TRANSLATION AND EXPLANATION

OF THE PRINCIPAL

TECHNICAL TERMS

AND

PHRASES

USED IN

MR ERSKINE'S INSTITUTE

OF THE

Law of Scotland,

IN THE ORDER OF THE BOOKS, TITLES, AND SECTIONS;

WITH A

COPIOUS INDEX MATERIARUM.

BY

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SOC. EXTR. REG. PHYS. SOCIET.

Author of the Compendium of the Faculty Collection of Decisions, and Continuation thereof; An Extensive Collection of Latin Maxims in Law and Equity, from Eminent Authors, on the Canon, Civil, Feudal, English, and Scots Law, with an English Translation, and Reference to the Authors; An Analysis of the Act of Parliament 6 Geo. IV. c 120, and Relative Acts of Sederunt of the Lords of Council and Session and Jury Court; and a Digest on the Marriage Law of Scotland.

THE SECOND EDITION;

REVISED, IMPROVED, AND MUCH ENLARGED.

Ignorantia juris neminem excusat.

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1829.

PREFACE TO THE FIRST EDITION.

THIS Work is offered to the Public with the utmost deference. The Author's object in it is, to explain the Latin Terms and Phrases which occur in Mr Erskine's invaluable "Institute of the Law of Scotland." He does not suppose that those who peruse that Work are unable to translate or understand Latin terms and phrases; but he may safely say, that they are often passed over, by the readers of Mr Erskine's Institute, without any particular attention, and without any attempt being made to ascertain their true meaning, and the bearing they have upon the text. He therefore flatters himself, that this Work will not prove unacceptable to the profession, as well as to general readers, who will there find an explanation of terms and phrases which often occur in law books and papers, and which, without such explanation, must be unintelligible to many whose interest it is to understand them.

This Work has cost the Author more labour than the Public will be disposed to allow,—but he will be satisfied, if it shall be found to be useful in assisting the studious reader to understand terms and phrases, in many instances by no means unobscure.

The Work is arranged in the order of Mr Erskine's Institute, by the Books, Titles, and Sections. There are added, a correct Table of the *Induciæ Legales* of Summonses before the Court of Session, which will be found to be convenient to practitioners, and a correct Note explanatory of the laws and privileges of the Sanctuary of Holyroodhouse, which the Author has no doubt will be found useful. There is likewise added, a copy of a Latin Charter of Lands held Soccage, for the amusement of the curious.

Edinburgh, November 1820.

PREFACE TO THE SECOND EDITION.

THE original design of this work was, not to supply the professional readers of Mr Erskine's invaluable "Institute of the law of Scotland" with a mere translation of the Latin Terms and Phrases which occur in it, for he never supposed that those who professionally perused that work could not translate these terms and phrases for themselves; but the Author's chief object was to give a translation according to the idiom of the text, which bears closely upon the Latin phrases, and to illustrate fully their meaning and application, in such a way as to impress more deeply upon the mind the legal principles which they contained or were employed to establish. The rapid sale of the first edition, and the many applications for a second, have induced the Author to conclude that his design was not considered to be useless. And as the work has been for a considerable time entirely out of print, he was induced to undertake this second edition, in which he has not only improved

the translations, but greatly enlarged the explanations and illustrations, and rendered it almost an entire new work. The labour bestowed on this new and much improved edition has been by far more arduous and greater than the public will readily believe. The author will not, however, regret that labour, if this new edition be found more useful to the public, and to those studying the laws of their country, than its predecessor.

The work is printed in a more convenient form than the first edition, and the Index Materiarum is greatly improved. The same appendix as in the first edition is given in the second, with the addition of a beautiful legitimate maxim, or phrase, L. 1. ff. *De regulis juris antiqui.*

22, Nicolson Street,
Edinburgh, 13th November 1829.

A

TRANSLATION AND EXPLANATION

OF THE PRINCIPAL

TECHNICAL TERMS AND PHRASES

USED IN

MR ERSKINE'S INSTITUTE OF THE LAW OF SCOTLAND.

IN THE ORDER OF THE BOOKS, TITLES, AND SECTIONS.

BOOK I.—TITLE I.

Of Laws in general.

Sect.

2. *Jurisprudentia.* — According to Justinian, 'JURISPRUDENTIA *est divinarum atque humanarum rerum notitia, justi atque injusti scientia.*'—That is, the knowledge of things human and divine, the science of right and wrong. It is translated by the word *jurisprudence*, signifying the science of law in general; and Mr Erskine calls jurisprudence 'the particular rule 'to which science is applied;' or it is the command of a sovereign or superior power, whether lodged in the hands of one or many, comprehending a rule of life for

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his subjects, and obliging them to obedience.

4. *Ex. gr.* a contraction for *exempla gratia.*—For the sake of example, for instance, to fulfil an engagement.

Justitia.—Justice, equity, or the conformity of our actions to law and equity, are, or ought to be the same, for what is not equity will not be found to be law. Ulpan, after the Stoic philosophy, defines it to be—'*Justitia est constans et perpetua voluntas jus suum cuique tribuendi,*' or a constant and perpetual inclination to give to every man what is due to him; for every one knows, without the aid of reason, that we ought to act to one another what we ourselves in the like circumstances would expect.

5. *Sancire.*—To confirm, sanction, or establish. That part of the law which inflicts the punishment upon disobedience is called its *sanction*; though it may not be expressed is implied; hence a judge may inflict punishment upon a transgressor according to the demerit of the offence.

18. *Civitas.*—A state or kingdom having power to make laws for the government of its own subjects.

Municipia.—Inert cities, dependent on Rome,

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and were allowed certain privileges as Roman citizens. States dependent upon some other state, but possessed of the privilege of enacting their own laws. The laws enacted by any independent state are now called the *Municipal* laws of the country; or, in a more limited sense, the enactments and rules within a barony or district, may be termed *municipal*; or, according to Sir George Mackenzie, B. 1. t. 3. § 9. 'Our municipal law of Scotland 'is made up partly of our written and 'partly of our unwritten law. Our written law comprehends, First, Our statutory law, which consists of our statutes 'or acts of Parliament; Second, The acts 'of Sederunt, which are Statutes made 'by the Lords of Session, by virtue of 'a particular act of Parliament, King 'James V. act 93, empowering them to 'make such constitutions as they shall 'think fit, for ordering the procedure and 'forms of administrating justice; and 'these are called Acts of Sederunt, because they are made by the Lords sitting in judgment, but are not properly 'laws, the Legislative power being the 'King's prerogative.' And he adds, that

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our Municipal law includes the books of *Regiam Majestatem, Leges Burgorum,* and other tracts noticed by Skene.

19. *Posteriora derogant prioribus.* — Posterior enactments abrogate or repeal prior ones; *L.* 4. *De const. princip.—ex. gr.* The right of legislation, in making, abrogating, or altering former laws, resides in the supreme power of any country.

21. *Ignorantia juris neminem excusat.*—Ignorance of the law excuses nobody for breaking it, because all persons are bound to know the law; *L* 19. *p. et* § 3. *De jure et fact ign.* This rule is universally admitted after the law is promulgated, and is as applicable to foreigners as to natives; but he may plead ignorance of the fact, as in the case of a mandatary acting under a mandant when he knew not that he was dead.

22. *Communia praecepta.* — Common precepts, rules, or regulations.

Communes reipublicae sponsiones.—The common obligations upon the inhabitants of a kingdom or state to observe the laws.

Privae leges.—Privileges, or private laws, applicable to certain individuals, or to corporations, but not applicable universally.

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28. *Canon.* — A rule, embracing the *decretum* or *decretalia*; *vide* next phrases; also Craig, B. 1. tit. 3. § 2. for a short and distinct account of the Canon law on this point.

Decretum.—A decree or sentence,—used to denote a collection by Gratian, a Benedictine monk, made from the opinions of the fathers, popes, and church councils.

Decretalia.—Decretals, a collection of decrees made by Pope Gregory from the decretal rescripts, or epistles of the popes.

32. *Regiam Majestatem.*—A system of old laws, supposed to have been compiled by order of King David the First.

Leges burgorum—Borough laws, also ascribed to King David the First, contained in the work called the *Regiam Majestatem.* In the books of *Regiam Majestatem* there is a strain of English law and phrase altogether unknown in ours. The fragments of civil law contained in these books could hardly have reached Scotland in David's time. It came only to be revived in Italy in the end of his reign.—*Vide* Craig, B. 1. tit. 8. § 7. Stair, p. 13.

35. *In libero sochagio.*—In free soccage, an ancient tenure of lands, by which the vassal was bound to perform agricultural

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services to the superior. *Vide* the end of this work for a curious copy of a Latin charter of lands held in free soccage, supposed to have been granted nearly five centuries ago.

35. *Per subsequens matrimonium.*—By subsequent marriage ; applicable to the legitimation of children by the marriage of their parents subsequent to their birth. In support of this maxim, a learned civilian says, *matrimonium subsequens tolit peccatum præcedens*, or subsequent marriage takes away the preceding transgression. This rule may be held to be a powerful inducement to subsequent marriages, as thereby they are held not only to be lawful, and the children legitimate, but the previous transgression is swept away. By our law, marriage may be established several ways, 1st, In *faciae ecclesiae*, termed regular, Act 1661, c. 34. and 10 Ann, c. 7. :—2d, By the above rule of subsequent marriage ; Walker *v.* M'Adam, 4th April 1807 :—3d, By habit and repute as man and wife ; M'Kenzie and children *v.* M'Kenzie, 8th March 1810 ; Fac. Col. Mor. p. 287 :—4th, By written declarations *de praesenti* ; Inglis *v.* Robertson, 14th Feb. 1789 ; Fac. Col. Mor. p. 12,698 :—

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5th, By verbal declarations *de praesenti*; Young *v.* Dr Arnot, 8th Dec. 1738; Elchie's Proof, No. 4.:—6th, By judicial declarations; Pennycook and Son *v.* Grinton and Graitie, 15th Dec. 1752; Fac. Col. Mor. 12,667:—7th, By promise and subsequent *copula*; *Ibidem.*

36 *Assisa Regis Davidis.*—The law or assize of King David.

Quoniam attachiamenta.—One of the books of the *Regiam Majestatem*, so called because it begins with these words, which signify since attachment.

Iter Camerarii.—Another of the books of the *Regiam Majestatem*, meaning the chamberlain ayre, or circuit of the chamberlain,—during which, in former times, he judged betwixt burgesses, and in all matters relative to the public police within boroughs.

Statuta gildae.—The laws of the guildry, said to have been enacted by the magistrates of boroughs, and perhaps embracing part of the *Regiam Majestatem.*

38. *Jus regium.*—The royal law, enacted by the King, and consented to by the Parliament,—*Vide* Sir George M'Kenzie's Institutions, and his *Jus Regium* at great length; or the written law enacted by

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the King alone, and the Parliament did no more than consent.

38. *Placuit regi et concilio suo.*—It has pleased the King and his council, being the first words of the first statute of King William.

Rex statuit per communi concilium.—The King has decreed, by the advice of his common council or Parliament; so expressed in the statute 9 of William.

39. *Periculo petentium.*—At the risk of the applicants, relating to applicants for private acts of Parliament which could not affect third parties.

Res inter alios acta aliis non nocet.—No person is allowed to be hurt by a transaction among other persons to which he is not a party, and such transactions are subject to reduction by the Court of Session.—Act 1567, c. 18. No. 1.

Salvo jure cujuslibet.—Saving and reserving every person's right or interest according to law; or a clause sometimes thrown in at the end of charters, reserving all persons right according to law.

40. *Vide infra.*—See below.

49. *i. e.*—A contraction for *id est*, that is.

A rubro ad nigrum.—Literally, 'from the 'red to the black,' in reference to the ancient practice of printing the titles of

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acts of Parliament in red, thence called the *rubric*, and the acts themselves in black. The meaning of the phrase is, that, in construing an act of Parliament, an argument may be drawn *from the title to the act itself.*—*Vide* M'Kenzie's Observations on the act 1424, c. 23

49. *Ex ingenio.*—According to the judgment or understanding of the clerk-register who framed the rubrics of the statutes; perhaps applicable to statutes which treat of matters concerning which common people do not usually advise with counsel, but trust to their own uninformed judgments.

51. *Ad captum vulgi.*—According to the understanding of the common people,—in a popular style.

52. *Ibid.*—A contraction for *ibidem*, the same.

57. *Casus omissus pro omisso habendus est.*—A case omitted is to be held as omitted; meaning, that cases omitted, however similar to those not excepted, are, in construing statutes, to be held as really and truly intended to be excluded.

Non entia.—Nonentities, non-existences, or cases that had not emerged at the time of an enactment.—*Vide* Bacon, Aphor. 20.

BOOK I.—TITLE II.

Of Jurisdiction and Judges in general.

Sect.

2. *Imperium mixtum.*—Mixed power, the power in judges of executing their sentences in civil matters; in opposition to the right of executing criminal sentences; *L.* 3. *De jurisd.*

Imperium merum.—Pure power, the right of executing criminal sentences; formerly in the power of the Barons, now in the High Court of Justiciary, Sheriff-depute, &c.

Jus gladii.—Literally, the right of the sword, the right of executing criminal sentences.

Inhaerere jurisdictioni.—To be inherent in jurisdiction; alluding to the *imperium mixtum*, which is inherent in jurisdiction.

2. *Judices pedanei.*—Inferior judges, delegated to hear and decide in a variety of causes, but without the right of execution, which was reserved to the *prætor* himself.

4. *Jurisdictionis contentiosae.*—Of contentious jurisdiction, in opposition to voluntary.

Pro tribunali.—Before the court, or in the presence of the judge in open court.

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4. *Voluntariae jurisdictionis.*—Of voluntary jurisdiction, or that which admits of no opposition, as in the next article.

Extra territorium.—Beyond the territory, over which the judge has jurisdiction; in reference to services which take place beyond the jurisdiction of the person served, and to ratifications by married women, who may lawfully make oath beyond their jurisdiction. Fount. Feb. 3. 1688; Cochrane.

Fictio juris.—A fiction, or supposition of law, as in the registration of deeds, in which a judicial sentence is prefixed to extracts, as a mere fiction or supposition of law.

6. *Magistratus majores.*—Superior magistrates, or supreme courts, possessed of the power of reviewing their own definitive judgments. The Court of Session, as the supreme civil court, have the right not only of reviewing their own sentences, but those of inferior judges. The High Court of Admiralty and Commissary Court at Edinburgh have the right of reviewing subordinate courts of the same jurisdiction.

7. *In dubio.*—In doubt, or uncertainty. Juris-

diction ought to be amply interpreted, and ought not to remain *in dubio.*

9. *Jure praeventionis.*—By right of preference; having reference to the right acquired by the court before which a cause is first brought, to prevent any other court of the same jurisdiction from interfering.

In publicam vindictam.—For vindicating the public interest, having reference to prosecutions for the sake of public example. Public policy requires that crimes should not remain unpunished, but inflicted without delay, *in terrorem* of others committing crime in future.

13. *Potestas gladii.*—Literally, the power of the sword, the power of judging in criminal cases involving life, &c. It is either proper or delegated. Proper belongs to the judge himself, or delegated by the judge to another, who is called his depute or substitute.

14. *Vide supra.*—See above, or before, in reference to a former section, passage, or doctrine.

16. *Ratione domicilii.*—Jurisdiction against a person is founded *ratione domicilii*, that is, on account of his domicile or residence within the territory of the judge.

17. *Ratione rei sitae.*—Jurisdiction against a

person is founded *ratione rei sitae*, that is, on account of the situation of the subject of controversy within the judge's territory.

18. *Commune forum.*—The common forum, or, in Scotland, the Court of Session.

Locus rei sitae.—The place where the property in dispute is situated. Questions regarding immoveable property can only be tried in the common forum within which it is situated.

19. *Arrestum jurisdictionis fundandae causa.*—An arrestment for the sake of establishing or founding jurisdiction, necessary to be used in all actions against foreigners, who have only moveable property in this country: and, generally, unless they have moveable property in this country, they cannot be made amenable to its laws.

Nexus.—Arrestment, tie, or the diligence of an arrestment used by a creditor in the hands of a third party indebted to the common debtor. An arrestment is considered to be a severe measure, if used upon a depending action, and before the debt becomes due, unless the debtor is *vergens ad inopiam*. Even in this case

it may prove destructive when the pursuer loses his suit.

19. *Judicio sisti.*—Caution *judicio sisti* is an obligation undertaken by the cautioner to sist the party in court when required to do so, under the penalty of being obliged to answer for him.

Judicatum solvi.—Caution *judicatum solvi* is an obligation to pay the sum that shall be found due. In all maritime cases in the Admiralty Court, the defenders are obliged *ante omnia* to find this caution.

Animo remanendi.—With the intention of remaining; as in the case of a Scotsman going abroad with the intention of not returning, or an Englishman coming here with the intention of remaining.

Ratione originis.—On account of the place of birth, a person is sometimes liable to the jurisdiction of the common court of the country.

20. *Ratione contractus.*—On account of the contract having been entered into at the time the defender had his domicile within a particular judge's territory, he may sometimes be sued before that judge, though he should not have his domicile there when the action is brought; *ex. gr.* as in the case of a marriage solemnized in Scot-

land, a declarator of marriage may be sued in this country, although one of the parties has withdrawn from it; June 11. 1745, Dods *v.* Westcomb; Kilk. Mor. p. 4,793-4.

21. *In meditatione fugae.* — In meditation of flight, or of absconding from the country. To justify an application of this sort, the creditor must depone before a judge, and satisfy him that he has good grounds to suspect and believe in his conscience that his debtor, whether a native or foreigner, intends to leave the country to defraud him of his just debt, to which he will make oath in the usual form. Damages will be awarded if there be not good grounds for this measure. See the case of Brown, Nov. 16. 1791, Mor. p. 11,763; also Tate's Justice of Peace, p. 222.

23. *Ratione delicti.*—On account of the offence having been committed within the judge's territory, jurisdiction is also founded against the delinquent.

Locus delicti.—The place where the crime or offence was committed. This alludes to the jurisdiction within which criminals may be tried—1460, c. 90; 1436, c. 148, &c.—either at the Circuit Court of the district where the crime was committed, or

before the High Court of Justiciary at Edinburgh. This court was settled by the act 1672, c. 16. and consists of the Lord Justice-General, the Lord Justice-Clerk, and five Lords of Session; the quorum of the court consists of three judges—1681, c. 22-23, Geo. III. c. 45. No appeal lies from the decisions of this high court, whether interlocutory or final, to the House of Lords or other court.—Ersk. B. I. tit. 3. § 34. et seq.; Hume, Vol. II. p. 1. et seq. By Stat. 20 Geo. II. c. 23, Circuit Courts were established regularly twice a year, in spring and autumn. It is competent for one judge to preside at the circuits; and the Circuit Court has also a civil jurisdiction, by way of appeal, where the value in dispute does not exceed L.25.

24. *Ratione causae.*—On account of the nature of the action, a Judge may be declined, or his jurisdiction excepted to. For example, the jurisdiction of a sheriff may be declined in actions regarding heritable property; the jurisdiction of the Court of Session in all criminal causes; and the jurisdiction of every other Court but the Court of Admiralty, in all maritime causes.

Ratione privilegii.—On account of privilege; for example, members of the College of Justice are amenable only to the jurisdiction of the Court of Session.

In fine.—Towards the end, or conclusion.

25. *Ratione suspecti judicis.*—On account of the judge being suspected of partiality his jurisdiction may be declined, which is presumed in all cases in which his near kinsmen are concerned.

26. *Fovere consimilem causam.*—To favour a similar action. *Ex. gr.* when a judge is a party to a cause similar to that brought before him, he is said by the canon law *fovere consimilem causam*, and may be declined; *Decreet. l.* 2. *tit.* 1. *c.* 18.

27. *Jurisdictio in consentientes.*—Jurisdiction depending upon the consent of parties. Among the Romans this jurisdiction was similar to our jurisdiction by prorogation. It is inferred against a pursuer by his bringing his cause before the judge, and against a defender proponing defences either dilatory or peremptory.

Primus actus judicii est judicis approbatorius. The first judicial act is held to be an approbation of the judge's power, so as to bar all future objection to his jurisdiction.

28. *Quodammodo jurisdictionis voluntariae.*—After the manner of voluntary jurisdic-

tion; and is confined to the registration of deeds having a clause of registration in any books competent, and has the effect to support the diligence which is founded on the registration.

29. *Prorogatio de tempore in tempus.*—A prorogation or adjournment from time to time. Prorogation cannot take place after the jurisdiction of the judge is vacated, or the time expired, even by consent.

Extra territorium.—Beyond the bounds of the judge's jurisdiction. For, beyond it, a judge is held to be none other than a private person.

Prorogatio de loco in locum.—A prorogation from one place to another. A party cannot subject himself to the jurisdiction of a judge while he is beyond his territory; but prorogation may be inferred when a defender shall exhibit defences *in causa* before a sheriff or other judge within whose jurisdiction he does not reside.

In causa.—On the merits of the action. Referring to defences being given in on the merits against a suit.

Praescriptio fori.—An exception to the forum Or, a party is so understood as to acquiesce in the jurisdiction, when he resides within the territory of the judge.

30. *De causa in causam.*—Jurisdiction is said to be prorogated *de causa in causam*, from one cause to another, when the parties consent that a judge who has jurisdiction in one cause shall judge in another in which he has no jurisdiction. This appears to be repugnant to reason, because the consent of the parties cannot give validity to a sentence pronounced by a judge, in the case of which the law denies the cognition; Mathie *v.* The Commissary Clerk of Edinburgh, 23d June 1705.

32 *Litem suam fecerit.*—Shall have made the cause his own; shall have erred, either through ignorance or corruption. In reference to judges' wilfully delaying or perverting judgment, of which we have no instances, to the honour of our country.

In apicibus juris.—In the quirks, niceties, or subtleties of the law, usually employed when a person strains a rule of law to its utmost limits, and when its application is attended with the utmost doubt and uncertainty; *vide* the learned and enlightened speech of the late Lord Meadowbank, in the case of Harvie *contra* Buchanan, 12th Dec. 1811:—or as Terence expresses it, *jus summum saepe summa est malitia.* Law, enforced to strictness,

sometimes becomes the severest injustice; or, according to the eminent and learned Judge Sir John Coke, "*Apicis juris non sunt jura.*" The extreme points of the law are not the law. The rigour of the law is not always to be considered unjust, but merely as a rule that is inflexible, which nevertheless has its justice; as in those cases where the law being designedly rigorous, the severity would destroy the law.

Ad vitam aut culpam.—During life, or good behaviour. Public offices (civic or magisterial offices excepted) are generally held for life, or fault, as a guard for good behaviour.

Lata culpa aequiparatur dolo.—A gross fault is held to be equal to bad intention. A sentence glaringly illegal is held to imply a perverse will.

33. *De fideli administratione.*—An oath taken by a person for the faithful discharge of the duties of an office, administered by a judge when the person enters upon it. The oaths imposed by our law upon our judges are; 1*st*, The oath of allegeance with the assurance, 1693, c. 6.—2*d*, The oath of abjuration, 6 Anne, c. 14.—3*dly*, Oaths of supremacy, 1 Geo. I. c. 13. imposed upon all officers civil and

military in Britain; and the oath *de fideli administratione*, as in this phrase.

BOOK I.—TITLE III.

Of the Supreme Judges and Courts of Scotland.

3. *Barones Majores.*—Greater Barons, so distinguished by their patents of peerage, and dignified with the title of Duke, Earl, Lord, &c. and so raised above the rank of common barons. We find this vocable used in France, sometime before the Roman conquest, to denote persons of the first dignity. After its translation into Britain its signification became more extended, and frequently included persons holding lands of the crown.

Barones Minores.—Inferior Barons. These inferior barons had no right to sit in Parliament, unless they were elected by the freeholders, agreeably to the directions of Parliament, 1427, c. 102. These lesser barons had no hereditary right to sit in Parliament, and could not be elected members unless they held lands in property or superiority of the crown, extended either to 40s. Scots of old extent, or to 400 Scots of valued rent,—1682, c. 21.*

* In remote times, some members of the Scotch Parliament received 6s. 8d. per diem, or, as it may now be rated at, 50s. Some of the districts of burghs withdrew this allowance, and lost their franchise, but retaining the magistracy and other privileges.

5. *Dabator cœteris licentia recedendi.*—Permission was given to the rest to recede or go away. The Committee of the Lords of the Articles were elected in the beginning of every Parliament, after which the Parliament was adjourned, and permission given to the rest to go away.

12. *College of Justice.**

19. *Cessiones bonorum.*—Ceding or giving up effects. It refers to one of those suits wherein the Court of Session has a primary jurisdiction. When a debtor obtains a decree of *cessio,* he grants a disposition *omnium bonorum* to his creditors, and obtains a discharge from the court.

21. *Ad civilem effectum.*—To the effect of giving reparation to the private party.

22. *Nobile officium.*—Noble or dignified office,—super-eminent power. It is inherent more or less in every civilized state, and exercised most properly by our Supreme Court, in inquiries into facts or steps to be taken in a cause, and even inflicting punishments against delinquents; but it cannot be demanded by a party as matter of right.

Ex Officio.—Officially, from or belonging to

* The College of Justice was instituted by James V. in 1532, after the model of the Parliament of Paris.

office. A judge may ordain a party to be examined, when his adversary declines to refer the matter at issue to his oath.

33. *In presentia.*—In presence of the Court. Referring to certain bills of suspension of sentences pronounced by the Judge-ordinary, which, by our ancient law, might be passed in presence of the Court in time of session, or by three Lords in time of vacation ; but now, by act of Sederunt passed on the 11th November 1828, § 5. the Lord Ordinary on the bills may pass all bills of suspension and advocation, without the concurrence of the Court, during session, or of one or more Lord Ordinaries during the vacation.

BOOK I.— TITLE IV.

Of the Inferior Judges and Courts of Scotland.

1. *Comes*,—An earl. He was an officer in ancient times possessed of territorial jurisdiction, into whose place came the sheriff, or vicecomes.

Vicecomes,--A sheriff, a viscount. The sheriff of all the counties of Scotland is the king, and the sheriffs-deputes of counties are appointed by the sovereign; 20 Geo. II. c. 43. The sheriff-depute must be an advocate of three years standing, and hold his office *ad*

vitam aut culpam, and is authorised to name a substitute, who must constantly reside within the county ; and by act Geo. IV. c. 33, he must be elected from the advocates, writers to the signet, or solicitors of supreme courts, or procurators before the sheriff court, of at least three years standing, and the substitute must be certified to be duly qualified by the Lords President and Justice-Clerk.—We know that, in some instances, sheriff-deputes selected their substitutes from persons unacquainted with the law, such as surgeons, officers in the army, and farmers ; but by this wise act a check is put thereto.

1. *Vicecomitatus*.—A shire or county ; or the jurisdiction within which the sheriff-depute and substitute have power to act.

4. *Ex intervallo*.—At some distance of time.

Flagranti crimine,—In a flagrant crime, in the act of committing, or immediately after committing, a crime.

Posse comitatus.—The power or force of the county, which the sheriff has a right to call out for enforcing the diligence of the law. The power of the whole county, says Bacon, is legally committed to the sheriff.

6. *De facto*.—In fact, of a truth. An assertion or allegation of a party, when no positive or precise proof can be had.

7. *In liberam regalitatem.*—Into a free regality. When the king granted feudal rights to the Lords of the Admiralty, they were termed a free regality.

7. *In perpetuum.*—In perpetuity, for ever. Grants by a lord of regality to his deputes, called stewarts or bailies, were made during pleasure, or life, or in *perpetuum*, to themselves or their heirs.

17. *Ex incontinenti.*—Summarily, on the spur of the moment. In allusion to warrants *de plano*, granted by justices of peace, or sheriffs, against offenders, for quelling riots, or for punishment.

25. *In liberam baroniam.*—Into a free barony. Grants were made, or confirmed, by the king to barons, erecting lands into a free barony.

26. *Cum fossa et furca.*—With pit and gallows. An expression used in ancient charters, conferring the right of trying capital offences, and of inflicting capital punishments.

27. *Cum curiis et bloodwitis. Cum curiis*—With the power of holding courts to take cognizance of common riots and actions of debt between tenant and tenant. *Cum curiis et bloodwitis*—With the power of holding courts and fining for blood.

BOOK I.—TITLE V.

Of Ecclesiastical Persons.

Sect.

2. *Papa.*—Father, or pope; an appellation given to all bishops previous to the beginning of the 7th century, when the patriarch of Rome was acknowledged as pope.

3. *Praepositus.*—A provost, or person set over others; or the heads of colleges or collegiate churches.

Praebenda.—A prebend, or clerk who enjoys a prebend or living, according to the degree or stall in the church where music was performed. St. B. 2. t. 8. § 15.

Capellanus.—A chaplain, or minister of a chapel; or an endowment to persons of small fortunes.

4. *Cura animarum.*—The care or charge of souls, which the regular clergy did not enjoy.

Priories.—Religious houses, the priors or heads of which were independent of any abbot. A term used in grants by persons of small fortunes.

In commendam.—In trust.

5. *In perpetuam commendam.*—In perpetual trust; which exempted the commendators from any obligation to account.

8. *Capitulum.*—Chapter, or bishop's council. So denoted because it was considered to be the inferior head of the diocese. It consisted of an archdeacon, dean, and several canons or prebendaries.

9. *Personatus.*—A parson, a person in an ecclesiastical office, parish, or church; and in the canon law was styled a presbyter or rector; hence our presbyterian church or presbyteries.

Proprio jure.—In his own peculiar right; or, the clergyman's right to the benefice when he entered upon it.

Advocatus ecclesiae.—The patron of a church or living.

10. *Trado tibi ecclesiam.*—I give you the living. A term formerly employed when the patron named a person to supply a vacancy in the church. Formerly the pope was held to be the patron of all churches which did not belong to any private person; but, on the Reformation, the king came to be acknowledged as patron where no right of patronage appeared in the person of a subject. From the Reformation down to 1649, c. 39, by which patronage was abolished, patrons continued to have the right of presenting ministers to the church of which they were patrons; but this act was

rescinded by the act of Charles II. 1661, c. 9. This right was taken away by the act 1690, c. 23. and the power of presentation given to the heritors and elders of the parish. Patrons were again restored to their rights by the 10 Anne, c. 12.

10. *Accipe ecclesiam.*—Accept the living.

11. *Alternis vicibus.*—By turns, by alternate presentations; where, by special statute, two patrons were directed to present the united benefice *alternis vicibus*, 1617, c. 3. § 3.

15. *Jus incorporale.*—A personal privilege, or incorporeal right; applicable to a patron's right to present, and may be carried by a disposition without seisin, St. B. 2. t. 8. § 35. But when the patronage is united to lands, the patron ought to be infeft, to give the disponer a proper title.

Glebe.—In the selection of a glebe, first the lands of vicars, then abbots, priors, bishops, and friars are in this order to be appropriated; and failing these the most contiguous temporal lands, by act of Parliament 13 James VI. And the glebe, over and above the stipend, ought to comprehend four acres of arable land, or 16 soums of pasture ground, where there is no arable land. A soum is what will graze 10 sheep, or as supposed one cow.

17. *Jure devolutionis.*—By right of devolution; in reference to the fact, that if a patron does not present to a vacant church within six months of the vacancy, he loses the right of presenting, which devolved, in former times, on the bishop, archbishop, and pope, in succession, but which now devolves on the presbytery within which the parish is situated.

19. *Pleno jure.*—By full right; in reference to churches within a bishop's diocese, to which he collated without presentation.

20. *Jus devolutum.*—A devolved right. A patron is bound, within six months after the death of the incumbent, to present to the presbytery a fit person to supply the cure; hence, the right of presentation, thus accruing to the presbytery, is called the *jus devolutum.*

25. *Cura Christianitatis.*—The care of Christianity; sometimes applied to the bishop's or consistorial courts.

30. *In rixa.*—In a quarrel, or scuffle. This has reference to questions of scandal and defamation falling under the cognizance of the commissaries, for verbal injuries, or words uttered suddenly in *rixa. Vide* the phrase, *Quod non in caetu nec vocifera-*

tione dicitur id infamandi causa dictum ; Ersk. B. 4. tit. 4. § 80.

30. *Personae miserabiles.*—Poor persons ; in reference to widows, orphans, and others, in needy circumstances, and deserving of compassion.

Jurisdictio contentiosa.—Contentious jurisdiction. The meaning of this phrase requires to be explained. Though deeds have a clause authorising them to be registered in a certain judge's books, this is not held to constitute what is called *jurisdictio contentiosa*, that is, prorogation of the judge's jurisdiction to judge of the validity and effect of these deeds. *Jurisdictio contentiosa* is said, by the civilians, "*in nolentes imperii vi exercri.*"

BOOK I.—TITLE VI.

Of Marriage, and the Relation between Parents and Children.

1*st, Of Marriage.*

2. *Conjunctio animorum.*—The union of minds ; consent, and mutual affection, which ought to precede marriage, and give sanction to the wise and well established maxims, *Consensus non concubitus facit matrimonium ; matrimonia debent esse libera, ubi dolus dicit causam contractui.*

2. *Conjunctio corporum.*—The union of bodies, or copulation; or the consummation of marriage.

Si malitia suppleat aetatem.—If ability supply the want of proper age, or power to procreate, according to the canon law; and refers to pupils who may enter into marriage provided they have ability; *Decret.* Lib. 4. tit. 2. c. 3.

Inspectio corporis.—An inspection of the procreative organs. This supposes an indecent inspection of the procreative organs, and cannot, therefore, be admitted, without the most urgent necessity; *Decret.* l. 3. 6. Quand, tut. vel, cur. Ersk.

3. *Sponsalatio.*—Espousals; or the contract or mutual promise between a man and a woman to marry each other.

Stipulatio sponsalitia.—A promise of marriage, or an antenuptial contract, may be resiled from *res integrae*, saving damages, in certain cases, against the party resiling.

De presenti.—A consent is said to be given *de presenti* when it is given in the present tense; as, I take you to be my lawful wife, and I take you to be my lawful husband. *Vide* page 10 of this work, under the phrase *Per subsequens matrimonium*.

3. *Jus antiquum.*—The ancient law. Referring to the ancient Roman law, where there was a *stipulatio sponsalatia*, which founded an action of damages against the party promising, and refusing to perform; and a similar action is, by our law, competent.

Arrhae sponsalitiae.—A pledge or earnest of marriage, given by the bridegroom to the bride. If the bridegroom resiled, he lost his earnest; and if the bride resiled, she was obliged to restore it with as much more; L. 5. c. *de Sponsal.*

Remediis praetoriis.—By praetorian remedies, such as imprisonment, seizing of goods, &c. In Holland, if the party promising, or espoused, continue obstinate, the judge may declare the marriage proven; *Brower de Jure Connub.* p. 255.

Matrimonia debent esse libera.—Marriages ought to be without restraint. Our law wisely has respect to this beautiful maxim; and it is material to notice, that in all questions of marriage, where force, fraud, and deception are alleged, it will be necessary *ante omnia* to establish a free and deliberate consent.

4. *Copula.*—Carnal connection. This phrase has reference to a previous promise of marriage, and a subsequent *copula*, which,

in the eye of our law, constitutes marriage, from a presumption that the consent *de praesenti* to marriage was given by the parties when the promise was made, or as laid down by Mr Erskine " That a copula ' subsequent to such promise, constitutes ' marriage, from a presumption or fiction ' that the consent *de praesenti*, which is ' essential to marriage, was at that mo- ' ment mutually given by the parties, in ' consequence of the anterior promise.' ' c. 1. t. 6, § 4.

De futuro.—At a future period ; used in reference to a promise of marriage at some future period, which, in our law, is held not to be binding, *rebus integris.*

6. *Rebus ipsis et factis.*—By facts and circumstances, such as cohabiting together, living together habit and repute man and wife.

7. *In solatium vitae.*—As a comfort of life. This expression refers to old or infirm persons who assume to themselves companions in the way of marriage, for their mutual help and comfort.

8. *E converso.*—On the other hand; and here has respect to the case of the wife's relations by affinity, in opposition to those of the husband.

Affinitas affinitatis.—Affinity of affinity; according to Doctors, not applicable to the kind of relationship which subsists between the husband's brother and the wife's sister, but between the kinsmen of both; or, the rule of computing degrees of consanguinity or affinity between the husband and the wife's relations. Solomon made affinity with Pharaoh by espousing his daughter, 1 Kings, iii. 1.

9. *In infinitum.*—Without end, for ever; or intermarriages in the direct line between ascendents and descendents are forbidden, let the degrees of propinquity between the parties be ever so remote.

Loco parentis.—In the place of a parent. In the collateral line, marriage is forbidden where one of the parties is brother or sister to the direct ascendent of the other party; thus, an intermarriage with a grand-niece is null.

11. *Jus mariti.*—The right of the husband over the moveable estate of his wife; or, it may be defined, the right or title arising from the marriage to the husband, in the moveable estate, or goods in communion, which either belonged to the wife at the time of the marriage, or during its subsistence; or it is a legal assignation, by

the wife to her husband, of all her moveable effects, which he may receive and discharge without her consent.—*Vide* Act 1661.

11. *Jus relictae.*—The widow's right to a share of the goods in communion, after deduction of debts, which, where there are children, is one-third, and where there are no children is one-half; and of which her husband cannot deprive her by any testamentary deed; 18th July 1784, Henderson *v.* Sanders. In the case of children by his last or former marriage, the division is tripartite, one-third goes to the children as *legitim*, one-third is the dead's part, which he may dispose of; failing his destination of it, it will go to his children as his executors, and the remaining third goes to the widow as *jus relictae*.

13. *Socii.*—Partners, friends, companions, as in the married state; but not to the effect of constituting a right to the wife over the goods in communion, which by law is vested in the husband.

14. *Bona fides.*—Good faith, understanding, truth.

15. *Dos.*—Tocher, dower, or jointure, given by the wife to the husband upon their marriage.

Praeter dotem.—Besides the tocher. This is a term borrowed from the civil law, *ff.* 23. 3. 9. § 3.; and is derived from the Greek language, signifying something over and above the dower.

15. *Paraphernalia*.—The jewels and other ornaments belonging to a woman when she is married: Or *Parapharnalia*, which includes the whole *vestitus et mundus muliebris*.

15. *Vestitus et mundus muliebris*.—The wearing apparel and ornaments of dress, as body-clothes, rings, necklaces, ear-rings, &c. belonging to a woman.

16. *Ex qua persona quis lucrum capit, ejus factum praestare debet*.—Whoever derives advantage from a person ought to be accountable for his deeds. For example, as a husband acquires by marriage a right to his wife's moveable estate, he becomes on that account liable in payment of all the moveable or personal debts contracted by her previous to the marriage.

Transeunt cum universitate.—They pass with the whole without exception, alluding to the woman's debts and obligations, which devolve upon her husband in consequence of the universal right which he acquires, *jure mariti*, to her moveable estate.

17. *In solidum.*—For the whole. The husband is liable for his wife's debts after her death, in so far as he is *lucratus*, if her creditors have not been able to obtain payment.

In quantum lucratus est.—In so far as the husband is benefited.

Locupletari cum damno alterius.—To be enriched by another's loss. A husband cannot enrich himself at the expence of his wife's creditors, in reference to the preceding phrase.

Ad sustinenda onera matrimonii.—To defray the expenses of the married state. A tocher is said to be given for an onerous cause, *ad sustinenda onera matrimonii.*

Subsidiarié.—Subsidiarily, auxiliarily. Where the wife's estate is insufficient to pay her debts, the husband's estate may be attached for them, or he may be made subsidiary liable.

18. *Universum jus.* Universal right, or title to both heritable and moveable property; or, in consequence of a marriage contract, by which the husband is assigned to his wife's effects, heritable and moveable.

Lucratus.—Benefited. Here the *lucratus* re-

fers to the liability of his wife's debts, in so far as the *lucrum* goes.

Lucrum.—Benefit, advantage.

19. *Vestita viro.*—Clothed with a husband. The wife, when married, is free from all diligence upon debts contracted by herself; unless in the case where she has a separate *peculium*, or stock, or a *praeposita negotiis*, or is interdicted by her husband.

A mensa et thoro.—From bed and board; applied to married persons, who live separately from each other, by contract between themselves, or by a decree of the Commissary-Court.

20. *Potestas maritalis.*—The husband's power in the married state, as curator to his wife, or otherwise having power invested in him.

In toto.—Altogether, entirely, wholly; here alluding to the period of marriage, when the right of a curator to a female minor expires, and the curatory of the husband commences.

21. *Vergens ad inopiam.*—Verging towards want, poverty, or insolvency; and thereby intimating that a wife is not authorised to sue her husband, unless on necessary or urgent cases; Fount. Nov. 16, 1704, Ross.

She may sue him if wilfully deserted; Dec. 21, 1626, La. Fowlis; or in the case of divorce or bad usage.

22. *Sui juris.*—His own master, her own mistress; in his or her own right. Deeds done by the wife, without the husband's consent, are null; his power *quoad* draws back to the time of proclamation of banns.

23. *Actor in rem suam.*—A judge or adviser in his own affair, or, who gives authority, or grants any deed for his own behoof.

24. *Culpa teneat suos auctores* —A fault can bind only its own authors: *ex. gr.* delicts by a wife are personal to herself, and have no operation against the husband.

25. *Sub cura mariti.*—Under the husband's care or power. Personal obligations, such as bonds, bills, &c. by the wife, without the husband's consent, are null while *sub cura mariti.*

Quodammodo. — After a certain manner, fashion, or sort. The person of the wife is by law itself held to be sunk in that of the husband, and her obligations are not considered to be actionable.

Ipso jure.—By law itself. In reference to

deeds by the wife without the husband's consent, are by their nature null.

25. *Peculium.*—Wealth, stock. Applicable to the separate stock of the wife from a father or a stranger, for the maintenance of herself and children, and exempted from the *jus mariti.* In the times of the patriarchs, horses, camels, asses, oxen, sheep, deer, were held to be their wealth or stock, and likened to *pecunia*; Gen. i. 25, and xxx. 43.

26. *Praeposita negotiis.*—A wife is sometimes said to be *praeposita negotiis*; that is, set over, or entrusted with the management of her husband's affairs.

Praepositura.—The office of a praeposita.

Ex re.—Arising out of the thing or matter itself, such as necessary and proper furnishings made to the wife, and which are effectual against the husband.

Praeposita negotiis domesticis.—Set over or entrusted with the management of domestic affairs. In the case of a married woman this is presumed; so that, without any express authority, she can bind her husband for whatever is proper for the family.

Aliunde.—Otherwise, elsewhere. After a

wife is inhibited by her husband from contracting debts, he is liable notwithstanding for necessary furnishings suitable to his rank, if he cannot prove that he provided her *aliunde*.

Etiam causâ non cognitâ.—A husband may inhibit his wife *etiam causâ non cognitâ*, that is, without the reason of his doing so being even assigned, or investigated into.

28. *Inter vivos.*—Between the living. Deeds are said to be executed *inter vivos*, when they have no reference to the death of the granter as the period at which they are to take effect.

29. *Plus enim valet quod agitur quam quod simulitate concipitur.*—For that which is done is more availing than that which is covertly pretended. A gratuitous right by one spouse to another, or in trust to a third party, is, notwithstanding this, subject to revocation; Feb. 1. 1728, Sanders.

30. *Quod excessum.*—In relation to the excess, in so far as excessive. Immediate provisions by a husband to a wife, in the event of her survivance, may be revoked only *quoad excessum*; June 27, 1677, Short.

31. *Etiam in articulo mortis.*—Even at the very

point of death. Donations may be revoked even at the point of death.

31. *Omnium bonorum.*—A disposition *omnium bonorum* is a conveyance of all the granter's goods.

In odium.—In detestation. Bankton, B. I. t. 5. § 100. affirms, that a revocation is presumed from the commission of adultery by the wife, not forgiven by the husband; and that this operates *ipso jure* in *odium* of the crime.—*Vide* Douglas from Hope.

32. *Resoluto enim jure dantis, resolvitur jus accipientis.*—The right of the granter being done away, the right of the receiver is resolved.

Morte donantis donatio confirmatur.—By the death of the granter, the donation or grant is confirmed.

33. *Vi aut metu.* — By force or fear. This especially refers to the influence which husbands have over their wives in granting deeds; hence judicial ratifications by wives are granted in absence of their husbands.

34. *Sine vi aut dolo.*—Without force or fraud. Arising from an excess of love which the wife is supposed to bear to her husband; and she may, therefore, *optima fide*, swear

that she granted the deed without force or fraud.

34. *A fortiori.* — As a necessary consequence arising from the stronger argument.

Ex vi aut metu.—Through force or fear, or that the ratification by the wife was granted without force or fear, and for her utility and advantage.

35. *Optima fide.*—With the greatest good faith.

Donationes velatæ. — Veiled or concealed gift; applicable to deeds granted by a wife to third parties in trust for her husband's use.

37. *Puberes.*—Persons above the age of puberty, which is 14 in males and 12 in females, and below the age of majority, which is 21.

38. *Intuitu matrimonii.*—In the prospect of marriage. In the prospect or contemplation of marriage, and in reference to settlements in marriage-contracts in favour of any of the two spouses, which are expressly made *intuitu matrimonii.*

Retro.—Backwards; in reference to a particular time or event.

Legitim.—A claim competent to children out of the free moveable estate of their father, amounting to one-third where there

is a widow, and one-half where there is no widow, and which the father cannot disappoint by any deed of a testamentary nature. This is a material part of the law of Scotland, the object of which is to prevent parents leaving their younger children unprovided for.

42. *In majorem evidentiam.*—For greater certainty ; in allusion to a marriage lasting year and day, and, in *majorem evidentiam*, the day is adjected.

43. *Hinc inde.*—Here and there, on every side, on all hands. This phrase is most frequently employed immediately before the registration clause of mutual contracts, under a penalty to be enacted by the party performing, from the party failing ; but the penalty is by law restricted to the actual damage and expence sustained.

Separatio tori.—A separation from the marriage bed, which the canons admitted in the case of adultery ; but the nuptial tie continued till decree of divorce. This makes part of our law, and extends to ill usage on the part of the husband.

44. *De praxi.*—From custom, usage. If any of the spouses wifully desert the other for four years, decree of divorce may be ob-

tained, upon the head of desertion alone : Act 1573, c. 55 ; 1 Cor. vii. 15.

46. *Donationes propter nuptias.*—Donations made on account of the marriage. In the law of Scotland, it means the provisions made by the husband to the wife on account of the tocher, &c.

Vice versâ.—On the contrary, on the other side. Either party deserting the other, loses his or her legal right of marriage.

2d, *Relation between Parents and Children.*

49. *Pater est quem nuptiæ demonstrant.*—He is the father whom the marriage pointed out to be so. Hence the legal presumption of legitimacy of the offspring of the marriage.

50. *De septimestri partu.*—Concerning birth in the seventh month. Hippocrates, in his treatise *De Septimestri Partu*, and the Roman law upon his authority, have pronounced six months as the *minimum* of an entire birth; *L.* 12. *De Stat. hom.* that is, six solar months, as it is explained *L.* 3. § 12. *De Su. et Leg. her.* ; and by our law, from the favour of legitimacy,

six lunar months is the *minimum*, and ten months the *maximum*.

34. *Ad lites.*—For the actions. When a minor has an action against his father, or a married woman has an action against her husband, the court is in use to appoint a curator *ad litem* to them, that is, for taking care of the action.

BOOK I.—TITLE VII.

Of Minors, their Tutors and Curators, and of the Relation between Master and Servant.

1st, *Of Minors, their Tutors and Curators.*

1. *Tueri.*—To protect, assist, or help. Hence tutory, or a power vested in a tutor to manage the estate of a pupil, which lasts till 14 if a male, and 12 if a female.

Cura.—Care. Hence curatory, which is a power of managing the estate, either of a minor pubes, or of a major who is incapable of acting for himself from defect of judgment; or the Court of Session may from this *nobile officium* appoint a curator or tutor to persons abroad.

1. *Pubes.*—A person above the age of puberty.
2. *Tutores testamentarii, legitimi, et dativi.*—Tutors testamentary, or by the appointment of the father in his will; tutors at law, from their relationship to the minor; and tutors dative, so called because they are appointed by the crown to persons incapable of acting for themselves.

   Patria potestas.—The power of a father over his children,—in virtue of which he is entitled to appoint tutors and curators to them.
3. *Pro non adjectis.*—As not named. Persons named as tutors, but incapable to fill the duties of the office, are held as not named.

   Rem pupilli salvam fore.—That the property of the pupil shall be preserved, and that he shall justly account for his administration; alluding to the favour shewn both by the Roman law and by our own to testamentry tutors, who are not bound to give security.
4. *Purè.*—Unconditionally. An office given to a remote agnate past 25 years, under no limitation in point of time, is termed *puré*, unconditionally.
6. *Jurisdictionis voluntariae.*—Of voluntary jurisdiction: referring to services in

virtue of a brief from the Chancery, for serving the next agnate as tutor at law to an office, termed voluntary jurisdiction.

7. *Infantiae proximus.*—Next to infancy; in relation to the right which the mother has to the custody of the pupil till he be seven years of age.

Gratis.—Gratuitously. Though a mother should offer to take the charge of her child by a first marriage *gratis*, after her second marriage, it may be withheld from her, unless the court interfere, and assume that she is a more fit person than the next heir.

8. *Pater patriæ.*—The father of his country; in relation to the king, who, in default of tutors nominate or at law, possesses the power of naming tutors to minors and furious persons.

11. *Ratio decidendi.*—The ground of decision. When a judge pronounces an interlocutor, he sometimes mentions the grounds of his decision or *ratio decidendi*; but he is not bound to do so, though we are disposed to think that he ought, in order that the party who considers himself aggrieved by the judgment, may speak with greater certainty to the points which the

judge assumes as the basis of his interlocutor.

12. *Officium virile.*—A manly office. Among the Romans, tutory was held to be *officium virile*, and so could not be exercised by women, excepting mothers in special cases.

12. *Formula.*—A formula or declaration appointed to be signed by papists before they could act as tutors.

13. *Curator bonis.*—A curator, or person appointed to take charge of the property and effects of persons incapable, from age, infirmity, or absence, to act for themselves.

Sententia contra minorem indefensum lata, nulla est.—A judgment pronounced against an unprotected minor, *i. e.* a minor who has no tutors or curators, is void and null.

14. *Tutor datur personæ.*—A tutor is appointed to take charge of the minor's person.

Curator rei.—A curator is named to take charge of the minor's property.

15. *Sine quo non.*—Literally, without whom not, meaning that persons appointed to act as tutors cannot act without a particular per-

son named as *sine quo non*, or contrary to that person's will.

17. *Jus novum.*—The new law of the Romans. In allusion to implied authority given to tutors and curators to dispose of things of little value, without the sentence of a judge. By our law, the curator cannot sell the minor's heritable property without authority from the Court of Session, and upon proof that such a measure is necessary and beneficial.

Fundo annexum.—Attached to the ground, as houses, trees, fences, &c., which may be sold by a curator on application to the Court of Session, upon cause shewn.

17. *Sine decreto.*—Without the decree or sentence of a judge. A renunciation of a wadset right, vested in the pupil, where it is granted by the tutor to the reverser, upon payment of the debt, is effectual *sine decreto*, though it is truly an alienation of heritage; Jan. 31, 1735, Graham.

19. *Auctores in rem suam.*—Tutors and curators cannot authorise any act, for their own advantage, which is contrary to the nature of the trust reposed in them.

20. *Munera publica.*—Public offices. Tutors and curators may accept or decline the office;

but, if they once accept, they may be compelled to performance, unless they are found not to be fit for the duty. Public offices cannot be forced upon any one.

22. *Ex culpa levissima.*—From the last fault. If a tutor or curator neglect to make up inventories of the minor's estate, &c., he may be removed, though no fraudulent intention is meant.

24. *Quamprimum.*—As soon as possible; without delay. Applicable to tutors and curators discharging the debts of the pupil as soon as funds can be raised.

In facto præstando.—In the performance of a fact. Tutors and curators are bound to perform a fact to which their office obliges them.

25. *In re propria.*—In one's own business.

26. *Ad auctoritatem praestandam.*—For interposing their authority, interdictors and curators *ad lites* are appointed.

27. *Singuli in solidum.*—Each individual for the whole. Tutors and curators are liable in diligence *singuli in solidum*, unless when named by the father; in which case, the act 1669, c. 8. makes them liable for intromissions, but not for omissions.

In liege pouste.—In perfect health. Here

implying that where the father, in a settlement, dispenses with the obligations imposed by law on tutors and curators, the act requires that he be in good health.

27. *Indefensus.*—Unprotected.

In rem minoris versum.—Employed or laid out in the minor's affairs, or for his advantage.

29. *In quod prius fuit voluntatis, postea fit necessitatis.*—That which was at first a matter of voluntary choice, becomes afterwards a matter of necessity.

Accusatio suspecti tutoris.—A complaint against a suspected tutor, competent to be brought by the minor's next in kin, or a co-tutor, to have him removed on sufficient grounds.

Popularis.—This *accusatio suspecti tutoris* was said by the Romans to be *popularis*, or popular, because among them it might have been pursued by any person, whether related to the minor or not.

31. *Actio tutelæ vel curatelæ directa.*—A direct action of tutory or curatory, competent to a minor or his heirs, against his tutors or curators, and their cautioners and heirs, for exhibiting a particular account of their disbursements and intromissions.

32. *Actio tutelæ vel curatelæ contaria.*—A contrary action of tutory or curatory, which tutors and curators may insist in against the minor, to discharge them of their office and administration.

Intus habet.—Law presumes that a tutor *intus habet* has in his own hands money sufficient to discharge his own claims, till an accounting take place.

Quæ sunt temporalia ad agendum, sunt perpetua ad excipiendum.—Those things which must be made the ground of action within a limited time, are open for ever to be pleaded by way of exception.

Officium nemini debet esse damnosum.—An office ought to be hurtful to no one.

33. *In pœnam.*—As a punishment. Contracts entered into by minors with consent of their curators, are held to be null and void *in pœnam* of those who would impose upon their weakness.

Nemo locupletandus est cum detrimento alterius.—No one is to be enriched at the expence of another: And minors may be restored against all deeds granted by them in minority to their prejudice within the *quadriennium utile*, or 25th year.

34. *Ex capite minorennitatis et læsionis.*—On

the ground of minority and lesion or fraud.

35. *Quadriennium utile.*—The four useful years allowed to a minor after arriving at majority, to challenge deeds executed by him to his own prejudice.

Tempus deliberandi.—The period allowed to an heir to deliberate whether he will represent his ancestor, being one year; or to a minor, to deliberate whether he will challenge any deeds granted by him during his minority, being four years.

Anni utilis.—Profitable or useful years, applicable to the *tempus deliberandi* when applied to minors.

Tempus utile.—A profitable period, applied by the Romans to those days in which it was lawful to hold courts.

Tempus continuum.—Time continually running on without interruption; comprehending every day, lawful and unlawful.

Quadriennium.—Four years allowed to a minor after his majority, within which he may sue for reduction of deeds granted by him to his prejudice while in minority.

Præsumptio juris et de jure.—A presumption of the truth of any point established by law or custom, which cannot be challeng-

ed or traversed by contrary evidence. For example, the presumed incapacity of a minor to act without the consent of his curators cannot be traversed.

36. *Aliqualis probatio.*—Any sort of proof, though not strictly legal, if joined with other proof, may be sustained, such as full proof of a minor's age; or the phrase may apply to a proof *prout de jure.*

De momento in momentum.—From minute to minute; and here referring to the computation of the years of minority till the 21st year be completely run.

Deceptis non decipientibus, jura subvenient.—Laws succour or protect the deceived, not the deceivers.

37. *Onus probandi.*—The burden of proving. As in the case of leison, the burden of proof is thrown upon the adverse party.

38. *In foro contradictorio.*—A decree pronounced in court, after a full discussion of the merits of the case, and cannot be opened up unless where there is a matter of fact *noviter veniens ad notitiam.*

39. *Sacramenta puberum sunt servando.* The oaths of minors are to be observed or kept inviolable.

40. *In pari casu.*—In a similar situation. Minors are said, by doctors learned in the law,

to be in *pari casu* in transactions entered into between themselves.

40. *In mala fide.*—In bad faith.

42. *Legitimum tempus restitutionis.*—The lawful period for restitution. It transmits to the minor's heirs.

43. *Minor non tenetur placitare super hæreditate.*—A minor is not bound to defend his title to the heritage of his ancestor, when claimed by a person under a title preferable to that of the ancestor, till he be major.

Haereditas paterna.—Inheritance derived from the father; in opposition to property derived from collaterals, such as brothers, uncles, &c.

44. *Haereditas.*—Inheritance. Heritable property. Heritage, or land, when opposed to moveables, or executry.

Fundo annexa.—Annexed to the ground; and comprehending, under it, rights of patronage, rights of property, &c.

Omne quod in se erat.—All that was in his power. Where the father does all that is in his power to obtain infeftment, the estate is held to be the minor's though conquest in the person of the father.

45. *Res judicata inter alios, aliis neque nocet neque prodest.*—A matter decided between

certain individuals neither hurts nor profits others.

46. *In possessorio.*—In possession. The minor is not exempted from acts of molestation. Dirl. 64; nor actions merely possessary, Mackenzie's Obs. on 1587, c. 42; nor from payment of feu duties.

Dominus directus.—The direct proprietor, the superior.

Actio contra defunctum coepta, continuatur in hæredes.—An action commenced against a person who dies, may be continued against his heirs.

Ex capite inhibitionis.—On the ground of inhibition. This is a species of diligence in our law for affecting heritable property till the debt is paid; and may proceed on depending actions, or constituted debts.

In damno vitando.—In the act of endeavouring to avoid a loss.

In lucro captando.—In the act of endeavouring to gain an advantage.

48. *Is qui omnino desipit.*—He who is altogether destitute of reason. Curators are appointed to idiots, and to furious and imbecile persons.

Si aliquid sapit.—If he has the least sense,

spark of judgment. This and the three following articles are necessary to be proved, in the case of a brief of idiotry for nominating curators to persons unsound in their minds.

50. *Si sit legitima aetatis.*—If he be of lawful age.

Si sit in compos mentis, fatuus, et naturaliter idiota.—If he be unsound in his mind, fatuous, and naturally an idiot.

Si sit in compos mentis, prodigus, et furiosus, viz. *qui nec tempus nec modum impensarum habet, sed bona dilacerando profundit.*—If he be unsound in his mind, a spendthrift, and furious person, namely, he who regards neither the time nor the measure of his expenses, but lavishly and foolishly squanders away his property.

53. *Citra causae cognitionem.*—Without investigating into, or taking cognizance of, the cause. Anciently, interdictions of persons were disallowed, without taking cognizance of the matter; but, by our present practice, persons may interdict themselves for their own preservation, as well as for that of their families, called voluntary interdiction, *citra causae cognitionem.*

54. *Post causam cognitam.*—After the cause has been heard or tried. Referring here to judicial interdiction, after the cause has been heard in the Supreme Court.

Ex nobili officio.—From the noble office, or supereminent power of the judge. The Supreme Court, from their *nobili officio*, during the dependence of a suit, may interpose their authority, when any abstract point comes before them, or they may punish a party guilty of improper conduct in *a causa*; of which we have several instances recorded in the acts of Sederunt.

Ex proprio motu.—Of his own accord. If *pendens* of a suit, it appears that either of the litigants is, from the facility of his temper, subject to imposition, the judge, *ex nobili officio*, may *ad interim* interdict him *ex proprio motu*; Feb. 17, 1681, Robertson.

Quamdiu sustinuit istam furiositatem.—How long he has laboured under that madness. Alluding to a retrospect of the time when the fatuity commenced.

55. *Rei suae providus.*—Careful of his own property. A process may be instituted in the Supreme Court for having the inter-

diction removed, upon the ground of *rei suae providus*.

Termini habiles.—Sufficient grounds for an opinion or decision.

Pessima fide.—In the worst faith. After an interdictor accepts the office, he is bound to register the interdiction without loss of time, otherwise he will be held to be *pessima fide*.

58. *Mortis causa*.—In relation to death; referring to deeds of a testamentary nature, which do not take effect till after the granter's death, and hence are said to be granted or executed *mortis causa*.

58. *Ex capite interdictionis*.—On the ground of interdiction.

Eadem persona.—The same person. The heir of an interdicted person may sue a reduction *ex capite interdictionis*, as he is considered to be the same person with the interdicted himself.

Ad auctoritatem praestandam.—To interpose their authority. This phrase applies to interdicters giving their consent to such deeds affecting heritage, as is reasonable for the interdicted to grant.

2d, *Of the Relation between Master and Servant.*

Sect.

60. *Servi.*—Slaves, (in this country, where slavery is abolished, called servants,) might be bought and sold as goods by the Roman law. By act 15 Geo. III. and 39 Geo. III. c. 56, colliers are declared to be free.

Adscripti or adscriptii.—Slaves by the Roman law, bound to perpetual service in cultivating a particular field or farm, with certain rights and capacities of purchasing, feuing, &c.

Nativi.—Natives, or bond-men; who could not be sold by their masters; but in other respects resemble the Roman *servi.* A negro slave, coming to this country with his master, is entitled to his liberty, nor can his master afterwards transport him against his will: Knight *v.* Wedderburn, January 15, 1778, Fac. Coll.

64. *Collegium or universitas.*—A corporation or community. So styled by the Romans, and were erected, by proper authority, into a body politic, to endure in continual succession, with rights of purchasing, suing, &c.—This, and many others from the Roman code, have been introduced into our law.

BOOK II.—TITLE I.

Of the Division of Rights, and the several Ways by which a Right may be acquired.

Sect.

1. *Jura in re.*—Rights in the property, real rights.

Duo non possunt esse domini ejusdem rei in solidum.—Two persons cannot be proprietor of the same property in the same capacity, at the same time.

2. *Interest enim reipublicae, ne quis re sua male utatur.*—It is for the advantage of the public that no person be allowed to use his property improperly, or to the prejudice of his neighbour.

Utitur jure suo.—He uses his own right, in a manner most beneficial to himself, but not to the injury of his neighbour.

In æmulationem.—Emulously, or hurting another.

In æmulationem vicini.—To the prejudice of his neighbour. This phrase respects the limitation of property, by which redress may be obtained against a person who exercises his right to the prejudice

of his neighbour, *ex. gr.* in throwing a greater quantity of water upon his neighbour's ground than is necessary; raising a wall to hurt the light of his neighbour, &c. in *æmulutionem vicini.*

Dominium eminens.—The eminent or universal right and power in the public over property. So called by Grotius: in virtue of which the supreme power may oblige the owner to part with his property, for the good of the public; as in the making of a high-way or street in a town, which may be carried through private property; but the party so deprived will be entitled to a full equivalent, in virtue of an act of Parliament to be obtained for that purpose.

4. *Dominium non potest esse in pendenti.*—Property cannot float in uncertainty; it must always be vested in some person or other.

Ex sua natura.—From its own nature. In reference to property which the proprietor abandons, or which becomes waste.

In hæreditate jacente.—An estate is held to be *in hæreditate jacente*, when no title has been completed to it in the person of the heir. *Hæreditas* is defined, "Successio

"in universum jus quod defunctus ha-
"buit tempore mortis,"—a succession to every thing which belonged to the defunct at the time of his death. *Hæreditas jacens* is said to be "*Quæ nondum adita est*;" a succession or inheritance which has not yet been taken up.

4. *In pendenti.*—In dependence, as the fee of a property is said to be after the death of the proprietor, and before the heir makes up his title.

Species facti.—The nature or quality of the fact.

5. *Res communes.*—Things common, as the air, running water, light, &c. which are incapable of appropriation.

Res publicae.—Things common to a state or community, *ex. gr.* navigable rivers, highways, harbours, bridges, &c.

Alveus.—The channel or bed of a river.

Ripae muniendae causa.—For the sake of protecting the bank of the river.

Jus gentium.—The law of nations. By the *jus gentium* the sea shore is not entitled to the appellation of common, because it is, in its nature, as capable of appropriation as any part of the ground to which it is contiguous.

7. *Res universitatis.*—The property of a community or corporation, as ware-houses, corporation halls, market-places.

Juris privati.—Of private right. In opposition to the *res publicae.*

8. *Res nullius.*—Things belonging to no individual, as things set apart for the service of God, *ex. gr.* communion cups, bells of churches, &c.

Juris divinæ.—Of divine right. Things *juris divinæ* cannot become the property of any person.

Res religiosa.—Sacred property; as burying-places.

9. *Quod nullius est, fit occupantis.*—That which belongs to no person becomes the property of the first occupant or possessor.

10. *Inter regalia.*—Among things belonging to the crown.

Jure coronae.—By the right of the crown. The crown has right to great or small whales which may be drawn from the water to the nearest part of the land, on a wain or waggon drawn by six oxen.

Leges Forestarum.—The laws of the forests. None but the King has right to a forest. *Nemo forestam habet nisi rex.* Loft. No. 53.

Sect.

11. *Quod nullius est fit domini regis.*—That which belongs to no person becomes the property of the king.

Nulla sasina, nulla terra.—No infeftment, no property. According to the feudal laws, and ours,—in the case where the disponer sells the property twice, if the second disponee obtains infeftment before the first, he acquires a preference to the property, which ought to induce purchasers *per saltum* to take infeftment.

14. *Fœtus.*—The young of animals, as foals, calves, &c. which go with the mother as accessories.

Partus sequitur ventrem.—The offspring follows the mother as an accessory.

Fructus pendentes.—Fruits not separated from the subjects which produced them; such as fruit not plucked from the tree, natural grass not yet cut; in opposition to annuals, which require yearly seed and industry.

Alluvio.—An accession of ground to a proprietor on the banks of a river, by the insensible operation of the stream.

Avulsio.—Property separated by an overflow of water from the ground belonging to one proprietor, and attached to the

ground belonging to another. This may arise from a gradual increase, or a violent flood, or a convulsion of nature; in which last cases, the ground so added will not belong to the owner of that property, but to the person to whom it originally belonged.

17. *Commixtio.*—Commixtion, the mixture of all subjects of whatever description. In a restricted sense, the mixture of liquids of different sorts.

Confusio.—The blending of things together, or the mixture of liquids or fluids, hence *confusio.*

Pro indiviso.—As undivided. When two or more persons have an equal right in a subject, they are said to hold it *pro indiviso*, as in the case of heiresses portioners.

18. *Causa et modus, transferendi dominii.*—The reason, or intention, and the mode, or manner of transferring property.

Traditionibus et usucapionibus, non nudis pactis, transferuntur rerum domina.—The property of things is transferred by tradition and possession, not by naked pactions or agreements.

19. *Ipsa corpora.*—The subjects themselves;

applied to moveables. There can be no tradition of moveables, without actual delivery; the retaining possession voids the sale in a competition with creditors.

19. *In Jure.*—In right, in law. Rights of jurisdiction, of patronage, of fishing, &c. are said to consist *in jure*, and to admit only of symbolical delivery.

Res incorporales.—Things incorporeal; as rights of jurisdiction, patronage, fishings, &c. These, not being tangible, are incapable of proper delivery.

Ficta traditio.—A feigned delivery; applied to cases in which the purchaser of a thing is in possession of it previous to the purchase.

Fictio brevis manus.—A fiction of short hand, applied by the doctors to the case where the proprietor of goods sells them to the depositary. In that case the depositary is held to deliver them to the seller, *qua* depositary, and the seller to re-deliver them to him, *qua* purchaser. This is called *fictio brevis manus.*

20. *Tanquam sedium positio.*—As the site or situation of dwelling places; the possession of which is considered the essence of property.

20. *Animus.*—Inclination, purpose, design, intention. Here the *animus* applies to the detention of a property, or the design in the detainer of holding it as his own.

21. *Solo animo.*—By inclination alone.

23. *Vi, aut clam, aut precario.*—By force, by stealth, or by tolerance or licence; in reference to the different way in which a person may possess a thing.

Ex continenti.—Immediately, instantly, without delay, on the spur of the moment. A person forcibly dispossessed of his property may, on the instant, possess himself of it *brevi manu.*

Jus sibi dicere.—To pronounce or declare the law to himself; to take the law into his own hand, which is against law and justice.

Tanquam dominus.—As owner, or proprietor.

24. *Quomodo desiit possidere.*—How he ceased to possess, or lost possession.

24. *Actore non probante absolvitur reus.*—When the pursuer fails to establish his case, the defender is acquitted or assoilzied.

In pari causa, potior est conditio possidentis.—In similar circumstances, the possessor is in the better condition.

25. *Præceptos sed non consumptos.*—Gathered but not consumed.—A *bona fide* pos-

sessor, by the Roman law as well as the law of Scotland, was not bound to account for the fruits which he had consumed. But whether he was entitled to those fruits which he had gathered or reaped but not consumed, was disputed by doctors learned in the law.

26. *Pendentes.*—Hanging; in reference to fruits not separated from the subject producing them.

Messis sementem sequitur.—The harvest follows the seed-time; in allusion to the fact that a *bona fide* possessor is entitled to reap the crop produced from the seed which he had sown.

Sponte.—Spontaneously; in reference to fruits which spring up of their own accord without cultivation.

Perceptione.—By gathering them; all fruits produced spontaneously are acquired by *bona fide* possession.

Cultura.—Cultivation, industry; which entitles the *bona fide* possessor to reap the fruits.

Fructus civiles.—Civil fruits; such as the rents of houses or lands.

In fructu—Of the nature of fruit or produce; which, by the Roman law, became

the absolute property of the *bona fide* possessor.

26. *Usurae.*—Usury, or money given for the use of money, or higher interest than allowed by law.

Vicem fructuum obtinere.—To come in the place or stead of fruits or produce. The interest of money is properly called its fruits or produce.

28. *Conscientia rei.*—Consciousness that the property belongs to another.

30. *Nemo potest sibi mutare causam possessionis.*—No person can, at his own hand, change the title of his possession.

Accessorium sequitur naturam rei cui accedit.—An accessary follows the nature of the property to which it is accessary.

BOOK II.—TITLE II.

Of Heritable and Moveable Rights.

3. *Hæredes in mobilibus.*—Heirs in moveables. Executors are said to be *hæredes in mobilibus*, because they succeed to the whole moveable property of the deceased.

Partes soli.—Parts of the soil. Trees are said to be *partes soli*, and as such go to the heir, and not to the executors.

6. *Tractus futuri temporis.*—A tract of future time. Rights which have *tractus futuri temporis*, as a yearly annuity or pension for a certain term of years, are heritable.

Ex sua natura.—From his or their own nature.

9. *Nomina debitorum.*—Debts; accounts of debtors. Debts due upon open account, or by promissary note, go to the executor.

Quasi feuda.—Having a resemblance to a right properly feudal; such as personal bonds, which, from their nature and bearing interest, were, by a general rule of our ancient law, accounted heritable.

10. *Fiscus.*—The Crown revenue; the Crown's right to the moveable estate of a person denounced rebel, in virtue of letters of horning.

E converso.—On the contrary.

12. *Hæres hæredis mei est hæres meus.*—My heir's heir is my heir. According to this rule, when a person makes a provision in favour of his heir, he is understood to make it, not for the first heir only, but for a succession of heirs, as long as the settlement is not altered.

14. *Destinatione.*—By destination. The heir

by destination, is the person who is called to succeed to heritable property, failing the person to whom it is disponed. A proprietor may, by destination, settle property in whatever way he pleases, if he has power to do so, and provided he shall properly discover his intention. An ordinary destination to A., and the heirs of his body *nasiturus*, whom failing to persons *nominatim*, may, notwithstanding, be be defeated, unless there are *in graemio* of the deed prohibitory, irritant, and resolutive clauses; but, in the absence of these clauses, A. cannot give away the property gratuitously to a third person, *in fraudem*, to the prejudice of the heirs *nasiturus* or *nominatim*. *Vide* the cases, Falkoner *v.* Wright, 22d January 1824; Shaw, vol. ii. p. 633; and Falconer *v.* Moncrieff, 20th January 1825; Shaw, vol. iii. p. 455. Debts, originally moveable, may become heritable by the supervening right of heritable security.

16. *Jus nobilius.*—The greater or superior right. Heritable debts do not become moveable merely by a supervening moveable security.

Quoad maritum.—In regard to the husband; in so far as the husband is concerned.

BOOK II.— TITLE III.

Of the Constitution of Heritable Rights by Charter and Seisine.

Sect.

2. *Duces et milites limitanei.* — Commanders and soldiers in garrison upon the frontiers.

Soldurii.—Men sworn and devoted to their friend, to partake of his good and ill fortunes; retainers to a great person, or one of his clan. The noble Gauls, in the time of Cæsar, had a number of these attached to them.

3. *Stipendia.*—Pay given to the Roman soldiers.

Feudum.—A feu; a right or title to property, held by a vassal from a superior.

Beneficium.—A grant or feudal right, which most probably we derived from the Lombards in the end of the fifth century, who, the better to secure the conquered country, gave it to their chief captains, reserving the superiority to their king. After an end was put to the Lombards in Italy, the policy of this system was so universally received, that it was adopted

by Charles the Great, and by most of the princes of Europe.

5. *Feudum novum.*—A new feu. A feu acquired by a vassal himself.

Consuetudines feudorum. — Usages of the Feudal System, ascribed to the Emperor Frederick, surnamed *Barbarossa*, and said to have been compiled in the year 1170.

8. *In alode.*—Lands, &c. enjoyed by the owner independent of any superior, or without any feudal homage, were said to be granted *in alode.*

Fidelis.—A trusty person.

10. *Dominium directum.*—The right of superiority; the direct domain or estate.

Dominium utile. — The vassal's right, the useful domain, because the vassal enjoys the produce of the estate.

Domini.—Proprietors, lords, or sovereigns.

Jus utendi, fruendi.—The right of using and enjoying; a species of usufruct transmissable to heirs and singular successors.

11. *Naturalia feudi.*—Things naturally belonging to a feu; or what is understood to arise from the nature of the feu contract, and considered part of it.

Accidentalia feudi.—Things added to a feudal grant by the convention of parties,

and must never be presumed, but be the subject of express stipulation.

12. *Feuda soldatæ, or custodiæ.*—The feus or annual gratuities given to a soldier or guard, which did not decend to heirs, and were said to be personal feus. They terminated with the death either of the granter or grantee.

Ligia et non ligia.—Liege, and not liege. A liege vassal owes absolute fidelity to his over-lord, which is the case in all feus granted by sovereigns.

Quæ sequuntur personam.—Which follow the person, as moveable property.

Antiqua et nova.—Ancient and new feus, corresponding nearly with heritage and conquest.

15. *Res alienæ.*—Things belonging to another; but, more concisely, no alienation of an estate, in *hæreditate jacenti*, made by an apparent heir before entry, is valid; at least its effect is superceded till the granter complete his title by service and retour.

17. *Vestis.*—A garment. Investiture; a feudal term, denoting the manner of constituting feus; the vassal being as it were

cloathed with the feu, comes from this word.

17. *Pares curiæ.*—Peers. "Principes qui rege "aut principe assident." Nobles who attend upon the King or the prince.

Breve testatum.—An attested brief. This was an acknowledgment in writing, made out on the lands at the time of giving possesion to the vassal, and attested by the seals both of the superior and *pares curiæ.*

18. *Unico contextu.*—At one and the same time. This expression is used to denote any thing done in relation to a grant, contract, or agreement, at the time that the grant, contract, or agreement is entered into.

Infeudatio.—Infeftment, seisine, investiture; comprehending the symbolical delivery of the property, in virtue of the charter or other warrant for infeftment. In the *Regiam Majestatem,* and other old books, the *infeudatio* is meant the charter alone. The word *seisine* is often erroneously spelled *sasine. Seisine* is the proper term, signifying to take possession of land or tenements,—to seize

upon, to lay hold of, to secure, &c. ;—*Seizin*, N. S. (Saisine, *Fr.*)

18. *Regiam Majestatem.*—Royal Majesty.

20. *A me.*—From me. A charter *a me* is granted by a subject superior to a vassal, to be held of his the granter's immediate lawful superior; but it is ineffectual till confirmed by the granter's superior.

Tenend. a me de superiore meo.—Holding from me, of and under my superior. The holdings of mortification and wardholding are extinct; the former tenure fell at the Reformation, and the latter was abolished by the Act 20 Geo. II. c. 5, and was one of the results of the rebellion in 1745, and meant to lessen the influence of superiors with their vassals. The ordinary holding now is either feu or blench; feu, where a sum is paid to the superior annually, or blanch is a mere elusory duty, as a penny Scots annually, *si petatur tantum.*

De me.—Of and under me. A charter *de me* is that by which the lands are to be held immediately of and under the disponer himself.

Tenend. de me et successoribus meis.—Holding of me and my successors.

21. *Pro non adjecto.*—As not adjected, as super-

fluous. For instance, where the consent of another is given who is merely supposed to have had a title, this is held as superfluous and unnecessary.

22. *Spe numerandæ pecuniæ.*—In the view of counting over and paying down the money.

Ex dolo.—Through fraud or deceit.

23. *De novo damus.*—We give of new. A charter of novodamus is one in which there is a clause of novodamus joined to the dispositive clause.

Quae quidem.—Which indeed. A clause in a charter by progress, mentioning the former vassal, and the manner in which the right was transmitted from him to the granter, whether by resignation or otherwise.

24. *Tenend. praedictis terras.*—Holding the foresaid lands. This phrase alludes to the superior of whom the lands are held, and the particular tenor by which they are enjoyed, whether by blench, feu-farm, or other services.

Reddendo inde annuatim. — Returning or paying annually therefor, or the services or feu-duty to be paid or performed by the vassal to the superior. It takes its

name from the words in the Latin charter, *Reddendo inde annuatim, &c.*

25. *Debitum subesse.*—That the debt was legally due. In allusion to the warrandice in a conveyance to the extent of the debt, and that it was truly due.

Debitorem locupletem esse.—That the debtor was able to pay. The granter is not understood to warrant the sufficiency of his debtor to the assignee, unless otherwise agreed on, as in § 27.

Nisi aliud convenerit.—Unless it shall be otherwise agreed.

26. *Contra omnes mortales.*—Against all and sundry; against all deadly. A clause of absolute warrandice is expressed in these terms.

27. *Sciens et prudens.*—Knowingly and wittingly. If a person, in making a gratuitous deed, shall bind himself in absolute warrandice, he ought, in law and equity, to be tied to his obligation.

Pacta dant legem contractui.—The stipulations of the parties constitute the law of the contract.

Per incuriam.—Through carelessness, negligence, or inadvertency.

Tanquam quilibet.—As any other individual.

In grants by the crown, no warrandice lies against the Sovereign *jure coronae;* but the granter, and his heirs who succeed to him in his private patrimony, are liable in the same degree of warrantry as other granters.

27. *Utitur jure communi.*—He uses the common law.

31. *Stricti juris.*—Of strict law, of strict interpretation. Warrandice, and the obligation to grant it, ought not to extend beyond the strict letter of it. *Vide* Bruce, 51.

Tanquam optimum maximum.—As free from all servitudes and burdens.

Per expressum.—In direct terms.

32. *Tanquam in libello.*—As in the libel.

35. *Propriis manibus.*—With his own hands. A person is said to give seisine *propriis manibus* when he appears personally on the ground, and delivers the usual symbols to the grantee. A vassal is said to resign his lands *propriis manibus* when he appears personally before the superior, and resigns his lands into his hands, in order that he may receive a new investiture.

38. *Non enim creditur referenti, nisi constet de relato.*—For people do not trust to a per-

son relating a matter, unless it appear evident from the fact related.

44. *Eo ipso.*—By the thing itself. Lands holding of the crown, when they fall to the King by forfeiture, are *eo ipse* consolidated with the superiority.

Pars fundi.—Part of the ground. In the conveyance of land, where no mention is made of coal, the feudal right to the coal is truly *pars fundi*; Jan. 30, 1662, Lord Buccleugh.

47. *Regalia.*—Things belonging to the King in right of the crown. Feudal privileges by the Sovereign, whether of union, barony, regalia, &c. ought to be expressed in the charter to the grantee.

49. *Debita fundi.*—Debts affecting the ground; debts heritably secured.

50. *Modus habilis.*—A proper or suitable method, and has reference here to a reserved faculty to burden land.

52. *Sk. de Verb. Sig.*—A contraction for *Skene de Verborum Significatione*, or an exposition of the terms and difficult words contained in the four books of the *Regiam Majestatem*.

BOOK II.—TITLE IV.

Of the several Kinds of Holding.

Sect.

1. *Servitia solita et consueta.*—Services used and wont. This tenor was considered military, if the charter did not mention that it was due in name of feu or blench farm.

Feudum rectum.—A proper feu, or military feu, according to the feudists.

Feudum militare.—A feu for military services. So named in the *Regiam Majestatem*, L. 2, c. 27. § 2.

Miles.—A soldier or vassal. He was subjected to military services; *Reg. Maj.* ib. § 2.

3. *Qui justus esse debit.*—We ought to be, or should be just. This refers to some near kinsmen of the heir's managing his estate during his minority, in lands holding ward, according to the ancient usage of England. He was to be accountable for the rents *qui justus esse debit*; *vide* Magna Charta of Henry I., preserved by Matth. Paris, edit. 1684, p. 46.

5. *Nomine feudifirmæ.*—In name of a feu-duty.

The vassals who held by this tenure, were obliged to pay or deliver to the superior a fixed yearly rent, either in money or grain, *nomine feudifirmæ*; and sometimes also they were bound, like soccagers, to perform services proper to a farm, as plowing, sowing, reaping, carriages, &c.

Extra curtem domini.—Beyond the territory of the superior. A vassal is not bound to carry the grain, or other articles payable to the superior, beyond the territory of which the vassal's property forms a part.

6. *Emphyteusis.*—Feu farm; one of the tenures by which a vassal held his feu. In the Roman law, this word signified a right by which the perpetual use of land was given to a person for the payment of rent; and although the holder could not sell the property without first offering it to the *dominus*, yet he was entitled to the full profits arising from it, and could im pignorate it for debt.

Jus dominii proximum.—A right next, or nearly equal, to that of the superior.

Actio in rem.—An action for recovering the property.

Emphyteuta.—A vassal who holds his lands

in feu-farm. This phrase refers to the right which the *emphyteuta* or vassal has in the property itself.

Feudum, or *subfeudum*.—A feu, or sub-feu; namely, a feu held of or under a vassal.

7. *Nomine albae firmae*.—In name of feu-duty. In blench holdings, vassals are taken bound to pay to the superiors, in full of all services, a small acknowledgment, either in money or some other subject,—as a penny money, a pair of gilt spurs, a pound of wax, pepper, &c. *nomine albæ firmæ*.

Feudum francum.—A free feu. In feus of this sort, all services are remitted, and it was by the oath of fealty alone that the right was known to be feudal.

Si petatur tantum.—If asked only. This refers to the feu-duty, and has been explained to mean a small acknowledgment by the vassal to the superior, if asked within the year.

Si petatur intra annum.—If asked within the year. This respects the blench holding, or the small annual duty or acknowledgement mentioned in the *reddendo* of the charter, which is not exigible if not demanded within the year.

Sect

8. *Naturalia.*—Things naturally or necessarily included, as watching and warding, which are included in a burgage tenure, though not expressed in the charter.

9. *Pro servitio burgali.*—For burgage service, or the tenor by which royal burghs hold of the Sovereign. In a charter of Robert III. erecting the burgh of Innerkeithing, the *reddendo* is *servitium solitum et consuetum*, or military service.

Utitur jure privato.—Uses its, his, or her private right or privilege.

10. *In puram eleemosynam.*—In pure charity; or donations granted to churches, monasteries, or other corporations, for religious, charitable, or public uses. These, in our law style, are said to be mortified.

BOOK II.—TITLE V.

Of the Rights of Superiority, and its Casualties.

5. *Salva rerum substantia.* — Preserving the substance of the things. Liferenters, and others having merely a temporary interest, are bound to use the property, *salva rerum substantia*, without consuming or wasting the things in which they have a temporary right.

8. *Volenti non fit injuria.*—An injury cannot be done to a willing person; or, no man can complain of a wrong by a proceeding, where the measure had his previous consent.

Pro quantitate hæreditatis et temporis.—The superior, during the ward, was bound to pay a certain proportion of the vassal's debts, *pro quantitate hæreditatis et temporis*, according to the extent of the heritage and the endurance of the ward.

9. *Jus individuum.*—A right that could not be divided, as a right of superiority; for, in the case of co-heiresses, the ward determined when the eldest attained the age of 14.

Gleba terræ.—A clod of earth. Heirs-portioners, being heirs *pro indivisio*, as undivided, each has an equal property *in omni gleba terræ*, in every clod of earth.

Capaces doli. — Capable of treachery or fraud. In wardholdings, the ward might be guilty of treachery, and his lands might be forfeited to the crown, at the age of sixteen.

15. *Cum effectu.*—With effect. Recognition, or when the vassal's lands fell to the superior, was not incurred where the property

was not transferred *cum effectu* by the vassal's alienation.

13. *In lecto.*—On death-bed. Recognition could not fall against an heir by his ancestor's deed, granted on death-bed, affecting his estate.

14. *In computo.*—In computation; in reference to what cases alienation might be conjoined so as to make up the half of the ward fee, and infer recognition.

Novodamus.—A new right granted by the superior to his vassal, or his heir; or a charter of *novodamus* is the name given to the charter by progress, which contains a clause of *novodamus*. In law, it is accounted an original right, and may be granted by the superior to his vassal's heir, knowing him to be so, with or without service.

16. *Alioqui successuri.*—Those who would otherwise have succeeded; referring to the heir of a vassal who would have succeeded to him by the law of primogeniture, without any deed in his favour.

17. *Clare constat.*—A subject superior sometimes grants a precept of *clare constat* to his deceased vassal's heir, as the cheapest and easiest method of making up his

titles. The deed is thus named from its commencing with the words *clare constat*, signifying it clearly appears.

18. *Maritagium.*—Marriage. This is not the same as *matrimonium.* In the feudal sense of the word, *maritagium* signified the casualty by which the superior was entitled to a certain sum of money from the heir of his former vassal, who happened not to be married at his ancestor's death. The avail of marriage was the sum payable to the superior by the heir of a deceased ward vassal, on his becoming marriageable. The avail, single or double, was not due, except in the case where the superior having offered to the heir of 21 years of age a wife, without disparagement, the heir, not contented with refusing the match offered, intermarried with another woman without the superior's consent. In the case of a female ward, Sir George Mackenzie, though in the title marriage he lays down 12 in females as the marriage age, yet in the title of holdings, in treating of ward, he says, B. 4. tit. 4. § 3. "In female vassals, this "casualty lasts only till 14 years com- "plete, because they may then marry

" husbands who may be able to serve the " superior." If no person was proposing marriage to the female ward, the superior might pitch upon six unexceptionable young men of the clan for her selection of one of them for a husband. The single avail was in the year 1674 fixed by the Court of Session at three years rent of the vassal's estate; but it was afterwards reduced to two. The double avail was estimated at two single avails. In estimating its amount, not only the ward estate, but the whole other free estate of the vassal, was brought in *computo* as it stood at the period when he became marriageable. But by the British statute 20 Geo. II. c. 50, not only the tenure of ward-holdings, whether simple or taxed, but all lands and the casualties of ward, marriage, and recognition consequent upon that tenure, were utterly abolished.

22. *Cum maritagio.*—With the casualty of marriage.

26. *Ob non solutum canonem.* — For not payment of the feu-duty, failing of which an action might be raised for declaring an irritancy.

Canon emphyteuta.—Yearly duty. By the

Roman law, the *emphyteuta* or proprietor had right to the lands, if the vassal ran three years in arrear, or two if derived from the church; *L.* 2. c. *de jure emple, Nov.* 120, c. 8. This was called the tinsel of the feu right, from tyne or lose.

28. *De non alienando.*—A clause *de non alienando* is a clause prohibiting alienation of the property.

31. *Census.*—A subsidy or tax. A general valuation of lands, first introduced by Alexander III., who, to create a tocher to his daughter, who was married to Eric King of Norway, raised a subsidy.

32. *Quantum valuerunt tempore pacis.* — How much the lands were worth in time of peace. This had reference to the valuation of old extent.

Quantum nunc valent.—How much the lands are now worth, in respect to the new valuation or extent.

38. *Valere seipsum.*—An infeftment of annual-rent is said *valere seipsam*, to put a value upon itself.

40. *Mora* or *culpa.*—Delay or fault, as in the case where the superior forfeits his non-entry-duties, after he is charged on a

precept from the Chancery to enter the vassal in the lands and refuses it.

42. *Interim dominus.*—A proprietor in the mean-time ; meaning here, the right of the superior, not as creditor, but as proprietor *interim dominus* of the rents due after citation, in an action of poinding the ground.

45. *Personali exceptione.*—By personal exception.

Simul et semel.—At one and the same time.

48. *Uti mos est in feudifirmis.*—As is the custom in feu-farms.

49. *Quantum*—Extent, amount.

50. *Responde*—or book kept by the director of the Chancery, containing the non-entry, or relief-duties, and chargeable upon the sheriffs, who are answerable for them to the Exchequer, by 1587, c. 73.

55. *Induciæ legales.*—Intermediate days, or days of indulgence, which are allowed to run between the citation of a defender, and the day on which he is cited to appear in court.*

58. *Ante omnia.*—First of all. In pleadings be-

* In the end of the work is annexed a comprehensive Table, or list, of the various *induciae legales.*

fore the Court, we find this phrase employed to denote that, before proceeding to the merits of a cause, some point of conscience should anteriorly be inquired into, considered, or granted *ante omnia*. In matters of fact, this rule ought never to be departed from.

59. *Ad factum præstandum.*—To perform a fact or deed in a man's own power.

64. *Regalem habens dignitatem.*—Having royal dignity or jurisdiction.

66. *Civiliter mortuus.*—Civilly dead. A person outlawed is said to be civilly dead; that is, to be unable to sue or defend, or to hold property in the country.

69. *Quoad fiscum.*—In so far as the fisk, or right of the crown, is concerned.

78. *In cursu rebellionis.*—In the course, or act of rebellion.

81. *Per membra curiæ.*—By the members of Court, by the officers and clerks of the Exchequer.

83. *Per saltum.* — At once. Signatures and charters of vassals of kirk-lands, if the valuation does not exceed L.100 Scots, pass the Great Seal *per saltum*, without passing any other; 1690, c. 32.

85. *Ultimus hæres.*—The last heir. The King,

as *ultimus hæres*, succeeds to the property of persons who die without heirs or assignees, or of bastards who die without leaving issue of their own body or a will. Originally, in default of the heirs of the investiture, the right of succession returned to the superior from whom it proceeded; but, since feus have changed their nature, the law calls the King to the succession, in right of his prerogative. He cannot be heir to a subject superior, and is under some necessity of presenting a donor, for he cannot be himself the vassal of any of his subjects; Craig, L. 2. tit. 17, § 5.

86. *Subreptione vel obreptione.*—By concealing the truth or affirming a falsehood. The passing of grants by the Seals may be stopped by the Barons of Exchequer, even after passing the signature, if it shall appear that the right applied for has been solicited and obtained in an improper manner.

BOOK II.—TITLE VI.

Of the Right which the Vassal acquires by getting the Feu.

Sect.

1. *A coelo usque ad centrum.*—From the heavens even to the centre of the earth. In reference to the vassal's *dominum utile*, contained in the charter, and comprehending baronies, tenantries, fields, and others: also, houses, trees, minerals, water, coal, limestone, &c.—*a coelo usque ad centrum.*

4. *Tenendas.*—Holding. This is the name by which a clause in a charter specifying the tenure of free-holding or blench-holding is commonly deisgnated.

Cum domibus, ædificiis.—With houses, buildings. These words are held to include houses of every description.

5. *Questio voluntatis.*—A question of will or intention.

Cum molendinis.—With grist mills. This phrase respects the point whether mills are carried by a charter of the ground; and it has been ascertained that it cannot be carried by a charter, without

either a special grant of it in the dispositive clause, or the erection of the lands into a barony; and, in illustration thereof, Mr Erskine says that the *questio voluntatis* may be gathered entirely from circumstances: "If one who has built a "mill on his lands should entail his "estate, the mill no doubt would be "carried by the entail, though there "should be no express mention of mills "in the deed; and, in the same man-"ner, an heir would carry the right of "mills by a special service and retour, "though the retour should only mention "the lands."

5. *Inest de jure.*—The restraint of a proprietor, whose lands are thirled to another proprietor's mill, from building a mill within the thirl. *Inest de jure* is implied without any explicit clause in his titles.

6. *Cum aucupationibus, venationibus, piscationibus.*—With fowlings, huntings, and fishings. This clause in a charter of hunting, fowling, and fishing, within one's own grounds, naturally arises from one's own property in the lands; but it is restored by sundry statutes.

7. *Cum cuniculis et cunicullariis.*—With rabbits

and warrens. Clauses with " rabbits and warrens"—the right to these are implied in property. The act of James IV. 1503, c. 14. enjoins landholders to exercise it, by making parks with deers, cuninghars, and dovecots.

Cum columbis et columbariis.—With doves and dovecots. By act of Parliament, 1617, c. 19. no landlord is allowed to build a pigeon-house unless he has an yearly rent of 10 chalders of victual lying within two miles of it.

8. *Cum fabrilibus, brasinis et brueriis.*—With forges, malt-kilns, and breweries. We are assured by Craig, c. 2. dieg. 8. § 25. that no vassal had anciently the right of brewing, or of a smith's forge, where horses might be shod, or plough-irons made, without a licence from the superior; but by the latter practice, feuars, more agreeably to the nature of their grants, were entitled to brew within their own property, without either an express clause in their charter or a licence from the superior.

9. *Cum libero exitu et introitu.*—With free ish and entry. With free access out and in; without which property would be use-

less, and without doubt import a right to all ways and passages, in so far as may be necessary for the vassal's access to kirk and market; but this right cannot of necessity extend to all convenient passages, or to roads by the nearest line, or though different parts of the grounds belonging to the counterminous proprietor; St. b. 2. t. 7. § 10.

10. *Cum herezeldis.*—With the best things that move, as horses, cows, belonging to a deceased tenant, which, by ancient custom, was due upon his death to his landlord.

11. *Cum pertinentiis.*—With the pertinents; such as, natural fruits, grass, &c. as part and pertinent to the vassal.

Sine cura et cultura.—Without care and cultivation. This refers to natural fruits, such as apples, grass, or pasture grounds, or natural grass, which grow up *sine cura et cultura.*

13. *Regalia* are either *majora* or *minora.*—The rights belonging to the King are either greater or less. The *majora* include the several branches of the royal prerogative, and are absolutely incommunicable to a subject. The *minora* include those

which the King might convey to any person at pleasure.

14. *Inter regalia.*—Jurisdictions and forests are *inter regali*, but woods or parks *juris privati*.

15. *Jus regale.*—A right belonging to the Crown, which in general is understood to be every right which the King has over the estates or persons of his subjects. Salmon-fishing is held to be a *jus regale*, and not carried by a charter without an express clause. The common clause *cum piscationibus* is a sufficient title to constitute a right to salmon-fishing by prescription : 40 years possession, connected with the general clause, establishes a right to that regale.

17. *In patrimonio principis.*—In the patrimony of the prince.

Juris publici.—A matter of public right.

18. *Nomen universitatis.*—The name of a community or corporation, including under it all the different subjects or rights of which it consists, though not expressed, as a barony, but pointing to the privileges of a barony, and what is carried by a general conveyance of it. Possession

of a part is considered possession of the whole.

Unum quid.—One individual right.

21. *Pactum de assedatione facienda et ipsa assedatio aequiparantur.*—An agreement for entering into a lease is as binding as the lease itself, in reference to the consent of the landlord, and possession by the tenant.

24. *Minimum.*—The least, or shortest period; as where a tack is sustained for two years only as the *minimum*, Nov. 22. 1737, Redpath, during which two years it is good against singular successors.

31. *Delectus personae.*—An election or choice of the person who becomes tenant, implied in all leases.

Propter curam et culturam.—A tack is said to be granted on account of the care and cultivation which the tenant is to bestow upon the lands.

39. *Tanquam bonus vir.*—As an honest man. This respects the obligation incumbent on the tenant to cultivate the lands properly.

In arbitrio judicis.—In the will, or at the discretion, of the judge.

41. *Plusquam tolerabile.*—More than tolerable;

more than can be suffered. This relates to an abatement of the rent, arising from the sterility of the grounds, or as possessed by an enemy, or overflowed by the sea.

41. *Colonus partiarius.*—A husbandman, or farmer, who goes shares with his landlord; applied to tenants who are taken bound to deliver a share of the increase, in name of tack-duty, and who therefore cannot plead exemption from payment of the tack-duty, on account of extraordinary sterility.

50. *Pactis privatorum publico jure derogari nequit.*—The law of the land cannot be taken away by the agreements of private individuals. The act of sederunt as to the removing of tenants seems to have considered the matter in this light; for though the act declares it lawful for the landlord, where the tenant has expressly bound himself to remove without warning, to charge him with horning on his obligation, yet it is only in the precise case that he actually charges the tenant forty days before the Whitsunday, and produces the tack and horning duly executed in Court, that the judge-ordinary is authorised to eject him six days after the

ish; or, it is not lawful in a landlord, by any private agreement with a tenant, to take advantage of his necessitous circumstances, and force him to remove without regular warning, in terms of the act of sederunt 1756.

54. *Probabilis causa litigandi.*—A probable ground for litigating; as in the case where a tenant or other person propones reasonable grounds of defence; or in the case of a pauper satisfying the Court that he has a probable ground of action, to entitle him to the benefit of the poors-roll.

56. *Pignus.*—A pledge. This refers to the landlord's right of hypothec in the fruits of the ground, and in the cattle brought upon it by the tenant.

59. *Currente termino.*—During the currency of the term. The landlord's right of retention of the tenant's stock is greater before the rent is due, or *currente termino*, than after the term of payment.

61. *Ex natura.*—According to natural course. This refers to the landlord's hypothec assumed over the cattle, sheep, lambs, and the whole flock or herd of the tenant. It does not appear to arise *ex natura*, as in

§ 56, but from an arbitary constitution introduced by customs; and our lawyers are agreed that it is not so strong as that on the fruits; St. 6. 1. t. 13. § 15, &c.

64. *Prædium urbanum.*—An urban tenement; a property in a town.

Invecta et illata.—Things imported and brought in. *Invecta et illata a jurisconsultis appellantur, quæ ab inquilinis ædes conductas inducuntur importanturque*: The furniture put into a house by a tenant, called *invecta et illata*, though borrowed or hired, is held to be hypothecated or pledged to the landlord for the rent. In thirlage, the grain purchased at a distance, and brought within the thirl to be manufactured, called *invecta et illata*, is sometimes liable for the multure payable for grain raised within the thirl; and meal or flour manufactured at a distance, and brought within the thirl to be consumed, is in some instances considered as *invecta et illata*, and, as such, held to be liable in multures, as if manufactured within the thirl.

BOOK II.—TITLE VII.

Of the Transmission of Rights by Confirmation or Resignation.

Sect.

2. *Majori minus inest.*—The less is included in the greater. A person who conveys an heritable estate, is held virtually to convey all inferior rights connected with it, though not expressed in the conveyance.

3. *Jus superveniens auctori, accrescit successori.* A right supervening, or afterwards arising to the proprietor of an estate, accrues to his successor. After a person has conveyed an estate, if any right connected with it supervene, it accrues to the person to whom he has conveyed it.

14. *Periculo petentium.*—At the risk of the applicants. Referring here to vassals applying to the Exchequer for confirmation of their right. In confirmations by the Crown, act 1578, c. 66. it was enjoined that no double confirmation of lands holding of the Crown should be granted in future; but this injunction, according to Erskine, was improper, for he says, the Barons of

Exchequer, not being competent judges, in the question of double confirmations, nor to the nullities that may be objected to a first, cannot refuse granting second and third confirmations *periculo petentium*.

19. *Ad perpetuam remanentiam*.—To remain for ever. When a superior purchases the *dominium utile*, the vassal executes in his favour a resignation *ad perpetuam remanentiam*; and whenever this is done, the property and superiority are consolidated as if they had never been separated.

In favorem.—In favour. When a vassal sells his lands, he sometimes resigns them into the hands of the superior *in favorem* of the purchaser, and for new infeftment to be given to him.

23. *Habilis causa transferendi dominii*.—A sufficient cause for transferring the property. Property cannot be transferred to a superior by a resignation *in favorem*, because in a resignation *in favorem* there is not only no *habilis causa transferendi dominii*, but the resignation is made with the view of conveying the property to another, and under the express quality that it shall not remain with the superior.

Sect.

26. *A non habente potestatem.*—From a person not possessing the power of doing what he has done, or intends to do. A right flowing from a person who has not the power to give it, is null and ineffectual. A person not infeft, cannot grant a precept of seisine to his disponee. Such a precept, as flowing *a non habente potestatem*, is null.

Jus obligationis.—A right of obligation; a personal right, not a *jus in re*, in the thing itself.

BOOK II.—TITLE VIII.

Of Redeemable Rights.

2. *Ex eo quod plerumque fit.*—From that which most frequently happens. This has respect to redeemable rights, which, according to Sir George M'Kenzie, returns to the disponer or granter on payment of the sum for which it was granted, and extends to a gratuitous disposition by a father to his son, redeemable on payment of a rose-noble, in the words of our author; and nothing hinders a right from returning to the granter without the payment of any sum, as if one should make over

lands to a stranger, with a clause of return to himself on the existence of issue of his body. And our learned author adds, "And though a right of this sort cannot "be called redeemable in the strict "grammatical sense of the word, since "no price is paid for recovering it, it car- "ries with it all the properties of a re- "deemable right."

2. *Pactum de retrovendendo.*—An agreement concerning the sale of a thing back again. An agreement to sell a thing back to the seller. A right of redemption, when adjected to a proper sale, is said to be a *pactum de retrovendendo.*

4. *In gremio.*—In the body of the deed; or a clause in a right of wadest, or other deed, which may be founded on by a party.

5. *Actio pignoratitia.*—An action for the redemption of a pledge.

Actio bonæ fidei.—An action of good faith. An action for the redemption of a pledge was said to be *actio bonæ fide.*

14. *Quandocunque.*—Rights of reversion, being perpetual, can be exercised *quandocunque*, that is, at any time.

Pactum legis commissoriæ in pignoribus.—An agreement of the Commissorian law

in pledges. *Lex Commissoria*, in regard to the contract of sale, is an agreement by which, if the price be not paid by a day certain, the sale becomes null. In regard to pledges, it is an agreement, that, if the debt for which the pledge is constituted be not paid by a certain day, the pledge becomes forfeited to the creditor.

14. *Contra bonos mores.*—Against good morals or good conduct. A condition adjected to some reversions, as to the subject impignorated becoming the property of the creditor wadsetter. This was reprobated by the Roman law, and is so by ours.

19. *Pro tanto.*—For so much; and has respect to consignation of redemption money, *ex. gr.* bonds of borrowed money, or other liquid obligation for debt due by the wadsetter to the reverser, cannot be sustained on grounds of compensation, so as to supply the place of consignation *pro tanto*, because all such equivalents are excluded by the tenor of the reversion, which requires consignation to be made in current money.

25. *Res non sit integra.*—The matter is not entire. As in the case of a sale of lands

where the bargain is incomplete for want of writing or possession, or otherwise, and may be resiled from, *res non sit integra*; or a promise of marriage, not followed by a *copula*, renders matters incomplete, but subjects the party resiling in an action of damages. In Holland, a simple promise of marriage, without a *copula*, validly grounds an action of declarator of marriage.

26. *In solutum*.—In satisfaction or payment, and thereby covenanting that the use of the lands possessed by the wadsetter shall, during the not redemption, go for the use of the money lent, so that the wadsetter enjoys the rents without accounting in satisfaction, or in *solutum* of his interest.

Periculum.—Risk, danger, and where the wadsetter in a proper wadset undertakes the *periculum* of the rents.

Tanquam interim dominus.—As a temporary proprietor. In a proper wadset, what the wadsetter receives of the rents is his own, with this only deduction, that every year's rent received by him, be it high or low, extinguishes a year's interest of the debt due to him by the ~~pursuer~~ reverser.

28. *In gremio juris.*—In the body of the right. Back tacks granted by the wadsetter to the reverser, if they be neither ingrossed in the wadset, nor registered in the register of reversions, are ineffectual against the wadsetter's singular successors; for no real right can be charged with any burden which is not either incorporated *in gremio juris*, or recorded in the register by the directions of 1617, c. 16.

37. *Pari passu.*—With an equal pace; equally. When a judge, in a multiplepoinding, pronounces an interlocutor giving creditors an equal preference to a fund *in medio*, it is styled a *pari passu* preference.

BOOK II.—TITLE IX.

Of Servitudes.

2. *Ex lege.*—From law or statute; in reference to servitudes being natural or legal.

4. *Tantum praescriptum, quantum possessum.*—There can be only a prescriptive right acquired in so far as there has been possession. Servitudes, or other rights acquired by prescription, can never extend

beyond the use which the acquirer has had, because to that extent only the prescription extends.

5. ***Praedium.***—A tenement of land or houses.

6. ***Rusticae*** and *urbanae.*—Rural and urban. Servitudes are divided into rural and urban; the former relating to rural tenements, as a farm, a field, a garden; the latter to urban tenements, as houses.

7. *Oneris ferendi.*—A servitude *oneris ferendi*, of bearing a weight, is a right which one person has to rest the weight of a house, or some part of it, upon the house of another.

Tigni immittendi. — A servitude *tigni immittendi*, of admitting the rafter or beam, is a right which one person has of having the rafter or joist of his house received into the wall of the house of his neighbour.

Paries oneri ferundo, uti nunc est, ita sit.—The wall of a house, by bearing the burden, as it now is, so let it be. By these words, servitudes *oneris ferendi* were constituted, which obliged the proprietor of the servient tenement to keep it in repair for ever.

8. *Strictissimi juris.*—Of the strictest interpre-

tation. Servitudes being *strictissimi juris*, are not to be extended by implication.

9. *Stillicidium.*—The rain-water that falls from the roofs of houses in scattered drops.

Flumen.—A river. The word *flumen* here signifies the rain-water that falls from the roof of a house, when collected into a spout.

Nemo potest immittere in alienum.—No person can throw the rain which falls on his house upon the property of his neighbour: No person can rest what belongs to himself upon the property of another, without his consent.

Cujus est solum ejus est usque ad cœlum.—He to whom the soil belongs is proprietor, even to heaven.

10. *Non officiendi luminibus vel prospectui.*—Of not obstructing the light or prospect. A servitude of this kind prevents the proprietor of the servient tenement from erecting any building which can obstruct the light, or the view of the dominant tenement.

Altius non tollendi.—Of not building higher. A servitude *altius non tollendi*, prevents the proprietor of the servient tenement from building above a certain height.

Altius tollendi.—Of building higher. A servitude *altius tollendi*, entitled the pro-

prietor of the dominant tenement to raise his house higher than the houses of the servient tenement, or, as some think, than the regulations of Augustus permitted.

12. *Iter.*—A foot-path. A servitude of this kind, of which there are many in Scotland, entitles the proprietor of the dominant tenement, and his servants and family, to a foot passage through his neighbour's property.

Actus.—A road for cattle; a private road. There are servitudes analogous to this in Scotland, known by the name of loanings, as well as of using private roads through a neighbour's property.

Via.—A road. A servitude of this description included both the *iter* and the *actus*, and implied the right of driving carriages of all kinds. In classical writers, *via* is used to signify a highway.

Aquaeductus.—The conveying of water in a conduit, or canal, from one place to another. A servitude of aqueduct is a right to convey water in conduits or canals, for a person's own use, through the property of his neighbour, as in the case of mill-dams.

Aquaehaustus.—This servitude implies a

right, belonging to the proprietor of the dominant tenement, of watering his cattle at any river, brook, well, or pond, that runs through, or stands upon the property, which forms the servient tenement.

14. *Jus pascendi pecoris.*—The right of pasturing cattle; or the servitude, in favour of the dominant proprietor, to the grass grounds of the servient, for pasturing a determinate number of cattle proper to the dominant.

Cum communi pastura.—With common pasturage. A clause often used indefinitely, without mentioning any servient tenement to be burdened with the pasturage.

18. *Locatio operarum.*—The letting of labour for hire; or a thirlage, whereby the miller lets out his labour for hire to those who shall employ him.

21. *Per expressum.*—By express words. Thirlage is established directly or indirectly; directly by an express grant of a mill, with the multures used and wont, though it should not specify the lands restricted, is sufficient to constitute a thirlage over such of the granter's lands as were at the date of the grant in use to pay insucken multures to the mill disponed, and it also

implies a conveyance of the thirlage of lands belonging to others which were at that date astricted to the mill disponed ; St. b. 2. t. 7. § 16.

22. *Cum astrictis multuris.*—With astricted multures. Thirlage may be established by a writing, indirectly, when the words of the grant bear no explicit constitution of that servitude, but in the construction of law imply it. A feuar of a part of a barony was subjected to thirlage for the lands feued, in a question with one who had afterwards purchased the mill itself from the Baron, *cum astrictis multuris*, notwithstanding the feuar's right, which, too, bore the *reddendo* of a special duty *pro omni alio onere*, in respect that it did not bear *cum molendinis et multuris ;* but, says our author, this constructive servitude appearing inconsistent with the legal presumption for liberty, it soon suffered limitations. The doctrine of multure, if well founded in the grant of a barony mill, must *a fortiori* obtain where there is no restriction.

Pro omni alio onere.—For every other burden. If a clause of this description is in the *reddendo*, the feuar will enjoy his

lands free from astriction, as in the preceding phrase.

22. *Cum molendinis et multuris.*—With grist mills and multures.

23. *Omnia grana crescentia.*—All growing corns; all grain produced within the thirl.

24. *In fraudem.*—Through fraud; to the prejudice of. A tenant who lays out his grounds in grass, is considered to do it *in fraudem* of the thirl.

26. *Granum crescens.*—Growing corn.

Invectum.—Brought, or carried in; or grain brought within the thirl, which is generally subject to a higher thirl than grain raised within it.

27. *Præsumendum est pro libertate.*—The presumption is for freedom, or in favour of liberty.

28. *In iis quæ sunt meræ facultatis nunquam præscribitur.*—In those things which consist of a mere power or faculty to act, there is never prescription.

29. *Aliqualis.*—Such as it is; and if followed by possession for 40 years, forms a prescription thirlage.

32. *Brevi manu.*—Literally, with a short hand; at his own hand; without the intervention of a judge.

Sect.

33. *Malitiis hominum non est indulgendum.*—No indulgence ought to be given to the craftiness, or malice of men.

34. *Unaquæque gleba servit.*—Every particle of land is subservient to the servitude; but servitudes ought to be used in the way least burdensome to the servient tenant.

36. *Res sua nemini servit.*—Nobody has a servitude over property which exclusively belongs to himself.

37. *Jure servitutis.*—By right of the servitude. This points out one of the modes by which servitude may be extinguished, when the same person becomes owner both of the dominant and servient tenements, for the use which the proprietor afterwards makes of the servient is not *jure servitutis*, but an act of property.

De novo.—Of new; in reference to the constitution of a service *de novo.*

Non utendo.—By not using it; referring here to servitudes being lost by the negative prescription of 40 years, *non utendo.*

Nihil tam naturale est, quam eo genere quidquam dissolvere quo colligatur.—Nothing is so natural as to extinguish a right in the same way that it was constituted.

Sect.

39. *Usus.*—Enjoyment, use; in allusion to the use of the fruits of the subject of the servient and his family.

Usarius.—A person who had a right by servitude to use a thing.

40. *Salvâ substantiâ.*—Without wasting its substance, as a field, a fishing, &c.

Quorum usus consistit in abusa.—The use of which consists in wasting it; relating here to subjects perishing in the use of them.

44. *Tertia.*—A third; in allusion to the third or terce of the lands which a widow has right to, in the property over which the husband stood infeft at the period of his death.*

50. *Interim domina.*—Interim proprietrix; as in the case of a widow's right, after her service, either to possess terce lands, or to let them to tenants.

* Lesser terce is due to a widow, while a widow of the husband's ancestor is alive. In this case, the second widow receives one-third of the two-thirds which remain unaffected by the first terce; but, on the death of the first widow, the lesser terce becomes enlarged to one-third of the whole rents. Terce is not due in burgage tenements, but it has been found due from tenements in boroughs of barony.

Courtesy—A right of liferent which the law gives to a husband on the death of his wife in all heritage in which she died infeft, provided a child was born alive of the marriage, who was, or could have been the heir of the mother.

54. *Titulo singulari.*—By a singular title.

58. *Cum sylvis.*—With woods. A life-renter infeft *cum sylvis* cannot sell the wood, but may use it for keeping, in a tenantable condition, the houses on the liferent lands.

59. *Cautio usufructuaria.*—Caution given by liferenters, among the Romans, to preserve the subject from waste or destruction.

60. *Nuda patientia.*—A bare forbearance or sufferance. The fiar of a decayed house cannot be compelled by the liferenter to put it in tenantable repair, because a liferent, being a servitude, binds the person burdened no farther than to a *nuda patientia.*

61. *Ubi id non agebatur.*—Where that was not agitated or treated of; in allusion to acts of convention, supply, and subsidy acts, subjecting annuitants to taxes.

63. *Ex jure naturæ.*—By the law of nature, in respect to a parent or heirs of entail being bound to maintain the next heir *ex jure naturæ.*

64. *In bonis.*—Among the goods of the deceased. If a liferenter survive Whitsunday, the preceding half-year goes to his executors; and the other half, not due till Martinmas, falls to the fiar.

66. *De die in diem.*—From day to day, daily; in

reference to the duration of the liferent of fishings, colleries, and all works and other subjects, the profits whereof arise from continual daily labour, and is not governed by any legal terms, but must be computed *de die in diem*.

BOOK II.—TITLE X.

Of Teinds or Tithes.

4. *Pauperes.*—Indigent or poor persons. Lay monks, in time of Popery, were so called, from the smallness of their livings in the church.

5. *Renovatio.*—Renewal, or the entry of the heir of the vassal by the superior.

Alienatio feudi.—An alienation of the soil, or property.

7. *Inconsulto Romano pontifice.*—Without consulting the Pope or Roman pontiff, who, in 1468, wrested the patrons right, whether kings or subjects, and voided all alienations of church-lands which were granted *inconsulto Romano pontifice.*

10. *Propter culturam et curam.*—On account of cultivation and care.

11. *De jure communi.*—By common law. This rule applies to tithes that are due to parochial churches *de jure communi.*

Parte inaudita.—Without hearing the party. Ministers are secured in the enjoyment of the tythes against all grants to their prejudice.

Decimæ debentur parocho.—The tithes are due to the priest of the parish.

Mensa.—A table, which, in the middle ages, signified whatever was in one's patrimony or property, and enabled the bishop of the diocese to support his table with hospitality.

12. *Jure proprio.*—In his or their own proper right.

13. *Decimæ rectoriæ.*—Parsonage tithes. They are called in Latin charters *decimæ rectoriæ*, from *rector*, a parson.

Decimæ garbales.—Corn tithes. This is merely another name for parsonage tithes.

Garba.—A sheaf or handful of corn; a vocable from *garba* or *gerba*, *from decimæ garbales*: *Craig*, *Lib.* i. *dieg.* 15, § 10. signifying a sheaf or handful of corn,—Du Cange *v.* Harba; and hence the French express the drawing of the tithe, or the carrying it off from the field, by *enlevement du gerbe—Dict. de l' Academie Franc.*

14. *Novalia.*—Lands newly brought under tillage were called *novalia.*

16. *Cum decimis inclusis, et nunquam separatis.* With the tithes included, and never heretofore separated.

18. *Bona vacantia.* — Goods that had no proprietor. The benefices of the clergy, at the Reformation, fell to the Crown as *bona vacantia.*

19. *Maisondieus.*—Hospitals, schools, &c., and such as had not been inverted to other uses than they were originally appropriated to.

29. *Surrogatum.*—A thing given in place of another, or that which comes in place of something else. The price is the surrogatum of an estate.

Communibus annis.—One year with another. When tithes are valued jointly with the stock, or the fifth of the rents, for the stock or teind, it is accounted a reasonable *surrogatum* in place of a tenth of the increase.

39. *Debitum fructuum.*—A debt upon the fruits. Tithes are said to form a burden upon the fruits, not upon the ground.

46. *Minimum.*—The least or smallest, alluding here to the smallest stipend appointed to

clergymen, which is not now less than L.150 per annum.

Maximum.—The greatest or highest. By the act 1617, the Commissioners of Tithes, (the Lords of Council and Session,) have a right to raise the stipend when there are free teinds in the parish.

64. *Quoad sacra*.—In regard to sacred matters. Lands are sometimes taken from one parish and united to another *quoad sacra*, that is, in so far as the ministerial duties are concerned.

65. *Annat* or *ann*—is a half-year's stipend after the death of a minister, to which his family or nearest of kin have right, in virtue of the act 1672, c. 13. It is not vested in the clergyman, but in his next of kin, and therefore can neither be assigned by him, even in a *mortis causa* deed, nor attached for his debts; or it is a half-year's benefice over and above what was due to the minister himself for his incumbency; so that if the incumbent survives Whitsunday, his executors have the first half of that year for the deceased's incumbency, and the other half as *annat*; if he survives Michaelmas, they have that entire year for his incumbency, and

the half of the next year in name of *ann*. The *ann* was first introduced into our law by a letter from James VI., desiring the bishops to make an act for that purpose. The *ann* divides into two equal parts between the relict and the children. When children fail, their half goes to the defunct's nearest of kin; July 19, 1664, Scrimgeour *v.* Murray. By the act 1672, the executors of the incumbent are declared to have right to the *ann* without confirmation.

66. *Annus gratiæ*.—A year of favour; in reference to the *annat* or *ann*, given by law to the friends of the incumbent after his death.

67. *Per capita*.—By heads. In the division of the *ann*, if there is a widow and children, the widow gets one-third; but where there is no children she receives one-half, and the other half goes to the executors of the defunct. If there be only children, it falls to them equally, or *per capita*; but if the incumbent dies without any family, the *ann* is taken up by his nearest in kin. Writers differ as to the division of the *ann* between the incumbent's widow

and children; but they rather think they ought to be governed by the rules of succession in executry. *Vide* the phrase *jus relictae.*

BOOK II.— TITLE XI.

Of Inhibitions.

2. *Actio Pauliana.*—An action instituted by the Prætor Paulus, by which creditors might vindicate such goods of their debtor as he had fraudulently alienated to their prejudice.

Præsumptio juris et de jure.—A presumption of law, and in law. *Præsumptio juris et de jure, est quæ non recipit probationem in contrarium.* It is that by which law, or custom, establishes the truth of any point, on a presumption which cannot be traversed by contrary evidence.

3. *Communis error.*—A common error; and here has respect to inhibition being raised before executing the summons on which it was grounded.

Ex capite inhibitionis.—On the ground of inhibition, as in the case where an inhibition is raised upon a depending action

before the defender is cited, as properly there can be no action till citation.

8. *Causa cognita.*—Upon the cause being tried, and that it evidently appears that the debtor is *vergens ad inopiam*, or that there is good grounds for using the diligence of inhibition.

9. *In nudis terminis.*—In the mere situation. Intimating that the diligence of inhibition may be effectual to affect charters or dispositions, though no infeftment followed, and remain *in nudis terminis* of personal deeds.

14. *Res inter alios acta, aliis neque nocet neque prodest.*—A matter transacted between certain individuals, neither hurts nor profits others.

15. *Pro rata.*—According to their proportion. When there are several infeftments of annualrent after inhibition, for satisfying all which, after payment of the inhibitor, the debtor's estate is insufficient, the loss must fall on the least preferable.

BOOK II.—TITLE XII.

Of Apprisings, Adjudications, and the Judicial Sales of Bankrupt Estates.

Note.—By the act 1672, adjudications came in place of the ancient apprising.

Sect.

2. *Juris gentium.*—Of the law of nations; in reference to the laws of civilized nations, used for taking the debtor's estate, real or personal, for payment of the debt.

5. *Communis patria.* —The common country. In apprisings, messengers formerly held their courts in the court-house of the head borough of the shire where the lands lay; but, in process of time, in consequence of a dispensing clause mentioned in the letters of apprising, they came to hold their courts at Edinburgh as the *communis patria. Patria* signifies one's native place.

6. *Ex capite lecti.*—On the head of death-bed. Where a person on death-bed disposes or burdens his estate, to the prejudice of his

heir, it will be competent to the heir to reduce the death-bed deed *ex capite lecti*.

7. *Ex delectu familiæ*.—On account of an election or choice of the family. When patents of honour were granted in virtue of a patent, to a patentee, without any grant of lands, it was understood to be conferred, on account of the choice of a family.

12. *Fictione juris*.—By a fiction of law. A special charge supplies the want of a service, and states the heir *fictione juris*, in the right of the subjects to which he is charged to enter, and consequently makes those subjects liable to the same execution, at the suit of the creditor, as if the heir had entered to them, and been infeft upon his service.

24. *Ex æquitate*.—By or according to equity. This phrase refers to a modified, and just composition, paid to the superior, for entering the appraiser, or vassal, or singular successor, and most frequently taxed in the original charter; but if not taxed, the superior is legally entitled to demand a year's rent of the subject; Acts 1469, c. 27,—1669, c. 18. and 1681, c. 17. But this rule is subject to certain modifica-

tions in the case where lands are let to tenants, under deduction of feu-duties, public burdens, and annual burdens, imposed with the superior's consent, also under deduction for repairs of houses, &c. Aitchison, 14th Feb. 1775, Fac.—also upon the point of subfeu, as a fair duty, see Cockburn Ross *v.* Heriot's Hospital, 6th June 1815, Fac.

27. *Retractus feudalis.*—A redeeming of the feu-right. If the superior offers to the creditor the just value of the subject affected by his diligence, the obligation ought to cease.

29. *Per se.*—By itself. This phrase may apply to a creditor obtaining an heritable bond for a sum of money, without taking infeftment; but if in the interim the debtor fraudulently grants another heritable bond to a different person, and obtains infeftment, the prior creditor in a competition with the second would lose his debt, as his bond, *per se*, without infeftment, could not give him a valid title.

35. *Funditus.*—Altogether, entirely, utterly.

36. *Tantum et tale.*—Such as it is; for instance, when an appriser uses diligence, and consults no record, but affects the subject ap-

praised *tantum et tale*, as it was vested in his debtor.

36. *Utitur jure auctoris.*—Uses the right of his author. The purchaser of an adjudication *utitur jure auctoris*, and consequently is exposed to all the objections, which could be pleaded against him.

40. *Hoc loco.*—In this place; in reference to shortening the *induciae legales* in adjudications, where creditors are in danger of losing that benefit.

46. *Jus individuum.*—An indivisible right, and here referring to the arrears of interest descending to an heir, as a *jus individuum*, being held to be part of the heritable property.

46. *Cognitionis causa.*—In order to ascertain or constitute. This phrase applies to decreets *cognitionis causa* against the heir of the debtor, as the foundation of an adjudication called *contra haereditate jacentem.*

Contra haereditatem jacentem.—Against the heritage, to which the heir has made up no titles; and has respect to adjudications carrying rents due out of the subject previous to the date of the decree.

48. *Necessitate juris.*—By the necessity of law.

When the heir renounces, the adjudger comes in the place of the heir, and the rents must *necessitate juris* be carried by the creditor's adjudication.

58. *Præstatio culpæ levis.*—An obligation for that degree of diligence which a prudent man employs in his own affairs.

59. *Invito debitore.*—Against the will, or without the consent of the debtor. Here referring to bankrupt estates, founded on the acts 1681 and 1690, where consent of the debtor was not given but implied.

65. *Pendente lite nihil innovandum.*—During the dependence of a process, there can be no innovation.

Ultimo loco.—In the last place; in reference to the ranking of personal creditors, founded upon adjudication, led after the sale of the property of the bankrupt, who draws the remainder of the price.

66. *Beneficium cedendarum actionem.*—This is the title of an essay. It signifies the privilege, which cautioners had among the Romans, of compelling the creditors to whom they paid, to assign to them their right of action, against the persons for whom they were cautioners.

BOOK III.—TITLE I.

Of Obligations and Contracts in general, and of Contracts to be perfected re.

Sect.

4. *Stante matrimonio.*—During the subsistence of the marriage. A widow, though naturally bound to fulfil obligations laid upon herself in *stante matrimonio*, yet no action lies upon her for performance; and in like manner a *minor pubes*.

Condictio indebiti.—An action for repetition of what was paid when it was not due. We borrow this suit from the Romans. By our law, an action is competent for recalling a payment, made through mistake or ignorance. Writers on the civil law have questioned the maxim, *ignorantia juris neminem excusat;* but the court has held that a mistake, in law, or fact, is a sufficient reason for recalling a payment; Carrick, 5th Aug. 1778, Mor. p. 2931. But to this rule there are exceptions, such as payment made under a natural obligation, and when the person knew none was due, or in the case of a compromise; Ersk. b. 3. tit. 3. § 54.

5. *A quo invito aliquid exigi potest.*—From whom something could be exacted against his will. This phrase applies to mixed obligations; but, in strict language, he alone is debtor *a quo invito aliquid exigi potest.*

6. *Pure*, or *in diem.*—Obligations are said to be either *pure*, that is, to which neither day nor condition is adjected, or *in diem*, where the performance is, by the agreement of parties, deferred to a particular day.

Dies statim cedit, sed non venit.—The day is instantly or presently fixed, but has not come. This refers to conditional obligations *in diem*; or, as they are sometimes called, *ex die*, *l.* 44. *de obl. et act*, and are those in which the performance is deferred to a determinate day, as in the case where an obligation is granted to a wife, the condition of which did not exist till the dissolution of the marriage by her death, was adjudged not to fall under the *jus mariti*, and may therefore be said only to create the hope of a debt.

Sub modo.—Under a condition, and alluding to an obligation granted in favour of third parties, though absent, or ignor-

ant thereof, or for certain uses or purposes.

10. *Is qui dolo malo desiit possidere, pro possessore habetur.*—He who has fraudulently discontinued to possess a thing, is held as the possessor, and is liable accordingly.

Condictio causa data, causa non secuta.—An action to recover back things given in the view of a particular event, if that event did not take place.

Condictio ob turpem causam.—An action to recover back things given on account of a base or dishonourable cause. In Scotland, obligations granted *ob turpem causam* are not actionable.

13. *Alterum non lædere.*—Not to injure another. This is one of the three excellent precepts laid down by Justinian. In consequence of this choice rule, any person possessed of reason, is naturally bound to indemnify his neighbour, for all the damage sustained by him through his improper conduct.

Squalor carceris.—Literally, the filthiness of a prison; the close confinement of a person in prison, in order to compel him to pay his debt.

14. *Pretium affectionis.*—The price of affection; the imaginary value which a person may put upon any thing which belongs to him.

16. *Personali objectione.* — By personal objection; as where one, in urging one plea, necessarily precludes him from urging another.

Ubi dolus dedit causam contractui.—Where deceit has given rise to the contract; or a machination, or contrivance to deceive, and which one of the parties would not have entered into, had he not been fraudulently led into it. Hence the contract may be set aside on the head of *dole*; or in reference to the baseness of a seducer, carrying off an heiress, minor, or orphan, we may with propriety introduce the excellent maxim, *Respondeat raptor, qui ignorare non potuit, quod pupillum alienum abduxit*—*Hob.* 99.

Ex capite doli.—On the head of fraud or deceit; in reference to a suit being brought for setting aside the contract, *ex capite doli.*

17. *Re, verbis, literis, consensu.*—Contracts were perfected among the Romans; *re*, by the intervention of things; *verbis*, by the in-

tervention of words; *literis*, by the intervention of writing; *consensu*, by consent alone.

17. *Mutuum.*—The contract of loan, by which the property of the thing lent is made over to the borrower.

Pignus.—The contract of pledge. In the contract of *mutuum* or of *pignus*, it is not enough that one agrees to give a thing in loan or pledge,—the subject must be actually impignorated or lent, otherwise the obligation would resolve into a *nudum pactum*, or naked promise, and not productive of an action.

Nudum pactum. — A mere agreement; a naked paction. *Vide* immediately above.

18. *Pondere, numero, et mensura.*—In weight, number, and measure; hence those things which can only be the subject of *mutuum.*

Quae functionem recipiunt. — Which receive a function; hence called fungibles: Pictures, horses, jewels, are not fungibles, but grain and coin are considered to be so, because one guinea, or one bushel or boll of sufficient mercantile wheat, precisely supplies the place of another.

19. *Res unaquaeque perit suo domino.*—Every thing perishes to its own proprietor; hence

as the borrower of an article is the *dominus*, if it perish, he must bear the loss.

20. *Ipsum corpus.*—The very thing itself. A species of *commodat*, by which the borrower is bound to restore the individual subject lent.

21. *Culpa levis.*—A slight omission; in relation to the degree of diligence necessary in a matter, in opposition to what a man of ordinary discretion uses in his own affairs.

Culpa levissima.—The slightest omission, or the neglect of diligence, which one of the most consummate prudence, is bound to perform.

De dolo, vel lata culpa.—For *dole*, or gross omission, which the law construes to be *dole*,—L. 226. *De Verb. Sig.*

24. *Actio directa commodati.*—A direct action of commodate, competent to the lender against the borrower, to obtain restoration of the thing lent.

Actio contraria.—A contrary action, competent to the borrower, against the lender, to obtain indemnification for the repair made upon the thing lent.

25. *Precarium.*—A loan where the thing lent is liable to be recalled at pleasure.

26. *De lata culpa.*—For gross negligence: as the

consequence of gross negligence, the depository is liable *de lata culpa.*

26. *Casu fortuito.*—By an accident, or unforeseen event; in reference to a subject perishing, though by mere misfortune, the depositary is liable for the value.

27. *Cum omni causa.*—With all its fruits and accessories. A depository is bound to restore the subject to the depositor *cum omni causa.*

28. *Nautae, caupones, stabularii*—Sailors, innkeepers, stablers. This is the title given to an edict of the Roman Prætor, by which shipmasters, innkeepers, and stablers, were made liable for the goods and effects of travellers brought into the ship, inn, or stable; which rule, from its expediency, has been received, with some variations, into the law of Scotland, and extends to masters for their servants entrusted with goods.

28. *Damno fatali.*—By an accident which could not have been foreseen, or prevented. Shipmasters, innkeepers, and stablers are bound to restore the goods placed, by travellers, in their ships, inns, or stables, unless they perish *damno fatale,* such as by a storm at sea, by accidental fire, by house-breakers, &c.

28. *Ad reprimendam improbitatem hoc genus hominum.*—To repress the dishonesty of that race of men; in reference to the Roman edict for the security of travellers, against the frequent thefts committed by depositaries.

29. *Exercitores.* — Employers; in allusion to masters of ships, whether they be themselves the owners, or have freighted the ships from the owners.

In litem.—To the truth of the action. *Jurare in litem,* to swear to the truth of his action before he enter it. The extent of the damages against shipmasters, innkeepers, and stablers, may be ascertained by the oath *in litem* of the party suffering.

31. *Periculum.*—Risk, danger; applicable to the risk of money consigned, lying on the consigner.

33. *Præstat culpam levem.*—He is accountable for a slight omission. A creditor who receives a pledge, is liable in the middle degree of diligence for preserving it.

Jus pignoris.—The right of pledge, as in the case where a creditor changes one security for another, in reference to land, or moveables.

34. *Ne urbs ruinis deformetur.*—Lest the city be deformed by ruinous houses. The expense of repairing houses within burgh, by a warrant of the Dean of Guild, is secured by an hypothec on the house repaired, *ne urbs ruinis deformetur.*

35. *Do ut des, do ut facias, facio ut des, facio ut facias.*—I give that you may give, I give that you may do, I do that you may give, I do that you may do. The civilians reduce all contracts, not distinguished by special names, into these four general heads. In the *first* head, the one party gives something, in order that the other may give something in return; in the *second*, the one party gives something, in order that the other party may do something in return; in the *third*, the one party does something, that the other may give something in return; and in the *fourth*, the one party does something, in order that the other may do something in return.

Dabo ut des.—I will give that you may give. An agreement in these terms was held to be a *nudum pactum* among the Romans, and not productive of any action.

BOOK III.—TITLE II.

Of Obligations by Word and by Writing.

Sect.

1. *Verborum obligatio.*—A verbal obligation; a contract perfected *verbis*, by words. But among the Romans certain *verba solennia*, solemn or formal words, required to be uttered by the parties, in order to the performing of the *verborum obligatio*.

3. *Locus pœnitentiæ.*—Place, or room for repentance. The right to resile from a bargain, before the necessary solemnities have been gone through; *id est*, there is place for repentance *rebus integris*.

3. *Interventus rei.*—The intervention of any thing, as the payment of money, which cuts off the right of either party to resile.

Res non est integra.—The matter is not entire. Wherever *res non est integra*, the *locus pœnitentiæ* is cut off.

4. *Pars contractus.*—A part of the contract; or bargains, where there is a special condition, that it should be reduced into writing, failing of which there is a right of resiling.

5. *Obligatio literarum.*—An obligation constituted by writing only. This is the third branch of contracts perfected *literis* by the Roman law. A holograph offer to sell a property at a certain price, and a holograph acceptance, may well apply to this rule. If, however, the offer and acceptance are not holograph, there will be ground for resiling, unless part of the price has been paid. But, from favour to commerce, such writings, though not holograph, will be binding, if they relate to moveable property.

Exceptio non numeratæ pecuniæ.—An exception that the money was not counted over and paid. This was one of the exceptions, founded on the *obligatio literarum* of the Romans. The exception was sufficient to elide the demand, unless the creditor proved, that he had advanced the money; but this rule does not seem to be recognized by our law.—Stair, b. 1. tit. 10. § 11.

6. *Si constet de persona.*—If it appears manifest who the person is. Here referring to the ancient practice of executing blank bonds, which passed from hand to hand.

7. *Remotis testibus.*—No witnesses being present; and having reference to the signing of deeds in absence of the witnesses inserted in the deed.

8. *De facto.*—In fact, of a truth; in reference to the actual signing of deeds under challenge, if questioned during the life of the instrumentary witneses. Subscriptions by initials, if unaccompanied with any other circumstance, will be held *nullo*, but an after acknowledgment of the subcription by initials, by the granter when alive, was held valid,—19th November 1760, Shepperd *v.* Innes, Fac. Col.—and by initials, with the attestation of one notary, that the party could not write otherwise, was found good,—22d June 1813, Weirs *v.* Ralston, Fac. Col.

17. *Enumeratio unius est exclusio alterius.*—The enumeration of the one is the exclusion of the other. Having reference to the designation of witnesses, not essentially necessary in certain executions, *e. g.* of summons because not mentioned in the act 1681, c. 5.

22. *Comparatione literarum.*—By a comparison of the hand-writing. An anologica. method of proving a writing, by compar

ing it with other writings of the same hand.

24. *In re mercatoria.*—In a mercantile transaction. Missive letters *in re mercatoria* are valid, though not holograph, as are also commissions from merchant to merchant, though wanting witnesses. This species of trade is competent to the Judge-Admiral; as are likewise bills, which, from their nature, are considered mercantile.

25. *In suo genere.*—In their own nature. Bills of exchange, from the favour of commerce, are said to be complete *in suo genere*, though they are destitute of some statutory forms.

30. *Ex mandato.*—From, or arising out of the mandate.

31. *In solutum.*—In payment. Bills, after being indorsed or assigned, are held as so much cash delivered to the onerous assignee or indorsee, free of all burdens but those marked on the bills themselves.

35. *Jus gentium.*—The law of nations. This rule refers to the general nature of bills of exchange, formerly treated of, in so far as they are regulated by the *jus gentium*.

39. *Ex comitate.*—From courtesy. This phrase

has respect to the effect given to deeds signed in a foreign country *ex comitate*.

39. *Comitas*.—Courtesy; the regard paid by one country to the laws of another.

40. *Secundum legem domicilii, vel loci contractus*.—According to the law of the domicile, or of the place of the contract.

Lex domicilii.—The law of the domicile. Personal obligations, or contracts entered into according to the *lex domicilii*, are effectual in Scotland, when receiving execution there; and in conveyances of immoveable subjects, or rights affecting heritage, the solemnities of the country where the heritage lies must be followed.

Mobilia sequuntur personam.—Moveables follow the person of their proprietor. The meaning of this is, that moveables fall to be divided according to the law of the place where their owner had his domicile.

BOOK III.—TITLE III.

Of Obligations arising from Consent, and of Accessory Obigations.

Sect.

2. *Emptio venditio.*—The name given by the Romans to the contract of sale, and exclusively refers to moveable subjects; *l.* 1. *pr. de contra empt.* This contract is not completed by consent alone, but by by tradition or delivery, and thereby not left to uncertainty or doubt.

5. *In majorem evidentiam.*—For the sake of greater certainty. Earnest; *ex. gr.* a shilling, a box, or anciently the licking of thumbs, were frequently given by the buyer, *in majorem evidentiam*, or as a corrobative symbol or mark that the bargain was perfected. The licking of thumbs was considered to be one of the symbols of sale.

Arrhae or *arrhabo.*—Earnest, which, in the law of Scotland, is given and and received in evidence of a finished bargain.

Eo nomine.—In that name. In reference to cases where earnest is to be imputed in part of the price of the thing sold, and

depends on the amount of the sum that is given *eo nomine*.

7. *Periculum rei venditae, nondum traditæ, est emptoris.*—The risk of a thing sold, but not delivered, lies upon the buyer from the date of the sale, and perishes with the buyer, because the fault lies with him in not removing the goods and paying the price; but in special cases it is agreed that the subject perishes to the seller, 1. If the seller is in fault; 2. If risk be laid on him by the contract,—and in the case of fungibles.

Cujus est commodum, ejus debet esse periculum.—He who has the chance of advantage, ought to bear the risk.

Lex contractus.—The law of the contract. If the risk is laid on the seller by the contract, the *lex contractus* must be the rule.

8. *Ubi dolus dedit causam contractui.*—Where fraud gave rise to the contract; *e. g.* where the buyer knew himself to be insolvent, delivery had not the effect to transfer the property of the thing sold to him.

8. *In medio.*—In dispute betwixt the parties, and still in existence, and in dependence

before the court; as in a process of multiplepoinding, where several creditors are claiming the sum *in medio*.

9. *Actio empti*.—An action for delivery of the thing purchased. By this *actio empti*, the seller is obliged not only to deliver to the buyer the thing sold, with the fruits of it after the sale, but to make the subject effectual to the buyer, though there should be no obligation of warrandice expressed, but implied.

Actio venditi.—An action for the price of an article sold. This action is competent to the seller.

10. *Actio redhibitoria*.—An action to get back the price of a thing upon discovering some latent defect, and to compel the seller to receive it back, which could have been brought, by the Romans, within six months of the sale.

Actio quanti minoris.—An action common among the Romans, to get back a proportion of the price of a thing, on discovering some slight insufficiency, which might, if known, have prevented such a high price from being given.

11. *Pactum legis commissoriae*.—Where the sale

becomes void if the price be not paid against a certain day.

Res fit inempta.—The thing becomes unsold, the sale becomes void; or where a sale is entered into on condition that the price be paid by a certain day, such condition is suspensive of the sale.

22. *Aeccidentalia.*—Things not necessarily connected with the contract of sale, and may be reckoned the *pactum retrovendi*, or right of reversion in sales, if the things sold are stipulated to return to the seller if he shall repay the price to the purchaser within a limited time.

14. *Locator.*—A person who lets his labour or property to hire: a lessor.

Conductor.—A person who hires the labour or property of another: a lessee.

15. *Præstant culpam levem.*—As the contract of location is for the advantage both of the lessor and lessee, the parties are liable in a middle kind of diligence.

Vis major.—A fatality, a weakness, or mistake, imputable to the lessor, for not putting the lessee in possession of the subject.

Ex locato.—On the contract of location. In reference to this contract, the lessor

is bound to give the free use and enjoyment of the subject to the lessee; and the lessor is not liable in damages, nor entitled to hire, if the subject be withheld without his fault from the lessee.

17. *Per centum.*—In the hundred. Insurers or underwriters, for a certain premium or per centage, oblige themselves to undertake the risk of a ship, or goods, proportioned to their value, and to warrant them to the owner, or merchant, during the adventure.

18. *Omnium bonorum.*—Copartnerships *omnium bonorum*, of the whole goods belonging to the *socii*, were sometimes entered into among the Romans.

19. *Coloni partiarii.*—Farmers who pay the landlords a portion of the crop, instead of rent.

29. *Singuli in solidum.*—Each for the whole. In copartnerships, each of the partners is liable to third parties for the whole debts due by the company. This is called a liability *singuli in solidum.*

33. *Qui tacit, consentire videtur.*—He who is silent, is held to consent.

34. *Propter delectum personae.*—On account of the choice or selection of the person, it

is inconsistent for a mandatory to delegate his power to a third party.

34. *Rei vindicatione.*—An action for vindicating or recovering a thing. If a mandatory who has received money from the mandant to purchase goods for him, buys them in his own name, he becomes the proprietor, so that the mandant cannot recover them as his own *rei vindicatione*, but must be contented with a personal action against the mandatory for damages; Jan. 24. 1672, Boylston.

Ultra fines mandati.—Beyond the limits of the mandate. Whatever a mandatory does in this way, is not binding upon the mandant.

37. *Casus fortuitus.*—An unforeseen event; an accident. This applies to a mandatory exceeding his powers, and who is accountable for every accident, or *casus fortuitus*, that through occasion of such delinquency shall afterwards bring hurt to the management.—*Dirl.* 259, Br. MS. June 28. 1716, Young.

Praestat culpam levem.—A mandatory who has a salary or remuneration for his trouble, *praestat culpam levem*, that is, is obliged to act with that degree of dili-

gence which a prudent man uses in his own affairs.

Loco tutoris.—In place of a tutor. The Court of Session are in the practice of appointing factors *loco tutoris*, for persons who cannot manage their own affairs.

38. *Officium nemini debet esse damnosum.*—An office ought to be injurious to nobody. Hence, mandatories and others are entitled to be indemnified of all the damages and expences *bona fide* incurred by them.

39. *Quæ servando servari nequeunt.*—Which cannot be preserved by being taken care of. A general mandatory ought to sell such of the mandant's moveable property as is of a perishable nature, and could not be preserved if kept.

40. *Dolose.*—Deceitfully. In reference to a mandatory who, at a critical time, renounces his appointment, which is attended with loss to the mandant, and subjects the mandatory in damages.

42. *Gratia mandatarii.*—In favour of the mandatory. In reference to the duty imposed upon exercitors to fulfil the contracts of their shipmasters, may be

considered as a tacit mandate, and are obliged by the contracts *magistri navium*, for all repairs, provisions, or furniture, necessary for the ship or crew. When a mandatory acts ignorant of the mandant's death, he may be considered to act *bona fide*, and his deeds will fall to be ratified by the mandant's heir.

43. *Jus civile.*—The civil law of the Romans.

44. *Jus praetorium.*—The prætorian law, by which the vigour of the civil law was in many cases much modified.

Magistri navium.—The masters or commanders of ships.

Exercere. — To employ; hence *exercitor*, noticed in the 43d section, under the phrase *jus civile.*

46. *Actio institoria.*—This was an action by which præpositors, or undertakers of any negociation, might be sued upon the contracts of those whom they set over it, and who were called *institors*, from *instare*, to superintend.

47. *Non ens.*—A nonentity. This phrase refers to deeds entered into by idiots, or pupils, which infer no degree of obligation; and, as such, are considered nonentities, which cannot admit of homologation.

47. *Quilibet enim juri pro se introducto renunciare potest.*—For any person who pleases may renounce a right introduced for his own benefit, but may be excluded by homologation, approbatory acts, and such like; *ex. gr.* A marriage-contract, though defective in the legal solemnities, is held, from the favour of marriage, to be homologated by the subsequent marriage of the parties; *Mackenzie*, b. 3. t. 2. § 5. In the case, Nov. 17, 1768, the widow and younger children of James Wemyss *v.* David Wemyss, a marriage-contract signed by the bridegroom, and by the bride's father, as taking burden on him for his daughter, but not by the bride, though named as a party in the deed, was found obligatory, in respect of the subsequent marriage of the parties.

50. *Actus animi.*—An act of the mind. Homologation, as it is an act of the mind, cannot be proved by witnesses. By this rule, no contract ought to be proved by witnesses, since consent, which is essential to all contracts, is *actus animi.*

51. *Ex re.*—Quasi contracts are constituted not only by explicit consent, but *ex re*, that is, by the thing itself.

51. *Indebiti solutio.*—The payment of debt to a person to whom it is not truly due. This produces an obligation *quasi mutuum*, to repeat.

Jactus mercium navis laevandae causa.—The throwing of goods overboard for the sake of lightening the ship.

52. *Negotiorum gestor.*—A person who takes the management of another person's affairs in his absence upon himself, without any authority or mandate. He is accountable for his intromissions, and is entitled to be indemnified of all necessary expences and other sums debursed by him.

52. *Ei abest*, or *ab futurum est.*—The meaning of this is, that a *negotiorum gestor* is entitled to claim not only what he has laid out, but what he has come under an obligation to pay, what he has paid, or is about to pay.

54. *Pro mutuum*, or *quasi mutuum.*—A sort or species of loan, or the payment of a debt not truly due, and is entitled to an action against the receiver for repayment, called by the Romans *indibitio solutio*; but this suit does not lye where payment has been once made of a sum due by an obligation merely natural.

55. *Ex quasi contractu.*—From an implied contract. Obligations are formed *quasi ex contractu*, as well as by express contract. When goods are thrown overboard for the sake of lightening the ship, the owners of the goods saved are *ex quasi contractu* obliged to make up a rateable proportion of the loss. This was introduced into the Roman law by the *lex Rhodia de jactu*, the law of the Rhodians concerning the throwing of goods overboard.

56. *Communi.*—Things common. An action for division of common subjects, and when limited to moveable subjects, is competent by our law, in reference to part-owners of ships, though not properly co-partners, who suffer frequently by the contracts or delinquences of shipmasters. A majority of owners may bring the ship to sale: action is competent to a particular owner. By 1695, c. 38, all conservitories, except those belonging to the crown or royal burghs, may be divided by an action *communi dividendo* at the suit of any person having interest.

56. Quasi-

57. *Communia.*—Things common, or common muirs or heaths; in reference to the proprietor's tenants having been in use to pas-

ture promiscuously upon a common property.

58. *Præcipuum.*—A separate allowance, which the proprietors had in virtue of their right of property, over and above the share due to them on account of their own or their tenant's possession by pasturage; Kames, 42 :—but the rights of servitude may be limited in the terms of the statute without prejudice to the right of property; 7th February 1771, Duke of Hamilton.

61. *Beneficium ordinis.*—The benefit of order, or, as we express it, the benefit of discussion. Cautioners have this benefit. Before paying, they can insist on the principal being discussed.

62. *Damnum et interesse.*—The loss and damage sustained; in reference to cautioners making up the loss to the parties suffering.

63. *Beneficium divisionis.*—The benefit of division. By the Roman law, cautioners were each of them liable *in solidum*, till the Emperor Adrian, from equity, introduced the *beneficium divisionis*, by which each of the cautioners could insist that

the demand should be divided among the whole *pro rata*, in so far as solvent.

64. *Sibi imputet.*—To himself be it imputed. A cautioner in an obligation, when the debtor's subscription is not legally attested, or for a married woman, or a minor, may be bound although the principal should get free. The reason is, *sibi imputet*, to himself be the blame imputed, for having interposed in such a case.

65. *De jure.*—In law or justice; for what is not justice, will not be found to be law.

Ex natura rei.—From the nature of the thing. An action of relief to a cautioner in a conditional obligation is competent, under the quality, that no execution shall be used on the decree till distress.

70. *Ex delicto vel quasi delicto.*—From real or constructive delinquency. Payment by one *subsidiarie, ex delicto vel quasi delicto*, does not entitle to relief against the proper cautioners.

74. *Correi debendi.*—Joint obligants for the same debt. It frequently happens, says Mr Erskine, that a creditor takes two or more bound to him, all as principal debtors, without any *fidejussion*, in the Roman law styled *correi debendi.*

74. *In faciendo.* — In doing something wholly, entirely, and not by parts; as the building of a ship, the inclosing of a field, and applicable to indivisible subjects; and all obligants, in that kind of obligations, were liable *singuli in solidum.*

76. *Bonae fidei, ex mora debitores.* — Interest, among the Romans, was due upon all contracts of good faith, on account of the delay of the debtor to pay, after a demand was made upon him.

77. *Dies interpellat pro homine.*—The day interrupts for the man. This applies to bills payable by a day certain, which bear interest from the day of payment, without any protest, or formal demand of payment.

80. *Nomine damni.*—In name of damage; in reference to interest due to merchants and others, in *nomine damni.*

Nummi pupillaris.[(e)]—The money belonging to a pupil.

83. *Vitium reale.*—A real vice, in the title by which property has been acquired, which affects the right even of purchasers and creditors.

84. *Pactum super hæreditate viventis.*—An agreement regarding the heritage of a person

alive, was held by the Romans to be *contra bonos mores*.

85. *Pro non scripta*.—As not written, or held to be illegal; in allusion to conditions adjected to obligations impossible, or unfavourable in their nature; *ex. gr.* that the grantee should not marry without the consent of certain persons named in the grant, because that condition restrains the natural liberty of marriage,—see *Gil.* 60: The child is even entitled to the subject provided, though she should have counteracted the condition, *Fount.* July 6. 1688, Dalziel: *Fount.* July 20. 1688; or a phrase of this kind is sometimes used by a judge, in an interlocutor, to denote that the proceedings are altogether irreglar, and must be held as *pro non scripta*.

Jus quæsitum.—A vested right, or when potestative conditions are held as fulfilled, if the creditor has done all in his power to fulfil them—*l.* ii. *de. cond. inst.* If, for instance, an obligation be granted under the condition that the granter shall intermarry with a particular lady, law considers the condition as purified, if he has made addresses to her, though she should have rejected them.

86. *Loco facti non præstabilis, vel non præstiti succedit, damnum et interesse.*—Damages come in the place of a fact not performed, or which cannot be performed.

87. *Beneficium competentiæ.*—The benefit of competence. By the Roman law, the granter of a gratuitous obligation was, before fulfilling the obligation, entitled to the *beneficium competentiæ.*

90. *Pactum donationis.*—An agreement to make a donation. It confers on the donee a *jus ad rem*, a right in the thing itself.

91. *Donatio mortis causa.*—A donation made in the view of, or to take place after the donor's death.

92. *Animo donandi*—With the intention of gifting. He who entertains a minor while the father is alive, is presumed to do it *animo donandi*, unless the father be in another kingdom.

Ex pietate.—From piety, or natural affection and duty.

93. *Debitor non præsumitur donare.*—A debtor is not presumed to give a thing to his creditor as a gift.

Novatio non præsumitur.—A change of the obligation for a debt is not presumed, unless the deed expressly bear so.

BOOK III.—TITLE IV.

Of the Dissolution of Obligations.

Sect.

2. *In duriorem sortem.*—An indefinite payment fell to be applied *in duriorem sortem*, that is, to the debt which bound the debtor fastest, or which bore a penalty.

In graviorem causam.—An indefinite payment fell to be applied in *graviorem causam*, to that debt which bound the debtor fastest, or to which a penalty was adjected—*l.* 3, 4, 5. *de. solut.*—that is, to the debt which pressed heaviest upon the debtor, and which it concerned him most to have extinguished.

5. *Chirographum apud debitorem repertum, præsumitur solutum.*—A written obligation, found in the hands of the debtor, is presumed to be settled and discharged.

9. *Unumquodque eodem modo dissolvitur quo colligatur.*—A written deed is discharged in the same manner, that is, with the same solemnities by which it was constituted.

12. *De liquido in liquidum.*—Compensation *de liquido in liquidum*, that is, of a liquid

claim against a liquid claim, is admitted by the act 1592, c. 141.

1 . *Proprio nomine.*—In his or her own proper name. In compensation, it is necessary that each of the parties, the debtor and creditor, stand in his own right *proprio nomine.*

Tutorio nomine.—In a person's name as tutor. If a bond be granted by the *tutorio nomine* upon the minor's account, he may properly plead compensation upon a bond due by the creditor to the minor—*Gosf.* Feb. 5. 1670, E. Northesk.

15. *Parata executio.*—Prepared execution; diligence ready to be executed; and, in virtue thereof, the creditor can immediately proceed to all legal diligence against his debtor for payment. A pure debt cannot be compensated by a conditional one, or where the term of payment is not come.

16. *Quod statim liquidare potest pro jam liquido habetur.*—A debt which can be instantly liquidated is held as already liquid, and is therefore admitted *ex æquitate* to compensate a liquid debt.

22. *Compromissor.*—An expression in the Roman law, denoting a person who comes

in place of the debtor, with the creditors consent.

Actum et tractatum.—Acted and transacted; *ex. gr*. where lands are sold, and a price paid by the purchaser, and that nevertheless a bond is granted by him to the seller for the price of these lands, more weight being paid under these circumstances, or what was *actum et tractatum* between the parties, than the former *forma verborum*, made use of in the conveyance

Forma verborum.—The form of words, as explained above.

23. *Quoad reliquum*.—In regard to the residue. If a co-heiress were either debtor or creditor to the deceased, the obligation is extinguished no farther than her representation goes; if she is, for example, one of three co-heiresses, the obligation is disolved *confusione* as to a third, and it subsists *quoad reliquum*, and will accordingly afford action either to or against the other two co-heiresses.

24. *In suo ordine*.—In his own order. An executor in moveables is liable in payment of his ancestor's moveable debts; if they areinsufficient to discharge them, the heir

in the heritage is liable *in suo ordine.* but not *subsidiarie.*

26. *Præceptione hæreditatis* —By an anticipation of the succession. *Præceptio hæreditatis* means the passive title incurred, by receiving a gratuitous right to land, from one to whom a person would have succeeded as heir.

Eadem persona cum defuncto.—Literally, the same person with the defunct. The heir who represents his ancestor is held to be the same person with the defunct.

BOOK III.— TITLE V.

Of Assignations.

5. *Retenta possessione.*—Possession being retained. If the granter of an assignation to moveables continues to hold possession, the assignee, in a competition with the creditors of the granter, loses his right and will be considered as a cover against just creditors.

10. *Assignatus utitur jure auctoris.*—An assignee enjoys the same right with his author.

BOOK III.—TITLE VI.

Of Arrestments and Poindings.

8. *Adquisita et adquærenda.*—Property acquired and to be acquired. This refers to the diligence of inhibition, which carries along with it a tract of future time.

9. *Ubi dies cessit, licet nondum venerit.*—When the day has arrived on which money begins to become due, although the day of payment shall not have yet come. Rent, for instance, begins to become due from the day of entry, but it does not become payable till the stipulated term. In that case, *dies cedit sed non venit.*

Dies nec cedit nec venit.—In annuities which depend upon the lives of the annuitants for their becoming due, the money does not begin to become due, and the day of payment does not arrive, till the term of payment.

11. *In rebus litigiosis.*—In things rendered litigious; as in the case of an arrestment, so soon as it is used, and before it is perfected by forthcoming.

22. *Toties quoties.*—So often as done; in allusion to trespases, by cows, horses, or sheep, which, by the act 1686, c. 11. subjects the owner in half a merk each, *toties quoties*, besides the damage done to the corn, grass, or plantation.

BOOK III.—TITLE VII.

Of Prescription.

4. *Via facti.*—By way of a fact. Heritage possessed for 40 years, in virtue of infeftment, without interruption, or by a notorial instrument *via facti*, gives the possessor a prescriptive right.

Titulo universali.—By a universal title. This phrase alludes to heirs who possess *titulo universali*, and need only produce seisines connected together for 40 years, without producing their relative charter, and does not apply to singular successors, who must produce for their title not only a seisine, but a charter or disposition, either in their own person, or in that of their author.

A non domino.—From a person who is not the proprietor. A charter granted by a

person who had no right is a good title of prescription, and only subject to challenge on the ground of falsehood, if possession has been held for 40 years.

9. *Ex facie.*—On the face of a deed.

10. *Res meræ facultatis.*—A mere power or faculty to do or not to do, which is *ex sua natura*, incapable of the negative prescription.

12. *Nunquam præscribitur in falso.*—Prescription never takes place in regard to a deed challenged on the head of falsehood or forgery.

Jure sanguinis nunquam præscribitur.—Prescription never takes place in the right of blood; for though it should be lost to one, it can never accrue to, or be taken up by another.

13. *Nihil tam naturale est quam unumquodque eodem modo dissolvi quo collégatur.*—Nothing is so natural as that an obligation should be dissolved in the same manner in which it is constituted.

14. *Præscriptio longissimi temporis.*—The longest prescription, or things incapable of the positive prescription, as tythes.

16. *Exceptio firmat regulam in non exceptis.*—

An exception establishes and confirms a rule in all cases not excepted.

21. *Non compos mentis.*—Not of sound mind. This phrase, *inter alia*, respects a *quinquennial* prescription of the right of appealing from the Supreme Court to the House of Peers, in reference to persons unsound in their minds, by order of that Right Hon. House, dated March 24, 1725. But, by act Geo. IV. c. 120, § 25. the limitation of the time of appeals to the House of Lords is two years, from the day of signing the last interlocutor, or before the end of fourteen days of the Session of Parliament next ensuing the two years; five years if a party is forth of the kingdom, or within two years after returning; two years after a minor is of age; two years after a person *non compos mentis* is restored to sound mind, or after the death of such person. And, by the 26th section, in case of appeal, the documents are to be laid before the House of Lords, and are to be certified as authentic by one of the principal Clerks of Session, or his assistant, and authenticated by the Lord Ordinary as directed.

30. *Tempus continuum.*—Time uninterrupted. Holydays, as well as days in which a person could prosecute his claim in court.

33. *Decennalis et triennalis possessio.*—Possession for 13 years. Possession for this period supports a clergyman's right to a benefice, though he produce no title in writing.

Decennalis et triennalis possessor non tenetur docere de titulo.—A possessor of a church benefice for 13 years is not bound to produce or instruct his title.

Triennalis possessor beneficii est inde securus. The possessor of a benefice for three years is thence secure. This was a rule of the Roman chancery.

35. *Casus insolitus.* — An uncommon circumstance; *ex. gr.* Minors are saved from the effect both of the positive and negative prescription, but not hospitals for minors; *Fount.* Dec. 17, 1695, Heriot's Hospital.

36. *Cum effectu.*—With effect. The negative prescription of three years against a tenant is stated to commence from the term at which the tenant is warned to remove, though the words of the act 1579, c. 82. seem to imply from the date of the warning; nor in

possessory actions, till the term of removing be come, nor till the term of removing be past, can he insist in the action of removing *cum effectu*.

37. *Contra non valentem agere, non currit præscriptio.* — Prescription does not run against a person not capable to act for himself, or not in a situation to sue forth his right or claim; for no man can be blamed for omitting what is not in his power, and, consequently, prescription does not run *contra non valentem agere*.

Ex justitia.—From justice. *Vide* the third phrase.

Ex reverentia maritali.—From reverence and respect to her husband. In all actions competent to the wife against third parties, upon bonds or other obligations, prescription runs against her, even during the marriage, since the *reverentia maritalis* is no bar to the suit; and, if the husband will not concur, the wife may be authorised by the Session. See *Dirl.* 297.

40. *Jactus lapilli.*—The throwing down of a small stone, or the throwing down one of the stones of the new work, in presence of witnesses who where called for that

purpose, or civil interruption, because it is attended with no violence, and, by our statutes, gets the name of interruption *via facti*, because it is founded on the extrajudicial deed of him who intercepts; hence protestation applies both to positive and negative prescription.

42. *Via juris.*—Or the interruption of prescription by a process not followed forth to a sentence against the possessor, or by another in his name.

46. *Unum quid.*—One individual thing, or when a partial interruption secures the whole right, as the interruption against the possessor of a barony, by arrestment, or levying the rents of any part or tenement, covers the whole from prescription. *Vide* our author, B. 2. t. 6. § 18. In like manner, diligence against one of several co-principals interrupts prescription against all of them, and diligence against a cautioner interrupts as to the principal.

47. *E contra.*—On the contrary. Interruption made by an assignee, though it preserves the part assigned, cannot avail the cedent as to the part which he retained to himself; nor, *e contra*, will interruption used by the cedent preserve the assignee's part.

48. *Lex loci contractus.*—The law of the country where the debt is contracted, and has reference to the prescription of debts due to foreigners, and demanded in this country. Civilians differ upon this point. Upon the principles of equity, the Court of Session have made the law of Scotland the rule of their judgment: the Scottish prescription of 40 years, found applicable to debts contracted in England by an English company, and due to Englishmen. In this case, however, it was agreed that the production of a decreet obtained in England, even after the 40 years had elapsed, would sufficiently obviate the objection; 9th March 1786, Delvall and others *v.* Creditors of the York Building Company. This judgment was reversed on appeal, after hearing counsel for the appellants, only in respect that the bonds claimed by the appellants, the pursuers, are cut off by the negative prescription of the law of Scotland.

BOOK III.—TITLE VIII.

Of Succession in Heritable Rights.

Sect.

2. *Ab intestatu.*—Succession to a person who dies *ab intestatu,* without leaving a will, and left to the rule of law of the country.

10. *Paterna paternis materna maternis.*—Paternal inheritance goes to the father's heirs, and maternal to the mother's heirs. This is said to be the rule in England.

11. *Jure representationis.*—By right of representation, or the right whereby one succeeds, as coming in the place, or as representing some of his deceased ascendants. Thus, a child by the eldest son, deceased, will succeed in the place of his father, who was the eldest son of the deceased, and, as such, would have excluded the youngest son, in preference to the second son, although the second son be alive, and one degree nearer to the ancestor than the grandchild. This representation respects collateral succession to heritage, as well as in that of descendents in the direct line.

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12. *In stirpes.*—Among the stocks. Succession *in capita* divides the inheritance into as many shares as there are heirs, but succession *in stirpes* divides it only into as many shares as there are stocks.

17. *Semel baro semper baro.*—Once baron always baron; in allusion to the presumption of lawyers, that a person who has been once infeft, is presumed to continue infeft, according to the rule *semel baro semper baro Vide* Dunbar *v.* Leslie, 8th July 1628; *Durie.*

18. *Quæ non recipiunt functionem.*—Which are not capable of use and waste, and hence are not held to be proper moveables. Heirship moveables, such as beds, grates, tables, chairs, &c. *non recipiunt functionem,* as they cannot be estimated by quantity.

26. *Verbatim.*—Word for word; referring to clauses which ought to be inserted in subsequent conveyances, and to particular irritances as specified in entails, and must be repeated *verbatim* in the retours or infeftments of each heir.

31. *In majorem cautelam.*—For greater safety, or, in reference to a contravener of entail, that he shall forfeit not only for himself,

but for all the heirs succeeding in and through him. When there is no express clause in the deed of entail restricting it, or where the entailer does not intend that the penalty shall reach to the heirs of the contravener s body, a clause is generally inserted in the deed *in majorem cautelam*, that the contravener shall forfeit only for himself, but not for his descendents.

35. *Nominatim.*—By name; or this vocable is used to signify an appointment to an office, or transmissions by a father to himself, his son, *nominatim*, &c.

36. *Persona dignior.*—The more dignified person; in respect to a right taken to a husband and wife in conjunct fee and liferent, or the heirs of his body, or their heirs indefinitely, the general rule is, that the husband is, from the prerogative of his sex, the sole fiar, as the *persona dignior*, and the right of the wife resolves into a liferent, for which reason the words, their heirs, are interpreted to be the heirs of the husband; *Dirl.* 85.

Cujus hæredibus maxime prospicitur.—The person is held to be fiar in a property, to whose heirs the substitution is chiefly provided.

40. *Liberis nascituris.*—To children to be procreated or born. Marriage settlements sometimes contain obligations though granted *liberis nascituris*, if secured by proper diligence, or perfected by seisine, and found to give a preference to the heir, against posterior deeds of the father, even through onerous.

Hæres actu.—An heir by deed. In rights constituting a proper credit, granted to the heir of the marriage, the appellation is only to be understood *designative* for marking out the person to whom the right is granted stands in such a relation to the deceased as gives him a right to serve him if he should think fit; but there is no necessity that he be *hæres actu* to his father, for he is his proper creditor; *New Col.* 1,177.

42. *Jus crediti.*—A right of debt. If a man has been twice married, and makes unreasonable and unjust settlements in favour of the first or second marriages, to the prejudice of either, the children injured are considered *qua* creditors to their father, and entitled to challenge any fraudulent or gratuitous deed.

Qua.—As. If, in particular, in the case

where provisions are made in favour of the first heirs of the marriage, and shall be held irrational, and exceed the just measure of the husband's circumstances, the issue of the second marriage, *qua* creditors to their father, are entitled to challenge the deed as fraudulent and gratuitous.

44. *Quandocunque defecerit.*—At whatever time he failed or died. This phrase has reference to heirs of provision succeeding in virtue of clauses of substitution in bonds. The substitute in a bond succeeds at what time soever the institute died, *quandocunque defecerit*, though he had actually taken the succession before his death; June 26, 1634, Keith.

46. *Si sine liberis decesserit.*—If he shall have died without children. This applies to all settlements by testament, made by one who had at the time no lawful issue; so that if the testator came afterwards to have descendents of his own body, the settlement lost its force.

50. *Portionibus hæreditariis.*—To heirs-portioners. As in the legal succession of females, the ancestor's rights decend *ipso jure* to

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the heirs portioners, *portionibus hæreditares*, so do his debts.

51. *Ultra valorem.*—Beyond the value. Heirs substituted in a bond, whether heritable or moveable, ought not to be subjected to an universal passive representation; and, as their right is limited to the sum in the bond, they are liable for the debts of the deceased simply *in valorem* of that sum.

56. *Damnosa* or *lucrosa.*—Injurious or advantageous. An heir is entitled to the *annus deliberandi*, so as he may form a judgment whether the succession be *damnosa vel lucrosa.*

Intra, or *extra familiam.*—Within, or out of the family. An heir may call for exhibition of deeds *ad deliberandum*, even after the year, because, until he is apprised of every obligation granted by the deceased, he cannot form a correct opinion whether to accept or abandon the succession, and this right applies equally strong to these *intra* or *extra familia.*

62. *De morte antecessoris.*—Of the death of the predecessor, — mortancestry; here referring to the brief of inquest which sometimes gets the name of the brief of

mortancestry, *de morte antecessoris, Cr.* lib. 2. dieg. 17. § 25. By the brief of inquest, a person is served heir to his ancestor; but a brief of mortancestry may be purchased by the undoubted heir, even although he had been already served or declared heir to his ancestor, against the superior of the lands, or against others who had been seized in them upon a title preferable to that of the heir; see act 1429, c. 127, and as it is explained by *Craig*, lib. 2. dieg. 7. § 24.

68. *Cum beneficio inventarii.*—With the benefit of an inventory. An heir, doubtful whether his ancestor's estate will be sufficient for satisfying his debts, may enter *cum beneficio inventarii*, by which means he keeps himself free from responsibility beyond the value of the estate.

69. *Primo venienti.*—To those who come first. The heir *cum beneficio* may pay the creditors applying to him, *primo venienti*, unless interpelled by citation, and provided he do it without collusion.

76. *Qui in utero est, pro jam nato habetur, quoties de ejus commodo quæritur.*—A child in the womb is esteemed as already born, when inquisition is made concerning his

advantage. Hence it is a good objection to a service, that there is a possibility of a nearer heir *in utero.*

76. *In spe.*—In hope, or expectation. If, as Mr Erskine says, " the father could not serve heir, while there is a nearer heir *in spe*, he could not be said to succeed, because, so long as he is alive, there is a possibility that he may have children, who would exclude himself from the succession of the deceased.'

77. *Jure sanguinis.*—By right of blood. There are subjects to which the heir requires no service ; *ex. gr.* titles of honour, offices of the highest dignity, heirship moveables attained by possession, tacks, pensions, &c. but decend *jure sanguinis.*

Mortuus sasit vivum.—The dead ancestor seises or infefts the living heir. This rule, which obtains in some countries, is repugnant to the law of Scotland, where the fee of a land-estate cannot be established without a service, even in the person of an heir who is *nominatim* substituted in an entail. In land-rights, the fee does not vest *ipso jure*, even in a *nominatim* substitute ; he must be served, for this reason, that property in land,

once vested, cannot be transmitted, but by writing. This holds even in a substitution to a *personal* right to land; for, in the one case, a general service is as necessary to establish a title, as a special service is in the other.

79. *Supplendo vices.*—As supplying, or coming in the place of. Although this phrase is put in parenthesis, it is necessary to be known. Where lands hold of the crown, the heir served in special obtains a precept from the Chancery, directed to the sheriff, for infefting the heir in the land. If the superior refused to enter the heir upon his service, three consecutive precepts were issued from the Chancery, commanding the superior to infeft him, and, if he still refused, a precept was issued against the next highest or mediate superior, as coming in place (*supplendo vices*) of the immediate one, and so on, from superior to superior, till he came to the sovereign, who refuses no vassal. But by 20. Geo. II. c. 50. the heir may now obtain a warrant from the Court of Session, upon production of his special retour, to charge the superior to receive him on fifteen days notice, which he

will do on payment of the casualties, and production of the ancient titles. The sheriff who gives seisine was, by ancient practice, entitled to a sesine-ox, as his fee ; but this perquisite is now generally paid in a sum of money, more or less, according to the value of the lands.

79. *Vassalo faciendo superiori quod de jure facere oportet.*—The vassal performing to the superior what it becomes him by law to do.

82. *Gestio pro haerede.*—Acting or behaving as heir ; or the passive titles in heritage, as intromitting with the rents of his ancestor's lands, granting a lease of the property, intromitting with the titles, and such like, infer a passive title.

In valorem.—For the amount. In ancient practice the *gestio pro hærede*, or doing certain acts which the law has declared to infer a passive title, subjected the heir, to the extent of his intromissions only, or *in valorem* of their amount.

83. *Animus gerendi.*—The intention of acting as heir. This is inferred from an heir taking possession of the charter-chest.

86. *Tam facti quam animi.*—As much a matter of fact as a matter of intention ; in re-

ference to intromissions by an heir, however small, being subjected, passive, where an *animus* or fraud appears.

86. *Delectus familiae.*—The choice of a family. Representation by the heir cannot be inferred from his exercising any hereditary office, or assuming his ancestor's titles of honour, or dignity hereditary to the family, as they arise from a *delectus familiae.*

Extra commercium.—Not capable of being bought or sold; and so may be enjoyed by the heir without representation, *Har.* 31.

88. *Successor titulo lucrativo post contractum debitum.*—A successor by a lucrative title after debt has been contracted. To prevent apparent heirs from accepting of gratuitous dispositions to lands to which they would have succeeded as heirs, the passive title of *præceptio hæreditatis* was introduced, by which, if heirs accept of any part of the estate to which they would have succeeded, by a gratuitous disposition, they are liable for all the debts contracted by the ancestor at the date of the gratuitous conveyance.

Titulo lucrativo, qui titulus est post contrac-

tum debitum.—By a lucrative title, which is a title after debt has been contracted; or that the heir, by taking a gratuitous right to subjects in which he is to succeed to the granter, is considered as acknowledging him as his heir; and, in the words of the learned Mr Erskine, is liable in payment of all the debts contracted by the granter before the acceptance of such right, and is on that account called *successor titulo lucrativo post contractum debitum.*

88. *Ex capite fraudis.*—On the head of fraud. This phrase has reference to the preceding, and the gratuitous deed may be set aside *ex capite fraudis.*

89. *Inter conjunctus personas.*—Between conjunct persons. Deeds granted between conjunct persons cannot be hurtful to lawful creditors.

Dicis causa.—For form or fashion's sake The sum paid by the heir who incurs a passive title, must bear some proportion of the value to exclude it. If it did not, says Mr Ersine, "the heir is presumed to "have paid that trifle, *dicis causa,* on "purpose to get quit of a passive title."

In quantum lucratus est.—In so far as the

heir is benefited or enriched, for even then the right of the heir may be set aside, in so far as it is gratuitous.

95. *Legitima potestas.*—The lawful power to do a thing. The moment that a person is seized with the disease of which he dies, he loses the *legitima potestas* of disponing his property to the prejudice of his heir.

96. *Morbus sonticus.*—A disease which affects the judgment. It falls under the law of death-bed, and constitutes a death-bed deed. If a person makes a deed relating to heritage within 60 days of his death, and while he is confined by disease, it may be set aside *ex capite lecti*, unless, in the course of that time, it can be proved that he went to divine service at stated days and hours, or to public market, unsupported by any person. Act of Sederunt, Feb. 29. 1692.

BOOK III.—TITLE IX.

Of Succession in Moveables.

Sect.

4. *Sine animo remanendi.*—Without an intention of remaining. If a Scotsman goes abroad without the intention of remaining, and dies there, the succession will be regulated by the Scots law, and *vice versa* in the case of a foreigner coming to Scotland, *sine animo remanendi.*

Lex patriæ, or *domicilii.*—Moveables, descend according to the law of the country, or domicile of the person to whom they belong, without regard to where they are situated.

Loco rerum immobilium.—In the place of immoveables. This phrase is explained by the following question and answer put by Mr Erskine: "A question having been "moved, whether debentures, granted "for money lent to the public in Ireland, "and secured to the creditors by an act "of the Irish Parliament, were to be "held *loco rerum immobilium*? It was "adjudged that they were not, but that "they descended as proper moveables "*secundum legem domicilii.*"—said Nov. 1744.

5. *Sanæ mentis.*—Of a sound mind. A person may make a testament, *id est*, a settlement of his moveable effects, in the last hour of his life, provided he is *sanæ mentis.*

Titius, hæres esto.—Titius, be my heir. These were the terms in which the Romans appointed their heirs.

Hæres fiduciarius.—A fiduciary heir; a trustee appointed by the deceased, and who is to be accountable to the next of kin, creditors, and others having interest in the succession.

6. *Universitas.*—Universal legatee; and not unfrequently he gets the name of residuary, if his universal right be granted with the burden of paying particular legacies to others.

8. *Dummodo constet de persona.*—Provided it appear who the person is. This phrase refers to a legacy, which is considered valid though a false cause of granting be assigned, and although the legatee be erroneously named, provided his description distinguishes him from all others.

9. *Spes obligationis.*—A conditional obligation. In conditional obligations, though the

creditor should die before the existence of the condition, yet it transmits the *spes obligationis*. A legacy of L.500 to A. B. to be paid when he is 16 years of age, was found, notwithstanding the legatee's predeceasing that period, to vest in him a *morte testatoris*, and to be due on his decease to his next of kin; Helen and Elizabeth Burnets *v.* Sir William Forbes, Baronet, 9th December 1783.

9. *Dies non cedit.*—The debt or legacy does not become due; the legacy does not vest so long as the person lives, and may alter his will. If the legatee die before the legator, the legacy lapses. It does not transmit to the legatee's heirs.

10. *Ut sortiantur effectum.*—That they may receive effect. According to the Roman law and ours, legacies ought to be so explained as to receive effect.

Legata rei alienæ.—A legacy of a thing belonging to another. Either in the case when the testator believed the subject to be his own when it was not, or was in *dubio* in regard to it.

Rei alienæ scienter legatæ.—Of a property belonging to another, knowingly legated, and so may be demanded, viz. either the

legacy itself or its value, by the legatee, though the subject of the legacy was *res sua*, as in next phrase.

10. *Res sua*.—His own property.

11. *Legatum quantitatis*.—A general or universal legacy; and includes cash found in the deceased's repositories, moveable bonds, and all other moveables, excepting heirship-moveables, which in testamentary deeds are reserved to the heir.

13. *Legatum generis*.—A legacy of a particular subject, without distinguishing it from others of the same kind, as a yoke of oxen, a horse.

14. *Ut voluntas testatoris sortiatur effectum*.—That the will of the testator may receive effect; *ex. gr.* as in the case of the death of all the trustees, the Court of Session may substitute one in their place, with power to carry the will of the deceased into execution, *ut voluntas testatoris sortiatur effectum*.

26. *Nudum officium*.—A naked or unprofitable office. When the legacies exhaust the dead's part, the executor gets nothing but *nudum officium*.

27. *Aditio hæreditatis in mobilibus*.—A succession to heritage in moveables.

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28. *Deductis debitis.*—Deducting the debts.

30. *In cursu diligentiæ.*—In the course of doing diligence.

36. *Ad omissa vel male appretiata.*—In regard to things omitted, or not fully valued; as in a confirmation where the effects are not fully given up, or are undervalued, and may be remedied *ad omissa vel appretiata*, at the instance of any creditor having interest.

38. *Quoad non executa.*—In so far not executed. The commissary, in the case of the office of executor falling before the testament was fully executed, was in the use of appointing an executor dative *quoad non executa*, as if there had been no former confirmation, for executing that part of the testament which had not received execution during the life of the first executor.

39. *Jus exigendi.*—The right to demand a debt. Sometimes the commissaries give a licence to the executor to sue for payment of a debt; but the right of compelling payment is suspended till confirmation.

Usque ad sententiam.—Until sentence be pronounced. A decree dative entitles

a person only to pursue *usque ad sententiam*, but not to uplift and discharge the sum found due.

41. *Ultra vires inventarii.*—Beyond the value of the inventory.*

43. *Primo venienti.*—To pay to those who come first; *i. e.* it is lawful in the common case to pay to that creditor who has first obtained decreet for the debt.

Sine quibus funus honeste duci non potest. Without which the funeral cannot be decently conducted. This term applies to funeral charges, such as hanging the room where the body is laid with black, if a person of rank; mournings to the widow, children, &c.

48. *Ex paritate rationis.*—From a parity of reason. This phrase has respect to the doctrine of relief authorised by statute 1503, c. 75. to the heir who has made payment of a moveable debt, against the executor; and though the statute contains no clause obliging the heir to relieve the executor as to the heritable debts, that right has

* It will be seen from section 45, that, in terms of the Act of Sederunt, February 28, 1662, the citation of the executor, or confirming executor creditor, within six months, gives a *pari passu* preference.

been extended in favour of the executor *ex paritate rationis*.

49. *Actio expilatæ hæreditatis*.—An action for recovering the penalties of ransacked heritage. This action, among the Romans, was nearly equivalent to our action for vitious intromission.

52. *Ante litem motam*.—Before an action is moved or raised. Vitious intromission is purged when confirmation takes place within the year; yet if he shall confirm after the year, and before he is cited by any creditor as a vitious intromitter, he is secure.

53. *Custodiæ causa*.—For the sake of custody or preservation. No passive title is incurred where the intromission was *custodiae causa*, or for preservation; as where the widow or next of kin does no more than continue the possession had by the deceased, for the behoof of all interested in the executry, that the goods may be saved from perishing.

BOOK III.—TITLE X.

Of Last Heirs, or Bastards.

Sect.

6. *Quam nuptiæ demonstrat.*—Whom the marriage points out; in reference to children lawfully begotten of a bastard. This is one of the impediments of succession. The right of the crown as *ultimus hæris* is excluded if the bastard have lawful children. Though a bastard should have no lawful issue, he may, while in *liege poustie*, sell, or gift his property, by any deed *inter vivos.*

Ex defectu natalium.—From defect of parentage.

Factio testamenti.—The power of making a testament or will. Where the bastard has lawful issue, he has the full *factio testamenti*, and consequently may make a testament, not only in favour of that issue, but of strangers.

7. *Per rescriptum principis.*—By a rescript or letter of the prince or king; and here referring to bastards being sometimes legitimated by the sovereign, and thereby confering on them all the rights of

lawfully begotten children; but this was excluded by the Roman law, if the bastard's father had at the time lawful issue.

7. *Legitima successio.*—Legitimate or lawful succession; in opposition to *spurii* or bastards. Succession, says Mr Erskine, "is "one of those civil rights to which none "are entitled who are not procreated in "lawful wedlock; and though the mother "of the child be certain, the bastard is "not her lawful child, and consequently "has no claim to her lawful or *legitima* "*successio*, either in heritage or move "ables."

Spurii.—Bastards. Among the Romans, they were allowed to succeed to their mothers.

BOOK IV.—TITLE I.

Of Actions.

Note.—By our ancient law, actions proceeded on brieves issuing from the Chancery, which were directed either to the Justiciar of Scotland or Judge Ordinary, who tried the matter by an inquest, or Jury, and upon their verdict (*verdictum*) judgment was pronounced. The mode of trial by Jury, in civil causes, was again introduced in the year 1815, in the present Jury Court, consisting of a Lord Chief Commissioner, and four Lords Commissioners, four principal clerks and assistants. The Lord Chief Commissioner is the Right Honourable William Adam of Blair, and the Honourable Lords Gillies, Pitmilly, M'Kenzie, and Cringletie, Commissioners.

Sect.

3. *Verdictum.*—A verdict, or the sentence of a jury consisting of twelve men of our country.

7. *Instantia perit.*—The instance or process falls. When the pursuer does not follow up his action, the defender may put up protestation for it; and as soon as this is admitted, the process falls; but a new summons may still be raised and insisted in.

14. *Actiones rei persecutoriæ et penales.*—Actions for recovery of a subject, or the payment of a sum of money unjustly with

held, and actions to obtain not only indemnification but a penalty. The chief difference between the two branches of this division is, that in actions *rei persecutoriæ* the pursuer insists barely for an indemnification of real loss, and transmits to heirs, whereas in penal actions, *venalis*, a delict or transgression, though the heir is considered as *eadem persona cum defuncto*, penal actions are personal, and do not transmit to heirs.

14. *Patrimonio ejus abest.*—That which is abstracted from a person's patrimony; as in the case of an action of vitious intromission, by which the pursuer frequently recovers the whole of the debt due to him by the deceased, though it should exceed the value of the goods intromitted with by the defender.

15. *Quilibet titulus excusat a spolio.*—Any sort of a title excuses from a spuilzie, which may be elided as to the penal consequences by voluntary restitution *de recenti* of the goods illegally carried off *cum omni causa.*

Ex delicto.—From delict, or fault. This suit is not only competent against the spoliator but against all abettors, each

of whom is liable in *solidum* without recourse against the rest, which is indeed the rule in all actions arising *ex delicto.*

17. *Actio popularis.*—A popular action, which, by the Roman law, might be carried on by any person, in opposition to private actions, and could not be insisted in but by persons interested in the issue of the cause.

22. *In publica custodia.*—Writings recorded in a public register.

24. *In foro contentioso.*—In a contested action, where parties have been fully heard, and sentence pronounced.

25. *Quæ singuli non prosunt, juncta juvant.*—Grounds of reduction, which are not sufficient singly, but may be so when conjoined and taken together.

26. *Vis aut metus qui cadet in constantem virum.*—A force or fear which would shake a man of resolution. In reductions on the head of force or fear, the *vis aut metus* must be of this description.

27. *Dolus in re.*—Fraud in the very thing. This applies to a person lending money to an eldest son, not made payable till after his father's death.

44. *Dolum inesse in re.*—That there was fraud

in the very transaction. Thus, a security granted by a debtor, knowing himself insolvent, in favour of one set of creditors, to the exclusion of another creditor equally onerous, without being pressed to it by diligence, was adjudged to lay no foundation of a preference to the creditors favoured. *Kames, Rem. Dec.* 95.

44. *Participes fraudis.*—Partakers of the fraud. The *actio Pauliana*, among the Romans, was not competent against creditors unless they were *participes fraudis*.

47. *Condictiones.*—Petitory actions, or actions for restitution of moveables. Personal actions were, by the Romans, considered petitory.

Quorum bonorum uti possidetis, and *undè vi.*—The possessory actions of our law, for recovering possession of goods which came in place of or were analogous to the Roman interdict *undè vi*, are those of spulzie, intrusion, and ejection.

52. *Nemo tenetur edere instrumenta contra se.*—Nobody is bound to produce writings against himself; *ex. gr.* in an accessory suit, the adverse party cannot be forced to expose his title-deeds with all their defects.

54. *Casus amissionis.*—The accident by which the loss happened, such as fire, robbery,

shipwreck, &c. In an action for proving the tenor, the pursuer must libel, and prove the *casus amissionis*, or accident, by which the deed came to be lost, before the tenor of it be admitted to proof.

54. *Casu fortuitu.*—By an unforseen event. In reference to the loss of a deed, and according to the opinion of lawyers, that, in an action for proving the tenor, it is sufficient to libel that the deed was lost any how, even *casu fortuitu.*

55. *Fidem facere judici.*—To make faith to the judge; as in the case of witnesses called upon in a process for proving the tenor, that the deed libelled on did truly exist, by producing adminicles in writing; but adminicles, from the necessity of the case, are dispensed with, when the writing, while in the creditor's possession, was taken from him by violence, or consumed by fire.

63. *Gratia mandatarii.*—From favour to the mandatory. Formerly, clauses for registering of bonds, or other deeds, were conceived in the form of mandates. A mandate may be constituted by writing, or tacitly. Although a mandate expires at the death of the mandant, yet, if the man-

datory be ignorant of his death, his acting will bind the heirs of the mandant. Even after he comes to know of the death of the mandant, the mandatory may proceed to complete the transactions previously begun, and which require to be completed.

65. *Judex pedaneus.*—An inferior judge. The Romans had a different formula for every different species of action, which it behoved the prætor to observe when he remitted the cause to the *judex pedaneus*.

66. *Persona standi in judicio.*—A person to stand in judgment. A right to appear in court, either as pursuer or defender.

65. *Formula.*—A rule, a form in law; or suits of the same species, and contained in one libel. The Roman *formulæ* had different conclusions upon the same ground of debt, recissory, declaratory, and petitory, if not repugnant to one another.

Quot articuli tot libelli.—As many libels as there are grounds of dispute; and this may hold in the case when two creditors, having separate grounds of debt, cannot be joint pursuers against their common debtor.

66. *Primere causam.*—To put an end to, or exhaust

the cause; and here employed to denote that a cause has been fully heard upon its merits, or, as it is termed, a final judgment, or *res judicata*, and cannot be opened up unless upon the plea of *res noviter veniens ad notitiam*, and paying the previous expences.

66. *Lis pendens.*—A depending action, *instanter* contested, or litiscontestation in a competent court between two or more parties.

67. *In limine judicii.*—In the outset of the action. Dilatory defences must be made *in limine judicii*; and where a peremptory defence is made, the defender is justly accounted to have passed from all his dilatory defences.

69. *Frustra probatur quod probatum non relevat.* A matter is needlessly proved, which, when proved, is not relevant; or in reference to warrants granted, before fixing the relevancy.

Reo absente.—The defender being absent, there can be no litiscontestation.

Parte non comparente.—The party not appearing, after being cited, decreet in absence will be pronounced.

70. *Reo præsente.*—The defender being present. By the defender's appearance a new quality is given to the action; and, as well expressed by Mr Erskine,—"in consequence of the judicial contract implied "in it, there arises a *nova causa obligationis.*" And, he adds, in reference to the death of the defender, it is perpetuated, and made transmissible against heirs; Feb. 17, 1712, Stewart.

Nova causa obligationis.—A new ground of obligation. After litiscontestation, *reo præsente*, a new quality is communicated to the action, namely, that it does not fall by the death of the defender, but is perpetuated and made transmissable against his heirs, even although it be of a penal nature, and would consequently, in the common case, fall by his death. Litiscontestation is therefore said to produce *nova causa obligationis*, because there is a judicial contract implied in it, containing the new quality already mentioned.

Fructus rei alienæ.—The fruit of a thing belonging to another; and is here set down by Mr Erskine in the following terms:—"Litiscontestation also does, in "sundry instances, put the defender in

mala fide with respect to the *fructus rei alienæ* gathered or received by him;" *Sup.* b. 2. t. 1. § 29.

BOOK IV.—TITLE II.

Of Probation.

1. *Scripto.*—A proof *scripto* is a proof by written documents; or this mode of proof, or averment, is instructed by writings signed by him against whom the fact is alleged, called a proof *scripto*; and, in the words of our author, "in this way all "points may be proved against a party "without exception."

Juramento.—A proof *juramento* is a proof by the oath of the party. This is a second mode of proof by the party's oath, or *juramento*, with some exceptions; and by this manner of evidence most obligations may be proved.

Probatio prout de jure.—A proof not only by writing or the oath of party, but by the testimony of witnesses. This third mode of proof includes every kind of legal

proof, such as the writing or oath of a party, and by witnesses.

4. *Semiplena probatio.*—A half proof; a proof which induces a strong belief, but does not amount to complete legal evidence. When a merchant keeps regular books, which by law are held to afford a *semiplena probatio*, and besides adduces one witness that the goods, the price of which is sued for, were delivered, this will afford a *probatio probata;* and in the case where the mother of a bastard child establishes a *semiplena probatio* against a person whom she alleges to be the father of her child, the mother's oath in supplement will be admitted, and will be held to establish her case.

8. *Quid juratum est.*—What is sworn to. A party swearing may have his adversary's oath, that he has no other mean of proof; but a judge has a discretionary power to ordain either of the parties to make oath, because it is supposed he has the best opportunity of knowing the fact.

10. *Res inter alios acta.*—A matter transacted between others. An oath of verity, however available to third parties, cannot hurt them in any case, being *res inter*

alios acta ; ex. gr. the oath of an executor proves against himself, but not so as to hurt the rights of the widow and children.

11. *Pars negotii.*—A part of the transaction. This phrase has reference to oaths on reference, in which there are intrinsic or extrinsic qualities. If intrinsic, the quality makes a part of the allegation which is referred to oath, and is received by the judge as such, but that which the judge rejects or separates from the oath is extrinsic ; *ex. gr.* in oaths on reference in a suit for payment of a prescribed account, if a defender on oath acknowledge receipt of goods, yet if he depone that he paid the price, the quality contained in the last part of the oath, relating to the payment, must be deemed intrinsic, since, as Mr Erskine says, " not only the constitution, " but the subsistence of the debt, is un- " derstood to be referred to oath ; *Fount.* July 6, 1711, Clerk." The oath of a bankrupt was admitted to prove the subsistence of a debt vouched by bill of exchange, so as to obviate the sexennial limitations ; January 31, 1789, Buchan *v.* Robertson, Barclay, &c. *Vide* Kaimes' Elucidations on the point, under the article Qualified Oath, p. 158, where he

submits six considerations tending to explain the difference between intrinsic and extrinsic qualities.

Mutua petitio.—A counter-claim; or the extrinsic quality in an oath. Mr Erskine gives the following exposition of it:—"Where the quality, which is adjected "to the oath of a defender does not im- "port an extinction of the debt, but "resolves barely into a counter-claim, "or *mutua petitio*, against the pursu- "er, it is considered as extrinsic: If, "for instance, he should swear that the "debt libelled was indeed just, but that "he delivered goods, or disbursed money "on the pursuer's account, to the full "amount of it:—For every one who lays "his plea upon a counter-claim must "bring legal evidence to support it, other "than his own oath, to which, therefore, "it is not *in dubio* presumed that the pur- "suer hath referred it; Dec. 23, 1707, "Brown."

15. *De calumnia.*—An oath of calumny, now scarcely in use, except in the Consistorial Court, which is regulated by the act of Sederunt 13th January 1692.

17. *Pro confesso.*—As confessed. This, *inter*

alia, refers to a defender being forth of the kingdom, and edictally cited at the market-cross of Edinburgh, pier and shore of Leith, to appear in Court, on two diets of 60 and 15 days; but this rule was removed by the act of Geo. IV. c. 120., and act of Sederunt, in reference thereto, passed on 11th November 1828, § 22. by which a copy of the summons is ordered to be served at the record-office of the keeper of the general records kept at Edinburgh, upon the *induciæ* of 60 days.

17. *Apud acta.* — Literally, among the acts. When a judge pronounces an order on a person personally present, to appear in court for a particular purpose, on a certain day, he is said to be cited or summoned *apud acta*. This mode of citing parties is very common in the church courts.

18. *Per modum pœnæ.* —By way of punishment. This phrase refers to a suit for damages, grounded on the edict *nautæ caupones stabularii*; and in which, from the necessity of the case, damages have been awarded.

23. *Infamia facti.*—Infamy of the fact; that is, infamy in the opinion of the virtuous part

of mankind. *Infamia juris* is inflicted by the authority of the law.

24. *Ob reverentiam personarum et metum perjurii.*—On account of their regard for the individuals, and for fear of perjury, wives and children cannot be compelled to give evidence against their husbands and parents.

26. *Cum nota.*—Where there is a *penuria testium*, a scarcity of witnesses, persons otherwise inadmissible are sometimes admitted to give evidence *cum nota*, leaving to consideration the belief, credit, and amount of the oath, according to circumstances.

26. *Testimonia ponderanda sunt, non numeranda.*—Testimonies are to be weighed, not counted. It is the importance of the evidence, not the number of the witnesses, that is to be considered.

28. *Initialia testimonii.*—The initials of the testimony. There are certain questions *in initialibus* put to every witness, the answers to which are called the initials of the deposition.

29. *Omni exceptione majores.*—Above all exception, unexceptionable. This refers to exceptionable witnesses in a cause on

the ground of reprobator, which may be proved not only by the oath of the party who produced the witness, but also by the testimony of witnesses, provided these witnesses be *omni exceptione majores*; July 14, 1671, and Feb. 10, 1672, L. Milton.

31. *In retentis.*—The testimony of old witnesses is allowed to be taken during the dependence of the process, and sealed up to lie *in retentis*, that is, in readiness to be opened up when a proof comes to be allowed.

33. *Probatio probata.*—An established fact. The sentence of a court or of a jury, which cannot be traversed, gets the name of *probatio probata*.

Secundum allegata et probata.—According to what is alleged and proved. A judge ought to decide only *secundum allegata et probata*, and not according to any knowledge of facts he himself may possess, for this reason, that he cannot be both judge and witness in the same cause.

34. *Discursus.*—Reasoning; and refers to proof by circumstances and presumptions, and from the premises to draw the conclusion. Presumptive evidence is, according to

Aristotle, and after him by Tully, called artificial, because it requires a *discursus*, or reasoning, to draw the conclusion from the premises.

36. *Praesumptio juris*.—A presumption of law that a fact is true, till the contrary be proved.

Super presumpto.—More than the presumption, and is taken for granted until the contrary shall appear to the judge to be supported by stronger evidence, as the property of moveables is presumed from possession; the person paying interest is presumed to be debtor in a capital sum corresponding to it; and the entertaining a person at bed and board, where there was no previous bargain, is held to be gratuitous.

37. *Præsumptiones hominis vel judicis*. — Presumptions which emerge from the special circumstances of the case, and on which it is the duty of a judge to lay more or less weight, according to the several degrees of evidence they carry with them.

BOOK IV.—TITLE III.

Of Sentences and their Executions, and of Decrees-arbitral.

Sect.

1. ***Res judicata.***—A matter that has been finally determined, and so called by the Roman law, and excludes all rehearing or review, either of the court that hath pronounced the sentence or of any other.

3. ***Media concludendi.***—Or grounds of action urged by the pursuer, and which, from their nature and tendency, sometimes do not warrant a judge to pronounce decree against the defender.

In foro contradictorio.—A decree *in foro contradictorio* is a sentence pronounced in a cause, which has been fully argued by the parties.

4. ***Res judicata pro veritate habetur.***—A matter finally determined is held to be founded in truth. This refers to the distinction to be made betwixt the *actio* and *exceptio rei judicatæ.*

Exceptio rei judicatæ.—An exception that the matter has been definitively decided,

and does not apply to *rei judicatæ* in decrees of inferior courts, on the ground, it is presumed, that inexpert procurators have been employed by the parties.

7. *Copia peritorum.* — Abundance of skilful lawyers.

17. *Manu militari.*—By military aid, for enforcing sentences *manu militari.*

21. *Prævento termino.*—For shortening the term. This refers to the shortening the term of appearance in a suspension or advocation, when too long terms are assigned.

25. *Assyla.*—Sanctuaries.—*Vide* Note No. II. of the Appendix, respecting the Jurisdiction of the Abbey of Holyroodhouse.

Termini sanctorum. — The precincts of sanctuaries or churches, or the boundaries of altars, dedicated to particular saints, which, among the Romans, afforded an assylum against punishment for small delinquencies. The sanctuary of the Jews, whose brazen altar protected petty criminals, a place of refuge and shelter, is called sanctuary; Isaiah viii. 14; Ezek. xi. 16.

26. *Cessio bonorum.* — The ceding or making over a person's property and effects to his creditors. The law of Scotland, after

the Roman law, allows insolvent debtors from motives of compassion, to get out of jail upon assigning over their property to their creditors.

32. *In ipso termino.*—A decree-arbitral may be pronounced *in ipso termino*, on the very day on which the submission terminates.

Ultra vires compromissi.—Beyond the limits of the compromise or reference. A decree *ultra vires compromissi*, may be reduced on that ground.

BOOK IV.—TITLE IV.

Of Crimes.

2. *Publica vindicta.*—Public justice. A crime, in the highest acceptation of the word, according to our author, signifies any breach or transgression, either of the law of God, or of the positive law of our country; delicts or slighter offences may be pursued by the private party, or the public prosecutor, *publica vindicta*; but the transgression of the divine law, which is hurtful to the peace of society, may be punished even with death;

thus sodomy and bestiality are held to be capital crimes, as is likewise adultery, by special statute.

4. *Crimina extraordinaria.* — Extraordinary crimes. Acts in breach of a statute, though not in their own nature immoral, are punishable as proper crimes, and, by the Roman law, got the name of *crimina extraordinaria.*

5. *Crimen dolo contrahitur.*—A crime is contracted by a wilful intention in the actor to commit it. An act without will, neither deserves the name of virtue or vice, and the actor may not be considered a proper object of punishment.

Jacere telum voluntatis est; ferire, quem nolueris, fortunæ.—It is a matter of voluntary choice to throw a weapon; but it is a matter of chance to kill a person whom you do not wish to kill. By the law of England, commonly called Lord Ellenborough's Act, the shooting at, conniving, or attempting to kill a person, is held a capital crime, for it is *intentio constituit crimen* that constitutes and forms the very essence of crime; and, not long since, this species of crime has been wisely introduced into our criminal code.

6. *Proximus pubertati.*—Verging towards puberty, which, in the case of males, is 14 years, and in that of females 12; and here reckoning that pupils, from their being on the confines of infancy, are incapable of a deliberate action. But when the guilt of the crime committed by the pupil arises chiefly from statute, so that its criminal nature is not so obvious, he ought not to be punished *nisi malitia suppleat actatem*, unless he appear to have a high degree of sagacity and judgment above his years. *Dole*, says our author, is seldom or ever inferred against a pupil, "because a greater degree of judgment "and address is required to be aiding to "another in the commission of a crime, "than to be himself the perpetrator of "it, such a degree as is hardly presume-"able in that age."

Nisi malitia suppleat aetatem.—Unless malice supply age; or, according to the humanists, the word *malitio* signifies sagacity, wit, and understanding to do ill; and, in the Roman law, *malitiosus* and *dolosus* are synonimous, the having a faculty to hurt by forethought, importing a stability and firmness of the organ on which the mind

operates; from which sufficiency in the body, the canonists presume an aptitude and capacity to beget children: besides, this word *Malitia*, in c. 9. *De Desponsatione Impuberum*, and in *C. ult. ejusd.* is called *prudentia*; and it is there said, *Nisi prudentia suppleat aetatem*. In this point, the civilians form upon a certain number of years, when the body is thought to acquire stability,—a rule concerning the judgment, and a capacity to Consent, being one of the requisites of marriage. On the same subject, Sir George Mackenzie, B. 1. tit. 4. § 3. says:—"Consent *de presenti* is that in which marriage does "consist; and, therefore, it necessarily "follows, that none can marry except "those who are capable to consent; and "so idiots and furious persons, *durante* "*furore*, cannot marry, nor infants who "have not attained the use of reason, "that is, when they are within the years "of pupillarity, which is defined in law "to be 14 years in males, and 12 in females, *nisi malitia suppleat œtatem.*" To the like purpose, President Stair lays it down, B. 1. t. 4. § 6.:—"The common "essentials of consent must also here be

" observed, so that who cannot consent " cannot marry, as idiots and furious per- " sons: So neither they, who have not " the use of reason, as infants, or who " are not come to discretion, as pupils, " (unless *malitia suppleat ætatem,*) that is, " when the person is within the years of " pupillarity, commonly established in " law to be 14 years in males, and 12 in " females." Lord Banckton teaches the same creed, B. i. t. 5. § 26. :—" Consent " of the persons contracting is essential " to marriage, and therefore furiosity or " idiotry hinders persons from marriage, " because they cannot give consent, " through want of judgment; but super- " vening madness will not annul a mar- " riage already constituted. *Multa im-* " *pediunt matrimonium contrahendum,* " *quae non dirimunt contractum.* Thus, " likewise, persons not capable to con- " sent, through nonage, cannot marry; " for which reason, such as are under " pupillarity, viz. 14 in men and 12 in " women, are regularly incapable to " marry." And, in like manner, Mr Ers- kine, in his Institute, B. i. t. 6 § 2. *inter alia,* says:—" Neither idiots nor pupils can

" marry, because both are incapable of " consent." The same is the law of England, as appears from Bacon's Abridgement, Vol. iii. p. 119; Wood's Inst. B. i. cap. 6. § 2.; and Mr Blackstone, B. i. cap. 15. p. 436. The same is the law of France,—Mons. Denisart, voce Marriage, p. 127, and other French law authors. Some of the Roman lawyers appear to have disputed, whether or not the *habitus corporis*, at least with regard to males, ought to be regarded, as well as the age, in questions of marriage. This was, however, settled by Justinian, and the age alone established as the rule, in order to prevent the *impudicam inspectionem corporis*.—*Vide* his Institutes, Lib. i. tit. 22. Here women are held to be *viri potentes* when they have completed their 12th year; and this was made a *presumptio juris et de jure*, the *inspectio corporis* being discharged. The favour of marriage has indeed been urged by some as an argument for sustaining marriage, even before the age of consent, *si malitia suppleat ætatem;* but this has justly been condemned, particularly by Mr Erskine, who gives the following

reasons against it:—"1st, That it draws "after it an indecent *inspectio corporis*, "which is not to be admitted without "the most urgent necessity; 2dly, It is "adverse to first principles; for if the "law declares a pupil incapable of enter- "ing into the most trifling contract, from "a defect of judgment, it surely ought "not to suffer him to engage in an in- "dissoluble society, the nature of which "he cannot form the smallest notion of."

9. *Pœna ordinaria.*—The ordinary punishment. Doctors learned in the law are generally inclined to think that an attempt, or *conatus*, to commit a crime ought not to be punished *pœna ordinaria*, with the same punishment which the law has inflicted on the crime itself.

9. *Conatus.*—An endeavour or attempt to commit a crime, as explained above.

Si diventum sit ad actum maleficio proximum. If it has proceeded the length of an act bordering upon mischief. In illustration of this phrase, we may well introduce the doctrine of Sir George Mac-Kenzie, as set down by our author, and, although of long standing, is consonant with Lord Ellenborough's wise act, and the now introduction of it into our law,

as noticed above:—"but Mackenzie, "*Crim.* Part I. tit. 1. § 4. asserts, that, in "atrocious crimes, the attempt, *si deven-* "*tum sit ad actum maleficio proximum,* "ought to be punished as severely as if "the crime had been *actually committed,* "both because such an attempt is a lesser "degree of that very crime to which it "so nearly approaches, and because the "state cannot be otherwise secure from "the person who has discovered such a "wicked and mischievous disposition."

10. *Ope et consilio.*—By assistance and advice, by aiding or abetting, by acting as art and part. By the Roman law and ours, the actors art and part of crimes are punished capitally.

19. *Crimen majestatis.*—A crime against the majesty and dignity of the state—high treason,* from the French *trahison*—is an act of treachery against the commonwealth. By our law, it is divided into proper, and statutory. Proper, or high treason, includes in it the contriving the

* Vide the learned and powerful speech of the Right Honourable the Lord President Charles Hope to the Grand Juries, as Preses of the Commission of Oyer and Terminer, held at Glasgow in 1820.

death of the Sovereign, or laying him under restraint in his person, or in the exercise of the Government; raising a fray in the host without a cause; levying war against him, or exciting others to invade him; the assaulting of castles where he resided; the endeavouring to alter the succession; impugning the authority of the estates of Parliament; the making of treaties, either with subjects or with foreign states, or maintaining any forts without the King's consent; and the resetting or concealing of traitors,—1449, c. 24; 1455, c. 54; 1584, c. 130; 1661, c. 5; 1662, c. 2. Statutory treasons, on the other hand, were, from their enormous guilt and mischievous consequences, punishable by statute with the pains of treason, viz. Theft by landed men, 1587, c. 50; murder under trust, ibid. c. 51; wilfully setting fire to coal-heughs, 1592, c. 146; or to houses or corns, 1528, c. 8;—and assassination. 1681, c. 15. The punishment of treason, whether proper or statutory, was death, and the forfeiture to the crown of the traitor's estate, real or personal, and the extinction of all the heritable dignities,

honours, or privileges that the King had conferred on him.—As to the sentence in the case of treason, see *Princ. of Penal Laws*, p. 147. Since the union of the two kingdoms in 1707, some British statutes upon high treason have been passed, the enumeration of which does not appear necessary, unless by noticing that it is high treason to kill any judge exercising his office. This extends to the Lords of Session and Justiciary.

24. *Ob defectum hæredis.*—For want of an heir; and here has reference to the pains and forfeitures consequent on high treason. The estate which the traitor cannot take, falls to his immediate superior as escheat, *ob defectum hæredis*, without distinguishing whether the lands hold of the crown or of a subject,—*Coke*, 1 *Inst.* Vol. i. l. 1. c. 1. § 4.; *Hale, Plac. Coron.* Vol. i. c. 27.

30. *Crimen repetundarum.*—The crime of accepting of a bribe to pervert punishment. By the Roman law, all judges and magistrates of provinces, who received money which they ought not to have received, were said to be guilty of the *crimen repetundarum*; and which term, says Mr Erskine, was at last applied to

every case where the judge accepted of a bribe to pervert judgment.

30. *Baratriam committit qui propter pecuniam justitiam baractat.*—He who commits barter sacrifies justice on account of money. This vocable is used in 1427, c. 107. to denote the crime of clergymen who went abroad to purchase benefices from the See of Rome with money.

32. *Pendente lite.*—During the dependence of an action. The beating or affronting of judges and other public officers, and disobedience to the Sovereign's commands, are crimes against the good government and police of a state, and severely punishable; and of this kind we have likewise deforcement of messengers, breach of arrestment, and battery *pendente lite*.

38. *Relegatione.*—By banishment. This crime refers to forestalling of markets, or regrating in our law, and held to be a crime against the state, and punished by sundry statutes. See 1592, c. 148.

40. *Claud mella.*—Slaughter executed on a sudden, in opposition to forethought, felony, or slaughter, committed in consequence of a previous design.

41. *Moderamen inculpatae tutelae.*—The bounds of self-defence, which a person may safe-

ly use, and is in no respect an object of punishment. If homicide be merely casual, and committed without blame, the agent must be acquitted. Homicide in self-defence, is that which must be understood where the agent was in some degree blameable; and subjects him to an arbitrary punishment. The man-slaughter of night-thieves and house-breakers, being a necessary act done in self-defence, is accounted lawful by the statute.

42. *Homicidium in rixa.*—The slaughter of a man, in a sudden tumult or scuffle. When a number of persons are engaged in a quarrel, and mortal wounds given, they who are proved to have given the wounds, are all liable to the pains of death, according to divine law, Numb. xxxv. 16, 17, and 18; and, according to the known rules in crimes, every one of many offenders is subject to the same punishment as if there had been but one.

46. *Ratione incidentiæ*—On account of its incidence. In the case of suicide, which is held to be an high act of disobedience to God, and insolent resistance to his providence, and is as truly criminal as the murder of one's neighbour; from the nature

of the crime, the offender withdraws himself from trial, and is no longer the object of punishment in his own person: But the legal penalties of murder by our usage take place; he loses his single escheat, whereby his moveable estate falls to the king, or his donatory. The donatory, to effect this, requires to bring an action of declarator, to which the next of kin of the deceased must be made a party, for having the self-murder declared.—The Court of Session is the proper court because it is only pursued *ad civilem effectum*, to procure a confiscation of moveables; and a proof of every fact material in the cause, though of its nature criminal, may be brought before them, *ratione incidentiæ*, as in this phrase.

49. *Bellum inter duos.*—Duelling. War between two individuals. This is justly considered a species of murder, and is the crime of fighting in single combat, upon a previous challenge given by the one party, and accepted by the other. It is the actual fighting with mortal weapons that constitutes this crime. It is not sanctioned by the law of Moses, nor by the precepts of our blessed Saviour. Both the challenger and chal-

lenged are to suffer death, by the statute 1600, c. 12. This act is ratified by 1696, c. 35. which provides farther, "That "what person soever, principal or second, "or other interposed person, gives a "challenge to fight a duel, or single "combat, or whoever accepts one, or "engages therein, shall be punished with "banishment and escheat of moveables, "though there should be no fighting in "consequence of the challenge." In former times, when simplicity of manners and honesty were perhaps more on the decline than at present, the parties *in rixa* settled the matter by exchanging a few blows, and afterwards sat down as good friends as ever. The pious and learned Dr Samuel Johnston, though he strongly inveighs against duelling, observed that, on account of the refinement of manners in his day, it perhaps became necessary. Fredrick the Great ordered a gallows to be erected on the spot pitched on, to hang the survivor. The late lamented Duke of York, commander-in-chief of his Majesty's forces, when a case of duelling in the army was reported to him at the Horse Guards, is said to have strictly enquired into the cause of the quarrel,

and, if it was found that a challenge had been given on frivolous grounds, the challenger's promotion was very dubious; and when it was discovered that the officer was fond of this kind of fighting, or was an habitual duellist, he was then generally recomended to sell his commission and retire from the army. To be sent to Coventry, however, is perhaps the most galling punishment that can possibly be inflicted upon any officer in the army, who has the least spark of feeling.—Mac-Cree, the noted duellist, challenged an Irishman unaccustomed to use fire arms: he accepted, but when he came to the spot he insisted on the choice of the distance (which was one foot) and the first fire, which at once resulted in a humble apology from the duellist.

55. *Cum virginitas vel castitas corrupta, restitui non possit.*—Because virginity or chastity, violated, cannot be restored. Rape is held to be a capital crime by all civilized states. It is the ravishing of a woman, or the crime consists in the forcible carrying off or aduction of a woman's person with the view to violate it, though there should be no actual violation. M'Kenzie,

however, is of opinion, *Crim.* Part. i. tit. 16. § 4. that the punishment of rape ought not to be inflicted unless where the abduction hath had its full effect. It appears, from our author, that where the woman gave her subsequent consent, the person accused was subjected to an arbitary punishment, by imprisonment, confiscation of goods, or a pecuniary fine; but we have a different doctrine on record, in the noted case of Robert M'Gregor, for hamesucken and forcible abduction of Jean Kay, a young widow of 19 years. He was tried before the High Court of Justiciary for these crimes. She was examined by the late Henry Home, Esq. thereafter Lord Kaims, and she declared that, however matters had been formerly carried on, she was now absolutely reconciled to her husband, loved him, and was fully satisfied with her present condition: yet the Court would not pass from the highest punishment of the law; and the son of Rob Roy, so much noted in fame by our justly far-famed great Scottish Bard, suffered a capital punishment at the Grassmarket of Edinburgh, on the 6th February 1754, having publicly acknowledged his crimes, and died a penitent.

55. *Fœdata et polluta—Defiled or polluted.*

56. *Incastus.* — Impure; hence incest. It is committed by an unnatural connexion of the bodies of man and woman, and is repugnant to the law of God and nature. It could not be committed by the law of Moses, unless by those who stood within the degrees either of consanguinity or affinity, within which marriage was forbidden, Lev. xxviii. 7. 16. and it was punished capitally, ibid. ver. 29.—By the act 1567, c. 14. this law was adopted into ours. During the Usurpation, an act was passed, July 16, 1649, c. 16, making the degrees more remote; it was repealed by the recissory act of Charles II. and never revived. Though we know that God first imposed this necessity upon the immediate descendants of our first parents, yet he could not make any conjunction necessary which implied a crime, and by the after propagation of mankind it became no longer necessary. Our author adds, "we find an absolute abhorrence of it in the minds of men, not philosophers only, but orators, poets, and lawyers; and in the sacred writings it is represented as a gross wickedness, Lev. xx. 17. Deut. xxviii. 22. and as one of the abominations for which

the Canaanites were to be driven out of their land."

56. *Civilis ratio civilia jura corrumpere potest, naturalia vero non utique.*—A political reason may break civil laws, but never natural ones.

58. *Contrectatæ.*—Intermeddled with.

Furtum.—Theft. This phrase is levelled against the property or goods of another, and has special reference to *furtum*, theft, falsehood, stellionate, usury, and fraudulent bankruptcy. The law of Moses punished sundry kinds of aggravated theft capitally, as the stealing of men, Deut. xxiv. 7. and of things sacred, Josh. vii.—but in common theft, the thief was only bound to restore, at most, five times the value, and in many cases less; Exod. xxii. 1. *et seq.*—Mr Erskine concludes this section in the following terms: "In like manner, the punish-
"ment of theft went no higher by the
"Roman law than the restitution either
"of the double or the quadruple of the
"thing stolen, according as the *furtum*
"was *manifestum*, or *nec manifestum*; but
"the stealing of men, the embezzling of
"the public money, the driving away of

" cattle, and theft attended with any " degree of violence, were punished with " death."

58. *Manifestum.*—Manifest, evident. *Nec manifestum.*—Not manifest. These two phrases, *manifestum, nec manifestum*, have relative but opposite meanings. If the theft was evident and aggravated, as in the end of the preceding phrase, the punishment was death; but if it was not attended with aggravating circumstances, the punishment might be imprisonment, or banishment. In either case, where the libel is not proved to the satisfaction of a jury, the pannel will fall to be acquitted.

63. *Receptatores.*—Resetters of theft. This crime, of reset of theft, consists either in harbouring the person of the thief, after the goods are stolen, or in receiving or disposing of the goods afterwards. By 1567, c. 21. it is enacted, that all persons harbouring a thief within 48 hours, either before or after committing the theft, should be tried as partakers of the crime. Those who received the stolen goods, knowing them to be such, were to suffer as thieves, by stat. Alexander II. c. 21. Those who sold goods belonging to

thieves, or to lawless persons, were punished with banishment and escheat of moveables, 1587, c. 109; but the resetter's punishment rose with the principal offender's in aggravated theft, *ex. gr.* aggravated theft committed by a landed man, or one who had been twice before convicted of that crime; and *vice versa*, in case of aggravation on the resetter's part, the resetter would suffer death, though the principal thief should have no landed estate, or should have committed no former theft.

66. *Extra ordinem.*—At the discretion of the judge; and having reference to persons charged with using false weights, and measures; the less heinous of which were punished *extra ordinem*, at the discretion of the judge. The act 1607, c. 2. after establishing an uniformity of weights and measures over the whole kingdom, declares the penalty of the crime to be the confiscation of goods; but this law has been materially altered by a British act lately passed, equalising the measures throughout the kingdom.

68 *Ad civilem effectum.*—Where improbation is moved by way of exception in an ac-

tion, even inferior judges are competent to it *ad civilem effectum*, in order to determine the legal effect of a deed, Arg. 1557, c. 62.—but no inferior court is competent to entertain a criminal trial for forgery.

68. *Per modum simplicis querelæ.*—By way of simple investigation, without any summons. The method of proceeding in an action of improbation, or forgery, before the session, is either summary, *per modum simplicis querelæ*, as in this phrase, without a summons, or by a formal summons of improbation.

Per modum exceptionis.—By way of exception. The pleader of falsehood was formerly obliged to find caution for a su m of money, but afterwards it was altered to consignation. These are now in disuse, when the improbation is pursued by way of action ; but when it is moved by a defender *per modum exceptionis*, the judge, by our present usage, decrees him to consign a sum of money, which he forfeits to his adversary, if his allegation shall appear calumnious.

71. *Alibi.*—Elsewhere. An *alibi* is a good defence against a criminal charge ; or, that

the granter of a deed was not present at the signing of it, in the place, when he is said to have signed it. This is one of the indirect ways of detecting forgeries.

75. *Lex talionis.*—The law of retaliation; the law by which like is given for like. This phrase, in reference to the punishment of perjury, is a most glaring defiance of the vengeance of heaven, and was punished by the Romans with whipping. It was held to be a capital crime by the Jewish law, which was governed as to this crime by the *lex talionis* By our statutes, the latest of which is 1555, c. 47. the punishment is confiscation of moveables, piercing the tongue, and infamy, to which the judge may add any other penalty that he shall think proper to inflict

76. *Usura manifesta,* Manifest usury. *Usura velata,* or covered.—These phrases refer to usury, or, as it is called in our old statutes, *oker,* a Saxon term of the same signification,—the taking of interest for the use of money, contrary to law. It is divided into *usura manifesta,* or direct, and *usura velata,* or covered. Direct is, when one becomes bound to pay a sum above the lawful interest, or takes interest before it becomes due; and

covered usury is that which is committed under the appearance not of a loan, but of some other lawful contract, *ex. gr.* a sale, or an improper wadset, in order to disguise the criminal nature of the bargain. The punishment of usury was, by 1597, c. 247. declared to be the escheat of moveables, the annulling of the usurious contract, forfeiture of the principal sum lent, &c. If usury is tried criminally, it must proceed before the Justiciary, but where the conclusion of the libel goes no farther than the annulling of the debt, and restitution of unlawful profits paid to the creditor, the Court of Session have a jurisdiction cumulative with the Justiciary;—see the case of M'Kenzie and Procurator-fiscal of Renfrew *v.* Wallace, where usury was found competent to be tried before the Sheriff, and the Court of Session thereafter judged upon it, when the cause was brought before them by advocation, June 26, 1766.

Usura vocata.—Concealed usury.

76. *Ubi aberat animus fœnerandi.*—Where a usurious intention was wanting in the receiver, he ought not to be liable in the pains of usury. Mr Erskine however says,

" as a creditor's right to interest is clogged
" with an uncertain condition, by which
" he runs the hazard of losing his whole
" debt if the condition shall never exist,
" he may stipulate for himself a higher
" rate of interest than the legal, without
" the crime of usury."

76. *Fœnus nauticum.*—The interest taken for money lent upon a ship, or upon bottomry. The lender of money upon bottomry, the repayment of which depends on the safe return of the ship on which it is lent, may lawfully take a rate of interest proportioned to the risk, called in the Roman law *fœnus nauticum*.

79. *Stellio.*—A serpent of the most crafty kind; hence stellionate, from *stellio*, the most crafty of all animals, *Plin. Hist. Nat.* l. 30. c. 10. and is a term used in the Roman law to denote all such crimes, where fraud or craft is an ingredient. Those who are guilty of this particular species of it, are those who grant double conveyances, and by statute declared infamous.

80. *Animus injuriandi.*—The intention of injuring a person. The *animus injuriandi* de-

notes the essence of a crime, which here applies to verbal injuries.

80. *Quod non in cœtu nec vociferatione dicitur, id infamandi causa dictum.*—That which is whispered about in private companies, to a person's disadvantage, is held to be spoken with the view of slandering or defaming him. The practice of whispering and tittering in private, to a person's disadvantage, is by far too common; and although it is held to be both a diabolical practice, as proceeding from a wicked and malignant heart, and an ungentlemanlike practice, as proceeding from a mean and dishonourable principle, it is too much countenanced. It is a gross violation of the excellent precept of Justinian, *Alterum non lædere*, as well as of the still more excellent maxim of our blessed Redeemer, to do to others as we would be done by. As it arises from, and gratifies the most malignant principles of human nature, it ought to be absolutely discouraged, and discontinued, by every person of honest and honourable feelings.

Animo defamandi.—With the intention of defaming. Crimes may be aimed against

our good name and character; and when this is done, it is defined to be a verbal injury. It may be inferred from presumptions or injurious words used, or the vilifying our neighbour by the name of thief, cheat, liar, &c. and justifies an action of damages, unless the defender shall prove that the truth excuses, according to the rule, *Quod veritas excusat*,—see Feb. 22. 1785, Chalmers *v.* Douglas.

83. *Obtorto collo.*—By head and shoulders. Absents cannot be prosecuted criminally, and when a defender would not voluntarily appear in judgment, the only remedy left to the pursuer was to drag him by open force to the court *obtorto collo.*

84. *Billa vera.*—A true bill. When a grand jury find a true bill, they indorse these powerful words on the bill of indictment.

Ignoramus.—We are ignorant. When a grand jury, in cases of high treason, do not think that the evidence laid before them amounts to high treason, they indorse this word on the back of the bill.

85. *Nunquam concluditur in falso.*—The matter is never concluded concerning falsehood. This section respects the commitment of criminals for trial, and the statutory

time for bringing on trials. No person, says Mr Erskine, can be imprisoned, in order to trial for any crime, without a warrant in writing, expressing the cause, and proceeding upon a signed information, 1701, c. 6.—unless in the case of indignities done to judges, riots, and some other offences specially mentioned in the statute. Bail may be taken in crimes not capital, from 12,000 to 600 or 300 merks. Criminals may insist for trial. Letters may be issued from the criminal court, directed to messengers-at-arms, to intimate to the prosecutor, within 24 hours after application, to fix the trial within 60 days, under the pain of wrongous imprisonment. If the trial is not insisted in within the same space, and the trial not finished within 40 days more, if before the Court of Justiciary, or 30 days if before any other judge, the prisoner is ordained to be liberated, under the same penalty; but this is not applicable to trials for forgery prosecuted indirectly before the Court of Session, according to this phrase *nunquam concluditur in falso.*

90. *Instantia perit.*—The instance is lost,—the criminal diets being peremptory, and if the criminal letters be not called on the

very day to which the defender is cited, their effect is lost, *instantia perit*, 1587, c. 79.; but as the right of prosecuting continues, the prosecutor may instantly raise new criminal letters, or a new indictment. In default of a defender's appearance on the day to which he is cited, he may be declared a fugitive from the law; but if the trial goes on, letters of exculpation for citing witnesses may be issued, and must be executed to the same day of appearance as in the indictment, and defences will be allowed to be put in and pled, though grounded on facts directly contrary to the libel.

90. *Partes rei sunt favorabiliores.*—The privileges of the pannel are more favourable. This right to prove his defence is therefore equally extensive with the prosecutor's right to prove his libel.

91. *Viva voce.*—By word of mouth. Two things are chiefly to be libelled in a criminal libel—the relevancy of the facts libelled to infer the conclusion, and their truth. After pleadings on the relevancy *viva voce*, and minutes thereof made up by the clerk, the court may forthwith pronounce their interlocutor, without written informations, unless directed. If the libel is

not found relevant, the court will dismiss the pannel from the bar ; but if relevant, they will remit him to the knowledge of an inquest. Trials must be advised with open doors, 1693, c. 27. except in cases of adultery, rape, and the like crimes, as to which the court have a power to continue the former practice, by advising criminal trials with shut doors, as civil causes formerly were by the Court of Session.

92. *Juratores.*—Jurors, so called because they are sworn to give their verdict according to truth.

93. *De plano.*—Straightway, immediately. This applies to small cases tried summarily, or with great dispatch, before the Justices of Peace and other subordinate judicatories.

93. *Leviora delicta.*—Lighter offences, such as petty riots, &c. This expression has reference to the trial of lesser crimes, which may be tried and punished, *de plano*, as in the preceding phrase, by Justices of the Peace, and other inferior judges. All greater crimes must be tried by jury.

94. *Nemo tenetur jurare in suam turpitudinem.*—Nobody is bound to give his own oath in evidence of his guilt. Crimes cannot be proveable by the defender's

oath, or, to the same purpose, *nemo tenetur seipsum accusare*, but smaller delicts may be so proved. A sentence absolvitory, on reference to oath, cannot extinguish the crime, because a power in the prosecutor, of referring a crime to the pannel's oath, imports a power of remitting it, which is a prerogative inseparable from the Crown.

97. *Socii criminis*.—Associates in the same crime. These are, in certain cases, admitted as witnesses; but their testimony is certainly the most exceptionable of all proof. Generally, all objections relevant against the competency of a witness in civil cases, are also relevant in criminal. No witness, says our author, ought to be admitted who may gain or lose by the event of the trial. Associates of the same crime, (unless from the necessity of the case, as in the late noted case of Burke, for murder of a most aggravated nature, where Hare, an accomplice and associate of the same crime, was admitted a witness *penuria testium,)* are not in general admitted to bear testimony against one another—not so much as they are account-

ed infamous, as because they have an obvious interest in the event of the suit. But from this rule there are other exceptions, such as crimes committed against the state, as treason, and occult crimes, where there is a penury of witnesses, as forgery, and special crimes, which are made an exception from the rule by statute or custom. In certain cases, therefore, that the guilty may not escape, the testimony of an associate in crime is good in law, and, in so far as corroborated by other testimony, is held to be unexceptionable, or otherwise, by circumstances of real evidence; but when it stands alone, and unsupported, the presiding judge will direct the jury to pay no attention whatever to it. A *socii criminis*, after he has been adduced as a witness in a trial for murder, cannot be tried for the same crime, either at the instance of the Lord Advocate or by the private party; but associates of crime, after being examined as witnesses, may be tried in England, and condemned; but the Sovereign generally pardons the offender. A person who has been tried by a jury for a crime,

and banished Scotland, is generally held to be infamous, and an incompetent witness; but he may, under pressing circumstances, be received *cum nota*.

Penuria testium.—A scarcity, penury, or want of witnesses, as in occult crimes, *e.g.* adultery, rape, robbery, &c.

99. *Luce meridiana clariores*.—Clearer than the light at noon-day; in reference to a proof by presumption of occult crimes, where criminals study the greatest privacy, and will hardly admit of a direct proof by witnesses, as adultery, incest, forgery, robbery, murder; yet, that the innocent may not suffer, the circumstances in criminal trials, which constitute the presumptions, ought, in the style of the doctors, to be *luce meridiana clariores*, so strong and convincing as to carry full conviction to every unprejudiced mind.

103. *Crimina morte extinguuntur*. — Crimes are extinguished by the death of the criminal; and even treason is not now allowed to be tried after death, because a dead person can make no defence, and because, after death, the traitor is carried beyond the reach of human penalties, and continues no longer an object of cor-

rection, which is one of the great purposes of punishment.

107. *Per modum justitiæ.*—By way of justice. A person who is restored to his estate *per modum justitiæ* against an attainder, either on account of its injustice, or of some legal nullity in the proceedings, says our author, "recovers his whole estate, though the King should have made "a grant of all, or part of it, over to a "donatory, after the forfeiture."

Per modum gratiæ.—By way of favour; or, on the other hand, where one is restored to his estate *per modum gratiæ*, merely in the way of favour, the attainder, says Mr Erskine, "is presumed to have been "legal, and is accounted such in law; "for which reason, all grants of the forfeited estate, made in consequence "thereof by the crown, in the intermediate period, between the attainder and "the restitution, must stand good." See 1606, c. 4.

108 *Dissimulatione tollitur injuria.*—An injury is extinguished by the injured person forgiving, or being reconciled to the offender, and here refers to a small injury being extinguished by a person being re-

conciled to the offender, according to the rule *dissimulatione tollitur injuria*; but if the crime is of a deeper dye, it cannot preclude the Lord Advocate, or procurator-fiscal, from insisting *ad vindictam publicam*.

Ad vindictam publicam. — For vindicating the public interest. If a crime is of a high and aggravated nature, the party injured, though he pass from the prosecution, in so far as his private interest goes, cannot preclude the King's Advocate, as public prosecutor, or the Procurator-fiscal, from insisting *ad vindictam publicam*; 1587, c. 76.