whereby the whole moveable estate of the deceased falls to the Crown; and a proof of the self-murder

may be brought in an action before the Court of Session at the instance of the Queen's donatary against the executors of the deceased. Insanity, however, is, if proved as the cause of suicide, sufficient to prevent the escheat. In proving the cause of death, it is sometimes difficult to determine whether the deceased was killed by some one else, or laid violent hands upon himself. Several cases of this nature will be found cited by Mr Steele in his very useful manual, p. 94; but no general rules can be laid down upon the point. The wounds inflicted by a suicide upon himself are usually in the front, and in an oblique direction, from right to left. The wounds made by an assassin are generally in the back; but when in the front, from left to right. *Hume*, i. 295; *Steele*, 94; *Ersk. B. iv. tit. iv. § 46*, note by *Ivory*; *Brown's Synop.* p. 532.

**Summary Actions;** are those which are brought into court not by summons, advocacy, or suspension, but by petition or summary complaint. See *Petition and Complaint*. *Ersk. B. iv. tit. 1, § 9*; *Stair, B. iv. tit. 3, § 25*; *Bell's Princ. § 2232, et seq.*; *Kames' Stat. Law Abridg. h. t.*; *Brown's Synop. h. t.*; *Shaw's Digest*, p. 414. See the respective articles. By Act of Sederunt, Nov. 1825, most summary causes are to be remitted to the junior Ordinary on the Bills, to be by him prepared. See *Sheriff. Actions. Interdict. Reclaiming Petition*.

**Summing up the Evidence.** Before the jury enters on the consideration of their verdict, the presiding judge sums up the evidence which has been adduced, accompanied with an exposition of the law where it appears necessary; an exposition intended not to control but to instruct the jury, and to correct the exaggerated representations of parties. 1587, c. 92; *Steele*, 13.

**Summons.** A summons in the Court of Session is a writ in the Sovereign's name, signed by a writer to the Signet, and passing the Signet, setting forth the grounds and conclusions of an action, and containing the royal warrant or mandate to messengers-at-arms to cite the defender to appear in Court to answer the demand; with certification, that if he fail to appear, the Court will pronounce decree in the terms concluded for in the summons. The statutory requisites of a summons are, that it shall set forth, in explicit terms, the nature, extent, and grounds of the complaint or cause of action, and the conclusions which, according to the form of the particular action, the pursuer is, by the law and practice of Scotland, entitled to deduce therefrom; 6 *Geo. IV. c. 120, § 2*. Summonses in the inferior courts are framed on the same model—with this difference, that in these courts the citation is given on the

warrant of the inferior judge or magistrate, and not of the Sovereign; *A. S. 12th Nov. 1825*. In libelling summonses it is a rule that two or more persons, unconnected as partners, and not aggrieved by the same act or having a joint interest in the matter libelled, cannot conclude against the same or different persons for payment of sums due to the pursuers separately. Two or more parties so disconnected, wishing to avoid the expense of separate actions, must assign their claims to one of their number, or to a third party as trust-assignee, who may sue for their behoof. See *Pursuer*. As to defenders, again, where several are liable under the same ground of debt or of action, any number may be sued in one summons; but where the defenders and their interests are separate and unconnected, no more than six can be included in one summons; *Articles of Regulation, A. S. 2d Nov. 1695, § 28*. And the same regulation applies in inferior courts; *A. S. 12th Nov. 1825*. The style of the wills of summonses, both in the supreme and inferior courts, is prescribed by *A. S. 8th July 1831*, and against defenders forth of Scotland by *A. S. 11th July 1828, § 22*. A libelled and signeted summons, or a summons signed by a depute-clerk of Session, or by the clerk of Court (where that is competent), becomes the ground for letters of arrestment, provided no undue delay occurs in executing the summons, and following out the requisite steps for constituting the debt; 54 *Geo. III. c. 137, § 2*. But where arrestment is used on an unexecuted summons, the summons must be executed within forty days after the date of the arrestment, otherwise the arrestment falls; and it is competent to the defender to apply to the Lord Ordinary on the Bills for loosing the arrestment, which will be granted without caution—the Lord Ordinary having power to award expenses, and his interlocutor not being subject to review; *A. S. 8th July 1831*. The limits of this work preclude the possibility even of a summary of the many important points of practice connected with the form, libelling, and conclusions of summonses; but the whole subject will be found very ably digested in *Skand's Practice*. See also *Jurid. Styles*, iii. p. 1, *et seq.*; *Stair, B. iv. tit. 3, § 7, et seq.*; *Ersk. B. iv. tit. 1, § 4, et seq.*; *Bank. ii. 599, et seq.*; *Macfarlane's Sheriff-Court Process*, 84, *et seq.*; *Macfarlane's Jury Prac.* 24–7, 31; and the articles, *Privileged Summonses. Bills of Signet Letters. Supplementary Summonses. Amendment of Libel. Arrestment. Calling of Summonses. Will of Summonses. Inducia*.

Formerly the allegation of facts which formed the ground of action was incorporated in the summons, but by the act 13 and 14 *Vict. c. 36, 1850*, they are set forth in an

articulate condescendence, which, with a note of the pleas in law, is annexed to the summons, and is held to constitute part of it. See *Statute and Schedule*.

**Sumptuary Laws**; are laws passed with a view to regulate the expenses of individuals and private families. Various laws were passed by the ancient Scotch Legislature for this purpose. Attempts were made to regulate the dress of the ladies, to save the purses of the "puir gentlemen," their fathers and husbands. Coming to kirk or market with the face muffled in a veil was strictly prohibited. Statutes were passed against superfluous banqueting, and the inordinate use of foreign spices "brocht from the parts beyond sea, and sauld at dear prices to monie folk that are very unbill to sustain that coaste." Such statutes, which betray an ignorance of the spirit of society, were but ill observed, and have long been in desuetude. For these laws, see *Kames' Stat. Law, h. t.*; *Hutch. Justice, ii. 3*.

**Sunday**. No arrestment, or poinding, or citation on adjudication, or execution of inhibition, or personal execution on a caption, and, generally speaking, no step of civil process, can proceed or be taken on Sunday; and those who have retired to the sanctuary of Holyrood House may leave the precincts on that day without being liable to arrest. But the sanctity of the day affords no protection against the execution of criminal or of *medietatis fugæ* warrants. Several statutes of the Scottish Parliaments enjoin the due observance of the Sabbath, and impose fines or corporal punishment on account of its profanation. The statutes are 1503, c. 83; 1579, c. 70; 1592, c. 124; 1593, c. 163; 1594, c. 201; 1661, c. 18; 1663, c. 19. And the execution of those laws is, by 1661, c. 38, particularly committed to the justices of the peace. But these offences are also cognisable at common law, as well as under later statutes, by all other judges, whether supreme or inferior. The pecuniary penalties go, one-half to the poor, the other to defray expenses, and to reward the informer. Any person may competently prosecute; and by 1693, c. 40, every presbytery is enjoined to name an informer and prosecutor for the district. The more recent statutes are 1672, c. 22; 1695, c. 13; 1696, c. 31; and 1701, c. 11. Prosecutions for mere profanation of the Sabbath are now very rarely resorted to. In one case, however, a person was prosecuted before the sheriff for sailing a steamboat with passengers on Sundays, and penalties and interdict were concluded for. The sheriff dismissed the petition on various grounds. Among others, he doubted of his jurisdiction, and intimated his opinion, that even if he had

jurisdiction, he would decide in favour of the defender. A bill of advocation was found incompetent, the action being considered of a criminal nature; *Jobson, Nov. 29, 1828, 7 S. & D. 88*. In another case, it was held in the Court of Session, that exercising the trade of a barber, by shaving on Sunday morning, is not contrary to law; and that an apprentice, who, in his indentures to a barber, had bound himself not to absent himself from his work, holiday or week-day, was obliged to work on Sunday morning, between the hours of seven and ten; *Phillips, May 19, 1835, 13 S. & D. 778*; but this judgment was reversed on appeal, 20th Feb. 1837. See *Hume, i. 563*; *Bell's Com. ii. 569*; *Stair, B. iii. tit. 1, § 37*; *tit. 3, § 11*; *B. iv. tit. 47, § 27*; *Bank. iii. 31*; *i. 360, 456*; *Bell's Princ. § 44*; *Illust. ib.*; *Kames' Stat. Law Abridg. h. t.*; *Hutch. Justice of Peace, i. 417, 423-6*; *ii. 332*; *Blair's do., voce Profanity*; *Brown's Synop. h. t. and p. 1236*; *Ross's Lect. i. 328*.

**Supercargo**; that officer in a vessel whose duty it is to superintend the trade for which the voyage is undertaken. Constituents have been found liable to pay money borrowed by their supercargo, though his commission bore no express power to borrow money, and though the money was not applied to their behoof; *Rogers, 25th July 1732, M. 3954*.

**Superinduction**; of letters or words in *substantialibus* of deeds vitiates them. *Stair, B. iv. tit. 42, § 19*; *More's Notes, cccvii.*; *Bank. ii. 633*. See *Deed. Challenge. Evidence. Illegibility. Erasure. Fraud*.

**Superintendents of the Church**; were persons chosen immediately after the Reformation to watch over the conduct of the parochial clergy, and to attend to the affairs of the Church; thus coming in place of the bishops, whose continuance was inconsistent with the forms of Presbyterian church government. *Ersk. B. i. tit. 5, § 5*.

**Superior**; is one who has made an original grant of heritable property, under the condition that the grantee shall annually pay to him a certain sum of money, or perform certain services. The grantee is termed the vassal. The interest of the granter is termed the *dominium directum*, that of the vassal the *dominium utile*. The superior has right to the feu-duties and other services stipulated in the grant, with the casualties which are by law given to a superior; while the vassal enjoys, in the absence of any limitation in the grant, every other right attaching to the subjects, such as fruits, woods, mines and minerals, and the rights of alteration and disposal at pleasure. *Ersk. B. ii. tit. 3, § 10, et seq.*; *Kames' Princ. of Equity (1825), 116*; *Kames' Stat. Law Abridg. h. t.*; *Sandford on*

*Heritable Succession; Sandford on Entails; Ross's Lect. ii. 119, et seq. See Feudal System. Holding. Tenure. Dominium Directum.*

**Superiority.** The superiority, or *dominium directum*, is the right which the Crown, as overlord of all Scotland, or subject superiors as intermediate overlords, enjoy in the land held by their vassals. It is not a right of use of the lands, but only a right to the civil rights of feu-duty, &c., and to the casualties. (See *preceding article*.) The right of superiority is held by the Crown, or by individuals as a consequence of their having been formerly vested, in their own person or that of their ancestors or authors, in the property of the lands; and they continue to hold a complete title, not only to the superiority, but to the lands themselves, this title being qualified in its effects by the feu-charter which the vassal holds, and in virtue of which he enjoys the *dominium utile* of the lands. When, therefore, a superior wishes to convey his right to another, the regular form is, not to dispose the superiority only, but to dispose the lands themselves, excepting from the grant the right of feu which the vassal possesses. The form of such a conveyance will be found in Jurid. Styles, i. 140, 141, and Bell's System of Deeds, i. 306, where it will be seen that the granter disposes "all and whole the lands," but in the clause of warrandice excepts the feu-rights and titles granted to a third party, or previously disposed to the grantee. Though this is the only regular mode of conveying a superiority, it was at one time common to dispose the superiority only, sometimes with the view of avoiding the irritancy under 20 Geo. II. c. 50, sometimes to serve electioneering purposes, by conferring on the donee the elective franchise without any right of property in the land. This conveyance, which has been censured by Stair (B. ii. tit. 4; § 1), as proceeding from "the ignorance of writers," has received various effects, according to the rights claimed upon it. It has been found effectual to confer the freehold qualification, and a title to pursue a removing; *Lagg*, Nov. 19, 1624, *M.* 13,787; *Hamilton*, Feb. 23, 1819, *F. C.* But it does not give a sufficient title to pursue a declarator of non-entry; *Park*, May 16, 1816, *F. C.* Where, however, in addition to a conveyance of the superiority, there is also an assignation to an unexecuted precept for infestment in the lands, or where there is a conveyance of the lands, "in so far as extends to the superiority," an unobjectionable title is established, and declarator of non-entry may be pursued upon it; *Mackenzie*, Dec. 14, 1822, 2 *S. & D.* 81; *Hill*, July 19, 1828, 6 *S. & D.* 433. A disposition of the feu-duties

and casualties of superiority also affords a sufficient title to pursue a declarator of non-entry; *Douglas*, Jan. 30, 1671, *M.* 9306. Infestment in the superiority or *dominium directum* of lands, being in truth infestment in the lands themselves, forms a sufficient title for prescription, and, followed by forty years' possession, vests the superior in the property of the lands. From the terms in which one case is reported, it is left doubtful whether or not the conveyance to the superiority only, above described, forms a good title for prescription; *Dunmore*, Dec. 22, 1774, *F. C.*; 5 *Br. Sup.* 614. But it has been thought that in that case the infestment must have been in the lands, and that, without such infestment, there can be no prescription; *Bell's Illust.* ii. 17, *note*. There are certain inherent rights of superiority which law supports, and renders efficient against every man; such is the superior's title to the feu-duty and services specified in the grant. These do not require infestment to secure them to the superior; he holds them as his inherent right, with which he has never parted, and of which he cannot be deprived either by any act of the vassal, or by the right of the vassal's heir or singular successor, or by prescription. So completely, indeed, are those rights inherent in the superior, that it has been made a question whether he can separate them from the superiority by renouncing them, so as to deprive a singular successor in the superiority of the power of demanding them from the vassal; and although the Court held that the rights of superiority might be renounced, yet they regarded the point as a difficult one. There are other rights, however, such as an obligation on the vassal not to sub-feu, or that he shall, before selling, give an offer to the superior at a certain price, called a clause of pre-emption. These will be effectual against purchasers of the property, and other third parties, only where they are engrossed in the infestment, so as to enter the record. See *Conditions. Burdens. Clause of Pre-emption*. The vassal is liable for the feu-duty from the time of accepting the right; and he continues bound for it to the superior, even after he has sold the feu, until the purchaser shall have completed his title—i. e., shall have become the superior's vassal; but the superior is bound to receive all singular successors on payment of one year's rent. See *Composition*. Where the right of property has been separated from the superiority, the two rights can be consolidated by nothing but a resignation *ad remanentiam*; so that a superior acquiring the superiority must resign in his own hands, or else the property and superiority will remain separate, and may descend to different heirs. See *Consolidation*. A superior cannot interpose

a superior between himself and his vassal; neither can a superiority be split to the effect of making the vassal hold of more than one superior, and thus become liable in more than one set of prestations. The superior's arrears and current feu-duties, and his casualties also, form both personal claims and *debita fundi*, preferable to all the vassal's other heritable debts, ranked first in judicial proceedings on bankruptcy, and to be made effectual by poidning of the ground and adjudication. *Bell's Com.* i. 22, *et seq.*; ii. 670, 683, 693, 716; *Ersk.* B. ii. tit. 5, *et seq.*; B. ii. tit. 6, § 63, *et seq.*; B. iii. tit. 8, § 81; *Stair*, B. ii. tit. 3, § 29, 41, 51; B. ii. tit. 4; B. ii. tit. 11, § 8, *et seq.*; B. iii. tit. 2; *More's Notes*, lx., clxxvi., ccxii., ccii.; *Bank.* B. ii. tit. 4, § 1, *et seq.*; B. ii. tit. 11, § 1, *et seq.*; B. iii. tit. 2, § 56; B. iii. tit. 5; *Bell's Princ.* § 676, *et seq.*; *Illust.* §§ 687, 855; *Sandford on Heritable Succession*, ii. 188, 197; *Sandford on Entails*, 232, 264; *Bell on Purchaser's Title*, 42, 115, 363; *Ross's Lect.* ii. 222, 292. See *Holding. Tenure. Feu-duty. Casualty. Charge. Adjudication. Composition. Consolidation. Confirmation. Resignation. Entry. Clare Constat, &c.*

**Supersedeas**; in English law, a writ to stay some ordinary proceedings at law, on good cause shown. *Tomlins, h. t.*

**Supersedere**; is either a private agreement amongst creditors, under a trust-deed and accession, that they will supersede or assist diligence for a certain period, or a judicial act, by which the Court, where they see cause, grant a debtor protection against diligence, without consent of the creditors. A creditor who commits a breach of supersedere is liable to the debtor in damages. *Bell's Com.* ii. 501, 574, 600-1; *Bank.* B. iv. tit. 38, § 23; *Ersk.* B. iv. tit. 3, § 24. See *Sequestration. Trust-Disposition. Bankrupt. Protection.*

**Supplement.** Formerly, where a party was to be sued before an inferior court *ratione rei sitæ*, and did not reside within its jurisdiction, letters of supplement required to be obtained on a warrant from the Court of Session, and in virtue of these he was cited to appear before the inferior judge. These letters run in the name of the Queen. They recite the ground of action, the reason why it should proceed before the inferior judge, and contain a warrant, addressed to messengers-at-arms, as sheriffs in that part, ordering them to cite the defender. They proceeded on a bill, and were signed by a writer to the Signet. They are also employed in the citation of persons out of the kingdom, where they are to be cited, not as principal defenders, but merely for their interest. *Ersk.* B. i. tit. 2, § 17; *Bell's Com.* ii. 66; *Hutch. Justice*, i. 103, 243; *Jurid.*

*Styles*, iii. 14, 274-80, 985; *Ross's Lect.* i. 282; ii. 531. See *Bills of Signet Letters*. By the Act 1 and 2 Vict. c. 119, § 24, a defender who is beyond the jurisdiction of a sheriff may now be cited on the sheriff's own warrant or precept, endorsed by the sheriff-clerk of the county in which he resides.

**Supplement, Oath in.** See *Evidence*.

**Supplementary Summons.** Where all the parties interested have not been called, or where the original summons requires amendment, and the defender has not appeared, a supplementary or auxiliary summons is necessary. But where the original action is null, such a summons is inadmissible. It may be used, however, to bring forward additional grounds of action, the conclusions of both summonses being the same. In those actions which must be raised within a certain limited time, defects in the original summons cannot be remedied by a supplementary summons, if the limited period for raising the original action has elapsed before the supplementary summons is raised. *Shand's Prac.* i. *et seq.*, and authorities there cited; *Maclaurin's Sheriff Prac.* 271.

**Supply, Commissioners of.** See *Commissioners of Supply*.

**Support**; the urban servitude of *support*. The *oneris ferendi* and *tigni immittendi* of the Roman law entitles the owner of the dominant tenement to rest the whole or part of a building, or of a beam, on the house, wall, or property of the servient tenement. By the Roman law, in the particular servitude *oneris ferendi*, the proprietor of the servient tenement became bound to preserve it in a state to answer the purposes of the servitude, or to abandon the property entirely. But by the law of Scotland, where a servitude of support is constituted by *writing*, it would seem that the servient proprietor is not bound to keep the servient tenement in repair, unless there be a special stipulation to that effect in the deed constituting the burden; and where it is merely a *prescriptive* servitude of this kind, the dominant proprietor may repair the servient tenement for his own use if so inclined; but there is no obligation, in that case, on the servient proprietor to repair, unless he has contracted an express obligation, servitudes being *strictissimi juris*, and not to be extended by implication. *Ersk.* B. ii. tit. 9, §§ 7 and 8; *Stair*, B. ii. tit. 7, § 6; *Bank.* B. ii. tit. 7, § 6; *Shaw's Digest*, p. 565; *Bell's Princ.* § 1003; *Illust.* ib. See the case of *Murray*, 24th June 1715, *Mor.* 14,521. See also *Common Interest. Servitude.*

**Supportation**; is any assistance rendered to enable one, otherwise incapable, to go to kirk or market, so as to validate a convey-

ance of heritage made within sixty days before death. See *Deathbed*.

**Supremacy.** See *Oaths*.

**Surety.** The security which any one having dread of harm from another may obtain, is treated of in the article *Lawburrows*. The other kinds of surety are, *surety of the peace*, and *surety for good behaviour*. 1.

Surety of the peace is a security against injury threatened or dreaded, exigible by any single justice of peace, who may proceed to lay under caution any parties between whom he is credibly informed there is appearance of trouble, unless they declare upon their conscience, that neither of them bears any grudge to the other. He may also impose this caution upon those who have threatened personal injury or fire-raising, having first brought the offenders before him by warrant; or on any complainer swearing that he has just cause of fear from a particular party, the justice or other magistrate may bind over the latter to keep the peace. A wife may obtain this security against a husband, or *vice versa*. The amount of the penalty is discretionary. A party failing to find a sufficient cautioner for the amount ordained, may be imprisoned till the expiry of the term for which he was to have been bound. Forfeiture of the penalty in the bond is incurred by the party committing any breach of the peace, whether against the complainer or other persons. A party whose cautioner has proved insufficient, or who has been convicted of breaking a surety of the peace, may be laid under a fresh security. Surety for the good behaviour is more rigorous than surety of the peace, and includes it. It may be imposed by any single justice upon any suspect man, who, for the most part, sleeps all the day and walks in the night, or upon those who are described as "suspicious persons, who are night-walkers, and cannot give a good account of themselves;" or it may be taken, instead of surety of the peace, from those who have threatened personal injury or fire-raising. Sometimes parties convicted of certain offences are directed by statute to be laid under this surety; and sometimes, at common law, a party is ordered to find this surety, by a judgment against him for some gross breach of public decorum. Forfeiture is incurred by whatever would cause forfeiture of surety for the peace, or by seditious words, or by being guilty of any offence which this caution is meant to prevent. *Hutch. Just. of Peace*, i. 399; *Tait's Just.* 380-2; *Blair's Manual*, 375. See *Lawburrows*. *Bail. Cautionary*.

**Surface-Damage;** damage done to the surface of the ground, in consequence of mining operations, &c. The tenant of the

ground, or the liferenter, is entitled to compensation for such damage where the mining is carried on by the landlord, or the farmer, or their respective lessees. See *Lease. Liferent*.

**Sur-Rejoinder;** in English law, the plaintiff's answer to the defendant's rejoinder. *Tomlins' Dict. h. t.*

**Surrender;** in English law, the yielding up of an estate, for life or years, to him that has the immediate estate in reversion or remainder. *Tomlins' Dict. h. t.* See *Remainder*.

**Surrender of Tithes;** the submission of tithes made to the Crown. It got the name of *surrender of tithes*, because the submission contained in it a surrender of the tithes into the hands of the King. See *Submission of Tithes and Teinds*.

**Surrogate;** in English law, a substitute, a person appointed to act for another, as by a bishop, chancellor, judge, &c. *Tomlins' Dict. h. t.*

**Surrogatum;** that which comes in place of something else. The price is the *surrogatum* of an estate, and is so called because, while it is distinguishable from other funds, the burdens which fell upon the estate will in some cases be transferred to the price received for it. In the case of an entail valid in every respect except that the irritant and resolute clauses did not apply to the prohibition to sell, the Court of Session found that the heir in possession, though he could not be prevented from selling the estate, was bound to reinvest the price in the purchase of other lands, to be settled conformably to the provisions of the entail; *Stewart of Ascoy*, Feb. 23, 1827, 5 S. & D. 418. But this decision was reversed on appeal, on the ground that, as the entail wanted the statutory requisites to prevent a sale, there was no obligation, which could be enforced by law, to subject the price to the fetters of the entail; July 16, 1830, 4 W. & S. 196; *Bell's Illust.* ii. 353. See *Stair*, B. ii. tit. 2, § 14; *Kames' Equity*, 293; *Brown's Synop. h. t.* See *Tailzie*.

**Survivorship, Presumption of.** See *Presumption of Survivorship*.

**Suspension;** is the general name given to a process in the supreme civil or criminal court, whereby execution or diligence on a sentence or decree is stayed until the judgment of the Supreme Court is obtained on the point. This form of review, in criminal cases, has been explained, *vide Bill of Suspension in Court of Justiciary*; and the present article relates exclusively to the process of suspension in civil causes. The party complaining commences proceedings by presenting a note of suspension in the Bill-



Chamber, setting forth that diligence has been used or threatened, in virtue of the decree or warrant to which he objects, and prays that the decree complained of be suspended. An articulate statement of the facts on which the prayer of suspension is founded, together with a note of pleas in law, is annexed to the note. See Act 1 and 2 Vict. c. 86, 1838. In the ordinary case, the complainer also offers caution to implement the decree of which he complains, and to pay the expenses of the process, if the Court shall so decide. This note is presented to the Lord Ordinary on the Bills; and if he think that the complainer has made out a sufficient *prima facie* case, he pronounces an interlocutor sisting execution in the meanwhile, and appointing the note of suspension to be answered. Thereafter the Lord Ordinary on the Bills resumes consideration of the note along with the answers, if lodged; and if that pleading does not satisfy him that the objection to the diligence or execution is groundless, he passes the note of suspension, whereby the cause is brought formally into the Court of Session in order to be discussed; and pending the discussion, the execution is stayed or suspended. If, on the other hand, the Lord Ordinary on the Bills be of opinion, either on considering the note itself, or on resuming consideration of it with answers, that there is no just ground of complaint, he refuses the note, upon which a certificate of refusal will be issued, and the diligence or execution complained of will proceed precisely as if no note of suspension had been presented. But the judgment of the Lord Ordinary on the Bills, whether refusing or passing the note, is subject to the review of the Court of Session, in the manner explained *voce Reclaiming Note*; or if the judgment has been pronounced during vacation, a second note of suspension may be competently presented to the next succeeding Lord Ordinary on the Bills. The note, when passed, is enrolled in the weekly printed roll, and proceeded with, as was formerly the case, on expedite letters of suspension. See *Shand's Practice*, 440, 459, *et seq.*

**Suspension and Interdict**; a judicial remedy competent in the Bill-Chamber, where there has been no decree, nor any proceeding which can issue in a decree, but where the object is to stop or interdict some act, or to prevent some encroachment on property or possession, or in general to stay any unlawful proceeding. The remedy is applied for by a note of suspension and interdict, which, in an annexed articulate statement of facts, sets forth the circumstances under which the complaint is made, and prays for suspension and interdict either with or without caution,

as the case may be. This note is presented in the Bill-Chamber; and if a *prima facie* case be made out, the Lord Ordinary on the Bills will immediately grant an *interim* interdict, and order the note to be answered. When the answers are lodged, the Lord Ordinary on the Bills resumes consideration of the case, and either passes the note and continues the interdict, or refuses it and recalls the interdict, as justice may require. As in ordinary suspensions, this interlocutor refusing or passing the note is reviewable by the Court; and if the note be eventually passed, the case proceeds in the manner already explained, *voce Suspension*; and in the same way, where the note is ultimately refused, the interdict is at an end. The remedy of summary interdict is also competent in inferior courts, where the subject-matter of complaint is cognisable in an inferior court; the form of complaint being by petition addressed to the inferior judge, praying for the interdict wanted. See *Shand's Practice*, 459, *et seq.*

**Suspension and Liberation.** Where a debtor has been incarcerated in consequence of diligence on a decree, or on any other warrant of incarceration, he may apply, in the Bill-Chamber, for redress by a note of suspension and liberation; and if he can satisfy the Lord Ordinary on the Bills that his imprisonment has been wrongful or illegal, the note of suspension and liberation, after it has been answered, will be passed. Here, also, the procedure is analogous to that in ordinary suspensions.

**Suspensive Conditions**; conditions precedent, or conditions without the purification of which the contract cannot be completed. *Bell's Com.* i. 237; *Bell's Princ.* § 109; *Shaw's Digest*, 313, 553; *Brown on Sale*, 32-42. See *Conditional Obligation. Resolutive Conditions. Sale.*

**Sutherland, County of.** See *Election Law.*

**Swans.** According to Stair, swans are *inter regalia*; but Erskine says, "Nothing appears, either in our statutes, law-books, or practice, in support of the opinion that swans were ever accounted *inter regalia*." See *Stair*, B. ii. tit. 3, § 60; *Ersk. B. ii. tit. 6*, § 15; *Bank. i.* 593; *Bell's Princ.* § 1290.

**Swearing, False.** See *False Swearing. Perjury.*

**Swindling.** Under the head of swindling are comprehended that numerous class of cases in which the offender, by the assumption of a false character, or a false representation of some sort, obtains the possession of money, or other property, which he appropriates to himself. Swindling differs from theft in this, that the thief takes the property, while the swindler obtains the owner's

consent to his getting it. It differs from failure to pay for goods obtained on credit in this, that the swindler uses fraud to get the goods. It is thought that an attempt to defraud is not a relevant charge. The punishment of this offence varies from imprisonment for six weeks to transportation for fourteen years. Using false writings is regarded as an aggravation. *Hume*, i. 57, 172; *Burnett*, 166; *Alison's Princ.* 250, 368; *Prac.* 290; *Steele*, 114, 141; *Swint. Abridg. voce False Tokens*; *Shaw's Digest*, p. 154; *Tait's Justice, vocibus Falsehood. Theft.* See *Theft. Breach of Trust.*

**Sylva Cœdua**; is a wood, which, on being cut, stoles out again for another cutting, so as, by proper management, to yield a yearly profit, which may be turned to account by a temporary usufructuary, as a liferenter or wadsetter on a good title, but not by a mere tenant, unless his lease expressly so provide. *Stair*, B. ii. tit. 3, § 74, *et seq.*; *Bank.* i. 658; *Hunter's Landlord and Tenant.* See *Liferent. Wood. Trees. Timber.*

**Symbols.** Heritable property was formerly transferred by the delivery of symbols. Thus lands were resigned by a vassal to his superior by the symbol of staff and baton; and in giving sasine, the symbols were varied according to the nature of the subject. In giving sasine of lands, the symbols were *earth and stone* of the lands; of an annual rent out of lands, *earth and stone, with a penny money*; of fishings, *net and cobble*; of mills, *clap and happer*; of houses within burgh, *hasp and staple*; of patronage teinds, *a sheaf of corn*; of patronage, *a psalm-book and the*

*keys of the church*; of jurisdictions, *the book of court.* *Ersk.* B. ii. tit. 3, § 36; *Stair*, B. ii. tit. 1, § 15; tit. 3, §§ 17 and 44; B. iii. tit. 2, § 6; *Morr's Notes*, p. elxi.; *Bank.* i. 509, 549; ii. 209; *Ross's Lect.* ii. 87, 196, 216, 374. See *Delivery. Resignation. Sasine. Titles to Land.*

**Synod.** A provincial synod is one of the church courts, composed of the members of the several presbyteries within the bounds prescribed by the General Assembly. Synods whose boundaries are contiguous correspond with one another, by sending one minister and one elder, who are entitled to sit and vote with the other members of the synod to which they are sent. They must have a regular commission from their own synods to act as correspondent members, and on its being produced and read, their names are added to the roll. The time and place of the synod's meeting are fixed by the Assembly. There are sixteen synods, and most of them meet twice a year. The synod is opened by the moderator of the preceding synod. After the roll is made up, a new moderator, who must be a minister, is elected. The minutes of every synod must be signed both by the moderator and clerk; and synod-books, completely filled up, must be produced yearly to the General Assembly, in order to their being revised. The clerk and officers of the synod are of its own appointment. Meetings of synod *pro re nata* are very rare. See *Ersk.* B. i. tit. 5, § 24; *Hill's Church Prac.* 80; *Church Law Society Styles*, 246; *Gillan's Acts of Assembly*, 297, *et seq.*; *Cook's Church Court Styles.* See *Church Judicatories.*

## T

**Tabling of a Summons.** At the institution of the College of Justice (1537), there was appointed a table, in which was set down all summonses, to be called in their turns; those from each quarter into which Scotland was divided, having a particular quarter of the year allotted to them. *Stair*, B. iv. tit. 2, § 5; *Bank.* B. iv. tit. 23, § 27; *Kames' Stat. Law*, h. t. See *Calling of a Summons.*

**Tabulæ**; the twelve tables upon which the laws of Rome were first inscribed for public inspection.

**Tabulæ.** Deeds *contra fidem tabularum* are all private covenants, whether before or after a contract of marriage, whereby the interests of the bride or bridegroom are injured, and which are held fraudulent and void on this account. *Bank.* B. i. tit. 5, § 21.

**Tacit Relocation.** See *Relocation.*

**Taciturnity**; a mode of extinguishing an

obligation in a shorter period than by the forty years' prescription. This manner of extinguishing obligations is by the silence of the creditor, and arises from a presumption, that in the relative situations of himself and his debtor, he would not have been so long silent, if the debt had not been paid, or the obligation implemented. The only cases in which extinction by such taciturnity has been recognised were those of bills of exchange, prior to the introduction of the sexennial prescription. Thus, in several cases, action was refused after a silence of twenty-three years, or upwards. *Ersk.* B. iii. tit. 7, § 29; *Brown's Synop.* p. 1694. See *Acquiescence. Presumption. Prescription. Evidence.*

**Tack.** See *Lease.*

**Tailsie, or Entail**; in its largest acceptation, signifies any deed whereby the legal course of succession is cut off, and an ar-

bitrary one substituted. But the term is usually applied to a deed framed in terms of the statute 1685, c. 22, and intended for the purpose of securing the descent of an heritable estate to the series of heirs or substitutes called to the succession by the maker of the tailzie.

Before adverting to the requisites of a statutory entail, it may be premised generally, that every proprietor legally invested with the right of property is entitled, whether the property has been acquired by his own exertions, or has descended to him by inheritance, to dispose of it at his pleasure. What is technically called a *simple destination* of the property does not preclude any substitute, after being invested, from exercising the powers of unlimited fiar, and thereby disappointing the posterior substitutes, by altering the investiture either onerously or gratuitously, and that even by a *mortis causa* deed. If, however, the destination has not been altered by any of the substitutes in possession, it will continue to regulate the course of succession. Hence, the effect of a simple destination is to confer on the substitutes a mere *spes successionis*, defeasible at the will of the heirs respectively, on their succession. As to the import of certain terms in destinations, see the article *Destination*. Formerly, a destination was rendered less liable to alteration by the addition of prohibitory clauses. Thus, if the destination was fenced by a clause prohibiting any of the heirs from doing any act or deed whereby the prescribed course of succession might be altered or affected, the substitutes succeeding were thereby laid under an obligation in favour of the posterior substitutes. The heir succeeding under a destination so fenced, took the property under the burden of the prohibitory clause. The obligation, however, not to defeat the destination, was merely a personal obligation against the heir in possession, and did not affect onerous disponees. Practically, therefore, the obligation imposed on the substitute in possession under such destinations, was not effectual to prevent the alienation of the property, since it might either be disposed for onerous considerations with perfect safety to the purchaser, or adjudged for payment of the heir's debts. It was at one time supposed, that, although the entail wanted the statutory requisites, and therefore did not prevent alienation, yet that the price received for the estate came in its place, and that the heir in possession was bound to invest it in accordance with the provisions of the entail; and so the Court of Session decided in the *Ascog* case; *Stewart*, Feb. 23, 1827, 5 *S. & D.* 418; but this decision was reversed on appeal, July 16, 1830, 4 *W. & S.* 196. See *Surrogatum*. If, however, the heir

under such a destination attempted to alter it by a gratuitous conveyance, such conveyance was liable to reduction, as being granted in contravention of the prohibition under which the granter possessed the estate. Except under the statute 1685, c. 22, a tailzie was not made effectual against third parties, however effectual it might be in constituting rights or obligations *inter hæredes*.

This statute provides, "That it shall be lawful to his Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolute clauses, whereby it shall not be lawful to the heirs of tailzie to sell, analzie, or dispone the said lands, or any part thereof, or contract debts, or do any other deed whereby the same may be appraised, adjudged, or evicted from the other substitutes in the tailzie, or the succession frustrated or interrupted, declaring all such deeds to be in themselves null and void; and that the next heir of tailzie may, immediately upon contravention, pursue declarators thereof, and serve himself heir to him who died last invest in the fee, and did not contravene, without necessity any ways to represent the contravener." But the statute provides that effect shall not be given to tailzies except on compliance with the following requisites: 1st, That the restrictive clauses shall be inserted in all the title-deeds of the estate. 2d, That the entail shall be presented to the Court of Session, and have the judicial authority of that Court interponed to it. 3d, That it shall be recorded in the Register of Entails. 4th, That being so recorded, it shall be real and effectual against creditors and purchasers, whether by legal or conventional titles. 5th, That, where the conditions of the entail are not inserted in the titles of the estate, the omission shall infer a forfeiture against the heir to whom it is to be attributed, but shall not militate against his creditors or purchasers from him. And, lastly, It is declared that the statute shall not prejudice the rights of the king as to confiscations or fines, for crimes, or the rights of superiors, for their casualties of superiority. The usual form of executing the tailzie is for the maker of the deed to dispone to himself and such a series of heirs as he may think proper to name, the lands intended to be entailed, under certain conditions, limitations, and provisions. Sometimes, also, the entailer disposes to another in the first instance, reserving a liferent to himself. In all cases the first disponee, whether the entailer himself, or another, is called the institute, and the subsequent heirs the substitutes. The clauses essentially necessary to give effect to an entail

are, 1st, Prohibitions against altering the order of succession, against alienating the land, and against contracting debts, whereby the lands may be burdened or affected by diligence. 2d, Irritant clauses, declaring that all deeds executed, whereby the course of succession may be altered, or the lands sold or conveyed away, and all debts contracted contrary to the above prohibitions, shall be void and null: And, 3d, Resolutive clauses, declaring that if any of the heirs of entail shall act contrary to all or any of the prohibitions, he shall forfeit his right to the lands entailed, sometimes for himself only, and in other cases for all the heirs who may take the succession as his descendants. The irritant and resolutive clauses may either apply generally to all the prohibited acts, or specially to each; but it is indispensable that every prohibited act be pointed at both by the irritant and resolutive clauses. These clauses must also be distinctly directed against the persons meant to be affected. Such are the essential clauses of an entail. But in the deed as now in use, a variety of other clauses are usually added. Thus, it is the general practice to insert a clause binding the several persons called to the succession, and the husbands of heirs-female, to assume and use the surname and arms of the maker of the tailzie. Provisions are also usually inserted as to the administration of the entailed estate, such as rules for the granting of feus, leases, or the like; and the heirs of entail are further required to satisfy all claims effectual by law against every entail, such as the entailor's debts, the feudal casualties, and the public or parish burdens. Certain powers are frequently reserved to the heir in the entail; such as a power to sell to pay the entailor's debts; a power to excamb or to sell and reinvest; a power to feu; a power to alter the order of succession, so as to avoid an idiot or a bankrupt, or the like. The heirs of entail in succession are also very frequently empowered to grant annuities to their widows or surviving husbands out of the rents of the entailed estates; and in like manner to make provision for their younger children. All the conditions and provisions of an entail are enforced against the heirs in succession, by the penalty of forfeiture of the right in case of contravention.

One limitation of the heir's right of fee is not to be inferred from the existence of another; but, on the other hand, the heir, formerly, was not entitled, fraudulently, to defeat one prohibition through the omission of another, as, for example, to alter the succession by raising a fictitious debt where the contraction of debt is not prohibited. The words of the statute do not authorise any re-

straint on the institute; but it has been decided, that he may be placed under the fetters of the entail. He must, however, be expressly comprehended in the prohibitory clauses; and the expression "heir or member" of tailzie does not include him. The entailor cannot gratuitously fetter himself to the prejudice of his creditors; but restraints may be imposed on him by an onerous or mutual entail. See *Mutual Entail*. The entailor's debts are a burden on the estate, which may be adjudged or sold to pay them.

The powers and restraints of heirs of entail have been the subject of various statutes since the passing of the Tailzie Act; but, at common law, the general rule is, that the provisions and conditions of the deed of entail, except in so far as modified or controlled by those statutes, form the legal measure of the heir's rights, and that, except in so far as he is limited, an heir of entail is held, in law, to be an absolute fiar. Before the passing of the act 11 and 12 Vict. c. 36, 1848, it was doubted whether an entail could be effectual which did not contain the whole of the three prohibitions;—against alienations; against the contraction of debt, so as to affect the estate; and against altering the succession; but it was decided, that a deed of entail containing any one of these prohibitions, properly fenced, was effectual so far as it went. The prohibition to alienate does not prevent a conveyance to the next substitute. The prohibition to alienate prevents the granting of feus, or of a locality to a widow beyond the amount of the terce; but this is the subject of statute. See *Infra*. It strikes against long leases, or leases with a grassum; but neither the power to grant long leases nor to take a grassum is limited, where there is no prohibition to alienate. See *Grassum*. And it may be stated generally, as the result of the numerous cases decided on the subject of leases, that an heir in possession, under an entail which prohibits alienation, is bound to administer the estate *secundum bonum et equum*, acting with good faith, and fairly towards those who are to come after him. In this view, it has been said, that every lease, whether long or short, may be regarded as an alienation, except in so far as it is necessary for realizing the full profits of the estate, and is granted in the fair exercise of the heir's power of administration. As to the right of the heir of entail to cut growing trees, see the article *Timber*. The effect of the prohibition to contract debt is different, according as the entail is onerous or gratuitous. If the entail be not onerous, the estate is liable to attachment for all debts contracted prior to the completion of the entail. If it be onerous or mutual, the creditors and heirs of entail

are regarded as competing creditors, and the completion of the entail, by infeftment and recording, excludes the diligence of creditors not previously infeft.

By 20 Geo. II. c. 50 and 51, heirs of entails are empowered to sell to each of their vassals, or to the Crown, the superiorities of the entailed lands held by them, the price being directed to be employed in the purchase of other lands to be entailed in the same manner as the superiorities sold. The following are the provisions of the act 10 Geo. III. c. 51 (commonly called the Montgomery Act), the object of which was the agricultural improvement of lands held under strict entail, and the remedy of the inconveniences attending entails, which unduly limited the heirs of entail as to their power of granting leases. Under this act, 1. Heirs of entail may grant leases not exceeding thirty-one years' endurance, or for fourteen years, and an existing life, or for two existing lives, provided, in the last case, the tenant be taken bound to enclose one-third of the lands in ten years, two-thirds in twenty years, and the whole in thirty years; and in the other cases, where the lease exceeds in duration nineteen years, that the tenant be taken bound to enclose one-third of the lands let before the expiration of one-third of the term, two-third parts before expiration of two-third parts of the term, and the whole before the expiration of the lease. See *Improving Lease*. 2. Such heirs may grant building leases for any term of years not exceeding ninety-nine, provided that no lease of more than five acres be granted to one person, and that the lease contain a clause, declaring that it shall become void, if a dwelling-house of the value of L.10 be not built upon each half-acre of the ground within ten years from the date of the lease, and if the houses built be not kept in tenantable repair. Such leases must not extend to the mansion-house, gardens, or adjacent enclosures, or to lands within 300 yards from the mansion-house. No lease can be granted till within a year of the expiration of the former lease. The rent must not be under what was formerly paid for the land, and no fine or grassum must be taken. 3. Every proprietor of an entailed estate who lays out money in enclosing, planting, draining, or building farm-houses and offices, becomes a creditor on the entailed estate for three-fourths of the money so laid out, until it amount to four years' free rent of the estate, as it may be ascertained at the first term of Whitsunday after the death of the heir who expended the money, with interest from the term when the next heir's right to the rents commenced, provided that at least three months' notice in writing be given to the next heir not de-

scended of the body of the heir in possession, or in case of his absence from Britain or Ireland, then to his nearest male relation of lawful age by the father's side, and that a copy of such notice, together with the annual accounts and vouchers of the improvements, be lodged with the sheriff-clerk of the county within which the lands lie, within four months after each term of Martinmas. The executors or assigns of the heir who expended the money have action against the succeeding heirs; but each heir in succession is only obliged to apply one-third of the free rents towards extinction of the debt, to which extent the claim is preferable to the debts of the heir in possession. No adjudication can pass against the entailed estate for the claim arising from such improvements. Where the succeeding heir comes to have right to the claim for improvements, it is extinguished. Where an heir has completed the improvement of all or any part of the entailed estate, he may bring an action before the Court of Session or sheriff of the county where the estate lies, calling the heirs who may succeed next after the heirs of his own body, for ascertaining the amount of the charge. The decree pronounced in the action by the sheriff becomes final, unless suspended within six months; and any decree of the Court of Session is final, unless an appeal to the House of Lords is brought within twelve months. 4. Every heir of entail who lays out money in building or repairing a mansion-house or offices becomes a creditor on the estate for three-fourths of the money expended, until it amount to two years' free rents of the estate, with interest from the term at which the next heir's right to the rents commenced (the same requisites of notice and registration being necessary), and those in right of the claim are entitled to obtain payment from the heir after one year from the death of the heir who has laid out the money. 5. Heirs of entail may exchange with neighbouring proprietors lands to the extent of thirty acres of arable ground, or of 100 acres improper for culture by the plough, upon its being ascertained by the sheriff, after taking the necessary proofs that the exchange is just and equal, the exchange being completed by a contract of excambion; after which the lands given from the entailed estate are free from the entail, and the lands added to it by the excambion subjected to the conditions of that deed. The provisions of the recent statute, 6 and 7 Will. IV. c. 42, which extends the power of making excambions, are given in the article *Excambion*. See also a Manual of procedure under that statute published by Mr Parker.

Heirs of entail in possession are also em-

powered by statute to redeem the land-tax payable out of the entailed lands. The procedure is regulated by the statute 42 Geo. III. c. 116, which authorises the heir of entail to redeem the land-tax, either by a sale of part of the entailed estate, or by borrowing money for the purpose on the security of the estate. If the heir of entail desires to sell a portion of the estate under this statute, he must apply by petition to the Court of Session, stating the amount of the land-tax, and the rent or annual value of the portion of the estate proposed to be sold for its redemption; and after the petition has been intimated on the walls of the Parliament House and in the Edinburgh Gazette (which is held equivalent to personal service on the substitutes), the Court may authorise a sale of such portion of the estate as they think ought to be sold, provided no sufficient objection is stated by any having interest. The heir proposing to sell must show, however, that the portion can be sold without material injury to the rest of the estate, otherwise the Court, *ex proprio motu*, may refuse the petition. When a warrant of sale is granted by the Court, the sale must proceed by auction at such time as the Court may direct, and under articles of roup, whereby the purchaser is taken bound to pay the price to a trustee named by the seller and approved of by the Court, and who must find caution for the due application of the price. The receipt of the cashier of the Bank of England (to whom the price must be paid to account of the Commissioners for the Reduction of the National Debt) is a sufficient discharge to the trustee and the purchaser; and the purchaser is then entitled to demand a disposition or other sufficient title to the land purchased. Such sales are declared by the statute to be as effectual as if the seller had been proprietor in fee-simple. The expense incurred in selling part of the estate for the redemption of the land-tax is paid out of the price received, on the amount of such expense being ascertained by decree of the Court of Session, obtained on a summary application. In case more land is sold than is sufficient, the surplus over redeeming the land-tax and paying the expenses of the sale must be disposed of under direction of the Court of Session, either in the payment of debts affecting the entailed estate, or in the purchase of other lands, to be taken under the limitations and conditions of the entail; the surplus, in the meanwhile, being vested in such security as the Court may deem proper, and the heir in possession being entitled to the interest. Where, however, the surplus is under L.200, it is transferred to a trustee named by the seller, to be applied as above, without the ne-

cessity of the Court's approbation or direction. Where, instead of a sale, the redemption of the land-tax is to be accomplished by a loan on the security of the entailed estate, it is also necessary to apply for the authority of the Court of Session by petition, stating the amount of the land-tax and the sum proposed to be borrowed. Such petitions are intimated in the same manner with those in the case of a sale; and the Court authorises the petitioner to grant heritable security for the requisite sum over the whole or part of the estate, as the case may require, provided no sufficient objection is stated by any having interest. The expense of the loan is included in the heritable security, and the security is declared by the statute to be as valid and effectual as if the borrower had been proprietor in fee-simple, except only that it is not competent for the creditor to adjudge all or any part of the entailed estate for the interest or principal. See the statute 42 Geo. III. c. 116, §§ 61-65, 101, 102, 143, *et seq.*

The statute 59 Geo. III. c. 61, directing assessments to be levied for building county jails in Scotland, also contains certain provisions applicable to heirs of entail. Thus, the heir of entail in possession, who pays assessment under the statute, is declared to be a creditor to the succeeding heirs of entail for three-fourths of the money paid; the person in right of the claim for the three-fourths being entitled, after the expiration of one year from the death of the heir who paid, to require the succeeding heirs to repay the three-fourths, with interest from the date of the opening of the succession to the succeeding heir, and upon granting to such succeeding heir a proper assignation. And if the three-fourths be not repaid within three months after requisition, it may be recovered in the same way as money expended under the statute 10 Geo. III. c. 51; the same rules of relief amongst succeeding heirs and their successors, provided by that statute, taking place also in regard to moneys expended on jail assessments. See 59 Geo. III. c. 61, §§ 15-17.

The statute 5 Geo. IV. c. 87 (commonly called Lord Aberdeen's Act), on the preamble that sundry entails contain no power to grant provisions to wives, husbands, or children, of the heirs of entail, and that, in other entails, by reason of the change in the value of money, and other causes, the provisions authorised to be granted are inadequate, makes the following provisions: 1. Every heir of entail in possession under an entail already made, or hereafter to be made, may infest his wife in a life rent annuity out of the entailed estate, not exceeding one-third part of the free yearly rent or value, deduct-

ing public burdens, liferent provisions, the yearly interest of debts and provisions, including provisions to children, and the yearly amount of all other burdens affecting the estate or the rents, and diminishing the value thereof to the heir in possession. 2. Every heir-female may infest her husband in a liferent annuity in the same manner to the extent of one-half of the free yearly rent or value, unless the lands be already burdened with a prior existing annuity granted to husband or wife under this statute, in which case the annuity to the husband must not exceed one-third part of the free yearly rent or value. 3. Where there are two subsisting liferents to wives or husbands, it is not competent to grant a third liferent to take effect until one of the former expire; but the power of granting may be exercised so as to increase a former liferent, or to grant a new one to the above extent, upon the expiration of a subsisting liferent, although the prospective or increased liferent may not take effect in the lifetime of the granter. 4. An heir of entail in possession may grant bonds of provision or obligations, binding the succeeding heirs of entail to pay, out of the rents or proceeds of the entailed estate, to the lawful child or children of the granter not succeeding to the entailed estate, such sum or sums of money, with interest from the granter's death, as he or she may think fit. But the amount of such provision to children must in no case exceed the following proportions of the free yearly rent or value of the estate—viz., for one child, one year's free rent or value; for two children, two years'; and for three or more children, three years' free rent or value for the whole. Such provisions, except in the case of the settlement thereof by a marriage-contract, are valid and effectual only to such child or children as are alive or *in utero* at the death of the granter, the provision of a child succeeding to the entailed estate being by that event extinguished for ever. 5. If any child to whom such provision has been granted marry, and if such provision, or any part thereof, be, with the consent of the granter, settled in the contract of marriage of such child, in the event of the child so marrying predeceasing the granter, the provision, or any part thereof, so settled in consideration of the marriage, is effectual in the same manner as if the child had survived the granter. 6. Where the powers of granting provisions to children have been exercised by one or more heir or heirs in possession to the extent of three years' free rent or value, as above, it is not in the power of any heir in possession to grant any further provisions until some part of the former provisions have

been paid or extinguished; but in that event, provisions to the extent of those paid or extinguished may be granted, to the effect of admitting the heir in possession to make provisions for children, so far as that power may remain open and unexercised by preceding heirs—so, however, that the provisions to be granted in no case exceed the above proportions of one year's free rent or value for one child, &c. Such provisions (except in the case of a settlement by a contract of marriage, as above) are available to such child or children only as are alive at the death of the granter, or *in utero* of his wife. 7. In every case in which the provisions granted to wives, husbands, or children, under this statute, exceed the before-mentioned proportions of the free rent or value, they are not deemed null and void, but may be set aside at the instance of any succeeding heir of entail to the extent of the excess, but no farther, the Court of Session being authorised to make the necessary order to that effect, on advising a petition from any of the succeeding heirs of entail. 8. No provisions to be granted under this statute can be made by any process of law whatsoever to affect the fee of the entailed estate; they only affect the yearly rents or proceeds. 9. After the expiration of a year from the death of the granter of the provisions to children, the person or persons having right to them may require the succeeding heir to make payment of them, with interest from the term at which the succeeding heir's right commenced. If the money be not paid within three months after requisition, the person or persons in right of such provision may institute an action in the Court of Session against the heir in possession for compelling payment; and decree being obtained, every kind of diligence or execution, authorised by the law of Scotland for recovering the payment of debts, may issue, except adjudication, against the entailed estate. 10. But any heir in possession sued for payment of provisions to children, granted under authority of this statute by any former heir or heirs, may be discharged from such suit upon assigning, or effectually conveying, to a trustee to be named by the Court of Session, one-third part of the clear rents or proceeds of the entailed estate, payable to such heir in possession during his or her life, or until the provisions to children have been paid off, the rent so assigned being applied in payment of the whole subsisting provisions. 11. No proprietor of an entailed estate is held to have committed any contravention, irritancy, or forfeiture, in consequence of granting the provisions authorised by this statute, notwithstanding any clause or pro-

vision in the entail to the contrary. 12. Nothing contained in this statute is to be held as diminishing or abridging the powers of the heir in possession in regard to the granting of provisions to his or her wife, husband, or children, where the entail authorizes larger provisions to be granted. But it is not competent to grant the statutory provisions over and above those authorised by the entail, so as to exceed in the whole the above-mentioned proportions of the free yearly rent or value. 13. Nor can the powers conferred by this statute, and by the statute 10 Geo. III. c. 51, be exercised in any case to such an extent as to deprive the heir of entail in possession of more than two third parts of the free yearly rents or proceeds. And the Court of Session is expressly authorised to give all necessary orders for relieving the heir in possession from the payment of more than two-thirds, by authorising the heir to retain any excess beyond the proper amount from the securities or provisions on the entailed estate least entitled to legal preference. Independently of the regulations made for provisions to wives and children by the above-mentioned statute, where the entail does not exclude the terce, and where provision is not otherwise made for the widow, the terce forms a legal burden on the entailed lands; and, upon the same principle, the husband, in similar circumstances, may enjoy the right of courtesy. See *supra*.

In determining what deeds are necessary for renewing the right in the person of an heir of entail, it is proper to attend to the distinction between an institute and an heir. The person first called to the tailzied succession, *i. e.* the disponee of the maker of the entail (whether he disposes to himself or to another), is called the institute, and all who succeed to him are, properly speaking, heirs of entail. The institute requires no service, but completes his title by resignation or by confirmation, under the procuratory of resignation or precept of sasine in the tailzie, as the case may be, or as he may think best. But on the death of the institute, whether he has completed his title or not, all those substituted to him in the destination must make up their titles respectively by service as heirs of tailzie and provision. Where the title of the institute has been completed under the entail, the next heir enters by a special service as heir of tailzie. Where the institute has not completed his title (*e. g.* where the institute has predeceased the maker of the entail, who has reserved a liferent to himself), the next heir in the opening of the succession must expedite a general service as heir of entail. The retour of the special service must recite the whole conditions, to-

gether with the irritant and resolute clauses of the entail. But as the object of the general service, as heir of entail, on the other hand, is merely to vest the heir with a right to the unexecuted procuratory of resignation and precept of sasine in the original deed of entail, it is not necessary that the retour should specify the conditions and provisions of the tailzie. The act 1685, c. 22, requires upon this point that the provisions and irritant clauses shall be repeated in all the subsequent conveyances of the tailzied estate to any of the heirs of tailzie,—the omission importing a contravention against the party and his heirs, who makes the omission. It would far exceed the limits of this work to give a detail of the many important questions in regard to entail law, and the construction of provisions and conditions in entails, which have come under judicial consideration. For such questions, reference is made to the following authorities: *Sandford on Entails*; *Stair*, B. ii. tit. 3, § 43, *et seq.*; *Bank*, B. ii. tit. 8, § 133, *et seq.*; *Ersk.* B. iii. tit. 8, § 22, *et seq.*; *Morr's Notes*, pp. lxxx., clxxvi., exc., ccvi.; *Bell's Com.* i. 44, *et seq.*; ii. 191, 259; *Bell's Princ.* § 1720; *Illust.* ib.; *Kames' Stat. Law Abridg.* h. 1.; *Sandford on Heritable Succession*; *Ross's Lect.* ii. 503; *Kames' Equity*, 85, 148, 235. See *Destination*. *Registration*. *Clauses Irritant and Resolutive*. *Diminution of Rental*. *Contravention*. *Conditional Institute*. *Institute*.

By the act 6 and 7 Will. IV. c. 42, 1836, heirs of entail are empowered to grant tacks of any part of the lands of an entailed estate, for any period not exceeding twenty-one years, and of any mines and minerals contained in the lands, for any period not exceeding thirty-one years; but all grassums are prohibited, and leases of the mansion-house, offices, garden, and policy, are limited to the lifetime of the heir granting the lease. The act also authorises the sale of entailed estates for payment of debts of the entailer affecting the estate. It also provides for the excambion of entailed estates. This act was amended by the act 4 and 5 Vict. c. 24, 1841.

Various amendments of the Law of Entail were introduced by the act 11 and 12 Vict. c. 36, 1848. By this act, an heir of entail in possession was empowered to disentail the estate in some cases without, and in other cases with, the consent of one or more of the substitute heirs. In the case of entails dated on or after the first of August 1848, an heir born after the entail, being of full age, is entitled to execute a disentail under the authority of the Court, without any consents being required. Born before the entail, he may do so with the consent of the heir-apparent, which expression is defined by the act to mean "the heir who



is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect." The heir-apparent, however, must have been born after the date of the entail, and at the time of giving his consent must be twenty-five years of age, and not subject to any legal incapacity.

In the case of entails dated *before the first* of August 1848, an heir born *after* that date is entitled to disentail the estate under the authority of the Court, without any consents being required. Born *before* that date, he may do so with the consent of the heir-apparent, provided he was born after that date, and is twenty-five years of age, and not subject to any legal incapacity. In all cases, the heir in possession may disentail the estate, if he is the only heir of entail in existence for the time, and unmarried; otherwise, he must obtain the consents of the whole heirs of entail, if there be less than three in being at the date of obtaining the consents, and also at the date of applying to the Court. If there are three or more heirs of entail in existence, he must obtain the consents of the three nearest heirs who, at the said dates, are for the time entitled to succeed to the estate, in their order successively, immediately after the heir in possession; or he must obtain the consents of the heir-apparent under the entail, and of the heir or heirs, in number not less than two, including the heir-apparent, who, in order successively, would be heir-apparent. In all these cases, the nearest heir of entail for the time, entitled to succeed immediately after the heir in possession, must be of the age of twenty-five years complete, and not subject to any legal incapacity.

Heirs of entail are also authorised to sell, charge, lease, and feu the estate with the like consents as would enable them to disentail it. They may also exchang the estate, in whole or in part, held under an entail, dated before the 1st of August 1848, with consent of the whole heirs, if there are less than three, or with the consent of the three nearest heirs, or with the consent of the heir-apparent, and of the heir or heirs, in number not less than two, including the heir-apparent.

One restriction, however, is made to affect the exercise of the power to disentail. Where an heir in possession under an entail, dated prior to the *first* of August 1848, or the heir-apparent, shall, together or separately, have secured by obligation in any marriage-contract the descent of the estate upon the issue of the marriage, it is not competent for either of them to apply for or to consent to the disentail of the estate until there shall be born a child of the marriage, capable of taking the estate; and who, by himself or his guardian, shall consent to the disentail, or

until the marriage shall be dissolved without such child being born, unless the trustees named in the contract, or the parties at whose right the provisions of the contract are directed to be carried into execution, shall concur in the application or consent.

An heir of entail entitled to succeed under an entail, dated before the 1st of August 1848, and who has contracted debt previous to the passing of the act, on the security or credit of his right of succession to, or interest in, the estate, is not entitled to give consent to a disentail, in opposition to the creditors in such debts. An heir-apparent under an entail dated before the said date, and who shall, after the passing of the act, have contracted debt on the security of his right of succession to, or interest in, the estate, is not entitled to consent to disentail, except under the like circumstances as would have enabled him to consent had the debt been contracted before the passing of the act. The creditors of an heir who is entitled to disentail without any consents, may affect the estate for payment of his debt.

An heir under an entail dated before the 1st of August 1848, who has obtained a decree for three-fourths of the expense of improvements, may grant a bond of annualrent, binding himself and the heirs of entail to make payment of an annualrent during his own life, and twenty-five years after, not to exceed the legal interest of the said three-fourths of the sum expended; and during the twenty-five years after his decease, not to exceed the sum of L.7, 2s. for every L.100 of such three-fourths. Where such heir shall execute such improvements subsequent to the passing of the act, and shall obtain decree for three-fourths of the expenditure, he is entitled to grant a bond of annualrent for payment of an annualrent during the period of twenty-five years from and after the date of the decree, or during such part of that period as may remain unexpired at the date of the bond, the annualrent not to exceed the sum of L.7, 2s. for every L.100 of the whole of the sums expended.

Where such heir of entail, whether before or after the passing of the act, has executed improvements of the nature contemplated by the Montgomery Act, and shall not have obtained decree, by reason of the provisions of that act not having been adopted, or not having been duly complied with, he is entitled, under the authority of the Court, to grant a bond of annualrent in the same manner as is provided in the case of improvements, for which decree in terms of that act has been obtained.

Where an heir of entail may be called upon to grant a bond of annualrent in terms of the act, he may also be called upon to charge the fee and rents of the estate, with

two-thirds of the sum, on which the amount of the bond of annualrent would be calculated in terms of the act. In no case can a bond of annualrent be the ground of an adjudication, and each heir in possession is bound to keep down the annualrents accruing during his possession; and the creditor in a bond of annualrent cannot attach the rents for more than two years' arrears of annualrent, except against the heir in possession, who is bound to pay the annualrent, and his representatives.

Provisions to younger children may be charged upon an entailed estate under the authority of the Court, and the heir in possession is bound to keep down the interest of such provisions. Wherever an estate may be charged with debt, it may also be sold for payment of debt. Feus and long leases may be granted, with the approbation of the Court, of portions of the estate, not exceeding in all one-eighth in value for the time. Money arising from the sale of any portion of the estate on account of any permanent damage to it under an act of Parliament, and money invested in trust for the purpose of purchasing lands to be added to the entailed estate, may, with the approbation of the Court, be applied in payment of entailer's debt, or in payment of any money charged on the fee of the estate under an act of Parliament, or in redemption of the land tax affecting the estate, or in permanently improving it, or in repayment of money already expended in improvements. Money vested in trust for the purchase of land to be entailed, may be dealt with as if it were the entailed lands; and provisions to wives and children may be granted out of money so vested.

An entail defective in regard to any one of the prohibitions against alienation, contraction of debt, and alteration of the order of succession, in consequence of defects, either in the original deed of entail, or in the investiture following upon it, is declared to be an invalid entail. A warrant, however, to record an entail in the Register of Tailzies, is declared to be equivalent to the insertion of irritant and resolute clauses in the entail.

The act of 1848 provides, that private roads made through an entailed estate shall be deemed to be improvements falling under the Montgomery Act, in the same way as enclosing, planting, and drainage under that act. It farther declares, however, that the Montgomery and Aberdeen Acts shall not apply to entails dated after the 1st of August 1848. The effect of this, however, was to cause the insertion in subsequent entails of the whole provisions in the Montgomery and Aberdeen Acts. Accordingly, by the act 16 and 17 Vict. c. 94, 1853, it was enacted, that where any entail, dated after the 1st of August 1848, declared these acts, or either of them, should

be applicable to the entails, the entail in these respects should be in the same position as if it had been dated prior to that date. It would have been better, perhaps, to have repealed altogether the provision on this subject in the act 1848.

In ascertaining a husband's or wife's provision under the Aberdeen Act, it is necessary to take into account the amount of the younger children's provisions, as forming a burden on the prior rental. In the same way, in ascertaining the amount of the younger children's provisions, it is necessary to take into account the provision in favour of the husband or wife. See the case of *M'Donald v. Lockhart*, May 18, 1836, 14 S. 785. The following simple method of ascertaining provisions under the Aberdeen Act has been furnished to the present edition.

I. Where a husband has granted provisions, to the full extent allowed by the act, in favour of his widow and younger children:—

1. In the case of a widow and one child, the interest of the provision of that child will be  $\frac{1}{3}$ ths of the whole free rental.

2. In the case of a widow and two children, the interest of the provision of such children will be  $\frac{1}{4}$ ths of the whole free rental.

3. In the case of a widow and three or more children, the interest of the provision of such children will be  $\frac{1}{5}$ ths of the free rental.

In all these cases, the amount of the children's provisions may be ascertained by multiplying the interest of them by 20; and the amount of the jointure may be ascertained by subtracting the interest of the children's provisions from the rental, and dividing the remainder by 3.

II. Where a wife has granted provisions, to the amount allowed by the act, in favour of her husband and younger children:—

1. In the case of a husband and one younger child, the interest of the provision of that child will be  $\frac{1}{4}$ th of the whole free rental.

2. In the case of a husband and two children, the interest of the provision of such children will be  $\frac{1}{5}$ th of the whole free rental.

3. In the case of a husband and three children, the interest of the provision of such children will be  $\frac{1}{6}$ ths of the whole free rental.

In all the above cases, the amount of the children's provisions may be ascertained by multiplying the interest of them by 20; and the jointure may be ascertained by subtracting the interest of the children's provisions from the rental, and dividing the remainder by 2.

To show the practical application of the above rules, it may be supposed that each of the cases occur in regard to an entailed estate of L.2000 a year free rental; and it may be remarked, that when there is one child, the provision of that child added to the jointure,

either of husband or wife, is exactly equal in amount to the whole free rental, and that one-half of the provision of two and one-third of the provision of three or more children added to the jointure will be equal to a year's free rental. This fact will be found of considerable use in checking any calculations made by means of the foregoing rules.

I. (1.) *Case of one Child.*

$$\pounds 2000 \div 59 = \pounds 33 \text{ } 17 \text{ } 11\frac{1}{2}$$

*Interest of Provision,*  $\pounds 67 \text{ } 15 \text{ } 11\frac{1}{2}$   
20

*Amount of Provision,*  $\pounds 1355 \text{ } 18 \text{ } 7\frac{1}{2}$

$$\begin{array}{r} \pounds 2000 \text{ } 0 \text{ } 0 \\ 67 \text{ } 15 \text{ } 11\frac{1}{2} \end{array}$$

3.  $\pounds 1932 \text{ } 4 \text{ } 0\frac{1}{2}$     644    1     $4\frac{1}{2}$  *{Widow's Jointure.}*  
 $\pounds 2000 \text{ } 0 \text{ } 0$

(2.) *Case of two Children.*

$$\pounds 2000 \div 29 = \pounds 68 \text{ } 19 \text{ } 3\frac{1}{2}$$

*Interest of Provision,*  $\pounds 137 \text{ } 18 \text{ } 7\frac{1}{2}$   
20

*Amount of Provision,*  $\pounds 2758 \text{ } 12 \text{ } 4\frac{1}{2}$

One-half whereof,  $\pounds 1379 \text{ } 6 \text{ } 2\frac{1}{2}$   
 $\pounds 2000 \text{ } 0 \text{ } 0$   
137    18     $7\frac{1}{2}$

3.  $\pounds 1862 \text{ } 1 \text{ } 4\frac{1}{2}$     620    13     $9\frac{1}{2}$  *{Widow's Jointure.}*  
 $\pounds 2000 \text{ } 0 \text{ } 0$

(3.) *Case of three Children.*

$$\pounds 2000 \div 19 = \pounds 105 \text{ } 5 \text{ } 3\frac{1}{2}$$

*Interest of Provision,*  $\pounds 210 \text{ } 10 \text{ } 6\frac{1}{2}$   
20

*Amount of Provision,*  $\pounds 4210 \text{ } 10 \text{ } 6\frac{1}{2}$

One-third whereof,  $\pounds 1403 \text{ } 10 \text{ } 2\frac{1}{2}$

$$\begin{array}{r} \pounds 2000 \text{ } 0 \text{ } 0 \\ 210 \text{ } 10 \text{ } 6\frac{1}{2} \end{array}$$

3.  $\pounds 1789 \text{ } 9 \text{ } 5\frac{1}{2}$     596    9     $9\frac{1}{2}$  *{Widow's Jointure.}*  
 $\pounds 2000 \text{ } 0 \text{ } 0$

II. (1.) *Case of one Child.*

$$\pounds 2000 \div 39 = \pounds 51 \text{ } 5 \text{ } 7\frac{1}{2}$$

*{Interest of Provision.}*  
20

$$\pounds 1025 \text{ } 12 \text{ } 9\frac{1}{2}$$

*{Amount of Provision.}*

$$\begin{array}{r} \pounds 2000 \text{ } 0 \text{ } 0 \\ 51 \text{ } 5 \text{ } 7\frac{1}{2} \end{array}$$

2.  $\pounds 1948 \text{ } 14 \text{ } 4\frac{1}{2}$     974    7     $2\frac{1}{2}$  *{Husband's Jointure.}*  
 $\pounds 2000 \text{ } 0 \text{ } 0$

(2.) *Case of two Children.*

$$\pounds 2000 \div 19 = \pounds 105 \text{ } 5 \text{ } 3\frac{1}{2}$$

*{Interest of Provision}*  
20

*Amount of Provision,*  $\pounds 2105 \text{ } 5 \text{ } 3\frac{1}{2}$

One-half whereof,  $\pounds 1052 \text{ } 12 \text{ } 7\frac{1}{2}$

$$\begin{array}{r} \pounds 2000 \text{ } 0 \text{ } 0 \\ 105 \text{ } 5 \text{ } 3\frac{1}{2} \end{array}$$

2.  $\pounds 1894 \text{ } 14 \text{ } 8\frac{1}{2}$     947    7     $4\frac{1}{2}$  *{Husband's Jointure.}*  
 $\pounds 2000 \text{ } 0 \text{ } 0$

(3.) *Case of three Children.*

$$\pounds 2000 \div 37 = \pounds 54 \text{ } 1 \text{ } 0\frac{2}{3}$$

*Interest of Provision,*  $\pounds 162 \text{ } 3 \text{ } 2\frac{2}{3}$   
20

*Amount of Provision,*  $\pounds 3243 \text{ } 4 \text{ } 10\frac{2}{3}$

One-third whereof,  $\pounds 1081 \text{ } 1 \text{ } 7\frac{1}{3}$

$$\begin{array}{r} \pounds 2000 \text{ } 0 \text{ } 0 \\ 162 \text{ } 3 \text{ } 2\frac{2}{3} \end{array}$$

2.  $\pounds 1837 \text{ } 16 \text{ } 9\frac{2}{3}$     918    18     $4\frac{2}{3}$  *{Husband's Jointure.}*  
 $\pounds 2000 \text{ } 0 \text{ } 0$

To prove the accuracy of the foregoing rules,—

Let  $a$  be the free rental ;  
 $x$  the jointure ;  
 $y$  interest of children's provisions ; then  
 $20y =$  children's provisions.

I.

(1.)  $x = \left( \frac{a-y}{3} \right) \dots (1.)$

$20y = (a-x) \dots (2.)$

$\therefore x = a - 20y \dots (3.)$

Equating values of  $x$  in (1.) and (3.):—

$$\frac{a-y}{3} = a - 20y$$

$$\therefore a - y = 3a - 60y$$

$$\therefore 59y = 2 \cdot a$$

$$y = \frac{2}{59}a.$$

$$(2.) \quad x = \frac{a-y}{3} \quad \dots \quad (1.)$$

$$20y = 2(a-x) \quad \dots \quad (2.)$$

$$\therefore x = a - 10y \quad \dots \quad (3.)$$

Equating values of  $x$  in (1.) and (3.):—

$$a - y = 3 \cdot a - 30y.$$

$$\therefore y = \frac{2}{29}a.$$

$$(3.) \quad x = \frac{a-y}{3} \quad \dots \quad (1.)$$

$$20y = 3(a-x) \quad \dots \quad (2.)$$

$$\therefore 3x = 3a - 20y \quad \dots \quad (3.)$$

Again from . . . (1.)

$$3x - a - y.$$

Equating these values of  $3x$ :—

$$3a - 20y = a - y$$

$$\therefore y = \frac{2}{19}a.$$

## II.

$$(1.) \quad x = \left(\frac{a-y}{2}\right) \quad \dots \quad (1.)$$

$$20y = (a-x) \quad \dots \quad (2.)$$

$$\therefore x = a - 20y \quad \dots \quad (3.)$$

Equating values of  $x$  in (1.) and (3.):—

$$\left(\frac{a-y}{2}\right) = a - 20y$$

$$\therefore a - y = 2a - 40y$$

$$\therefore y = \frac{1}{39}a.$$

$$(2.) \quad x = \frac{a-y}{2} \quad \dots \quad (1.)$$

$$20y = 2(a-x) \quad \dots \quad (2.)$$

$$\therefore 2x = 2a - 20y \quad \dots \quad (3.)$$

Equating values of  $2x$  in (1.) and (3.):—

$$a - y = 2a - 20y$$

$$\therefore y = \frac{1}{19}a.$$

$$(3.) \quad x = \frac{a-y}{2} \quad \dots \quad (1.)$$

$$20y = 3(a-x) \quad \dots \quad (2.)$$

$$\therefore 3x = 3a - 20y$$

$$\therefore 6x = 6a - 40y \quad \dots \quad (3.)$$

Again, from (1.):—

$$6x = 3a - 3y \quad \dots \quad (4.)$$

Equating values of  $6x$  in (3.) and (4.):—

$$3a - 40y = 3a - 3y$$

$$\therefore 37y = 3a.$$

$$\therefore y = \frac{3}{37}a.$$

See also on this subject "*Notes on the Pecuniary Interests of Heirs of Entail*," by William Thomas Thomson, Esq., Fellow of the Institute of Actuaries.

By the Titles to Land Act, 1860, where an entailor's debts, or other debts, or sums of money, may be made chargeable by adjudication, or otherwise, upon the fee of an entailed estate, the heir of entail in possession may, with the authority of the Court of Session, grant bonds and dispositions in security for such debts and sums of money, in the same manner as he is empowered to do by 11 and 12 Vict., c. 36, and 16 and 17 Vict., c. 94, in the case of provisions to younger children; and such bonds and dispositions in security may be granted in favour of any parties in right of such debts, and sums of money, at the date when such deeds are executed.

**Taxed Ward and Marriage.** See *Tenure Casualty. Marriage.*

**Taxes;** are supplies granted by the House of Commons, and confirmed by Acts of Parliament, constituting the extraordinary revenue of the Crown, and paid yearly towards the expenses of Government. It does not suit the plan of this work to give any view of the various statutes which have been passed connected with taxation. In so far as they may be considered as peculiarly connected with our law, all that seems necessary to be said will be found in the article *Public Burdens. Taxes* and the arrears of taxes are Crown debts. See *Crown Debt*. As to the supposed power of the magistrates of royal burghs to impose taxes with consent of the majority of burghesses, see *Ersk. B. i. tit. 4, § 22, and note by Ivory. See Stamp Laws. Land-Tax.*

**Taynt.** See *Attaynt.*

**Teind Court;** or *Commissioners of Teinds.* Several expedients to provide the reformed clergy with proper stipends having failed, a commission of Parliament was appointed by the act 1617, c. 3, to plant churches and modify stipends out of the tithes of every parish within the kingdom. Other commissions were afterwards granted, with powers to unite or disjoin parishes, to value and sell tithes, &c. The last of these commissions was authorised by 1693, c. 23; and by 1707, c. 9, the powers of it and of all former com-

missions were transferred to the Judges of the Court of Session, who, since that time, have continued to exercise the powers thus conferred on them, as a parliamentary commission, under the name of the *Teind Court*, or "*The Commission for Plantation of Kirks and Valuation of Teinds.*" This Court is distinct from the Court of Session, having a special jurisdiction, and a separate establishment of clerks and officers. The whole judges sit in one chamber, nine judges being a *quorum*; and the Court meets every second Wednesday during the sittings of the Court of Session, beginning with the second Wednesday after the meeting of the Court for the summer or winter sessions; 48 Geo. III. c. 138, § 15. The jurisdiction of the Court extends to all matters in which the former commission were authorised to judge; e.g., valuations and sales of teinds, augmentations of stipends, prorogations of tacks and of teinds, and (with consent of three-fourths of the heritors of the respective parishes) the disjunction or annexation of parishes, and the building of new churches, &c. An appeal lies from this Court to the House of Lords. See *Appeal*. The Teind Court has no power to put its decrees in force: this is done by the Court of Session on a bill presented at the Bill-Chamber, craving a warrant for letters of horning, which is granted, of course, and the letters pass the signet in the usual manner on *inducia* of ten days; 1633, c. 19. All summonses before this Court also pass under the signet of the Court of Session; but they, as well as the diligences on the decrees of the Teind Court, instead of being subscribed by a writer to the Signet, are subscribed by the clerk of the Teind Court.

By the Judicature Act, 6 Geo. IV. c. 120, § 54, a distinction was made between the judicial and ministerial duties of this Court. As to its judicial duties, it was provided, that from and after 11th November 1825, all actions for the valuation and sale of teinds, or of proving the tenor thereof, all actions of suspension or reduction of localities, and all actions of declarator or reduction connected with teinds, formerly competent before the Teind Court, should be brought before one or other of the Divisions of the Court of Session, which Division is to be held as a *quorum* of the Commissioners of Teinds. The procedure in such causes is to be assimilated to the procedure in ordinary cases in the Court of Session; the Lord Ordinary having the same power to determine and to report as in that Court, and his interlocutors being in like manner subject to review in the Division of the Court to which the cause belongs. By the same statute, it is enacted that all actions as to the localing of modified stipends, and

other causes formerly remitted by the Teind Court to a Lord Ordinary, are to be conducted as nearly as may be like Court of Session causes. The ministerial duties of the Commissioners of Teinds remain as before, including the plantation of kirks and valuation of teinds, the modifying of stipends, the uniting and disjoining of parishes, and, in general, the entire ministerial or discretionary jurisdiction of the former Teind Court. In furtherance of these statutory changes, the Act of Sederunt 12th Nov. 1825 provides for the enrolment of teind causes by the teind clerk, both before the junior Lord Ordinary, and in the Teind Court, properly so called; as also for the publication of a minute-book of teind causes: 6 Geo. IV. c. 120, § 54; A. S. 12th Nov. 1825. Thus, the ministerial duties of the Teind Court remain; 1. In proper augmentations. 2. In regard to small stipends under the statutes 50 Geo. III. c. 84, and 5 Geo. IV. c. 72. See *Small Stipends*. 3. In augmentations in order to exhaust the teinds, &c., so as to enable the minister to claim aid in Exchequer as for a small stipend, &c.; and, 4. In processes of transportation, annexation, disjunction and erection. The judicial duties again, which are in effect transferred to the Court of Session, are exercised, 1. In localing a modified stipend. 2. In processes of reduction of decrees of valuation, and of locality. 3. In provings of the tenor, of decrees of reduction and sale, or the like. 4. In processes of prorogation of tacks of teinds. 5. In processes of approbation of valuations of the sub-commissioners. 6. In processes of valuation of teinds. 7. In processes of sale of teind. 8. In cases where the record of a decret is not extant in the Teind Court, under 1707, c. 9, praying for a new extract; and, 9. In the combined process of valuation and sale of teinds; and in other proceedings of a like character, connected with teinds. On this subject, the separate articles suggested by the preceding enumeration may be consulted; as also the article *Teinds*; and the following authorities: *Ivory's Form of Process*, vol. ii. p. 415, *et seq.*; *Beveridge's Form of Process*, ii. 709, *et seq.*; *Ersk. B. i. tit. 5, § 21, et seq.*; *Stair*, B. ii. tit. 8, § 12, *et seq.*; *Mor's Notes*, p. cccxxvii.; *Connell on Tithes*, i. 254, *et seq.*; *Watson's Stat. Law*, voce *Commission of Teinds*, p. 341, *et seq.*; *Bank*. vol. ii. p. 61. See *Augmentation*.

**Teinds or Tithes.** Teinds or tithes are, in their original signification, the tenth part of the annual produce of the land and industry of the laity, which the clergy began, in the earlier ages of the church, to claim and to receive as a fixed provision for the maintenance of religious instructors. Teinds are of two

kinds, *personal* and *predial*. The former are unknown in Scotland. The latter, affecting the fruits of land, are either *natural* or *industrial*; of which the industrial correspond to the *mixed* tithes of some writers; *Stair*, B. ii. tit. 8, §§ 5-6; *Decretal*, L. 3, t. 30, c. 20; although others confine the term *mixed* to the tithes of cattle and their fruits; *Bank*, B. ii. tit. 8, § 136. In Scotland, until teinds came to be regulated by the valued rental, there was hardly any teinding of *natural* fruits; so that *predial* tithes of industrial fruits have all along, with a few local and consuetudinary exceptions, constituted the whole teinds leviable by the Church in Scotland. They consisted of the tenth of all profit produced by the application of industry to land; with the exception of certain lands, such as glebes, temple-lands, and those belonging to the Cistercian and other religious orders; and of lands, the proprietors of which have acquired their teinds from churchmen originally. They were leviable without any deduction, *propter curam et culturam* in favour of the possessor, and were of two kinds, *Parsonage* and *Vicarage*; of which *parsonage*, due exclusively to the parson, or others having right to the parochial benefice, and called *Decimæ Rectoriæ*, or *Decimæ Garbales*, were leviable from corn alone at the terms of Whitsunday and Michaelmas; 1672, c. 13. *Vicarage* teinds were paid to the vicar, if originally appointed by the patron; yet, where he was not, they also went to the beneficiary, who might make what agreement he pleased with assistants of his own appointment. Those teinds were drawn from all other and minor fruits, such as cattle, fowls, eggs, milk, hay, lint, fishings, &c., &c., not, as *parsonage* teinds, according to any general rule, but according to the usage of every individual benefice or parish. Hence, in *parsonage* teinds, although the negative prescription may destroy the right to those of each year, and although the positive prescription will operate in favour of one infest in his own *parsonage* teinds (*Bank*, B. ii. tit. 8, § 143), yet, because they are due by law, and form an inherent burden on the land, the right to levy them cannot be lost *non utendo*; whereas *vicarage* teinds are regulated, both in kind and in amount, by the use of payment; are established by use alone; and are lost by the negative prescription. *Ersk.* B. ii. tit. 10, § 10, *et seq.*; *Stair*, B. ii. tit. 8, § 5, *et seq.*; *Bank*, B. iii. tit. 8, §§ 134, *et seq.*, 206, *et seq.*

Prior to the Reformation, the Church, enjoying tithes *de jure communi*, had, besides, accumulated a great deal of landed property. But, notwithstanding this, the tithes were gradually almost entirely carried away from their proper destination, and the acting parochial clergy thus left in a state of compara-

tive indigence; 1st, By the consecration of tithes to other churches or churchmen not connected with the lands; 2d, By papal exemptions; 3d, By the infeudation of tithes to laymen. Religious houses were always, on account of their apparent sanctity and austerity, regarded by the laity with greater favour than that shown to the secular clergy. Donations and mortifications thus became frequent; and it often happened that, on the emerging of a vacancy in the parochial charge, patrons, considering themselves then absolute proprietors of the benefice which they had founded, appropriated great part of its tithes to some favourite monastery, and frequently, indeed, conveyed away to some religious institution the right of presentation also; thus making it, as it were, the perpetual beneficiary of the church annexed, with an unlimited power in restricting the clergyman's allowance,—a practice attempted to be checked by 1471, c. 43, but which continued to prevail till the Reformation. The Pope, too, was the presumed patron of all parochial charges to which no one else could show a valid right of presentation. Hence, in all these, his support of any religious order naturally took along with it a gradual diminution of the incumbent's provision, if not a complete transference of it; and where he was not the patron, the plenitude of his power enabled him, in any case, to exempt from all payment of tithe the lands (often very extensive) of churchmen and religious societies, and thus directly to rob the regular clergy. Moreover, grants of part of the tithes were often made by the patron, as opportunity offered, to needy lay friends. The religious houses, also, which had acquired rights to tithes, often profited, and, at any rate, saved themselves from odium and trouble, by the disposal of them to the Crown, or to lay subjects; and the practice became common, both of granting tacks of the tithes, and of feuing them out for payment of an annual feu-duty, with a grassum, notwithstanding various restraints upon the one, and prohibitions against the other; and also of feuing the landed property of the Church in the same way, *cum decimis inclusis et nunquam antea separatis*; a provision which transferred to the lay possessor the same exemption, after seven years' possession, which had formerly been enjoyed by the Church. These feus were, by 1564, c. 88, rendered void, unless confirmed by the Crown, but continued in practice—the Crown's confirmation being generally adhibited. In consequence of such a state of things, various measures were taken at different times, as by an Act of Privy Council, 15th February 1562, and by acts 1567, c. 10, and 1592, c. 161, to check this systematic spoliation of the parochial clergy; but suc-

cessively failed in remedying the evil, and were indeed rendered almost nugatory by 1606, c. 2. *Ersk. B. ii. tit. 10, §§ 15, 16, 17; Stair, B. ii. tit. 8, §§ 10, 11, 17, 18, 19.*

At the Reformation, the King, whether by resignation or by confiscation, became the proprietor of all Church lands, especially of those formerly belonging to religious houses, of whatever description, unconnected with parochial charges; and, on the death or dispersion of the abbots and priors, he first appointed lay commendators for life, and then created the monasteries and priories into temporal lordships, the grantees to which were styled *Lords of Erection*, or *Titulars of the Tithes*; thus transferring the possessions of the Church permanently into the hands of laymen holding of the Crown; while, at the same time, the Crown, coming in place of the Pope, became patron of every regular parochial charge to the patronage of which no subject could show a good title, and thus acquired a great accession to its influence. The *property* of the lands erected, and their *exemption* from tithe (where it existed), constituted the *temporality*, and the tithes themselves the *spirituality* of the *benefice*; and the Lords of Erection continued the exercise of the rights which their predecessors had exercised, in presenting such ministers, and assigning such stipends, as they chose; although a very limited independent provision was confirmed to the reformed clergy by 1572, c. 52.

These Lords of Erection themselves, however, soon became objects of jealousy, and their possessions objects of importance. It became, therefore, advisable to check the practice of erections; and, in consequence, by 1587, c. 29, all Church lands were inalienably annexed to the Crown, with the following exceptions: *1st*, Of the temporal lordships erected by the Crown, prior to the date of the act. *2d*, Of lands made over to hospitals, schools, and universities, and not diverted from their original uses. *3d*, Of benefices which, before the Reformation, had either been retained by the original lay patrons, or had been feued out to laymen by the Church; the feu-duties, on the Reformation, vesting in the Crown with certain limitations. *4th*, Of the manse and glebes of the Popish churchmen, which were not annexed, because regarded, like those teinds which were appropriated to parsonages and vicarages, as part of the spirituality of benefices, and were, like them, reserved either to the possessors at the time, or to the Protestant churchmen who were to come in their place. See 1593, c. 190. *5th*, Of certain pensions granted by the Pope, or his successor the King, or by bishops, with consent of the incumbent, provided they were either autho-

rised by the Lords of Council, or followed by possession. See 1606, c. 3. It remains a matter of doubt whether the act of 1587, c. 29, annexed to the Crown the *teinds* of benefices; *Erskine, B. ii. tit. 10, § 22*, maintaining that it did; while *Stair, B. ii. tit. 8, § 9*, and other writers, with more apparent correctness, maintain the reverse. Notwithstanding this act, further erections were made by the Crown, which gave rise to a second act, 1592, c. 121, voiding all erections subsequent to 1587, except those in favour of persons created, since that period, Lords of Parliament. On the restoration of bishops, the annexations of their benefices and those of their chapters were rescinded, respectively, by 1606, c. 2, and 1617, c. 2; but these measures were cancelled by the act 1690, c. 29, on the re-establishment of Presbytery; and the King has since applied the bishops' tithes to public uses and pensions. Thus, it appears that, after the Reformation, the whole teinds of the country belonged either to the Crown, to the Lords of Erection, called *titulars*, to the original founding *patrons*, or to the *feuars* from the Church,—the whole rights of the Church to teind being thus transferred to, and vested in, these parties. The teind was originally made effectual by *drawing* it; which was performed by the beneficiary carrying off from the ground every tenth sheaf, the remainder of the produce being termed the *stock*. This practice was attended with great inconvenience, and became a constant instrument of oppression, from the proprietor being obliged to allow his whole crop to stand on the ground, exposed to all the vicissitudes of the seasons, until the beneficiary should choose to draw away his teind. It became a frequent custom for the beneficiary to commute his tithes for either a certain yearly tack-duty, or a stated number of *rental bolls*; to which both parties were, under certain limitations, bound permanently to adhere. And it often happened that the beneficiary persevered in nimsiously delaying to draw his teind, for the purpose of thereby making better terms in any proposed arrangement with the proprietor. Various remedies provided for this evil by the acts 1606, c. 8, 1612, c. 5, and 1617, c. 9, were found to be in a great measure inoperative; so much so, that Charles I. was induced, soon after his accession, to execute a revocation of all grants of Church lands or of tithes made by James VI. to the Crown's prejudice; and, the year after, to bring a reduction of all erections, both those before and those after the Act of Annexation; of the former, on the ground that they proceeded on the resignations of the beneficiaries; and of the latter, on the ground that no annexation

to the Crown could be dissolved but by Parliament; and contending, 1st, That the titulars should yield to the Crown the superiority of the Church lands, and that a certain yearly annuity should be paid out of the tithes to the Crown. 2d, That the titular (*i.e.*, beneficiary) should sell the tithes to the proprietor at a fixed number of years' purchase; and that tithes set aside yearly for the support of the clergy, universities, schools and hospitals, should be valued at the suit of the proprietor, who, on payment either of the price, or of the valued yearly duty, should have the entire management of the crop, stock, and tithe.

All parties having interest entered, in 1628, into four submissions, referring to the King himself; the first and fourth signed by the Lords of Erection with their tackmen, and by the landlords,—the second by the bishops and clergy,—and the third by the commissioners of several royal burghs. On the 2d September 1629, the King pronounced separate decrees-arbitral. The first and fourth declare the King's right to the superiorities of erection, resigned to him by their submissions. They give 1000 merks Scots from him to the Lords of Erection, as the purchase-money of each yearly chaldar of feu-farm, or each 100 merks of yearly feu-duty or other constant rent of superiority, deducting an equivalent to the blench-duties,—the feu-duties to be retained until payment. All this is confirmed by 1632, c. 14; but the Crown's right of redemption was renounced, as unprofitable, by 1707, c. 11. See *Ground-Annual*. Still, however, there remained the other important provision—*viz.*, the power given to the heritor to have his teinds valued, and his yearly charge thus permanently fixed, and also to bring an action of sale against the titular or his tackman. The rule fixed as to the first was, on the one hand, that where, by whatever arrangement the teind, being under the management and in the possession of the heritor along with his stock, was of necessity joined with that stock in one common valuation, then the yearly duty payable by the heritor to the titular or beneficiary should be *one-fifth of that whole annual valuation of the rent of stock and tithe together*, which fifth was deemed a reasonable *surrogatum*, in place of a tenth of the whole *increase*; and, on the other hand, that, where the tithe was drawn every harvest by the titular, and its value thus admitted yearly of a proof separate from that of the stock, the commissioners appointed for the valuation of teinds were to take proof of its amount, and take its value *communibus annis*; which value the proprietor was to pay annually to him who had right to the teind, under deduction of a fifth, called the *King's Ease*, because

granted in his awards as an allowance of abatement to the proprietor. Where, however, the teinds, though drawn *ipsa corpora*, had been mixed with others, so as to prevent discrimination, or where the titular was not a party, their value was to be taken at one-fourth of the valued rent of the heritor's stock; *Campbell*, August 4, 1773; *Ersk. B. ii. tit. 10, §§ 24-33*. And the rule as to the second was, that where the seller had an heritable and unburdened right to his tithes, *e.g.*, that of the titular, he should be obliged to sell for nine years' purchase; and that, where the teinds were enjoyed by tackmen, or where the purchaser himself was tackman, the commissioners should allow a deduction regulated by the endurance of the tack, —a matter generally so arranged by them, that, while the titular or other seller received his purchase-money at the expiration of the tack, the tackman, whether the purchaser or a third party, retained in the one case, and drew in the other, the interest of the price during the currency. This is ratified by 1633, c. 17; but the limitation of the action of sale to two years after the valuation has been overlooked in practice; *Irvine*, May 14, 1794, *Mor. p. 15,698*. The grain, in which teinds have been already valued, must be valued at the medium fiars for seven years preceding. The King's decreets on the other submissions, were much to the same effect, except that the King's power of valuation extended to those only of the bishops' tithes which they did not actually possess by rental bolls or drawn tithe, but which were in tack or other use of payment.

In 1627 commissioners had been appointed by the king to fix his annuity; but, in order that the decrees-arbitral, in the valuations of teinds, might be executed under authority of a proper court, a commission was appointed by 1633, c. 19, with power generally to value and sell tithes, and approve the valuations of these sub-commissioners. Valuations were, under it, carried on for a long time, although part of the records were carried off by Cromwell, and others were destroyed by fire in the year 1700. By 1707, c. 9, the commission was renewed to the Judges of the Court of Session, who approved of the valuations of the sub-commissioners, which, however, may be derelinquished by the voluntary introduction of a different amount, not mode of payment, to the minister or titular; although a decree of the High Commission cannot be so derelinquished. *Ersk. B. ii. tit. 10, §§ 18, 31, 34, 36*; *Stair, B. ii. tit. 8, §§ 21, 22, 24, 35*; *Bank. B. ii. tit. 8, §§ 39, 99, 150, 154, 157, 200*; *Ivory's Form of Process*, vol. ii. p. 441.

The teinds vested in the lay patrons are in a different situation from those vested in the



titulars. When they lost the right of presentation by 1649, c. 39, they received, as an indemnification, all those tithes of the parish which had not previously been disposed of; and, when their right of presentation was restored by 1690, c. 23, their right also to these teinds was confirmed, "with the burden always of the minister's stipend, tacks, and prorogation already granted of said teinds, and of such augmentations of stipend, future prorogations, and erections of new kirks, as shall be found just and expedient, providing the said patrons, getting right to the teinds by virtue of this present act, and who had no right thereto before, shall be, likeas they are hereby obliged to sell to each heritor the teinds of his own lands at the rate of six years' purchase, as the same shall be valued by a commission for valuation of teinds." Thus, the heritor is entitled to have his teinds in all cases valued, and purchases them from the titular at nine years' purchase, and from the patron, where not titular also, at six years' purchase—this last privilege belonging to the heritor alone. But there are still certain teinds, which, though they may be valued, can never be bought by the heritor or feuar of the lands titheable: 1st, Teinds, either allocated to or belonging to ministers; 1690, c. 30. 2d, Teinds granted to colleges, schools, or hospitals. 3d, Teinds formerly belonging to bishops, and thereafter to the Crown on the abolition of Episcopacy, so long as these teinds remain with the Crown. 4th, Teinds which the heritor is bound to pay to a former heritor, or to a titular, his superior, who having either bought his own teinds, or enjoying the teinds of his own lands, retained them, in subsequently feuing out the lands to him. *Ersk. B. ii. tit. 8, § 37; Bank. B. ii. tit. 8, §§ 161-163.*

The action for valuation of teinds proceeds now before the Court of Session, by 6 Geo. IV. c. 120, § 54, and may be raised at the instance of the heritor, or sometimes of the minister. In the one case, the titular or his tacksman, and generally the minister, or, if there be none, the moderator of presbytery; and, in the other, the titular or tacksman, and the heritor, are made parties. A proof, if allowed, must be directed chiefly to the following particulars: 1st, Where the lands are in the natural possession of the proprietor, the fair and just rent of the lands must be proved under a nineteen years' lease, if arable, eleven years if pasture, and nineteen if partly both, with the usual clauses; *A. S. 12th Nov. 1825.* 2d, Where they are under lease, the full rents, whether in money or victual, and and in some cases kain, the amount of the grassum (if there be any), and the endurance of the lease, must be ascertained. 3d, All

deductions must be inquired into, such as the landlord's expense in supporting houses, a superabundance of buildings, the existence of orchards, woods, moss, mill-rent, machinery, manufactures, fishings, coal-pits, mines, minerals, extraordinary and not annual expense of culture, such as for embanking, draining, enclosing, and the improvement or creation of rent by uncommon exertion, as the banking off of the sea, the transference of any obligation by agreement from the tenant to the landlord, whereby the rent is raised, the letting of the lease in steelbow; all these create deductions from the titheable fund; and the tenant's obligation to relieve the landlord from the land-tax does not form part of the calculated rental; *A. S. 12th Nov. 1825.* As to grass, it is exempt from teind, where it is mere pasture, or where no industry has been exerted in its production, and where the cattle which it feeds are teinded; but where it forms part of a rotation of crops, and where it yields a return by being let for pasture, while the cattle which it produces are exempted, it is liable. No heritor can object to or reduce a valuation obtained by another; but a valuation reduced is null as to all parties. *Stair, B. ii. tit. 8, § 31; Ersk. B. ii. tit. 10, §§ 32-43; Bank. B. ii. tit. 8, §§ 152-3.*

Where the parsonage and vicarage teinds fall to be valued separately, as due to different titulars, 1633, c. 19, the yearly estimation of the vicarage, as one-tenth of the whole vicarage increase, is to be deducted from the fifth part of the joint stock and teind rental, and the remainder is the valued parsonage teind; *Ersk. B. ii. tit. 10, § 33; Bank. B. ii. tit. 8, § 155.* A titular cannot require a proprietor who has got his teinds valued, to infest him in the lands in security of the yearly duty; but a sale of teinds to the heritor is perfected by sasine, upon a conveyance which burdens him with all present and future impositions, absolute warrandice to the extent of the price being granted by the titular; 1633, c. 19. But, in many cases, as where tithes are due from office, or by statute, they vest *ex lege.* At any rate, they are always conveyed by titles distinct from those of the lands. See 1690, c. 23. The king's annuity has not been demanded out of tithes since 1674, by either our kings or their donataries; *Ersk. B. ii. tit. 10, §§ 38, 39, 40;* except in the case of sale on a decree, when the heritor is taken bound to relieve the titular or patron of it. *Bank. B. ii. tit. 8, §§ 156-160.*

Teinds are *debita fructuum, not debita fundi.* Their arrears, therefore, do not affect singular successors; and the right to them can be made effectual against the parties liable, without any real security. The king's annuity, too, and the annual valuation or pur-

chase-money of teinds, also continue of the same nature as that of which they are the surrogates, unless where the annual value is secured by sasine. Action, then, lies for arrears against none but such as have intromitted with them as teinds; whether the intromitter be the heritor or his tenant; and the titular's hypothec, which extended originally only over corns, is cut off by valuation. *Ersk. B. ii. tit. 10, §§ 42-44; Stair, B. ii. tit. 8, §§ 1-33; Bank. B. ii. tit. 8, § 134.*

The right, even to parsonage teinds, is cut off by the positive prescription. Prescription extends to all heritages; and, if tithes be contained in an infestment, it must be a good title for prescription of them, when of forty years' standing; for although tithes may exist in a patron's person without infestment, yet prescription cannot operate in favour of his disponee without infestment; and the prescription, though established, cannot defend him from future proportions of localised stipend in his due order, still less from the existing payment of stipend; although, in a case of *bona fide* possession on a grant *cum decimis inclusis* merely, and from one who was not a churchman, and therefore could not exempt, he would be still freed from payment of by-gones, which, until decree of valuation, must be the actual teind of each year. A grant of one kind of tithe includes no other. Tacks of teinds admit both of tacit relocation, and of prorogation by the commissioners. *Bank. B. ii. tit. 8, §§ 128-199; Ersk. B. ii. tit. 10, § 45; Connell, vol. ii. pp. 439-445.*

As to the mode in which the clergy are provided for out of the tithes, it may be observed, that there were formerly two descriptions of clergymen, of whom the first, the clergy of the bishops' mensal churches, were, in the period between the Reformation and the abolition of Episcopacy, at the mercy sometimes of the bishops, sometimes of the Crown, but have now permanent stipends modified to them by the commissioners from the bishops' tithes, now the king's. The second, whose stipends had never, since their original appointment, been given out, remained proprietors of the full tithe, until it was given, by 1649, c. 39, to the patron as a *solatium* for his loss of presentation, while a stated provision for them was imposed as a burden on the patron on his retention of the tithes, after recovery of the right of presentation. So that now every parochial minister is, in fact, a stipendiary either from the Crown or the titular (perhaps merely nominal) or the patron *qua* titular.

Besides the other powers granted to the commission of tithes by 1633, c. 19, they were authorised to modify reasonable stipends out of the tithes to the parochial clergy. By a

former commission (1617, c. 3), the lowest stipend modified was to be 500 merks Scots, or five chalders of victual, or the whole fruits of any benefice which might fall short of this, and the highest 1000 merks or ten chalders, the chalders of oatmeal being sixteen bolls, at eight stone to each boll. The act 1633 raised the *minimum* to eight chalders, or proportionally in money, amounting to L.44, 8s. 10<sup>3</sup>/<sub>4</sub>d. sterling; but it did not limit the commissioners in their alteration of the old *maximum* of ten chalders. So that they exercised a discretion in giving a stipend often exceeding it, when there was enough of free tithe in the parish, if they saw cause for so doing. This practice was continued by the Lords of Session after the commission was vested in them by 1707, c. 9; the respective teinds being valued either by decrees of valuation, or in any other competent way. It was, however, long held to be *ultra vires* of the Court to grant a second augmentation; but that idea has never been acted upon since 1789, and repeated augmentations have been given to the same stipend. By 50 Geo. III. c. 54, L.150 sterling is made the *minimum* annual value of any stipend, any deficiency of teinds being made up by Government. As to the process of augmentation, see *Augmentation*.

When the increase of stipend is granted, each heritor is liable in payment to the whole extent of his teinds if valued, or their rent, if let to him, although with right of recourse against the rest; and all intromitters whatever are similarly liable. Hence the process of augmentation is combined with what is called a locality, whereby the proportion payable by each heritor is allocated on him, after which he is liable for his share, and for no more. See *Locality*. The modified stipend is a *debitum fructuum* simply, like the teinds from which it is taken, and is free of all tacks and burdens whatsoever—1593, c. 162; so that no minister can do anything as to it, any more than as to the glebe or manse, to prejudice his successor. *Ersk. B. ii. tit. 10, §§ 46-50, 61; Stair, B. ii. tit. 8, §§ 7, 30; Bank. B. ii. tit. 8, § 164, et seq.; 48 Geo. III. c. 138, § 8.*

It is a rule strictly adhered to, that the teinds of one parish cannot be taken to provide stipend to the minister of another; and where any portion of the teinds of a parish has been so appropriated in former times, it may be reclaimed by the parish minister whenever the other teinds of his parish are inadequate to afford him a competent stipend. The Court of Session, as the commission of teinds, are empowered to unite parishes, or to disjoin or divide such as are too large, and to modify stipends out of the teinds to the addi-

tional ministers thereby rendered necessary; but under this qualification, that parishes cannot be disjoined or divided, except with the consent of three-fourths of the heritors, reckoning not by the number of the heritors, but by the amount of their valued rent within the parish. The following is the order in which the teinds of a parish are liable for payment of existing stipends and augmentations: 1st, Teinds never erected—*i. e.*, never granted by the Crown to any layman. 2d, Teinds which have been erected and are yet in the hands of the lay titular, including the tack-duties or rents drawn by the titular for teinds let in lease, and the feu-duties payable by parties having right to their own teinds, and holding them under the titular as superior. 3d, Teinds let in lease by the titular. 4th, Teinds heritably disposed by the titular, and the teinds of the titular's own lands. 5th, bishops' teinds; but teinds acquired by bishops after the Reformation are not held as such, but are localised on in the order in which they would have been liable, if still in the hands of those to whom they previously belonged. 6th, Teinds belonging to colleges or universities, or appropriated to other pious uses, including the teinds formerly belonging to the Chapel Royal. See *Campbell*, March 7, 1770; *Skene*, June 3, 1770, &c.; *Portmoak*, Dec. 9, 1795; *Ersk. B. ii. tit. 10*, §§ 51, 52; *Bank. B. ii. tit. 8*, §§ 168-170, *et seq.* An heritor may, after valuation, surrender his teinds, which surrender, however, will not diminish the amount of stipend localised; *Connell*, vol. ii. p. 295, *et seq.* Where, without any decree, heritors have been in the use of certain payments to the minister, no more can be demanded until an inhibition of tithes be raised at the instance of the patron or titular, or other person entitled to them; *Bank. B. ii. tit. 8*, § 179. In decrees of modification, an *extra* sum is generally allowed for communion elements; see 1572, c. 54, and 1593, c. 162; although no proper part of the stipend. See *Sacraments*. It cannot, however, be modified out of the stock, but must come from the teind; *Wilkie*, Feb. 13, 1793; *Logie*, June 17, 1772. Of course, this provision goes, not to the minister, but to the parish poor for all those years in which he does not administer the sacrament. It appears, from the third Report of the Church Commission, that the teinds at present in the hands of the Crown are—1st, Bishops' teinds; 2d, The teinds which formerly belonged to the Chapel Royal; and, 3d, The teinds which formerly belonged to the Abbey of Dunfermline. The greater part of the Crown teinds are held under leases, as to which a detailed account is given by the Solicitor of Teinds in the Appendix to the Report.

When teinds which at one time belonged to the Crown as bishops' teinds have been disposed to a subject, they lose the privilege of being postponed in the order of allocation of stipend; *Common Agent in Prestonkirk Locality v. Fergusson*, Nov. 14, 1846, 9 D. 61. Where an inhibition of teinds is not acted on, and the tack-duty is accepted after the inhibition has been used, the inhibition is held to be extinguished, and tacit relocation to have taken place; *Solicitor of Tithes v. Earl of Fife*, Dec. 4, 1799, *F. C.* See also the case of the *Lord Advocate v. Skene*, March 15, 1860, 22 D. 927. See generally, on the subject of teinds, *Connell on Tithes*; *Ersk. B. ii. tit. 10*; *Bank. vol. ii. p. 1, et seq.*; *Stair*, B. ii. tit. 8; *More's Notes*, pp. cccix., cccxxix., clxxi., cxxxviii., ccxcii.; *Bell's Princ. § 837, et seq.*; 1147, *et seq.*; *Illust. ib.*; *Kames' Equity*, 85; *Kames' Stat. Law Abridg. h. t.*; *Bell on Leases*, i. 132; *Hunter's Landlord and Tenant*; *Sandford on Heritable Succession*; *Sandford on Entails*; *Bell on Purchaser's Title*, 124-126; *Ross's Lect. i. 461*; *Hutch. ii. 425*; *Connell on Parishes*, 435. See *Stipend. Patronage. Glebe. Augmentation. Modification. Locality. Inhibition. Manse.*

**Teller.** See the form of a bond with cautioners, by the cashier or teller of a bank, in *Jurid. Styles*, ii. 61.

**Temple-Lands.** Temple-lands were originally the property of the Knights-Templars, an order which existed from 1128 to 1312, when their lands were variously disposed of. The exemption from tithe which attached to those lands, while in possession of the knights, adhered to them long after. *Bank. B. ii. tit. 8*, §§ 19, 207, 208; *Stair*, B. ii. tit. 8, § 7; *B. iv. tit. 24*, § 9; *Connell on Parishes*, 359; *Dunlop's Parish Law*, 115; *Brown's Synop.* pp. 294, 1201, 1202, 2317.

**Temporality.** The temporality of benefices, consists in such lands or other property (except tithes, manses and glebes) as may have accrued to the Church by gifts to, or purchases by, its members as such, and not *tantumquam quilibet*. It is opposed to the spirituality, and has been annexed to the Crown. 1587, c. 29; *Ersk. B. ii. tit. 10*, § 4; *Stair*, B. ii. tit. 8, §§ 9, 35; *Bank. vol. ii. pp. 1, 46*; *Connell on Parishes*, 358, 416, 421. See *Teinds. Spirituality of Benefices.*

**Tenant.** In Scotland, the term tenant is used only for the lessee or party to whom a lease is granted. But in England, a tenant is any one who holds or possesses lands or tenements, by any kind of title, either in feo, for life, for years, or at will. A tenant in dower is the possessor of lands in virtue of her dower; a tenant in mortgage is a possessor of lands by a mortgage, &c. *Tomlins' Dict. h. t.*

**Tender.** In an action of damages, a tender is a judicial offer made by the defender, of a specific sum in name of damages and of expenses down to the date of the tender. A tender is usually made in a separate minute or other writing, and need not be expressed according to any particular *formula*. All that is necessary is that it should contain a distinct offer of a specific sum in name of damages, along with the pursuer's expenses up to the date of the tender; with a *proviso*, that in the event of the tender being rejected, and the case going to trial, the pursuer is not to be entitled to read the tender to the jury, or to found on it as evidence at the trial. The effect of a tender in freeing a defender from liability for the subsequent expenses is stated in the article *Expenses*, p. 409. See also *Macfarlane's Jury Prac.* p. 289.

**Tenendas;** is that clause of a charter by which the particular tenure, *e. g.* *feu-holding*, is expressed; *Stair*, B. ii. tit. 3, § 16; *Ersk.* B. ii. tit. 3, § 24; *Bank*. i. 548, 688; *Bell's Princ.* § 761; *Bell on Leases*, i. 22; *Bell on Purchaser's Title*, 278; *Brown's Synop.* p. 2359; *Ross's Lect.* ii. 159, 290. See *Charter*.

**Tenementum;** the property of lands or other immovable subjects. *Stenc.* h. t.

**Tenor.** The tenor of a deed lost may be proved. See *Proving the Tenor. Casus Amisionis*.

**Tenure.** See *Holding*; and in addition to the authorities there cited, see *Swint. Abridg. voce Tenure*; *Jurid. Styles*, i. 546. See also *Feu. Burgage. Mortification. Non-entry. Escheat. Treason*.

**Terce;** is one of the two legal liferents known in the law of Scotland; being a real right constituted without either covenant or sasine, whereby a widow, who has not accepted of any special provision, is entitled to the liferent of one-third of the heritage in which her husband died infest, provided the marriage has endured for year and day, or has produced a living child. By the act 1681, c. 10, it is declared, that wherever a particular provision is granted by a husband to his wife, either in an antenuptial or post-nuptial contract of marriage, or in any other deed, the wife shall be thereby excluded from her terce, unless the contrary be expressly provided in the contract of marriage, or other deed containing the provision. This liferent can be affected by such burdens only as affect the husband's sasine, and bears no more than its proportion of any burden affecting the estate. Custom has excluded from the terce the mansion-house, where only one exists, burdens by reservation, rights of reversion, superiority and patronage, leases, feu-duties and burgage tenements. Lesser terce is that which is due out of lands still burdened with

terce to the widow of the former proprietor, and is therefore one-third of the remaining two-thirds, but extends to a complete third on the death of the former tercer. Where a husband has disposed property in which he stands infest, but dies before the disponee has taken infestment, the widow's terce will form a burden on the property so disposed, since the disposer was not feudally divested of it during his life; and this rule holds, even although, before the dissolution of the marriage, the disponee should have attained actual possession; *M'Culloch*, 10th July 1788, *Mor.* p. 15,866. And the same principle applies to the courtesy; *Bell on Purchaser's Title*, p. 353. Although the husband's infestment of fee at the time of his death is said to be the measure of the widow's terce, yet, if the infestment be reduced on account of informalities in making up the titles, the widow's claim to her terce will, notwithstanding, be good in questions with her husband's representatives. The terce is diminished by all real burdens completed by infestment before the husband's death. And, in a case in which a husband, a short time before his death, feued out the greater part of his estate by a single transaction, at a feu-duty greatly beyond its agricultural rent, it was nevertheless held, that the widow's right of terce did not extend to the feu-duties, but only to the rent of the land unfeued; *Nisbet*, Feb. 24, 1835, 13 *S. & D.* 517. No widow is entitled to her terce until she is regularly kened to it. See *Kenning to Terce*. See generally, on the subject of *Terce*, *Ersk.* B. ii. tit. 9, § 44, *et seq.*; *Stair*, B. ii. tit. 6, § 12, *et seq.*; *More's Notes*, cxxvi.; *Bank*. B. ii. tit. 6, § 11, *et seq.*; *Bell's Com.* i. 57, *et seq.*; *Bell's Princ.* § 1596, *et seq.*; *Illust.* ib.; *Bell on Completing Titles*, 87, 372; *Kames' Stat. Law Abridg. h. t.*; *Bell on Leases*, ii. 61; *Hunter's Landlord and Tenant*; *Sandford on Heritable Succession*; *Sandford on Entails*. See *Marriage. Brieve of Terce. Tailzie Liferent*.

**Term;** in judicial procedure, is a certain time fixed by authority of a Court, within which a party is allowed to establish by evidence his averment. If he fails to do so, at its expiration the term may be circumscribed against him at the desire of his opponent. But he will get a second term, or a prorogation of the first, on showing cause, and paying such previous expense as shall be modified at the time. *Stair*, B. iv. tit. 46, § 6, *et seq.*; *A. S.* 12th Nov. 1825. See *Circumduction*.

**Terms Legal and Conventional.** The term is the day at which rent or interest is payable. Terms are either legal or conventional. The legal terms are *Whitsunday*, the 15th of May, and *Martinmas*, the 11th of

November. Conventional terms are any terms agreed upon between the contracting parties. When the conventional are later than the legal terms, the rent is called backhand rent; when they are earlier, it is called forehand rent. See *Forehand Rent*. The terms at which rent is payable determine the period at which they are *in bonis* of the landlord, and therefore are of importance in settling the interests of heirs and executors, of liferenters and fiars, and of purchasers. In questions between fiar and liferenter, the conventional terms are not taken into account. These terms depend upon the special agreement between the landlord and tenant, and have no reference to the continuance of the liferenter's right. Thus, it may be agreed between the liferenter and his tenants, that they shall pay for the crop of one year at a certain term in the preceding year. This agreement does not affect the fiar, who is entitled to the rent of the year during which he is proprietor of the subject. Such questions, therefore, are settled by reference to the crops sown or reaped during the respective possessions of the fiar and liferenter. The crop is understood to be fully sown at the term of Whitsunday, and to be reaped at the term of Martinmas. Supposing the year, therefore, to run from Martinmas to Martinmas, if the liferenter survive the intervening Whitsunday, he is entitled to half the rent payable for the crop of that year: if he survive the succeeding Martinmas, he is entitled to the whole of the rent; *Kames' Elucid.* pp. 60 and 61; *Carnegie*, July 24, 1668, *M.* 15,887. Questions between heir and executor are settled by reference to what has arisen, or what has yet to arise from the land; the executors taking all the former, the heir all the latter, as accessory to the land. Rent in arrear at the ancestor's death goes to augment the moveable estate; and in determining the time at which it falls in arrear, a distinction is taken. Where the conventional term is earlier than the legal term, the conventional term is taken as the criterion for determining when the rent is *in bonis* of the landlord; where it is later, the legal term is taken as the rule. Thus, if the tenant enter at Martinmas, or at the separation of the crop in the year 1859, and bind himself to pay the rent for the year 1859-60, half at Martinmas 1859, and half at Whitsunday 1860, and if the landlord survive Whitsunday 1860, the executors will be entitled to the whole rent for the year 1859-60; whereas, if the legal term were adopted, they would only be entitled to half the rent. This doctrine was established in the case of *Marquis of Queensberry v. Montgomery*, Feb. 18, 1814, *F. C.* On the other hand, the

landlord transmits to his executors the rent legally due at Whitsunday, although not conventionally due till the Martinmas succeeding; *Innes*, Nov. 13, 1822, 2 *S. & D.* 3. In this way, the executors derive all the benefit of the anticipation, while they do not suffer by the postponement of the term. These rules are now too well established to be easily shaken. But it would appear more consonant to principle, that the conventional terms should either be invariably adopted, or not at all. The legal terms of payment in an ordinary lease have been extended to leases of grass farms, although in such leases Whitsunday, and not Martinmas, is the usual term of entry. Although, therefore, the tenant enter at Whitsunday 1859, and pay his rent by equal proportions at Martinmas 1859 and Whitsunday 1860, yet, should the landlord survive Martinmas 1859, it is held that his executors are entitled to the rent payable not only at that term, but also at the Whitsunday succeeding; *Johnson*, Feb. 1727, *M.* 15,913; *Elliot*, Nov. 28, 1792, *M.* 15,917; *Swinton*, June 20, 1809, *F. C.*, and other cases cited in *Bell's Illust.* ii. 234. The analogy of grass farms, again, has been extended to dwelling-houses; and it was found that the rent payable at the term succeeding the landlord's death is *in bonis* of him at the time of his death; *Binny*, Jan. 28, 1820, *F. C.* It appears from a note of Professor Bell's (*Illust.* ii. 235), that in this case there were gardens attached to the houses, which suggested the analogy of grass farms; but in a subsequent case the same decision was pronounced, where the question turned purely upon the right to the rents of dwelling-houses; *King*, Jan. 24, 1828, 6 *S. & D.* 422. The interest of moveable bonds is held to fall due *de die in diem*. The interest of heritable bonds, on the other hand, on account of the analogy which it bears to the rents of heritage, falls due only at the terms at which it is payable. In settling the rights of heir and executor, the conventional terms are adopted as the rule; and the interest payable at the term preceding the ancestor's death is alone held to be *in bonis* of him; the interest payable at the succeeding term goes to his heir; *Murray Kynynmond*, Nov. 6, 1739, *M.* 5415; *Lord Daer*, Feb. 27, 1740, 5 *Brown's Supp.* 695; *Elch. voce Herit. and Mov.* 11. The legal terms for payment of stipend, which regulate the claims of the family of a minister, are Whitsunday and Michaelmas, not Martinmas; because the stipend is understood to come from the tithes, which ought to have been drawn at Michaelmas; *Ersk.* B. ii. tit. 10, § 54. See *Minister. Ann.* For the terms of removing, see *Removing. Warning.* And generally, on the subject of this article,

see *Kames' Elucid.* Art. 9; *Ersk. B. ii. tit. 9, § 64*, and *Notes by Ivory*; *Stair, B. ii. tit. 8, § 33*; *B. iii. tit. 8, § 57*; *More's Notes*, p. cxxxix.; *Bank. ii. 109*; *Kames' Stat. Law Abridg. h. t.*; *Bell on Leases*, i. 213, 220, *et seq.*; *Hunter's Landlord and Tenant*; *Ross's Lect. i. 57, 290*; *ii. 237, 488*; *Bell's Princ. §§ 1204, 1230, 1499*; *Illust. ib.*

By the Apportionment Act, 4 and 5 Will. IV. c. 22, 1854, all rents, annuities, and other payments, made payable and coming due at fixed periods, under any instrument executed after the passing of the act, fall to be apportioned in such manner that, on the death of the party interested in the rents, &c., his executors or assignees are entitled to a proportion of them according to the time which may have elapsed from the commencement or last period of payment thereof, subject to all just allowances and deductions in respect of charges on the rents, &c. This statute was found applicable to Scotland; *Bridges v. For-dyce*, March 7, 1844, 6 D. 968; *affirmed*, Feb. 23, 1846, 6 Bell, 1.

In the application of this statute it has been held that the representatives of a landlord, who died after the term of Whitsunday, are entitled at common law to one half of the year's rent, and under the statute to the proportion accruing between the term of Whitsunday and the date of his death. See the case of *Campbell v. Campbell's Assignees*, July 18, 1849, 11 D. 1426; and also the case of *Blaikie v. Farquharson*, July 18, 1849, 11 D. 1456.

**Terræ Dominicales**; in old charters and indentments, "maines, or domaine lands, laboured and occupied by the proprietor." *Stems, h. t.*

**Territorial Jurisdiction**; was at one time universal, but, becoming formidable, was repeatedly discouraged by different acts, as 1455, c. 43 and 44, and 1 Geo. I. c. 50; and by 20 Geo. II. c. 43, all heritable jurisdictions, whether of barony, regality, sheriffship, stewardry, or any other, were abolished or annexed to the Crown, with the exception of those of admiralty, and an insignificant jurisdiction reserved to barons; so that almost all jurisdiction is now personal. *Ersk. B. i. tit. 2, § 12*. See *Jurisdiction. Heritable Jurisdiction.*

**Territory of a Judge**; is the district over which his jurisdiction extends in causes and in judicial acts proper to him, and beyond which he has no judicial authority; *Ersk. B. i. tit. 2, §§ 3, 15, et seq.*; *Kames' Equity*, 473. See *Jurisdiction. Judges. Justices of the Peace.*

**Test Act.** See *Oath.*

**Testament**; in the strictly legal acceptation of the word, is a deed in a writing, by

which the grantor appoints an executor—that is, a person to administer his moveable estate after his death, for behoof of all who may be interested in it—and of which the other clauses, if any, relate exclusively to moveables, and do not operate till the death of the grantor. A testament may thus consist merely of the nomination of an executor, or it may contain, along with such a nomination, clauses bequeathing, in the form of legacies, either the whole or part of the moveable estate. A deed, containing legacies without the nomination of an executor, is not strictly termed a testament, but a codicil. In its more common meaning, however, a testament is a declaration of what a person wills to be done with his moveable estate after his death. Any person has power to execute an effectual testament, who is of sound judgment at the time, although he be labouring under bodily sickness, or even be on deathbed. A wife has power to test without the consent of her husband; a minor without the consent of his curators; and a person interdicted without that of his interdictors. A pupil, however, has not the power to test, nor an idiot, nor a furious person in his furiosity. Neither, as the law formerly stood, had a bastard this power, except in favour of his lawful issue, unless he had obtained letters of legitimation; but by the act 6 Will. IV. c. 22, it is declared to be lawful "to bastards or natural children domiciled in Scotland, to dispose of their moveable estates by testament or last will, in like manner as other persons belonging to that country may do." See *Bastard*. A testament is effectual only with regard to the moveable estate of the testator. By such a deed, therefore, one cannot settle heritage, nor even such moveables as are rendered heritable by destination, and are carried by service, as bonds secluding executors, and the like. Even with regard to things strictly moveable, a person cannot effectually dispose by testament of more than that share of them which is termed the dead's part, as a testament which encroaches on the *jus relicta* or *legitim* may be reduced at the instance of the widow or children of the testator in so far as they are concerned. See *Legitim. Jus Relictæ*. A testament, containing the nomination of an executor, or the bequest of a legacy of greater value than L.100 Scots, is not valid, unless it be executed in writing, however small may be the value of the estate to which it relates. See *Nuncupative Testament*. It must be properly tested and signed before witnesses; but if it be in the testator's own handwriting, witnesses are not required. If the testator cannot write, a single notary may execute it for him in presence of only two witnesses; and in this case a minister is

authorised to act in place of a notary. In this, as in all other deeds, the intention of the granter must be clearly expressed; and if this be done, a testament will be effectual though not quite formal, especially if it be executed where men of skill in business cannot be had. See *Testing Clause*. As testaments do not operate till the death of the granter, they may validly be revoked at any time; and a clause declaring them irrevocable is ineffectual. The revocation of a testament may either be express, by the granter executing a writing for that special purpose, or implied by his making a new testament inconsistent with the former. As it is thus always the testament that may have been executed last which is effectual, deeds of this kind have obtained the name of last or latter wills. The effect of a testament is to authorise the Commissary Court to confirm, after the testator's death, the person who has been named executor, in preference to all others who may apply for the office; or, in other words, to empower that person to recover and administer the moveable property of the deceased, for behoof of all interested in it. With regard to the form of confirmation, and the duties and powers of executors, see *Confirmation*. *Executor*. Testaments are not of frequent occurrence in modern practice. The reason is, because they relate only to moveables. A person, in executing a will, generally wishes to settle his whole estate, whether heritable or moveable; and there are few cases—at least there are few in which a settlement can be necessary—in which the granter does not possess some heritable property, or may not come to be possessed of it before his death. The ordinary form, therefore, at present, in which settlements are prepared, is one which relates equally to heritage and moveables. *Stair*, B. iii. tit. 4, § 24, *et seq.*; tit. 8, § 20, *et seq.*; B. iv. tit. 43, § 21; *More's Notes*, p. cccxxxviii.; *Ersk.* B. iii. tit. 9, § 5, *et seq.*; and *Notes by Ivory*; *Bank* ii. 377; iii. 52; *Bell's Princ.* § 1862, *et seq.*; *Illust.* § 1692; *Robertson on Personal Succession*; *Kames' Princ. of Equity* (1825), 127, 325, 387, 453; *Kames' Stat. Law Abridg.* h. l.; *Watson's Stat. Law*, voce *Executors*; *Sandford on Entails*. For directions concerning the execution of a settlement, including heritage as well as moveables, see the article *Will*. See also *Disposition and Settlement*. *Legacy*. *Dead's Part*. *Executor*. *Confirmation*.

**Testator**; the granter of a testament, or more generally of a legacy.

**Testificate**; was a solemn written assertion, not on oath, used in judicial procedure, principally for instructing reasons of advocacy, or of suspension, where founded upon

matter of fact; although it did not prove in the principal cause. The term is now obsolete. *Stair*, B. iv. tit. 40, § 3; tit. 42, § 15; tit. 43, § 5.

**Testimonia Ponderanda non Numeranda sunt**; is a rule applicable to evidence. *Ersk.* B. iv. tit. 2, § 26. See *Evidence*.

**Testing Clause**. The testing clause is the technical name given to the clause whereby a formal written deed or instrument is authenticated according to the forms of the law of Scotland. The following is the usual form of that clause: *In witness whereof, these presents, consisting of this and the preceding pages, written by I. F. (designing him), on paper duly stamped, are subscribed by the said A. B. (the party), at the day of one thousand eight hundred and years, in presence of these witnesses, P. Q. and R. S. (designing them).* A. B.

P. Q., witness.

R. S., witness.

Of the particulars mentioned in this form, some are statutory, and some merely consuetudinary requisites. Thus the name and designation, or addition, of the writer,—the mention of the number of pages of which the deed consists,—and the names and designations of the witnesses, are statutory requisites. On the other hand, the attestation that the deed has been subscribed, and the mention of the date and place of subscribing, are consuetudinary requisites, the want of which would not annul the deed. Where marginal notes or additions have been made, or where parts of the deed have been erased or deleted, the name of the writer of the marginal note, as well as the extent and number of the erasures, must also be mentioned in the testing clause; and although it is not necessary that the whole deed should have been written by the same person, yet, where more persons than one have been engaged in that operation, the full name and designation of each writer must be inserted in the testing clause, and the portion written by each distinctly specified; all those particulars partaking of the character of statutory requisites. It is a frequent although a dangerous practice, not to fill up the testing clause at the date of executing the deed. It is not, however, illegal to delay filling up the testing clause, as that may be done at any time before the deed is judicially founded upon, or put on record. With regard to the witnesses to the deed, they must be of the male sex, and above fourteen years of age; they ought to know the party, and to see him subscribe, or be present when he acknowledges his subscription; and, in the latter case, they ought, immediately after the acknowledgment, to add their subscrip-

tions as witnesses. This is not necessary, however, where witnesses have seen the party subscribe; for in that case two witnesses may witness all the subscriptions, however numerous, and although adhibited on different days; and at last by subscribing once, respectively, as witnesses, they may attest the various subscriptions which they have witnessed. See *Instrumentary Witnesses*.

Subscription by initials is effectual, if it be admitted or proved to be the common method in which the party subscribes. But subscription by a cross or mark is altogether invalid; and, in general, it is the safer practice in deeds of importance, to avoid subscription by initials, and in that case, as well as where the party cannot write, to resort to notarial subscription. A witness who subscribes by initials seems to be wholly inadmissible, since whatever may be the case with regard to a party, there can be no occasion for choosing a witness who cannot subscribe his name in the usual manner.

Where notarial subscription is resorted to, the testing clause of the deed is written out as if the deed were to be subscribed by the party himself, and then the notaries add a doquet, certifying the directions received by them from the party, and the reason of his not subscribing himself. The doquet also states that the maker of the deed touched the pen, in token of the authority conferred on the notaries. Two notaries and four witnesses are required. The notaries sign in presence of each other as notaries and co-notaries; and a deed so executed is held in law to be as valid as if it were signed by the party himself.

In the case where the grantor of the deed is blind, the safest practice seems to be, to read over the deed to him, in presence of the notaries and witnesses; for, in such a case, it seems the better course to have the blind person's deed signed by notaries; although, in the recent case of *Lord Fife*, as decided in the House of Lords, 17th July 1823, where a deed by a blind person had not been so subscribed, it was held that the signature of the blind person does not require to be attested by notaries by the statute 1579, but that if it be attested, in the usual manner, by two witnesses, it is in law a probative deed, which lays upon the party challenging it the *onus probandi*; that the witnesses did not know the party, or see him subscribe, or hear him acknowledge his subscription; and that the party did not know the contents of the deed when he subscribed it. It was farther held in that case, that it is not a solemnity required by law that the deed should be read over to the blind person at the time of the execution, or at any other time; and that, if

such deed be duly executed and attested, the party's knowledge of the contents is presumed, until the contrary be proved. Where a party not totally blind had executed a deed by notaries, as if he had been blind, it was held in a reduction that the deed was valid, although, at its date, the party could subscribe his name, and was in the practice of subscribing writings requiring his signature; *Reid*, 19th Dec. 1837, 16 *D. B. & M.* 273. *Ersk. B. iii. tit. 2, § 9, Notes by Ivory; More's Notes on Stair*, pp. ccccli., ccccliii.; *Hunter's Landlord and Tenant; Brown's Synop.* p. 2717.

Testaments are so far favoured instruments, that if the testator cannot write, a single notary may execute the testament for him, in presence of only two witnesses; and, in that case, a clergyman is authorised to act in place of a notary; *Ersk. B. iii. tit. 2, § 23; Tait on Evidence*, pp. 97, 98; *Trails*, 27th Feb. 1805; *Mor.* p. 15,955. The statutes relating to the authentication of deeds are, 1540, c. 117; 1555, c. 29; 1579, c. 80; 1593, c. 175; 1672, c. 21; 1681, c. 5; 1696, c. 15; 1696, c. 25. And for a full account of the statutory and consuetudinary solemnities required in the execution of formal deeds, see *More's Notes to Stair*, p. cccxvi.; *Ersk. B. iii. tit. 2, § 7, et seq.; Bell's Com. i. 323; Bell's Princ. § 19; Bell on Purchaser's Title, 75, 279; Tait on Evidence*, 3d edit. 101-5; *Ross's Lect. i. 121, et seq. See Deed. Date of a Deed. Conveyancing. Subscription.*

In the case of *Thomson v. M'Crinnen's Trustees*, Feb. 1, 1856, 18 *D.* 470, affirmed 24th March 1859, it was held that the direction in the act 1696, c. 15, that "in deeds written bookways every page be marked by the number, *first, second, &c.*" is imperative, and a deed written on seven pages, and described in the testing clause to be written on "this and the six preceding pages," was held invalid, because the pages were not marked in terms of the statute. On appeal, this judgment was affirmed. By the act 19 and 20 Vict. c. 89, 1856, the above provision of the act 1696 is abolished.

**Thanus**; a name of dignity, supposed to be equal in rank to the son of an earl, because the *cro* or satisfaction was the same for the death of both. *Thanagium regis*, a part of the king's lands, governed by a person thence called Thane. Thane was likewise a servant; and "unter thane," an inferior servant or subject; *Skene, h. t.*

**Theft**; is the intentional and clandestine taking away of the property of another, from its legitimate place of deposit, or other *locus tenendi*, with the knowledge that it is another's, and the belief that he would not consent to its abstraction, and with the intention of never restoring it to the owner. The



distinction between the *infang thief*, or one taken while yet in sight, or with the *manour*, and the *oufang thief*, is now done away. But the present law makes a distinction between trifling theft, called *pickery*, which is punishable with corporal punishment, imprisonment in Bridewell, or fine, and theft properly so called. Simple theft has never been, by the law of Scotland, punishable capitally, unless aggravated. As, 1st, Theft by landed men, formerly punished as treason, but now not an aggravated theft. 2d, Theft under trust, if of a black description. 3d, Theft of the *majora animalia*, among which children are included. Sheep-stealing is made capital by statute; but capital punishment is not inflicted for the theft of one sheep only. The theft of a single horse or ox is punishable with death. 4th, Theft, to a great extent; although, in smaller cases, the value of the articles stolen merely regulates the degree of minor punishment. 5th, Theft, by one habit and repute a thief; a qualification to be established either by three registered convictions for theft, or by concurrent testimony, without exception, of those who have the best *causa scientiæ*, that the character and associates of the panel are thievish and disreputable. But if the principal charge is not proved, no conviction can follow on a proof of habit and repute; nor can it aid in the proof of the principal charge. 6th, Three acts of theft proved at once. 7th, Theft by breaking lockfast places. See *Lockfast Places*. 8th, Theft by housebreaking, which may be committed by unlawfully getting in by the usual place of entry in an unusual way (*e.g.* by force), or by simply going in or abstracting by an unusual access, or by *effractio* when already in the house. The crime is completed in all cases but the last, simply by removing from its place any article in the house. A house is understood to mean every tenement above a cart-shade, hen-house, or the like, if ever occupied. Housebreaking of itself is not indictable as such, but when coupled with intent to steal is subject to an arbitrary punishment. See *Housebreaking*. 9th, Theft to the amount of ten shillings from a bleaching green (18 Geo. II. c. 27), in punishing which, however, the judge has a discretionary power; and theft from the Post-Office, mail, or post-bags, also by statute, was formerly capital, but is now punishable with transportation for life. See *Post-Office Offences*. The High Court of Justiciary is alone competent to convict capitally for theft. *Hume*, vol. i. p. 56, *et seq.*; *Alison's Princ.* 250; *Steele*, 114; *Burnett*, 112; *Shaw*, 220; *Ersk. B. iv. tit. 4, § 58, et seq.*; *Bank. i. 6, 218, 275*; *ii. 164*; *Bell's Com. i. 470*; *Kames' Stat. Law Abridg. h. t.*; *Tait's Justice of Peace,*

*h. t.*; *Blair's do. h. t.* See *Housebreaking. Robbery. Breach of Trust. Swindling.*

**Theft-Bote**; is the crime of taking a reward from a thief to shelter him from justice, or of compounding with him, which was once punishable in private persons as theft, and in magistrates, &c., with death; 1515, c. 2; 1436, c. 137. These laws are now in desuetude, though the crime is still punishable. *Hume*, vol. i. p. 406, *et seq.*; *Ersk. B. iv. tit. 4, § 30*; *Kames' Stat. Law, h. t.*; *Brown's Synop. p. 531.* See *Bote*.

**Theme**. According to Skene, he who was infest with *theme* had a right to possess territorial bondmen or slaves; *Skene, h. t.*

**Things**; are objects of law, only in so far as rights in regard to them exist. They are, 1st, Things common, or the *res communes* of the Romans, which belong to all alike, as air, running water, wild animals, and unappropriated ground in countries where the sovereign is not held the proprietor. The sea, however, and its shores within water-mark, are common merely for the purposes of navigation, and in other respects belong to the community. 2d, Things public, *res publicæ*, which are common, not to the whole world, but to the estate or community, as navigable rivers, highways, harbours, bridges. With us, though their *use* is common, they are *inter regalia*, the sovereign being head of the State, and their use is often turned to profit. There are other things which fall to the Queen, not in her character of guardian of the State, but according to the maxim, *Quæ nullius sunt, cedunt dominæ reginæ*; such are game, royal fish, treasure trove, &c., many of which belong now to donataries. 3d, Things styled *res universitatis*, belonging to some lawful corporation or society, as a burgh, an hospital, &c., of which the use is with the individual members, and the property with the managers for the time; 1491, c. 36. 4th, Things sacred, called *res nullius*, because *juris divini*, of which there were a great variety under the Roman and Papal laws, but which have been unknown in Scotland since the Reformation, except in so far as they are *extra commercium* while sacredly employed, and as their price, when they are sold, is usually applied to some similar purpose. The heritors and inhabitants of a parish have a *quasi* right of property in them, *e.g.* in the seats, and area, and burying-ground of a church; and private burial-grounds are *juris privati*, and may be sold either separately or with the proprietor's other lands. See *Burying-Place*. Things are also moveable, such as pass constantly from hand to hand; or immoveable, *i. e.* the soil or houses, or things not separable, or not separated from the soil. Things have also been divided into corporeal, *i. e.* the *ipsa corpora*,

and incorporeal, *i. e.* rights; but if refinement is to be carried thus far, it will be found that the sole *property* in things consists in the *right* to receive or to use them. *Ersk. B. ii. tit. 1, § 5, et seq.; Bank. B. i. tit. 3, § 1, et seq.* See the different articles under *Res.*

**Thirds.** At one period, before the annexation of the year 1587, the king, in order to prevent the entire abstraction of their provisions from the acting clergy, and after other measures had proved ineffectual, assumed into his own hands a third of the revenues of all ecclesiastical benefices, which he intrusted to the Commissioners of Plat (1567, c. 10), who assigned to the ministers respectively sufficient provisions, and reserved the remainder for the king. *Bank. B. ii. tit. 8, § 164; Ersk. B. ii. tit. 10, § 17; Hutch. Just. ii. 427.* See *Teinds.*

**Thirlage;** is that servitude by which the proprietors or other possessors of lands are bound to carry the grain produced on them to a particular mill to be ground, for payment of the duties specified in the conveyance or other writing whereby the servitude is constituted. The principal duty is *multure*, consisting of a proportion varying from about one-thirtieth to about one-twelfth of the grain carried, or of the flour made, deliverable to the miller or other possessor of the mill under the proprietor, or to the proprietor or superior himself. The smaller duties of knaveship, bannock, lock and gowpen, called *sequels*, fall to the servants of the mill, according to the particular usage of each mill. The astricted lands are called the *thirl* or *sucken*, their possessors *suckeners*, and the multures which they pay *insucken* multures, in contradistinction to those paid by voluntary employers not thirled, called *outsucken* multures, and in general not nearly so much above the real value of the labour of grinding as the *insucken*, being commonly every twenty-fourth peck only. Thirlage is constituted by writing, directly or indirectly: *Directly*, 1st, By the proprietor thirling his tenants to his mill, which, however, requires the written or the tacit consent of these tenants. 2d, By his expressly reserving the thirlage of lands conveyed by him, even where the purchaser is to hold of his author's superior; for a proprietor need not be superior of all lands thirled. 3d, By the proprietor of a mill conveying it with the multures of formerly astricted lands, by implication and *per expressum* along with the multures of his own lands; which multures, however, can apply neither to lands in his own cultivation, nor to tithes, if not his own as purchaser or titular, even though acquired by himself posterior to the conveyance. *Indirectly*, By the lands in question being part of a barony; with these ex-

ceptions, that though the mill of the barony be made over as such, yet the expression, *with multures used and wont*, conveys merely the former thirlage; and that, if the baron, before his conveying the mill *cum astrictis multuris*, had feued part of the barony to another for a *reddendo, pro omni alio onere*, and with a clause of multures, though only in the *tenendas*, the feuar will be exempt from astriction. This is a doctrine which holds *a fortiori* where there is no erection into a barony. Thirlage, constituted by writing, may either express or not the nature and quantity of grain astricted. In the first case, it is either, 1st, Of *omnia grana crescentia* (comprehending even barley), with the exception of corn expended in sowing and cultivation, and of grain-rent payable unground, or of victual due to the titular, provided it is not consumed within the thirl, and of feu-duty. 2d, Of *grindable corns*, which is interpreted to mean, those corns alone which are ground for use within the thirl (and which the mill is fitted to grind), whether grown or bought with the price of grains grown on the lands, provided the surplus is not ground elsewhere. This second description of thirlage will not prevent a tenant from laying down his lands in grass, provided he do so in *bona fide*. 3d, Of *invecta et illata*, meaning *all grain brought within the thirl that tholes fire or water therein*, an expression which does not mean baking and brewing. This thirlage is imposed generally on burghs and villages. Thirlage may thus become twice exigible on the same corn; but where the two mills belong to one and the same proprietor, he cannot demand the multure twice over. In indefinite thirlage, the easiest is presumed where usage has not otherwise fixed it. Thirlage cannot be acquired by the long prescription alone (as other servitudes are) without some title, however irregular, except in mills belonging to the queen in property, *jure coronæ*, or to churchmen (*A. S. Dec. 16, 1812*), in whose favour thirty years' possession operates; and in *dry multures, i. e.* a yearly payment fixed in money or grain, whether the tenant grind his grain at the mill or not. But the kind and *quantum*, both of multures and sequels, and of services, may be fixed by prescription alone. Interruption for less than a year will not stop this prescription. Thirlage is extinguished for the time by the ruin of the mill, and permanently by discharge, or forty years' exemption, and could not be constituted by a voluntary grinding of corn at the mill, although immemorably practised. Two distinct actions are competent to one having a right of thirlage—*viz.*, a declarator of astriction, and an action of abstracted multures. The former is resorted to where the right of thirlage is denied, and the action must be

raised in the Court of Session; the latter where, without disputing the right, the mulcture is illegally abstracted. This last action may be raised before the Judge Ordinary. (See *Abstracted Mulctures*.) The act 39 Geo. III. c. 55, enables the proprietor of astricted lands, or of the mill, to petition the Judge Ordinary for commutation of the thirlage. In the consequent action, all concerned must be called; and the parties having stated, on the one hand the nature and extent of, and on the other the claims of deduction from, the servitude, the Judge Ordinary, subject to the review of the Court of Session, pronounces on the relevancy, and then pronounces an interlocutor, calling a jury to whom to refer the matter. Twenty-one heritors to the extent of L.30 Scots of valued rent, or tenants paying L.80 sterling yearly of rent, both within the county, must be called as jurymen to a certain day and place; and the proprietor of the mill commencing, each party strikes off one alternately until nine are left. This jury, after considering the evidence (taken in writing), the application, pleadings and decree on the relevancy, fix the annual payment and the kinds of grain which they deem a compensation for every restriction or prestation of the thirlage. An abridge of their verdict must, within sixty days, be recorded in the General or Particular Register of Sasines; and after three years from this recording, the verdict is safe from all review. See on the subject of thirlage generally, *Ersk. B. ii. tit. 9, § 18, et seq.*; *tit. 10, § 41*; *Bank. B. ii. tit. 7, § 38, et seq.*; *B. ii. tit. i. § 19*; *Stair, B. ii. tit. 7, §§ 2, 15, et seq.*; *More's Notes, p. cxxv., et seq.*; *Bell's Princ. § 1017*; *Illust. ib.*; *Kames' Stat. Law Abridg. h. t.*; *Watson's Stat. Law, h. t.*; *Hunter's Landlord and Tenant*; *Maclaurin's Sheriff-Court Process, 24*; *Hutch. Justice of Peace, ii. 400*; *Jurid. Styles, 142-3*; *Brown's Synop. h. t.*; *Ross's Lect. ii. 169, 496.*

**Threatening Letters.** By the law of England, as fixed by various statutes, the offence of knowingly sending any letter *without a name*, or with a fictitious name, demanding money or any other valuable commodity, or threatening (without any demand) to kill or murder, or to set fire to the house, or the like, is felony without benefit of clergy. Those statutes do not extend to Scotland; but by our common law, such offences are punishable arbitrarily, and have been punished by pillory and transportation for life. *Hume, i. 434, et seq.*; *Tomlins' Dict. h. t.*; *Shaw's Digest, p. 149.*

**Threats**; when used so as to infer *justum metum*, or even if less violent, when accompanied with importunity, will void a deed granted by any person while under their influence; *Stair, B. iv. tit. 40, § 26*; *B. i.*

*tit. 6, § 34*; *Ersk. B. iv. tit. 1, § 26*; *Bank. i. 266*; *ii. 377*; *Bell's Com. i. 296*; *Hutch. Justice of Peace, i. 382*; *Tail's do. h. t.*; *Blair's do. h. t.* Using threats of death to any person, or attempting or pretending to carry them into execution, in order to compel a confession of a real or supposed crime, is punishable at common law; *Alison's Princ. 631.* For threats, as incapacitating a witness, by their having been used either against or by him, see *Evidence*. See also *Force and Fear. Extortion.*

**Tigni Immittendi**; the Roman law urban servitude, whereby the servient proprietor was bound to permit the dominant proprietor to insert a beam or joist in the wall of the servient tenement. See *Support*.

**Timber, Growing.** Questions regarding the right to use growing timber may occur between the fiar and the liferenter, the landlord and tenant, and between the heir in possession under an entail and the next substitute. A liferenter may take any timber which is necessary to maintain the houses and other erections on the estate in proper repair; but he must give notice to the fiar before cutting it. Beyond this, the liferenter has no right to cut timber, unless it be such as grows again after being cut, or unless it be laid out in lots for annual cutting, when it is regarded as part of the crop. See *Liferent. Sylva Cædua*. Woods are reserved to the landlord *ex lege*. And even a lease of lands with "woods" gives only the power of cutting wood for repairing or building houses upon the ground, but not of selling or otherwise disposing of the wood. The tenant in such a lease may cut willows when young, as a crop, but he is not entitled to cut willow trees of a large size. A tenant selling or destroying the timber on his farm, renders himself liable to a claim of damages, or to certain statutory forfeitures. See *Planting and Inclosing*. An heir in possession under an entail is entitled to cut the timber as long as his possession lasts. In one case, in which an heiress of entail, who was eighty years of age, quarrelled with the next heir, and advertised a sale of all the planted timber on the estate, the Court refused to grant an interdict, although the heir offered the value of the whole if preserved; *Hamilton v. Viscountess of Oxford, Feb. 16, 1757, M. 15,408.* The Court have, in a few instances, granted interdict against the sale of unripe timber, or ornamental timber, necessary to the amenity of the mansion-house; but it has been remarked that it requires a strong case to authorise judicial interference. An heir of entail in possession cannot give a right to cut timber to last beyond his own life. See on this subject, *Stair, B. ii. tit. 3, § 73*; *More's Notes, clxxxvii.*; *Brodie's Sup. 897*; *Ersk. B. ii. tit. 9, § 58*;

*Bell's Com.* i. 52, 63, 176, 756; *Bell on Leases*, i. 82, 348; ii. 10, 299, 430; *Hunter's Landlord and Tenant*; *Bank.* i. 239; *Bell's Princ.* §§ 1046, 1058, 1224-6, 1303, 1754; *Illust.* ib.; *Ross's Lect.* ii. 175. The destruction or injuring of growing timber has been prohibited by different acts, as 1535, c. 11; 1698, c. 16; 1 *Geo. I.* c. 48; 6 *Geo. III.* c. 48; under various penalties, as fine, imprisonment, and by the first, even death; and in particular the act 1698, c. 16, ordains tenants and cottars to preserve the growing wood on their farms, imposes fines on them for injuries to it, and makes them liable for the acts of their household. See *Planting and Inclosing*.

**Timbrellum**; a kind of torment, as "stockes or joggles with which craftsmen, such as browsters," were punished. *Skene, h. t.*

**Timbrellus**; a little whale. *Skene, h. t.*

**Timbria**; or timmer of skins; an old Scotch mercantile term, signifying so much money as is "included within twa broddes of timmer," which was commonly forty skins; for in this way merchants used to bring home "martrik, sable, and other costly skins and furrings." *Skene, h. t.*

**Time.** See *Computation of Time*.

**Tin and Lead Mines**; are, by 1592, No. 12 (unprinted), freed from being annexed to the Crown as gold and silver mines are. *Ersk.* B. ii. tit. 6, § 16. See *Mines*.

**Tinnellus**; the sea-mark, the tide-mouth, the farthest part where the sea flows. *Skene, h. t.*

**Tinsel of the Feu**; is an irritancy incident to every feu-right, by the failure to pay the feu-duty for two years whole and together. It was established by the act 1597, c. 246. This is a penal irritancy, and therefore requires to be declared by an action; and if the vassal appear at any time before decree be pronounced, and pay the arrears, the irritancy will be discharged. There is sometimes an irritancy stipulated in the charter; and where such a clause is inserted, it was formerly the practice to allow the irritancy to take place, without the necessity of a declarator. But by the present practice, even where the statutory irritancy is fortified by a conventional irritancy, a decree of declarator of the irritancy is required, and the irritancy may be purged in the course of the action by payment of the arrear. See *Ersk.* B. ii. tit. 5, § 25, *et seq.*; *More's Notes on Stair*, c. vi.; *Bell's Princ.* § 701; *Illust.* ib.; *Kames' Stat. Law*, voce *Irritancy*; *Kames' Equity*, 150, 235; *Jurid.* *Styles*, iii. 184-6; *Brown's Synop.*, p. 280. *Napier v. Kincaid*, 8th Dec. 1743, *Elchies*, voce *Non-entry*, No. 2; *Collart v. Tait*, 15th Feb. 1782, *M.* 9313; *Mason*, 5th April 1557, *M.* 7180; *Kilbirny v. Crawford*, 22d

Dec. 1620, *M.* 7182; *M'Vicar v. Cochran*, 14th July 1748, *M.* 15,095; *Barholm v. Dalrymple*, 27th Nov. 1750, *M.* 7187.

**Tinsel of Superiority**; is a remedy introduced by statute for unentered vassals, whose superiors are themselves uninfest, and therefore cannot effectually enter them; 1474, c. 58. In such a case, the vassal must charge the superior to obtain himself infest in the superiority, within forty days, under certification that, if he fail, he shall "lose the tenant for his lifetime," i. e. lose the casualties that may fall to him through the act or delinquency of the vassal, besides making up the damage sustained through his failure. Mackenzie (in *Observ.* on 1474, c. 58) mentions an Act of Sederunt interpreting "for his lifetime" to mean the superior's lifetime. But no such Act of Sederunt now exists, and it has been assumed that the forfeiture is for the vassal's life; *Dickson*, 1st July 1802, *M.* 15,024. See the forms of a summons of declarator of tinsel of superiority, and of a horning on it, in *Jurid. Styles*, iii. 182, 758. See also *Stair*, B. iii. tit. 5, § 46, *et seq.*; B. iv. tit. 7; *Ersk.* B. iii. tit. 8, § 80; *Bank.* ii. 335, 431; *Bell's Princ.* § 736. See *Charge. Titles to Land*.

**Tithes.** See *Tithes*.

**Title to Exclude.** In an action of reduction, a title to exclude is a title in the defender preferable to that on which the pursuer founds. A title to exclude must be pleaded before taking a day to satisfy the production. A title to exclude may be sufficient, though it be part of the titles called for to be reduced; and if sufficient, it must be reduced before the pursuer can insist for a further production. If it be insufficient, the defender cannot produce a farther title to exclude. *Ersk.* B. iv. tit. 1, § 23; *Shand's Prac.* See *Reduction*.

**Title to Pursue.** There must be, at the raising of every summons, an *active title* in the pursuer, and a *passive title* in the defender, either express or implied. An active title, which may be either original or by progress, ought to be produced along with the summons; but accessory titles may be made up *cum processu*. The passive title means a capability to be decreed to pay, perform, suffer, permit, or not repugn. *Stair*, B. iv. tit. 38, § 18, *et seq.*; B. iv. tit. 39, §§ 17, 18; *Bank.* B. iv. tit. 23, § 20; *Bell's Com.* i. 742; ii. 258, 359, 583 *et seq.*; *Bell's Princ.* § 1268; *Illust.* ib.; *Kames' Stat. Law Abridg.* h. t.; *Hunter's Landlord and Tenant*; *Shaw's Prac.*; *Maclaurin's Sheriff-Court Process*; *Macfarlane's Jury Prac.*, 26. See *Interest. Judicial Procedure*. And as to the distinction between title to pursue and *persona standi in judicio*, see *Persona Standi*.

**Titles to Land.** Titles to land are the deeds and instruments by which lands are held,

whether in fee, in liferent, or in security. Lands may be held either of the grantor of the conveyance or of his superior. If they are conveyed to be held of the grantor, a new or original right is created. The grantor remains the vassal of his superior, and becomes the superior of the grantee. If the lands are conveyed to be held of the grantor's superior, the feudal relation of superior and vassal between the grantor and superior ceases on the grantee being entered with the superior. No new right is created, but the right formerly held by the grantor is transmitted to the grantee to be held by him under a new investiture in his favour. Conveyances of lands, however, are most usually granted with a double manner of holding. The infestment following upon such a conveyance imports a holding of the grantor until it has been confirmed by the superior. After confirmation, the character of a new or original right flies off, or is absorbed in the higher right holding of the over-superior. The right constituted by such conveyance is the same as if it had been granted under a conveyance with an *a me* holding merely. A charter confirming an *a me* holding, or a charter of resignation, by which lands which have been resigned by the proprietor to the superior in favour of any one are again given out by him to such person, are termed charters by progress, in contradistinction to original charters, where the feudal relation is constituted for the first time. Similar in their nature to charters by progress, in some respects, are precepts granted by a superior in favour of the heir of the last vassal. They are renewals of the last investiture in favour of the heir of the investiture. There is, however, this material distinction between charters by progress and precepts in favour of an heir, that in the case of charters by progress a new investiture is granted, while in the case of a precept to an heir no new investiture is granted, but only the former investiture renewed in the person of the heir entitled to succeed under it.

Recent legislation has very much simplified titles to land. In 1833 a commission was appointed to inquire into various legal matters, including the completion and transference of heritable rights. Their third report, which relates exclusively to this subject, was made in 1838. The first change following upon this report was made in 1845. Two acts were passed in that year, the Heritable Securities Act and the Infestment Act.

*Heritable Securities Act of 1845.*—By the first of these acts, 8 and 9 Vict. c. 35, where an heritable security had been constituted by infestment, the right of the creditor might be transferred, in whole or in part, by a short form of assignation; and the assignation, being

duly recorded in the Register of Sasines, was declared equivalent to a disposition of the security, followed by an instrument of sasine duly recorded, according to the previous law and practice. The title of an heir to an heritable security was allowed to be completed by a writ of acknowledgment recorded in the Register of Sasines, and granted in his favour by the person duly infest, of whom the security was held. Adjudgers of heritable securities were allowed to complete their title by recording in the same register the abbreviate of adjudication; and heirs duly served, and general disponees, were allowed to complete their titles by notarial instruments, duly recorded in the same register. The security might be renounced or discharged by a short form of discharge duly registered.

*The Infestment Act.*—By the second of these acts, 8 and 9 Vict. c. 35, the ceremony of giving sasine on lands not held in burgage tenure was declared unnecessary, and a recorded instrument of sasine was made to have the same effect as if sasine had been taken and the instrument of sasine had been duly recorded, according to the previous law and practice.

In 1847, four acts were passed by which various other changes were effected.

*Transference of Land Act.*—By the act 10 and 11 Vict. cc. 48 and 49, the transference of land was much simplified. The first of these acts applied to lands not held in burgage tenure, and the second to lands that were so held. Many of the clauses used in the conveyances of lands were greatly shortened, and conditions of entail were allowed to be referred to, if already appearing in the Register of Entails or in the Register of Sasines. In the same manner real burdens were also allowed to be referred to, if already appearing in the latter of these registers. Superiors were obliged to grant entries by confirmation as well as by resignation, and charters of confirmation were made to imply a general confirmation of all title-deeds of the lands. Precepts of *clare constat* were declared not to fall by the death of the grantor. Various provisions were also introduced for enabling a vassal, by judicial process, to obtain an entry where the superior's title was incomplete, and superiors might judicially relinquish their rights of superiority. General and special and general special charges were abolished, and actions of constitution were made equivalent to general charges; and actions of adjudication, following upon decrees of constitution, in the case of an ancestor's debts, or against an heir for his own debt, were made equivalent to special or general special charges, as the circumstances of the case required. Decrees of adjudication and of sale

were allowed to contain a warrant for infeftment, with a double manner of holding.

*Burgage Tenure Act.*—Similar provisions, in so far as applicable, were introduced by the act 10 and 11 Vict. c. 49, in regard to land held in burgage tenure, and the ceremony of taking infeftments in burgage subjects was dispensed with.

*Heritable Securities Act of 1847.*—The previous act of 8 and 9 Vict. c. 31, 1845, related only to the transmission of heritable securities already constituted by infeftment. The act 10 and 11 Vict. c. 50, 1847, related to the constitution as well as to the transmission of heritable securities, and a short form for such securities was given in the schedule to the act. An important distinction, however, was still continued between the constitution of securities over and the constitution of rights of property in land. Although the ceremony of infeftment was dispensed with by the act 8 and 9 Vict. c. 35, an instrument of sasine was still necessary to be expedite, and recorded in the Register of Sasines. An instrument of sasine, however, was dispensed with in the case of the deed of constitution of securities, and the registration of the security itself was made sufficient, in the same way as the registration of an assignation of an heritable security was made sufficient by the act 8 and 9 Vict. c. 31. A sale of the lands over which the security was constituted, by a creditor having the power of sale in his bond and disposition, was declared to be as valid and effectual to the purchaser as if made by the grantor of the security himself, although it should have been made after his death. No confirmation of the sale was required, either from him or his heir; and the same was declared to be good, although the debtor in the security, and in right of the land at the time of the sale, should be a pupil or minor, or subject to any legal incapacity. On the creditor who sold the lands consigning in bank the surplus of the price, his disposition to the purchaser was declared to have the effect of completely disencumbering the lands of all securities or diligence posterior to the creditor's bond in security, as well as his own security and diligence.

The benefit of the two Heritable Securities Acts was restricted by their terms to bonds and dispositions in security; but by the act 17 and 18 Vict. c. 12, 1854, it was extended to the constitution, transmission, and extinction of all heritable securities, as well as bonds and dispositions in security.

*Crown Charters Act.*—By the act 10 and 11 Vict. c. 51, 1847, signatures and precepts from Chancery were abolished, and draft charters and precepts were directed to be lodged with the Presenter of Signatures, and, when revised by him, engrossed in Chan-

cery. The ceremony of resignation in Crown lands was also abolished, and charters of confirmation were allowed to be granted in combination with precepts for infefting heirs. Conditions of entail and real burdens were also allowed to be referred to in charters, in the same manner as had been provided in regard to the transference of land by the act 10 and 11 Vict. c. 48.

*Service of Heirs Act.*—By the act 10 and 11 Vict. c. 47, the practice of issuing brieves from Chancery for services of heirs was abolished, and services were directed to proceed by petition to the sheriff of the county in certain cases, and in other cases to the Sheriff of Chancery. Where a general service only is intended to be carried through, the petition may be presented to the sheriff of the county within which the deceased had, at the time of his death, his ordinary or principal domicile, or, in the option of the petitioner, to the Sheriff of Chancery; but if the deceased had no domicile within Scotland at the time of his death, the petition must be presented to the Sheriff of Chancery. Where, again, a special service is intended to be carried through, the petition may be presented to the sheriff within whose jurisdiction the lands embraced by the service are situated, or, in the option of the petitioner, to the Sheriff of Chancery; but if the lands are situated in different counties, then the petition must be presented to the Sheriff of Chancery only.

The extract decree of service is declared to have the full legal effect of a service duly retoured to Chancery, and to be equivalent to the retour of a service under a brieve of inquest according to the former law and practice.

A decree of special service, besides operating as a retour, has also the operation and effect of a disposition from the party served to the heir served; and the decree is directed to contain a precept of sasine for infeftment of the party served; and infeftment following on the precept is declared to form, along with the decree, as effectual an investiture of the lands holding base from the party served to, until confirmed by the superior, as if such investiture had been created by a disposition from the party served to, with an infeftment following upon it. A decree of special service, however, is declared not to be transmissible for the purpose of infefting the heir or assignee of the person served.

No person is entitled to oppose a service under the act who could not competently appear to oppose a service under a brieve of inquest. Competing petitions may be presented, and in that case the proceedings may be advocated to the Court of Session, for the purpose of having the competition tried by a jury.

A special service is declared not to be equivalent to a general service in the same character except as to the particular lands embraced by it, and not to infer a general representation either active or passive, but to infer only a limited passive representation, the person served being liable for the debts and deeds of the deceased only to the extent of the value of the land embraced by the service. In any petition for special service as heir-of-line or heir-male, the petitioner may also pray for a general service in the same character. A general service may be applied for, and obtained to a limited effect, by annexing to the petition a specification of the lands to which the service is to be limited, and such service infers only a limited passive representation, the person served being liable for the debts and deeds of the deceased only to the value of the land contained in the specification.

*Titles to Land Act, 1858.*—No farther step was taken for simplifying titles to land till 1858, when the Titles to Land Act was passed. This act applied to absolute titles the principle which had already been applied to security titles. By the act of 1845 heritable securities might be transmitted without infeftment, and by the act of 1847 they might be constituted without infeftment. This principle is extended to all titles to land, by the act of 1858. Instruments of sasine are declared to be no longer necessary, and conveyances themselves are authorised to be recorded in the Register of Sasines, and the recording of a conveyance is made equivalent to a recorded instrument of sasine. Where it is not wished to record the whole of the conveyance, a notarial instrument is allowed to be expedite, setting forth those portions of the deed by which the lands were conveyed, in which a real right is desired to be completed. Instruments of resignation *ad remanentiam* are also dispensed with, and the recording of the procuratory held to be sufficient. In order to shorten the descriptions of lands in conveyances, it is made competent to refer to descriptions contained in previously recorded writs, and also to comprehend under one general name separate lands conveyed by the same deed, and to refer in future deeds to the general name, as including the several lands comprehended under it. The simplification of titles is also extended to charters. Instead of long charters of confirmation and resignation, containing descriptions of the lands, with all the burdens imposed upon them by the deed of conveyance, as well as containing the *tenendas* and *reddendo* of the original charter, short writs of confirmation and resignation, written upon the conveyances themselves, are authorised. Where, however, char-

ters separate from the conveyance are required, it is made competent, instead of inserting the *tenendas* and *reddendo* at length, to refer to them as set forth in any recorded charter or writ. The writs of *clare constat* introduced by this act do not direct infeftment to be given to the heir, but merely declare him to be the heir entitled to succeed to the land, to be holden by him in the manner specified in the charter or writ referred to.

The intervention of the Court, in the case of general disponees, is also dispensed with. Instead of bringing an adjudication against the heir of the granter of the general disposition, and thereafter completing a title by charter of adjudication and sasine, a general disponee is allowed to expedite a notarial instrument, in which the lands belonging to the granter, and conveyed by the general disposition, but not specially expressed in it, are set forth, and the recording of the instrument in the Register of Sasines completes the title of the general disponee.

In the case of entails, destinations may be referred to in subsequent titles to the entailed estate, instead of being repeated at length; and the clause authorising the recording of an entail in the Register of Tailzies is made to import a prohibition against alienation, contracting debt, and altering the order of succession, in the same manner as by the Entail Act of 1848 it had been made equivalent to the insertion of clauses irritant and resolute.

Judicial factors are authorised to complete their title to the estate placed under their management, by recording in the Register of Sasines the warrant granted by the Court for making up a title—the lands being specified in the judicial warrant. Trustees in a sequestration are allowed to complete their title to the bankrupt's estate by expediting and recording a notarial instrument, setting forth the warrant of confirmation and the lands belonging to the bankrupt.

Simpler modes of extinguishing mid-superiorities are also introduced. The interposition of the Court is no longer necessary to effect this object. A simple relinquishment of the superiority by the superior, followed by an acceptance by the vassal, written on the same deed, and by a short writ of investiture by the over-superior, also written on the same deed, effects the extinction of a mid-superiority.

The period before the lapse of which diligence could not proceed against apparent heirs is altered from a year to *six months*; and in actions of constitution and adjudication against an apparent heir, on account of his ancestor's debts, for the purpose of attaching his heritable estate, it is declared unneces-

ary to raise separate summonses of constitution and of adjudication, and the combination of both actions is made competent in one summons, whether he renounced the succession or not.

It is farther declared by the act, that all deeds, writs, and instruments whatever, may be partly written and partly printed or engraved.

*Titles to Land Act, 1860.*—By the act 23 and 24 Vict. c. 143, the provisions of the Titles to Land Act, 1858, are extended to lands held by burgage tenure, in so far as they were applicable to that mode of tenure. Instruments of sasine, or of resignation and sasine, on any conveyance of land held burgage, are no longer necessary, and the conveyance itself may be recorded instead. An heir in burgage subjects may complete his title by obtaining a writ of *clare constat* from the magistrates of the burgh, or a decree of special service before the Sheriff of Chancery or before the sheriff of the county within which the burgh is situated, in the same manner as if the land were not held burgage. Such writ of *clare constat* or decree of special service may be recorded in the appropriate Register of Sasines; and, when so recorded, it has the same effect as if cognition and entry of the heir had taken place, and an instrument of cognition and sasine in his favour had been expedite and recorded according to the former practice.

As some doubt existed in regard to the true meaning and effect of the words "to be holden in the same manner in which the granter of the conveyance held or might have held the same," which words frequently occur in the previous act of 1858, it is declared that these words are to be held to mean that the lands are to be held *a me vel de me* when the investiture of the lands contains no prohibition against subinfeudation, or against an alternate holding, and *a me* only when the investiture contains such prohibition. It is provided, however, that where the investiture contains such prohibition, a conveyance of the lands held under such investiture, on which an entry with the superior shall be expedite within twelve months from its date, shall have the same preference in all respects from the date of recording the conveyance in the appropriate Register of Sasines as if it had contained an *a me vel de me* holding, and as if the investiture had contained no prohibition against subinfeudation or against an alternate holding. At common law, all conveyances requiring to be confirmed by the superior can only rank as real rights from the date of the confirmation. This proviso, therefore, alters the common law principle; and enacts that where

the investiture prohibits subinfeudation or an alternative holding, an *a me* conveyance last recorded but first confirmed shall not have the common law preference over a similar conveyance first recorded but last confirmed, if the confirmation shall have taken place within twelve months from the date of the conveyance.

*Farther Simplification of Titles to Land.*—

Titles to land might still farther be simplified with advantage to the vassal, and without prejudice to the superior. The necessity of recurring to the superior on the vassal's death, and also on every transmission of the land by the vassal, ought to be dispensed with. Such recurrence to the superior ought not to be required, unless it is essential for the protection of the superior's rights. The rights of the superior, however, might be sufficiently protected if the conveyance by the vassal were granted under burden of the whole clauses of the original charter by which the feu was first constituted, or of any subsequent charter by progress, by which it was renewed. For this purpose the charter, as recorded in any public register, or the infestment following upon it, where that was competent, as recorded in the Register of Sasines, ought to be specially referred to in the vassal's conveyance. The party appearing in the Register of Sasines as proprietor should always be held to be the vassal in the lands; and on the death of the last vassal who had paid for an entry, such party should be liable to the superior in payment of a composition, or other casualty, exigible on that event. In this way, if the party appearing on the register was a singular successor in the land, a composition would be due to the superior, and he would not be prevented from demanding it by the heir of the former vassal offering to enter, and so saving the singular successor payment of the composition. An advantage would thus be obtained by the superior. Crown vassals should be authorised to purchase the whole duties payable by them; and on that being done, the recurrence to the Crown on any conveyance by the vassal ought to be dispensed with. A statute authorising these changes, would complete the simplification of the law of real property in Scotland.

**Titles of Honour;** go to the heir where there is no destination, and may be taken up without inferring representation under the passive titles. The eldest of heirs-portioners, where the title is not otherwise limited, takes a title of honour. *Ersk.* B. ii. tit. 2, § 6; B. iii. tit. 8, § 86; *Stair*, B. iii. tit. 5, § 11; *Bank.* B. i. tit. 2, § 32; B. iii. tit. 5, § 83; *Bell's Princ.* §§ 1659, 1679; *Brown's Synop.* 1022. See *Baron. Election Laws. Nobility. Dignities.*



**Titles, Active and Passive.** See *Passive Title. Representation.*

**Titular.** See *Teinds.*

**Tocher**; is the marriage portion, or *dos*, which a wife brings to her husband, *intuitu matrimonii*, as provided in her marriage settlement; not what she otherwise acquires or succeeds to during the subsistence of the marriage. The tocher is presumed to be given in satisfaction of all other provisions by, or claim against, her father; and, on the dissolution of the marriage within year and day, without a living child, the tocher returns to the contractor, not to the wife or her representatives. *Bank. B. i. tit. 5, § 121; tit. 6, § 5; tit. 10, § 77; Stair, B. i. tit. iii. § 19; tit. 8, § 2; Ersk. B. i. tit. 6, §§ 38, 46, 47, 48, note by Ivory; Bell's Com. i. 833. See Marriage. Liferent. Husband. Contract.*

**Tolbooth**; the old word for a burgh jail, so called from that being the name of a temporary hut of boards erected in fairs and markets, in which the customs or duties were collected, and where such as did not pay were confined. *Ross's Lect. i. 319.*

**Toleration Act.** The act 10 Anne, c. 6, allows all sectarians in Scotland to meet for religious service, in any place but a parish church or chapel, as they think fit. It imposes a fine of L.100 on those who disturb them; and allows the Episcopal clergy in Scotland to perform the ceremony of marriage, and to administer the sacraments. *Bank. i. tit. i. § 53; Kames' Stat. Law, vocibus Religion, Papist; Hutch. Justice, ii. 224, 318, 328. See Papist. Roman Catholic. Episcopalian.*

**Tolls**; are placed at turnpikes by road-trustees acting with discretionary powers under authority of Parliament. It would appear that toll was formerly used for custom of any kind. *Skene, h. t. See, as to tolls, Barclay's Law of the Road; Kames' Stat. Law Abridg. h. t. See Road Trustees. Highways.*

**Top Annual**; mentioned along with *ground and feu* annuals in 1551, c. 10, as a real burden on houses within burgh; connected in that act with the burnings of houses within burgh, effected at different times, by the English. *Skene, de Verb. Sig. voce Annual; Craig, lib. i. dieg. 10, § 38; Stair, B. ii. tit. 5, § 7; Ersk. B. ii. tit. 3, § 52; Kames' Stat. Law, h. t.; Ross's Lect. ii. 326. See Ground-Annual.*

**Torrallium**; a kiln. *Skene, h. t. See Kiln.*

**Tort**; injury, "non-reason, unreason, wrang or unlaw." *Skene, h. t. See Injury.*

**Torture.** The application of torture for the discovery of crime was declared contrary to law by the Claim of Right in 1689; and

by 7 Anne, c. 21, § 5. *Ersk. B. iv. tit. 4, § 96; Bank. ii. 660; Kames' Stat. Law, h. t.*

**Toscheoderache**; an office or jurisdiction, formerly common in the Highlands and Islands, "not unlike to a baillierie." *Skene, h. t.*

**Towers.** See *Fortalice.*

**Town-Clerk**; the clerk to a corporation or burgh-court in Scotland. The town-clerk acts as notary in all infestments granted of burgage property. But in a case in which the town-clerk himself succeeded to property within burgh, the sheriff-clerk was authorised to act as notary in giving infestment; and a complaint by the magistrates that this was an encroachment on their rights was dismissed; *Duff, Jan. 16, 1823, 2 S. & D. 117.* It is illegal to elect a town-clerk removable at pleasure; and even when he is so elected, he cannot be removed but on just cause; *Simpson, June 17, 1824, 3 S. & D. 150.* A town-clerk having been appointed for five years, and the council at the end of that period having elected another person, it was found, in a suspension and interdict, that he was not summarily removable, and the council was interdicted from carrying the new appointment into effect; without prejudice to any declarator the council might be advised to institute for having it found that the office came to an end at the lapse of the stipulated period; *Farish, Nov. 22, 1836, 15 D. B. M. 107.* It is not competent to try the right to the office of joint town-clerk in a summary form; *Drysdale, June 30, 1825, 4 S. & D. 126.* A town-clerk is not a magistrate; and, accordingly, a charge, in which he, along with the magistrates, was charged to perform the town's obligations, was found null; *Drumlanrig, 15th Jan. 1624, M. 13,089 and 2509.* The town-clerk of a royal burgh is the proper custodian of the burgh records, and is entitled and bound to give extracts therefrom, without being subject to interference on the part of the town-council; *Spence, July 6, 1830, 8 S. & D. 1015.* And a town-clerk who declined to give extracts from the records, to enable a party to complain against an election of magistrates, was found liable in expenses, although he furnished them on being served with a complaint; *Tod, June 17, 1824, 3 S. & D. 153.* See also *Gardiner, Dec. 11, 1823, 2 S. & D. 571. See Bell's Princ. § 844; Shaw's Digest, p. 484; Magistrates of Annan, Dec. 5, 1835, 14 S. & D. 111. See Burgh Royal. Burgage.*

**Town-Council**; as to the functions and election of the town-council of royal burghs, see *Burgh Royal. Magistrate.*

**Town-Hall.** The town-hall of a burgh is not subject to the diligence of the creditors

of the burgh; *Phin*, 22d May 1827, 5 *S. & D.* 690. See *Burgh. Community.*

**Tractus Futuri Temporis.** See *Heritable and Moveable.*

**Tradition;** is necessary to every conveyance of property where the acquirer has not already the custody or possession. Tradition is either actual, or, where actual is impracticable, symbolical; *Ersk. B. ii. tit. 1, § 18, et seq.*; although, in some cases, the want of symbolical cannot be supplied even by actual possession. *Stair, B. iii. tit. 2, §§ 5, 6, et seq.* See *Delivery, and authorities there cited. Symbols. Possession. Sasina.*

**Traistis;** in old law language, a roll or catalogue, containing the particular dittay taken up upon malefactors, which, with the "portuous," was delivered by the Justice-Clerk to the "Crownier," that the persons enumerated in the portuous might be attached, conform to the dittay contained in the traistis, so called because committed to the "traist," faith, and credit of the clerks and crownier. *Skene, h. t.*

**Transaction;** is any agreement between two parties tending to the settlement of doubtful and controverted claims. It does not apply, in strictness, to mere contingencies. The sentence of a court, if subject to review, does not exclude it. It may be entered into by any one who can lawfully administer his own affairs, or those of others. It has been observed, that of all agreements, the transaction or arrangement of doubtful rights is the most difficult to set aside; *Campbell Stewart*, Nov. 22, 1836, 15 *D. B. M.* 112. Transaction with regard to moveables cannot be proved by witnesses; but acquiescence in an alleged transaction may be inferred from the subsequent conduct of the party, and the facts and circumstances establishing it may be proved by witnesses. *Stair, B. i. tit. 17, § 2; Bank. B. i. tit. 23, § 1; Kames' Equity*, 181, 365; *Tait on Evidence*, 303; *Tait's Justice, h. t.; Blair's Justice, h. t.*

**Transference;** is that step whereby a depending action is transferred from a person deceased to his representative. An action of transference *active* is rendered unnecessary by 1693, c. 15, the pursuer's representative producing merely his titles, *vis. retour*, confirmed testament, or special assignation. Where the pursuer's representative, however, declines insisting, the defender has a remedy by action precisely similar, with conversion of terms, to the action of transference *passive*, which remains just as before 1693, and the statutes against the representative of a deceased defender, declining to sist himself. Where the heir is representative, a transference cannot, unless he has intromitted, proceed against him within the *tempus deliberandi*; but after

that the pursuer may then transfer the action *passive* against him, whether he be served heir or not, by summons of transference, libelling simply the active and passive titles, and the conclusions of the original summons, and proceeding on one diet of six days. It is called and enrolled as an ordinary summons. When an interlocutor of transference *in statu quo* has been pronounced, the process is borrowed up and lodged in the principal process, which then proceeds. When defences against the transference are lodged, and a long litigation appears to be likely, it is usual to remit the process *ob contingentiam* to the Ordinary in the principal cause. The representative of a defender is entitled to sist himself in the principal cause, though the pursuer oppose his so doing, and be unwilling to proceed with his action. But where the pursuer dies, and his heir does not insist, an action of transference must be raised against him. Where it is doubtful whether the party is the representative of the deceased or not, decree of transference is pronounced, reserving defences against his liability, and these are discussed in the principal cause. Transferences are competent to inferior judges only when the representatives reside within their jurisdiction, and the principal cause is in dependence before them. Where the representatives reside in a different jurisdiction, or are furth of the kingdom, the transference must be raised before the Court of Session, and the principal cause advocated *ob contingentiam*. The Court of Session cannot grant letters of supplement, so as to give an inferior judge jurisdiction in such circumstances. Where the representatives of a party are furth of Scotland, and have neither heritable nor moveable property in Scotland, no action of transference can be raised against them. In a recent case, in which the opinion of the whole Court was taken, an action had been brought against a foreigner, and jurisdiction founded by arrestment. After the summons was executed, but before it was called in Court, the defender died; and his representative, also a foreigner, not having confirmed the subject previously arrested, and no new arrestment *jurisdictionis fundandæ* having been used, it was held that, although the action was capable of being transferred as a depending action, yet that, in the above circumstances, a transference against the defender's representative was incompetent from want of jurisdiction; *Cameron v. Chapman*, 9th March 1838. *Stair, B. iv. tit. 34; Ersk. B. iv. tit. 1, §§ 60-1; Ivory's Form of Process*, vol. ii. p. 26; *Bank. B. iv. tit. 24, § 64; 6 Geo. IV. c. 120, § 53; Kames' Stat. Law Abridg. h. t.; Shaw's Prac.; MacLaurin's Sheriff-Court Process*, 23, *et seq.* See *Death*.

**Transitu, Stoppage in.** See *Stoppage in Transitu*.

**Translation of Ministers.** The translation of a minister is his removal from one parish to another. When the presentee to a vacant parish is already the minister of another vacant parish, his qualification to Government, and letter of acceptance, must be laid on the presbytery table along with the presentation. If he is already a member of the presbytery, he is afterwards directed to intimate from his pulpit that there is a call to him from another parish, and that it is intended to transport him thither. He is likewise directed to summon such of his parishioners as wish to defend their right to their minister to attend the presbytery when the case is to be heard. He is himself summoned *apud acta*, or by letter, if he does not happen to be present. If the parish attends, and urges its right to retain its minister, the presbytery judges between it and the competing parish. If no appearance is made on the part of the parish, and if the presbytery be satisfied with the reasons for the transportation, sentence is pronounced, dissolving the relation between the minister and his parish, declaring that parish vacant, and translating him to the other, fixing the day of his admission, and appointing his edict to be served. It is always provided that he continues minister of the one parish until he is admitted minister of the other. If he belong to a different presbytery, the presbytery which has received the presentation and call commissions some of its members to repair to that presbytery, to lay before it the call, and an account of their proceedings, and to request that the presbytery under whose jurisdiction he is will take the necessary steps for effecting his removal. See *Hill's Church Prac.* 67; *Church Law Styles*, 91, *et seq.*; *Gillan's Acts of Assembly*, 307. According to Bankton, the city of Edinburgh has the privilege of calling what ministers it pleases from all other parishes; *Bank. B. ii. tit. 8, § 32*. See *Minister. Admission. Induction*.

**Transmission of Penal Action.** A penal action transmits against the heir only *in quantum lucratus*, and that not unless there has been, in the common case, litiscontestation, and, in public crimes, sentence. The heir is liable in restitution or damages for all delinquencies proved during the deceased's life, and in penalties incurred by the deceased's breach of contract, even without any previous action for them. *Bank. B. iv. tit. 45, § 70, et seq.* See *Penal Action*.

**Transmission of Rights.** Some rights are intransmissible, such as those of parent and child; others transmissible, but only with the consent of him on whom lies the correspond-

ing obligation; while, in other cases, either the law or the individual possessor may transmit, either directly without consent, or indirectly without requiring consent. Where transmission is practicable, it is that either of a *moveable* or an *heritable* right. If of a moveable right, it is either *voluntary*, as by *assignation*, or *involuntary* (*i.e.* by legal diligence), as by *arrestment* or *poinding*. If of an heritable right, it is also either *voluntary*, as by *disposition*, or *involuntary*, as by *adjudication*. *Ersk. B. ii. tit. 7*. See *Feudal System. Disposition. Assignation. Adjudication. Poinding. Charter. Heritable and Moveable. Superior. Confirmation. Resignation. Titles to Land*.

**Transportation of Churches.** To transport a church means to authorise the erection of the parish church in a different part of the parish from that in which it has formerly stood. The act 1707, c. 9, gives the power of determining, as to the transportation of churches, to the Court of Session, as the Commission of Teinds. The consent of three-fourths of the heritors, in point of valuation, is necessary to the removal. But any party having interest is entitled to oppose it. In sanctioning the transportation, the Court is in use to give decree against the heritors for the erection of the new church, and to order the materials of the old building to be sold, and the price applied in defraying the expense of the new. The form of applying for transportation is by a summons raised before the Teind Court, concluding for authority to transport, and to have the new church declared the regular parish church, &c. The heritors who are not parties to this summons as pursuers should be cited as defenders, as also the minister and presbytery, who have an interest to appear and object if they see cause. See *Ersk. B. i. tit. 5, § 21*; *Bank. B. ii. tit. 8, § 49*; *Dunlop's Parochial Law*, 26. See *Church. Teind Court*.

By the act 7 and 8 Vict. c. 44, 1844, the consent of the heritors of a major part of the valuation of a parish is declared to be sufficient in all cases in which the consent of the heritors of three parts of four of the valuation of the parish was required by the act 1707, c. 9. Heritors who do not judicially state their dissents are to be reckoned as consenting heritors. The act contains various other provisions in reference to the building and endowment of churches.

**Transportation of Felons:** is the banishing or sending away of convicts out of Great Britain as a punishment. The statute 25 Geo. III. c. 46 provides for the more effectual transportation of criminals from Scotland, and the removal of prisoners from gaols in Scotland to the gaols or hulks in Great Britain. Criminals condemned to transportation, accord-

ing to the former practice, were sent to New South Wales; and 56 Geo. III. c. 27 gives the Sovereign power, with advice of the Privy Council, to appoint the place beyond seas to which convicts may be sent. The annual mutiny act, and most of the revenue statutes, make returning from transportation, following on a sentence pronounced for offences under these acts, a capital felony. The statute 35 Geo. III. c. 67 extends that penalty to persons transported for bigamy; and, indeed, capital punishment is the general certification against the unlawful return from transportation. And by 5 Geo. IV. c. 84, the being at large within the kingdom, after sentence of transportation, is declared a capital offence, whether the penal was actually sent to New South Wales, or to the hulks, or to the Penitentiary, or was never removed from a jail in Scotland. But the punishment of returning from transportation has hitherto been confined to transportation; and by 4 and 5 Will. IV. c. 67 it is declared to be no longer a capital offence. The act 1 Vict. c. 90, passed to amend the law relative to offences punishable by transportation for life, substitutes for that punishment, in certain cases, transportation for any term not exceeding fifteen years, nor less than ten years, or imprisonment for any term not exceeding three years. *Alison's Princ.* 559, *Prac.* 20; *Steele*, 173; *Bank.* i. 492; *Swint. Abridg. h. t.*; *Watson's Stat. Law, h. t.*; *Hutch. Justice*, i. 190, ii. 82.

By 20 and 21 Vict. c. 3, 1857, sentences of transportation are abolished, and sentences of penal servitude substituted. The provisions of previous statutes applicable to persons under sentence of transportation extend to persons under sentence of penal servitude; and the provisions of the act 5 Geo. IV. c. 84, authorising the appointment by the Crown, with the advice of the Privy Council, of any place or places beyond the seas to which felons and other offenders under sentence or order of transportation shall be conveyed, are declared to extend to the appointment of any place beyond the seas to which offenders under sentence of penal servitude may be conveyed. All enactments in force, which refer to crimes punishable with transportation, are declared to refer to crimes punishable with penal servitude.

**Transumps.** An action of transumpt is an action competent to any one having a partial interest in a writing, or immediate use for it, to support his titles or defences, in other actions; directed against the custodian of the writing, calling upon him to exhibit it, in order that a transumpt thereof may be judicially made and delivered to the pursuer. This action may be competently pursued be-

fore the judge ordinary. Although, in the ordinary case, the title of the pursuer of an action of transumpt consists of an obligation by the defender to grant transumps, it is, nevertheless, a sufficient title to insist if the pursuer can show that he has an interest in the writings; but, in that case, he must be at the expense of the transumpt. After the writings to be transumed are judicially exhibited, duplicates are made out, collated, and signed by one of the clerks of Court. Such duplicates are called transumps, and have a decree of the judge interponed, declaring that they are to bear as full faith or credit as an extract from the record of that Court. Hence, a decree of transumpt cannot be challenged except by an action of improbation; and in that case, the user of the transumpt sought to be reduced must support it by the production of the principal writing, for the recovery of which a diligence will be granted to him against havers; and if it be not produced, certification will be granted against it. The parties chiefly interested in the deeds to be transumed; both granters and grantees, or their representatives, must either be made parties to the action, or consent expressly to the transuming of the deeds. All others pretending interest may be cited edictally. *Stair*, B. iv. tit. 31; *More's Notes*, cccclxxxiii; *Ersk. B. iv. tit. 1*, § 53; *Bank. B. ii. p. 622*; *Jurid. Styles*, i. 108, iii. 267; *Tait on Evidence*, p. 202, *et seq.* See *Evidence. Privileged Summons.*

**Traveller.** The powers of a mercantile traveller, or rider, are regulated by the terms of his commission; but he has also, by custom, an implied power to receive payment for his principal, and to take orders for him, which the principal is bound to perform. *Bell's Princ.* § 231, and authorities there cited.

**Traverse;** in English law, the denial of a matter of fact alleged in the declaration, or pleadings. *Tomlins' Dict. h. t.*

**Treason.** By the older law of Scotland, treason was either proper or statutory—the first comprehending all facts which were, by common law or by statute, held to be high treason itself, committed against the state or its head (see 1424, c. 3, 4; 1449, c. 25; 1455, c. 54; 1584, c. 129; 1661, c. 5; 1662, c. 2; 1689, c. 1, 2; 1703, c. 1, 3); the second comprehending all facts which, though in themselves bearing none of the characters of treason, were from their mischief and enormity punished as such (see 1587, c. 50, 51; 1592, c. 146; 1528, c. 8; and 1681, c. 15); the punishment of both being death, forfeiture of real and personal estate, and loss of honour and privilege. But by 7 Anne, c. 21, §§ 1, 23, the law of England as to treason was adopted as the law of Scotland. The great basis of

the English treason law is 25 Edw. III. stat. 5, c. 2, which declares, that it is treason—

1. To compass or imagine the death of the King, meaning also the Queen Regnant (though not her husband), the Queen, or their eldest son; which includes the mere *designing* even of such a deed, if evinced by *overt act*, affording evidence of *means*, even remotely employed to accomplish it. Such overt acts are—lying in wait in order to attempt the life of the King; providing arms; preparing poison; sending letters; assembling and consulting; presence at consultation, with subsequent concealment of the scheme, and previous knowledge of the purpose of assembling; offering money, whether accepted or not; or in any other way instigating or abetting to kill the King. As also, every act of which danger to the King is the natural consequence: as marching in array against him; fortifying in resistance to his authority; enlisting men to depose him; taking measures, by subscribing bonds, associating, writing letters or otherwise, to imprison, or get forcible or fraudulent possession of his person; conspiring, or taking measures to levy war, or raise insurrection against his person or government, or constrain any of his sovereign acts; soliciting or concerting measures with a foreign power to invade the country, or going, or even displaying a purpose of going, abroad with that view. The same observations hold, though not so rigorously, as to the Queen-consort and the eldest son, in so far as their different *status* allow the application; *Forster*, p. 195, *et seq.*; *Black.* vol. iv. p. 79, *et seq.*; *Hume*, i. 506, *et seq.* The act 36 Geo. III. c. 7 makes it treason to *compass, devise or intend*, the death, or bodily harm tending to the death, maiming, wounding, or restraint of the King; or the depriving the King of his style and honour; or levying war against him within the realm, to make him change his measures, or to intimidate or constrain either House of Parliament; or moving any foreign power to invade the realm—provided that such compassing, &c., be published by writing, printing, or other overt act. No writing unpublished, and purely speculative (as without a definitive reference to purpose), is treasonable. But all writings, even unpublished, which refer to any treasonable scheme set on foot, or to be set on foot, and all words and opinions written and published expressing a general hostility to the King's life, are treasonable. Words merely spoken do not amount to treason, except as expounding acts into treason, *e.g.* in consultations or advices to kill, &c. *The King* means also the Prince Regent—57 Geo. III. c. 6; and generally that person who is, as head of the State, in possession of the Crown, whether

rightfully or not, as none can be punished for obeying the powers that be at the time; 11 *Henry VII.* c. 1; except perhaps, in the case of voluntarily and ultroneously acting against a rightful King dispossessed by a usurper, which is certainly treason. 2. It is treason to violate, whether with or without consent, the Queen, regnant or not, or the wife of the eldest son (while in these characters), or the King's eldest daughter, while unmarried. 3. To levy war against the King within his *realm*. This includes every act deliberately and directly defying, and forcibly opposing or instantly threatening, or beginning so to oppose, the authority of the State, as a whole, and as represented by the King as its head, whether that defiance is intended as the means or as the end of action, or whether the King himself or the organs of Government are so opposed. The narrow seas are held within the realm; so that to assail King's ships on them is treason. 4. Adhering to, or assisting or corresponding with, the King's enemies, anywhere, whether rebels or foreign foes, without the excuse of compulsion, *i.e.* reasonable fear for life or person. Where rebels are assisted, it becomes a levying of war. Enemies need not be acting under authority of their respective governments, or of any government; and the King's allies or stipendiaries are identified with himself. 5. To counterfeit the King's Great or Privy Seal; and (by 7 Anne, c. 21) to counterfeit the seals used in Scotland. 6. To counterfeit the King's money, or bring false money into the realm to be passed as true. No issuing is necessary. But issuing is not treason of itself. Gold and silver alone are the King's money; though counterfeiting copper is made felony by 2 Geo. III. c. 40. 7. To kill the Chancellor, Treasurer, or any of the King's Justices, or (by 7 Anne) the Supreme Judges in Scotland, provided they be in their places, and in the execution of their official duty. By the act 1 Anne, stat. 2, c. 17, an endeavour, by any direct and overt act, to hinder the succession to the Crown of the person nearest, according to the limitations of the Act of Settlement, is treason; and by 6 Anne, c. 7, it is treason to maintain and affirm, advisedly and directly, by writing or printing, that any person has right to the Crown of these realms, otherwise than by the Act of Settlement, or that the King and Parliament cannot make laws to bind the Crown and descent thereof. But to do the same by teaching, preaching, or advised speaking, does not amount to treason. By 13 and 14 Will. III. c. 3, it is treason to hold correspondence any how with, or knowingly to remit money or aid to, or for the use of, the Pretender, or any employed by him. By 17 Geo. III. c. 39,

the like is declared in regard to his sons; and he, or his sons, or his emissaries, landing, or attempting to land, or being found within Great Britain, are held guilty of treason. 9. There are four offences which, as regarding the Popish faith, are treason—viz. any Popish priest, born in the dominions of England, and coming here from beyond seas, or remaining here three days, without conforming, is guilty of treason by 27 Eliz. c. 2. Any person twice convicted of advisedly maintaining or defending the Pope's jurisdiction here, is also guilty by 5 Eliz. c. 1. The using any bull, or instrument of absolution or reconciliation, obtained from the see of Rome, is treason by 13 Eliz. c. 2, Parl. 2 and 3; and by 3 James I. c. 4, any born subject either withdrawn from his allegiance, and reconciled to the see of Rome, and promising obedience thereto, or to any other prince or state, or endeavouring to persuade to such apostasy, is guilty of treason. But these acts are obsolete. 10. By 1 Mary, stat. 2, c. 6, it is treason to counterfeit foreign coin of gold or silver current (by consent of the Crown) within the realm, or to forge the sign-manual, privy signet, or privy seal. By 1 and 2 William and Mary, c. 11, it is treason to bring in any such counterfeit foreign money, with intent to utter. By 5 Eliz. c. 11, whoever shall wash, clip, round, or file—and by 18 Eliz. c. 1, whoever shall impair, diminish, falsify, scale or lighten the proper or the permitted coin of this realm—is guilty of treason. By 8 and 9 Will. III. c. 28, made perpetual by 7 Anne, c. 25, it is treason knowingly to make, mend, buy, sell or have, or take out of the King's mint, any instrument proper for coining alone, or to mark on the edges, colour, gild or case over any coin, or even round blanks of base metal, to resemble current coin. By 15 and 16 Geo. II. c. 28, it is treason to alter or colour silver current coin to look like gold, or copper to look like silver. Formerly none of these offences could be tried but as treason. For the more recent law, see *Coining*.

All accessories, whether before or after the fact, are principals in treason. Treason may be committed by all who owe *allegiance*. Allegiance is either *natural*, viz. that of a born subject, which he cannot by his own act shake off during life; or *local*, which is as binding, while it lasts, as the natural, and is owed by every foreigner while he resides in Britain, even though his Government should, during that period, go to war with Britain; and even though, on such a war occurring, he quits Britain himself, but leaves his family and effects here voluntarily. Foreign ambassadors are guilty of treason when they attempt the King's life. In other cases of

offence as ambassadors, they become merely enemies.

Trial in Scotland for treason is competent to the Court of Justiciary, and to any commission of *Oyer and Terminer* appointed by the Crown, and containing at least three Lords of Justiciary (see 7 Anne), of whom one to be of the quorum. At the desire of the Lord Advocate, any trial for treason pending before the commission may, by a *certiorari* under the Great Seal, be transferred to the Justiciary Court; but a prosecution takes place now, not at the discretion of the Lord Advocate, but on a bill found by a grand jury, as in England. The petty jury consists, not of fifteen, but of twelve men taken from the county within which the treason is alleged to have taken place, or within which the Court sits, if on the trial of treason committed abroad; which jury must be unanimous or agreed in their verdict. See *Jury*. Trial in absence for treason, and trial after death, which last was allowed by Parliament, Dec. 10, 1540, are abolished by 7 Anne. Two concurring witnesses to each overt act libelled, or one witness to each of two or more overt acts of the same species of treason, are required; 1 *Edw. VI. c. 12*; 5 and 6 *Edw. VI. c. 11*; 1 and 2 *Philip and Mary, c. 10*, and 7 *Will. III. c. 3*; but one witness will suffice to establish any other and extrinsic circumstance, such as a former confession. Judicial confession at the bar convicts. The grand jury's bill must (except in trial for an attempt at assassinating the King) be found within three years from the date of the offence. The panel may see his indictment and lists of witnesses and jurors ten free days before trial (7 Anne, 21), and may challenge thirty-five jurors. He may compel the appearance of his witnesses, and employ counsel in his defence; *Foster*, ii. 230.

The punishment of high treason is now, by 54 Geo. III. c. 146, that the offender shall be drawn on a hurdle to the place of execution, and there be hanged by the neck until he be dead, and that afterwards his head shall be severed from his body, and his body divided into four quarters, and disposed of as the King shall think fit; with power to the King to direct that the offender shall not be drawn to the place of execution, and that he may not be hanged but beheaded, and also to direct as to the disposal of the body, &c. From the date of the treason the traitor's moveables are confiscated, and his heritage and honours are forfeited for ever by himself and his heirs, though, on the failure of heirs, an entailed estate returns to the next substitute. Debts heritably secured are not forfeited; but personal debts are at common law, although, on the Rebellions 1715 and

1745, personal debts were, by statute, allowed to be claimed. Forfeiture extends to the estate even of an apparent heir. By corruption of blood in consequence of sentence for treason (a stain which nothing short of an Act of Parliament, not even a pardon, can remove), neither the offender, nor any one who traces connection through him, can succeed. *Hume*, i. 506, *et seq.*; *Ersk.* B. iv. tit. 4, § 20, *et seq.*; tit. 4, § 110; B. ii. tit. 5, § 9; *Bank.* B. ii. tit. 3, § 46, *et seq.*; tit. 19, §§ 26-8; 54 *Geo.* III. c. 146; *Tomlins' Dict.* h. t.; *Stair*, B. ii. tit. 3, § 66; B. iii. tit. 3, § 28; *More's Notes*, p. xcxi.; *Swint. Abridg.* h. t.; *Kames' Stat. Law Abridg.* h. t.; *Watson's Stat. Law*, h. t.; *Hutch. Just.* of *Peace*, i. 436; *Tait's do.* h. t.; *Shaw's Digest*, p. 148.

**Treason, Misprision of.** See *Misprision of Treason*.

**Treasurer, Lord, of Scotland.** The duty of the Lord Treasurer was to examine and pass the accounts of the sheriffs and others concerned in levying the revenues of the kingdom, to receive resignations of lands and other subjects, and to revise, compound, and pass signatures, gifts of tutory, &c. In 1663, he was declared President of the Court of Exchequer. *Ersk.* B. i. tit. 3, § 30.

**Treasures.** *Treasure-trove*, i. e., treasures dug out of the ground or out of buildings, or found in the sea, and the owner of which is unknown, fall to the Crown, according to the maxim, *Quod nullius est, fit domini regis.* *Ersk.* B. ii. tit. 1, §§ 6, 12; *Stair*, B. ii. tit. 1, § 5; tit. iii. § 60; B. iii. tit. 3, § 27; *More's Notes*, p. cxlvi.; *Bank.* i. 85, 211; *Bell's Princ.* § 1293; *Illust.* ib.

**Trees.** See *Timber. Planting*.

**Trespass.** It follows, from the exclusive right of property, that a proprietor is entitled to prohibit all trespass within his grounds, and to bring an action of damages against the trespasser. Such prosecutions may be brought before justices of the peace. Trespass, by travelling through wheat, is, by statute, made liable to the penalties of L.10 Scots for the first offence, L.20 Scots for the second, and forfeiture of moveables—which Mr Blair says may practically be interpreted as an arbitrary fine—for any subsequent offence, and the penalties go to the public. For trespasses in pursuit of game, and in relation to planting and inclosing, see the articles, *Game Laws. Planting and Inclosing*. Action of trespass prescribes in three years, if understood to be included in the expression, "and others of that sort," occurring in 1579, c. 81, which so limits actions of spuilzie and ejection. Other remedy is competent after expiration of three years; but, after the lapse of that period, the pursuer loses his right to prove his damage

by his own oath *in litem.* *Ersk.* B. iii. tit. 7, § 16; *Bank.* B. ii. tit. 12, § 11.

**Trial for Crimes.** See *Criminal Prosecution*.

**Tribula**; a flail for thrashing out corn. *Skene*, h. t.

**Trout-Fishing.** The right of trout-fishing is conveyed, along with lands, as part and pertinent. The right, however, may be reserved or transferred to a stranger. No one standing on a highway, or on public ground contiguous to a stream, has right to angle in the stream, a stream being the property of the parties through whose ground it flows. Accordingly, in the case of *Ferguson v. Shireff*, July 18, 1844, 6 D. 1363, the defender, who, as one of the public, had a right of way along the bank of a stream, was interdicted from fishing in the stream where it adjoined the road. In the case of *Lord Somerville v. Smith*, Dec. 22, 1859, 22 D. 279, a proprietor of lands which lay along the bank of a river, and who had the exclusive right of salmon-fishing within certain limits, was held not to be entitled to an interdict against a person fishing for trout from the opposite bank, within the limits of his right of salmon fishing and *ex adverso* of his lands, it not being alleged that he was fishing in an illegal manner, or making a practice of fishing for trout for the purpose of disturbing the salmon, and so injuring the proprietor's rights. Where one person has right to the salmon-fishing, and another to the trout-fishing, the right of fishing trout must be exercised in such a way as not to prejudice the salmon-fishing; *Carmichael*, Nov. 20, 1787, M. 9645. The doctrine that trout-fishing is an accessory of the adjacent land, was confirmed in *Mackenzie*, May 26, 1830, 8 S. & D., affirmed May 14, 1832; and in *Macdonald*, Dec. 4, 1836, 15 D. B. M. 259. In this last case the rule was established, that the proprietor of the adjacent lands does not lose his right to the trout-fishing by mere abstinence, but by exclusion on the part of another claiming the right. See also *Forbes*, May 31, 1826, 4 S. & D. 650; *Bell's Princ.* § 747; *Illust.* ib.; *Hutch. Just.* ii. 562.

**Trover**; in English law, a form of action which lies against a person for the conversion or appropriation to his own use of any personal property in which the plaintiff has a general property as owner, or special property as carrier, depositary, &c. The action is brought to recover the specific chattels themselves, or damages for their conversion. *Tomlins' Dict.* h. t. See *Detinue*.

**Trust.** A subject is conveyed in trust when the person to whom it is conveyed, and who is called the trustee, does not acquire an unlimited right of property, but holds the subject for the purpose of applying it to certain uses, expressed or implied. Trust is

either voluntary, constituted by a disposition of the trustor, or judicial. A conveyance in trust is completed by delivery of the moveables and by sasine in the heritage. The completion of the conveyance denudes the trustor, and prevents his creditors, or others coming in his place, from attaching anything but the reversionary interest after the purposes of the trust are fulfilled. The conveyance may be either absolute, with a back-bond or other acknowledgment granted by the trustee that he holds the subject for the purposes of the trust; or it may be *ex facie* a trust-conveyance. In our earlier law, it was customary to grant absolute dispositions without receiving any back-bond; and presumptions and parole evidence were admitted to establish the trust against the trustee or his representatives, although not against his singular successor. But it was afterwards enacted, that no action for declaring a trust shall be sustained, unless the trust be proved by oath of party, or by a written acknowledgment of trust from the trustee; 1696, c. 25. A formal back-bond of trust, however, is not indispensable; it is competent to prove the trust by writings under the hand of the trustee importing an acknowledgment or admission of trust; *Macfarlane*, May 23, 1837, 15 *S. & D.* 978. It has been decided that circumstances may be admitted to prove trust. And where the acknowledgment of trust is destroyed by accident or fraud, the trust may be proved by parole evidence. It is competent to prove the existence of a trust as between two third parties, *prout de jure*; and the act 1696, c. 25, only applies to the case of proper declarators of trust by the trustor, or those in his right, against the trustee; *Lord Elibank*, Nov. 16, 1827, 6 *S. & D.* 69. An acknowledgment of trust by the representatives of the trustee, combined with other circumstances, was found sufficient to establish trust. The persons having the beneficial interest under a trust are properly creditors having a preference over the private creditors of the trustee. Persons not yet born may be the creditors under a trust. The beneficial interest is heritable or moveable according to the nature of the prestations directed to be made. See *Jus Crediti*.

A voluntary trust-disposition is often had recourse to for securing property, which might otherwise be exposed to the acts and deeds of the person in possession; as in marriage-contracts, in family settlements, and in the constitution of liferents, where it is proper that the fee should not be *in pende*. It is also employed by debtors, whether companies or individuals, who may desire extrajudicially to wind up their affairs, and to settle with their creditors. And where the conveyance is not struck at by the act 1696, c. 5, or

1621, c. 18, a voluntary trust may be granted for the purposes of sale and distribution. Those creditors who accede to the trust will be bound by the sale, distribution, and other transactions, in terms of the trust, and by the deeds of the trustee, in the exercise of discretionary powers committed to him. But no voluntary trust-deed, however unexceptionable, can stop the diligence of creditors who have not acceded to it; *Ersk. B. iv. tit. 1, § 45*. Hence, those creditors who do not assent may proceed with diligence against the estate, directed either against the grantor or his heirs, or against the trustee. But adjudication, or other real diligence thus used, will not divest the trustee, or create a preference over the trust creditors, if the trust conveyances have been completed before the commencement, or the using, of the real diligence. The expense of the diligence, however, is legally chargeable against the trust estate.

Where the conveyance to the trustee is completed according to the nature of the subjects or rights conveyed, as by delivery of moveables, or sasine in heritage, whether it be a conveyance *in gramo* conditional, or absolute with a separate declaration of trust, the estate is fully vested in the trustee for the purposes of the trust; although the deed should contain no list either of the creditors for whose behoof it is granted, or of the trustor's debtors. According to Professor Bell, those creditors who are enumerated in the trust-deed as recorded have a real security; but "whether a trust-deed will give preference to creditors whose names are not enumerated, and the amount of their debts recorded, is a question not yet settled;" *Bell's Princ. § 1996*. The competition between the acceding creditors or the trustee, and those creditors who pursue separate measures, is regulated by the completion of their respective rights, with due regard to *pari passu* preferences, and to the regulations of the Bankrupt Statutes. See *Conjunct and Confident. Bankrupt*. But any creditor appearing under the trust, before actual division of the funds has commenced, will not be excluded by a condition in the trust-deed tending to limit the benefit of it to those who appear within any fixed time. The estate is vested in a voluntary trustee, even without his acceptance. And if he is unwilling to act, he has merely to execute a conveyance to whomsoever the debtor or creditors may recommend as his substitute. Great delay in accepting will be held as a renunciation. See *Darling*, Jan. 14, 1824, 2 *S. & D.* 607. Where the trustee, acquiring a trust without mention of heirs and assignees, dies, the right will notwithstanding subsist in the persons of his representatives for the benefit of all



having interest; and in such a case, as the trustor is already divested, the correct procedure is by action of adjudication and declarator at the instance either of the creditors *nominatim*, or of a trustee to whom they have for this purpose conveyed their debts, calling the debtor or his representatives, the representatives of the former trustee, and all concerned; and the conclusions of which will be for declarator of the trust, and for adjudication in favour of the original trust creditors. A similar procedure is resorted to where it becomes necessary to remove the trustee, unless the trustee has already bound himself to denude when required. A trust-deed is not superseded by a subsequent disposition *omnium bonorum* in a *cessio*; *Leith*, June 22, 1821, 1 S. & D. 79. But, if the trustor be a person against whom sequestration may be awarded, the private trust may be superseded by a sequestration proceeding on the application of any non-acceding creditor to the requisite value, or on the application of the trustor himself, if he deem it advisable; in which case the private trustee is bound instantly to denude in favour of the trustee under the sequestration. See *Trustee. Sequestration*. Accession on the part of creditors, although not indispensable to a voluntary trust, makes it more complete and effective. A trust-deed for creditors not acceded to, was held not sufficient to divest the grantor, so as to invalidate a subsequent conveyance, with which the trustees did not compete; *Barbour*, Jan. 25, 1831, 9 S. & D. 334. Where the accession is expressed by a deed of accession, the signature of each creditor, or of his mandator, attested by witnesses, if the signatures are *separatim* affixed, binds him. But an inhibiting creditor is not understood, in acceding, to depart from his inhibition, unless by a special agreement to renounce his preference. The terms of a deed of accession vary according to the nature of the arrangement with the creditors; but, in the ordinary case, it contains a power of arbitration, accompanied with a submission and clause of registration,—a power of management, sale, and distribution,—a settlement of the periods for dividends,—a consent to a *supersedere* of diligence,—and frequently an agreement to discharge, on a certain composition being paid by the bankrupt. Where there is no deed of accession, accession to the effect of checking an attempt at an individual preference is very liberally inferred, both from direct acts and from circumstances calculated, in common construction, to mislead other creditors into the belief of acquiescence. But, in the case of *Mackie*, 6th June 1822, 1 S. & D. 465, acquiescence in a trust as debtor was found not to imply acquiescence as creditor.

And in the case of the *Earl of Breadalbane*, Jan. 16, 1824, 2 S. & D. 621, virtual accession to a trust was held not to bar adjudication against the trustee, to enforce an obligation. Accession, however, to the effect of binding the creditor to any important act, will hardly be inferred but from evidence equivalent to express written accession. An implied accession to a trust-deed was not sustained where all the creditors had not acceded, and where a subsequent sequestration had been awarded; *Lyell*, March 11, 1823, 2 S. & D. 288. It was held not to be accession to a trust, that a party having a claim against the trustor, and over the lands in possession of the trustees, demanded payment from them, obtained a decree against them, and charged them thereon; *Campbell*, July 3, 1829, 7 S. & D. 826.

The import of the trust-deed is interpreted according to the plain meaning of the terms used; and whatever is necessary to the rational interpretation, and for carrying into effect the purposes of the trust, is implied. Power is sometimes reserved to declare the purposes of the trust; and when this is done they may be declared at any time, in a testament or deed, unless such declaratory deed fall under the law of deathbed. See *Deathbed*. Where the grantor had claims for ameliorations on a farm, which he could not prosecute till the end of the lease, a general conveyance in trust, was held to carry these claims, although the grantor died before the end of the lease; *Munro*, Dec. 17, 1825, 4 S. & D. 328. A testator appointed trustees to purchase lands with his money, and to settle them in strict entail, "according to the law and practice of Scotland," on his eldest son, "and the heirs of his body lawfully begotten," &c. It was held that the trustees were bound to execute the entail so as to exclude heirs-portioners; *Sprot*, May 22, 1828, 6 S. & D. 833. A trust-disposition of an estate for behoof of creditors, with powers of sale, subject to an obligation on the trustee to reconvey the remainder, although followed by infestment, does not divest the trustor of his radical right to the lands; and therefore, although a reconveyance by the trustee be informal, the trustor can, in virtue of his radical right, execute an effectual entail by procurator of resignation; *M'Millan*, March 4, 1831, 9 S. & D. 551; affirmed, June 28, 1832. Upon the principle that the reversion remains radically in the person of the grantor, it has been decided that it may be adjudged by his creditors; *Campbell*, Jan. 14, 1801, *M. App. Adjud.* No. 11. A formal trust-disposition of heritage may be revoked by an English will, not probative according to the law of Scotland. After the purposes of the

trust are fulfilled, the trustees must pay over the residue to the heir-at-law, or to the executors, according to the nature of the subjects of which it consists; and if the subjects be heritable, the heir-at-law will be entitled to them, although the trustees may have had a power of sale, which they have not found it necessary to exercise; *Cathcart*, May 26, 1830, 8 S. & D. 803. See also *Burwell*, Dec. 14, 1825, 4 S. & D. 314; and *Angus v. Angus*, Dec. 6, 1815; 1 *Ross's L. C.* 524. A trust-deed having provided that certain special legacies should be "set apart," after which the residue of the estate was to be divided into four portions, to be also "set apart for particular legatees;" it was held, that any loss which might arise upon the trust-estate, by the mode of investment adopted by the trustees, prior to all the shares being separately invested, must be charged upon the portions of the residuary legatees; *Gray*, June 4, 1835, 13 S. & D. 866. The Court allowed a party to receive the rents of a trust property, the destination to which carried it to him, failing issue of his own body, there being no issue at present in existence, on caution to repeat in the event of issue; *Blackwood*, June 11, 1833, 11 S. & D. 699.

A formal trust-disposition of heritage may be revoked by a deed valid either by the law of the place where it is executed, or by the law of the maker's domicile at the time of execution, although not valid by the law of Scotland. See the case of *Leith's Trustees v. Leith*, June 6, 1848. Also 1 *Ross's L. C.* 667, *et seq.* See also *Wills*.

Many questions have arisen as to the competency of defraying out of the trust-funds the expense of litigations as to the trust. In several cases the expense of the discussion of the validity of the trust-deed has been allowed out of the trust-estate; *Stainton*, Jan. 17, 1828, 6 S. & D. 363; *Morrison*, June 30, 1829, 7 S. & D. 1810; *Earl of Strathmore*, Feb. 16, 1830; 8 S. & D. 530; *aff. March 23, 1831, 5 W. S.* 170. And the expenses of a discussion arising from the ambiguity of a trust-deed have been laid on the trust-funds; *Grieve's Trustees*, June 9, 1830, 8 S. & D. 96; *Bryden*, Feb. 17, 1831, 9 S. & D. 457; *aff. April 22, 1833.* Where it was for the benefit of the trust that a question regarding trustees' powers should be judicially settled, the expenses of all parties were allowed out of the trust-estate; *Robertson*, March 7, 1832, 10 S. & D. 438. But the expenses of a competition were refused to be allowed out of the trust-funds which were the subject of it; *Sommervail*, Jan. 22, 1830, 8 S. & D. 370. See generally, on the subject of Trust, *Bell's Com.* i. 31, *et seq.*; ii. 305, 437, 693; *Ersk.* B. iii. tit. 1, § 32; B. iv. tit. 1, § 45;

*Stair*, B. iv. tit. 6; tit. 45, § 21; *More's Notes*, lxxi. *et seq.*, cxliv. clxix.; *Bank.* i. 272, 395, 262; *Bell's Princ.* § 1991, *et seq.*; *Illust. ib.*; *Kames' Princ. of Equity* (1825), 286, 325; *Hunter's Landlord and Tenant*; *Bell on Purchaser's Title*, 5; *Sandford on Heritable Succession*, ii. 30-32; *Jurid. Styles.* See also the articles *Composition. Sequestration. Bankrupt. Trustee. Accession. Supersederes. Insolvency. Trust-Bond. Adjudication on.* See *Adjudication. Service.*

**Trust-Oath.** See *Election Laws.*

**Trust, Breach of.** See *Breach of Trust.*

**Trustee.** A trustee is a person appointed to act in the administration, disposal, or sale and distribution, of an estate, in the room of the proprietor, and in the manner pointed out by the conveyance, voluntary or judicial, which vests it in him. The purposes of a trust-conveyance may be indefinitely varied. But a trustee may be considered as having right either to a solvent or to an insolvent estate; and when having right to an insolvent estate, as having it either by voluntary conveyance from the bankrupt simply, or by conveyance from him with accession of creditors, or by involuntary or judicial conveyance under mercantile sequestration.

1. *Extrajudicial Trustees.*—When the trustees appointed in a trust-deed, *inter vivos*, are named jointly, the nomination falls by the failure of any one of them; and it would appear, that, where not otherwise expressed in the deed, the nomination is presumed to be joint. When the nomination is to the acceptors or survivors, the trust subsists if any of them accept and survive. But when a quorum is named, it is necessary that the number of which the quorum consists should accept, survive, and act. See *Quorum.* A trustee named a *sine quo non* must concur in all acts, and on his death the nomination falls. See *Sine Quo Non.* A majority of trustees, under an indefinite nomination, is entitled to act in the necessary absence of the others; *Campbell and Macintyre*, June 12, 1824, 3 S. & D. 126. But where a trust is vested in a certain number of trustees, and no quorum mentioned, any act of extraordinary administration requires the concurrence of the whole trustees; *Freen*, June 28, 1832, 10 S. & D. 727. A majority of the trustees under a marriage-contract being declared a quorum, it was held, in an action in which two of the trustees entered appearance as defenders, that a majority of the remainder, although not a majority of all the trustees, were entitled to pursue; *Shanks*, March 4, 1830, 8 S. & D. 639. A trust-deed, *mortis causa*, does not fall by the death or non-acceptance of some of the trustees named. No person named trustee can be compelled to act, unless he accept.

But if infestment should be taken in his name without his knowledge, he may be compelled either to act or denude. Trustees who have once accepted are not entitled to throw up the office before they have executed the purposes of the trust. "Trustees must not imagine, that, whenever they are tired of their office, they can slip their necks out of the collar, and leave the matter to be extricated by the Court."—*Per Lord President, in Curstairs, Jan. 20, 1776, 2 Hailes, 678.* A trustee whose concurrence is necessary, may be compelled to concur in a reasonable act of management, and if he refuse, he will be liable for the damage thereby incurred by the trust-estate; *Lord Lynedoch, Feb. 15, 1827, 5 S. & D. 358; aff. July 7, 1830, 4 W. S. 148; also Nov. 20, 1832, 11 S. & D. 60.* A trustee is understood to act gratuitously, unless the trust-deed provides a remuneration for him.

A trustee who acts as agent for the trustor, or who employs the firm of which he is a partner to do so, is not entitled to remuneration; *Lord Gray and Others, June 21, 1856, 19 D. 1.* See also *Wellwood's Trustees v. Boswell, Dec. 19, 1856, 19 D. 187.* Where, however, a trustor empowers his trustees to appoint agents and factors, either of their own number or other fit persons, this is held to imply an intention on the part of the trustor, that the person appointed should receive remuneration; *Goodsir v. Carruthers, June 19, 1858, 20 D. 1141.* The powers of the trustees are usually fixed in the deed by which they are nominated; but where not so fixed, they are understood to be such as are calculated to enable them to carry into effect the purposes of the trust. Under a power to trustees to sell property and name commissioners for managing the trust, it was found competent for the trustees to empower the commissioners to sell the property; *Innes, June 22, 1822, 1 S. & D. 518.* It has also been found that a trustee with powers of sale, with an unexecuted precept in the trust-deed, may sell and assign the unexecuted precept to the purchaser, to the effect of entitling him, in virtue of such precept, to take infestment in fee-simple; *Cockburn v. Cameron, 4th June 1836, 14 D. B. M. 889.* Where trustees were named to purchase lands, authority was granted them to purchase superiorities, such an acquisition being beneficial to the estate; *Sharpe, Feb. 11, 1823, 2 S. & D. 203.* Trustees named to pay debts, and entail a certain part of the estate, were authorised to sell the part specified, the rest being found inadequate to the discharge of the debts; *Erskine, May 13, 1829, 7 S. & D. 594.* But where the trustor had conveyed his whole estate, heritable and moveable, to trustees, with the evident intention

that they should realise the proceeds of a certain portion of his heritage, and purchase lands to be entailed on a series of heirs, other than his heirs-at-law, but where he had omitted to confer an express power of sale on the trustees, it was held in the House of Lords (reversing the judgment of the Court of Session), that although the trustor's heritage was vested in the trustees, yet, as they had not power to dispose of it so as to apply its proceeds to the purposes of the trust, the heirs-at-law were not effectually displaced; and hence, that they were, by necessary implication, entitled to require the trustees to denude in their favour; *Robertson's Trustees v. Allan, 7th March 1832, 10 S. & D. 438; House of Lords, 31st August 1835, 2 Shaw and Maclean, 333.* Trustees are liable for obligations incurred *qua* trustees, to the extent of the trust-estate. Trustees for creditors taking possession of a farm held by the bankrupt are liable for the rents during their possession, but they are entitled to credit for the value of the effects sequestered by the landlord; *Fairlie, Dec. 18, 1821, 1 S. & D. 222; Fairlie, Feb. 12, 1823, 2 S. & D. 214.* The trustees for the creditors of an insolvent debtor were held liable for the expenses of an accountant's report, in a submission to which the insolvent was the ostensible party, but in which the trustees had the real interest, and in which they had taken an active part; *Welsh, June 15, 1826, 4 S. & D. 710.* Trustees may become personally liable beyond the amount of the trust-estate. Trustees become personally liable where they exceed their powers. They are answerable for their intromissions, and are personally liable in so far as they cannot account for them according to the principles of a trustee's accounting; as, *e.g.*, where they have paid to one not entitled to receive payment. They are jointly liable for their intromissions, unless the trustor limit each trustee's responsibility to his own intromissions. Trustees who resist the execution of their duty become personally liable for the consequences. Trustees who brought an action to ascertain the extent of their powers, were found not personally liable in expenses of process; *Cundell, Dec. 14, 1822, 2 S. & D. 89.* Trustees who become parties to an action, or sist themselves in an action already in Court, are personally liable for the expenses of their antagonist, if he be successful, and it is not relevant for them to object that the trust-funds are exhausted; *Robertson, Dec. 4, 1823, 2 S. & D. 553; Scott, Dec. 21, 1826, 5 S. & D. 172; Raeburn, June 14, 1831, 9 S. & D. 728.* This rule is, however, subject to modification; and a distinction has been taken between trustees in a sequestration, whose commission gives them an interest to litigate, and gratuitous

trustees. Trustees under a private deed of settlement were held not personally liable for the expenses of a litigation *bona fide* carried on by them as defenders, to satisfy which the trust-funds were inadequate; *Dickson*, Nov. 20, 1829, 8 S. & D. 99. And even where a trustee in a sequestration sists himself in a litigation in which expenses are ultimately awarded, those incurred before he becomes a party can only be ranked for on the estate; *Kidd*, May 17, 1828, 6 S. & D. 825. The trustee for a bankrupt litigant is not entitled, in sisting himself as party to the process, to insert a qualification that he shall not be liable for the expenses; *Buchanan*, June 15, 1827, 5 S. & D. 805. Gratuitous family trustees were found personally liable in payment of a bill, granted by them to a third party, for a debt due by the truster; the *ratio decidendi* being, that when they grant such a liquid obligation, they give assurance of funds, and pledge themselves to retain sufficient to answer the debt; *Thomson*, June 24, 1829, 7 S. & D. 777. Testamentary trustees, who were appointed to invest the residue of the funds in heritable property, or bank security, and who, acting under the advice of counsel, declined, on the requisition of all concerned, to invest the residue in Government stock, and brought a process of multiplepointing and exoneration, in which the fund was paid to those having right, were found liable in the loss sustained; *Morison*, Feb. 9, 1827, 5 S. & D. 322. A party who accepts the office of trustee, and allows his name to be used as such, cannot deny liability for the intromissions of his co-trustees, on the ground that he never personally intromitted; *Maclymont*, Feb. 14, 1827, 5 S. & D. 346. See also *Kennedy*, June 28, 1827, 5 S. & D. 852. Many cases have occurred, in which trustees have been found personally liable on account of their neglecting their duties, or exceeding their powers, &c. The following cases may be consulted: *Sim*, May 13, 1830, 8 S. & D. 741; *Chalmers' Trustees*, June 23, 1830, 8 S. & D. 961; *Hepburn*, Dec. 15, 1830, 9 S. & D. 188; *Graham*, March 4, 1831, 9 S. & D. 543; *Jaffray*, Feb. 10, 1831, 9 S. & D. 416; *Wellwood*, June 23, 1831, 9 S. & D. 790; *Anderson*, Feb. 12, 1833, 11 S. & D. 382; *Donaldson*, June 18, 1833, 11 S. & D. 740; *Blain*, Jan. 28, 1836, 14 D. B. M. 361. See also the case of *Home v. Menzies*, July 10, 1845, 7 D. 1010. Trustees must keep exact accounts; they must take credit only for actual payments, and communicate for the benefit of the trust, whatever eases they may have had in paying. They must give up to those interested all acquisitions made by them in the course of their administration. They must not avail themselves of any rights purchased

by them, although these rights may be such as might otherwise have come into competition with those concerned in the trust.

Some trust-deeds empower the trustees to assume others into the trust, or to convey the trust to others; and this power may be exercised on deathbed. Where no such power is conferred on the trustees, and where the trust fails before its purposes have been completed, by the death of the trustees, the Court appoints a *curator bonis*, or judicial factor, in like manner as when the nomination has never had effect, or the party beneficially interested may proceed by declaratory adjudication, under which the trust will be declared at an end, and the superior ordained to grant him a charter. This is also the correct method of proceeding where the trust is conceived in favour of the heirs and assignees of the last survivor, and where the son of the last survivor refuses to make up titles; *Dalsell*, March 11, 1756, M. 16204. See *Declaratory Adjudication*. In a case in which the trustees died without assigning the beneficial interest, a creditor of the person holding the beneficial interest was found entitled to adjudge; and, in virtue of that adjudication, to pursue an action, the title to pursue which was one of the rights conveyed in the trust-deed; *Gavia v. Kirkpatrick*, May 30, 1826, 4 S. & D. 629; affirmed in 1830, 4 W. S. 48. A trustee who becomes bankrupt will be ordered by the Court to denude, and a *curator bonis* or judicial factor will be appointed to act in his room, and to call him to account. Where a trust-settlement was conceived in favour of the trustees, and one of two surviving trustees became insane, the Court granted authority to the other trustee to wind up the trust, with the full powers conferred on the trustees or survivor, but only on condition of his finding caution; *Fraser*, March 1, 1837, 15 D. B. M. 692. See, for cases in which the Court has supplied the failure, bankruptcy or denuding of trustees, 1 *Shaw's Digest*, p. 627.

A trustee appointed for behoof of the creditors of an insolvent person not sequestrated, is generally intrusted with full powers to judge of claims and preferences in the ranking, or to refer such matters to arbitration. He is, in the ordinary case, bound to lodge the sums received by him in a bank, in the character of trustee; and if this provision is either not made or not observed, and the trustee fails after a dividend has been advertized and partially paid, the loss falls not on the estate, but on the creditors failing duly to apply. The general rules as to trusteeship apply to the case of a voluntary trust by a bankrupt; and every such trustee who illegally refuses to denude, may be compelled to denude in favour of a new trustee,

or of a purchaser, by a declarator of trust. On the subject of extrajudicial trustees generally, consult the following authorities: *Bell's Com.* i. 32; *Add. No. IV.*; *More's Notes on Stair*, lv., lxxvi.; *Bell's Princ.* § 1993, *et seq.*; *Kames' Equity*, 334; *Hunter's Landlord and Tenant*; *Bell on Completing Titles*, 91.

2. The trustee under a sequestration is elected by the creditors; and his election thereafter is approved of by the Court of Session. His duty is to carry into effect the diligence which brings the property of parties subject to mercantile sequestration under judicial administration for behoof of their creditors. The duties of the trustee are defined by statute, and have regard to the interests of all the creditors under the sequestration; and the proceedings of the trustee, in the exercise of his statutory powers, are all subject to the review of the Court of Session on summary complaint. See *Bankrupt. Sequestration.*

**Tuernay**; an old word of doubtful signification. Skene thinks that in one passage, "*implacitis burgorum utilitur Tuernay*," it means the title to sue or "do richt." He seems afterwards to think it synonymous with *twenty-nay*, a word by using which an accused person approved his judge, so that he could not afterwards decline his jurisdiction. *Skene, h. t.*

**Turnpikes.** See *Highway. Toll.*

**Turpis Causa.** An obligation to pay money, *ob turpem causam*, cannot found an action in law. Where a gift proceeds *ex turpi causa*, if the unlawfulness lie with the giver, restoration can in no case be competently required; if it lie with the receiver, it is otherwise; if it lie with both parties, then, *in pari casu, potior est conditio possidentis.* *Bank. B. i. tit. 8, § 22*; *Stair, B. i. tit. 7, § 8*; *tit. 18, § 1*; *Ersk. B. iii. tit. 1, § 10*; *Kames' Equity*, 170, 305; *Brown's Synop.* 436; *Johnston, Dec. 4, 1835, 14 D. B. M. 106.* See *Pactum Illicitum, and authorities there cited.*

**Tutor**; is the legal representative and guardian of the person, and the administrator of the estate, of a pupil, failing the father, who during his life as administrator-in-law, is legally vested with the powers both of a tutor and of a curator for his children during their minority. The tutor is either a *tutor-nominate*, or a *tutor-at-law*, or a *tutor-datave*—a division borrowed from the Roman law.

A *tutor-nominate* or testamentary is he whom the father, who alone has the power of naming a tutor, has nominated, either in a testament or in some other writing, sufficiently indicative of his intention. A tutor so appointed has the precedence of every other tutor. A father may nominate any number of tutors; and if some of those named refuse, or are unable to act, they are merely held *pro non adjectis*; and the nomination holds

good as to the rest, unless one of them who cannot, or will not act, is named *sine quo non*; in which case, failing the *sine quo non*, the nomination falls. A tutor-nominate must be major before he can act; but he is exempted from the oath *de fidei administratione*; and although in peculiar cases, as of one who is *vergens ad inopiam*, or of dubious character, the Court may, *ex nobili officio*, ordain him to find security, he is not, generally speaking, bound in security *rem pupilli salvam fore.* The devising of an estate to the pupil, with provision of an individual to manage it during the donee's pupilarity, does not supersede the nomination of a tutor by the father; for such a manager, although he will have the management of the special estate so devised, has no control over the person of the pupil, and is in no sense of the term a tutor, although sometimes erroneously so called. *Ersk. B. i. tit. 7, § 2, et seq.* See *Curatory.*

A *tutor-at-law*, or *tutor-legitim*, has place only where there is no tutor-nominate, or where the tutor-nominate is dead or cannot act, or where he has not accepted. A *tutor-at-law* acquires his right by the mere disposition of law, and cannot be supplanted by a tutor-nominate who has once distinctly renounced, whether when called at the instance of the tutor-at-law or otherwise. No *cognate* (*i. e.* no relation by the mother's side) can be a *tutor-at-law*; and no *agnate* (*i. e.* no person related through the father) can be so either, unless a male. The nearest male agnate, of common understanding and prudence, and twenty-five years of age (1474, c. 52), who can give security *rem pupilli salvam fore*, is the *tutor-at-law*. Where more than one are alike near, it is he who would be the pupil's heir-at-law in a general service; omitting those not of the proper age. The *tutor-at-law* desiring the office obtains a brieve from Chancery directed to any judge having jurisdiction, requiring him to call a jury to ascertain, 1. Who is the nearest male agnate, heir-general, and twenty-five years of age? 2. Is he attentive to his own affairs? 3. Can he give security? 4. Who is the nearest cognate entitled to be custodier of the person of the pupil? Of these, the first alone is really examined into,—the second is presumed,—the third the clerk looks to,—and the last is left to the courts of law; and arises from this, that where there is a *tutor-legitim*, the custody of the person is taken from him, as being the successor of the pupil, and given to the mother till the pupil be seven years of age; at which time, or on her second marriage, if she marry again before that time, it is transferred from her to the tutor, if he be not of law; and if he be, then to the next nearest cognate not at the time (if female)

*vestita viro*; to whom also, if capable, the custody goes from the first, if the mother be then either dead, or married, or incapable. The tutor-at-law, however, retains every right but that over the pupil's person. The tutor's caution is recorded in the judge's books, and he takes the oath *de fidei*. See *Brieve*. A tutor-dative is named by the Sovereign as *pater patriæ*, on the failure both of tutors-nominate and of tutors-at-law, but never till a year after the tutor of law might have served; and great allowance, in point of form, would be made to a tutor-at-law desiring to precede a tutor-dative. A tutor-dative is appointed on his presenting a signature in Exchequer, with the consent of the next of kin on both father's and mother's side, or at least after those parties have been regularly cited. See 1672, c. 2. The signature examined, and charged with a small composition to the Crown, is passed and stamped with the quarter seal. Where a pupil has no tutor at all, the Court of Session will, at the suit of any kinsman of the pupil, and after due intimation to the nearest of kin, appoint a factor *loco tutoris*, whose office expires with the pupilarity, and who must conform to the Act of Sederunt, Feb. 13, 1730. The powers of a factor *loco tutoris* are similar to those of a tutor; but the factor may be superseded *quandocunque* by the service of a tutor-at-law.

As no one can be a tutor who is not in the uncontrolled management of his or her own affairs, a female is excluded, even when tutor-nominate, from the office, while she is *vestita viro*. Professed Papists, and all suspected of Popery, were, by 1661, c. 8, and 1700, c. 3, excluded from this office. But that disability was removed by the statute 33 Geo. III. c. 44. See *Papists*. A tutor is vested with the management of both the *person* and the *estate* of his pupil, while a curator's sole concern is with the *estate*. Hence the maxim, *Tutor datur personæ, curator rei*. The tutor acts alone, the pupil having no person in law; while the minor, on the other hand, acts, but with the advice and consent of his curator. A deed signed by a pupil is null, *ope exceptionis*. A tutor is allowed no remuneration for his trouble; and when the father, in his nomination, has provided a remuneration for him, it is understood to cover all incidental outlays which otherwise he might have charged. The concurrence of a fixed *quorum*, or of a *sine quo non*, where one is named, is indispensable, as is that also of every one of a number of *joint* nominees. See *Quorum*. *Sine quo non*. A tutor can sue for, receive and discharge all debts due to the pupil, rents, interests, or even principal sums when required, and must use regular diligence. He may remove tenants and may grant leases to

endure for the period of his office; but he cannot sell or feu the heritage without the authority of the Court of Session obtained in an action, and on showing that a sale is necessary by the exhibition of a state of the pupil's affairs; although the tutor may implement any commenced transaction, and must go on with any procedure of the law in regard to his pupil's heritage. See *Cognition and Sale*. He may, if necessary, appoint factors under him, with reasonable salaries, and giving security. He may sell the moveables of his pupil, and may validly submit to arbitration all doubtful claims as to them. He may do any thing whereby the better to secure debts to the pupil; but any change in the nature of the debt (as from heritable to moveable), produced in doing so, is not good unless afterwards approved by the pupil when major; and, generally speaking, the tutor cannot, without very weighty considerations, change the nature of any part of the pupil's property so as to invert the course of the pupil's succession. Neither can a tutor be *auctor in rem suam*; he cannot buy from (unless at public sale) or lend to his pupil; he ought not to assign any debt due to the pupil, except in the case of a cautioner paying to him the debt of another; and he must communicate the advantage of any bargain which he may have got in buying a debt affecting the pupil's property. *Ersk. B. i. tit. 7, §§ 16-20*. A tutor may accept or decline his office; and acceptance is not to be inferred by implication. It is fixed on tutors-nominate by writing to that effect, or by acts of administration as tutors; and on tutors of law and dative by their applying for the office, ordering any thing which a tutor alone has right to do, and clearly evincing their intention to accept, even although they have omitted to give security. By 1672, c. 2, a tutor on entering to his office is bound to make up a tutorial inventory. See *Inventory. Curatory*. And, failing his doing so, he is not entitled to any disbursements made by him for the pupil in litigation or diligence; he is accountable for omissions, and may be removed even without cause assigned, at least *ex culpa levissima*; 1672, c. 2; *Act of Sederunt, 25th Feb. 1693*.

A tutor should, in his care of the pupil's person and education, allow him yearly a decent aliment, not, however, exceeding the annual income of his estate. He should pay off the debts, and discharge all other obligations, *quamprimum*; and must do everything to continue the estate, *at least*, as it was. He must raise due diligence against the pupil's debtors. Sums due at the tutor's entry, and not bearing interest, must be recovered and put out at interest. Rents must be lent out, if payable in grain, a year, and if in money,

six months after they fall due. The accruing interest of bonds must be accumulated at the expiration of the office, and in particular cases before that time. Land may be bought with the pupil's accruing funds, if due caution be used. *Ersk. ib.* §§ 24, 25. Tutors are accountable from the time of their acceptance, whether intromitting or not. As to the required degree of diligence, fathers and honorary tutors are liable merely for intromissions; and testamentary tutors are liable in the diligence which a prudent man would give to his own affairs; while tutors of law and dative, and *protutors* (i. e. persons who, without legal authority, act as tutors), are all liable in exact diligence. Tutors are liable *singuli in solidum*, except, 1st, Where a father has divided the management into parts. 2d, Where the father has, in *liege poustie*, and in regard to that estate alone which comes from himself, expressly exempted the tutors-nominate from omissions, and liability in *solidum*; 1696, c. 8. Tutory expires by the death of either tutor or pupil—by the death of a *sine quo non*, or the deficiency of a *quorum*, where a *quorum* is fixed in the nomination—by the pupil's attaining to puberty—by the marriage of a female tutor (though it may revive on her widowhood)—by supervening incapacity, natural or legal—or by gross misconduct in the tutor, cognisable by the Court of Session

alone. The tutory may also expire by the tutor's renunciation made on reasonable cause, and admitted by the judge; for although one cannot be compelled to accept the office, yet, having once accepted, he cannot renounce at his pleasure, since *id quod prius fuit voluntatis postea fit necessitatis*; 1555, c. 35; *Ersk. B. i. tit. 7, § 29*. On the expiration of the office, mutual actions (the *directa et contraria tutelæ*) are competent for the adjustment of the claims of each—the tutor accounting for the rents and for the other profits of the heritage, and for such debts as he has or ought to have known of, and to have recovered; and claiming, though no remuneration, yet relief from all rational engagements, and payment of all reasonable expenses or purchases on the pupil's behalf, of which, however, evidence must be brought, in order to elide a contrary presumption. The latter action is of course uncalled for where the former has been instituted. All claims against a tutor by a minor prescribe in ten years. *Ersk. B. i. tit. 17, § 1, et seq.*; *Bank. B. i. tit. 7, § 1, et seq.*; *Stair, B. i. tit. 6, § 1, et seq.*; *Morre's Notes*, p. xxxv. *et seq.*, lv., cccxlv.; *Bell's Com. i. 132*; ii. 7; *Bell's Princ. § 2067, et seq.*; *Kames' Princ. of Equity* (1825), 108, 334, 353, 467; *Kames' Stat. Law Abridg. h. t.* See *Minor. Pupil. Curatory. Inventory*.

## U

**Udal Right**; is that right in land, which, though dependent on the Crown as superior, for payment of a tribute called Skat, is completed without charter or sasine, by undisturbed possession, proveable by witnesses before an inquest, and founding petitory actions and rights of prescription just as infeftment does. This right is said to have prevailed in Britain before the introduction of the strictly feudal system, and is still to be met with in Orkney and Shetland. See 1669, c. 13. Udal lands are not exempted from land-tax; and are now very commonly converted into feus, by the giving out of Crown charters, a practice introduced into Orkney and Shetland by the annexation of the church-lands. *Bank. B. ii. tit. 3, §§ 10, 18, et seq.*; *Stair, B. ii. tit. 3, § 11*; *B. iv. tit. 22, § 2*; *Morre's Notes*, xxxiii.; *Ersk. B. ii. tit. 3, § 18*; *Bell's Princ. § 932*; *Kames' Stat. Law, h. t.*; *Brown's Synop. h. t.*; *S. & D. xv. 265*.

**Ultimus Hæres.** See *Last Heir*.

**Ultroque Witness.** See *Evidence*.

**Umpire.** See *Arbitration. Oversman*.

**Untum Porcorum**; "swine's seame or fat." *Skene, h. t.*

**Underwriter**; the person who undertakes to insure or indemnify another against losses by sea or by fire. He is called underwriter from writing his name *under*, or at the foot of the policy or instrument by which the insurance is effected. See *Insurance*.

**Unfeudalised Heritage.** Rights which are heritable, but not feudal, may be attached by adjudication duly recorded, without sasine or charge. *Bell's Com. i. 755-58*; ii. 511. See *Adjudication. Bankruptcy. Personal Rights*.

**Unfunded Debt**; is that part of Government stock for the payment of the interest on which no certain funds are set apart. The chief documents of this debt are Exchequer and navy bills, which bear interest from their dates, or from six months after they are issued. These funds are held in law to be moveable, and the right passes with the possession of the document. *Bell's Com. i. 106*; *Bell's Princ. § 1343*. See *Exchequer Bills*.

**Unilateral Obligations**; are those obligations in which one party alone is bound. Unilateral trusts are those which a debtor

voluntarily and extrajudicially executes, for the better and more equal settlement of the claims against him, in favour of a trustee for behoof of all his creditors. *Bell's Com.* i. 334; ii. 486. See *Trust-Disposition. Trustee. Bankrupt.*

**Union.** The acts of the Scotch Parliament, 1707, c. 7 and c. 8, contain the articles of union between the kingdoms of Scotland and England, including an exemplification, under the Great Seal of England, of the corresponding act of the English Parliament. By the Union, the two kingdoms of Scotland and England were, from and after the 1st May 1707, united, under the title Great Britain, with one King, Court, and Parliament, and one Privy Council. For the Parliamentary representation of Scotland, see *Election Laws and Reform Act.* The Scotch courts of justice remain unaltered, except by the abolition of the Privy Council. The English law of treason has been substituted for the Scotch, and the revenue laws are also assimilated; but, with those exceptions, all our other laws, so far as consistent with the object of the Union, remain unaltered. *Bank. B. iv. tit. 1, § 14, et seq.; Swint. Abridg. h. t.; Kames' Stat. Law, h. t.; Brown's Synop. 5303.* See *Exchequer. Treason.*

**Union, Charter of.** Formerly, where lands lay discontinuous, although all the separate tenements or parcels might be of the same kind, and held by the same tenure, under the same superior, and derived from the same author, a special infeftment was required to be given in each tenement, unless the Sovereign, by a Crown charter, had united them into one tenantry. That is, failing such union, there was a separate act of symbolical delivery in each of the discontinuous tenements; and the instrument of sasine accordingly bore that infeftment was so given in each parcel or tenement. The object of a charter, or clause of union, was to dispense with the necessity of taking separate infeftments, and to declare that one sasine should be sufficient to carry the whole discontinuous subjects. If the clause of union mentioned the particular place at which the sasine was to be taken, it required to be taken at that place, otherwise it reached only to the tenement in which it was taken. But if no place was fixed, sasine taken on any part of the united lands served for the whole. It is to be observed, however, that the only effect of a clause of union was to unite lands locally discontinuous; for where lands were derived from different authors, or held of different superiors, or of the same superior, but by different tenures, they could not legally be the subjects of union. Where a part of the united lands was disposed, and thus separated

from the rest, some lawyers have held that the union was thereby dissolved; but the more correct opinion appears to be, that a grant of part of the united lands did not dissolve the union as to the part which remained. The erection of lands into a barony confers a higher right on the grantee than that resulting from a mere clause of union; for such an erection has the effect not only of uniting land naturally discontinuous, but it makes one sasine serve for all, although the subjects erected should be perfectly distinct, as lands, patronages, mills, &c. *Ersk. B. ii. tit. 3, § 44, et seq.; Stair, B. ii. tit. 3, § 18, and B. ii. tit. 3, § 44; More's Notes, xciii.; Bank. B. ii. tit. 3, § 88; Wight on Elections, p. 224, et seq., and Appendix to Wight, p. 66; Bell's Princ. § 875; Kames' Stat. Law Abridg. h. t.; Bell on Purchaser's Title, 200, 302; Jurid. Styles, 2d edit. i. 441, 468.* See *Barony. Erection. Charter. Infeftment. Dispensation, Clause of.*

A charter of union is now no longer necessary, as recent legislation first dispensed with the necessity of infeftment on the lands, and afterwards with the instrument of sasine also. See *Infeftment and Titles to Land.*

**Universal Representation.** See *Representation. Heir. Discussion. Hereditas Jacens. Passive Titles.*

**Universitatis Res.** See *Things.*

**Universities;** their rights. See *Things. Corporation. Community.*

**Unlaw.** A witness was formerly inadmissible who was not worth the King's unlaw, i. e., the sum of L.10 Scots, then the common fine for absence from courts, or for small delinquencies. *Bank. B. iv. tit. 30, § 21; Stair, B. iv. tit. 43, § 9.* See *Evidence. Amerciamentum. Tort.*

**Upset Price.** The remedy provided by 1690, c. 24, for the case of the upset price in a judicial sale being fixed too high, not having been found beneficial, the Court of Session has introduced the practice of lowering the price on cause shown, care being taken duly to advertise the adjournment and reduction. In a voluntary sale of a bankrupt estate, consented to by a majority of the creditors in value, the upset price is fixed, and may, if advisable, be lowered by the trustee and a majority of the commissioners. *Bell's Com. ii. 272, 417.* See *Judicial Sale. Ranking and Sale. Power of Sale.*

**Urban Servitudes.** See *Servitude.*

**Usage of Trade.** General or local usage of trade, unless where (if local) it be known to one party, or where an express stipulation exists, establishes an implied condition essential to a sale; and non-compliance with which may import voidance or relief. And usage may constitute a general lien, e. g. in different branches of manufacture for work



done. *Bell's Com.* i. 433, 440, 482; ii. 107; *Bell's Princ.* §§ 101, 173-76; *Illust. ib.*; *More's Notes to Stair*, cvi. See *Prescription. Servitude.*

**Usance**; is the customary time at which bills are made payable in a particular country. In France, thirty days; in Hamburg, one calendar month; in Leghorn, three calendar months. Double, treble, and half usance, are terms implying corresponding alterations on the usual period; *Bell's Com.* i. 410; *Stair*, B. i. tit. 11, § 7; *Bank*. i. 360; *Thomson on Bills*, 380, 808. See *Bill of Exchange.*

**Use, Servitude of**; a personal servitude, whereby the whole fruits of a subject are enjoyed, *salva rei substantia*—an important servitude with the Romans, but with us little known. See *Servitude*. The *usarius* could not, by the Roman law, dispose of anything from the servient subject, so that his use was confined to what he and his family could consume. *Ersk. B.* ii. tit. 9, § 39. See *Liferent.*

**Usucapio**; the right which, by the Roman law, long, uninterrupted, and *bona fide* possession, founded on a colourable title, gave to property. The analogous provision of the law of Scotland is the long prescription of forty years. *Stair*, B. ii. tit. 12, § 2, *et seq.*; *Bank*. B. ii. tit. 12, § 1, *et seq.*; *Ersk. B.* iii. tit. 7, § 2. See *Prescription.*

**Usufruct**; was one of the three personal servitudes of the Roman law, *use, usufruct, and habitation*, and is essentially the same as *liferent*, being that right by which, during the life of the usufructuary, the whole benefit of the subject, *salva rei substantia*, is enjoyed. *Stair*, B. ii. tit. 6, § 1, *et seq.*; *Bank*. B. ii. tit. 6, § 4; *Ersk. B.* ii. tit. 9, § 39, *et seq.*; *Bell's Princ.* § 1037. See *Liferent.*

**Usury, or Oker**; is the taking, or agreeing to take, in return for the loan of money, more than the legal interest in the place where the loan is contracted. Before the Reformation, while taking of interest was prohibited, wadsets and rights of annual rent were usual and very injurious covers for loans, and were justly superseded by rendering a stipulation for interest legal. The statute of 12 Anne, sess. 2, c. 16, which in a great measure supercedes the statutes 1594, c. 222; 1597, c. 251; and 1621, c. 28, made five per cent. the legal

interest of Britain; describes the crime of usury; and fixes as its consequences, *penalties and nullity.*

By the Act 17 and 18 Vict. c. 90, 1854, the whole acts against usury were repealed. See *Interest.*

**Uterine Brother**; a brother by the same mother, but by a different father. By the former law he was not entitled to succeed to his half-brother or half-sister, as there was no succession through the mother. *Stair*, B. iii. tit. 8, § 43; *Ersk. B.* iii. tit. 8, § 8; *Bank*. ii. 296; *Bell's Princ.* §§ 1652, 1665; *Ersk. Princ.* 11th edit. 386. See *Succession. Half-blood.*

By the act 18 and 19 Vict. c. 23, 1855, brothers and sisters uterine succeed where the intestate dies without issue, and having been predeceased by his parents, and leaving no brother or sister german or consanguinean, or their descendants.

**Uti Possidetis**; an interdict of the Roman law as to heritage, ultimately assimilated to the interdict *utrubi*, as to moveables, whereby the colourable possession of a *bona fide* possessor is continued until the final settlement of a contested right. *Stair*, B. iv. tit. 26, § 1; *Bank*. B. iv. tit. 24, § 53. See *Possessory Judgment.*

**Utlagium**; or *utlagatum*, "outlawry, rebellion, disobedience to the laws, banishment, or forfaultor." *Skene, h. t.*

**Uttering**. In reference to forgery and counterfeit coining, the word *uttering* signifies the putting to use the false deed, or the passing as true the base coin. The crime of forgery is not completed without the uttering; but if it has been proved that some one has uttered the false writing, this is presumed to have been done with the fabricator's concurrence; and if he denies it, the *onus* lies upon him to show how the writing passed from his possession, without his connivance. The vending or delivering of forged notes to an associate, at less than their nominal value, and for the purpose of being passed as genuine, does not amount to uttering; but it constitutes a relevant charge. *Hume*, i. 146; *Alison's Princ.* 371; *Steele*, 145. See *Forgery*; and for the punishment of uttering base coin, see *Coining.*

## V

**Vacant Stipends**. The stipend due during a vacancy was formerly at the disposal of the patron for pious uses. But it has been given, by statute, to the Widows' Fund. It was first provided, by 50 Geo. III. c. 84, § 17, that when the pastoral charge in any of the churches or parishes, the stipends

of which are augmented, as mentioned in the act, become vacant, the several sums directed to be appropriated for augmenting such stipends respectively, shall not, during any such vacancy (excepting only with regard to the half-yearly moiety in name of Ann), be applicable to the purposes to which vacant sti-

pendis in Scotland are at present by law applicable, nor shall they be subject to those having a right to the disposal of vacant stipends, but shall be paid into the Ministers' Widows' Fund. And by 54 Geo. III. c. 169, § 9, *et seq.*, when any parish in the Church of Scotland becomes vacant by the death, translation, resignation, or deprivation of an incumbent holding the pastoral cure and benefice, and vacant stipend arises in consequence, such vacant stipend, in so far as it has heretofore been applicable by the patron to pious purposes, is levied and paid to the general collector of the Ministers' Widows' Fund, who is directed to apply the produce for behoof of the fund. And as, by an act of William and Mary, the vacant stipends had been withdrawn from the patrons of the several parishes, and made payable to the Synod of Argyle, or their factors, it is provided, that all such vacant stipend be applied, as in the other parishes in Scotland, but without prejudice to any claim of the Synod of Argyle to dispose of the rent of manse and glebes, or of the sums paid in lieu of manse, termed Manse-money, within the shire of Argyle. The right of the widow and nearest of kin to a half-year's stipend, in name of Ann, is also reserved. So often as any portion of vacant stipend occurs, in any parish within the bounds of any presbytery of the Church of Scotland, the moderator is required, within three months, or, if the parish be situated within the Western or Northern Isles, within six months after the terms of Whitsunday or Michaelmas, at which such vacant stipend becomes due, to make intimation thereof, by writing under his hand, to the general collector of the Widows' Fund, at his office at Edinburgh. The writing must contain an attested list of the several heritors or others by whom the vacant stipend is payable, and of the proportion payable by each of them, so far as the moderator can obtain information. He is also required, within three months after the vacant stipends become due, to give notice in writing to the several heritors and others liable, that they are required, under authority of this act, to make payment of the vacant stipend to the collector, his deputies or factor demanding it, on or before the 1st of May immediately following the terms of Whitsunday or Michaelmas, at which it becomes due. And, if the moderator neglect to make these intimations, he and his presbytery are liable to pay the whole vacant stipend to the general collector, at their own expense. But, in such event, they are entitled to levy, uplift and receive such vacant stipend from the persons liable, and to grant receipts, and have the same remedies for recovering it as the gene-

ral collector would have had. On the subject of vacant stipends, see *Ersk. B. i. tit. 5, § 13; Bank. B. ii. tit. 8, § 77; Stair, B. ii. tit. 8, § 35; Bell's Princ. § 836; Kames' Stat. Law Abridg. h. t.; Hutch. Just. of Peace, ii. 509; Connell on Parishes, 169, 334, 546.*

In the case of *Kinnoull v. Gordon*, 5 D. 12, it was held that the patron was entitled to the vacant stipend, where the vacancy of the benefice was caused by reason of the Church Courts refusing to put the presentee of the patron upon his trial; but the judgment was reversed in the House of Lords, who decided that such vacant stipend belonged to the Widows' Fund, under the provisions of the act 54 Geo. III. c. 169; *Gordon v. Earl of Kinnoull*, April 19, 1845; 4 Bell, 126.

**Vadiare Duellum**; a phrase peculiar to the trial by single combat. The pursuer and defender were said *vadiare duellum*, when they give pledges to fight, the one to prove what he asserted, the other to disprove what he denied. *Skene, h. t. See Single Combat.*

**Vadium**; a wad, wedde or pledge. *Skene, h. t. See Wadset.*

**Vagabond, or Vagrant.** Vagrants and sturdy beggars were at one period classed as necessary, *i. e. involuntary servants*, such as indigent children, colliers, salters, and workmen, who refused to serve at the legal rates; see 1663, c. 16. Various severe enactments were passed against them under the descriptions of beggars, fortune-tellers, jugglers, minstrels, &c., providing sometimes even capital punishments; 1424, c. 42; 1535, c. 22; 1579, c. 74; 1597, c. 272; 1617, c. 10; 1663, c. 16; 4 Geo. I. c. 11; and 9 Geo. II. c. 5. The act 1698, c. 21, ratified all but the two last. Yet now vagrants are seldom taken up or punished, unless where police regulations are enforced; or where they are entering a parish in the face of an advertised prohibition; or where they are committing, or in the notour habit of committing, petty delinquencies. *Ersk. B. i. tit. 7, § 61; Hume, i. 474; Bank. i. 59; Kames' Stat. Law Abridg. voce Vagrant; Hutch. Justice of Peace, h. t.; Blair's Justice, h. t.; Dunlop's Parish Law, 252. See Poor. Egyptians.*

**Valent Clause.** The valent clause in a retour of a special service is that clause in which the old and new extent of the lands are specified. *Bank. ii. 459; Bell's Princ. §§ 1830, 2153; Jurid. Styles, i. 341. See Extent. Election Laws.*

**Valuable Consideration.** See *Consideration. Onerous Deed. Conjunct and Confident. Gratuitous Deed.*

**Valuation of Lands.** By the act 17 and 18 Vict. c. 91, 1854, commissioners of supply of every county, and the magistrates of every burgh, are directed to cause a valu-

ation-roll to be made up annually, shewing the yearly rent or value of the whole lands and heritages within each county or burgh respectively, and for that purpose assessors are directed to be appointed for estimating the yearly value of lands and heritages. The same is taken to be the rent at which, one year with another, they might be reasonably expected to let from year to year; and where the lands are *bona fide* let for a yearly rent conditioned as the fair annual value thereof, without grassum or consideration other than the rent, the rent is taken to be the yearly rent, except where the lands are let on a lease of a longer duration than twenty-one years, or in the case of minerals under a lease of a longer duration than thirty years. Where the lands consist of woods, copse, or underwood, the yearly value of the same is taken to be the rent at which such lands might, in their natural state, be reasonably expected to let from year to year as pasture or grazing lands. See also the Act 20 and 21 Vict. c. 58, 1857.

**Valuation of Teinds.** See *Teinds*.

**Value, or Avail of Marriage.** See *Avail of Marriage*.

**Valued Policy.** In marine insurance, a valued policy is a policy in which a specified value is put on the ship, goods or effects insured. This value is held to be of the nature of liquidated damages, to save the necessity of proof in the event of a total loss; and the value is, or ought to be, the value of the ship, or the prime cost of the goods at the date of effecting the policy. Such policies are said to have originated in the difficulty occasionally found, of proving the exact amount of the value of the interest insured; and if the insured be able to prove *some* interest, he need not prove interest to the *full* amount of value specified. But if such a policy could be proved to have been a mere cover for gambling, it would be void as a wager policy. *Marshall*, 110, 199. See also *Arnold on Marine Insurance and Duer on Marine Insurance*. See *Insurance*. *Wager Policy*.

**Varda; quasi varda;** custody or keeping. *Skene, h. t.* See *Ward-Holding*. Also *Varda Curia*. *Skene, h. t.*

**Vareenna; a warren.** *Skene, h. t.* See *Rabbits*.

**Vassal.** In feudal law, the vassal is he in whom the *dominium utile* of the feu is vested, in contradistinction to the superior who holds the *dominium directum*. See *Dominium Directum and Dominium Utile*. *Superior*. *Feudal System*. *Base Rights*. *Feu*. *Disposition*. *Tenure*. *Charter*.

**Vastation;** by any public calamity, as war, or by any other *damnum fatale*, does, if affecting the unseparated fruits of the ground, entitle the tenant to proportional deduction of rent for that year. *Stair, B. i. tit. 15, §*

*3; Bank. B. i. tit. 20, § 13.* See *Damnum Fatale*. *Sterility*.

**Vendition of a Ship;** is the deed or instrument whereby a ship is conveyed either absolutely or in security. This conveyance must be in writing; but the complicated forms which were at one time required, are now considerably simplified. The sale or transfer may be either of the whole ship, or of one or more shares, and transfers and mortgages of ships and shares, as now regulated by the merchant shipping Act, 1854, 17 and 18 Vict., c. 101. *Bell's Princ.* p. 370; *Jurid. Styles*, ii. p. 518, *et seq.*; *Stair B. ii. tit. 3, § 7*; *Brodie's Supp.* 951; *Bell's Com.* i. 160-64; ii. 11. See *Ship*. *Registry Acts*.

**Vendor and Vendee.** Vendor is the person who sells anything; and vendee is he to whom the sale is made. See *Sale*. *Delivery*.

**Venysoun;** a word anciently used in infeftments, and in the English laws, signifying a license and power to hunt, take and slay of the King's venison within his parks and forests. *Skene, h. t.*

**Verbal Obligations;** are such as have no proper appellation; as, 1st, *Promises* on one part alone; therefore gratuitous. 2d, *Verbal* and mutual agreements. But verbal agreements regarding heritage are invalid (except where they regard a lease, which can be thus constituted for one year); and are not proveable by reference to oath of party. In obligations, in the constitution of which writing is usually employed, a verbal obligation even as to moveables is invalid; but a verbal obligation founded on or referable to any known contract, and in all cases where the value of the subject of the obligation is under L.100 Scots, may be proved by witnesses. *Ersk. B. iii. tit. 2 § 1, et seq.*; *Bell's Com.* i. 330; *Kames' Equity*, 143. See *Evidence*. *Pacta Liberatoria*.

**Verborum Obligatio;** in the Roman law, was completed by certain *verba solennia* unknown in Scotland.

**Verd, vert;** according to *Skene*, from the Latin *viride*; a word anciently used in charters and infeftments, and also in the English laws, where it is called "granehue," signifying power to cut green trees or wood. Also a power and license of pasturage within the King's forest. *Skene, h. t.*

**Verdict;** the judgment or deliverance of a jury. In criminal trials, the verdict is according to the votes of the majority of the jury. All verdicts returned before the adjournment of the Court must be *viva voce*; and if the jury are not unanimous, this circumstance must be stated by the chancellor in announcing the verdict. On the jury being asked what is their verdict, their chancellor proclaims it aloud; and if it is special or detailed, the

clerk takes it down in the words of the chancellor on a slip of paper. It is then transferred to the record and read aloud to the jury, who are asked, "Is this your verdict?" After this, the verdict acquires the nature of a written verdict, and cannot be explained or modified by the declarations of the jury. *Written verdicts* are only competent where the Court adjourns before the verdict is returned. The names of the persons of assize are set down, and if a name is omitted, or a wrong one introduced in the sederunt, the error may be afterwards corrected, if the jury unanimously testify to the Court that the proper persons, and no other, were present on the occasion. The names of the chancellor and clerk are then mentioned, and after some further preamble, the judgment or finding is inserted. It is then signed by the chancellor and clerk, folded and sealed up in presence of the jurors while still enclosed. On returning to Court, the names of the assize are called over; they are asked who is their chancellor, and he delivers the verdict to the presiding judge, who, having unsealed and perused it, delivers it to the Clerk of Court, to be by him transferred into the record, after which it is read aloud, all the assize being still present to hear and acknowledge their verdict. The finding may be either, generally, *guilty, not guilty, or not proven*, or it may find certain things proven, from which the Court are left to draw the inference; 6 *Geo. IV. c. 22*; 9 *Geo. IV. c. 29*; *Hume, ii. 426, et seq.*; *Alison's Prae. 631*; *Steele, 207*.

In civil causes, a jury formerly required to be unanimous in their verdict. If they could not agree on their verdict within twelve hours, they were discharged, and the trial went for nothing; but if they unanimously applied to the Court for further time to consider their verdict, they were allowed such further time as they desired. By the act 22 and 23 *Vict. c. 7, 1859*, if after three hours deliberation nine of the jury agree, a verdict may be returned. See *Jury. Inquest. Chancellor. General Verdict. Special Verdict. Not Guilty. Jury Trial. Issues. New Trial.*

**Veredictum Assisæ.** See *Proporcitas*.

**Vergelt;** a compensation for a wrong. *Stene, h. t.*

**Vergens ad inopiam.** When a man is clearly *vergens ad inopiam*, his creditors may legally resort to various measures calculated to secure their claims, which would be otherwise regarded as inadmissible or nimious. See *Bell's Com. i. 223*; *ii. 68, 144*; *Bell's Princ. § 46*; *Ersk. B. ii. tit. 12, § 42*; *B. iii. tit. 3, § 65*; *tit. 6, § 10*; *Kames' Equity, 284*.

**Veritas Convicii, an Excuset?** The general rule, both in the practice of England and Scotland, is, that in the criminal action for

libel, *veritas convicii* is not admitted as a defence, and that when the circumstances of the case warrant the indulgence, it is allowed to be pleaded, only in mitigation of punishment. In civil cases, proof of the *veritas* is not admissible without an issue or issues in justification, setting forth the facts, the truth of which the defender undertakes to prove. See *Brodie, 20th Jan. 1836, 14 S. & D. 267*. Where a defender pleads *veritas*, the pursuer may meet him by counter evidence. It is not competent for a defender to justify his libel, by pleading that the pursuer has been similarly libelled by others; *Goddard, Nov. 4, 1816, 1 Mur. 159*; *Edwards v. Macintosh, Dec. 23, 1823, 3 Mur. 369*; *Gilchrist v. Dempster, Sept. 10, 1823, 3 Mur. 363*. See, generally, on this subject, *Borthwick on Libel*; *Ersk. B. iv. tit. 4, § 80*; *Bank. i. 250*; *Bell's Princ. § 2057*; *Macfarlane's Jury Prac. 219*; *Brown's Synop. 2138*; *Shaw's Digest, i. 517*; *ii. 257*. See *Defamation. Libel. Injuries.*

**Verity, Oath of.** See *Oath. Evidence. Claim. Sequestration.*

**Verso, actio de in rem verso;** an action borrowed from the Roman law, whereby whatever is done by one party for the direct benefit of another, lays the party benefited under an obligation for recompense, to the extent of the benefit conferred at the other's expense. *Stair, B. i. tit. 8, § 7*. See *Recompense*.

**Vesting.** See *Legacy. Jus Crediti. Succession. Contract of Marriage. Dies cedit.*

**Via;** a Roman law rural servitude, including the two minor servitudes of the same class of *iter* and *actus*, and in addition conferring on the dominant proprietor the right to use the road for carriages drawn by horses and other beasts of draught. *Ersk. B. ii. tit. 9, § 12*. See *Actus. Iter. Road.*

**Vicar, Vicarage.** See *Tiends*.

**Vice, Succeeding in the.** Succeeding in the vice, is an intrusion whereby one enters into possession, in the place of a tenant bound to remove; such entry being made collusively with the outgoing tenant, and without the landlord's consent. In this case, both the tenant and he who thus collusively takes his place, are liable as violent possessors; because it was legally incumbent on the tenant to have left the possession void for the landlord's entry. The person succeeding in the vice, therefore, will be subjected as an intruder, unless he have a colourable title of possession to protect him. *Bank. B. i. tit. 10, § 149*; *Stair, B. ii. tit. 9, § 45*; *Hunter's Landlord and Tenant. See Ejection and Intrusion. Violent Profits.*

**Viccomes;** the ancient name of the sheriff. See *Sheriff. Comes*.

**Vicennial Prescription;** pleadable against holograph bonds not attested by witnesses. *Bell's Com. i. 329*. See *Prescription*.

**Victual**; is the name given, in our law, to any sort of grain or corn. *Ersk. B. ii. tit. 10, § 46, in notes.*

**View, Proof on**; an extraordinary mode of proof by inspection judicially authorised. *Bank. B. iv. tit. 26, § 4. See Evidence. Jury Trial.*

**Viewers.** In jury causes, it is sometimes thought expedient that the jurors, or some of them, should have an opportunity of inspecting premises in dispute previously to the trial. When this is proposed, the course is, for the party wishing the view to apply to the Court for a view, giving notice to the agent of the opposite party. The application must be made at least six days previous to the day of trial; and where it is granted, six jurors are selected for the purpose, called *viewers*, who must be summoned by the sheriff to attend at the place in question, some convenient time before the trial, where the premises are pointed out to them by two persons, named by the Court, usually on the joint suggestion of the parties, and technically called *shewers*. The expense of such views is borne, in the first instance, by the parties equally, and no evidence can be adduced at the time of taking the view. The object of the view is, to render the ground of dispute more intelligible to the jury; but it will only be granted where the necessity of it is made very apparent. The attendance of agents at the view is disapproved of, and all discussion on that occasion is inadmissible. The shewers are the only parties properly entitled to interfere or communicate with the viewers. Where the subject of the view lies in the counties of Sutherland, or Caithness, or Orkney, which are not required to send jurors to Inverness, the sheriffs of these counties are required, by a special enactment, to return three persons of the county in which the action arises, to be viewers, who are also bound to attend the trial, and to be first called to serve on the jury. If, from any cause, it is expedient that these viewers should be sent from a neighbouring county, the Court may issue an order for a certain number of jurors from the nearest county, from which it is expedient to take them, who shall be bound to attend as viewers, and who shall be first called to serve on the jury. *55 Geo. III. c. 42, § 29; 59 Geo. III. c. 35, § 35; Macfarlane's Jury Prac. 97, et seq.*

**Vigilantibus, non dormientibus, jura subveniunt.** See *Stair, B. iii. tit. 2, § 42; Kames' Equity, 408.*

**Villenagium**; slavery or servitude. *Skene, A. t.*

**Vindicatio Rei**; a Roman law real action, founded on the right of property, little known now in that form. *Stair, B. iv. tit. 3, § 43; Bank. B. iv. tit. 24, § 36. See Action.*

**Vintners.** The edict *Nautæ, Caupones, Stabularii*, is extended, by our law, to vintners. See *Nautæ, Caupones, &c. Innkeepers.*

**Violating Sepulchres.** See *Sepulchres.*

**Violence**; may be established by parole evidence to the effect of reducing a deed perpetrated thereby; and the amount of damage sustained by violence may be judicially ascertained by an oath *in litem*; *Ersk. B. iv. tit. 2, § 18, 21. See Extortion.* Violent or clandestine possessors, if not explicitly or tacitly acknowledged, may be removed without warning, but not without order of law. *Bank. B. ii. tit. 9, § 57; Stair, B. iv. tit. 26, § 14; tit. 28, § 1, et seq. See Ejection.*

**Violent Profits.** "Violent profits are so called because they became due on the tenant's forcible or unwarrantable detaining the possession after he ought to have removed;" *Ersk. B. ii. tit. 6, § 54.* In an action of removing, the defender must, in most cases, find caution for the violent profits; 1555, c. 39. He must be prepared with a cautioner for violent profits, at giving in his defences, unless he instantly verify a defence excluding the action; *A. S. 12th Nov. 1825, Sheriff-court, c. vii. § 6.* In rural tenements, the violent profits are held to be the full profits which the landlord could have made either by possessing the lands himself, or by letting them to others. In urban tenements, the violent profits are generally estimated at double the stipulated rent. See *Watt v. Bell and Balfour, 10th July 1822, 1 S. & D. 556.* If the tenant, in resisting the removing, have a *probabilis causa litigandi*, the rent decreed for will be limited to the rent stipulated in the lease; *Ersk. ib.* As to the effect of the tenant's *bona fides* where his lease is under reduction, and as to the period at which, in the course of such an action of reduction, his *bona fides* will be held to cease, to the effect of entitling the landlord to claim violent profits, see the *Duke of Buccleuch and Queensberry v. Hyslop, 13th Nov. 1822, 2 S. & D. 6*; affirmed 10th March 1824, *2 Shaw's Appeals, 54*; *Earl of Wemyss, 13th Jan. 1823, 2 S. & D. 107, 2 Shaw's Appeals, 70.* Violent profits are also due by any other unlawful possessor *in mala fide*; *Ersk. B. ii. tit. 6, § 54; Bank. B. i. tit. 10, § 133-47.* It is the opinion of Stair, that, *in dubio*, the pursuer's oath *in litem* should be admitted; *Stair, B. iv. tit. 29; B. i. tit. 9, § 16, 26; and B. ii. tit. 9, § 44.* See also *More's Notes, p. lxi; Bell on Leases, ii. 83-5, 347; Hunter's Landlord and Tenant; Ross's Lect. ii. 519. See Removing. Spuilzie. Warning. Bona Fides. Ejection. Advocation.*

**Vis et Metus**; form a good ground of reduction, if they be such as *cadunt in constantem virum*, not if they be trifling, or not present, or merely reverential, or proceeding

from the just execution of legal diligence, and used for procuring a deed relating to a debt contained in the diligence. A third party interposing his credit, or advancing money in behalf of a person illegally threatened or forced, has, in a reduction, the same plea as he who was so relieved; and has, if unable to recover from the person menacing or forcing, right of recourse against the party relieved. See *Ersk. B. iv. tit. 1, § 26; Stair, B. i. tit. 9, § 8; B. i. tit. 17, § 17; More's Notes, lviii; Bank. i. 255; Kames' Stat. Law, h. t. See Reduction. Force and Fear.*

**Viametum;** neighbourhood. *Skene, h. t.*

**Vitiation.** Vitiation or alteration in a material part of any deed, e.g., the date of a bill, without consent of parties, is fatal to the document; independently of the objection on the stamp laws, unless the alteration be made evidently to correct a mistake, and in furtherance of the original intention. A vitiation affecting a distinct part only of a deed, generally speaking, goes merely to cause that part to be held *pro non scripto*. *Bell's Com. i. 291, Add. No. XI.; More's Notes to Stair, p. cccvii.; Ersk. B. iii. tit. 2, § 20, et seq.; Thomson on Bills, 70, 179, 612; Tait on Evidence, 3d edit. 19, 39, 143-150; Ross's Lect. i. 145. See Deed. Bill.*

**Vitiosus Intromission.** See *Intromission.*

**Vitium Reale.** See *Vitiation. Labeas Realis. Bill of Exchange. Fraud.*

**Vitriol, Throwing on the Person.** See *Stabbing. Attempt at Murder.*

**Voluntary Jurisdiction;** is that exercised in matters admitting of no opposition or question, and, therefore, cognisable by any judge, in any place, and on any lawful day; such as the judicial ratification of a married woman, briefs of tutory, general service, &c. *Ersk. B. i. tit. 2, § 4. See Jurisdiction. Ratification.*

**Vote, Casting.** The privilege of giving a casting vote is sometimes conferred on the preses or chairman, or on some particular member of a meeting, or nomination of persons entitled to vote; that is, the person having this privilege is entitled not only to his deliberative vote as a member of the meeting, but also to a second vote in cases of

equality. This right does not exist at common law; and must therefore be vested in the party exercising it, either by statute, or by special deed or agreement, binding on all the voters. See *Election Law. Preses.*

**Votes, in Sequestration.** See *Sequestration. Trustees. Scrutiny.* Votes for member of Parliament, or in Parliament, see *Election Laws. Parliament. Reform Act.*

**Voth;** outlawry. (See *Utlagium*). **Vouth,** calling or accusation. *Skene, voce Voth.*

**Voucher;** is the technical name for the written evidence of payment. See *Discharge.*

**Vow;** refers chiefly to pious dedication in times of Popery. *Bank. B. i. tit. 23, § 53, et seq.*

**Voyage;** the master and owners of a vessel are liable for the consequences of all misconduct on the voyage, such as sailing too late (unless the delay be involuntary, as from adverse or boisterous winds)—sailing without convoy in time of war—going unnecessarily out of the usual course, under the limitations of 26 Geo. III.—navigating carelessly—failing to deliver the cargo to the proper persons in safety, according to the local customs, &c., &c. Shipowners are liable under the edict *Nautæ*, &c., except that they are answerable only up to the value of the ship, at the time of the loss, and of the whole freight, and are not answerable for the act of God, or of the Queen's enemies, or for accidental fire; 26 Geo. III. c. 86, § 2 (reserving all regulations against fires); or for valuables put on board, unless their true nature and value be declared in writing, to the master or owner; 26 Geo. III. c. 86, § 3; or for any loss by act or neglect, or embezzlement, without their privity; 7 Geo. II. c. 15; 26 Geo. III. c. 86, § 1; 53 Geo. III. c. 159, § 1, et seq.; remedy remaining, however, at common law against the master and mariners—the master having an exemption only as to valuables. See the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, § 503, et seq. *Bell's Com. i. 554, et seq.; Ersk. B. iii. tit. 3, § 17; Bell's Princ. § 408, 448, 456, 471, et seq.; Illust. ib.; Brodie's Sup. 981. See Charter-Party. Demurrage. Ship. Nautæ, Coupons. Insurance.*

## W

**Wadset;** is the conveyance of land in pledge for, or in satisfaction of a debt or obligation, with a reserved power to the debtor to recover his lands, on payment or performance. The lender is called the *wadsetter*, and the borrower the *reverser*. Formerly the reverser never parted with more than the bare possession of his lands, regularly pledged,

until payment; but afterwards a wadset assumed the form of an absolute conveyance, and the debtor got separate letters of reversion from the creditor, which, as conveying a right merely personal at common law, were, by 1469, c. 27, made effectual against the singular successors of the wadsetter. Such a right of reversion, when duly registered,

never prescribes. See *Redeemable Rights. Rights of Reversion. Redemption.* Wadset is now little used; but, when it is, it is generally effected by a mutual contract. Wadset is *proper* or *improper*. Under a proper wadset, the wadsetter enjoys the yearly profits of the wadset lands, in satisfaction of his interest, during the non-redemption; while, by the improper wadset, which is in fact nothing more than a *pignus* or right in security, the wadsetter is accountable to the reverser for the excess of the rents over the interest, and can claim from him the deficit from the interest of his money; thus undertaking no part of the hazard of the rents, and being obliged to account for any excess of rent, as payment *pro tanto* of the capital. Hence, a clause adjoined to a proper wadset to the effect of defending the wadsetter against all risk is, by 1661, c. 62, declared usurious; and a proper wadsetter forcibly turned out of possession, has a personal claim for his rents against the reverser. The provision of a determinate rent in corn, or of redemption on payment of the principal and interest, makes a wadset improper; but a proper wadset may contain an obligation of relief from public burdens in the wadsetter's favour. Even a proper wadsetter may grant a back tack to the reverser for payment of a certain tack-duty, in lieu of interest; thus rendering his wadset improper; and the payment of the tack-duties may, by special provision, be made a *real* burden on the redemption (though not a *debitum fundi* until redemption), if the back-tack be either engrossed in the wadset, or registered in the register of reversions; 1617, c. 16. A conventional irritancy on failure to pay the tack-duty is more liberally interpreted than a similar provision in a sale under reversion; and, on declaration of the irritancy, the wadset, if formerly proper, resumes its character. By 1661, c. 62, all proper wadsetters must, during non-requisition of the sum lent, quit possession on offer of security for payment of the interest by the reverser, or any in his right; or else impute the excess of rent over the interest in payment of the capital sum; the wadset being then held improper. As an eik to the reversion of a wadset which had been previously burdened with a back-tack to the reverser, is not *real* against the reverser's singular successor, a wadsetter, whose right is to be declared extinguished by possession, cannot ascribe his intrusions to the sums contained in the eik. *Ersk. B. ii. tit. 8, § 3, et seq.; Stair, B. ii. tit. 10, § 1, et seq.; B. iv. tit. 5; B. ii. tit. 6, § 17; B. i. tit. 13, § 14; Bank, B. ii. tit. 10, § 2, et seq.; More's Notes, pp. cclxi., ccccxvii.; Bell's Com. i. 670-79; Bell's Princ. § 901, et seq.; Illust.*

*ib.; Kames' Princ. of Equity, 45, 49 (1825); Kames' Stat. Law abridg. h. t.; Ross's Lect. ii. 329, et seq. See Election Laws. Redeemable Rights. Eik. Reversion. Redemption. Pledge. Premonition.*

**Wager.** Wagers and gaming debts are regarded in the law of Scotland as *pacta illicita*, as not partaking of the nature of serious business, but as mere pastime and amusement. Hence, no action is competent for the recovery of any sum gained by betting or wagering in any form. The view taken in Scotland is, that courts are instituted to enforce the rights of parties arising from serious transactions, and can pay no regard to *sponsiones ludicæ*. For the same reason, if the money lost has been actually paid, the loser cannot recover it in an action; for, in such a case, the maxim *melior est conditio possidentis* applies; *Wordsworth, 15th May 1799, Mor. p. 9524.* In England the law was formerly different; but some very eminent judges in that country expressed regret that it was so. By the English statute 8 & 9 Vict. c. 109, § 18, all contracts by way of gaming or wagering are declared null and void. See *Bell's Com. i. 300, et seq. and notes.* By the act 1621, c. 14, it is enacted that if any man wins more than 100 merks (L.5, 11s. 1 $\frac{1}{2}$ d.) at cards or dice, within twenty-four hours, or by wagers upon horse races, the surplus shall, within twenty-four hours thereafter, be consigned in the hands of the kirk-treasurer, if in Edinburgh, and, if in a country parish, of the kirk-session, for the use of the poor of the parish. Power is given to magistrates, sheriffs, and justices of the peace to pursue, and, failing their doing so, a common informer may sue for double the sum—one half of which goes to the poor, and the other to the informer. This act was found not to be in desuetude in 1774; *Maxwell, 14th July 1774, Mor. p. 9522.* And, by 9 Anne, c. 13, any person who, by any fraud in playing at cards, dice, &c., or in betting, wins any money, or at one sitting wins above L.10, shall forfeit five times the value of the money, or other thing won, to any person who shall sue for it; and, besides, shall be deemed infamous, and punished as in cases of perjury. By the same statute, all bonds or other securities given for money won at play, or lent at the time to play with, are declared utterly void; and all mortgages or encumbrances of land made on the same considerations are ordered to be made over for the use of the mortgagor; *Bell's Com. i. 300.* See also *Hutch. Justice of Peace, vol. ii. p. 349; Bank, B. i. tit. 10, § 20, et seq.; More's Notes to Stair, p. lxxv.; Ersk. B. iii. tit. 1, § 10, and notes by Ivory; B. iii. tit. 3, § 84; Kames' Princ. of Equity (1825), 21; Thomson on Bills, 116;*

*Tait's Justice of Peace, voce Gaming; Brown's Synop.* pp. 1428, 1438. See *Gaming. Pactum Illicitum.*

**Wager Policy**; has been defined, a pretended insurance founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss by the happening of any of the misfortunes insured against. Such insurances are usually expressed by the words, "interest or no interest,"—or "without farther proof of the interest than the policy,"—or "without benefit of salvage to the insurer." Notwithstanding the general principle that insurance is a contract of indemnity, such policies came in England, after some fluctuation in judicial opinions, to be held as legal contracts at common law; and the gambling thus legalized became so prevalent and injurious, that wager policies, as above defined, were prohibited by the statute 19 Geo. II. c. 37. *Valued policies* have sometimes been made the cover for wager policies; as to which the general rule seems to be, that where, in a valued policy, the interest is so small as to be a mere cover for a wager, the contract will be void; but, on the other hand, when it appears that the contract is fairly meant as an indemnity, a valued policy is not held to fall under the statutory prohibition; nor will courts of law inquire minutely whether the valuation specified in the policy is or is not very near the true interest of the insured. *Marshall*, 199 and 95, 112. *Arnould on Marine Insurance*, 329. See *Insurance. Valued Policy. Open Policy.*

**Wages.** A workman or servant hired to a precise day or term, is entitled to his whole wages, although prevented from making out his engagement by sickness or other necessary cause, as the master's death, or his own dismissal without good reason; but, if the servant die, wages are due only to the day of his death. A master, in like manner, is entitled to the whole apprentice-fee of an apprentice who has died, or deserted his service; *Ersk. B. iii. tit. 3, § 16.* Servants' wages are privileged debts for the current term, both on the death and on the bankruptcy of the master, provided they be strictly servants' wages; *Bell's Com. ii. 157; Ersk. B. iii. tit. 9, § 43.* See *Privileged Debts. Executor.* Claims for servants' wages fall under the triennial prescription of 1579, c. 83; *Ersk. B. iii. tit. 7, § 17; Bell's Com. i. 332.* Servants' wages are alimentary, and cannot be arrested, in so far as they exceed what is required for subsistence: arrears of them, however, may be arrested. By the Small Debt Act, 1 Vict. c. 41, § 7, wages of labourers and manufacturers, so far as necessary for their subsistence, are deemed alimentary, and, in like manner as servants' fees and other

alimentary funds, not liable to arrestment. Every agreement as to seamen's wages must be in writing, signed by each mariner within three days after entry; but need not be stamped as to coasting vessels. The pay stipulated in the colonies must not exceed double the British pay, and must be paid within thirty days after arrival, or at discharge. *Ersk. B. iii. tit. 6, § 7; Bell's Com. i. 75.* With regard to seamen's wages, the claim for which is regulated in a great measure by statute, see *Seamen.* See, on the subject of wages, *Bell's Com. ii. 103; i. 510, et seq.; Morre's Notes to Stair*, p. lxxxv; *Brodie's Supp.* 955, 976; *Bank. i. 58; Bell's Princ. § 178, et seq.; 630, 1407, 364; Illust. 185; Kames' Princ. of Equity (1825), 215; Hunter's Landlord and Tenant.* See *Charter-Party. Demurrage. Hypothec. Salvage. Workman.*

**Waife Beast**; "an animal which wanders and wavers without any known master, which, when any one finds it within his own bounds, he ought to cause to be proclaimed diverse and sundry times upon market days, at the parish kirk, and within the sheriffdom; otherwise, if he detain the same, he may be accused for theft therefor." It is "leasum to the owner of the beast to repeat and challenge the same within year and day." *Stems, A. 1.* See *Estray.*

**Waith or Waif Cattle.** Waif cattle belong to the Queen (i. e. to her donatory the sheriff), where advertised and not claimed within a year, unless the proprietor on whose lands they were found have a grant of waifa. Inanimate property lost is not supposed to go to the Queen. *Ersk. B. i. tit. 1, § 12; Stair, B. ii. tit. 1, § 5; B. i. tit. 7, § 3; Bank. i. 221, 208-9; Bell's Princ. § 1294; Kames' Stat. Law, h. 1.* See *Estray. Dereliction.*

**Wakening.** Where a summons is not called within year and day after its execution, the instance falls, and a new action must be raised. But where, at any time after calling, no judicial proceeding takes place in the action for a year and day, the depending process merely falls asleep, and may then be wakened at any time within the period of the long prescription, either by written consent of parties through their counsel, or by an action of wakening (which, on the death of a party, was formerly often conjoined with an action of transference). This action might be raised at the instance of either party, grounded upon the last step of procedure, and insisting against every defender of a number, in the conclusion proper to him. The *inducia* of a summons of wakening were six days. The summons was then called like an ordinary action; but it was not necessary to enrol it in the printed rolls of the Outer House. It might be put at once to the hand-roll of the



Lord Ordinary in the principal cause. By the Act 13 and 14 Vict. c. 36, § 30, 1850, actions may now be wakened without a summons, but by an order of the Lord Ordinary in the cause, after ten days' intimation of a motion by either of the parties to that effect. By the same act an action of transference is made to include a wakening. Actions on the proper Inner House roll, and those in which decree has been pronounced, never sleep. *Ersk. B. iv. tit. 1, § 62; Ivory's Form of Process, ii. p. 53; Stair, B. iv. tit. 2, § 3; tit. 34; Bank. ii. 624; Darling's Prac. 326-30; Maclaurin's Sheriff-Court Process, 260; Jurid. Styles, 2d ed. iii. 260, et seq.; Brown's Synop. p. 1803; Shaw's Digest, p. 371; S. & D. xiii. 400; 6 Geo. IV. c. 120, § 53. See Calling of a Summons.*

**Wand**; the baton which, along with the blazon, forms a messenger's insignia, must be exhibited by him in executing a caption. *Stair, B. iv. tit. 47, § 14. See Imprisonment.*

**Ward, Casualty of.** See *Tenure. Casualty.*

**Ward-Holding.** *Skene, voce Varda. See Tenure.*

**Warding and Watching**; services in burgage tenure, constituting the *reddendo* of burgage-holding. See *Burgage-Holding. Tenure.*

**Warding, Act of.** See *Act of Warding.*

**Ware of the Sea**; (*alga maris*). According to Skene, he who was infest with ware, might stop and make impediment to all other persons, both within and without flood-mark, to gather ware, for "mucking and guding of their lands;" or to gather "wilkes, cockles, lempers, mussels, sandeilles, small fish, or baite, upon the sand or craiges foreanent his lands." But if any person were not infest with this privilege, he could not prevent the king, or any of his lieges from doing so, or from "winning stanes, or exercising onie uther industrie, to their profit, within flood-marke." *Skene, h. t. See Sea. Seashore.*

**Warehousing.** The warehousing system is that by which merchants are enabled to deposit goods imported from abroad, in warehouses belonging to the Crown, without paying the duty for impertation. The goods are kept in bond, as it is called, until the merchant pays the duty and removes them from the warehouse. The warehousing system has been the subject of various legislative enactments, the subsisting act being 3 and 4 Will. IV. c. 57, and 16 and 17 Vict. c. 107. On the construction of the warehousing acts, the following authorities may be consulted:—*Bell's Com. i. 186; Bell's Princ. § 1368; Ersk. B. iii. tit. 3, § 8, and note by Ivory; Brodie's Supp. to Stair, 872; Watson's Stat. Law, h. t.; Shaw's Digest, 552. See also Bonding. De-*

*livery. Hypothec. Cellar. Stoppage in transitu.*

**Warning of Servants.** Unless the master or the servant give warning to the other, at least forty days before the term, they are held to continue their contract till another term. The terms are usually Whitsunday or Martinmas, unless where the agreement of parties, the custom of the service, or local usage has fixed other term days. Such agreement or usage may also alter the length of notice required, or overcome the presumption for tacit relocation. Warning may be given indirectly, by any steps being taken which cannot fail to make the parties aware of each other's intention; but what circumstances shall be held equivalent to warning, is a question of evidence which necessarily depends on the specialties of individual cases. It has been decided, that certain circumstances indicating an intention of the master to let the garden which the servant was hired to manage, and on the servant's part, a knowledge of this, and application for service elsewhere, were not sufficient to supply the want of warning; *Maclean, Feb. 4, 1813, F. C. See Ersk. B. iii. tit. 3, § 16, notes by Ivory; Bell's Princ. § 173-4; Illust. ib.; Hutch. Justice, ii. 159; Tail's Justice, voce Servant; Blair's Justice, voce Servant. See Master and Servant, and authorities there cited.*

**Warning of Tenants.** See *Removing. Chalking of Doors.*

**Warrantice**; is the obligation whereby a party conveying a subject or right, is bound to indemnify the grantee, disponee or receiver of the right, in case of eviction, or of real claims or burdens being made effectual against the subject arising out of obligations or transactions antecedent to the date of the conveyance. Warrantice is either personal or real. *Personal* warrantice, by which the granter and his heirs are bound personally, is *general* or *special*, of which the former is interpreted by the rules of implied warrantice, while the latter is either, 1st, *Simple*, viz. that the granter shall do nothing inconsistent with the grant, which is that implied in donations; 2d, *From fact and deed*, i.e. that he neither has done, nor shall do, any contrary deed, which is that implied in transactions; or, 3d, *Absolute, contra omnes mortales*, against all deadly, whereby the granter is liable for every defect in the right which he has granted. This liability is sometimes expressly limited to the extent of the price or equivalent received; but where it is not, it extends to the full value of the subject at the date of eviction, and to all damage whatever consequent upon eviction. See *Eviction*. As to *implied* warrantice, it does not, in assignations, reach to the sol-

veny of the debtor; and even absolute warrandice in such a case, however anxiously expressed, imports merely, that the bond or other voucher is a valid deed. In donations, warrandice against the voluntary deeds of the donor is implied, and in all onerous deeds, absolute warrandice (restricted, however, to the mere value in redeemable and personal rights) is implied; but no warrandice is implied against a bare consentor to a conveyance. Express warrandice supercedes implied; and parties may provide, or tacitly consent to any kind of warrandice, or even that there shall be none at all. A grantor expressly exempted from warrandice is not, however, secured, if he grant a subsequent inconsistent deed. The Sovereign, though liable in no warrandice when granting rights *jure coronæ*, is liable, as a subject, when acting *tanquam quilibet*, and thus burdens himself and the heirs to his private patrimony. Churchmen, having feued or leased lands annexed to the Crown by 1587, c. 29, were obliged in warrandice from fact and deed merely, however their former express warrandice ran. Real warrandice is that whereby certain lands, called *warrandice lands*, are made over eventually in security of the lands conveyed. In excambion, real warrandice is implied. See *Excambion*. Warrandice, moreover, though from fact and deed merely, may be incurred simply from the nature of the obligation; as where a liferent out of lands to a widow is warranted to a certain amount, in which case the grantor is liable for every accident by which the lands may be prevented from yielding so much. No contravention, however, of warrandice is inferred from events not anterior to the conveyance, or from the operation of a supervenient public law, or arising from the legal effects of ownership, unless the grantee has obtained special warrandice against such grounds of eviction. Warrandice, it ought to be borne in mind, is not an obligation to *defend* the right warranted, but to *indemnify* in case of eviction. Hence, warrandice is not incurred until judicial eviction, unless it can be shown that the ground of eviction is undeniable, and that it proceeds from the fault of the seller, in which case the purchaser may sue at once, and before eviction, to have the ground of eviction purged, or for indemnification. Where the eviction is partial, a corresponding indemnification is due under the warrandice. A real burden must be discharged, if covered by the warrandice; although warrandice being *strictis juris*, small matters, or trifling servitudes will not infer warrandice. Neither will the purchaser have any claim under the warrandice, if the purpose of his purchase is defeated as a nuisance. Where

eviction has taken place, the claim of indemnification extends to the value of the subject as at the date of eviction, and not merely to the price paid. But the person bound in warrandice is entitled to have notice of the claim, or attempt to evict; and although the purchaser is not bound to defend the right, yet, if he undertake the defence without notice, and omit a good plea, the seller will be free. On the other hand, the seller is not bound to defend against the claim, and if the purchaser do so while the seller declines, and if such defence fails, the purchaser will not be entitled to the expense of the litigation. A conveyance in real warrandice does not fall under the act 1696, c. 5, as a security for future debt; *Bell's Com.* ii. 280; but it must be completed by sasine duly recorded, although lands disposed in this way may be effectually bound after forty years in case of eviction. See *Ersk. B.* ii. tit. 3, § 25, *et seq.*; *Stair, B.* ii. tit. 3, § 27; *B. iv.* tit. 35, § 24; *B. ii.* tit. 3, § 46, *et seq.*; *B. iv.* tit. 20, § 29; *Bell's Com.* i. 644; *Bell's Princ.* p. 245, and authorities there cited; *Illust.* § 894; *Morr's Notes on Stair*, p. xci.; *Brodie's Supp.* 909; *Bank. i.* 576, *et seq.*; *Kames' Princ. of Equity* (1825), 116, 185, 190; *Kames' Stat. Law abridg. h. t.*; *Bell on Leases*, 4th edit. i. 218, 450; *Hunter's Landlord and Tenant*; *Brown on Sale*, 208, 240 to 309; *Bell on Purchaser's Title*, 2d edit. 42, *et seq.*; *Ross's Lect.* i. 193, *et seq.*; ii. 143, *et seq.*, 235, 299, 345, 491. See *Eviction. Judicial Sale. Sale.*

By the Mercantile Law Amendment Act, 19 and 20 Vict. c. 60, 1856, a seller is not held to warrant the quality or sufficiency of the goods sold unless he shall have given an express warranty, or unless the goods have been sold for a specified and particular purpose.

**Warranties, in insurance;** are absolute conditions, non-compliance with which voids the insurance. They are either express or implied. See *Insurance*.

**Warrant of Commitment.** See *Criminal Prosecution. Bail. Commitment for Trial. Backing a Warrant.*

**Warrants of Decree.** See *Grounds and Warrants.*

**Warren.** See *Rabbit.*

**Water Course or Watergang.** See *Aqueductus.*

**Watering.** See *Aqueductus.*

**Waygoing Crop.** The usual terms of removal, under an agricultural lease, are Whitsunday, as to the houses and grass, and Martinmas, or the separation of that year's crop, as to the arable land; and the crop sown by the tenant, in the spring of the year of removal, is called his *away-going*, or *way-*

going crop. The general rule is, that the tenant is entitled to reap the crop which has been sown before the term of removal; as having had the right of exclusive possession during seed-time. But there have been conflicting decisions upon the point, and cases where, from special circumstances, the tenant's right to the waygoing crop would have given him one year's rent more than he had paid rent for, and where therefore it was disallowed. In absence of express provision, it has been held that the outgoing tenant has no right to keep possession of the barns and similar offices, for thrashing out and disposing of the last crop, longer than the Martinmas succeeding the Whitsunday of his removal. But local usage sometimes establishes a different rule. *Bell on Leases*, i. 830; ii. 97; *Hunter's Landlord and Tenant*; *Bell's Princ.* § 1269; *Illust. ib.* See *Grass. Straw. Fallow.*

**Ways, Private.** See *Servitude. Via. Highway. Regalia. Road.*

**Weights and Measures.** Weights and measures have been the subject of many statutory enactments; see 1491, c. 33; 1540, c. 114; 1607, c. 2; 1621, c. 17. After many ineffectual attempts to equalise the weights and measures throughout the kingdom, that object was effected by the act 5 Geo. IV. c. 74, amended by 6 Geo. IV. c. 12, and 5 and 6 Will. IV. c. 63, which last act repealed 4 and 5 Will. IV. c. 49. The following are the principal provisions of these statutes: The straight line between the gold studs in the brass rod in the custody of the clerk of the House of Commons, on which "standard yard, 1760," is engraved, is denominated the "imperial standard yard," and is declared to be the unit or only standard measure of extension, from which all other measures, lineal, superficial, or solid, are to be ascertained. Thus,  $\frac{1}{2}$  of this standard yard is a standard foot;  $\frac{1}{4}$  of a foot is an inch;  $5\frac{1}{2}$  yards are a pole or perch; 220 yards a furlong, and 1760 yards a mile; 5 Geo. IV. c. 74, § 1. A rood of land contains 1210 square standard yards, and an acre 4840 square yards, or 160 square perches, poles or rods; § 2. Directions are given for the restoration of the standard yard, if it should be lost or destroyed, it having been discovered, that when compared with a pendulum vibrating seconds of mean time in the latitude of London, in a vacuum at the level of the sea, the imperial standard yard is in the proportion of 36 inches to  $39\frac{1333}{10000}$  inches; § 3. The standard brass weight of one pound troy weight, made in 1758, in the custody of the clerk of the House of Commons, is denominated the imperial standard troy pound, and is declared to be the unit or only standard measure of weight,

from which others are to be ascertained. Thus,  $\frac{1}{12}$  of the troy pound is an ounce;  $\frac{1}{20}$  of an ounce a pennyweight; and  $\frac{1}{48}$  of a pennyweight a grain; so that 5760 such grains are a troy pound. A pound avoirdupois is equal to 7000 such grains;  $\frac{1}{16}$  of a pound avoirdupois is an ounce avoirdupois, and  $\frac{1}{16}$  of such ounce is a dram; § 4. Directions are given for the restoration of the standard pound, it having been ascertained that a cubic inch of distilled water, weighed in air by brass weights, at the temperature of 62° Fahrenheit, barometer thirty inches, is equal in weight to  $252\frac{458}{1000}$  grains; § 5. The standard measure for capacity, for liquids and dry goods not measured by heaped measure, is the gallon, containing ten pounds avoirdupois of distilled water, weighed in air, the thermometer and barometer standing as above. A measure was directed to be made forthwith of such contents, and was declared to be the imperial standard gallon, and the unit and only standard measure of capacity. A quart is  $\frac{1}{4}$  of the standard gallon; a pint  $\frac{1}{2}$  of a gallon; the peck two gallons; the bushel eight gallons; and eight bushels a quarter of corn, or other dry goods, not measured by heaped measure; § 6. It was directed that the standard measure of capacity for goods commonly sold by heaped measure, should be the aforesaid bushel, containing eighty pounds avoirdupois of water, being made round with a plain and even bottom, and being 19 $\frac{1}{2}$  inches from outside to outside. Directions were likewise given for the manner in which the bushel should be heaped; §§ 7 and 8. But by 5 and 6 Will. IV. c. 63, § 7, heaped measure is abolished, bargains by heaped measure are declared null and void, and every person selling articles by heaped measure forfeits 40s. *toties quoties.* Yet, as some articles heretofore sold by heaped measure are, from their size and shape, incapable of being stricken, and, from their nature and quality, may not be conveniently sold by weight, it is provided by § 8, that such articles may be sold by a bushel measure, corresponding in shape with the bushel above described, or by any multiple or aliquot part of such bushel, filled in all parts as nearly to the level of the brim as the size and shape of the articles will admit. This provision is declared not to prevent the sale by weight of any article heretofore sold by heaped measure. It is provided that all coals, slack, culm, and cannel, of every description, must be sold by weight, and not by measure, and whoever sells such articles by measure, forfeits forty shillings for every offence; 5 and 6 Will. IV. c. 63, § 9. Things not formerly allowed to be sold by heaped measure, and agreed to be sold by weight or measure, must be sold by the standard of weight, or by the

standard gallon, or some multiple or aliquot part thereof; and the measures must be stricken with a round stick, straight, and of the same diameter from end to end; 5 *Geo. IV. c. 74, § 9*. The same act requires that all weights and measures should be models and copies in shape of the standards deposited in Exchequer, and provision is made for obtaining such copies; §§ 11, 12, 13. But, by the last act, this provision is repealed; 5 and 6 *Will. IV. c. 63, § 3*. And it is provided, that weights and measures verified at Exchequer shall be taken as legal, although not similar in shape to those required by 5 *Geo. IV.*, and the superintending officer is empowered to verify and stamp weights and measures, although not of the required shape; § 4. Copies of the standard weights and measures which have been worn and mended, may be sent to Exchequer to be re-verified; § 5; The use of customary weights and measures allowed by 5 *Geo. IV.*, is abolished by 5 and 6 *Will. IV.*; and it is provided, that any one selling, by any denomination of measure, other than one of the imperial measures, or some multiple or aliquot part, is liable to a penalty not exceeding forty shillings for every such sale. But this provision is declared not to prevent the sale of any articles in any vessel, where the vessel is not represented as containing any amount of imperial measure, or of any fixed, local, or customary measure heretofore in use; § 6. All articles sold by weight must be sold by avoirdupois weight, except gold, silver, platina, diamonds, or other precious stones, which may be sold by troy weight, and drugs, which, when sold by retail, may be sold by apothecaries' weight; § 10. The weight denominated a stone, must, in all cases, consist of fourteen standard lbs. avoirdupois; a cwt. of eight such stones; and a ton of twenty such cwt.; § 11. All weights made after the passing of the act, of the weight one lb. avoirdupois, or more, must have the number of lbs. contained in them, stamped or cast on the top or side, in legible figures or letters; and all measures of capacity must have their contents marked on the outside, in legible figures or letters; § 12. No weight made of lead or pewter, or of any mixture thereof, can be stamped or used; but these metals may be used in the manufacture of weights, if they be wholly and substantially cased with brass, copper, or iron, and legibly marked "cased;" and a plug of lead or pewter may be inserted into weights, if *bona fide* necessary for the purpose of adjusting them, and affixing thereon the after-mentioned stamp; § 13. Provision was made for ascertaining and providing for the fulfilment of all contracts existing at the passing of the act, and fixing the payments to be

made of all stipends, feu-duties, rents, tolls, customs, casualties, and other demands payable in Scotland, by directing that the sheriff of each county should, soon, after the passing of the act, summon a jury to ascertain the several amounts; § 15. The fiars prices of all grain in every county, must be struck by the imperial quarter, and all other returns of the prices of grain must be set forth by the same, without reference to any other measure. And any sheriff-clerk, clerk of a market, or other person, offending against this provision, forfeits a sum not exceeding L.5; § 16. In Scotland, the justices of peace at the general or quarter sessions, or a meeting called by the sheriff or magistrates, are directed to determine the number of copies of the imperial standard weights and measures requisite for the comparison of the weights and measures within their respective jurisdictions, to direct the procuring of them, and to fix the places at which they shall be deposited. They are also directed to provide inspectors, &c.; § 17. The justices and magistrates must provide for the use of the inspectors good and sufficient stamps for stamping weights and measures used in each county, &c., and all weights and measures, except as after excepted, used for buying or selling, or for the collecting of tolls or duties, or for making charges on the conveyance of goods, must be examined and compared with one or more of the above-mentioned copies. The inspectors must stamp, in such manner as best to prevent fraud, the weights and measures, when examined and compared, if found to correspond with the said copies. The inspector's fees are specified in a schedule annexed to the act. Every person using a weight or measure other than those authorised by the act, or some aliquot part thereof, or which has not been stamped, except as after excepted, or which has been found light or otherwise unjust, is liable to a penalty not exceeding L.5: the bargain is null; and the weight or measure is forfeited. As 56 lbs. is the greatest imperial standard weight deposited in Exchequer, no single weight above 56 lbs. requires to be stamped. Any wooden or wicker measure used in the sale of lime, or such like articles, or glass or earthenware jug or drinking cup, though represented as containing the amount of any imperial measure, or of any multiple thereof, does not require to be stamped; but any person buying by any such vessel is authorised to require the contents to be ascertained by comparison with a stamped measure, to be provided by the seller; and if the seller refuse such comparison, he makes himself liable to the penalties for using light weights; § 21. Provision is made for defraying the expenses of providing copies of

standard weights, and of the remuneration to inspectors; § 22. No maker or seller of weights can be appointed inspector. Various provisions are made respecting the appointment, duties, and liabilities of inspectors; §§ 23, 24, 25. Weights and measures when once stamped, are legal throughout the kingdom, and need not be re-stamped on being used in a different place than that in which they were stamped; § 27. Power is given to sheriffs, justices, and magistrates, at all reasonable times, to enter any shop, store, warehouse, &c. within their jurisdiction, in which goods are sold or are weighed, and there to examine the weights, steelyards, &c., and compare them with the standard copies; and if the weights and measures prove light or unjust, they are forfeited, and the person in whose possession they are found forfeits a sum not exceeding L.5. And any person having an unjust steelyard or other weighing machine, or who refuses to produce weights, measures, &c., when required, is liable to a like penalty; § 28. An inspector, for every instance of misconduct or neglect of duty, forfeits a sum not exceeding L.5. Forging, or assisting in forging, the stamps or marks, subjects to a penalty from L.10 to L.50; selling, uttering, or exposing to sale, weights or measures with such forged stamps, subjects to a penalty of from 40s. to L.10. All such weights and measures are directed to be broken up; § 31. The printer who prints, or the clerk of market who makes any return, price-list, &c., denoting greater or less weight or measure than the same denomination of imperial weight or measure, forfeits for each offence a sum not exceeding 10s.; § 31. Provision is made for the recovery of penalties before sheriffs, magistrates, or two or more justices, at the instance of the procurator-fiscal, or any person who may prosecute for them; § 37. An appeal is provided to the circuit court, in which, instead of finding caution in terms of 20 Geo. II. c. 43, the appellant is bound to find caution to pay the penalties and expenses in the event of the appeal being dismissed. No other appeal is competent; § 38. Various other provisions are made for regulating the suits for penalties, &c. On the subject of weights and measures the following authorities may be consulted: *Ersk. B. iv. tit. 4, § 66; Bell's Princ. § 91; Swint. Abridg. h. t.; Kames' Stat. Law abridg. h. t.; Watson's Stat. Law, voce Burgh Royal; Hunter's Landlord and Tenant; Hutch. Justice of Peace, ii. 144; Tait's do., voce Falsehood; Blair's do. h. t.; Brown's Synop. p. 2038.* For the old Scotch computation of weights and measures see the article *Sorplath*.

**Weregild**; or **Cro**; was the assyhtment due by an offender to the friends of one killed

by him. It did not infer representation, and was not discharged by the remission of the punishment. *Bank. B. i. tit. 10, § 15, et seq.; Kames' Stat. Law, voce Vergelt.* See 1426, c. 93; 1457, c. 74; 1503, c. 63; 1528, c. 7; 1592, c. 157.

**Whales.** By the *leges forestarum*, § 17, all whales thrown ashore, of above six power draught, belong to the Queen; but in practice they require to be of much greater size before they become her Majesty's property, or that of the admiral, her donatary. With regard to the smaller whales cast on shore, it has been a question whether they belong to the landlord or the tenant. The rule seems to be that they belong to the catcher, without regard to the rights of landlord and tenant. But in the Shetland islands, by usage, such whales belong half to the proprietor on whose lands they are driven, and half to those concerned in catching them; *Stove v. Colvin*, May 26, 1831, 9 S. & D. 633. See 17 Edw. II. c. 11; *Ersk. B. ii. tit. 1, § 10; Stair, B. ii. tit. 1, § 5; Bell's Princ. § 1289; Illust. ib.; Hutch. Justice, ii. 380.*

**Wharfage Dues**; are a burden, operating lien, not on the goods, but on the ship. *Bell's Com. ii. 101.*

**Wharfinger.** Delivery of goods sold, while in wharf, is completed by transfer in the wharfinger's books from the seller's name to the buyer's, the wharfinger then becoming custodier for the buyer; or simply by notice to the wharfinger, or other custodier, which may be proved by the transfer itself, by postmark or acceptance of written order, or by evidence of party or other witnesses. Wharfingers are liable for goods lodged with them, and for the negligence of those whom they may employ to unload vessels. They have a lien on the goods for their balance, by usage, which usage forms matter of evidence. *Bell's Com. i. 183, 200, 558; ii. 107; Bell's Princ. §§ 236, 1434; Brodie's Sup. 872, 881, 920. See Delivery. Lien.*

**Whitebonnet.** A whitebonnet or puffer, is a person who, in collusion with the exposor, or other party interested in a sale by auction, attends the sale, to raise the price by making offers, so as to lead on to other offerers; while the whitebonnet himself holds either an express or an implied obligation, from the party for whom he interferes, to relieve him of the consequences of his offer, in case the subject should fall into his hands. The intervention of a whitebonnet is held in law to be a fraud upon the other bidders, and either the next highest offerer will be preferred to the purchase, or the sale effected by such means may be entirely set aside; *Gray, 7th July 1753, Mor. 9560; Anderson, 16th Dec. 1814, Fac. Coll.; More's Notes on Stair, lx.* See also

*Articles of Roup. Auction, and authorities there cited. Pactum Illicitum.*

**Whitsundayes Styles;** according to Skene, were certain constitutions and statutes which freeholders, both spiritual and temporal, especially convents of abbeys, and religious places, made betwixt them and their tenants before Whitsunday, for service to be done to them, and better labouring of their lands, and payment of their duty. *Skene. h. t.*

**Whitsunday;** was formerly a moveable term, often reaching far into summer; but the legal term of removing, both in burgh and in rural tenements, was fixed, by 1690, c. 39, to be the 15th May, a provision extended, by 1693, c. 24, to every other civil question. *Ersk. B. ii. tit. 6, § 46; Stair, B. iv. tit. 26, § 7; Bell on Leases, ii. 63, 363; Hunter's Landlord and Tenant. See Removing. Terms, Legal and Conventional.*

**Widow.** See *Marriage. Jus Relictæ. Terce. Executory. Contract. Entail. Liferent. Ann. Relict.*

**Widows' Funds.** The funds provided for the widows of members of various societies have been the subject of statutory enactments. Thus, the Advocates' Widows' Fund is regulated by 11 Geo. IV. and 1 Will. IV. c. cxli., and that of the Society of Writers to the Signet by several statutes. But the most important widows' fund, and that which has come most frequently under judicial consideration, is the

*Ministers' Widows' Fund.*—This fund has been the subject of several statutes, the one now in force being 19 Geo. III. c. 20, as amended by 54 Geo. III. c. clxix. This statute bears to have been passed for the purpose of raising and securing a fund for a provision for the widows and children of the ministers of the Church of Scotland, and of the heads, principals, and masters in the Universities of St Andrews, Glasgow, Edinburgh, and Aberdeen. The statutes 17 and 22 Geo. II. are repealed. All who are admitted to any of the offices above mentioned are liable in the payment of certain annual rates, varying, by the older act, from L.2, 12s. 6d. to L.6, 11s. 3d. But by the later act (54 Geo. III. c. clxix.), on the preamble, that the annuities were found insufficient for their purpose, the rates were increased, and are now L.3, 3s., L.4, 14s. 6d., L.6, 6s., and L.7, 17s. 6d. When the benefice or office is of a temporary or precarious nature, the holder is not liable, nor entitled to claim the benefit of the fund. Assistants and successors are not held as admitted to a benefice or office until they come to have full right to the benefice or salary. Ministers of the parliamentary churches, established by 5 Geo. IV. c. 90., were held entitled and com-

able to become contributors to the Ministers' Widows' Fund; *Gordon, 18th Feb. 1836, 14 D. B. M. 509.* And in a question between the same parties, it was afterwards decided, that a minister who, in ignorance of his right to become a contributor to the ministers' widows' fund, had allowed several years to elapse without claiming such right, was liable as a contributor from the date of his induction, at the rate fixed by the statute for those who have not duly declared their selection of one of the several rates; and that he was chargeable with interest on the arrears of such rate; *Gordon, 15th Nov. 1836, 15 D. B. M. 15.* In a more recent case, however, it was held by a majority of the whole Judges (overruling the decision in the above case of *Gordon*), that a clergyman appointed under the statutes for erecting additional churches in the Highlands is not entitled to become a contributor to the ministers' widows' fund; *Pearson, 24th May 1838.* A third charge, revived and instituted in a parish where there were only two, was held to be permanently endowed, and to be a benefice in the sense of the act, and the vacant stipend was found to be due to the fund; *Magistrates of Stirling, 24th Feb. 1837, 15 D. B. M. 657.* The ministers and professors must make their choice of the rates which they intend to pay, within certain specified periods, varying according to the situation of the benefice; and every minister, &c., neglecting to give notice, is held to have made his election of the annual rate of L.3, 18s. 9d. (now L.4, 14s. 6d.), for which he is liable during life. At the first Candlemas after making his election, the minister or professor must make payment of the rate for the period during which he has already enjoyed his benefice or office, and a year's rate at each succeeding Candlemas. If at his death he be entitled to only one-half of his salary or stipend for the year, half of the rate only is payable at the succeeding Candlemas. On marriage, he pays double rate a year after his marriage; and, in like manner, a married man pays double rate the first year after his admission into a benefice, or other office. He is not liable to this additional tax if the person whom he marries is an annuitant under the act. Persons of forty years of age, at their admission having a child or children, are liable to a payment of two and a-half years' rate, to be made at the term of Candlemas first after they have, or ought to have, made their election. But if they be bachelors, or widowers without children, they are not liable to this tax, unless they marry afterwards, in which case it must be paid at the first Candlemas after the marriage. Besides the sums payable on account of marriage, or entering after being forty

years of age, the later act directs that an addition thereto, at the rate of 20 per cent., shall be paid. Persons holding two offices are not subject to an additional rate. Rate is payable for the first half-year succeeding the death of the person liable, out of the ann.; and where no ann. is competent, by his heirs and executors. A rate of L.3. 2s. is, by the older act, payable during every half-year of a vacancy. By the later act, 20 per cent. additional is laid upon all the rates payable; and it is provided that the whole of the vacant stipend shall be paid into the fund. See *Vacant Stipends*. Intimation must be made to the persons liable, by the moderators of presbyteries, and the principals of universities, or their clerks, within three months after the rate falls due, under pain of their becoming liable for the full expenses and damages sustained by the fund through such default. The rates begin to bear interest eleven days after the respective terms. In default of intimation being made as above required, the principals and moderators, or their clerks, are liable for the interest, instead of the minister or other payer of rate. The rates and other sums payable, together with the interest, are privileged debts, and preferable to all other debts of the persons liable, not only on their benefices and salaries, but also upon their whole other personal estate. The full expenses incurred in recovering the sums due to this fund may also be recovered out of their respective estates, without abatement. In virtue of this section of the act, the collector of the fund has been found preferable to all other creditors on the personal estate for all sums due to the fund; to the funeral expenses; and to a right of retention pleaded by an heir, in whose hands the collector had arrested the stipend due to the minister; *Bell's Com.* ii. 159. The money is directed to be applied for payment of the charges of management; for raising the capital; and for paying the annuities to widows. By the older act, if the husband was liable to the annual rate of L.2. 12s. 6d., the widow got an annuity of L.10; if to L.3. 18s. 9d., the widow got L.15; if to L.5. 5s., the widow got L.20; if to L.6. 11s. 3d., the widow got L.25. But in consequence of the additional rates made payable by the later act, additions were made to the annuities. The trustees were directed, at their meeting on the third Tuesday of February 1822, to calculate the average amount of the annual produce of this excess, which average should be fixed upon as the sum to be divided among the number of widows and children then upon the fund, and the proportion of such average which should fall to each widow or family of children, was directed to be

fixed upon as the sum to be thenceforth paid annually to each widow or family of children. Provision is made for new accumulations and new additions; and the additions are directed to be paid as the former annuities were payable. From an excellent report prepared by the late Mr Cleghorn in the year 1831, it appears that from 1827, down to the date of the report, the widows had drawn annuities of L.22, L.30, L.38, and L.46 respectively; and the children L.8, L.10, L.11, and L.13. Upon the death or marriage of any widow, her annuity determines as upon the 26th of May or 22d of November immediately preceding. If she die or marry before the lapse of ten years from the commencement of her annuity, and her former husband shall have left a child or children under sixteen years of age, at her death or marriage, such child or children are entitled to a sum of money equal to ten years of the said widow's annuity, under deduction of what she has received, to be equally divided among the children. A widow marrying a person liable in payment of rate continues an annuitant; and if she survive her second husband, she is entitled to an annuity corresponding to the rate paid by him. But if her former husband have left a child or children under the age of sixteen years at the date of her second marriage, and she have not drawn ten years' annuity, her annuity determines as in the usual case, and such child or children are entitled to the reversion of her ten years' annuity, in the same manner as if she had married a person not subject to the payment of rate. The child or children of a widower are entitled to a sum equal to ten years of the annuity that would have been payable to their father's widow, to be equally divided among them. When the rate paid has not amounted to three years of its corresponding annuity, the trustees may stop the half of the annuity, until either the widow pay into the fund, or the stoppages shall amount to what, together with the rate paid, is equal to three years' annuity. So with the annuities to children. Loans to ministers are required to be discontinued, and directions are given for raising the capital. Provision is made for the election of trustees, who are authorised to levy the rates and other sums payable, and to issue the same for the purposes of the act, but who cannot lend out, re-employ, or uplift any part of the capital without the advice and consent of the Lord President and the two senior Judges of the Court of Session, the Lord Chief Baron and the senior Baron of the Court of Exchequer (there is now only one Baron of Exchequer, and the Lord Justice-General and Lord Justice-Clerk for the time

being, or any three of them. Provision is made for the election of clerks and of the collector of the fund, and powers are given to the collector to take steps for carrying the purposes of the act into execution. He is directed to keep a public office in Edinburgh. He must deduct from the annuities of widows and children the sums due by their deceased husbands and fathers. Letters of horning are directed to be issued, at the instance of the general collector, against the contributors and others, in the same manner as hornings at the instance of the Scotch clergy for payment of their stipends. The form of letters of horning, at the instance of the collector of the ministers' widows' fund, is given in *Jurid. Styles*, iii. 730. Provision is made for the filling up of vacancies. Directions are given for the making up of lists of the persons liable in payment of rates, and of the widows and children entitled to annuities, to whom certificates are directed to be given. In processes of modification and augmentation of stipends, the annual rates payable by the ministers of the Church of Scotland, by virtue of this act, are deemed and computed as part of their stipends. Both the older act and the amending act are declared public acts. The annuities due to ministers' widows and children are alimentary, and cannot be arrested. The benefit of the act 33 Geo. III. c. 54, permitting the formation of friendly societies, is extended by a later statute to institutions for the purpose of relieving the widows, orphans, and families of the clergy and others in distressed circumstances; 35 Geo. III. c. 3. See *Friendly Societies*. See for interesting information on the state of the ministers' widows' fund, the Report by the late Mr Cleghorn to the General Assembly in 1831. See also *Ersk. B. i. tit. 7, § 44, note*; *B. iv. tit. 3, § 10, note*; *Bell's Com. i. 130*; *ii. 159*; *Church Law Society Styles*, 224, 237.

**Wife.** See *Marriage. Jus Mariti. Jus Relictæ. Contract. Donation. Entail. Inhibition.*

**Will.** This term is not one which is used technically in our law, at least by itself, although it is sometimes so used in combination, as in the expression, *last or latter will*, which is synonymous with testament. In popular language, however, it is employed to signify any declaration of what a person wills with regard to the disposal of his property, heritable or moveable, after his death, and thus includes not only testaments, but all the complicated forms of deeds granted *intuitu mortis*.

For the rules of law, as applicable to this important subject, see the articles, *Disposition and Settlement—Testament—Legacies*, and *Conjunct Rights*. The object in the present

article rather is to give such general directions for making wills, as may enable persons not educated to the law to perform this office to themselves; recommending, however, to testators, in every case where they can obtain it, to call in professional assistance; because so important a matter as the validity of a will ought never to be left in doubt.

A will by which moveable property only is to be disposed of, and which contains no registration clause, may be written on unstamped paper; but where heritage is to be destined, it is necessary, according to the practice in Scotland, to use what are commonly called deed stamps. These are stamps of the value of thirty-five shillings and twenty-five shillings; the former being used for the first sheet, and the latter for every other. It is proper to attend to the rule, that if more than 2159 words be written on the first sheet, or more than 3239 on the two first sheets, or more than 4319 on the three first, and so forth, increasing by 1080 each time, the deed will be null under the stamp laws.

Three forms of wills are subjoined to this article. The first is for disposing of the testator's moveable estate only; the second, of his heritable and moveable estates together; and the last, which embraces both descriptions of property, is for placing the whole under the charge of trustees.

The style which may be adopted in any case must, of course, be altered to suit the precise circumstances of that case. It is proper, however, to state, that none of the clauses ought to be omitted altogether, without due deliberation. In the disposition and settlement, in either of its forms, the clauses reserving the grantor's liferent and power to alter, and dispensing with the delivery, must, in every case, be retained. So also must the clauses in the trust-deed, for the safety of creditors and purchasers, and of the trustees themselves.

When it is intended to give the residuary legatee the absolute right to the property conveyed, it will be found more expedient to adopt one of the first two styles subjoined; and the third, or trust-deed, ought to be used only when the residuary legatee ought not to be intrusted with the management of his affairs, or when it is not intended to give him a vested right to the estate, immediately on the testator's death, but at some subsequent period; as at his majority, or when he is to have a mere temporary interest in the property, as, for instance, a liferent of it. Even when the residuary legatee is a minor, a conveyance to him directly is, in general, preferable to one in favour of trustees for his behoof; because it is attended with less diff-



sully and expense, and his tutors or curators supersede the necessity of trustees.

It is necessary to state, that under the forms subjoined the heritable property cannot be at once feudally vested in the disponees; for these forms contain no special description of particular subjects, and no warrants for infestment. These clauses have been omitted, because they can be safely prepared only by an educated conveyancer, who understands their precise form and effect, and the proper mode of adapting them to the state of the testator's titles. But notwithstanding this circumstance, wills duly executed in the styles exemplified, are quite effectual; because, if the heir-at-law be unwilling to ratify them by making a corresponding conveyance, the Court of Session will adjudge the property in implement to the disponees, and ordain the superior to give them infestment.

But under the Titles to Land Act 1858, § 12, general disponees may complete a title to lands by expeding a notarial instrument in the form annexed to the statute.

As legacies are expressed in the same terms, whether inserted in a testament, a disposition and settlement, or a trust-deed, the forms of them are exemplified separately at the end of this article; and such of these forms as may be suited to the circumstances of the case, may be inserted in the proper place, in any of the styles given of the will. And any of the forms of legacies may, by obvious variations, be converted into the clause of the trust-deed, by which the residue is disposed of.

It is quite impossible to give examples of all the forms in which it may be necessary to express legacies; but no technical words of style are required, and it is only requisite to express them in plain and unambiguous language. Some general rules, however, on this subject, and generally on the form of preparing a will, may be useful. (1.) The legatees should always be fully named, and properly designed. Thus, for instance, in the case of an illegitimate child, he should be described not as "son to A. B.," (the word "son" meaning, in general, a lawful child,) but as "the reputed son" of A. B. (2.) The distinction between special and general legacies should be kept distinctly in view. Thus, if A. were to bequeath to B. "his gold watch," or "the L.1000 three per cent. consols standing in his name," B., the legatee, would, in either of these cases, take the specific subject bequeathed to him, though the estate were inadequate to the payment of the general legacies. If, however, the bequests were expressed in these terms: "To B. the sum of L.30 to purchase a gold watch," or "to B. such a sum as will purchase L.1000 three per cent. consols," then, if there should

be a deficiency of the estate, B. would suffer a proportional abatement with the other legatees. But if the testator, intending to give a legacy which should be liable for no share of the eventual deficiency of his funds, should express the clause in the form of a specific bequest, and if he should afterwards inadvertently dispose of the subject bequeathed without altering his will, the legatee would thereby be deprived of the benefit intended for him, because the subject bequeathed was no longer the testator's to dispose of. (3.) It is a saving to the estate generally, to give the legacies free of duty; because, by the legacy-duty acts, money left, in addition to a legacy, for the purpose of paying duty thereon, is not itself liable for duty. In consequence of this rule, it is better to give a stranger, who is liable for duty at the rate of ten per cent., a legacy of L.900, free of duty, than L.1000 not free of it; because, in the one case, the estate pays only L.900, with L.90 of duty, or, in all, L.990; whereas, in the other case, it would be liable for L.1000, thus saving L.10; and, in either case, the legatee receives the same sum, namely, L.900, free of duty in the one case, and L.1000, under deduction of L.100 of duty on the other. (4.) Annuities, especially those to persons having no other funds, ought, in general to be given free of duty. The reason is, that the legacy-duty falls heavier on the annuitants than on other legatees, at least during the first years of the annuity. By the legacy-duty acts, the annuity is valued as at the date of the testator's death; the percentage of duty is then calculated on this value, and the amount of that duty is deducted in four instalments out of the first four years' annuities. Thus, an annuity of L.26, or ten shillings per week, to a person aged fifty, who is not a relation of the testator, being worth L.292, 17s. 3d., would be liable for L.29, 5s. 8d. of duty; and, consequently, if the bequest be not given free of duty, the annuitant, instead of getting ten shillings a-week for the first four years, would have no more than seven shillings, the remainder being kept back to pay the duty. (5.) It sometimes happens that a friend or relative is owing a debt to the maker of a will, which he, the testator, wishes to discharge. It is a matter of prudence, however, not to include the discharge in the will, as is often done, because such a discharge is construed into a legacy of an amount equivalent to the debt, and is therefore liable for the legacy-duty. In such a case the testator ought to cancel the grounds of debt, and take no notice of the matter in the will. (6.) No alterations should be made in a will by marginal notes, or interlineations, or erasures, or deleting words, for such operations, if they do not

vitiates the will altogether, are not likely to be considered probative. Alterations, therefore, should be made by way of additions at the end of the will, expressed in clear language; and they must be tested and signed before witnesses with the same care and solemnity as the original will. A form is subjoined. (7.) It is proper, in order to prevent ambiguities in a will, to write every word at full length, without contractions, and to insert no sums or dates in figures, but entirely in words. And the whole of the deed should be written continuously, without breaks or new lines, otherwise room would be left for interpolations. See *Stair*, B. iv. tit. 42, § 21; *More's Notes*, p. cccxxviii., and p. x.; *Ersk.* B. iii. tit. 9, § 5, *et seq.*; and the authorities cited in the articles *Testament* and *Legacy*.

**TESTAMENT OR WILL disposing of Moveables only.**

I A. do hereby NOMINATE, CONSTITUTE, and APPOINT B., whom failing, C., to be my sole executor and universal legatory, LEAVING and BEQUEATHING to the said B., whom failing, the said C., the whole goods, gear, debts, and sums of money, household furniture, and, in general, the whole moveable means, estate and effects whatsoever that may pertain and be resting owing to me at the time of my decease: BUT ALWAYS with and under the burden of all my just and lawful debts, deathbed and funeral charges, and the legacies hereinafter appointed to be paid: And I ORDAIN my said executor to pay and deliver the following legacies to the persons after named and designed, viz. (*here specify the legacies*). IN WITNESS WHEREOF, I have subscribed these presents, written (*add if the deed consists of two pages*, on this and the preceding page, *or if it consists of three or more pages*, on this and the preceding pages), by (*here the person who writes the will must insert his name and designation at full length*), at (*insert the name of the place where the will is signed*), the day of one thousand eight hundred and years, before these witnesses, M. and N. (*here the full names and designations of the witnesses must be inserted by the writer of the deed*). (Signed) A.

M., witness.

N., witness.

*Note.*—The witnesses must be males above the age of fourteen years.

**DISPOSITION AND SETTLEMENT OR WILL disposing of Heritage as well as Moveables.**

I A. do hereby GIVE, GRANT, ASSIGN, and DISPONE to and in favour of B., and failing him, by his predeceasing me, to and in favour of C., and the heirs of his body, whom failing, to and in favour of D., and his heirs,

executors, and assignees, ALL and SUNDRY lands and heritages, goods and gear, debts and sums of money, and, in general, the whole means, estate and effects, heritable and moveable, real and personal, of what kind or denomination soever, or wheresoever situated, at present belonging and addebted, or that shall belong and be addebted to me, at the time of my decease: AND I hereby NOMINATE and APPOINT the said B., and failing him, by his predeceasing me, the said C., to be my sole executor and universal legatory: DECLARING ALWAYS that the said B., and failing him, as aforesaid, the said C., and his foresaids, whom failing, the said D., and his foresaids, shall be BOUND and OBLIGED, as by acceptation hereof, they BIND and OBLIGE themselves, out of my said estate and effects, heritable and moveable, above conveyed, to make payment of the debts, provisions, and others under written, viz., FIRST, To make payment of all my just and lawful debts, deathbed and funeral expenses: SECONDLY, To make payment to

&c.: AND LIKEWISE to pay to : RESERVING ALWAYS my own liferent of the whole estate and effects, heritable and moveable, above conveyed, with full power to me, at any time in my life, and even on deathbed, to alter, innovate, or revoke these presents, in whole or in part, as I may see proper: DISPENSING with the delivery hereof, and DECLARING these presents to be good, valid, and effectual, though found lying by me at the time of my death, or in the custody of any other person for my behoof: AND I CONSENT to the registration hereof in the books of Council and Session, or others competent, therein to remain for preservation; and thereto I constitute (*leave a blank at this part of the deed of about a line*) my procurators, &c. IN WITNESS WHEREOF, I have subscribed these presents, written on stamped paper (*or, as the case may be*, written on this and the preceding page [or preceding pages] of stamped paper *by (as in preceding example.)*)

**TRUST-DISPOSITION AND SETTLEMENT OR WILL, appointing Trustees, and disposing of Heritage and Moveables.**

I A. do hereby GIVE, GRANT, ASSIGN, AND DISPONE, to and in favour of B., C., D., and E., or the acceptors or acceptor, survivors or survivor of them, and to such other person or persons as shall be assumed, in manner after mentioned (the major part accepting and surviving at the time being a quorum), as trustees, for the ends, uses, and purposes after mentioned, and to their assignees, ALL and SUNDRY lands and heritages, goods and gear, debts and sums of money, and in gene-

ral, the whole means, estate, and effects, heritable and moveable, real and personal, of what kind or nature soever, or wheresoever situated, presently belonging and addebted, or which shall belong and be addebted to me at the time of my decease: . BUT IN TRUST ALWAYS, for the ends, uses, and purposes after specified, viz., IN THE FIRST PLACE, For payment of all my just and lawful debts, deathbed and funeral expenses, and the expense of executing this trust: SECONDLY, For payment to (specify here the provisions and legacies given to the widow, children, or others, agreeably to the forms subsequently exemplified): AND LASTLY, After payment of my debts, deathbed and funeral expenses, the expenses of managing this trust, and the legacies, provisions, and others foresaid, I appoint the trustees under this settlement to pay, assign, and dispose the free residue and remainder of my estate, heritable and moveable, real and personal, above conveyed (if there be an annuity add, but under the burden always of the said annuity of L. to the said W., in case she shall be alive at the time), to and in favour of L., and his heirs, executors, and successors whomsoever: WITH POWER to the said trustees to enter into possession of the said trust-estate and effects, to call, sue for, uplift and receive the rents, mails, and duties, and interests and annual profits of the same, and to grant discharges thereof, which shall be as valid and effectual to the receivers thereof as if granted by myself: AS ALSO WITH POWER to them to output and input tenants, and to grant tacks or leases of the lands and heritages hereby conveyed, for such periods not exceeding nineteen years, at such rents and on such conditions as to the said trustees shall seem proper: AND WITH SPECIAL POWER to the said trustees to compound, transact, and agree, or to submit and refer any questions or differences that may arise between them and any other person or persons in relation to the said trust-estate and effects, or any debts or claims which any persons may have or charge against me or my said estate, or which the said trustees may have or make against others; all which transactions and submissions, with the decrees-arbitral to follow thereupon, shall be valid and effectual: WITH FULL POWER also to the said trustees to sue for, uplift, and receive the principal sums of the debts, heritable and moveable, hereby conveyed, and bygone interest due thereon, to discharge or assign the same, and renounce or dispose the securities held therefor, and to alter, change, and vary the said securities as they may see fit; declaring, that it shall be competent for them to invest the said sums in any of the government or parliamentary stocks or funds:

AS ALSO to sell or dispose of all or any part of the said trust-estate and effects, in such lots and portions as my said trustees shall consider most advantageous, and that either by public roup or private bargain, upon such advertisements, and, if by public roup, after such prorogations and adjournments as to them shall seem proper: DECLARING, that the person or persons who, as debtors or purchasers foresaid, shall pay to the said trustees any sum or sums of money, shall nowise be concerned with the application of the same, or with any of the conditions or provisions hereof, but shall be sufficiently exonerated by the simple receipt and discharge of the said trustees: WITH POWER also to the said trustees to appoint factors, either of their own number or other fit persons, for uplifting the rents of my lands and estate, and principal sums and annualrents of the debts hereby conveyed, and the other subjects of the said trust, and to allow such factors suitable gratifications for their trouble: AND WITH POWER ALSO to the said trustees, from time to time, as they may judge it expedient, to nominate and assume such other person or persons as they shall think fit to be a trustee or trustees along with them, and after their decease: DECLARING, that the powers and privileges of such assumed trustee or trustees shall be as extensive, and their acts and deeds, in regard to the said trust-estate and effects, as valid and effectual, as if their names had been herein inserted and conjoined with those of the other trustees above named: AND FURTHER, I do hereby NOMINATE, CONSTITUTE, and APPOINT the said trustees to be my sole executors and intrmitters with my moveable estate and effects, with power to them to give up inventories thereof, to confirm the same, and to do every thing competent to the office of executors: And I do also hereby nominate and appoint the said B., C., D., and E., or the acceptors or acceptor, survivors or survivor of them, to be tutors and curators to R., my son, and S. and T., my daughters, and to any other child or children to be procreated of my body during their respective pupilarities and minorities (the major part of them accepting and surviving at the time being a quorum): DECLARING, that the said trustees named and to be assumed, and the said tutors and curators, shall not be liable for omissions, error, or neglect of management, nor *singulis in solidum*, but that each shall be liable for his own actual intrmissions only, and that they shall not be further liable for any factor or factors whom they may appoint, than that such factors or factor are habit and repute responsible at the time of appointment: AND I hereby RESERVE to myself not only

my own liferent of the estate and effects, heritable and moveable, real and personal, above conveyed, but also full powers, at any time of my life, and even on deathbed, to alter, innovate, or revoke these presents, in whole or in part, as I shall think proper: **BUT DECLARING** that the same, in so far as not altered or revoked by me, shall be a valid and effectual deed, though found lying in my own repositories, or in the custody of any other person to whom I may intrust the same, undelivered at the time of my death, with the delivery whereof I have dispensed, and hereby dispense for ever: **AND I CONSENT** to the registration hereof (*the rest of the deed is as in the last style*).

**GENERAL LEGACIES of Capital Sums.**

To F., the sum of L.500 sterling, clear of legacy-duty (or say) of all taxes and deductions).

*Item*, To G., the sum of L.1000 sterling, and that at the first term of Whitsunday or Martinmas which shall happen after the lapse of six months from the time of my decease, with the legal interest of the same, from the said term of payment until payment thereof.

*Item*, To H., the sum of L.700 sterling, and that at the first term of Whitsunday or Martinmas after the decease of the longest liver of me and W., my spouse.

*Item*, To J. (if she shall attain the age of twenty-one years complete, or be married), the sum of L.500 sterling, and that at and against the first term of Whitsunday or Martinmas after she shall attain the said age or be married, which first shall happen, with the interest of the said sum from the said term of payment till payment thereof.

*Item*, To K., the sum of L.500 sterling, and that on his attaining the age of twenty-one years complete, with the legal interest thereof from the day of my decease, during the not payment thereof: **DECLARING**, that the said sum shall become vested in the said K. if he shall survive me, and the same shall transmit to his executors or assignees, although he shall die before attaining the said age of twenty-one years complete.

*Item*, To L., and to his heirs, executors, or successors, the sum of L.200 sterling, and that at the first term of Whitsunday or Martinmas after my decease, with the legal interest of the said sum, from the said term of payment until payment thereof.

*Item*, To M., or in case he shall die before the sum after mentioned shall have become vested in him, to N., the sum of L.500 sterling, and that twelve months after my decease, with interest from the said term of payment till paid.

*Item*, To O., and failing him to P., the

like sum of L.500 sterling, and that also twelve months after my decease, with interest from the said term of payment till paid: **Declaring**, that in case the said O. shall predecease me, or (if he shall survive me) in case he shall die without having received payment, or having assigned the sum foresaid, then the said P. shall succeed thereto in preference to the nearest of kin, and other successors of the said O., whom I hereby in that case expressly seclude from the succession to the same.

*Item*, To Q. in liferent, and to R. in fee, the sum of L.600 sterling.

*Item*, To S. and T., the sum of L.100 sterling.

*Item*, To V., X., and Y., children of U., and to any other child or children to be hereafter lawfully born to him, equally among them, share and share alike, the sum of L.1000 sterling, and that at the first term of Whitsunday or Martinmas after my decease: **DECLARING**, that in case any one or more of the said V., X., and Y., or any other child or children to be born to the said U. as aforesaid, shall happen to predecease me, or die without having received payment of his, her, or their share, or several shares of the foresaid sum of money, or without having assigned or bequeathed the same, then such share or shares of the child or children so dying shall accrue to the survivor or survivors equally among them, share and share alike: **PROVIDING**, nevertheless, that if such child or children so dying shall have left lawful issue, then such issue shall have right to the share or respective shares of the foresaid sum, which their deceased parent or parents would have been entitled to if living.

*Item*, I leave the sum of L.100 sterling to and among such poor families in the parish of Z., as my wife, or, failing her, the minister of the said parish for the time being, shall think most deserving of assistance, the same to be divided among them in such proportions as my said wife, or, failing her, the said minister, shall think fit.

*Item*, To the treasurer for the time being of the

society, in the sum of L.100 sterling, to be applied by him to the purposes of the said society, the two immediately preceding legacies to be payable six months after my decease.

**GENERAL LEGACIES OF ANNUITIES.**

To F. (if she shall survive me), a free annuity, clear of legacy-duty, of L.100 sterling during her life, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first payment thereof at the first of these terms which shall happen

after my decease, and the next payment of the same at the next of the said terms, and so forth, yearly and termly thereafter, during the life of the said F., with a fifth part more of each termly portion of liquidate penalty, in case of failure in the punctual payment thereof, and the legal interest of the same from and after the respective terms of payment, until payment thereof: **DECLARING**, that the said annuity is granted to the said F. in name of aliment, and for her own personal support and subsistence only; and it shall not be in the power of the said F. to assign the said alimentary provision, nor shall the same be arrestable or affectable for her debts or deeds of any description whatsoever: **DECLARING** also, that the said annuity of L.100 sterling shall be paid to the said F., exclusive always of the *jus mariti* of her present husband, or of any other husband she may hereafter marry, and that the receipts for the same to be granted by the said F. alone, without the consent of her present or any other husband, shall be good and effectual discharges for the annuity foresaid.

#### SPECIAL LEGACIES.

To F., the sum of L.500 sterling, contained in and due by a bond, bearing date the \_\_\_\_\_, made and executed by G. in my favour, with the penalty therein contained, and the whole interest that may be due thereon at the time of my decease.

*Item*, I **DISCHARGE** H. of the sum of L.200 sterling, contained in his bond to me of date the \_\_\_\_\_, with the whole interest due thereon at the time of my decease, and I desire my said executors to deliver to him the said bond, to be cancelled.

*Item*, I leave to K. the whole farming-stock and implements of husbandry that may be upon and pertaining to my farm of Z. at the time of my death.

*Item*, I **LEAVE** and **BEQUEATH** to L. all and sundry my household furniture, bed and table linen, silver plate, table and ornamental china, and generally all kinds of household furniture and plenishing, whether useful or ornamental, that may be in and about my dwelling-house at the time of my decease, excepting always the particular articles after specified.

*Item*, I **LEAVE** and **BEQUEATH** to M. the whole silver plate belonging to me which has the arms or crest of the family of M. engraved thereon.

**CODICIL**, *revoking, restricting, and adding to Legacies.*

I, A., before designed, do hereby **REVOKE**

and **RECALL** the legacy of L. \_\_\_\_\_ sterling, bequeathed in the foregoing settlement in favour of B., and declare the same to be null and void. **AND FARTHER**, I do hereby **RESTRICT** the legacy of L. \_\_\_\_\_ sterling, bequeathed to D., to the sum of L. \_\_\_\_\_

sterling, and revoke and recall the same so far as it exceeds the said sum of L. \_\_\_\_\_

**AND**, in addition to the sum of L. \_\_\_\_\_

sterling bequeathed to E., I hereby leave and bequeath to him the farther sum of L. \_\_\_\_\_ sterling, to be paid to him at the same term at which his original legacy is payable. In witness whereof (*as in the preceding styles*).

It has been ruled in England, that the validity of a will depends on the law of the domicile of the testator at the time of his death, and not on the law of the place where the will was executed. The principle of this rule is understood to be, that a man has no natural right to regulate the disposal of his property after his death, and that in the exercise of that power he must conform to the law of the country in which he is domiciled at the time of his death; because a will being ambulatory till death, expresses the last wishes of the testator at that time. The legal consequence of such a rule is, that a testator is required to execute a new will on every change of domicile, if the law of the new domicile differs from that of the previous one. So inconvenient a consequence would seem to require the interposition of the Legislature. In Scotland, it has always been understood that a will was valid if executed according to the law of the place of execution, although not according to the law of the testator's domicile at the time of his death; and farther, that a will was valid if executed according to the law of his domicile at the time of its execution, although not executed according to the law of the place of its execution. The convenience of this rule is important in a double point of view. It enables a testator to execute a valid will in a foreign country, where it may be impossible for him to obtain any legal assistance to enable him to execute it according to the law of his own country, in which he may still retain his domicile. Farther, by not allowing a change of domicile to operate as a revocation of a former will, it obviates the necessity of a testator executing a new will in every place in which he may acquire a domicile. An important case on this subject in the law of England is that of *Croker v. Marquis of Hertford's Executors*, decided by the Privy Council, 21st February 1844, and reported, 4 *Moore's Privy Council Cases*, p. 339. No case till recently has occurred in Scotland in which the point has been raised

although in many cases effect may have been given to wills not valid according to the law of the domicile of the testator, although valid according to the law of the place of its execution. A case, however—*Purves' Trustees v. Purves' Executors*—has recently occurred, which is not yet reported. The Lord Ordinary found in favour of the validity of the will, although not executed according to the law of the testator's domicile. His judgment having been reclaimed against, the case was heard before the whole Court, and the validity of the will was sustained.

**Will of a Summons, or other Signet Letter.** The will is that part of the writ beginning, "*Our will is,*" &c., and containing the will or command of the Sovereign, or of the judge in whose name the writ issues, to the messenger-at-arms or other officer of the law, requiring him to cite the party to answer in court, at the suit of his opponent. The will charges the officer to cite the party, on the *inducia* appropriate to the particular action, to appear to answer at the instance of the other party in the matter libelled. In the Act of Sederunt 11th July 1828, § 22, the form of the will of a summons against a defender furth of Scotland will be found; and the same form, *mutatis mutandis*, is to be adopted in all other letters passing the signet, bearing a citation, charge, publication, or service, against persons furth of Scotland. And the Act of Sederunt 8th July 1831 contains forms of the wills of summonses, of suspensions, and of advocations, together also with the form of the will of a sheriff-court summons; and as these forms differ, in some respects, from those given in the ordinary books of style, it is proper for practitioners to keep this in view. The officer serves a copy of the summons on the party, along with a citation to appear in court, pursuant to the injunction in the will, but these service copies, or *doubles* as they are called, in the ordinary case, do not contain a copy of the will; hence, the technical expression in the officer's execution is, that he served the party with a full double "*to the will,*" i. e., as far as the will. The same course is followed in executing diligence; for, generally speaking, all writs used in the practice of Scotland, either for bringing parties into court, or for obtaining legal execution or diligence, are closed with a *will*. *Stair*, B. iv. tit. 5, § 2; *Ersk.* B. iv. tit. 1, § 7; *Darling's Prac.* i. 140; *Maclaurin's Sheriff-Court Prac.* 84; *Ross's Lect.* i. 290; A. S. 11th July 1828, § 22, and 8th July 1831. See *Doubles of Summonses. Inducia. Advocation. Suspension. Edictal Citation. Citation. Execution. Diligence.*

**Wind Bills.** See *Accommodation Bills.*

**Winter Herding.** Prior to the passing of the Act 1686, c. 11, no one was bound to herd his cattle so as to prevent their trespassing, except during what was called "haining time," that is, while the corn was on the ground. Hence, although a man might drive his neighbour's cattle off his ground, he could not pound or detain them *brevis manu*, until the above statute, on the preamble that much damage to plantings and inclosures was sustained through the not herding of cattle and sheep during the winter, enacted that all heritors, liferenters, tenants, cottars, and other possessors of lands or houses, should herd their horses, nolt, sheep, swine, and goats, during the entire year, winter as well as summer; and in the night-time should keep them in houses, folds, or inclosures; certifying the contravenors that they should pay half a merk (about 1s. 3½d. sterling) for every animal found on their neighbour's ground, over and above making reparation for the damage done to the "grass or planting." It is also made lawful, by this statute, for the heritor or possessor of the ground to detain animals found trespassing until the half-merk is paid, together with the expense of keeping the animal. Actions under this statute may be brought before the sheriff; and it seems to have been decided (although the cases are exceedingly ill reported)—1. That so far as regards the damage done, the statute applies to damage done to *corn* as well as to grass or planting, although, where a herd had been kept, the statutory penalties were held not to be exigible; *Govan*, 18th Feb. 1794, *Mor.* 10499. 2. That where there was not only a march-fence, but also herds kept, the owner of the trespassing cattle was liable both for damages and also for the statutory penalties; *Loch*, 3d July 1799, *Mor.* 10501. In the former of these cases, the cattle had not been pointed *brevis manu*, and it was argued (although unsuccessfully), that in such circumstances the statute did not apply. In *Loch's* case, the cattle were pointed or detained, and then returned to the owner, and the action thereafter raised. See *Stair*, B. ii. tit. 3, § 67; *Bank*, B. iv. tit. 41, § 16; *Brak.* B. iii. tit. 6, § 28. See *Planting and Inclosing. Pointing of Stray Cattle.*

**Witchcraft;** was formerly held to be an offence punishable with death, and cognisable even by the sheriff; 1563, c. 73. But all prosecution for this imaginary crime was prohibited by Geo. II. c. 5, except that persons proved to have pretended to witchcraft, occult skill, fortune-telling, or any such art, calculated to impose on the ignorant, are to be imprisoned for a year, to stand once every three months during that period on the pillory, and to find security for their good be-

haviour. *Ersk. B. i. tit. 4, § 4; B. iv. tit. 4, § 18; Hume, ii. 578, et seq.*

**Witness.** See *Evidence. Testing Clause.*

**Execution.** For the qualifications, &c., of witnesses to deeds, see *Instrumentary Witnesses.* See also *Partial Counsel. Interest. Relationship. Infamy. Citation, &c.*

**Women;** are excluded from a variety of offices peculiar to men, such as that of *tutor-at-law.* All objections to their admissibility as witnesses, however, is now done away, except in so far as their more pliant natures may strengthen the presumption of force or bribery, and that they cannot be instrumentary witnesses; *Ersk. B. i. tit. 6, § 4; B. iv. tit. 2, § 22.* See *Evidence. Testing Clause.* A woman may be made bankrupt, except where married; and even in that case, if her husband have abandoned Scotland, and if she trades for herself, she may be rendered bankrupt. See 1696, c. 5, corrected by 23 *Geo. III. c. 18, § 1; by 33 Geo. III. c. 74, § 2,* as explained by *A. S. 14th Dec. 1805,* and by 54 *Geo. III. c. 137, § 1,* providing for rendering those persons bankrupt who are not liable to imprisonment, either by reason of their absence from the country, or (as women) by their personal privilege and protection exempted from horning and caption. *Bell's Com. ii. 166-7-9.* See *Bankrupt. Sequestration.*

**Woods.** Proper forests are not conveyed without a special clause; but common woods go as part and pertinent of the lands. *Ersk. B. ii. tit. 6, § 14; Bell's Com. i. 52, et seq. 176; ii. 28, 191.* The woods and forests belonging to the Crown are managed by commissioners appointed for the purpose. By 2 and 3 *Will. IV. c. 1,* the office of the surveyor-general of works and buildings is united with that of the commissioners of the woods, forests, and land revenues; and by 3 and 4 *Will. IV. c. 69,* the powers of the commissioners of woods and forests are extended in relation to the management of the land revenue in Scotland. See *Timber. Sylva Cœdua. Planting. Tailzie. Liferent. Teinds. Hypothec. Sale.*

**Working Days.** It is generally stipulated in charter-parties, that the master of the ship shall remain at the port of delivery to unload or procure cargo, or sail with convoy, for a certain number of *working or lay-days,* with allowance of a further time, called *days of demurrage,* during which he may remain on payment of a daily hire; and, on occasion of improper detention, demurrage is given to the shipowners in name of damage also, as well as under contract. *Bell's Com. i. 577. Brodie's Supp. to Stair, 988.* See *Demurrage. Lay-Days.*

**Workman.** A workman holds goods for the seller, if employed by him, and for the buyer, if either employed by him or receiving

notice of transfer and order for delivery; *Bell's Com. i. 182.* See *Delivery.* On his employer's bankruptcy, then, if the work be completed, he claims as a personal creditor, with lien, if before delivery. If it be not completed, he may either be forced by the creditors, if they choose to pay him, to fulfil his contract, or have his claim for payment of part work, and for damages; and, if the work be not commenced, he may claim as damage the penalties incurred to persons who have been employed under him, and the profit he would have gained. On his own bankruptcy, his creditors may, with his assistance, complete the contract, unless peculiar circumstances render its proper completion impracticable, in which case the employer may insist for what damage he can instruct. Loss arising from inevitable accident falls on the employer; but fault and negligence make the workman liable, and even *imperitia culpæ annumeratur.* *Bell's Com. i. 457.*

The settling of disputes between master and workman, and the providing means for having their contracts implemented, have been the subject of several statutes. The acts 20 *Geo. II. c. 19,* and 6 *Geo. III. c. 25,* make regulations respecting certain servants and apprentices. The powers of these acts are extended by 4 *Geo. IV. c. 34,* of which the following are the principal provisions: Any master or mistress, or his or her steward, manager, or agent, may make complaint upon oath against any apprentice within the meaning of the above acts, to a justice of the county or place in which the apprentice is employed, for any misdemeanour or misconduct. Or if the apprentice have absconded, any justice of the place in which he is found, or where he has been employed, may, upon complaint upon oath by the master, mistress, &c., issue his warrant for apprehending every such apprentice. The justice may hear and determine the complaint, and punish the offender, by abating the whole or any part of his or her wages, or otherwise by commitment to the house of correction, to be held to hard labour for a reasonable time, not exceeding three months; § 1. All complaints and disputes arising between masters and their apprentices within the meaning of the above acts, respecting wages due to the apprentices, may be determined by one or more justices of the place where the apprentice is employed. The justice is empowered to examine upon oath the master, apprentice, or witnesses, and to summon the master to appear before him at a reasonable time, to be named in the summons, and to order payment within such time as he thinks proper, of so much wages as appear to him to be due. In case of refusal or non-payment, the justice may

issue his warrant to levy the amount (not above L.10), by distress and sale of the goods of the master or mistress, rendering the overplus to the owners, after payment of the charges; § 2. If any servant in husbandry, or any artificer, calico-printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, contract with any person to serve him, and do not enter into or commence his or her service, according to contract (such contract being in writing, and signed by the parties); or having entered into such service, absent himself before the term of the contract (whether in writing or not) is completed, or neglect to fulfil the contract, or be guilty of any other misconduct or misdemeanour in the execution of it, or otherwise respecting it; any justice of the county or place where the servant, &c., has contracted, or is employed, or is found, may, upon complaint upon oath by the other contracting party, or his steward, manager, or agent, issue his warrant for apprehending the servant in husbandry, artificer, &c., and examine into the nature of the complaint. And if it appear that the servant, &c., has not fulfilled the contract, or has been guilty of any other misconduct or misdemeanour as aforesaid, the justice may commit him to the house of correction, to be held to labour for a reasonable time, not exceeding three months, and abate a proportional part of his or her wages for the time of confinement; or in lieu thereof, punish the offender by abating the whole or any part of his or her wages, or discharge him or her from the contract or service; and this discharge is given under the hand and seal of the justice gratis; § 3. Where the employer resides at a considerable distance from his place, or is occasionally absent for long periods of time, and intrusts his business to the management of stewards, agents, foremen, or managers, any justice of the place where a servant in husbandry, artificer, &c., is employed, may, upon the complaint of such servant, &c., touching the non-payment of wages, summon the steward or other manager, and determine the complaint in like manner as complaints of the like nature against a master are directed to be determined, and make order for the payment by such steward, &c., to the servant, &c., of such wages as appear to be due, provided the amount do not exceed L.10. And in case of refusal of payment by the steward, &c., for twenty-one days from the date of the order, the justice may issue his warrant to levy the amount by distress and sale of the goods of the employer, rendering the overplus to the owner, or to the steward, &c., for the use of the employer, after payment of the charges of distress and sale; § 4. Every order or determination of a jus-

tice made under this act is final and conclusive; § 5.

This act was extended by 10 Geo. 4. c. 52.

Statutory provisions are also made for the settling of disputes between master and workman by arbitration. The following are the principal provisions of the act 5 Geo. IV. c. 96, which consolidated and amended the laws relative to the arbitration of disputes between masters and workmen. The following disputes may be settled in the manner provided by the act: 1. Disagreements as to the price to be paid for work done, or in the course of being done, whether the disputes respect the payment of wages as agreed upon or the hours of work as agreed upon, or any damage done to the work, or any delay in finishing the work, or the not finishing the work in a good and workmanlike manner, or according to any contract, or as to bad materials. 2. Cases where the workmen are to be employed to work any new pattern, requiring them to purchase new implements, or to alter the old implements, and the masters and workmen cannot agree as to the compensation to be made to the workmen. 3. Disputes respecting the length, breadth, or quality, of pieces of goods, or, in the case of cotton manufacture, the yarn thereof, or the quantity and quality of the wool thereof. 4. Disputes respecting the wages or compensation to be paid for pieces of goods that are made of any great or extraordinary length. 5. Disputes in the cotton manufacture respecting the manufacture of cravats, shawls, policat, nomal, and other handkerchiefs, and the number to be contained in one piece of such handkerchiefs. 6. Disputes respecting the particular trade or manufacture, or contracts relative thereto, which cannot be otherwise mutually adjusted. 7. Disputes between masters and persons engaged in sising or ornamenting goods. It is declared that nothing contained in the act shall authorise justices to establish a rate of wages at which workmen shall in future be paid, unless with the mutual consent of both master and workmen. All complaints by a workman as to bad materials must be made within three weeks of his receiving the same; and all complaints from any other cause within six days after such cause arises. This period has been extended by a recent act to fourteen days after the cause of complaint arises; 1 Vict. c. 67, § 1. Whenever any of the above subjects of dispute arises, the master and workman, or either of them, may demand and have an arbitration or reference. Where the complainer and party complained of come before, or agree, by any writing under their hands, to abide by the determination of a justice of peace, or magistrate of a county, burgh, &c.,



within which the parties reside (by 1 Vict. c. 67, § 2, however, on account of the difficulty where both parties do not reside in the same jurisdiction, the clause "within which the parties reside," has been changed to "where the party complained against resides"), such justice of peace or magistrate may hear and finally determine, in a summary manner, the matter in dispute. But if they do not so come or agree, then any such justice or magistrate must, on complaint made before him, and proof, by the examination of the complainer, that application has been made to the party complained of to settle the dispute, and that it has not been settled, or where the dispute relates to a bad warp, that the cause of complaint has not been done away with, within forty-eight hours after such application, summon before him the party complained of, on some day, not exceeding three days, exclusive of Sunday, after the complaint is made, giving notice to the complainer of the time and place appointed. And if the person summoned do not appear, or send some one to settle the dispute on his behalf, or appearing, do not do away the cause of complaint, the justice must, at the request of either of the parties, nominate arbitrators or referees for settling the matters in dispute. He must then and there propose not less than four, nor more than six persons, one-half of them master manufacturers, or agents or foremen of some manufacturer, and the other half of them workmen in such manufacture, all residing in or near the place where the disputes arise. The master engaged in the dispute, or his agent, chooses one out of the master manufacturers, &c., and the workman, or his agent, chooses another out of the workmen proposed; and these two have full power to hear and finally determine the dispute; § 3. In case any of the persons proposed refuse or delay to accept the arbitration, or accepting, do not act within two days after the nomination, the justice must proceed to name another, or other persons, of the above description in his or their room. And in every case of a second nomination, the arbitrators must meet within twenty-four hours after the application. The expense of every application for a second appointment must be borne by the party through whose default, or the default of whose referee, the application is rendered necessary. The justice making the second appointment must certify the same, according to a form given in the act. Whenever a second arbitrator is appointed, and does not attend at the time and place appointed for settling the dispute, the other arbitrator, at such time and place, may proceed by himself to determine the dispute; and in such case the award of the sole arbitrator is final; § 4. On the

nomination of the arbitrators, the justice must appoint a place and day of meeting, notice of which must be given by the justice to the persons nominated, and to any party who did not attend the meeting. The persons appointed must hear and examine the parties and their witnesses, and determine the dispute within two days after their nomination, exclusive of Sundays. Their award is final; § 5. In all cases where complaints are made respecting bad warps or utensils by workmen, the place of meeting must be at or as near as may be to the place where the work is carrying on, and, in all other cases, at or as near as may be to the place where the work has been given out; § 6. If any complainer do not personally, or by deputy, attend the meeting for the nomination of arbitrators, he is not entitled to the benefit of the act; and if any person complained of do not attend that meeting, the justice names an arbitrator for him; § 7.

Provision is made for the arrest and commitment of refractory witnesses; § 9. Arbitrators who cannot agree, or who do not sign their award within three days, must go before the justice who appointed them, or in case of his absence or indisposition, to any other justice of the county or place, who must himself settle the dispute within two days, and his award is final; § 10. If either arbitrator do not go before the justice, the justice may, after summoning the arbitrators, determine the dispute upon the representation of either of them who comes before him; § 11. No manufacturer can act as a justice under this act; § 12. Disputes may be adjusted by any other mode of arbitration on which the parties may agree, and the same proceedings may be had for enforcing the award as are provided for enforcing an award under this act; § 13. Agents and servants who deliver work, or partners, may be treated as principals; § 14. Any master or workman, by writing under his hand, may authorise any person to act for him in submitting to arbitration, and attending arbitrators or justices touching the matter of any arbitration; § 15. Where a master becomes bankrupt after proceedings have been commenced against him, the trustee or factor on his estate comes in his place, in the proceedings under this act; but all sums of money to be paid in pursuance of awards, are recoverable only out of the trust-estate; § 16. Where a married woman is the complainer, her husband may proceed in her name. And where a minor is the complainer, his father, or if dead, his mother, or if both parents be dead, any relation, or the surety in his indenture, or any person nominated by the minor, may proceed in his name;

§ 17. Tickets of particulars must be given out with work, of which the master keeps duplicates, which are good as evidence, if the workman do not produce the tickets themselves; §§ 18 and 19. Masters who do not by themselves, or their clerks or foremen, object to an article within twenty-four hours, cannot afterwards complain; § 20. The parties may by agreement extend the time for making award; § 21. The form of the award is given in a schedule annexed to the act; § 22. When the award is fulfilled, the fulfilment must be acknowledged in a specified form; § 23. Performance of the award may be enforced by distress, and failing that, the party refusing is imprisoned; § 24. Where distress appears ruinous to the defaulter and his family, warrant is withheld, and the defaulter is committed to prison; § 25. On payment to the governor of the prison of the sum awarded with costs, the party is discharged; § 26. No proceedings under the act are invalid for want of form; § 29. No appeal is competent; § 28. Provision is made for fees to clerks and constables, and the settlement of costs; §§ 30, 31. Proceedings under the act are exempt from stamp-duty; § 32. By 1 Vict. c. 67, § 3, it is enacted, that wherever the expression "Justice of the Peace" occurs in the above act, it shall be construed to mean "Magistrate."

The statute 1 and 2 Will. IV., c. 37, was passed to prevent the payment in certain trades of wages in goods, or otherwise than in the current coin of the realm. It is generally known as the "Truck Act."

See, on the law respecting workmen, *Bell's Com.* i. 182, 457; *Bell's Princ.* §§ 150-54, 190-92, 1430; *Illust. ib.*; *Hunter's Landlord and Tenant.* See also *Hypothec. Artists and Artificers. Apprentices. Master and Servant. Wages. Location.*

**Wrang.** See *Tort.*

**Wrecks;** formerly fell to the king or his donatary, the admiral or the heritor, if no living thing escaped; statute Alex. II. c. 25, § 1. But foreigners can always, on application, have access to their wrecks on our coasts—1429, c. 124; and the wrecks of natives belong to the owners, if they apply within a year, or even at a more remote period, if reasonable in the circumstances. Theft from wrecks is punished with severity; *Ersk. B. i. tit. 1, § 13*; *B. iv. tit. 4, § 65*; *Hume.* Stranded goods, and such wreck goods as the owners claim and recover (but not *flotsam, jetsam, and lagan*) are liable to custom. Our law as to shipwreck is not innovated on by 12 Anne, c. 17, although it extends to Scotland. *Stair, B. ii. tit. 1, § 5*; *Bank. B. i. tit. 8, § 5, et seq.*; *More's Notes to Stair, p. cxlvi.*; *Bell's Com.* i. 516, 598; *Bell's*

*Princ.* §§ 443, 1292; *Illust. ib.*; *Swint. Abridg. h. t.*; *Tait's Justice of Peace, h. t.*; *Blair's do. h. t.*; *Brown's Synop. h. t.*, and p. 1979. See *Dereliction. Flotsam. Jetsam.*

**Wreck of the Sea;** "a word specified in the laws and sundry infestments, signifying power, liberty and prerogative, competent to the king, or to any person to whom the same is granted by him, by infestment or any other disposition, to intromit and uptake such gudes and gear as are ship-broken, or fall to him by escheat of the sea. This liberty was as competent and profitable to him who was infest with wreck as it might be to the king" himself. *Stene, h. t.* See *Wrecks.*

**Writ of Error.** See *Error, Writ of.*

**Writers to the Signet.** See *Clerks to the Signet. College of Justice.*

**Writing.** See *Obligation. Evidence.*

**Writings or Writs.** See *Deed. Proving of the Tenor. Delivery. Acceptance. Testing Clause. Evidence. Registration.*

**Written Law.** See *Law.*

**Written Verdict.** See *Verdict.*

**Wrong.** See *Delinquency. Damages.*

**Wrongous Imprisonment;** is described by the act 1701, c. 6, called the *Scotch Habeas Corpus.* Under that statute, wrongous imprisonment is committed by a judge or magistrate, granting warrant for commitment, in order to trial, without cause expressed, and on information not subscribed by the informer; by officers of the law receiving or detaining prisoners on such warrants—refusing to the prisoner a copy of the warrant of commitment—detaining him in close confinement above eight days after such commitment—not duly releasing him on bail, where he is committed in order to trial for a bailable offence—or transporting persons beyond seas without their own consent, or a lawful sentence. Other species of wrongous imprisonment, not falling under the statute, are punished arbitrarily at common law. The statutory punishment is a pecuniary fine, and payment of a sum of money *per diem* to the prisoner, both proportioned to his rank; and, moreover, incapacity for public trust. This act has been extended to private offenders also; and the penalties (which cannot be modified) may be sued for before the Court of Session, who have the sole cognisance of the crime; *Ersk. B. iv. tit. 4, § 31*; *Hume, ii. 94, et seq.* The right to prosecute under the statute prescribes in three years. But this prescription does not extend to actions founded on imprisonment for civil debt; *M'Christie, Jan. 21, 1831, 9 S. & D. 312.* Wrongous imprisonment founds also a civil action at common law for damages, at the instance of the injured party, against the magistrate or officer of the law, or other person

who has done the wrong. And in actions of damages for wrongous imprisonment, a verdict awarding nominal damages carries costs; *Cowan*, Dec. 17, 1833, 12 *S. & D.* 221. In an action for wrongous imprisonment, it is competent to prove, in aggravation of damages, that one of the pursuer's family was sick; *Beveridge*, July 13, 1822, 3 *Mur.* 108. A summons founded exclusively on the act 1701 cannot support a conclusion for damages at common law, independently of the penalties

imposed by the act; *Millar*, May 21, 1831, 9 *S. & D.* 625. In this case an amendment of the libel was allowed. See generally, on the subject of wrongous imprisonment, *Ersk. B. iv. tit. 4, § 3*; *Hume*, ii. 94; *Alison's Prac.* ii. 151, 152; *Bank.* i. 64; *Bell's Com.* ii. 566; *Bell's Princ.* § 1701, 2035-38; *Tait's Justice of Peace*, h. t.; *Blair's do. h. t.*; *Jurid. Styles*, 2d edit. iii. 89. See *Damages. Bail. Imprisonment. Liberation. False Imprisonment. Habeas Corpus.*

## Y

**Yare.** See *Cruives*.

**Yburpananseca.** This word is by Skene supposed to mean the law of birdingsek or burdenseck, which was, "*De furta vituli, vel arietis, vel quantum cibi quis portare potest super dorsum sum, curia non est tenenda.*" *Skene, h. t.* See *Burdenseck*.

**Year and Day.** The lapse of a year has several important effects in the law of Scotland, the day being added in *majorem evidentiam*. Thus, formerly the heir had a year and a day to deliberate as to whether or not he will take up his ancestor's succession, after the lapse of which he has not the privilege of serving heir *cum beneficio inventarii*. But by the Titles to Land Act, 21 and 22 Vict. c. 76, 1858, diligence may proceed against an apparent heir at any time after the lapse of six months from the date of his becoming apparent heir. See *Annus Deliberandi. Beneficium Inventarii*. So also formerly, if a marriage did not subsist for a year and day, or until the birth of a living child, matters, *quoad* the spouses, were restored to the state in which they were before the marriage; unless otherwise provided in the contract of marriage. See *Marriage*.

**Terce.** But by the Intestacy Act, 18 Vict. c. 22, 1855, it is enacted that the dissolution of a marriage by the death of one of the parties before the lapse of a year from its date shall not affect the rights of the survivor or those of the representatives of the predeceased. All adjudications led within year and day of the first effectual adjudication rank *pari passu* on the debtor's estate. See *Adjudication. Effectual Adjudication*. Letters of horning must be denounced within year and day of the charge, in order to warrant the issuing of a caption. See *Denunciation*. A summons must be called within year and day after its execution, otherwise it falls. See *Summons*. A depending process must be moved in by having an interlocutor pronounced within year and day after the immediately preceding interlocutor, otherwise it falls asleep. See *Wakening*. Under the Small Debt Act, a new charge of payment must be given to the debtor if the decree is not enforced within a year from its date, or from the charge for payment. See *Adjudication Sequestration. Bankrupt. Annus Deliberandi. Computation of Time. Dies inceptus pro completo habetur*.

## Z

**Zairs.** See *Cruives*.

**Zarde**; an old English land measure, the same as *virgata terræ*, containing in some places twenty, in others twenty-nine, and in others thirty acres. *Skene, h. t.*

**Zelde**; a gift or donation. *Skene, h. t.*

**Zemsel**; of a castle; the custody and keeping of a castle. *Skene, h. t.*

**Zetland.** The *retractus gentilius*, i. e. the right of the udaller's heir to redeem from a purchaser, and the succession of all the sons or brothers by *gavel-kind*, with a *precipuum* of the house and pertinents to the eldest, formerly prevailed in Zetland. *Bank. B. ii. tit. 3, § 30.* See *Udal*.

## ERRATA.

BORDER WARRANTS, p. 122, col. 2, line 18 from top, for "this action," read "an action of relief by the defender against his agent."

OATHS, *Add*, "See also 21 and 22 Vict. c. 48, 1858, and *Affirmation*."













