

preting 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; Bank. i. 24; Bell's Com. i. 456; Brown's Synop. tit. Consuetude*, and pp. 308, 1105; *Shaw's Digest, tit. Consuetude*. See also *Desuetude. Usage*.

**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. [See the Customs Duties Consolidation Act, 1876 (39 & 40 Vict. c. 35), amended by 50 Vict. sess. II. c. 7; also *Barclay's Digest*. See *Excise. Smuggling*.]

**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*.

[**CY-PRÈS**. Where a person has expressed a general intention, and also a particular mode in which he wishes it carried out, but the intention cannot be carried out in that particular mode, the court will in certain cases direct the intention to be carried out *cy-près*, that is, as nearly as possible in the mode desired. *Sweet's Law Dict.* See *Burnett*, 12 June 1888, 15 R. 723. See *Nobile Officium. Trust*.]

## 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. [See *Penalties*.] 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. [The rule in England, which is also generally accepted in this country, is that the damages given for breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it; *Hadley*, 9 Exch. 341. See *Bell's Princ.* § 31; *Dunlop*, 24 Feb. 1848, 6 Bell's App. 195; *Borguis*, 15 Q.B.D. 85. The parties may agree beforehand as to the damages to be exigible for non-performance; and such sum, whether it be called "liquidated damages" or "penalty," will be awarded by the court, though exceeding the actual loss sustained, except in so far as it is exorbitant; *Forrest*, 26 Nov. 1869, 8 Macph. 187; *Robertson*, 2 March 1881, 8 R. 555; *Kemble*, 6 Bing. 141; *Wallis*, 21 Ch. D. 243.]

Culpable neglect or ignorance, without any positive criminality, is also a ground for damages. Thus, 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*, 1812, [5 Pat. 567;] *Innes*, 1790, M. 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. [Hence also railway companies, and owners of stage-coaches, steam-boats, or ships, are liable for injuries to person or property sustained through the *culpa* of themselves or their servants. This liability, however, arises partly *ex contractu*, the obligation being to convey passengers or luggage in safety. See *Carriers*. But if there is contributory negligence, *i.e.*, if there is *culpa* on the part of the injured as well as of the injurer,

[the injury being due to the combination of both faults, no liability is incurred for reparation of the injury; *M'Naughton*, 17 Dec. 1858, 21 D. 160; *Radley*, 1 App. Ca. 759; *Wakelin*, 12 App. Ca. 41. Hence trespassers on a railway have no claim for damage; *Davidson*, 5 July 1855, 17 D. 1038; *Grant*, 10 Dec. 1870, 9 Macph. 258.]

[In *Duncan v. Findlater*, 19 June 1838, 16 S. 1150, the Court of Session found, in conformity with previous decisions, that road trustees were liable to the extent of the trust funds for an accident arising from the state of the road; but this decision was reversed by the House of Lords (8 July 1839, M.L. and Rob. 911). In a more recent English case, however—*Mersey Docks Trs. v. Gibbs*, 1866, L.R. 1 E. & I. App. 91—the House of Lords affirmed the liability of a statutory corporation; and in *Virtue*, 12 Dec. 1873, 1 R. 285, the Court of Session held that the *Mersey Dock Trs.*, though an English case, yet having been decided on principles of law common to both countries, overrules the judgment of the Lords in *Duncan v. Findlater*. It may thus be regarded as settled that statutory trustees, administering funds for public purposes, are liable, as such, in the same way as individuals.]

[A master is civilly liable for the negligence of his servants; see *Master and Servant*. A person is not, however, liable for the negligence of a tradesman or contractor employed by him, nor a principal for the negligence of a sub-agent; *M'Lean*, 9 March 1850, 12 D. 887; *Quarman*, 6 M. & W. 716; 3 *Ross's L. C.* 266 *et seq.*] 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. [In *Fleming*, 3 April 1855, 2 Macq. 14, the owner of a dog which destroyed a number of sheep was held not to be liable for their value, in respect there was no evidence showing knowledge of the dog's vicious propensities, or want of due care in keeping the dog. But it was enacted by 26 & 27 Vict. c. 100, § 1, that in any action brought against the owner of a dog for damages in consequence of injury done by such dog to any sheep or cattle, the pursuer need not prove a previous propensity in such dog to injure sheep or cattle. But see *M'Intyre*, 18 Feb. 1870, 8 Macph. 570. The same statute provides (§ 2) that, in the absence of contrary proof, the occupier of the house or premises where the dog has been usually kept or permitted to live, shall be liable as the owner of such dog. Section 1, however, applies only to injuries done by a dog to sheep or cattle (including horses). In other cases, the rule of the common law holds, that, when injury is done by an animal, the owner of the animal is responsible only on proof that the animal was vicious; *Clark*, 11 July 1862, 24 D. 1315.] 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. Mobbing*.

[Actions of damages are among those declared proper for trial by jury by 6 Geo. IV. c. 120, § 28. See *Jury Trial*. They are competent both in the Court of Session, and in the inferior courts. Where the pursuer in an action of damages in the Court of Session recovers by the verdict of a jury less than five pounds, he is not

[entitled to expenses, unless the judge certifies that the action was brought to try a right besides the mere right to recover damages; or that the injury in respect of which the action was brought was malicious; or, in the case of actions for defamation or for libel, that the action was brought for the vindication of character, and was in his opinion fit to be tried in the Court of Session; 31 & 32 Vict. c. 100, § 40.] With regard to the jurisdiction of the High Court of Justiciary in such actions, 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. 32. 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*, 25 May 1809, F.C. and note; [*Mackay's Prac.* i. 369. Even when the claim is merely for *solatium* for wounded feelings, it transmits against the representatives of the wrongdoer; *Evans*, 15 July 1885, 12 R. 1295. As to the measure of damages, contrast *M'Master*, 27 Nov. 1885, 13 R. 252, where the court refused to interfere with a jury's award of £400 to a father for the loss of a son of sixteen years (an ironworker); and *Wallace*, 13 Jan. 1888, 15 R. 307, where the court set aside an excessive award to a widow for the loss of her husband (a builder), and assessed the damages at £400, besides £100 for *solatium*. See also *Young*, 29 Nov. 1882, 10 R. 242, as to the elements to be considered in estimating damages for personal injury.] See on this subject, *Stair*, B. i. tit. 9, §§ 3 et seq.; *More's Notes*, lvii., lxi., xcii.; *Brodie's Supp.* 1003; *Ersk.* B. iii. tit. 1, § 12; *Bank.* i. 252; *Kames' Equity*, 41, 62, 211; *Bell's Princ.* §§ 30–34, 543, 2028; [*Bell's Com.* i. 698; *Guthrie Smith*



[*on Damages; Pollock on Torts; Addison on Torts; Sedgwick on Damages; Mayne on Damages; Anson on Contract*, 314.] See *Malice. Jury Trial. Defamation.*

**DAMNUM**; in the Roman Law, signified any loss sustained in person or property. *Damnum* was either *injuria datum* or *absque injuria*. *Damnum injuria datum* was any loss occasioned by a free person, *versans in illicito*, and consequently guilty either of *dole* or *culpa*. *Damnum 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.* [See *Andrew*, 10 March 1873, 11 Macph. (H.L.) 13; *Wilson*, 1 Dec. 1876, 4 R. (H.L.) 29; *Smith's L. C. i.* 319.] *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. [See *Samuel*, 12 Dec. 1850, 13 D. 312; *Tennant*, 3 March 1864, 2 Macph. (H.L.) 22; *Potter*, 25 Nov. 1864, 3 Macph. 83; *Pirie*, 18 Jan. 1871, 9 Macph. 412. See also *Ersk. B. iii. tit. 1, § 28*;] *Brodie's Supp. to Stair*, 989; *Bell's Com. i.* 499, 606; *Hunter on Landlord and Tenant*, ii. 452; [*Rankine on Land-Ownership*, 314.] 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. [By § 6 of the Bankruptcy Act (19 & 20 Vict. c. 79), the date of a deed under that act, or under 1696, c. 5, is 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 in the particular case is requisite for rendering such deed completely effectual. See *Insolvency. Bankruptcy*. As to holograph deeds, see *Holograph*.] See *Stair, B. iv. tit. 42, § 19*; *More's Notes*, ccccvii.; *Ersk. B. iii. tit. 2, § 18*; *Bank. ii.* 634; *Ross's Lect. i.* 132; *Bell's Com. i.* 719; ii. 168; [*Menzies' Conv.* 124; *M. Bell's Conv. i.* 65; *Dickson on Evidence*, §§ 718, 770, 814, 877, 959, 1254; *Kirkpatrick*, §§ 99, 107, 113. See *Deeds, Execution of. Testing Clause.*]

**DAVACH**; an ancient term of measurement of land, used chiefly in the north-eastern counties. A davach was equal to four ploughs. The etymology is uncertain. See *Innes' Legal Antiquities*, 271.]

**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.* ii. 456; *Bell's Princ.* § 431; *Ross's Lect.* i. 329. [See *Computation of Time. Holidays.*]

**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.*

**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. [Days of grace have been abolished in most countries, but are still in force in Russia, the United States, Portugal, and some of the smaller states, as well as in this country; *Thorburn on Bills of Exchange Act*, 45.] The number of days allowed differs in different countries. In Great Britain, three days of grace are allowed. [With reference to the case of the last day of grace falling on a Sunday or holiday, see *Bills of Exchange Act*, 1882, § 14, quoted under *Bill of Exchange*, p. 110.] See *Ersk.* B. iii. tit. 2, § 33; *Bell's Com.* i. 434; *Bell's Princ.* § 327; *Thomson on Bills*, 250; [and authorities cited under *Bill of Exchange.*]

**DEAD BODY.** The offence of disintering a dead body, or *crimen violati sepulchri*, is punishable arbitrarily, by fine, imprisonment, whipping, [or penal servitude,] according to the circumstances attending the commission of the crime. It is committed by raising the body, though ever so little, from the shroud. This offence is not regarded properly as a theft, but as a great indecency, and a crime of its own nature. [See *Soutar*, 24 Oct. 1882, 5 Coup. 65.] 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*, cclxxxvii; [*Alison's Princ.* 461; *Macdonald*, 76; *Tomlins' Dict. voce Corpse*. See also the *Anatomy Act*, 2 & 3 Will. IV. c. 75.]

**DEAD FREIGHT.** [See *Freight.*]

**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 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; tit. 8, § 54; *Ersk.* B. iii. tit. 9, §§ 18, 30; *Bank.* B. iii. tit. 8; [*Bell's Princ.* § 1592; *Fraser on Husb. and Wife*, ii. 1071.] See also *Confirmation of Executor. Jus Relictæ. Legitim.*

**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, [or make a will,] 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; [*Kirkpatrick*, 8 June 1853, 15 D. 734.] 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; B. i. tit. 10, § 13; *Ersk.* [B. i. tit. 7, § 48;] B. iii. tit. 1, § 16; *Bank.* B. i. tit. 7, § 11; [*Fraser on Parent and Child*, 532, 544.] 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, *note*; *Alison's Princ.* 667. [In the case of a deaf and dumb panel, an interpreter is usually appointed by the court, just as in the case of one who does not understand English; *Turner*, 25 Sept. 1861, 4 Irv. 93. Deaf and dumb witnesses are admissible, though they have had no education, and can only converse by gestures, provided they know right from wrong, and are aware of the existence of a Supreme Being. See *Dickson on Evidence*, §§ 329, 1406, 1555; *Macdonald*, 259, 474, 482.] It is almost superfluous to observe that it is a valid objection to a jurymen that he is deaf or dumb; *Hume*, ii. 310.

**DEAN**; an ecclesiastical dignitary in the Church of England. [The Dean and Chapter are the council of a Bishop, and also assist in the celebration of divine service in his cathedral. The dean is the president of the council. The chapter consists of dignitaries of the church called canons. *Sweet's Law Dict.*]

**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 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. [See *Smellie*, 9 July 1868, 6 Macph. 1024.] 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 appeal, suspension, or reduction. By the Burgh Reform Act, 3 & 4 Will. IV. c. 76, while the right of the guildry to elect their dean is preserved, he is no longer recognised as an official and constituent member of the town-council, and his functions are 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.

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. [For recent questions as to his jurisdiction, see *Mitchell*, 18 March 1885, 12 R. 844; *Gourlay*, 4 June 1887, 14 R. (J.C.) 31; *Robertson*, 17 June 1887, 14 R. 822; *Walker*, 29 Feb. 1888, 15 R. 477.] 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 *viva 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 *Ersk.* B. i. tit. 4, § 24; [B. ii. tit. 9, § 9;] *Bank. B. iv. tit. 22*; *Bell's Princ.* § 2165; *Jurid. Styles*, iii. 366-7; *Boyd's*



*Judicial Proceedings*, B. v. tit. 3; A.S. 12 Nov. 1825 (*Burgh Courts*), part iii. c. 1; [*Rankine on Land-Ownership*, 565; *Marwick's Municip. Elections*, 242, 408; *Iron's Police Law*, 196; *Spink's Procedure*, 210.] See *Burgh, Royal. Jedge and Warrant. Weights and Measures. Edinburgh. [Lining.]*

#### 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; 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 delinquence, as a resolute condition, is not excluded by the vassals' death. 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 intimate, to insist in the principal cause;" and successors or purchasers may proceed with the action on producing their title, and being sisted by a minute. [On the defender's death, an action of transference was necessary until 1868, when a short procedure was substi-

[tuted by 31 & 32 Vict. c. 100, §§ 96, 98. See *Transference*.] A forthcoming may be raised on an arrestment, notwithstanding the death of the arrester, arrestee, or common debtor; 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. [See *Presumption of Life*. As to registration of deaths, see *Registration*.] See *Stair*, B. ii. tit. 11, § 33; B. iii. tit. 5, § 34; tit. 6, § 15; *More's Notes*, cii., ccvii., ccclxv.; *Ersk. B. iii. tit. 3, § 42*; B. iv. tit. 1, § 61; *Bell's Com. ii. 286, 495*; *Bell's Princ. §§ 228, 375, 1528, 1640*; [*Dickson on Evidence*, §§ 116, 1179.] See *Capital Punishment*.

**DEATHBED.** By the law of deathbed, which was peculiar to Scotland, the heir in heritage was 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. See 1696, c. 4; A.S. 29 Feb. 1692. Such deeds, granted *in lecto*, as it was called, were contradistinguished from deeds granted by a person in what was termed *liege poustie* (*legitima potestate*); that is, where the granter was legally presumed to have been of a sound and disposing mind. But deathbed deeds, although challengeable by the heir, were effectual, unless challenged by way of reduction, and were not null *ope exceptionis*. The law of deathbed, which was part of our ancient common law, is of uncertain origin. It was extolled by some of the highest authorities in the law of England, and ridiculed by others; see Lord Eldon's encomium, in *Crawford*, 2 Bligh, 660. [It is now practically abolished; the act 34 & 35 Vict. c. 81, having enacted "that no deed, instrument, or writing, made by any person who shall die after the passing of this act (16 August 1871) shall be liable to challenge or reduction *ex capite lecti*." This statute was inadvertently included in the schedule of acts repealed by the Statute Law Revision Act of 1883 (46 & 47 Vict. c. 38); but by § 1 of that act, the repeal does not revive or restore "any custom, right, usage, practice, procedure, or other matter or thing not now existing or in force." The question whether the abolishing act reaches every transaction which was challengeable



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[under the law of deathbed is raised by Lord Fraser (*Husb. and Wife*, ii. 1008 ; see also *Parent and Child*, 42). The learned author there suggests that certain transactions not covered by the terms "deed, instrument, or writing," e.g. delivery of cash on deathbed, and the lending out money on heritable securities, were, and still are, challengeable by the law of deathbed. But in the *Lauderdale Peerage*, 22 July 1885, 10 App. Ca. 692, the House of Lords (Committee of Privileges) held that certain children had been legitimated by marriage on deathbed ; and declared that "the law of deathbed was, according to all the authorities, limited in its application to deeds, instruments, or writings executed *in lecto* to the prejudice of the heir *aliouquin successurus*" (per Lord Watson, p. 754). The law of deathbed is more fully expounded in previous editions of this Dictionary.] See also *Reg. Majestatem*, tit. ii. c. 18, §§ 7, 9; *Craig de Feudis*, lib. i. dieg. 12, § 36 ; lib. ii. dieg. 1, § 28 ; *Dirleton and Steuart, vocibus Legitima Liberorum, Reduction ex capite lecti*, and *Faculty to Alter*; *Stair*, B. iii. tit. 4, § 27 ; B. iv. tit. 20, § 37 ; *More's Notes*, cccxiii. ; *Mackenzie's Inst.* B. iii. tit. 8 ; *Bank*, B. iii. tit. 4, § 32 ; *Ersk.* B. iii. tit. 8, § 95 ; *Fountainhall*, i. 479 ; ii. 324 ; *Bell's Com.* i. 80 ; *Bell's Princ.* § 1786 ; *Sandford on Herit. Succession*, i. 81 ; *Kames' Equity*, 282, 462 ; [*Fraser on Husb. and Wife*, ii. 1006 ; *McLaren on Wills*, § 325.]

[**DEATHBED EXPENSES.** These constitute a privileged debt, ranking along with funeral expenses preferably to other claims against the deceased's estate. See *Privileged Debts*, and authorities there cited.]

**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. 143 ; 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, [were made] 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. [Most of the restrictions formerly affecting debating societies were repealed by 32 & 33 Vict. c. 24.] 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.* See *Before Answer*.

**DEBENTURE.** [This term is generally applied to a bond or deed of mortgage granted by a railway or other public company, whereby, in consideration of money lent, the whole property and undertaking of the company is charged with repayment of the loan, at a certain period, and at a certain rate of interest. The issue of debenture stock is now regulated by Part III. of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118). Debenture stock, with the interest thereon, is a charge on the undertaking of the company prior to all shares or stock of the company. It is transferable in the same way as other stock of the company, and in all other respects has the incidents of personal estate. Debenture-holders in Scotland have no preference over ordinary trade creditors of the company in regard to leasehold subjects or corporeal moveables, unless the assignation is followed by possession ; *Clark*, 30 June 1882, 9 R. 1017. See *Lorimer on Joint Stock Companies*, 52 ; *Lindley on Company Law*, 196 ; *Cavanagh on Securities*, 351. See *Joint Stock Companies*.]

**DEBITOR NON PRÆSUMITUR 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 *præsumptio juris*, which will yield to contrary proof, or

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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. ut infra*. 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. See *Dows*, 1681, M. 11478; *Gibson*, 1726, M. 11481; [*Balfour*, 10 March 1842, 4 D. 1044; *Kippen's Trs.* 3 July 1856, 18 D. 1137. See also *Stair*, B. i. tit. 8, § 2; B. iv. tit. 42, § 21; tit. 45, § 17; *Ersk.* B. iii. tit. 3, § 93; *Dickson on Evidence*, § 165; *Kirkpatrick on Evidence*, § 159. See *Donation*.]

**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 poinding of the ground. In the same way, an annualreuter, 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 poinding of the ground. See *Poinding 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 infeftments, 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*, clxxii.; [*Ersk.* B. ii. tit. 8, § 37;] B. iv. tit. 1, § 11; *Bank.* B. ii. tit. 5, § 18; *Bell's Com.* i. 723, 739, 752; *Bell's Princ.* § 699; *Ross's Lect.* ii. 392. See *Absolute Disposition*.

[**DEBTORS ACT**; 43 & 44 Vict. c. 34. See *Bankruptcy. Cessio. Fraudulent Bankruptcy. Imprisonment*.]

[**DEBTS RECOVERY ACT**. By the Debts Recovery Act, 1867 (30 & 31 Vict. c. 96), a summary procedure, for the most part resembling that of the Small Debt Court, was provided for the recovery before the sheriff of debts of a certain class, exceeding the limit (£12) fixed by the Small Debt Act, but not exceeding £50 in value. The actions to which the Debts Recovery Act applies are actions of debt "for house maills, men's ordinaries, servants' fees, merchants' accounts, and other the like debts;" being generally the same debts which (when not founded on written obligations) fall under the triennial prescription of the act 1579, c. 83. But the words are not to be controlled by a limited construction of the terms of the earlier act; see *Sundys*, 26 Nov. 1874, 2 R. (J.C.) 7; *Grant*, 10 Dec. 1881, 9 R. 257. A person suing under this act is in all cases held to have passed from and abandoned any remaining portion of his debt, beyond the sum actually concluded for. See *Fraser*, 19 Dec. 1867, 6 Macph. 170; *M'Kendrick*, 14 Dec. 1870, 9 Macph. 283. See *Dove Wilson's Sher. Court Prac.* 524; *Lees' Sher. Court Styles*, 423; *Lewis' Sher. Court Prac.* 71. See *Small Debts*. Appeal under this act is competent only from the sheriff, not from the sheriff-substitute; and cannot be taken until judgment has been pronounced, finally disposing of the cause (§ 10). The sheriff's findings in fact are final, unless one of the parties has required a note of the evidence to be taken; *ib.* For other provisions as to appeal, see the act. See also *Mackay's Prac.* ii. 448. As to expenses, see *Walkers*, 17 July 1884,



[11 R. 1101. An appellant may not state a new plea in the Court of Session, if he had sufficient means to employ an agent in the sheriff court; *Simpson*, 2 Feb. 1881, 8 R. 469. See *Appeal to Court of Session*.]

**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; 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." See *Extract. Interim Decree. Decree*.

**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. 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 INCLUSÆ**; teinds which have never been separated from the stock, and which are not demandable by the titular or minister. [Lands feued *cum decimis inclusis et nunquam antea separatis* are exempted from payment of tithe. This privilege appears to be traceable to a prior exemption vested in the monasteries to whom the lands belonged in former times. By the old canon law, the lands of monasteries, as well as all other lands, were burdened with the teind. But in the beginning of the 12th century, Pope Paschal II. granted a general exemption, in favour of all monks and canons, of their *labores*, or lands cultivated by their own hands or at their own expense. About the middle of the same century, this general exemption was restricted by Hadrian IV. to the *novalia*, or lands newly brought into cultivation by the monks; and the exemption of the *labores* was confined to the three orders of Cistercians, Templars, and Hospi-

[tallers. The latter having apparently abused their privilege by purchasing lands with the view of acquiring the right of exemption, it was further limited, by a Lateran Council in 1215, to lands acquired by these orders before that year. But this canon as to *acquirenda* does not seem to apply to *novalia*; *Connell*, ii. 11. "This exemption of the *novalia*," says Lord Pres. Blair, in *Auchterlony*, 23 May 1810, F.C., "was indeed just and expedient, founded on at least as much good sense as generally distinguishes the canon law. Now, when lands were held by the monasteries in this way, as it is certain that they did feu out their lands, it seems reasonable to suppose that they feued out these sometimes as well as others; and if they did feu out such lands, it was very natural, and must have appeared just, that they should feu them with the same exemption which had always been attached to them. In order to do this, however, it appears exceedingly probable that they inserted a declaration of the fact that the teinds were included in the conveyance of the lands, and had never been separated, '*cum decimis inclusis et nunquam antea separatis*.' . . . The consequence of this being the form of feuing out *novalia* was that, where this clause was found, there existed at least a presumption that the lands had really been ancient *novalia*, and entitled to exemption. This seems to me the true, and it seems a reasonable and equitable origin of the privilege of exemption from minister's stipend of lands held *cum decimis inclusis et nunquam antea separatis*." The foregoing explanation is perhaps the most satisfactory that can now be looked for on so obscure a subject. But Sir John Connell (ii. 37) holds that lands may be entitled to exemption which were formerly possessed by the privileged orders as *labores*, as well as *novalia*; and Mr Buchanan (p. 38) gives his personal testimony to the effect that Lord Pres. Blair did in fact include the *labores*, as one source of the exemption, and that the Faculty report of his opinion is in this respect defective. It is difficult, however, to understand how it could be truly declared of lands other than *novalia*, that the teinds never had been separated from the stock. But the main difficulty in connection with this subject is to account for the continuance of the exemption, after the lands had passed from the church into the hands of lay grantees. The original exemption of church lands was a privilege

[of a strictly personal nature, and came to an end so soon as the ecclesiastics ceased to be the immediate occupants and cultivators of the lands. This was found with regard to *labores*, in *L. Blantyre*, 4 Dec. 1838, 1 D. 148; and appears, with regard to *labores* and *novalia* alike, from a canon of Alexander III., which declares that "*non est licitum eis decimas de terris suis subtrahere quas aliis tradunt excolendas*," as well as from the terms of the papal bulls, limiting the exemption in each case to lands cultivated by the monks themselves, "*propriis manibus vel sumptibus*;" *Connell*, ii. 5, 6; *Buchanan*, 98. And yet every decision of the court, in which *decimæ inclusæ* rights have been sustained as inferring exemption from teind, implies that the privilege had been effectually transmitted along with the conveyance of the lands. In England, the right of exemption from tithe was changed at the Reformation from a personal privilege to a real right, by 31 Henry VIII. c. 13, which enacted that all persons, who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeys themselves had formerly held them. In Scotland, however, *decimæ inclusæ* rights seem to have been incorporated into the law merely by the authority of the decisions of the courts; and no satisfactory explanation has yet been offered of the grounds on which they were at first recognised. Mr Buchanan, the most recent writer on teinds, pointing to the fact that no deed has been discovered, containing any terms on which the exemption could have been claimed, of an earlier date than 1543, "the era of all the sinister devices which preceded and accompanied the Reformation," is of opinion that "the imposing clause, so much founded on, *Cum decimis inclusis*, &c., truly means nothing," and "only serves as one, and not the least skilful, among the many devices, which were the fruit of these disturbed times, for manufacturing an apparent title to assist in the general spoliation of church property" (p. 108). The requisites to be fulfilled by parties claiming exemption under *decimæ inclusæ* titles, are the following, as summarised by Lord Curriehill, in *D. Atholl's Trs.* 3 June 1864, 2 Macph. 1133:—"The first thing they have to establish is that the lands and teinds belonged to a monastic establishment, or to what is called the regular clergy. It is not enough that they belonged to laymen, or to the secular

[or parochial clergy. (See *Offrs. of State v. Stewart*, 20 July 1858, 20 D. 1331). In the next place, they must never have been teindable. If even the monastic institution had acquired lands from which teinds had previously been drawn, teinds would still have continued to be exigible from them. The lands must have been what were called *novalia*,—that is, lands reclaimed by the labour or expense of the monks themselves. . . . There was an exception from the rule, when the lands were acquired by either of the three orders, Cistercians, Templars, and Hospitalers. In the third place, it is necessary that the title shall bear that the lands are held *cum decimis inclusis et nunquam antea separatis*. Both these phrases are necessary." See also *Dundas*, 27 Feb. 1880, 7 R. (H.L.) 19; *E. Mansfield*, 30 Jan. 1880, 7 R. 552. The title must in every case be anterior to the Act of Annexation in 1587. Some writers hold also that the grant must have been confirmed by the Pope before 8 March 1558, or by the King before the Act of Annexation. But in *E. Dalhousie*, 15 July 1864, 2 Macph. 1349, Lord Benholme, following Sir J. Connell (ii. 40), expressed a doubt whether a grant, fortified by prescription upon a proper clause of *decimæ inclusæ*, could be called in question, so far at least as regards the right to teinds, on the ground of want of confirmation. "All these concurring requisites, however, only give rise to a presumption that the lands and teinds have been continuously possessed in a united form, which presumption may be overthrown by proof of a prior separation, either by a distinct conveyance or lease of the lands without the teind, or *vice versa*, or of separate rents or reddendos being exacted for stock and teind respectively;" *Buchanan*, 131. See *Stair*, B. ii. tit. 8, § 10; B. iv. tit. 24, § 8; *More's Notes*, ccxxxix.; *Ersk.* B. ii. tit. 10, § 16; *Connell on Tithes*, ii. 1; *Buchanan on Teinds*, 75. See *Teinds*.]

**DECIMÆ RECTORIÆ**; personage 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 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*.

**DECISIONS.** The decision of a court is the judgment pronounced in a cause



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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 predecessors 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; [*Stephen's Com. i. 53.*]

**DECLARATION**; in the law of England, a legal specification, on record, of the cause of action, by a plaintiff against a defendant; *Tomlins' Dict. 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, [without unnecessary delay,] 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. [The prisoner is entitled, immediately on arrest, to have intimation sent to a law

[agent, and may have a private interview with him, before examination; and the examination may be delayed for forty-eight hours, to allow time for the agent's attendance; Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35, § 17).] 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; [*Mahler*, 15 June 1857, 2 *Irv.* 634; or if the examination is unfair or oppressive; *Kelly*, 28 April 1843, 1 *Broun*, 543.] 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. [The magistrate ought also, at least when a grave offence is charged, to inform the accused of his right to have the assistance of a law agent; *Goodall*, 3 July 1888, 15 *R. (J.C.)* 82.] 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. [If the declaration, or part of it, is emitted in the absence of the magistrate, even though subsequently acknowledged and adhered to in his presence, it is invalid; *M'Millan*, 29 Sept. 1858, 3 *Irv.* 213; *Mahler, supra.*] The declaration must be taken down at large in writing, as given by the prisoner, [except the formal parts, which may be either written or printed; act of 1887, § 69. The writer must be a neutral party; *Kelly, supra.*] The declaration 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. After the declaration 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 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. [The prisoner's agent is entitled to be present; 1887, § 17.] A formal testing

clause with the writer's name is not required; [but the declaration should conclude with a docquet, stating the names and designations of the magistrate and witnesses. Articles shown during the examination are labelled, and signed by the prisoner and magistrate as relative to the declaration.] 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 [taken in connection with] 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. [It is evidence against the panel, but not in his favour. He cannot demand its production, if the prosecutor object; *Kennedy*, 27 Dec. 1842, 1 Broun, 497. But if one of several declarations is produced, the accused is entitled to have them all read to the jury. The declaration, if duly authenticated, is received as evidence without being sworn to by witnesses; and the witnesses to the declaration need not be in the list of witnesses served on the accused; but witnesses may be examined in regard to the declaration without previous notice; 1887, §§ 69, 35. And before the declaration is read to the jury, the accused may examine the witnesses who were present when it was taken, and may move the court to refuse to allow it to be read, on grounds disclosed in such evidence, or appearing *ex facie* of the declaration; § 69. In such case, the prosecutor may also examine any witness

[whom the accused is entitled to examine; *ib.*] See *Hume*, ii. 80, 324, 407; *Bell's Notes*, 239; *Alison's Prac.* 555; *Macdonald*, 257, 508; *Dickson on Evidence*, i. § 314; *Kirkpatrick*, § 50.] 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 general rule there is an exception [in cases where the person, whose statement is narrated, was admissible when he spoke, but has died before the 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 successfully used to exculpate from a charge of murder. *Hume*, ii. 406; *Bell's Notes*, 291; *Alison's Prac.* 515; [*Macdonald*, 499, 511; *Bell's Princ.* § 2259; *Dickson on Evidence*, § 266; *Kirkpatrick*, §§ 39, 213. As to formal depositions of dying persons taken by a magistrate, see *Deposition*. See *Evidence. 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. A declaration made in this way can never be regarded as anything 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. In practice, the interrogatories are usually put by the counsel or agent for the adverse party. [Judicial examination is only allowed in cases of suspicion, and its importance has greatly declined, since the admission of parties to a cause as witnesses, by 16 Vict. c. 20. See *A. B.* 23 Dec. 1843, 6 D. 342; *M'Kellar*, 8 Feb. 1862, 24 D. 499; *Seeales*, 13 March 1866, 4 Macph. 575; *Stewart*, 3 June 1870, 8 Macph. 821; *Surtees*, 20 Jan. 1872, 10 Macph. 355; *Henderson*, 23 May 1874, 1 R. 920. See also *Dickson on Evidence* (2d ed.), § 1394; *Bell's Princ.* § 2262; *Shand's Prac.* 403; *Mackay's Prac.* ii. 28, 250. See *Evidence*.]

**[DECLARATION OF PARIS**; a state paper agreed upon at the conclusion of the Crimean War, on 26th Feb. 1856, by the representatives of Great Britain, France, Austria, Russia, Sardinia and Turkey, in which the following agreements in maritime law were come to:—(1) Privateering is abolished. (2) The neutral flag covers enemy's goods, save contraband of war. (3) Neutral goods, save contraband of war, are not liable to capture under the enemy's flag. (4) Blockades, to be binding, must be real. See *Wharton's Lex*; *Phillimore's Internat. Law*, iii. 359; *Hall's Internat. Law*, 485, 646, 658, 671.]

**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 servitude, — of expiry of the legal, — of marriage, — of bastardy, and many others.

[In an action of declarator, "the right of the pursuer is craved to be declared, but nothing is claimed to be done by the defender; but the effect is, that in petitory or possessory actions, the defender is excluded from any defence that might have been proposed in the declaratory action;" *Stair*, B. iv. tit. 3, § 47. It is usual, however, to follow the declaratory conclusions with petitory, possessory, or prohibitory conclusions, in order 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 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*, 8 July 1829, 7 S. 854; *Lyle*, 17 Nov. 1830, 9 S. 22. [Nor is this process intended to declare rights which are clear, and are not attacked; nor remote and contingent rights, unless they are disputed; *Mags. of Edinburgh*, 5 June 1863, 1 Macph. 887; *Mackenzie's Trs.* 1 July 1846, 8 D. 964. But the question of liability or non-liability in a continuing money payment, depending on the application either of statute or of common law, is appropriately raised in a declarator; *Hogg*, 22 June 1880, 7 R. 986. See decisions commented on in that case; also *Leith Police Commrs.* 21 Dec. 1866, 5 Macph. 247; *Glasgow Railway Co.* 18 July 1884, 11 R. 1110. As to declarator in case of irritancy in a lease, see *Irritancy*.] 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 are for the most part appropriate to the Court of Session; but by 40 & 41 Vict. c. 50, § 8, jurisdiction was conferred on the sheriff, subject to certain qualifications, in actions of declarator relating to questions of heritable right or title, where the value of the subject in dispute does not exceed the sum of £50 by the year, or £1000 value. See *Sheriff*.] And in any case, 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*, 19 May 1831, 9 S. 612. Declaratory actions, although they form a great and valuable class of actions in the law of Scotland, are unknown in the English practice; [see Lord Brougham in *E. Mansfield*, 3 July 1846, 5 Bell's App. 139.] See *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.* i. 785; *Bell's Princ.* §§ 706, 735, 830, 905; *Jurid. Styles*, iii. 36; [*Shand's Prac.* ii. 735; *Mackay's Prac.* i. 203 (as amended on p. 622), 357; ii. 93; *Dove Wilson's Sher. Court Prac.*, 64, 404.]

#### 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 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, [where the value exceeds £1000,] such an action being competent only in the Court of Session. A judge may also be declined, *ratione suspecti judicis*, where either the judge or his near kinsman has an interest in the cause. [But, by A.S. 1 Feb. 1820, "the circumstance of a judge being a proprietor or holding shares of the capital stock of a chartered bank in Scotland, is not a ground of disqualification against his lordship judging in questions connected with the bank, or wherein it may have an interest." And by 31 & 32 Vict. c. 100, § 103, it is no ground of declinature "that the judge (whether in the Court of Session or in any of the inferior courts) is a partner in any joint stock company carrying on as its sole or principal business the business of life and fire or life assurance, where such company

[is a party to the proceeding in which the judge is called to exercise his jurisdiction;" nor "that any such judge is possessed, merely as a trustee, of any stock or shares in any incorporated company, where such company is a party to the proceeding." An ordinary director of a chartered bank is still disqualified; but not an extraordinary director; *Bank of Scotland*, 1738, 5 Br. Supp. 206. And the ordinary rule of disqualification seems to apply to a judge "who holds a share in his own right in any company other than a chartered bank or a joint stock life and fire or life insurance company, and even as trustee in any company not incorporated;" *Mackay's Prac.* i. 97. The rule, however, is not extended to cases where the interest is so shadowy as to be inappreciable; see *L. Adv. v. Commrs. of Supply*, 5 June 1861, 23 D. 933; *Sibbald's Trs.* 13 Jan. 1871, 9 Macph. 399. Judges do not judge in a question as to their own declinature on the ground of interest, when a quorum of the court remains; *Blair*, 26 Jan. 1814, F.C. App. to vol. for 1814-15.] In certain cases, the court have repelled 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. 22 July 1774, and 22 Jan. 1789; *Printed Acts*, p. 644. 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. 216, and 1681, c. 13; [*Moubray's Trs.* 16 Jan. 1883, 10 R. 460.] 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; *Ersk.* B. i. tit. 2, § 26; *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*, 1687, M. 3420; *Goldie*, 16 Feb. 1816, F.C.; A.S. 16 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, on the ground that the second son of one of the claimants had married the judge's daughter; *Shaw Stewart*, 30 May



1820, F.C. In this case, however, as to which the whole judges were consulted, eight of the fifteen were of opinion that there was no ground of declinature. But, according to the regulations then in force, the decision of the Division in which the case occurred, differed from that of the majority of the whole judges; see *Consultation of Judges*. [Declinature was sustained, where the judge's brother sued merely as cashier for statutory trustees; *Highland Roads Commrs.* 25 June 1858, 20 D. 1165; and where the judge's brother-in-law was only mandatory for one of the parties; *Campbell*, 26 June 1866, 4 Macph. 867.] 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; *Shaw Stewart*, *supra*, note. 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*. [See *Belfrage*, 20 June 1862, 24 D. 1132. A judge is not disqualified by having formerly been counsel in the cause; *King*, 27 Nov. 1841, 4 D. 124; but a judge who declines on that ground is not called on to vote; *Innes*, 21 Dec. 1827, 6 S. 279.] 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 authorised to judge by special statute; 1579, c. 84. [Where a judge is disqualified, the whole judicial proceedings that may have been taken before him are null, even though no objection have been taken at the time; *Ommaney*, 13 Feb. 1851, 13 D. 678. But an objection to a judge on the ground of malice or corruption must be stated *in initio litis*; *D. Athole*, 15 Dec. 1869, 8 Macph. 299.] See *Stair*, B. iv. tit. 39, § 14 *et seq.*; *More's Notes to Stair*, cclxvii.; *Ersk. B. i. tit. 2, § 25*; *Bank. B. iv. tit. 2, § 37*; *Kames' Stat. Law Abridg. h. t.*; [*Shand's Prac.* 59; *Mackay's Prac.* i. 95. See *Judges*.]

**DECREE.** A decree or decret is the judgment or sentence of a court, whereby the question at issue between the parties is decided. Decrees are said to be either *condemnator* or *absolvitor*: 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. [Decree of *dismissal* is one by which the action as laid is dismissed, but which does not exclude a new action; see *Stewart*, 26 June 1868, 6 Macph. 954. Decree of *absolvitor*, on the other hand, constitutes *res judicata*, and excludes another action on the same grounds. But a decree of *absolvitor* "from the action as laid" was held equivalent to dismissal; *Gillespie*, 22 July 1859, 3 Macq. 757; *Waterston*, 1 July 1884, 11 R. 1036.] 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. [See *Absence*.] A decree *in foro contradictorio* or *contentioso* is a decree in a cause which has been litigated by both parties. ["Where there is once compearance for any party and defences proposed, the decret shall be holden as done *in foro*;" 1672, c. 16, § 19. Decrees by default, therefore, are decrees *in foro*; see *Default*.] Decrees *in foro* of the Court of Session operate as *res judicata*, and cannot be 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. [See *Res judicata. Competent and Omitted. Res Noviter Veniens*. Decrees are also said to be either interlocutory, interim, or final; as to which see *Interlocutory Judgment. Interim Decree. Final Judgment*. Decree pronounced by a Lord Ordinary, if not reclaimed against, is as effectual as one pronounced by either of the Divisions; and a decree of the Inner House, if not appealed from, is as effectual as a judgment of the House of Lords. See *Appeal. Reclaiming Note*. As to the form of a decree, see *Interlocutor*. The word "decerns" is essential to the effective force of a decree; *Anderson*, 1 June 1836, 14 S. 863. It may, however, be added *ex intervallo*; *Lawrie*, 16 Jan. 1833, 11 S. 246.] 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 cumbrous 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. Those extracts were formerly authenticated by the subscription of one of the principal clerks of Session; but now, by 1 & 2 Geo. IV. c. 38, § 17, extracts of decrees are authenticated by the signature of the extractor by whom they are prepared. [See *Extract.*] See *Stair*, B. iv. tit. 1, §§ 44, 50; tit. 40, § 12; *Ersk.* B. iv. tit. 1, § 69; tit. 3, § 3; *Bank.* B. iv. tit. 36, § 3; [*Mackay's Prac.* i. 581.]

#### 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 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. See *Ersk.* B. ii. tit. 5, § 54; [*Bell's Com.* i. 4;] *Bell's Princ.* § 68. See *Registration*.

**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 authorising 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 authorise pointing 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 authorise 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 authorises diligence under the signet, on the same principle with the ancient decrees conform; *Ross's Lect.* i. 237, 270. [And this practice has, in its turn, been practically superseded by the form of diligence introduced by the Personal Diligence Act (1 & 2 Vict. c. 114). See *Diligence*.]

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 authorise execution at his own instance on the decree in favour of his predecessor. But by A.S. 22 June 1687, this practice was abolished; and 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 DECRE TALIA.** See *Canon Law.*

**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, 1<sup>st</sup>, 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. Conjunct and Confident. Fraud. Force and Fear.* 2<sup>d</sup>, It is essential to a deed, whatever be its nature, that it contain 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 inconsistent with established law. See *Pactum Illicitum.* 3<sup>d</sup>, Every deed must be legally authenticated as the deed of the party or parties who become bound by it. [See *Deeds, Execution of.*] With regard to delivery, considered as essential to the validity of deeds, see *Delivery of Deeds.* 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. [See *Indenture.*] Neither is it necessary, in Scot-

land, 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.

**[DEEDS, EXECUTION OF.]** Certain statutory solemnities, greatly simplified by recent legislation, are required in the execution of deeds, in order that they may be received as the genuine and authentic acts of the parties by whom they bear to be granted. The subscription of the party, by his own hand, or, if he could not write,

[by that of a notary, was first required by 1540, c. 117. Both subscription and sealing were required in deeds relating to heritage, and other writs of importance, by 1579, c. 18; the subscription to be by two notaries, before four witnesses, in case of the principal not being able to write. By 1584, c. 4, sealing was made unnecessary, when the deed was to be registered, registration being the more solemn act. The practice of sealing thereupon fell into general disuse; but the validity of unsealed deeds "of importance" (*i.e.*, above £100 Scots in value), except such as are within the scope of the act 1584, rests solely on inveterate usage. By 1593, c. 179, the name and designation of the writer were required to be inserted in all deeds, before the names of the witnesses. The act 1681, c. 5, ordained that only subscribing witnesses should be probative; that all writs wherein writer and witnesses were not designed should be null; and that no one should act as witness, unless he knew the party and saw him subscribe, or saw or heard him give warrant to a notary to subscribe for him, and in evidence thereof touch the notary's pen, or unless the party did, at the time of the witness subscribing, acknowledge his own subscription, on pain of being held accessory to forgery. And by 1695, c. 15, all contracts, dispositions, or other securities were allowed to be written bookwise, instead of consisting, as they formerly did, of several sheets battered together, and folded or rolled up; "providing that if they be written bookways, every page be marked by the number, first, second, &c., and signed as the margins were before (*i.e.*, by the granter of the deed), and that the end of the last page make mention how many pages are therein contained, in which page only witnesses are to sign in writs and securities, when witnesses are required by law." This act being permissive, the privilege of writing deeds bookwise depended on compliance with the formalities required in the proviso. Hence a deed was reduced for want of pagination, in *Thomson*, 18 D. 470, *affd.* 24 March 1859, 31 Scot. Jur. 425. And another deed was reduced on the ground that, being written bookwise on two sheets of paper, it was signed by the parties on the seventh page only, the other pages being merely initialed by them; *Gardner*, 21 March 1878, 5 R. (H.L.) 105.

[The former of these cases gave occasion to the act 19 & 20 Vict. c. 89, under which it is no longer necessary to mark the pages

[of a deed by numbers. A further relaxation was made by 31 & 32 Vict. c. 101, § 149 (re-enacting, with alterations, 21 & 22 Vict. c. 76, § 34, and 23 & 24 Vict. c. 143, § 20), which allowed all deeds having a testing clause to be partly written and partly printed or engraved or lithographed, provided the date (if any), the names and designations of the witnesses, the number of pages, and the name and designation of the writer of the written portions of the body of the deed, were expressed at length in the testing clause. (As to how far this provision is still in force, see *Testing Clause*. See also *Instrumentary Witnesses*.) A more radical change was effected by the Conveyancing Act, 1874 (37 & 38 Vict. c. 94), which enacts (§ 38) that it shall be no objection to the probative character of a deed, instrument, or writing, whether relating to lands or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of such deed, or in the testing clause thereof; provided that where the witnesses are not so named and designed, their designations shall be appended to or follow their subscriptions; and such designations may be so appended or added at any time before the deed shall have been recorded in any register for preservation, or shall have been founded on in any court, and need not be written by the witnesses themselves. "A deed is now probative, on the face of it, if three requisites are complied with—1st, if there are subscribing witnesses; 2d, if these witnesses are either designed in the deed or testing clause, or their designations are added to their subscriptions before the deed is recorded for preservation, or is founded on in court, it being provided that the designations 'need not be written by the witnesses themselves;' 3d, if the deed be subscribed by the granter on the last page in the case of a deed on one sheet only, or subscribed by him on each of the sheets or pages in the case of a deed written on more than one sheet" (*per Lord Deas*, in *M'Laren*, *infra*). The act of 1874 farther enacts (§ 39), that no deed, instrument, or writing, subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect, according to its legal import, because of any informality of execution, but the burden of proving that such deed was subscribed by the granter or maker



[thereof, and by the witnesses by whom such deed bears to be attested, shall lie upon the party using or upholding the same; and such proof may be led in any action or proceeding in which such deed is founded on or objected to, or in a special application to the Court of Session, or to the sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed was subscribed by such granter or maker and witnesses. See *Addison*, 23 Feb. 1875, 2 R. 457; *Thomson's Trs.* 2 Nov. 1878, 6 R. 141; *Tener's Trs.* 28 June 1879, 6 R. 1111. This enactment does not apply to deeds executed prior to 1st Oct. 1874; *Gardner, supra.* In *M'Laren*, 20 July 1876, 3 R. 1151, it was held, by a majority of seven judges, that a deed of more than one sheet, subscribed by the granter on the last page only, might be validated by proof *prout de jure*. The minority were of opinion that the deed, being signed only on the last page, was not "subscribed by the granter" in the sense of the statute. See also *Brown*, 22 Dec. 1883, 11 R. 400. With regard to parties who, from any cause, are unable to write, the act of 1874 provides (§ 41), that a deed may be validly executed on behalf of such party, "by one notary public or justice of the peace subscribing the same for him in his presence and by his authority, without the ceremony of touching the pen, all before two witnesses, and the docquet thereto shall set forth that the granter of the deed authorised the execution thereof, and that the same had been read over to him in presence of the witnesses." See *Watson*, 24 Oct. 1883, 11 R. 40. A form of docquet is provided in a schedule, but conformity therewith is not essential, if the docquet is otherwise sufficient; *Atchison's Trs.* 21 Jan. 1876, 3 R. 388. The docquet must be holograph of the notary; *Henry*, 10 Feb. 1871, 9 Macph. 503. A parish minister may act as notary in his own parish in the execution of testamentary writings. A deed to which a company, registered under the Companies Acts, 1862 and 1867, is a party, is validly executed in Scotland on behalf of the company, either if executed in terms of these acts, or if sealed with the common seal of the company, and subscribed on behalf of the company by two of the ordinary directors and the secretary; and such subscription is equally binding and effectual, whether attested by witnesses or not; § 56 of same act. Blind persons may either sign deeds for themselves, if they are able to write, or use the

[assistance of notaries: *E. Fife*, 17 July 1823, 1 S. App. 498; *Reid*, 19 March 1840, 1 Rob. 66. When a deed *ex facie* probative is challenged as not duly subscribed or tested, the onus of proof lies on the challenger; *Baird's Trs.* 21 Nov. 1883, 11 R. 153; *Stirling Stuart*, 6 Feb. 1885, 12 R. 610; *Brown*, 9 March 1888, 15 R. 511.] Holograph deeds—that is, where the whole deed is in the handwriting of the granter—are exempted from the rules with regard to the authentication of ordinary deeds. 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 *rei interventus* or by homologation, on the part of the person entitled to call them in question. [See on this subject, *More's Notes to Stair*, cccxcvi.; *Ersk. B. iii. tit. 2, § 6*; *Bell's Com. i. 340*; *Bell's Princ. §§ 19, 2225*; *Dickson on Evidence*, § 638; *Kirkpatrick's Digest*, § 96; *Menzies' Conv. 72*; *M. Bell's Conv. i. 23*. See *Notary. Designation. Initials. Mark. Marginal Addition. Erasure. Deletion. Date.*]

**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. [A crown vassal infeft in a royal forest is not entitled to go upon the land of a neighbouring proprietor in pursuit of deer that have strayed from the forest, or to prevent the neighbouring proprietor from shooting deer within his own march; *D. Athole*, 28 Feb. 1862, 24 D. 673. A reservation by a subject superior of a right to all deer on the lands granted, does not confer a right of hunting or stalking deer on them; *Hemming*, 13 Nov. 1883, 11 R. 93.] 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; [1551, c. 9;] 1579, c. 84; 1587, c. 59; and 1607, c. 3. See also *Hume*, i. 81; [*Stair*, B. ii. tit. 3, § 68; *Ersk.* B. ii. tit. 1, § 10; tit. 6, § 14;] *Bell's Princ.* § 1290; [*Journ. of Jurisp.* xxix. 293.]

**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. 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 or maliciously charging one with a crime of which he is not guilty. *Lastly*, The Court of Justiciary may 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. 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. [See *Hume*, i. 340; ii. 139; *Ersk.* B. iv. tit. 4, § 80; *Macdonald*, 178. A claim for mere pecuniary reparation to a private individual is not entertained by the Court of Justiciary; *Hume*, ii. 33. Before the abolition of the commissary courts, actions for defamation were frequently

[brought before them, concluding for punishment of the offender (generally by fine), for damages to the complainer, and also for a palinode, or judicial retraction of the slander; and these conclusions, in an action before the sheriff as commissary, were held competent so recently as in 1831; *Turner*, 21 June 1831, 9 S. 774. The usual remedy now is an action concluding only for damages and expenses, either in the Court of Session, or in the sheriff court.

*Differences between English and Scots Law.*—In England, there is a material distinction between *libel*, which is used to denote defamation by writing, printing, &c., and *slander*, which is restricted to spoken utterances. Libel is always actionable; but slander is actionable only when special damage has resulted, and also in the following cases:—"Where the words impute a criminal offence; where they impute having a contagious disease which would cause the person having it to be excluded from society; where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession, or trade, in short, where they manifestly prejudice a man in his calling;" *Pollock on Torts*, 206. These artificial rules and distinctions have never been observed in this country. Again, in England, damages are awarded, in an action for libel or slander, only as reparation for actual or probable injury to reputation; whereas in Scotland damages are also awarded as *solatium* to the feelings of the defamed person. It follows that in England, libel or slander which is not communicated to a third party is not actionable; but in this country damages may be recovered for written slander in a private letter, or for oral slander overheard by no third party; *Mackay*, 27 Jan. 1883, 10 R. 537.

*Actions for Defamation.*—In the Court of Session, actions for defamation are generally tried by jury; see *Jury Trial*. But the court will not grant an issue for jury trial, unless they are satisfied that the language complained of is either in itself libellous, or capable of being reasonably understood in the libellous sense attributed to it; and they will set aside the verdict of a jury, if manifestly contrary to evidence, or if the damages awarded are clearly excessive. See *Ross*, 17 Dec. 1886, 14 R. 255; *Capital and County Bank, infra*, 7 App. Ca. 741. In the case of verbal slander, the words used must be accurately set forth, with precise mention of the time and place of utterance, and the persons in



[whose hearing they were spoken; *Bisset*, 21 May 1864, 2 Macph. 1096; *Stephen*, 1 March 1865, 3 Macph. 571; *Walker*, 1 Feb. 1868, 6 Macph. 318; *Broomfield*, 7 July 1868, 6 Macph. 992. The right of action transmits to the representatives of the defamed person; *Auld*, 16 Dec. 1874, 2 R. 191. A husband is not liable for his wife's slander; *Barr*, 20 March 1868, 6 Macph. 651. A sheriff may entertain an action for slander uttered within his jurisdiction by a foreigner, cited personally; *Kermick*, 7 July 1871, 9 Macph. 984. As to action between domiciled Scots for slander uttered abroad, see *M'Larty*, 22 Jan. 1881, 8 R. 435.

*What Words are Actionable.*—In general, words tending to disparage a person's good name, character, or credit are actionable; but mere opprobrious epithets, implying no specific imputation, are not generally so regarded. In *Jameson*, 13 June 1873, 11 Macph. 703, it was held actionable to call a man a "low blackguard," but not so to call him a "d—d puppy." Frequent and persistent attacks in a newspaper, holding a man up to public ridicule, form a relevant ground of action; *Sheriff*, 1 March 1855, 17 D. 528; see also *Cunningham*, 16 June 1868, 6 Macph. 926. Malice, which in its legal sense signifies merely the absence of just cause or excuse (*Pollock on Torts*, 214), is of the essence of slander; and is presumed by law in every injurious and untrue statement, unless it is privileged (see *infra*). Even where wrong is done by inadvertence, as by erroneous insertion of a man's name in a list of bankrupts in a newspaper, or by careless repetition of an injurious rumour, damages are due; *Outram*, 28 Feb. 1852, 14 D. 577; *Fletcher*, 21 Feb. 1885, 12 R. 683; *Odgers on Libel and Slander*, 162. (But a news vendor is not liable for unconscious dissemination of a libel; *Emmens*, 16 Q.B.D. 354.) Much confusion has arisen from this technical application of the word "malice," to cases where there is no malice in the ordinary sense, meaning ill-will (called in law-books "actual" or "express malice," or "malice in fact"). The most recent English writer on libel has discarded the technical use of this word (*Odgers*, 271).

*Innuendo.*—Words which in their ordinary meaning are not injurious, may be libellous by reason of being used with some special application or significance; and an averment that words were so used is called an *innuendo*. The facts and circumstances founded on as warranting the actionable

construction must be distinctly set forth. It is for the court to say whether the words are capable of the meaning alleged, and to grant or refuse an issue or proof accordingly. If an issue is granted, it is for the jury to say whether, in the whole circumstances as proved, the words actually conveyed the meaning alleged. For recent cases where issues were granted, the slander being relevantly innuendoe, see *Broomfield*, 10 March 1868, 6 Macph. 563; *Johnston*, 16 June 1875, 2 R. 836; *Dun*, 24 Jan. 1877, 4 R. 317; *Mackay, supra*; *Stuart*, 5 Dec. 1885, 13 R. 299; *Gudgeon*, 1 Dec. 1888, 16 R. 183; and for cases where issues were disallowed, the innuendoes being inadmissible, see *Caldwell*, 21 May 1872, 10 Macph. 717; *Brydone*, 17 May 1881, 8 R. 697; *Fraser*, 24 Feb. 1888, 15 R. 454. See also *Campbell*, 28 Jan. 1882, 9 R. 467, in which it was held that a pursuer who did not deny the truth of language of which he complained, could not make his case relevant by the mere addition of an innuendo. To these may be added an instructive English case, *Capital and Counties Bank*, 1882, 7 App. Ca. 741; where a circular in these terms—"H. & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches" of the bank—was innuendoe to impute insolvency. The House of Lords, however, held that there was no case to go to a jury. Lord Watson observed:—"If I were satisfied that an inference injurious to the credit of the bank would naturally and necessarily suggest itself to the mind of any person of average intelligence on reading the circular, I should hold that it had a libellous tendency, although the language used is not in itself libellous. But besides the one injurious inference suggested by the appellants, there are many other inferences of an innocent character which naturally might, and probably would, suggest themselves to any reader of the circular who was not induced to put a malignant construction upon it by some cause such as is not proved to have existed in the case of any one of the persons to whom it was sent." On the other hand, words which in their usual significance are defamatory, may be proved to have been meant and understood in an innocent sense; *M'Neill*, 18 May 1883, 10 R. 867.

*Fair Comment on Public Matters.*—Comments fairly made on matters of public concern, even though they involve severe disparagement of individuals, are not libellous. It is the right of every citizen to discuss freely the merits of public men, and

[to animadvert on their public conduct. "A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury, are all subjects of public discussion. Whoever fills a public position renders himself open thereto. He must accept an attack as a necessary, though unpleasant, appendage to his office;" *per* Bramwell, B., in *Kelly*, L.R. 1 Q.B. 689 (as quoted in *Odgers*, 40). In like manner, authors of literary or artistic publications, actors, performers, exhibitors, and other persons who invite public attention, are held to challenge criticism, and cannot complain if they suffer thereby. And if a private citizen takes part in a public meeting, his speech and opinions are open to public comment. But in all these cases, comment and censure must be confined within fair limits; and these are exceeded, if a man's private or domestic life is intruded into, or if evil motives are imputed. Moreover, "the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon, or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct;" *per* Lord Ch. Herschell, in *Davis*, 1886, 11 App. Ca. 187. In literary criticism, "whatever is fair, and can be reasonably said of the works of authors, or of themselves as connected with their works, is not actionable, unless it appear that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author; and then it will be a libel;" *per* Lord Tenterden, in *M'Leod*, 3 C. & P. 311. And injurious criticism based on a misrepresentation of facts is actionable; *Merivale*, 20 Q.B.D. 275. In the case of a candidate for a public office, such as a seat in Parliament or a chair in a University, not only his qualifications, but in a certain degree his character and past history, are subject to public scrutiny and animadversion. See *Auld*, 14 July 1875, 2 R. 940 (Lord Neaves at p. 949); *Guthrie Smith on Damages*, 243-44. This general right of free comment is distinct from the privilege attaching to particular persons or occasions, which will next be described. In the latter, motive is a material consideration; whereas in the former, the only question appears to be whether the language used transgressed the limits of fair criticism.

[See *Pollock on Torts*, 219-21; *Campbell*, 3 B. & S. 769; *Merivale*, *supra*; also cases of *Hamilton*, *Leslie*, and *Aiton*, 3 Mur. 75, 157, 284; *Davis*, 5 July 1855, 17 D. 1050; *Drew*, 28 Feb. 1862, 24 D. 649; *Wason*, L.R. 4 Q.B. 73; *Davis*, L.R. 9 C.P. 396; *Purcell*, 2 C.P.D. 215.

*The Plea of Privilege.*—On certain occasions, men are not only entitled, but bound, to make damaging statements regarding their neighbours. A communication made on such an occasion is termed *privileged*; and in regard to it the legal presumption of malice which otherwise applies to defamatory statements is displaced by a contrary presumption, viz., that it was made in the *bona fide* discharge of duty. In a few special cases, this latter presumption is a *presumptio juris et de jure*, and the privilege is *absolute*; in other cases, the presumption is only a *presumptio juris*, yielding to proof of actual malice, and the privilege is *qualified*.

*A. Absolute Privilege.*—Members of Parliament are absolutely protected in respect of their utterances in Parliament; 1 Will. & Mary, stat. 2, c. 2 (Bill of Rights); and the same unqualified immunity is enjoyed, on grounds of public policy, by judges, advocates, and witnesses, in their utterances as such. See as to judges, *Haggart's Trs.* 1 April 1824, 2 S. App. 125; *Harvey*, 23 Dec. 1876, 4 R. 265; as to advocates, *Munster*, 11 Q.B.D. 588; and as to witnesses, *Mackintosh*, 3 July 1875, 2 R. 877; *Seaman*, 2 C.P.D. 53; *Dawkins*, L.R. 7 H.L. 744. The Lord Advocate is also absolutely privileged in the discharge of his duty as public prosecutor; *Borthwick on Libel*, 202. By 3 & 4 Vict. c. 9, the publication of reports, papers, votes, or proceedings of either House of Parliament by its order or under its authority, or of copies thereof, is absolutely protected. Extracts or abstracts of such reports, papers, &c., are protected if, in the opinion of the jury, they were published *bona fide*, and without malice (*i.e.*, these have only qualified privilege).

*B. Qualified Privilege.*—In almost all other cases, the existence of privilege removes the presumption of malice, but does not preclude the defamed person from proving it. In general, this qualified privilege attaches to every occasion on which a person is called on to express an opinion, or to communicate information, either in fulfilment of a duty, or in furtherance of a legitimate interest. "Privilege consists in the right of a man to express his honest



[opinion on a matter in regard to which he has a duty or a right or an interest to speak to any other who has a corresponding duty or right or interest;" *per* Lord J. C. Moncreiff, in *Auld*, 14 July 1875, 2 R. 940, 946.

*Public Bodies.*—Members of public or quasi-public bodies are privileged in expressing their opinions on matters properly under consideration. This has been decided in regard to the Senatus of a university in *Hamilton*, 10 March 1827, 5 S. 569; in regard to a meeting of contributors to an infirmary, in *Craig v. Jex Blake*, 7 July 1871, 9 Macph. 973; and in regard to the town council or police commission of a burgh, in *Shaw*, 11 July 1888, 15 R. 865. But no member may take advantage of the occasion for the purpose of calumny; and remarks which are not pertinent to the business before the meeting are not privileged. In regard to aspersions upon an individual, the test of privilege is "to consider whether it is at all necessary for the performance of the duty, or legitimate in the exercise of the right properly belonging to the defender on the occasion in question, to make any allusion to an individual at all," *per* Lord Pres. Inglis, in *Craig*, *supra*. The recent judgment in *Shaw*, *supra*, if sound, indicates a tendency towards increased latitude in allowing privilege.

*Newspaper Reports.*—Fair reports of judicial proceedings are privileged, unless unfit for publication, or prohibited by the court. But the privilege is not absolute; see *Rüdel*, 27 May 1885, 12 R. 976; *Wason*, L.R. 4 Q.B. 73; *Stevens*, 5 Ex. D. 53 (in which damages were awarded in respect of a report furnished not by a regular reporter, but by an outsider). In Scotland, this privilege applies only to proceedings in open court; and the publication of a summons, containing defamatory matter, before defences had been lodged, was held actionable without privilege; *Richardson*, 18 Nov. 1879, 7 R. 237. As to publication of decrees in absence, see *Andrews*, 5 March 1887, 14 R. 568; *Taylor*, 17 March 1888, 15 R. 608. Reports of parliamentary debates are privileged; *Wason*, *supra*. In regard to proceedings at public meetings generally, much may be said in favour of allowing protection to fair reports thereof; see *Guthrie Smith on Damages*, 254; but the point has not been decided in this country. In England, such reports were held to have no privilege, in *Davison*, 7 E. & B. 229, and *Purcell*, 2

[C.P.D. 215; but since then a qualified privilege has been conferred on them by 44 & 45 Vict. c. 60, which does not extend to Scotland. In an action for slander in an anonymous letter published in a newspaper, if the publisher refuses to disclose the name of the writer, he cannot plead privilege; *Brims*, 28 May 1885, 12 R. 1016.

*Privilege arising from Duty or Interest, private, common, or social.*—A statement made in answer to an inquiry as to the character of a former servant is a typical instance of a privileged communication; and other answers to confidential inquiries are similarly protected. In like manner, a legal adviser is privileged in warning a client regarding the soundness of a security; and a parent or near relative in giving information bearing upon an intended marriage. Where no such confidential relationship exists, special circumstances may impose the duty of volunteering information to the prejudice of another; but no general rule of law can be laid down. See cases in *Odgers*, 213–21. In all such cases the privilege is coextensive with the duty, and if words are used more defamatory than the occasion requires, the presumption of malice revives. "Not only must the occasion create the privilege, but the occasion must be made use of *bona fide* and without malice;" *per* Lord C. J. Coleridge, in *Stevens*, 5 Ex. D. 53. Confidential information communicated inadvertently (*e.g.*, through being written on a post-card) to persons in respect of whom there is no privilege, is not protected. It was recently decided in England that a confidential letter which had been put into a wrong envelope, and thus reached a person for whom it was not intended, retained 'its privilege owing to the *bona fides* of the writer; *Tompson*, 11 Q.B.D. 43; but the decision has not been accepted as sound law; see *Pollock*, 216, 234.

Information given to the proper persons, in order to the detection of crime, is privileged. "When it comes to the knowledge of any one that a crime has been committed, a duty is laid on that person, as a citizen of the country, to state to the authorities what he knows respecting the commission of the crime, and if he states only what he knows and honestly believes, he cannot be subjected to an action of damages merely because it turns out that the person as to whom he has given the information is, after all, not guilty of the crime;" *per* Lord Pres. Inglis, in *Lightbody*, 15 June 1882, 9 R. 934. See also *Green*, 12 Dec. 1878,

[6 R. 318. An accusation needlessly made in presence of members of the public is not privileged; but where a person charged a man with crime on the street, in presence of others, and having fetched a policeman after a short interval repeated the charge before him, the whole *res gestæ* were held to form one occurrence, and both accusations were held privileged; *Hassan*, 26 June 1885, 12 R. 1164. Complaints or memorials to the proper authorities, reflecting on the conduct of officials, are privileged; *M'Murchy*, 21 May 1887, 14 R. 725; *Clark*, 3 Q.B.D. 237; *Proctor*, 16 Q.B.D. 112. A public official publicly attacked is entitled to defend himself publicly, and the language used by him in doing so is not to be strictly scrutinised; *Laughton*, L.R. 4 P.C. 495.

A litigant is privileged in stating in his pleadings what may affect his opponent's character, provided it be pertinent to the cause; and one seeking damages in respect of such statement must not merely aver malice, but facts and circumstances from which malice may reasonably be inferred; *Scott*, 18 July 1884, 11 R. 1131; *Gordon*, 16 Nov. 1886, 14 R. 75.

In like manner, in an action against a medical man in respect of an opinion given by him, it is not enough to aver that the opinion was false, and was given "recklessly, maliciously, and without probable cause," but particulars must be stated, which, if proved, will imply malice; *Urquhart*, 21 Dec. 1864, 3 Macph. 283. An injurious allegation made rashly and without foundation, may yet be without malice; *M'Lean*, 30 Nov. 1888, 16 R. 175. Where a case of privilege is disclosed on record, the pursuer must take an issue of malice and want of probable cause. But where the defence of privilege is raised at the trial, it may be met by proof of malice, if averred on record, though not in the issue; *M'Bride*, 28 Jan. 1869, 7 Macph. 427; *Rankine*, 26 Nov. 1873, 1 R. 225.

*The Plea of Veritas*.—In a civil action for defamation, proof of the *veritas*, or truth of the alleged libel, is a complete defence. The brocard *veritas convicti non excusat* applies to criminal prosecutions, and was acted on in the commissary courts, where the actions were partly penal; but it does not apply to an action for damages alone. See *Mackellar*, 14 Jan. 1859, 21 D. 222. "The law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess;" *per* Littledale, J., in

[*M'Pherson*, 10 B. & C. 263, 272. If the defender undertakes to justify the statement in respect of which he is sued, the *veritas* must be distinctly averred on record, and a counter-issue must be taken on it; otherwise evidence in justification is not admitted, even to the effect of mitigating damages. See *M'Neill*, 15 July 1847, 10 D. 15; *Torrance*, 12 Dec. 1868, 7 Macph. 243; *Craig v. Jex Blake*, *supra*. The counter-issue must state precisely and pointedly the facts which the defender undertakes to prove, with particulars as to dates, places, and persons; *Scott*, 25 June 1821, 2 Mur. 484; *Rankine*, 30 June 1859, 21 D. 1057. The counter-issue must substantially meet and cover the alleged slander; *M'Donald*, 1 March 1862, 24 D. 685; *Carmichael*, 19 Dec. 1862, 1 Macph. 204; *Ogilvy*, 28 June 1873, 11 Macph. 776; *Bertram*, 7 March 1885, 12 R. 798. The fact that a gamekeeper had formerly been a poacher was found to be no justification for calling him by that name after an interval of years; *Brownlie*, 11 Feb. 1859, 21 D. 480; see also *Fletcher*, 21 Feb. 1885, 12 R. 683.

Although the defender is not entitled to lead evidence in support of the *veritas*, where he has not taken a counter-issue, yet "it is equally well settled that a defender charged with slander is entitled to lay before the jury the circumstances under which the slander was uttered, in order to prove the state of his information with regard to the subject-matter, and to show that the offence and consequent injury to the pursuer is not so great as is represented, and so to diminish the amount of damages," *per* Lord Pres. Inglis, in *Paul*, 23 Jan. 1884, 11 R. 460; see also *White*, 21 Dec. 1847, 10 D. 332. Where the defender is the publisher, but not the writer, of the slander, he may not prove in mitigation of damages circumstances which might have affected the writer; *Browne*, 29 Jan. 1889, 16 R. 368. Where a person sued the publishers of a newspaper in respect of an editorial article and a series of anonymous letters bearing to be written by different people, and averred that the letters were either written, or procured to be written, by the defenders themselves, and that the whole formed part of a systematic plan to injure his reputation, he was held entitled to prove the circumstances in aggravation of damages, and to recover documents relating to the authorship of the letters and article, though their recovery might lead to the disclosure of the names of anonymous correspondents who



[were not represented in the cause; *Cunningham*, 2 Feb. 1889, 16 R. 383. As to the plea of *compensatio injuriarum*, see that article.

A tender of compensation, to be available to the defender, must be accompanied by a full retraction, so as to clear the pursuer of the slander in the same way as a verdict would have done; *Faulks*, 22 Dec. 1854, 17 D. 247. Where the pursuer recovers less than £5 by the verdict of a jury, he is not entitled to expenses from the defender, unless the presiding judge certifies that the action was brought for vindication of character, and was fit to be tried in the Court of Session; 31 & 32 Vict. c. 100, § 40. The judge's certificate is final; *Macmillan*, 25 Oct. 1887, 15 R. 6.

See on this subject, *Stair*, B. i. tit. 9, § 4; *Ersk.* B. iv. tit. 4, § 80; *Bell's Princ.* § 2043; *Borthwick on Libel*; *Guthrie Smith on Damages*, 227; *Macfarlane and Cleghorn on Issues*, 27; *Birnie on Issues*, 5; English treatises by *Starkie*, *Folkard*, and *Odgers*; *Shortt's Law of Literature and Art*, 455; *Pollock on Torts*, 204; *Addison on Torts*, 166. See *Injury. Leasing-Making. Scandalum Magnatum*.]

**DEFAULT.** In judicial procedure, default arises from failure in compliance with [statutory] rules and orders of court. [The court has power to pronounce decree by default against either the pursuer or the defender of an action, for disobedience of any such rule or order. In some cases the judge is bound to pronounce decree by default; as where the pursuer fails to deliver printed proofs of the record within eight days after defences are lodged, in terms of 31 & 32 Vict. c. 100, § 26; or where counsel are absent without sufficient excuse, under A.S. 2 Nov. 1872. Such decree is not a decree in absence, but a decree *in foro*, and constitutes *res judicata*; see *Forrest*, 15 Oct. 1875, 3 R. 15. It can be set aside only by reclaiming note, or appeal to the House of Lords; or, if it has become final, by an action of reduction. Exceptions, however, have been made in cases where the default was due to the poverty of the party; see *Sassen*, 10 March 1830, 8 S. 707; *Gordon*, 3 March 1865, 3 Macph. 595. Suspension of such decree, on the ground that it had become final through neglect of the agent, was refused; *Maule*, 19 Oct. 1878, 6 R. 44. It is entirely in the discretion of the court to decide whether, and on what conditions as to expenses, &c., they will repon a party applying by any competent mode; see

[*Mackenzie*, 26 June 1861, 23 D. 1201; *Arthur*, 16 June 1866, 4 Macph. 841; *Anderson*, 16 Dec. 1875, 3 R. 254; *Ferguson*, 2 July 1878, 5 R. 1016; *Halligan*, 14 June 1883, 10 R. 972; *Gael Iron Co.* 18 Dec. 1884, 12 R. 345. See A.S. 11 July 1828, §§ 72, 73; *Shand's Prac.* ii. 961; *Mackay's Prac.* i. 554, 586; ii. 504. See *Decree. Absence. Reponing*.]

**DEFEASANCE**; an undoing or rendering void. In English law, the term is more properly applied to a condition relating to a deed, contained in a separate instrument, on performance of which the deed is made void. *Sweet's Law Dict.* See *Warrant of Attorney*.]

**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*. [It is in the form of articulate answers to the pursuer's condescendence, either admitting or denying the averments made. Where necessary, a separate statement of facts for the defender is appended, without argument; and a note is subjoined of the defender's pleas in law; 13 & 14 Vict. c. 36, § 1; A.S. 7 Feb. 1810. Defences must be signed by counsel; *Jaffray*, 18 Dec. 1863, 2 Macph. 355. They must be lodged on or before the tenth day after the date of calling the summons, failing which the cause may be immediately enrolled for decree in absence; 31 & 32 Vict. c. 100, § 22. If the ten days expire in vacation, defences may be lodged on the first ensuing box-day or sederunt day; *ib.* § 93 (Scott and Brand's edition of the act).] 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 homologa-

tion 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. [See *Exception*.] *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, § 14; *Ersk.* B. iv. tit. 1, § 67. See *Declinature*. 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 the same action, and where they have all precisely the same defence, [a single defence may be lodged for all, or] one defence may be lodged, containing the defence which is applicable to the whole, and separate *pro forma* defences lodged for each defender, [adopting and holding as repeated the defence stated by the leading defender; *Richardson*, 19 Dec. 1851, 14 D. 275. As to defences in sheriff court,

[see 39 & 40 Vict. c. 70, § 16.] See *Stair*, B. iv. tit. 39 and 40; *Ersk.* B. iv. tit. i. § 66; *Bank.* B. iv. tit. 25; [*Shand's Prac.* 287, 316; *Mackay's Prac.* i. 428; *M'Glashan's Sher. Court Prac.* 187; *Dove Wilson's Sher. Court Prac.* 147. See *Record. Amendment of Record. Absence. Admission. Reduction. Defender. Litis-contestation*. As to special defences lodged by a panel, 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; [unless the action is at the instance of the husband, or unless the wife is judicially separated, or has obtained an order of protection under the Conjugal Rights Act, or carries on a separate business;] 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*, 1761, M. 4644. A different rule was at one time recognised in the case of the mandatory of a defender abroad, or a foreigner; *Leigh*, 1792, M. 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; [see *Mandatory*.] 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. 2 Nov. 1695, § 28; and the same rule applies in inferior courts; A.S. 12 Nov. 1825. [But there is no limitation where the ground of action is the same against all the defenders, nor even where there is community of interest; *D. Buccleuch*, 30 Nov. 1876, 4 R. (H.L.) 14. Any party with a clear interest to defend in an action may sist himself as defender, without the pursuer's consent; *Mackay's Prac.* i. 500; *Glasgow Shipowners' Association*, 25 Feb. 1885, 12 R. 695; but see *Laing's Sewing*



[*Machine Co.* 31 Oct. 1877, 5 R. 29. See also *Interest. Supplementary Summons.* Accumulation of defenders sued in respect of distinct wrongs is incompetent; *Taylor*, 15 July 1885, 12 R. 1304. In general, caution is not required from an insolvent defender; *Lawrie*, 3 Nov. 1888, 16 R. 62.] 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*, ii. 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 litiscontestation; *Gray*, 1773, M. 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.* [See *Shand's Prac.* i. 204; *MacKay's Prac.* i. 341. See *Summons. Pursuer. Persona Standi.*]

**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.*

**DE FIDELI.** The oath *de fidei 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 fidei* does not amount to the crime of perjury. See *Hume*, i. 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. [See *M'Lean*, 18 Oct. 1886, 14 R. (J.C.) 1.] 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. 85, 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. 152, which makes deforcement an offence 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. 152, 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 more recent authorities it appears that this is not necessary; see *Hume*, i. 394; [*Hunter*, 16 Jan. 1860, 3 Irv. 518.] 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. [See *Matheson*, 19 March 1885, 12 R. (J.C.) 40.] 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*. [In the case of revenue officers, it is no defence against a charge of deforcement, to allege that they had no written warrant, as they are not required to hold a warrant for the discharge of their ordinary duties. But they must have a special warrant for such extraordinary duties as breaking open doors or lockfast places.] See *Stair*, B. i. tit. 9, § 29; B. iv. tit. 49; *Mackenzie*, B. iv. tit. 4, § 17; *Ersk.* B. iv. tit. 4, § 32; *Bank.* B. i. tit. 10, § 190; *Ross's Lect.* i. 338; [*Hume*, i. 386; *Alison's Princ.* 501; *Macdonald*, 212.]

**DEFRAUDING OF CREDITORS.** See *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 the Court of Exchequer [now 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*.

**DEFUNCT**; a deceased person; see *Stair*, B. iv. tit. 43, § 21.

**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. [But see *Blasphemy*.] See also *Atheism. 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  $2\frac{1}{2}$  per cent. on the price, and  $2\frac{1}{2}$  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 20s. in the £ on his whole debt. ["It was at one time thought that an agent acting under a *del credere* commission was not merely in the same position as a surety, responsible only in the case of the default of the purchaser, but that he was liable to his principal in the first instance; but that doctrine has been overturned by subsequent authorities, which have settled that he is but in the position of a surety;" *Smith's Merc. Law*, 115. See *Morris*, 4 M. & S. 566.] See also *Brodie's Supp. to Stair*, 921, 941; [*Bell's Com.* i. 394;] *Bell's Princ.* §§ 222, 286; [*Addison on Contracts*, 462; *Leake's Digest of Contracts*, 521; *Wharton on Agency*, § 784; *Story on Agency*, §§ 33, 112, 215, 328. See *Factor. Principal and Agent.*]

**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 subset. 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. So also offices in which there is a personal trust reposed, are neither saleable nor adjudgeable for debt, although, in the ordinary case, the emoluments of an office are attachable by diligence. *Ersk. B. ii. tit. 6. § 31*; [*B. iii. tit. 3, § 22*; *Bell's Com.* i. 72, 122; *Bell's Princ.* §§ 358, 1214;] *Bell on Leases*, i. 180; *Hunter's Landlord and Tenant*, i. 218, 236, 242; *Ross's Lect.* ii. 481. See *Offices. Lease. [Partnership.]*

**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; 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 [were, until a recent statute,]

authorised to appoint deputies, called substitutes, to exercise jurisdiction over the whole, or over particular districts of the county. [See *Sheriff-Substitute*.] 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. *Ersk. B. i. tit. 2, § 13; 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. [What constitutes delegation is a question of circumstance and intention. The following cases may be referred to in illustration:—*Threipland*, 23 Feb. 1855, 17 D. 487; *Muir*, 16 May 1860, 22 D. 1070; *Pollock & Co.* 6 Nov. 1863, 2 Macph. 14; *M'Intosh*, 10 Jan. 1872, 10 Macph. 304.] See *Stair*, B. i. tit. 18, § 8; *More's Notes*, cxxxvi.; *Ersk. B. iii. tit. 4, § 22; Bank. B. i. tit. 24, § 38; Bell's Princ. § 577; [M. Bell's Conv. i. 353.]* See *Novation. Expromissor*.

**DELEGATUS NON POTES 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 *Thomson*, 8 Dec. 1887, 15 R. 165. See

[two preceding articles;] also *Stair*, B. i. tit. 12, § 7.

**DELETION IN WRITS**. [In construing a formal deed, the court is not entitled to look at words which have been deleted before signature, but which happen to remain legible; *Buttery*, 8 March 1878, 5 R. (H.L.) 87. See *Erasure. Deeds*.]

**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 seems 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:—Assythment, 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 *Stair*, B. i. tit. 9, § 4, *et seq.*; *Ersk. B. iii. tit. i, § 12; Bank. B. i. tit. 4, § 26; tit. 10, §§ 4, 14; [Bell's Princ. §§ 543*



[*et seq.*] See *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. [Registration.]* 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; [as to which see Lord J. C. Inglis, in *Anderson*, 1 June 1866, 4 Macph. 765; also *Black*, 13 Dec. 1867, 6 Macph. 136; *Pochin & Co.* 11 March 1869, 7 Macph. 622; *Vickers*, 20 March 1871, 9 Macph. (H.L.) 65; *Dis-*

*tillers Co.* 9 Feb. 1889, 16 R. 479.] (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, *Allan, Stewart & Co.*, [1790, 3 Pat. 191;] and brought with it all the difficulties which had occurred in England relative to the kind of delivery necessary to complete the transit, and bar the seller's right to retain or to resume possession. 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. 176 *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*, 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. [As to this, see Lord M'Laren's note in *Bell's Com.* i. 183. See also *Stoppage in Transitu*. By the law of Scotland, things sold but not delivered remain the property of the seller; as to which doctrine, and the modification thereof by the Mercantile Law Amendment

[Act of 1856, see *Sale*.] With regard to false credits raised by apparent or reputed ownership, after constructive or symbolical delivery of moveables, see [*Reputed Ownership*.] On this subject, see *Stair*, B. i. tit. 1, § 15; *More's Notes*, lxxxix.; *Brodie's Supp.* 875; *Ersk.* B. ii. tit. 1, § 19; [B. iii. tit. 3, § 8;] *Bell's Princ.* §§ 108, 114–120, 1299; *Kames' Equity*, 325, 387.

**[DELIVERY ORDER;** an order addressed by the owner of goods to the person in whose custody they are, directing him to give delivery to the person named in the order. Delivery orders are chiefly used in connection with dock companies, wharfingers, &c. Independently of the Factors Act, indorsement does not, as in the case of a bill of lading, operate as a transfer of the property of the goods. See *M'Ewan*, 14 Jan. 1847, 6 Bell's App. 340, Ross's L.C. ii. 591; also *Hamilton*, 13 Dec. 1856, 19 D. 152; *Smith*, 14 Dec. 1859, 22 D. 208; *Mackinnon*, 2 July 1868, 6 Macph. 974; *Imperial Bank*, 5 Ch. D. 195; and cases cited in last article. But by the Factors Act, 1877 (40 & 41 Vict. c. 39), § 5, the lawful transfer of a delivery by the buyer to a *bona fide* transferee for value divests the original vendor's lien. The document requires a penny stamp. See *Robertson's Bankers' Law*, 112; *Campbell's Merc. Law*, 98; *Benjamin on Sale*, 778; *Blackburn on Sale*, 414; *Sweet's Law Dict.* As to iron warrants, see *Bovill*, 29 July 1856, 3 Macq. 1; *Merchant Banking Co.* 5 Ch. D. 205.]

**DELIVERY OF DEEDS.** While a deed or writing remains in the custody of the grantor or of his agent undelivered, it is not obligatory; for, so long as it remains within the grantor'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 [for his behoof. It is often difficult to determine whether or not the act of delivery has taken place. No ceremony is required with us, as in England, and the decision of each case must depend on its own circumstances. Delivery is held to be complete, when the grantor of the deed has himself done all that is within his power to deliver it; *Crawfords*, 1807, M. App. Moveables, No. 2. When a deed is found in the hands of a third person, the question whether he holds it for the grantor or for the grantee is one of fact, depending on evidence. There are, however, some rules fixing the burden of proof in certain circumstances. Possession

[by the grantee's agent, or by any one connected with the grantee, infers a presumption of delivery, which, however, will yield to contrary evidence. A deed found in the custody of one who is a stranger to both parties, if onerous, is held to be delivered; if gratuitous, it is held to be revocable during the life of the granter; *Ker*, 1677, M. 3249. When the depositary is agent for both granter and grantee, Erskine and other authorities hold that delivery is to be presumed. But it is doubtful whether any weight would now be given to such a presumption, in opposition to evidence of a contrary tendency. The question is purely one of intention, and in each case the whole facts and circumstances must be looked to. See *Ramsay*, 25 March 1830, 4 W. & S. 58; *Maiklem*, 29 March 1842, 4 D. 1182; *Mair*, 20 Feb. 1850, 12 D. 748. Where one of several co-obligants in a bond signed it, and returned it to the agent for himself and the other co-obligants, but died before all had signed, while the bond was still in the agent's hands, and no money had been advanced on the bond, it was held undelivered, the implied mandate to deliver after completed execution having fallen by the mandant's death; *Life Association*, 27 May 1886, 13 R. 910. If the deed were found in the custody of the grantee himself, the older writers held that the presumption of delivery could not be elided but by the writ or oath of the grantee. This rule seems also open to qualification. See *Ogilvie*, 1699, 4 Br. Sup. 446; *Mair*, *supra*; *M'Aslan*, 17 Feb. 1859, 21 D. 511; *Martini*, 18 Dec. 1878, 6 R. 342. But in general,] deeds found in the hands of the grantee are presumed to have been delivered at their dates, especially where they are onerous or rational. The following are exceptions to the rule [that undelivered deeds are not obligatory]:—1st, Where the deed contains a clause dispensing with delivery, it is effectual although found in the granter'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 granter'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 forisfamiliaried, 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. [But a policy of insurance taken by a husband in favour of trustees for behoof of his wife and children was held to confer no vested right without delivery; *Jarvie's Trs.* 28 Jan. 1887, 14 R. 411.] 4th, A deed in which the granter himself has an interest requires no delivery, e.g., a reserved life-rent; because the presumption there is, that the granter holds the deed, not because his mind is not made up in regard to it, but in order to secure his own reserved life-rent. 5th, Deeds which the granter 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. [See *Robertson's Trs.* 20 Dec. 1873, 1 R. 323.] Lastly, if the granter inserts the deed in a public record, it is held to be equivalent to delivery. [See *Burnet*, 19 March 1864, 2 Macph. 929; *Tennent*, 2 July 1869, 7 Macph. 936.] Lord Kames (*Eluc.* art. 4) attempts to deduce the doctrine of the delivery of deeds from the granter'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. Delivery renders a deed obligatory on the granter; but, in order to bind the grantee, the deed must be accepted. See *Stair*, B. iv. tit. 42, § 8; B. i. tit. 7, § 14; *More's Notes*, li., cccviii.; *Mackenzie*, B. iii. tit. 2, § 6; *Bank*, B. i. tit. 11, §§ 36, 48; B. ii. tit. 1, § 25; *Ersk.* B. iii. tit. 2, § 43; *Bell's Princ.* §§ 23, 84; [*Menzies' Conv.* 176; *M. Bell's Conv.* i. 102; *Dickson on Evidence*, § 916; *Kirkpatrick's Digest*, § 112; *Craigie's Digest* (Mov.), 44.]

**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. [Demembration is now prosecuted as an aggravated assault.] See *Hume*, i. 330; *Ersk.* B. iv. tit. 4, § 50; [*Alison's Princ.* 195; *Macdonald*, 158.]

[**DEMESNE**; that part of the lands of a manor which the lord has not granted out in tenancy, but which is reserved for his own use and occupation. *Wharton's Lex.*]

**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 apprising, 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.

[**DEMISE**; a grant by lease. The term is applied to an estate either in fee or for term of life or years, but most commonly to the latter. The operative word "demise" in a lease implies an absolute covenant on the part of the lessor, or person leasing, for the lessee's quiet enjoyment during the term, which, however, may be, and usually is, qualified by a more limited express covenant. The term is also applied to the death of the Sovereign, *demissio regis vel coronæ*, an expression which signifies merely a transfer of property; for when we say demise of the Crown, we mean only that in consequence of the disunion of the Sovereign's natural body from his body politic, the kingdom is transferred or demised to his successor, and so the royal dignity remains perpetual. *Wharton's Lex.*]

**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.* 61. See *Deposition*.

[**DEMPSTER.** The public executioner was formerly called the dempster or doomster. See *Dooms*.]

**DEMURRAGE**; is the allowance or compensation 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 lapse 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 wherever the delay is imputable to any fault of the freighter or the consignee, demurrage will be due. [See *Hansen*, 20 June 1874, 1 R. 1066; *Lamb*, 14 Jan. 1882, 9 R. 482; *Wyllie*, 29 Oct. 1885, 13 R. 92.] *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. [The word "demurrage" in the lien clause of a charter-party was held not to cover undue detention at the port of loading; *Gardiner*, 20 March 1889, 16 R. 658.] *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 custom-house, 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 custom-house holidays; under the latter, the days are reckoned as in a bill of exchange. [See *Nielson*, 16 Q.B.D. 67.] Where the expression used is "days" merely, running days are presumed; but special usage may overcome this presumption. [See *Holman*, 8 Feb. 1878, 5 R. 657.] *6th*, If there is 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 ship-owners 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. [11th, Lay days do not necessarily commence when the vessel reaches port; but only when she reaches that part of the port at which she is to discharge. As to what is reckoned a place of discharge, see *Lacour & Watson*, 22 May 1874, 1 R. 912; *Dall' Orso*, 4 Feb. 1876, 3 R. 419; *Bremner*, 18 June 1877, 4 R. 934. 12th, When the stipulated time is estimated by days, a fraction of a day counts for a day; *Hough*, 27 May 1879, 6 R. 961. If it is reckoned by hours, demurrage accumulates continuously, day and night; *Laing*, 3 Q.B.D. 347. 13th, The loss to a ship through detention by quarantine on arriving at the port of loading falls on the shipowner, even when the charter-party binds the charterer to load within a fixed period after the ship's arrival, in respect that the ship cannot be regarded as having arrived at the port of loading until it is placed at the disposal of the charterer; *White*, 5 Feb. 1886, 13 R. 524. 14th, In a case, where the charter-party contained a "floating clause," i.e., a stipulation that the vessel should be kept afloat at all times of the tide, it was held that a vessel going to Glasgow was bound to lighten at the Tail of the Bank at Greenock, to such an extent as would enable her to keep afloat in Glasgow harbour, and then to proceed to Glasgow, and discharge there the remainder of her cargo; *Hillstrom*, 1 Feb. 1870, 8 Macph. 463. The time, however, so spent in lightening a vessel is included in her lay days; *Dickinson*, 11 July 1874, 1 R. 1185.] 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. See *Brodie's Supp. to Stair*, 981; *Bell's Com.* i. 621; ii. 95; *Bell's Princ.* § 431; [*Abbott on Shipping*, 241; *MacLachlan on Shipping*, 521; *Smith's Merc. Law*, 292.] 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.* [Pleading by demurrer, as a separate step, was abolished by the Rules of Procedure, 1883. *Broom's Common Law*, 142.]

**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 which 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. See *Stair*, B. iv. tit. 44, § 1; *Ersk.* B. iv. tit. 2, § 16; A.S. 1 Feb. 1715, § 6; 7 Feb. 1810, and 11 July 1828, § 105. See *Calumny, Oath of. Condescendence. Confession*.

**DENIZEN**; is an alien born, who has obtained from the Sovereign letters of denization, [which confer certain privileges of British subjects; *Bell's Princ.* § 2137. See *Alien*.]

**DE NON APPARENTIBUS ET NON EXISTENTIBUS 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*.

**[DENTISTS**. See 41 & 42 Vict. c. 33.]

**DENUNCIATION**; is the act by which a person who has disobeyed a charge is proclaimed a rebel. [Prior to 1838,] the act was performed 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 was 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 if the execution did 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. [Under the Personal Diligence Act, the extract of a decree of court, or of registration, contains a warrant to charge the debtor to pay within a certain number of days, under the pain of poinding and imprisonment; and, on expiration of the days of charge, and within year and day, the execution of charge may be registered in the Register of Hornings, at Edinburgh; which registration has the same effect as if the debtor had been denounced rebel in virtue of letters of horning, and operates as an accumulation of the debt and interest into a capital sum bearing interest; 1 & 2 Vict. c. 114, §§ 9, 10.] Denunciations may also proceed against persons cited to the Court of Justiciary 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 Justiciary. 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 only effects now of denunciation for a civil debt are accumulation of the debt and interest into a capital sum

[(as above provided), and, in certain cases, liability to imprisonment. See *Imprisonment*.] 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 day unrelaxed; see *Escheat*.] 2d, Prior to 1612, c. 3, 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 was gradually mitigated, both by legislative enactments and by the progress of civilisation. By 20 Geo. II. c. 50, escheat upon denunciation for civil causes was 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 was made within year and day of the date of the execution of the horning, the charge fell, and the horning had to be executed afresh. Denunciation of 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*, i. 182. See *Stair*, B. iii. tit. 3, § 7; *Bank.* B. iii. tit. 3, § 2; *Ersk.* B. ii. tit. 5, § 56; [*Bell's Com.* i. 697; ii. 435 *et seq.*; *Bell's Princ.* § 2312;] *Ross's Lect.* i. 305; *Jurid. Styles*, iii. 370. [See *Diligence. Horning. Caption.*]

**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. [They were abolished by 9 & 10 Vict. c. 62. See *Wharton, 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. [See *Inhibition. Arrestment.*]

**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 redelivered 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 redeliver 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—1<sup>st</sup>, 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, 2<sup>d</sup>, 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. [See *M'Gregor*, 4 March 1887, 14 R. 535.] 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. [A depository is not entitled to retain the thing deposited, on the ground that it is not the property of the depositor; *Gelot*, 1 July 1871, 9 Macph. 957.] 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 *Stair*, B. i. tit. 13; *More's Notes*, lxxvii.; *Bank*. B. i. tit. 15; *Ersk.* B. iii. tit. 1, § 26; *Bell's Com.* i. 277; *Bell's Princ.* § 210.

**[DEPOSIT RECEIPT]**; a voucher or document of debt given by bankers to their customers for sums deposited with them, whereby the relation of debtor and creditor is constituted between the bank and the party in whose name the receipt is taken. A deposit receipt is payable on demand, and bears interest from its date. It is not a negotiable document; and consequently indorsation does not *per se* transfer the right to its contents, but imports merely a mandate to receive the money from the bank for behoof of the indorser. See *Barstow*, 5 Dec. 1857, 20 D. 230; *Kennedy*, 8 July 1863, 1 Macph. 1042; *Durie*, 6 July 1871, 9 Macph. 969. Mere possession by an agent of a deposit receipt in favour of his client, not indorsed by the latter, implies no authority to the agent to uplift the money; *Forbes' Exrs.* 9 March 1854, 16 D. 807. A deposit receipt can have no testamentary operation or effect; *Watt's Trs.* 1 July 1869, 7 Macph. 930; *Crosbie's Trs.* 28 May 1880, 7 R. 823; *Jamieson*, 13 July 1880, 7 R. 1131. As to whether delivery of a deposit receipt may imply donation *inter vivos* or *mortis causa*, see *Donation*, and cases there cited. As to what is sufficient discharge of a deposit receipt, see *Stewart*, 8 July 1859, 21 D. 1180. See *Thomson on Bills*, 124; *Robertson on Bankers' Law*, 65; *Cavanagh on Money Securities*, 78.]

**DEPOSITION**; is the testimony of a witness, who is called also a deponent, put down in writing. [See *Evidence. Commission*. In criminal cases, where there is reason to apprehend that a witness will die before the trial, his deposition may be taken by a magistrate, and read at the trial in the event of his death. The examination is obtained on application to a magistrate or the judge ordinary of the

[bounds. It is not necessary here, as it is in England, that the deponent should believe himself to be dying; *Brodie*, 12 March 1846, Ark. 45; nor that he should be warned to speak the truth as in the prospect of death; *Stewart*, 4 June 1855, 2 Irv. 166. The deposition is taken upon oath, and signed by the magistrate. It must be proved at the trial by two witnesses; *Ward*, 1 Feb. 1869, 1 Coup. 186. See *Hume*, ii. 407; *Alison's Prac.* 605; *Macdonald*, 511; *Dickson on Evidence*, § 1754; *Scot. Law Review*, i. 181.]

#### 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 by 1592, c. 115, sentence of deposition by a church court has the effect of depriving the deposed minister of the rents and emoluments of his benefice, and the benefice thereby becomes vacant. The steps are in all respects similar to those taken on the occasion of a vacancy by death or translation. 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 the 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 reponed, 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. See *Bank. B. ii. tit. 8, § 220*; *B. iv. tit. 22, § 21*; *Hill's Prac.* 60; [*Cook's Styles*, 143. See also 26 & 27 Vict. c. 47.] See *Minister. Church Judicatories*.

**DEPREDACTION or HERSHIP**; 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 was capital. *Hume*, i. 110. See *Hership*.

**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 granter is not liable for the acts of his assignee. No judge has the power to name a deputy, unless he is expressly authorised 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**; anything forsaken, or left, or wilfully cast away. 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*. In England, 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. 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 lands so gained would belong to the adjacent proprietors whose property is bounded by the seashore. *Bank. B. i. tit. 3, § 4*; *Ersk. B. ii. tit. 1, § 6*; *tit. 6, § 17*. [See *Lost. Strays.*] *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 been a use of payment of a higher rate of teind than that fixed by the sub-commissioners, the sub-valuation will be held to be dereliquished, 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 dereliquished by prescription, or by a contrary and a higher rate of payment for any period, however long. See *Connell on Tithes*, i. 242; [*Ersk. B. ii. tit. 10, § 34*.] See also *Teinds*.

**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 Army Act, 1881 (44 & 45 Vict. c. 58), § 12, any person subject to military law who deserts or attempts to desert Her Majesty's service, or persuades or endeavours to persuade any other such person to desert, is liable, on conviction by court martial—(1) if he committed the offence when on active service or under orders for active service, to death; (2) if in other circumstances, to imprisonment for a first offence, or to penal servitude

[for a second or any subsequent offence. Desertion from the naval service is punishable in like manner; see the Naval Discipline Act, 1861 (24 & 25 Vict. c. 115), §§ 19 *et seq.*] 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. 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 £20; but a justice of the peace may lawfully grant warrant for such a search. Desertion is not a crime cognisable 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. See also *Tait's Justice of Peace*, 387; *Blair's Justice, voce Soldiers*, p. 320; [*Macdonald*, 231; *Manual of Military Law* (War Office, 1887), 23, 350. See *Army*.] *Court-Martial*. In the merchant service, a seaman who deserts the ship before the expiration of the term of his agreement forfeits all his wages. [See 17 & 18 Vict. c. 104, § 243, amended by 43 & 44 Vict. c. 16, § 10.] But it is not desertion, if a seaman enter into the Queen's service, either voluntarily or by impress. 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 *Brodie's Supp. to Stair*, 978; *Bell's Com.* i. 563; [*Maclachlan on Shipping*, 240.]

**[DESERTION OF INFANTS.** See *Exposing Children*.]

**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 had deserted from the other without reasonable cause, and remained maliciously separate for one year, the party deserted might obtain decree of adherence; after which the church was directed to proceed against the defender, first by admonition and then by excommunication; and if these measures were disregarded, and four years had elapsed since the beginning of the desertion, decree of divorce might be granted. But by the Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86, § 11), all these preliminaries were dispensed with; and divorce may now be obtained at once, after four years' continuous desertion. See *McCallum*, 15 Feb. 1865, 3 Macph. 550; *Muir*, 19 July 1879, 6 R. 1353; *Auld*, 31 Oct. 1884, 12 R. 36. As in every consistorial action, the summons must be served on the defender personally, when he is not resident within Scotland; unless it be shown to the satisfaction of the court that he cannot be found, in which case edictal citation is sufficient; 24 & 25 Vict. c. 86, § 10. But the desertion must be proved to be malicious and without reasonable cause; *A. v. B.* 30 May 1868, 40 Scot. Jurist, 497; *Chalmers*, 4 March 1868, 6 Macph. 547. It must not only have been unjustifiable in its beginning, but obstinately persisted in throughout the four years in spite of remonstrance; *Barrie*, 23 Nov. 1882, 10 R. 208. It is no sufficient cause for a wife's desertion, that her husband superseded her in the management of his shop; *Gould*, 22 Dec. 1887, 15 R. 229. The pursuer must be willing to adhere; *Bowman*, 7 Feb. 1866, 4 Macph. 384. Where the wife has left her husband on account of his cruelty, her remedy is an action for separation and aliment. But see *Winchcombe*, 26 May 1881, 8 R. 726; *Gow*, 29 Jan. 1887, 14 R. 443. Adultery committed by the deserted spouse before raising the action, puts an end to the right to demand adherence, and therefore to the right to sue for divorce; *Auld, supra*. It appears, contrary to the *dictum* of Erskine (B. i. tit. 6, § 19), that judicial separation would not be granted on the ground of desertion alone; *Fraser on Husband and Wife*, ii. 896. See *Separation*.] Where the husband or wife is 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; [*Ersk. B. i. tit. 6, § 44.* But this is not settled law; see *Divorce.*] The *bona fides*, however, will be a protection against any criminal prosecution, either on the ground of bigamy or adultery. The effect of divorce on the ground of desertion is declared by 1573, c. 55, to be, that the party offender shall “tyne and lose the 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.*

[By § 1 of the Conjugal Rights Act, a wife deserted by her husband may apply, by petition to any Lord Ordinary, for an order to protect against her husband and his creditors all property acquired or to be acquired by her through her own industry, or by succession, after the desertion. The petitioner must prove the desertion, and that it was without reasonable cause. But it is not necessary to prove that it was “malicious or obstinate,” as is required by 1573, c. 55; *Turnbull*, 14 Jan. 1864, 2 Macph. 402; *Chalmers, supra*, 6 Macph. 547. The husband or his creditors may apply for a recall of this order, if they have not lodged answers to the wife’s application. But the recall, if granted, affects no right or interest onerously and *bona fide* acquired by any third party from the wife, before the recall; § 2. The Lord Ordinary’s interlocutor may be brought under review of the Inner House within twenty-one days; but the order of protection takes effect at once, unless the Lord Ordinary directs otherwise. The order continues operative, until cohabitation is resumed, or until the Lord Ordinary, upon a petition by the husband, is satisfied that he has ceased from his desertion, security being found, if required, that he will continue to cohabit; § 3. After the interlocutor of protection is pronounced and duly intimated, the wife’s property belongs to her as if she were unmarried; and the order has the effect of a decree of separation *a mensa et toro* in regard to the rights and obligations of both spouses, and in regard to the wife’s capacity to sue and

[to be sued; §§ 4, 5. By 37 & 38 Vict. c. 31, jurisdiction is conferred on the sheriff to entertain such applications for orders of protection, or for their recall. As to orders of protection, see *Fraser on Husband and Wife*, i. 824; *Mackay’s Prac.* ii. 363;] and on this subject generally, see *Stair*, B. i. tit. 4, §§ 8, 20; *More’s Notes*, xxvii.; *Bank. B. i. tit. 5, § 127*; *Ersk. B. i. tit. 6, § 44*; *Bell’s Princ.* § 1535, 1560; *Lothian’s Consistorial Law*, 96–117; [*Fraser on Husband and Wife*, ii. 1207; *Mackay’s Prac.* ii. 281.] See also *Marriage. Divorce. Oath of Calumny. Commissary Court.*

**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, [*Ex proprio motu.*] in consequence of the absence of the prosecutor at the calling of the diet, [or of irregularity in the citation, or irrelevancy of the libel.] This will have the effect of freeing the panel from a prosecution on that particular libel, but will not [necessarily] prevent a new process being raised on the same grounds. [See *Hall*, 17 June 1881, 8 R. (J.C.) 52.] 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 from 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; [see *Collins*, 3 Nov. 1887, 15 R. (J.C.) 7. This motion is usually granted, but is refused when no good cause is shown, and delay would unfairly affect the interests of the prisoner; *M’Atamney*, 6 April 1867, 5 Irv. 363. In *Duncan*, 4 Jan. 1875, 3 Coup. 80, the diet was deserted *pro loco et tempore* on account of the death of a material witness. If the prosecutor refuse to proceed, the court may desert the diet *simpliciter*, in which case a new libel for the same offence would probably be held incompetent. A new libel cannot be insisted in by the prosecutor, until he has judicially abandoned the old one, unless the former instance has fallen (as explained

[under *Diet*). See *Tabram*, 23 May 1872, 2 Coup. 259; *Edgar*, 1817, notes to *Hume*, ii. 276, 279. The latter case is separately reported as "*McKinley's Trial*."] 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; [*Martin*, 22 July 1858, 3 Irv. 177.] 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. [See *Hume*, ii. 275; *Ersk. B.* iv. tit. 4, § 90; *Alison's Prac.* 98, 355; *Macdonald*, 459.] See *Liberation. Diet. Criminal Prosecution*.

[**DESERTION OF A SERVANT.** See *Master and Servant*.]

**DESERTION OF A TENANT.** The A.S. 14 Dec. 1756, § 5, provides that, where a tenant shall desert his possession, and leave it unlaboured at the usual time of labouring, the judge ordinary may ordain the tenant to find caution, within a limited time, for arrears, and for the rent of the five crops following, or during the currency of the tack, if the tack is of a shorter endurance than five years; and, failing thereof, he may decern the tenant summarily to remove, and eject him in the same manner as if the tack were determined, and the tenant had been legally warned in terms of the act 1555. But independently of the A.S., 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

A.S. 1756. See *Taylor*, 1728, M. 15310; *Bell on Leases*, i. 324; *Hunter's Landlord and Tenant*, ii. 124; [*Rankine on Leases*, 463.] See also *Lease. Irritancy*.

**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. [See *Deeds, Execution of. Testing Clause. Summons. Falsa Demonstratio*.]

**DESIGNATION OF A MANSE AND GLEBE.**

Manse and glebes for the clergy are designed, or set apart, from the church lands in the parish, by the presbytery of the bounds. 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. See *Stair*, B. ii. tit. 3, § 40; *More's Notes*, clxxii; *Bank. B.* ii. tit. 8, § 119; *Ersk. B.* ii. tit. 10, § 55; *Bell's Princ.* § 1173; *Dunlop's Parish Law*, 95, 156; [*Duncan's Par. and Eccl. Law*, 497, 620, 623.]

[**DESIGNS.** See *Copyright*.]

**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 the deed



[contain an express clause authorising registration of the deed in the Register of Tailzies,] the estate will descend in course pointed out by the proprietor; [31 & 32 Vict. c. 101, § 14. See *Entail*.] 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. [But the distinction between heritage and conquest is now abolished; 37 & 38 Vict. c. 94, § 37.] (3) The term "heirs whatsoever," [generally denotes the heirs-at-law; but the meaning of this term may in some cases be controlled by the context of the deed; *M'Ewan*, 23 July 1868, 6 Macph. (H.L.) 147.] (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*, 1766, M. 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. [See *Forbes*, 17 June 1873, 11 Macph. (H.L.) 44.] (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 *Hope* (Bargeny), *Elchies*, *voce* Provisions to Heirs and Children, No. 2, [revd. 1739, 1 Cr. & St. 237.] 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*, 13 Nov. 1810, F.C. 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 destination, 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 heritable destination is described as second son, or as third son to the maker of the destination, [the general rule seems to be that the reference is not to the time of making the deed, but to the opening of the succession. See the Roxburgh case, *Innes*, 1807, M. App. Tailzie, No. 13, affd. 5 Paton, 320; also *Shepherd*, 28 May 1838, 3 S. & M'L. 255.] (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 *Conditio si sine*. (11) A destination to A. and his heirs, whom failing, to B., brings in the whole line of descent of A. before B.; *Bailie*, 1766, M. 14941, [revd. 2 Paton, 243;] and such a destination is held to call, not merely the heirs-male of A.'s body, but his heirs-male generally; *Hay*, 1788, M. 2315, [affd. 3 Paton, 142.] (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; also *Sandford on Heritable Succession*, i. 172-179. 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. Conjunct 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 prescribed 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 resolute clauses in protecting destinations, see *Entail*; 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 *Contract of Marriage. Conjunct Rights. Bankruptcy. [Insolvency.] Conjunct and Confidential.*

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 implied 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. [But the character thus accident-

ally impressed on subjects by destination, though it has ruled questions of succession, is not admitted to change them in respect to diligence; *Bell's Com. ii. 6; Bell's Princ. § 1475.* See *Heritable and Moveable.* See *Ersk. B. iii. tit. 8, § 47; Bell's Princ. § 1693 et seq.; Sandford on Heritable Succession*, i. 158; *Ross's Lect. ii. 482; Menzies' Conv. 698; M. Bell's Conv. ii. 833, 1074; M'Laren on Wills*, i. §§ 1141 *et seq.*; *Fraser on Husband and Wife*, ii. 1401; *Craigie's Digest (Herit.)*, 67.]

**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*, 27 Feb. 1810; *Printed Acts of Sederunt*, 53. According 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 [see *Sunday*.] 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*, 6 Dec. 1810, F.C., correcting *Bank. B. i. tit. 1, § 60.* See *Usage. Customary Law. [Statute Law.* In England, a statute cannot be repealed by non-user; *Dwarris on Statutes*, 529; *Maxwell on Statutes*, 515.]



**DETINUE**; [in English law, was the form of action whereby, before the Judicature Act, 1875, a person claimed the specific return of goods wrongfully detained from him, or their value; as where A. lent B. a horse, and B. refused to return it. *Sweet's Law Dict.*;] *Brodie's Supp. to Stair*, 849; *Bell's Com.* i. 269. See *Trover*.

**DEVASTAVIT**; in English law, any violation or neglect of duty by an executor, which makes him personally responsible to persons having claims on the assets, *e.g.*, creditors or legatees. Thus, if an executor applies the assets in satisfaction of a debt due by himself to a third person, or collusively sells the testator's goods at an undervalue, or pays claims which he is not bound to satisfy, he is guilty of a *devastavit*. *Sweet's Law Dict.*]

**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; [*Strickland*, 20 Jan. 1869, 7 Macph. 400.] 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 deviation 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. 669. 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. [Deviation to save life is justifiable, but not merely to save property; *Scaramanga*, 5 C.P.D. 295.] Lastly, The *onus probandi* lies on the underwriters, who allege that a deviation has taken place. See *Brodie's Supp. to Stair*, 976; *Bell's Com.* i. 669 *et seq.*; *Bell's Princ.* §§ 241, 435, 492; [*Marshall on Marine Insurance*, 138; *Arnould*, 449; *Abbott on Shipping*, 306; *MacLachlan on Shipping*, 424.] See *Insurance*.

**DEVISE**; is an English law term, signifying properly a gift of lands, &c., by a last will and testament. The giver is called the *devisor*; and he to whom the lands are given is called the *devisee*. *Tomlins' Dict. h. t.*

**DEVOLUTION**. [See *Clause of Devolution. Jus Devolutum.*]

**DIEM CLAUSIT EXTREMUM**; a writ issued from Exchequer, where a Crown debtor 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.* ii. 50; *Bell's Princ.* § 2296. [This writ was abolished, along with writs of extent, by 19 & 20 Vict. c. 56.] See *Crown Debt. Extent*.

**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*.

**DIES INCEPTUS PRO COMPLETO HABETUR.** See *Computation of Time*.

**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 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*.

**DIET.** 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 *inducie* 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 the practice of citing defenders in two diets was in all

cases put an end to. [As to the modern practice, see *Inducie. Summons. Citation*.]

**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 continued 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*. [When the instance falls by reason of the prosecutor not moving the court to call the diet, it is still open to him to proceed on a new libel; *Tabram*, 23 May 1872, 2 Coup. 259. The court will not, in ordinary circumstances, interfere with the prosecutor's discretion by calling the diet on the motion of the panel; *Keith*, 23 April 1875, 3 Coup. 108.] 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. [See *Desertion of the Diet*.] If the prosecutor be a private party, the court may also declare his bond of caution to insist to be forfeited. 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. [This, however, can only be done by the supreme court.] See *Outlawry*. 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. See *Hume*, ii. 263; *Alison's Prac.* 343; [*Ersk. B. iv. tit. 4, § 90*; *Macdonald*, 457.] See *Bail. Criminal Prosecution*.

**DIGEST**; the name given to the Pandects of the Civil Law, called the Digest, as containing "*Legalia præcepta excellentior digesta*;" *Du Cange*. See *Roman 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. 120*.

#### **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 1564, c. 88; 1581, c. 101;

1585, c. 11; 1606, c. 3; 1617, c. 5; 1621, c. 15; also *Stair*, B. ii. tit. 8, § 17; *Ersk. B. ii. tit. 10, § 7*; *Bank. B. ii. tit. 8, § 110*. With regard to the minister's right to the use of his glebe, and the obligation under which he lies to execute repairs on his manse, see *Glebe. Manse*.

**DILATORY DEFENCE**; is a plea offered by a defender for eliding the conclusions of the action, without entering on the merits of the cause; 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; *Macfarlane's Jury Prac.* 28; [*Mackay's Prac. i. 430*.] See *Defences*.

**DILIGENCE**. This term is used in three different and unconnected meanings:—1<sup>st</sup>, 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 (as to which, see *Culpa*); 2<sup>d</sup>, It means the warrants issued by courts for enforcing the attendance of witnesses, or the production of writings; and, 3<sup>d</sup>, 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.

*Diligence against Witnesses and for Recovering Writings*.—When a judge allows a proof of the whole, or of any particular branch of a cause, [or when he grants commission to examine witnesses, or to recover documents,] he at the same time grants to both parties diligence for citing witnesses, and possessors of writings (or *havers* as they are technically called), to appear before [himself, or] the commissioner, in order to be examined, or for the purpose of producing the writings. [The citation was formerly given in virtue of letters of diligence, a formal extract being required;] and in case the citation was disobeyed, the court then issued letters of second diligence, containing a warrant to apprehend the witnesses or havers who had been disobedient, and to bring them before the court. [A certified copy of the interlocutor fixing a jury trial, or a proof before a judge

[alone, or granting commission and diligence, is now sufficient warrant to cite witnesses and havers; 13 & 14 Vict. c. 36, §§ 25, 43, 46, 48. As to sheriff courts, see 16 & 17 Vict. c. 80, § 11. In case of failure to attend, letters of second diligence may still be applied for. See *Collins*, 28 Jan. 1851, 13 D. 541; *National Exchange Co.* 19 March 1858, 20 D. 840. In jury causes, "the practice still is to take out letters of first and second diligence in the form formerly used, and these letters are usually combined in one. They are issued by the clerk of court, and pass the signet;" *Mackay's Prac.* ii. 44.] 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. 393; [*Alison's Prac.* 622; *Macdonald*, 279. Letters of diligence are issued by the clerk of Justiciary; 11 & 12 Vict. c. 79, § 2. See *Criminal Prosecution*. Provision is made, by 6 & 7 Vict. c. 82, for compelling witnesses and havers in any part of the United Kingdom to attend and be examined before a commissioner; and by 17 & 18 Vict. c. 34, for compelling witnesses in any part of the United Kingdom to attend personally at trials before the Court of Session.] See *Ersk.* B. iv. tit. 1, § 71; tit. 2, § 30; *Bank.* B. iv. tit. 24, § 59; *Stair*, B. iv. tit. 41, § 6; *Jurid. Styles*, iii. 388; [*Dickson on Evidence*, ii. § 1690; *Campbell on Citation*, 119; *Shand's Prac.* i. 365; *Mackay's Prac.* ii. 44.] See *Evidence. Commission. Haver.*

*Diligence of Creditors.*—The diligence at the instance of creditors is divisible into that against the heritage, the moveables, and the person of the debtors. 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*, 13 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 *nexus* is effectual, yet the ultimate efficacy of the diligence is contingent on decree being obtained in the depending suit. The diligence 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 maills 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 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 *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, [in certain cases,] imprisoned until he do so. To this diligence are analogous the act of warding issued by the magistrates of royal burghs, and the warrant of imprisonment granted by justices of the peace, or by sheriffs under the small debt acts. [See 1 Vict. c. 41, § 13; 30 & 31 Vict. c. 96, §§ 6, 8. 2d, *Warrant to charge under the Personal Diligence Act*. By this act (1 & 2 Vict. c. 114), all extracts of decrees of the supreme and sheriff courts, and all extracts of registered obligations or documents, on which diligence may competently proceed, may contain a warrant to charge the debtor to pay, within a certain number of days, under pain of poinding and imprisonment (§ 1), or of poinding alone, where imprisonment is incompetent (A.S. 8 Jan. 1881). Upon an extract containing such warrant, the creditor may arrest, and charge the debtor to pay within the days of charge (§§ 2, 3). On expiration of these, and within year and day, the execution of charge may be registered in the Register of Hornings, and such registration has the same effect as if the debtor had been denounced a rebel, in virtue of letters of horning, and also accumulates the debt and interest into a capital sum, bearing interest (§ 5). The extract and execution, with certificate of registration, are then presented in the Bill-Chamber or the sheriff court, as the case may be, for a warrant to imprison, which is granted at once, if there be no lawful cause to the contrary; the clerk of the bills, or the sheriff-clerk, writing on the extract the words, *Fiat ut petitur*, and dating and subscribing the same; and this extract and deliverance thereon are sufficient warrant for imprisonment, as if letters of caption had been issued under the former law (§§ 6, 10, 11). But see *Imprisonment*. The provisions of this act have practically superseded the old forms of diligence by letters of horning and caption, which, however, are still competent, though their

[additional expense would not be allowed, except on very special grounds (§ 8).] 3d, 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 he find caution *de judicio sisti*; and 4th, *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 *Bell's Com.* i. 3; *Ersk. B.* ii. tit. 5, § 55; tits. 11 and 12; *B. iv.* tit. 3, § 9; *Ross's Lect.* i. 234; *Bell's Princ.* §§ 331, 342, 1231, 1468, 2355, 2381; [*Jurid. Styles*, iii. 329; *Campbell on Citation*.]

The second branch of the act 1621, c. 18, provides for the case of voluntary payments, or conveyances, made by the debtor in fraud 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 authorises 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 fraud 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. 186; *Ersk. B.* iv. tit. 1, § 37. See *Litigiosity*. [*Insolvency*.] 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

assignment of the diligence; *Bell's Com.* i. 428. [As to summary diligence on bills, see *Thorburn's Bills of Exchange Act*, 214.]

**DIMINUTION OF RENTAL.** It was [formerly] a question of great importance in entail law, whether an heir of entail in possession, could grant leases of the entailed estate, at rents lower than the estate was let for at his entry. [But by 45 & 46 Vict. c. 53, § 8, notwithstanding any prohibition in a deed of entail against granting leases unless without diminution of rental, any heir in possession may grant leases, for such period as is otherwise competent to him, at a fair rent. If the rent be less than a fair rent, or if a grassum be taken, the lease is null.] See *Sandford on Entails*, 200; *Hunter's Landlord and Tenant*, i. 106, 117; [*Rankine on Leases*, 55.] See *Entail*.

**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 Tithes*, i. 23. The ecclesiastical subdivisions of Scotland are now presbyterian. See *Church of Scotland. Church Judicatories*. [*Bishop*.]

[**DIRECTION, CLAUSE OF.** See *Registration for Publication*.]

[**DIRECTOR OF PUBLIC PROSECUTIONS**, in *England*; an officer appointed under the Prosecution of Offences Act, 1879, whose duty it is, subject to the superintendence of the Attorney-General, to institute, carry on, or assist in criminal proceedings which appear to be of importance or difficulty, or in which special circumstances, or the refusal or failure of a person to proceed with a prosecution, appear to render the action of the Director necessary to secure the due prosecution of an offender. *Sweet's Law Dict.*]

**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. Compensation. 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. [The stamp duty payable on a receipt or discharge for payment of money



{amounting to £2 or upwards, is one penny. But if the deed contains a clause of registration, or a discharge of the actings of parties, or of "all other claims," or any other clause bringing it under the category of a deed, the duty is 10s.; 33 & 34 Vict. c. 97.] With regard to the discharges of heritable securities, real burdens, &c., see *Heritable Securities. Burdens. Renunciation*. [As to discharge of claim of damages by minor and pupil children, see *Jack*, 17 Dec. 1886, 14 R. 263.] 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; [*Ewen*, 28 June 1825, 1 W. & S. 595; *Talbot*, 1705, M. 5027.] But a discharge which is entirely general, without mentioning any special debt or claim, will receive a more liberal interpretation; [*Harris*, 2 March 1822, 1 S. 370; *Brit. Linen Co.* 6 June 1849, 11 D. 1104.] Even such a discharge, however, 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 prestanda*; [*M'Taggart*, 24 Nov. 1830, 4 W. & S. 361; *Moon's Trs.* 28 June 1836, 14 S. 1026; *Greenock Banking Co.* 17 July 1844, 6 D. 1340; *M. Tweeddale*, 26 May 1848, 10 D. 1053.] 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; [*Logan*, 1736, M. 5041. As to reduction of a discharge, so far as granted *sine causa*, by a party ignorant of his legal rights, see *Dickson*, 17 Feb. 1854, 16 D. 586; see also *Error*.]

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; [*Patrick*, 8 March 1859, 21 D. 637.] 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. [As to implied discharge of cautioners, see *Cautionry*.] See *Stair*, B. i. tit. 18, § 2, and B. iv. tit. 40, § 35; *More's Notes*, cxxii.; *Brodie's Supp.* 945; *Ersk. B.* iii. tit. 4, §§ 9, 10; *Bank. B.* i. tit. 24, § 13; *Bell's Princ.* §§ 582, 567; *Kames' Equity*, 157; *Ross's Lect.* i. 212; [*Menzies' Conv.* 268; *M. Bell's Conv.* i. 337; *Dickson on Evidence*, §§ 177, 628-9, 784, 796, 926; *Jurid. Styles*, ii. 724; *Craigie's Digest* (Mov.), 176. See *Implied Discharge. Error*.]

**DISCHARGE OF BANKRUPT.** See *Sequestration*.

**DISCLAIMER**; in English law, is a plea containing an express denial or renunciation of a thing. See *Tomlins' Dict. h. t.* [See *Patents*.]

**DISCLAMATION**; signifies a vassal's disavowal or disclaimer 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 the forfeiture. [This casualty is now obsolete.] See *Ersk. B.* ii. tit. 5, § 51; *Stair*, B. ii. tit. 11, § 29; *More's Notes*, cccxxviii.; *Bank. B.* ii. tit. 11, § 24; *Mackenzie*, B. ii. tit. 5, § 9; *Skene de Verb. Sig. h. t.*; *Bell's Princ.* § 730.

**DISCOUNT OF BILLS;** [deduction from the sum in the bill in consideration of payment before the stipulated time.] 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.* ["Discretion is to discern by the right line of law, and not by the crooked cord of private opinion, which is vulgarly called discretion;" *Coke upon Lyttelton*, 227; *Sweet's Law Dict.* When discretionary powers are conferred by the legislature, they must be exercised with a regard to the common rights of others; *Pollock on Torts*, 112. See *Trustee.*]

**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, [to which the registration of an expired charge is now equivalent]—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 never had the benefit of discussion, except in the case of a cautioner for another, that he should perform a fact, who was, [and still is,] in no case liable until the principal obligant be 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*, 1757, M. 2110. [The privilege of discussion was taken away by the act 19 & 20 Vict. c. 60, § 8; and the creditor is now entitled to proceed directly against the cautioner, unless the latter 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. This act, however, applies only to cautioners for debt, and does not affect cautioners *ad facta prestanda*.] See *Stair*, B. i. tit. 17, § 4; *More's Notes*, cxiii.; *Brodie's Supp.* 945; *Ersk. B. iii. tit. 3, § 61*; *Bell's Com. i. 364*; *Bell's Princ. § 252*; *Ross's Lect. i. 77*; [*Menzies' Conv.* 213; *M. Bell's Conv.* 282. See *Cautionary.*]

**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 [under the former law;] 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. [If, however, the ancestor have left a general disposition, the general disponees or trustees are primarily liable for all heritable debts not specially charged on particular estates, or on particular heirs. Heirs of different estates are liable rateably, *secundum valorem* of the estates which they respectively inherit; *Mackenzie*, 5 March 1847, 9 D. 836.] 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. 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. 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. See *Stair*, B. iii. tit. 5, § 17; *More's Notes*, cccxlvii.; *Bank*. B. iii. tit. 5, § 60; *Ersk.* B. iii. tit. 8, § 52; *Sandford on Entails*, 256; *Ross's Lect.* i. 74 *et seq.*; *Bell's Princ.* § 1935; [*Menzies' Conv.* 199; *M. Bell's Conv.* ii. 247; *M'Laren on Wills*, § 2269.] 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*.

[**DISENTAIL.** See *Entail*.]

**DISFRANCHISING**; signifies the depriving a person of the rights and privileges of a free citizen or subject. *Tomlins' Dict. h. t.*

**DISHABILITATION**; 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.* 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. 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 [a majority] of the heritors in the parish, reckoning the votes, not by the number of heritors, but by their valued rent within the parish; [7 & 8 Vict. c. 44, § 1. See also 31 Vict. c. 30.] See *Ersk.* B. i. tit. 5, § 21; *Bank.* B. ii. tit. 8, § 47; [*Buchanan on Teinds*, 472.] See *Parish. Annexation*.

[**DISMISSAL.** See *Decree. Master and Servant*.]

**DISORDERLY HOUSE**; a house of ill-fame, kept for the resort and commerce of lewd persons of both sexes. "It is not 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." [See *Greenhuff*, 21 May 1838, 2 Swint. 128, 236, 279; 1661, c. 3; 17 Geo. II. c. 5; 25 & 26 Vict. c. 101, § 337. See also *Criminal Law Amendment Act*. See *Hume*, i. 478; *Barclay's Digest*; *Irons' Police Law*, 254.]

**DISPARAGEMENT**; inequality in blood, honour, dignity, or otherwise. Under the casualty of marriage in wardholding, 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 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 Marriage*. *Ward-Holding*.

**DISPENSATION, CLAUSE OF.** Where heritable subjects lie locally discontinuous, or where the progresses of title-deeds to several parcels of land comprehended in one Crown charter, are different, a clause of dispensation may be inserted, specifying a particular place at which it shall be sufficient to take infeftment for the whole lands, and other subjects, however discontinuous or dissimilar, and dispensing with any other symbols than earth and stone. The Crown alone can competently grant such a dispensation. [As infeftment on the lands is now unnecessary, there is no occasion in modern conveyancing for a clause of dispensation. See *Infeftment*.] See *More's Notes on Stair*, xcii.; [*Menzies' Conv.* 574; *M. Bell's Conv.* i. 660. See *Barony. Union*.]

**DISPONEE**; the person to whom a disposition is granted. See *Disposition*.

**DISPOSITION.** In its general acceptation, 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 *Charter*. In the ordinary case, the disposition contains the following clauses:—1<sup>st</sup>, The *narrative*, called also the *inductive* clause, containing the names of the disponent and disponent, stating the cause of granting the deed, [and setting forth fully all facts and circumstances affecting its liability to *ad valorem* stamp duty, or the amount thereof; 33 & 34 Vict. c. 97, § 10.] Where the deed is onerous, this clause usually contains an acknowledgment of the receipt of the price or consideration, and a discharge of it. 2<sup>d</sup>, The *dispositive* clause, containing words of *de præsenti* 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. [See *Dispositive Clause*.] 3<sup>d</sup>, At the close of the dispositive clause, the term of entry is usually specified. If no term is specified, entry is at the first term of Whitsunday or Martinmas after the date or last date of the conveyance, unless it appear from the deed itself that another term of entry was intended; 37 & 38 Vict. c. 94, § 28. 4<sup>th</sup>, A clause expressing the manner of holding. 5<sup>th</sup>, An assignation of writs. 6<sup>th</sup>, An assignation of rents. 7<sup>th</sup>, An obligation to free the disponent of all feu-duties, casualties, and public burdens, exigible on account of the subject disposed prior to the term of entry. 8<sup>th</sup>, A clause of warrandice; implying, unless specially qualified, absolute warrandice as regards the lands and writs, and warrandice from fact and deed as regards the rents; § 8 of the Consolidation Act (31 & 32 Vict. c. 101). 9<sup>th</sup>, A clause of registration, for preservation, or for preservation and execution; and, 10<sup>th</sup>, A testing-clause. A disposition formerly contained also a procuratory of resignation and a precept of sasine; but these clauses are no longer in use, as infeftment is now completed by registration of the conveyance, and all writs by progress are now unnecessary and incompetent. Registration of the disposition at once completes the feudal title of the disponent, and implies an entry with the superior. If it is not desired to record the whole disposition, a notarial instrument may be expedite and recorded under § 17 of the Consolidation Act. With regard to the clause expressing the manner of holding, it is declared by



[§ 6 of the same act (1) that, if the lands are conveyed to be holden *a me* only, the clause so expressing the manner of holding implies that the lands are to be holden from the grantor of and under his immediate lawful superiors, in the same manner as the grantor or his predecessors held, hold, or might have holden the same, and that the donee's title may be completed either by resignation or confirmation; (2) that if the lands are disposed to be holden *a me vel de me*, the clause implies that they are either to be holden of the grantor in free blench, for payment of a penny Scots, if asked only, and freeing and relieving the grantor of all feu-duties and other duties and services exigible out of the lands by his immediate superiors, or to be holden from the grantor of and under his immediate superiors in the same manner as the grantor or his predecessors held, hold, or might have holden the same, and that the donee's title may be completed either by resignation or confirmation; and (3) that where no manner of holding is expressed, the conveyance is held to imply a holding *a me vel de me*, where the titles contain no prohibition against subinfeudation or against an alternative holding, and a holding *a me*, where the titles contain such prohibition. Since the Conveyancing Act of 1874 (37 & 38 Vict. c. 94), this clause is altogether superfluous, as entry with the superior is implied in the case of every registered conveyance, and the holding, therefore, cannot be otherwise than *a me*. The clause, however, has not been entirely discontinued. See *Ersk. B. ii. tit. 7, §§ 1 et seq.*; *Ross's Lect. ii. 215*; *Jurid. Styles, i. 89*; *Duff's Feudal Conv. 187*; *Menzies' Conv. 613, 639*; *M. Bell's Conv. i. 679*. See *Conveyancing. Infeftment. Registration. Confirmation. Resignation. Consolidation. Base Rights. Absolute Disposition. General Disposition. Consenter. Accretion.*]

II. *Disposition of Moveables.*—A disposition of moveables is a deed by which the donor conveys his moveable estate, either partially or *per aversionem*, to the donee. Sometimes the disposition bears reference to an inventory, as containing a more particular enumeration of the effects conveyed. Power is given to the donee to assume possession of the subjects,—the warrantice 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; [*Chalmers, 1739, M. 11590*; *Roberts, 28 July 1842, 5 D. 6*. When the subjects have been already contained in a conveyance or other deed, they may be conveyed by the short form of assignation provided by the Transmission of Moveable Property Act, 1862 (25 & 26 Vict. c. 85). See *Ersk. B. iii. tit. 5, §§ 1, 5*; *Bell's Com. i. 178, 272*; *Menzies' Conv. 463*; *M. Bell's Conv. i. 331, 436*; *Jurid. Styles, ii. 346, 455.*] See *Delivery. Assignation.*

[**DISPOSITION AND ASSIGNATION.**  
See *Personal Rights.*]

#### 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 wherever 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

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disponees; the appointment of executors; a reservation of the granter'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. [See forms in *Jurid. Styles*, i. 286; ii. 574; and in *M'Laren on Wills* (Appx.). See *Trust. Will.*]

**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. [Hence, in the event of any discrepancy between the dispositive and any other clause, the former controls the other; *Shanks*, 1797, M. 4295; *E. Aboyme*, 16 Nov. 1814, F.C.; *Forrester*, 11 July 1826, 4 S. 824; *Chancellor*, 19 July 1872, 10 Macph. 995. But ambiguities and omissions in the dispositive clause may be explained or supplied by the others; *Sutherland*, 1801, M. App. Tailzie, No. 8. And a reservation of minerals in the *tenendas* was sustained, though not mentioned in the dispositive; *Bain*, 19 May 1865, 3 Macph. 821. The word "dispone" was formerly essential in all grants of heritage; *Hamilton*, 3 March 1815, F.C.; *Howden*, 7 July 1864, 2 Macph. 1317; *Kirkpatrick*, 23 June 1874, 1 R. (H.L.) 37. But the Consolidation Act, 1868, rendered it unnecessary in *mortis causa* deeds; 31 & 32 Vict. c. 101, § 20; and the Conveyancing Act, 1874, has extended this relaxation by providing that "it shall not be competent to object to the validity of any deed or writing as a conveyance of heritage coming into operation after the passing of this act, on the ground that it does not contain the word 'dispone,' provided it contains any other word or words importing conveyance or transference, or present intention to convey or transfer;" 37 & 38 Vict. c. 94, § 27. When lands have been particularly described in any prior recorded deed, it is sufficient to specify the name of the county,

[or, in the case of burgage lands, the burgh and county, in which they are situated, and to refer to the particular description contained in the prior recorded deed; *ib.* § 61. Reservations, real burdens, conditions, &c., may be validly imported into a deed by reference to a prior recorded deed, in which they are set forth at length; § 32. See *Ersk. B. ii. tit. 3, § 23*;] *More's Notes to Stair*, clvii.; *Bell's Princ.* § 760; *Ross's Lect.* ii. 157, 233, 287, 344, 380; [*Menzies' Conv.* 537; *M. Bell's Conv.* i. 586; *Duff's Feudal Conv.* 60. See *Charter. Disposition. Parts and Pertinents.*]

**[DISQUALIFICATION OF JUDGE.** See *Declinature.*]

**DISRATIONARE**; from the French word *Disrener*, to fight in single combat. *Skene, h. t.*

**DISSASINA**; a French word signifying dispossession, ejection, or spuilzie. *Skene, h. t.*

**DISSENTERS**; persons who dissent from the doctrines of the Established Church. The numerous statutes of the Scotch Parliament directed against non-conformity were repealed after the Revolution of 1688, by 1690, c. 5, and 1690, c. 27, and have not since been revived. *Hume*, i. 575; *More's Notes to Stair*, lxxv., ciii. [By 4 & 5 Will. IV. c. 28, it was made competent for dissenting clergymen to celebrate marriages. See *Church Judicatories.*]

**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 taking, without legal process, of a personal chattel from the possession of a wrong-doer into the custody of a party grieved, as a pledge for the redressing an injury, the performance of a duty, or the satisfaction of a demand. The most familiar example is the landlord's power of distress, whereby he is entitled, in the event of the rent falling into arrear, to enforce payment without a legal process, by entering the land, and seizing the goods and chattels found thereon. See *Stephen's Com.* iii. 254; *Wharton's Lex.*] 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 poiding; *Stair*, B. iv. tit. 47, § 24. It seems, however, to have differed from that diligence, in so far as poiding, 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 *brevi 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.* i. 385; [ii. 392; *Stair. B. ii. tit. 3, § 46*; *B. iv. tit. 23, § 1*; *Hunter's Landlord and Tenant*, ii. 357; *Barclay's Digest*.]

**[DISTRINGAS**; an English writ, so called from its commanding the sheriff to distrain on a person for a certain purpose, *e.g.*, for recovery, of a chattel, to compel appearance to answer an indictment. The commonest species of *distringas* was that issued by the High Court of Justice, to prevent a public company (such as the Bank of England) from permitting the transfer of stock in their books, or from paying dividends on it, without previously giving notice to the person who had obtained the writ. Under the present practice no writ is issued, and in lieu of it a notice is given to the bank or other company to prevent the transfer of stock or payment of dividends, without previous intimation to the party giving the *distringas* notice. The proceeding is commonly used to prevent unauthorised or fraudulent dealings with stock by the person in whose name it is standing, *e.g.*, a trustee. *Sweet's Law Dict.*]

**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*, ii. 23; and, as to the present practice, see *Criminal Prosecution*.

**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. [See *Bankruptcy. Sequestration*.]

**[DIVIDEND WARRANT**. The provisions of the Bills of Exchange Act, 1882, as to crossed cheques (§§ 76-82), are declared by § 95 to apply to a warrant for payment of dividend. See *Cheque*. See also *Partridge*, 9 Q.B. 424.]

**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; [19 & 20 Vict. c. 79, §§ 83, 125.] 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. 361. [See *Sequestration*.]

**[DIVISION, or DIVISION AND SALE, ACTION OF**. This action is competent to joint owners *pro indiviso*. The conclusion is generally alternative—for division, or for sale if division be found impracticable or disadvantageous; *Craig*, 14 March 1863, 1 Macph. 612. Such action may be raised by a trustee, though the trust-deed gives no power of sale; *ib.* Sale will be ordered by the court if division would depreciate the value of the shares; and at such sale any *pro indiviso* proprietor may buy; *Thom*, 26 Nov. 1875, 3 R. 161. See also *Bryden*, 4 Feb. 1837, 15 S. 486; *Brock*, 25 Nov. 1851, 19 D. 701 (note); *Anderson*, 11 March 1857, 19 D. 700. This action has superseded the older procedure by *briefe* of division; see *Brieve*. It is competent in the sheriff court if the value of the subject does not exceed £50 a year, or £1000 value; 40 & 41 Vict. c. 50, § 8 (3). Registration of a decree of division, whether pronounced by a court or by an arbiter, is equivalent to a registered conveyance; 37 & 38 Vict. c. 94, § 35. An action of division and sale does not seem to be competent unless the property is held *pro indiviso*; *Kennedy*, 2 June 1885, 12 R. 1026. See *Stair*, B. i. tit. 16, § 4; *Ersk.* B. iii. tit. 3, § 56; *Bell's Princ.* § 1079; *Shand's Prac.* 604; *Mackay's Prac.* ii. 306; *Dove Wilson's Sher. Court Prac.* 408; *Rankine on Land-*

[*Ownership*, 492; *Jurid. Styles*, iii. 45; *M. Bell's Com.* ii. 831. As to division of commonty, see *Commonty*.]

**DIVISION, BENEFIT OF.** See *Beneficium Divisionis*.

**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; *Bell's Com.* ii. 268. See also *Judicial Sale*. [By § 128 of the Bankruptcy Act (19 & 20 Vict. c. 79), it is enacted that the trustee in a sequestration shall, before the expiration of six months from the date of the deliverance actually awarding sequestration, make up a scheme of division of the fund directed by the commissioners to be divided, and apportion the same, according to their respective rights, among those creditors whose claims have been sustained by him, or by the Lord Ordinary or the sheriff, or who shall have appealed against his decision, (which scheme shall be patent to all concerned), and shall send notice to each creditor of the amount of dividend to which he may be entitled. See *Bell's Com.* ii. 364. See *Sequestration*.]

**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. 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*. [The summons must be served personally, when the defender is not

[resident in Scotland; but such service may be made by any person authorised by the pursuer, though not an officer of the law. Where the defender cannot be found, edictal citation is sufficient; but in that case, service is required on the children of the marriage, if any, and also on certain of the next-of-kin, if resident in the United Kingdom; 24 & 25 Vict. c. 86, § 10; 31 & 32 Vict. c. 100, § 100. In an action of divorce for adultery, the alleged paramour may be called as co-defender, and, if the adultery is proved, may be found liable in expenses; 24 & 25 Vict. c. 86, § 7; provided he is subject to the jurisdiction of the court; *Fraser*, 14 Jan. 1870, 8 Macph. 400. "The result of the decisions is, that the name of the paramour, if known, must be condescended on; if not known, the action will be relevant without it, but in such a case the other circumstances founded on as proving adultery must be fully and specially averred;" *Mackay's Prac.* ii. 263. See *Tulloch*, 28 Feb. 1861, 23 D. 639.] In every such action, whether founded on adultery or on desertion, the pursuer must make oath that the action is not collusive. [See *Calumny, Oath of*.] 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. [See *Graham*, 15 Dec. 1881, 9 R. 327. As a further precaution against collusion, the Lord Advocate is empowered to enter appearance in all actions of divorce, and lead such proof as he thinks fit; 24 & 25 Vict. c. 86, § 8. See *Ralston*, 13 Jan. 1881, 8 R. 371. Proof is necessary in all cases, even when the action is undefended; 1 Will. IV. c. 69, § 36. The action is tried before the Lord Ordinary, without a jury, the evidence being taken down by a shorthand writer; *ib.* § 13; 31 & 32 Vict. c. 100, § 100. The parties are competent witnesses; 16 & 17 Vict. c. 20, § 3. But no witness, whether a party to the suit or not, is liable to be asked, or bound to answer, any question tending to show that he or she has been guilty of adultery; 37 & 38 Vict. c. 64, § 2. See *Kirkwood*, 9 Dec. 1875, 3 R. 235; *Cook*, 4 Nov. 1876, 4 R. 78. Adultery may be inferred from facts and circumstances, without direct proof of any specific act of adultery;



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[*Walker*, 23 June 1871, 9 Macph. 1091. Jurisdiction in actions of divorce is founded on the husband having a true and permanent domicile in Scotland. See *Domicile*; and contrast *Carswell*, 6 July 1881, 8 R. 901, with *Stavert*, 3 Feb. 1882, 9 R. 519, and *Redding*, 22 March 1888, 15 R. 1102. Residence for forty days does not give jurisdiction in divorce; *Ringer*, 15 Jan. 1840, 2 D. 307. With regard to divorce on the ground of desertion, see *Desertion*.] In the case of adultery, if the injured party continue the matrimonial connection 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 *Remissio Injuriae*. *Lenocinium*—that is, the husband's participation in the profits of his wife's prostitution, or even his 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. See *Lenocinium*. Bankton (B. i. tit. 5, § 128), [and other old writers, following the Roman and Canon laws,] hold recrimination to be a good defence against divorce for adultery. The contrary doctrine, however, is now settled in the law of Scotland. [But see Lord Ardmillan's dissents in *Brodie*, 11 June 1870, 8 Macph. 854; *Walker*, *supra*, 9 Macph. 460, 1091; and *Fraser*, 21 June 1872, 10 Macph. 837.] 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*, 1787, M. 338; *Lockhart*, 1799, M. App. Adultery, No. 1; [*Walker*, *supra*. The effect of a second marriage, contracted in the *bona fide* belief of the death of the first spouse, is not settled. Erskine (B. i. tit. 6, § 44) holds that *bona fides* would be no defence against a civil action for divorce; and the opinions in *Donald*, 30 March 1863, 1 Macph. 741, incline to this view. But see, *contra*, *Thomson*, 9 Dec. 1836, F.C.; *Fraser on Husband and Wife*, ii. 1143; *Mackay's Prac.* ii. 273. In actions of divorce raised by a husband, he is bound to furnish the wife with the means of defending herself; and even when her defence has failed in the Outer House, if she has reasonable grounds for reclaiming, she is entitled to recover the Inner House expenses from her husband; *Hoey*, 6 June 1884, 11 R. 905. In the case of a woman who has no separate estate, this rule is not affected by the

[Married Women's Property Acts of 1877 and 1881; *Milne*, 8 Dec. 1885, 13 R. 304. But if she has separate estate, she is not entitled to the expenses of an unsuccessful defence; *Henderson*, 9 Nov. 1888, 16 R. 84. If the action is raised by the wife, and she establishes a *prima facie* case, she may obtain decree against her husband for such sums as may be necessary to carry on the action; *Walker*, 27 Jan. 1871, 9 Macph. 460.]

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. ["The party injurer loseth all benefit accruing through the marriage, but the party injured hath the same benefit as by the other's natural death;" *Stair*, B. i. tit. 4, § 20.] It has been decided, however, that the offending husband, where the divorce is for adultery, is not bound to restore the tocher; *Justice*, 1761, M. 334. This decision is said by Erskine to have been pronounced in deference to an uniform train of old decisions; but, on investigation, it rather appears that the course of decisions had fixed an opposite rule; *Ersk.* B. i. tit. 6, § 48; *Ivory's note*, 177. [See, however, *Johnstone-Beattie*, 7 Feb. 1868, 6 Macph. 333; *Harvey*, 22 Feb. 1872, 10 Macph. (H.L.) 26; *Fraser*, ii. 1223. The forfeiture of provisions affects not only the guilty spouse, but also his assignees; *Johnstone-Beattie*, *supra*. But the forfeiture does not extend to property acquired subsequently to the decree of divorce, unless settled by marriage-contract; *E. Elgin*, 26 Jan. 1827, 5 S. 243; *Thom*, 11 June 1852, 14 D. 861. See *Journ. of Jurisp.* xxi. 361. Donations made by the injured party are revoked by decree of divorce, while those made by the offending party become irrevocable; *Murray*, 1575, M. 328; *Ritchie*, 5 June 1874, 1 R. 987.] 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 [been said not to have] the effect of bastardising such issue; [*Stair*, B. iii. tit. 3, § 42; but see *Fraser*, i. 151. The act is still *in viridi observantia*; but it does not apply, unless the paramour is named in the decree of divorce; *Beattie*, 15 Dec. 1866, 5 Macph. 181; *Campbell*, 16 July 1866, 5 Macph. (H.L.) 115.]

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 supercedes 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 litiscontestation in such an action renders it transmissible to representatives was argued, but not decided, in *Campbell v. Mucallister*, 1821, First Division, not reported. [When a pursuer died, after obtaining decree of divorce in the Outer House, his representatives were held entitled to oppose a reclaiming note; *Ritchie*, 11 March 1874, 1 R. 826. As to reduction of decree of divorce on the ground of subornation of perjury, see *Begg*, 27 Feb. 1889, 16 R. 550.] See *Stair*, B. i. tit. 4, § 7; *More's Notes*, xvi., xxvii.; *Bank*, B. i. tit. 5, § 126; *Ersk.* B. i. tit. 6, § 43; *Bell's Princ.* §§ 1530, 1622; *Lothian's Consist. Prac.* 96; *Fergusson's Reports on Divorce Cases*; [*Fraser on Husb. and Wife*, ii. 1129, 1245, 1326; *Mackay's Prac.* ii. 260.] See *Marriage. Impotency.*

**DOCK WARRANTS.** The bonding warehouses in London, mentioned in 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. [See *Melrose*, 4 Feb. 1850, 12 D. 665; 28 Feb. 1854, 1 Macq. 698.] See *Bell's Com.* i. 206; *Bell's Princ.* § 1305; *Brown on Sale*, 460; [*Blackburn on Sale*, 415; *Benjamin on Sale*, 801. See *Delivery Order. Sale.*]

**DOCQUET.** The word docquet 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 docquets, particularly when done by notaries. The notarial docquet is the most ancient example of fixed style in Europe; and it was formerly common to all solemn instruments. In Scotland, however, it is almost exclusively appropriated to the instrument of sasine. It consists of a Latin attestation, holograph of the notary, annexed to the notarial instrument prepared by him, on the occasion of the infeftment being taken. The docquet sets forth the name of the notary, and the authority under which he has been appointed a notary public. It then states 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 has authenticated it by his sign, name, and surname; and, by express statute, the docquet must mention the number of "leaves" of which the instrument consists; 1686, c. 17, and A.S. 17 Jan. 1756. [The short form of instrument provided by 8 & 9 Vict. c. 35, has no docquet appended to it. See *Ersk.* B. ii. tit. 3, § 35; *Ross's Lect.* ii. 187; *Bell's Princ.* §§ 771, 871; *Menzies' Conv.* 576; *M. Bell's Conv.* i. 656; *Dickson on Evidence*, §§ 688, 1288, 1802. See *Sasine. Notary Public.* As to the docquet of a notary or justice of the peace signing a deed for a party unable to write, see *Deeds, Execution of.* And as to decqueting of accounts, see *Dickson*, § 797.]

**DOGS.** Dogs are so far the objects of law, that, by 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; *Obs. on the Stat.* 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. [In modern practice, however, the stealing of a dog, which has been brought into possession, is regarded as theft.] See *Hume*, i. 82, 124. The owner of a vicious dog is liable for the injuries done by the animal to persons whom it may attack; [*Cowan*, 23 Nov. 1877, 5 R. 241; *Burton*, 1 July 1881, 8 R. 892; *Daly*, 25 June 1886, 14 R. 154; *Smillies*, 2 Dec. 1886, 14 R. 150; *Fraser*, 14 June 1887, 14 R. 811. With regard to injury done by a dog to sheep or cattle, the owner of the dog is liable in reparation, even though no previous vicious propensity be proved; 26 & 27 Vict. c. 100, § 1. See *Damages*. The use of dogs for purposes of draught is prohibited by 17 & 18 Vict. c. 60, § 2. Provision is made by 34 & 35 Vict. c. 56, for the detention of stray dogs, and the destruction of dangerous dogs, and also for restrictions being imposed upon dogs being at large, if danger from *rabies* is apprehended. See *Henderson*, 18 March 1876, 3 R. 623; *Iron's Police Law*, 562; *Barclay's Digest*. As to the duties payable on dogs, see 30 Vict. c. 5; 41 & 42 Vict. c. 15, §§ 17–23.]

**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 stratagem 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*, 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; [not necessarily where he is actually resident at the time, but where his intention of permanent residence is presumed by law.] 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 domicilii*, 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 *Milligan*, 9 Feb. 1826, 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. [Questions of status, such as legitimacy, or validity of marriage or divorce, are also regulated by the parties' domicile.]

[A person can only have one permanent or true domicile, regulating status and succession; *Somerville*, 5 Vesey, jr. 785; *Hog*, 12 July 1804, 4 Pat. 581. "Of this sort of domicile there are three kinds—the domicile of origin; the domicile by choice, which a party *sui juris* acquires on his leaving his domicile of origin; and domicile by operation of law, such as that of a wife, which is governed by marriage;" *Fraser on Husband and Wife*, ii. 1251. (1) *The domicile of origin* is not necessarily a person's birthplace, but is the domicile of his father (or of his mother, if illegitimate) at the time of his birth. After another domicile has been acquired, the fact that this country was a party's domicile of origin is not sufficient to give jurisdiction; *Pedie*, 5 July 1825, 1 W. & S. 710; *Sinclair*, 17 July 1860, 22 D. 1475. (2) *Domicile by Choice*. A change of domicile is possible only in the case of persons *sui juris*, and requires clear proof. "Every man's domicile of origin must be presumed to continue until he has acquired another

[sole domicile by actual residence, with the intention of abandoning the domicile of origin. The change must be *animo et facto*, and the burden of proof unquestionably lies upon the party who asserts that change;" *per* Lord Wensleydale, in *Aikman*, 12 March 1861, 3 Macq. 854. See also *Bell*, 14 May 1868, 6 Macph. (H.L.) 69; *Lawlerdale Peerage*, 1885, 10 App. Ca. 692; *Steel*, 13 July 1888, 15 R. 896; *Vincent*, 19 March 1889, 16 R. 637. Absence arising from a temporary cause, *e.g.*, on military or diplomatic service, or for the sake of health, does not effect a change of domicile; *Pitt*, 6 April 1864, 2 Macph. (H.L.) 28; *Udny*, 3 June 1869, 7 Macph. (H.L.) 89. (3) *Domicile by Operation of Law*. A wife's domicile is that of her husband. Hence an illegitimate child may be legitimated by the subsequent marriage of the parents in England, if the father's true domicile continued to be Scotch; *Munro*, and *Macdonall*, 10 Aug. 1840, 1 Rob. 475, 492; *Rose*, 16 July 1830, 4 W. & S. 289. See *Legitimation*. And if the husband's domicile be Scotch, a marriage celebrated in England may be dissolved by the Scotch courts, on account of adultery committed abroad; *Warrender* 27 Aug. 1835, 2 S. & M'L. 154; *Tulloch*, 28 Feb. 1861, 23 D. 639; *Carsewell*, 6 July 1881, 8 R. 901. But after a cause of action has arisen, it is doubtful whether a husband is entitled, by changing his domicile, to subject his wife to the jurisdiction of the courts of a foreign country; *Pitt*, *supra*; *Redding*, 22 March 1888, 15 R. 1102. In some cases the Scotch courts have recognised a matrimonial or consistorial domicile, where there was no Scotch domicile of succession, as sufficient to found jurisdiction in matrimonial actions; *Jack*, 7 Feb. 1862, 24 D. 467. But the authority of these cases has been shaken by opinions expressed in the House of Lords, to the effect that nothing short of a complete domicile of succession can give jurisdiction in actions of divorce; *Pitt*, *supra*. These opinions, however, were not necessary for the decision in *Pitt's* case; and as the theory of a matrimonial domicile, differing from the absolute domicile which rules succession, has been subsequently upheld by Lord Pres. Inglis, in *Wilson*, 8 March 1872, 10 Macph. 577, and *Stavert*, 3 Feb. 1882, 9 R. 519, and by Lord Fraser in his treatise on *Husband and Wife* (ii. 1276), the question cannot be regarded as settled. See *Mackay's Prac.* ii. 266. See *Divorce*.

[*Domicile of Citation*.]—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. [See *Joel*, 10 June 1859, 21 D. 929; *Ritchie*, 11 Dec. 1852, 15 D. 205.] 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*, 1672, M. 3724. [Residence for forty days gives no jurisdiction in actions relative to status or succession; *Ringer*, 15 Jan. 1840, 2 D. 307.] 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. 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.

See on this subject, *Ersk.* B. i. tit. 2, § 16; [B. iii. tit. 9, §§ 4, 29;] *Stair*, B. ii. tit. 2, § 17; iii. tit. 8, § 81; *Ross's Lect.* i. 492; [*Robertson on Personal Succession*, 118; *M'Laren on Wills*, § 1; *Fraser on Husb. and Wife*, ii. 1251; *Fraser on Parent and Child*, 46; *Shand's Prac.* i. 236; *Mackay's Prac.* i. 166; *Phillimore's Internat. Law*, iv. 32; *Story's Conflict of Laws*, § 39; *Guthrie's Savigny on Priv. Internat. Law*, 53; *Dacey on Domicile*.] See *Jurisdiction. Forum Competens. [Foreign]*.

**DOMINANT TENEMENT**; is the name given to the tenement or subject in favour of which a servitude exists or is constituted. See *Servitude*.

**DOMINIUM DIRECTUM** and **DOMINIUM UTILE**. In the language of the feudal law, the interest vested in the superior is called the *dominium directum*, or superiority, as being the higher or paramount right. The vassal's interest,



as contradistinguished from the superiority, is termed the *dominium utile*, or the property, as comprehending the more profitable and useful enjoyment of the subject and its fruits. Much controversy has prevailed amongst feudalists as to the philosophical correctness of those terms; but practically there exists no doubt as to their import. [In *Gardner*, 9 Feb. 1841, 3 D. 534, infetment in the *dominium directum* was sustained as a good title to pursue a declarator of non-entry.] See *Stair*, B. ii. tit. 3, § 7; *Bank*, B. ii. tit. 3, § 2; *Ersk.* B. ii. tit. 3, § 10; *Bell's Com.* i. 711; *Bell's Princ.* § 676; *Ross's Lect.* ii. 147; [*Menzies' Conv.* 668.] With regard to the nature and extent of the respective rights of the superior and the vassal, see *Superiority. Vassal. Property. [Conveyancing.]*

**DOMINIUM EMINENS**; the right vested in the supreme power of every state, in virtue of which a proprietor may be compelled to sell his property for an adequate price, when this is demanded by a necessity, or at least an evident utility, on the part of the public. The Lands Clauses Consolidation Act, 1845 (8 Vict. c. 19), contains regulations as to compulsory purchase of lands for railways and other public undertakings. See *Ersk.* B. ii. tit. i. § 2; *Rankine on Land-Ownership*, 300.]

**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*, 21 Nov. 1823, 2 S. 507. And in *Corsan*, 8 Feb. 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*. [On the other hand, in *Mathieson*, 8 Nov. 1853, 16 D. 19, one who had advanced funds, guaranteed payment of the agent's account up to a certain date, and otherwise taken an active interest in a litigation, was found not to possess the character of *dominus litis*. In that case Lord Rutherford observed—"It will not make a person liable in the expenses of an action, that he instigated the suit, or told a man that he had a good cause of action, and that he would be a fool if he did not

[prosecute it, or though he promoted it by more substantial assistance. It will not make him liable in the expenses of the suit that, while he does both of these things, he shall have some ultimate consequent benefit in the issue of that suit. But when you go a step further, and find a party with a direct interest in the subject-matter of the litigation, and through that interest master of the litigation itself, having the control and direction of the suit, with power to retard it, or push it on, or put an end to it altogether, then you have a proper character of *dominus litis*; and though another name may be substituted, the party behind is answerable for the expenses." Contrast *Jenkins*, 20 March 1869, 7 Macph. 739, with *Potter*, 19 July 1870, 8 Macph. 1064. See *Mackay's Prac.* i. 294, 312, 316; ii. 579.] See *Mandatory*.

**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*, ascribed to Lord Elchies (p. 136). Acceptance by the donee is not required to complete the donation. The Roman law allowed *beneficium competentie* 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 Competentie*. 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 *Conditio 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; but this ground of revocation was personal to the donor, and not descendible to his heirs, the presumption being that, if the donor died without revoking the donation, he had forgiven the injury. [According to Stair (B. i. tit. 8, § 2), and Bankton (B. i. tit. 9, § 4), this is also the law of Scotland; see *Ersk.* B. iii. tit. 3, § 90. But it is thought that the doctrine of revocability on account of ingratitude would not now be recognised by the court.] 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.

No deed is presumed in law to be a donation; 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 [indicate] his intention to make a gift. [Accordingly, to take an example which has frequently come up for decision, the mere possession of an indorsed deposit receipt does not infer donation of its contents. The indorsation, whether blank or specific, implies nothing more than a mandate to the indorsee to draw, and a warrant to the bank to pay the contents. An indorsee claiming the money has still to contend with the presumption against donation; but he may prove *prout de jure* that the indorsed receipt was delivered to him *animo donandi*. “In the first place, there is no doubt that such a donation may be proved by parole evidence; for the delivery of corporeal moveables or money not being generally done by writing, but simply by tradition from hand to hand, therefore as writing is not necessary to the constitution of the contract, it would be against rational legal principles that writing should be required to prove the existence of such donation. Another rule is equally well

[settled, that there is a strong presumption against donation in such a case, and it requires very strong and unimpeachable evidence to overcome it;” *per* Lord Pres. Inglis, in *Sharp*, 21 June 1883, 10 R. 1000. See also *Crosbie’s Trs.* 28 May 1880, 7 R. 823; *Thomson*, 9 Jan. 1884, 11 R. 453; *Milne*, 5 June 1884, 11 R. 887; *Macdonald*, 11 June 1889, 16 R. 758. Some previous cases (*e.g.*, *Robertson*, 9 Jan. 1858, 20 D. 371) in which parole proof was excluded, may be regarded as overruled. See *Journ. of Jurisp.* xviii. 289, 345. Delivery *donationis causa*, being proved, operates as a mandate *in rem suam* to the indorsee, which does not fall by the death of the mandant, and the *jus crediti* is thus effectually transferred to the holder; *Muir*, 15 June 1866, 4 Macph. 820. See *Deposit Receipt*.

[In certain circumstances, the presumption against donation is overcome, or rather reversed. For example, advances made by a parent, or one *in loco parentis*, are presumed to have been made *ex pietate*, in the absence of evidence to the contrary; *Forbes*, 4 Nov. 1869, 8 Macph. 85.] 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. [See *M’Gau*, 10 Nov. 1882, 10 R. 157.] 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*, 19 Jan. 1830, 8 S. 332. 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; [*Gordon*, 1757, M. 11161. See *Aliment. Debitor Non Presumitur Donare*.] See *Stair*, B. i. tit. 8, § 2; *Bank.* B. i. tit. 9, § 1 *et seq.*; *Ersk.* B. iii. tit. 3, § 88; [*Dickson on Evidence*, i. § 158; *Kirkpatrick*, §§ 143, 159; *M’Laren on Wills*, ii. § 1588.]



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 his favour, revocable at the granter'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 granter's life, his creditors are preferable to the grantee. But where they become good by the granter'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 granter; *Boston*, 1781, M. 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 granter's death, delivered and irrevocable, is not a donation *mortis causa*, but an absolute right; *Bank. B. i. tit. 9, § 18*.

[Such is the account given by Bankton of *donatio mortis causa*, which agrees, for the most part, with the doctrine of the Roman law. Erskine says that this kind of donation is little known in our practice, and down to a recent date it obtained very doubtful recognition. Thus, Lord Glenlee is reported to have observed that "we have nothing like the Roman doctrine as to their peculiar *donatio mortis causa*;" *Duguid*, 29 June 1831, 9 S. 844; see also Lord Ivory, in *Miller*, 3 Feb. 1859, 21 D. 388. On the other hand, in *Mitchell*, 21 Nov. 1759, F.C., M. 8082, and *Fyfe*, 6 March 1847, 9 D. 853, such donations were expressly recognised; see also *Kennedy*, 8 July 1863, 1 Macph. 1042 (Lord Curriehill). It was in the leading case of *Morris*, 16 July 1867, 5 Macph. 1036, that the doctrine as to this institute was first settled and defined. Lord Pres. Inglis there said:—"Donatio mortis causa in the law of Scotland may, I think, be defined as a conveyance of an immoveable or incorporeal right, or a transference of moveables or money by delivery, so that the property is immediately transferred to the grantee, upon the condition that he shall hold for the granter so long as he lives, subject to his power of revocation and, failing such revocation, then for the grantee on the death of the granter. It is involved, of course, in this definition, that, if the grantee predecease the granter, the

[property reverts to the granter, and the qualified right of property, which was vested in the grantee, is extinguished by his predecease." Lord Deas, in the same case, expressed the opinion that a *donatio mortis causa* takes effect only in the event of death occurring from the existing illness, otherwise it falls to be returned, revocation being inferred in case of recovery; see also *dicta* in *Milne*, *supra*, 11 R. 887. But this view was corrected by the decision in *Blyth*, 20 Feb. 1885, 12 R. 674; where it was held unnecessary to the validity of such a gift that it should have been made under an immediate apprehension of death. It was held sufficient in that case that the gift was made in contemplation of death, i.e., "the deceased had it in his mind that life was short and uncertain, and that there was a probability that his wife would survive him" (*per* Lord Shand). But it was observed that "the state of the donor's health, his prospect of life, and, above all, his own feelings and belief on this matter, are relevant and important considerations in such a case, as bearing on the proof of the *animus donandi*, and also as tending to show whether the gift is meant to be absolute or *sub modo*" (*per* Lord Pres. Inglis). Writing is not necessary to the constitution of *donatio mortis causa*; nor is actual delivery of the subject; *Gibson*, 5 July 1872, 10 Macph. 923; *Blyth*, *supra*; *Connell's Trs.* 16 July 1886, 13 R. 1175. The presumption of law is against donation *mortis causa*, as well as *inter vivos*; but it may be rebutted by parole proof in the one case as well as the other. See *Sharp, Crosbie's Trs.* and *Thomson*, *supra*; also *Ross*, 7 Dec. 1871, 10 Macph. 197; *Jamieson*, 13 July 1880, 7 R. 1131; *Galloway*, 8 Feb. 1884, 11 R. 541. See *Bank. B. i. tit. 9, §§ 16 et seq.*; *Ersk. B. iii. tit. 3, § 91*; *Bell's Princ.* § 1874; *Dickson on Evidence*, i. §§ 161, 634; *M'Laren on Wills*, i. § 739.]

3. *Donations Inter Virum et Uxorem*.—All deeds importing donation, 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*. But mutual remuneratory grants between the spouses

are not revocable, where there is any reasonable proportion between the two; *Hepburn*, 6 June 1814, 2 Dow, 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 survivance; 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 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. 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 granter has previously divested himself; *Handyside*, 1699, M. 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; [see *Wright's Exrs.* 24 Jan. 1880, 7 R. 527; *Honeyman & Wilson*, 7 Dec. 1886, 14 R. 163;] 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 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 confirmatur*. [Decree of divorce for adultery operates as a revocation of a donation made to the guilty party; and also as a bar to revocation by the offending spouse.] It has even been held that, to give effect to a revocation, a guilty husband must prove that it was executed before commission of the crime, as well as before sentence of divorce; *Murray*, 1576, M. 328. The presumption of law is against this, as well as other kinds of donation, but it may be overcome by proof *prout de jure*; *Thomson*, 8 June 1882, 9 R. 911; *Smith*, 26 Nov. 1884, 12 R. 186.] See *Stair*, B. i. tit. 4, § 18; *Bank. B. i. tit. 5, § 96*; *Ersk. B. i. tit. 6, § 29*; *Bell's Princ.* § 1616; [*Fraser on Husb. and Wife*, ii. 916; *Dickson on Evidence*, i. § 164. See *Revocation. Divorce*.]

4. *Donations Propter Nuptias*.—In the Roman law, *donationes propter nuptias* are described as that sum or subject, given by the husband in security of 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.* 101; *Bank. B. i. tit. 5, § 6*; *Ersk. B. i. tit. 6, § 46*. See *Contract of Marriage*.

**DONATORY.** A donatory 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 heres*, or the like. *Ross's Lect.* i. 208. See *Escheat. Gift*.

**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. [See *Mackay's Prac.* i. 38.] 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, 16 March 1773, and the sentence ordained to be pronounced in future by the presiding judge. *Hume*, ii. 3, 472; *Ersk.* B. iv. tit. 2, § 39.

**DOOMSDAY BOOK.** See *Domesday Book*.

**DOOR, CHALKING OF.** See *Chalking of Door*.

**DOORS, LETTERS OF OPEN.** See *Open Doors*.

**DOQUET.** See *Docquet*.

**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 husband, *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. *Ross's Lect.* i. 19. See *Interest*.

**DOUBLE DISTRESS.** Where arrestments are 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 is called an action of *double* or of *multiple* pointing; because pointing anciently denoted any distress or diligence. *Stair*, B. iv. tit. 16, § 3; *Bank.* 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. 414 *et seq.* Questions of considerable difficulty arise on bankruptcy in the ranking of double securities. See *Catholic Creditor*. [*Sequestration*.]

**DOUBLES OF SUMMONSES**; [are copies served on defenders when the summonses are executed. See *Summons. Citation. Will*.]

**DOVECOT.** By 1617, c. 19, no person is entitled to build a dovecot or pigeon-house, either in town or country, unless he has 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. Nor is it 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*, 1752, M. 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. See *Ersk.* B. ii. tit. 6, § 7; *Bank.* B. ii. tit. 3, § 167; *Stair*, B. ii. tit. 3, § 78; *Bell's Princ.* § 975; *Ross's Lect.* ii. 173; [*Rankine on Land-Ownership*, 129.] Dovecot breakers, and stealers of pigeons therefrom, are declared guilty of theft; and, in addi-

tion 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 might be capitally punished, even by an inferior court; 1474, c. 61; 1579, c. 84; *Hume*, i. 80; *Ersk.* B. i. tit. 4, § 4. [It is not relevant to justify a tenant in shooting his landlord's pigeons, to allege that they are destructive to his farm; *Easton*, 18 May 1832, 10 S. 542.] 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*, 1797, M. 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.

**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 assignment, and the proper evidence of the completed transfer is the protest for non-acceptance. [See *Cheque. Bill of Exchange*.]

**DRAWER AND DRAWEE OF A BILL**. See *Bill of Exchange*.

**DRAWN TEIND**; was the *ipsa cor-*

*pora* 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 authorise 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*.

**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 60 Geo. III. c. 1, 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, or imprisoned for 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. *Alison's Princ.* 595. See *Treason. Sedition*.

**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. [*Aubaine*



[is from *alibi natus*.] See *Ersk. B. iii. tit. 10, § 10*; [*Blackstone* (11th edit.), i. 372.]

**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*, 1773, M. 14512. [But the existence of such a road does not give a general right to drove-stances, for resting and pasturing the cattle; *M. Breadalbane*, 14 July 1848, 7 Bell's App. 43.] See *Servitude. Road*.

**[DRUNKARDS, HABITUAL.** By 42 & 43 Vict. c. 19, the justices of peace in counties, and the magistrates in burghs, may license retreats for habitual drunkards; and any habitual drunkard may, on his own application, and on complying with certain formalities, be admitted to a retreat for the time specified in the application. He may be discharged at any time after admission, by order of a justice, on a written request by the licensee of the retreat. The act provides for inspection of retreats, and for temporary leave of absence being granted during the period of detention. The continuance of this act was limited to ten years. But the limitation was repealed, and the act otherwise amended, by 51 & 52 Vict. c. 19.]

**DRUNKENNESS.** 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. [By the Public Houses Act, 1862 (25 & 26 Vict. c. 35, § 23), persons found intoxicated and incapable of taking care of themselves are guilty of an offence, punishable by fine or imprisonment; and by the General Police and Improvement Act, 1862 (25 & 26 Vict. c. 101), § 254, the like penalties are

[enacted against drunkenness accompanied by riotous or indecent behaviour in the streets. See also Edinburgh Police Act (42 & 43 Vict. c. 132), §§ 247 (6), 248 (4).] 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; [*Macdonald*, 13; *Stephen's Digest*, art. 29; but see *Brown*, 15 March 1886, 13 R. (J.C.) 50.] 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; [*Johnston*, 19 Dec. 1854, 17 D. 228; *Taylor*, 16 June 1864, 2 Macph. 1226; *Pollok*, 3 March 1875, 2 R. 497.] Drunkenness, as a ground of nullity, is not pleadable by way of exception. See *Stair*, B. i. tit. 10, § 13; and B. iv. tit. 20, § 49; *Bank. B. i. tit. 9, § 66*; *Ersk. B. iii. tit. 1, § 16*; *More's Notes*, xiv., lix.; *Bell's Com. i. 317*; *Bell's Princ. § 14*; [*Illust. ib.*; *Menzies' Conv. 44*; *M. Bell's Conv. i. 142*.]

**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. 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 59 Geo. III. c. 70. [Where no fatal result ensues, duelling may be prosecuted as a police offence, being a breach of the peace; *Burns*, 6 Jan. 1842, 1 Broun, 1.] See *Hume*, i. 230, 247, 442; *Ersk.* B. iv. tit. 4, § 49; *Alison's Princ.* 53; [*Macdonald*, 124.] See *Homicide. Challenge.*

**DUELLUM**; "duorum bellum vel plurius," single battle or combat. *Skene, h. t.*

**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.* ii. 3; *Bell's Princ.* §§ 1261, 1475; *Roxburgh*, 1816, *Hume's Dec.* 867, revd. 2 Bligh, 156; *Hunter's Landlord and Tenant*, i. 329, 390; [*Rankine on Leases*, 374.] See *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; *Cubbison*, 1716, M. 16988. See *Hunter's Landlord and Tenant*, i. 402; [*Dickson on Evidence*, § 228, 882, 897.]

**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.*; [*Pollock on Contract*, 553; *Anson on Contract*, 171. A contract made under duress is not void, only voidable. Contrast the law of Scotland, under *Force and Fear.*]

**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-Poudreux*, and in Scotland of *Dusty-Foot*. See *Regiam Majestatem*, *Burrow Laws*, c. 134, 140; *Kames' Stat. Law*, 412, note 5. See also *Tomlins' Dict. voce Court.*

**DWELLING-HOUSE.** 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.* i. 335; *Bell's Com.* ii. 461. See *Caption*; also *Hamesucken. Citation. Execution. Criminal Prosecution. Domicile. [Election Law. Houses.]*

**DYING DECLARATION.** See *Declaration. [Deposition.]*

**DYVOUR** or **DYOUR**; according to Skene, is a bankrupt or "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 A.S. 17 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 A.S. 26 Feb. 1669, and 23 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 A.S. 18 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 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 *cessio bonorum*, it was the practice, until the passing of the cessio act, 6 & 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. In *Drysdale*, 1752, M. 11781, and *Dick*, 1775, M. 11791, where the bankrupt's losses had arisen from dealing in smuggled goods, the court granted the benefit of cessio, but refused to dispense with the habit. See *Stair*, B. iv. tit. 52, § 34; *More's Notes*, cccxxxvii.; *Ersk.* B. iv. tit. 3, § 27; *Bell's Com.* ii. 471; *Skene*, h. t.

## 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 *Vicecomites* 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 personal, 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*, 53; *Tomlins' 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. In hiring domestic servants, it is usual [in some localities] 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. [There may, however, be *locus pœnitentiæ* till arles be given, if such be the uniform and notorious custom of the locality.] See *Stair*, B. i. tit. 14, § 3; *More's Notes*, xcvi.; *Brodie's Supp.* 853; *Ersk.* B. iii. tit. 3, § 5; *Bank.* B. i.