

acquired, inherited, or transferred, as a burial-place, according to the ordinary rules of law, and always consistently with this special use of the subject. [Lair-holders in a private cemetery have no right of property in their lairs, but only a right, depending on contract, to use them in perpetuity for sepulture, with a corresponding obligation on the proprietors of the cemetery to dedicate it exclusively to that purpose; *Cunningham*, 23 June 1871, 9 Macph. 869. The act 18 & 19 Vict. c. 68 (amended by 19 & 20 Vict. c. 103, § 69; 20 & 21 Vict. c. 42; 29 & 30 Vict. c. 50; 44 & 45 Vict. c. 27; 49 & 50 Vict. c. 21), provides for the formation of new burial-grounds, and their management by parochial boards. The same act also gives power to Her Majesty, on the representation of a Secretary of State, to restrain the opening of new burial-grounds, and to order the discontinuance of burials in specified places (§ 5). See *Bain*, 6 Nov. 1884, 12 R. 62.] See *Ersk.* B. i. tit. 5, § 13; B. ii. tit. 1, § 8; *Bell's Princ.* § 836; [*Dunlop's Par. Law*, 72; *Duncan's Par. Eccl. Law*, 231; *Black's Par. Eccl. Law*, 65; *Rankine on Land-Ownership*, 163, 656.] See *Churchyard*.

BUTCHERS. By 1703, c. 7, butchers are prohibited from possessing, on lease or otherwise, either directly or indirectly, more than one acre for the purpose of grazing cattle, &c. The object of this act seems to have been to prevent monopolies; but there is no evidence of its ever having been enforced. *Hunter's Landlord and Tenant*, i. 197.

BUYING OF PLEAS. By 1594, c. 216, it is not lawful for members of the College of Justice, or for any inferior judges, their deputies, clerks, or "advocates," directly or indirectly, by themselves, or others for their behoof, to buy any lands, teinds, rowms or possessions (extended by judicial construction to all

debateable rights, whether heritable or moveable), which are or have been in dependence and remain undecided. The penalty is loss of office, place, and privilege. The object appears to have been to prevent parties connected with the court from purchasing depending suits, and using their influence in the court in promoting their success: and hence it seems to be held that the purchaser of the plea must be a practitioner in the court before which it depends, otherwise he will not be affected by the statute. Although the act does not mention procurators before inferior courts, Mackenzie holds that the word "advocates" before these courts extends to procurators. *Mackenzie's Obs.* 289; *Stair*, B. i. tit. 10, § 8; tit. 14, § 2; tit. 17, § 14; *Kames' Equity*, 235; [*Bell's Princ.* § 36; *Menzies' Conv.* 52; *M. Bell's Conv.* i. 161.] See *Pactum de quota litis*.

BYE-LAWS; [rules made by some authority (subordinate to the legislature) for the regulation, administration, or management of a certain district, property, undertaking, &c., and binding on all persons who come within their scope; *Sweet's Law Dict.* Thus, an act of Parliament incorporating a railway company gives it power to make bye-laws for the regulation of its line, subject to the sanction of the Board of Trade.] Every corporation lawfully erected has power to make bye-laws or private statutes for the government of the corporation, which are binding on themselves, unless contrary to the laws of the land, or to the terms of their charter. [See *Brice on Ultra Vires*, 7; *Slattery*, 13 App. Ca. 446. Blount, in his *Law Dict.*, holds that the word *bye-law* is the same as the old *birlaw* or *burlaw*; see *Burlaw*. It is derived from *bylag* (Swedish) or *bylov* (Danish): *by*, a village, and *lag* or *lov*, law. *Skeat's Etymol. Dict.* See *Lumly on Bye-laws*.]

C

[**CABS.** See *Hackney-Coachmen*.]

CADROW; erroneously printed in the act 1434, c. 41, for *Cadzow* or *Hamilton*. *Skene, h. t.*

CALENDAR. The statute altering the calendar, and introducing what was called the *new style*, is 24 Geo. II. c. 23, which enacted, that from and after 31st December 1751, 1st January, and not 25th March, shall be reckoned the first day of the year;

as also, that the day after 2d September 1752 should be reckoned 14th September. The statute provides for all the other changes connected with the alteration in the calendar. A calendar month consists of thirty or thirty-one days, except February, which has twenty-eight, and in leap years twenty-nine days. See *Swint. Abridg. h. t.*; [*Wharton's Lex.*]

[**CALL.** The capital of a joint stock

[company is usually raised by instalments or calls. The term "call" may mean either the demand for money, or the sum demanded. There are two kinds of calls: (1) calls made by the directors of a company in respect of the unpaid portion of the capital, according to agreement; (2) contributions required after that capital has been raised and exhausted, in consequence of the liability of shareholders to discharge their debts. In the case of a limited company, members are not liable to pay calls of the latter kind, unless they have agreed to do so expressly or by implication. See *Clark on Partnership*, i. 157; *Lindley on Company Law*, 407. See *Joint Stock Company*.]

CALLING OF SUMMONS. After a summons has been executed, and the diet of appearance has arrived, the first step taken by the pursuer, in order to bring the case into court, is to call the summons. In the Court of Session this was formerly done by the clerks of court reading over the names of the pursuer and defender from a *partibus* written on the margin of the summons. This duty was performed every Thursday and Saturday morning during the sitting of the court, and on each of the nine last sederunt days of the summer and winter sessions; and appearance was made for the defender, by the clerk of the counsel who was to act for him appearing at this calling, and stating the names of the defender's counsel and agent, which were marked upon the margin of the summons by the clerk of court. The summons thus marked was then given by the pursuer's agent to the agent for the defender to prepare defences. At the expiration of six days it was necessary to return it, and the cause was then enrolled in the *Ordinary Action Roll*, and debated and disposed of according to the former practice. If no appearance was made for the defender at these callings, the cause was enrolled in the *Regulation Roll*; and if, when it came to be called before the Lord Ordinary in the course of that roll, the defender still failed to appear, decree in absence was pronounced. By A.S. 11 March 1820, these callings before the clerks of court were abolished, and calling lists substituted, containing the names of the pursuer and defender, and of the pursuer's counsel and agent, as in the *partibus*; which lists were thereby appointed to remain exhibited on the walls of the Outer House during the forenoon of the calling-days, so as to admit of the defender's agent entering appearance for him at the

clerk's office in the course of the evening. [Summonses may now be called in court on any sederunt day in session, or on any box-day in vacation; and the calling lists are printed and published in the daily rolls of court. The summons must be lodged with the clerk on the previous day (or, in vacation, on the second day preceding the box-day), accompanied by a copy of the *partibus*. If it is not called on the first sederunt day after expiration of the *induciae*, or on one of the two sederunt days next ensuing, the defender has the remedy of protestation. If not called within year and day, the summons falls of itself; 31 & 32 Vict. c. 100, § 22; A.S. 14 Oct. 1868, §§ 8, 10; A.S. 26 Feb. 1718; A.S. 8 July 1831. Where the pursuer at whose instance a summons has been executed dies before it is called, it may be called by his representatives; *Gallie*, 24 Jan. 1840, 4 D. 446 (Lord Gillies). When the defender dies during the same period, the procedure is by motion for transference; 31 & 32 Vict. c. 100, § 96. See *Shand's Prac.* i. 264; *Mackay's Prac.* i. 408, 425; *Coldstream's Procedure*, 10. See *Appearance, Entering. Partibus. Protestation. Induciae. Rolls of Court. Litigiosity*.]

CALUMNY, OATH OF. The act 1429, c. 125, in order to prevent calumnious and unnecessary suits, ordains both parties, at the beginning of a cause, to swear, either by themselves or their counsel, that the facts set forth by them are true. This oath of calumny, as it is termed, was in practice never put, unless the adverse party required it; and, when made, it was held as an oath of credulity or opinion merely. The party putting it was not thereby understood to renounce all other probation. The terms of the oath are prescribed in A.S. 13 Jan. 1692; [see *Coldstream's Procedure*, 140.] Oaths of calumny have been little in use since A.S. 1 Feb. 1715, by which it was provided (§ 6), that a party or his counsel might be called upon to confess or deny (but not on oath) any relevant matter of fact founded upon by him; and if he denied what was afterwards proved to have been known to him, he should be found liable, without modification, to all the expenses to which his opponent had been put by such calumnious denial. [The oath of calumny is now almost in desuetude, except in consistorial actions; see *Paul*, 7 March 1855, 17 D. 604; *Paterson*, 19 July 1865, 3 Macph. 1119. It is still required of the pursuer in an action of divorce, in order to guard against collusion between spouses;

[1 Will. IV. c. 69, § 36. It is administered in court before the Lord Ordinary, when the case first appears in the rolls; but on special cause shown, the oath may be taken on commission; *Murray*, 20 Feb. 1846, 8 D. 535. The oath has been required, in practice, in actions of nullity on the ground of impotency, though the act does not specify such actions. It is not required in actions of separation. See *Ersk. B. iv. tit. 2, § 16*; *Stair, B. iv. tit. 44, § 15*; *More's Notes*, cccxcv., cccxcvi.; *Shand's Prac.* 385, 421, 433; *Dickson on Evidence*, ii. § 1411; *Fraser on Husband and Wife*, ii. 1195, 1228; *Mackay's Prac.* ii. 258, 275. See *Divorce*.]

CAMPIONES; synonymous with *Champion*, and applied to the champion whom, in the days of single combat, a litigant brought to fight for him. *Skene, h. t.*

[CANALS. The Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), established a Railway and Canal Commission, and made regulations for the traffic and management of canals. See *Railways*.]

CANDIDATE. [See *Election Law*.]

CANDLEMAS-DAY. The feast of the purification (February 2).

CANON LAW; [a body of ecclesiastical law, compiled under the authority of the early Church of Rome. It consists of (1) the *Decretum*, a collection of the opinions of the fathers, popes, and church councils, made by a Benedictine monk, towards the close of the 12th century, in imitation of the Roman Pandects; (2) the *Decretalia*, which were collected by Pope Gregory IX. in the following century, from rescripts or epistles of the popes, corresponding to Justinian's Code; (3) the *Clementines* and *Extravagants* of the later popes, resembling the *Novellæ Constitutiones* of the Roman civil law. According to Erskine, the Canon Law "contains rules, not only for informing the conscience, but for the fixing of private property, civil as well as ecclesiastical. It is compounded, on the one hand, of beautiful principles of equity, chiefly borrowed from the Roman law, and, on the other, of a collection of absurd canons and rescripts, extolling church authority above the highest secular powers." Before the Reformation its authority in Scotland was equal to that of the Roman law. Since then its influence has declined, being now discernible chiefly in those matters which were formerly under the jurisdiction of the consistorial and ecclesiastical courts. See observations in *Collins*, 18 Feb. 1884, 11 R. (H.L.) 19. See also

[*Stair, B. i. tit. 1, § 14*; *Ersk. B. i. tit. 1, §§ 28, 42*; *Ross's Lect. i. 9*; *Fraser on Husband and Wife*, i. 20; *Encyc. Brit. h. t.*]

CANUM, *Canna*; used in old charters to signify the duty paid, chiefly in kirklands, in kind, as wheat, bear, oats, &c. *Skene, h. t.* See *Kain*.

CAPIAS; in English law, a term applied to certain writs, from the occurrence of the word (*capias*) in the ancient Latin forms. *Capias ad respondendum*, is a writ [which may be issued for the arrest of a person against whom an indictment for a misdemeanour has been found, in order that he may be arraigned.] *Capias ad satisfaciendum*, usually called a *ca. sa.*, is a writ to imprison the person of the defendant, after judgment has been pronounced against him, until he make satisfaction to his creditor. *Capias utlagatum*, is a writ against a person outlawed. *Tomlins' Dict.:* [*Sweet's Law Dict.:*] *Ross's Lect. i. 244.*

CAPITA, *Succession per*; in contradistinction to *succession per stirpes*, is when each individual succeeds in his own right, and the right of representation is excluded. See *Succession. Stirpes*.

CAPITAL PUNISHMENT. The following statutes have been enacted, restricting the punishment of death; 4 & 5 Will. IV. c. 67; 5 & 6 Will. IV. c. 81; 7 Will. IV. & 1 Vict. c. 84 and 91; [50 & 51 Vict. c. 35. Before the last-mentioned act, though it had long been the practice to restrict the pains of law in all cases except those of murder and high treason, several other offences, such as robbery, rape, incest, wilful fire-raising, were capital by the law of Scotland. But by § 56 of the recent act, a capital sentence is not now competent except on conviction of murder or of a murderous assault under the act 10 Geo. IV. c. 38. The act does not, however, apply to the crimes of treason or rebellion against the Sovereign; § 75. By 31 & 32 Vict. c. 24, capital punishments are now carried into effect within prisons. See *Execution of Sentences*.]

CAPITIS DIMINUTIO; in the Roman law, signifies a loss or change of *status*. It was of three kinds, answering to the three kinds of *status* which might be lost. *Minima* was a simple change in the individual's situation in reference to family, as from being *sui juris* to *alieni*, or from *alieni juris* to *sui*. *Media* was a loss of civil rights, while that of liberty was retained. *Maxima* was a loss of both civil rights and liberty.

CAPTAIN. See *Master of a Ship*.

CAPTION. A caption is a warrant for the apprehension of the person of a debtor or obligant, on account of the non-payment of a debt, or the non-performance of an obligation. With the exception of the act of warding, which can be executed within burgh only, the caption, strictly speaking, is the only civil warrant recognised in law for the above purpose. The fiction on which the apprehension under the caption proceeds is, that the debtor in the obligation having refused obedience to the Sovereign's letters, charging him to pay or perform, is imprisoned as a rebel. A caption is a writ which passes the signet, and which is prepared by a writer to the signet. It proceeds in the Sovereign's name, and is addressed, like all other signet letters, to messengers-at-arms, as sheriffs in that part, commanding them to charge sheriffs, magistrates, and messengers, within three days after the charge, to apprehend the person against whom the caption is directed, and to imprison him until he fulfil the charge in the letters of horning which he has disobeyed. A caption must proceed on proper evidence of the failure to pay or implement; and this evidence consists in the exhibition at the Bill-Chamber of letters of horning against the debtor, executed, denounced, and recorded, along with a bill praying for letters of caption. The Bill-Chamber clerk, on being satisfied with the evidence produced to him, grants a deliverance on the bill, which is the warrant to the keeper of the signet to impress the signet on the caption. [Caption is still competent, but has been practically superseded by the simpler form of diligence introduced by the Personal Diligence Act, as to which see *Diligence*.] See *Stair*, B. iv. tit. 47, § 13; *More's Notes*, cccxxix.; *Ersk.* B. iv. tit. 3, § 12; *Bell's Com.* ii. 159, 435; *Bell's Princ.* § 2311; *Ross's Lect.* i. 312; [*Campbell on Citation and Diligence*, 183; *Menzies' Conv.* 297; *M. Bell's Conv.* i. 531; *Jurid. Styles*, iii. 371.] See *Act of Warding. Horning. Denunciation. Apprehending a Debtor. Booking a Prisoner. Imprisonment.*

CAPTION, PROCESS. A process caption is a summary warrant of incarceration, granted on the application of the clerk of court, for the purpose of forcing back a process which has been unduly and contumaciously retained by the party whose receipt stands for it in the court books. In the Court of Session these warrants, which may be executed by macers or mes-

sengers-at-arms, are issued by the Lord Ordinary [or the court], on the application of the clerk to the process. They are directed against the agent and his clerk whose receipt stands for the process, and authorise their incarceration and detention until it is returned. The application is usually made at the request of the opposite party, who, at the time, must be entitled to force back the process from his antagonist; and as this compulsor is understood to rest on a presumed contempt of court, so it would seem that it is not the appropriate remedy where the process has been actually lost, or where, from some other inevitable accident, it cannot be returned. In such cases, the remedy is an action of damages at the instance of the party prejudiced against the party by whose fault or negligence the process has gone amissing. Where an attempt is made to enforce a process caption under such circumstances, relief may be applied for by note of suspension. In the inferior courts process captions are issued by the inferior judge, on the application of the clerk of court. [See *Watt*, 24 May 1870, 8 Macph. (H.L.) 77; 21 April 1874, 1 R. (H.L.) 21. The practice with regard to borrowing and returning process is regulated by A.S. 11 July 1828, §§ 32, 104; 10 July 1839, § 159; 16 Feb. 1841, § 23; 7 July 1858. See *Stair*, B. iv. tit. 47, § 23; *Ersk.* B. iv. tit. 3, § 12; *Ivory's Process*, i. 181; *Beveridge's Process*, i. 250; *Shand's Prac.* 286, 512; *Mackay's Prac.* i. 452; *M'Glashan's Sher. Court Prac.* 317; *Dove Wilson's Sher. Court Prac.* 292.]

CAPTIVE. All actions against a prisoner taken by the enemy stop till his return; but execution by horning may proceed against him. A ransomed hostage is entitled to the wages during his captivity which he would have been receiving on board ship; and even a sailor who receives no wages is entitled to a sum as *solatium*. The owners of the ship are bound in every case to procure the immediate release of a hostage, and indemnify him for his losses. *Brown's Syn. h. t.*; [*Bell's Com.* i. 564.]

CAPTURE. The jurisdiction in all matters relative to prize and capture in war, and the condemnation of ships, is now exclusively vested in the High Court of Admiralty of England. [See *Bell's Princ.* § 1295; *Abdy's Kent's Internat. Law*, 226, 247, 325; *Hall's Internat. Law*, 404, 674. See *Admiralty. Declaration of Paris. Insurance.*]

CARRIER; a person who holds himself out to the public as willing to undertake

for hire the conveyance of goods from one place to another. [Such a person is bound to take goods offered for carriage, if he can, provided they fall within the line of business publicly professed by him, and provided they are not specially dangerous; see 29 & 30 Vict. c. 69, § 6. (See also *Explosives*.) But he is entitled, before undertaking the responsibility, to be paid the amount of his hire, if reasonable. See *Pickford*, 10 M. & W. 399; 12 M. & W. 766. To make the carrier responsible, he must be legitimately charged with the goods, by delivery to him, or to some one empowered to act for him. As to what is sufficient delivery to the carrier, see cases in *Bell's Princ.* § 162; *Macnamara on Carriers*, §§ 34 *et seq.* The goods must be properly addressed; *Caled. Railway*, 8 June 1858, 20 D. 1097. His obligation is to convey the goods in safety, and to deliver them at the address specified, without undue delay. A railway company receiving goods to be conveyed to a point upon the line of another company is answerable to the sender for the safe carriage of the goods to their destination, and also for their safe custody and redelivery to the sender's order, in the event of the consignee refusing to take delivery, the second company being regarded as the first company's agent during that part of the transit which takes place on its line; *Metzenburg*, 25 June 1869, 7 Macph. 919; *Muschamp*, 8 M. & W. 421. The owner may at any time during the transit countermand the direction given, and either require delivery of the goods at a different address, or their return to himself, paying all additional expense; *Scothorn*, 8 Ex. 341. The question whether there has been undue delay depends on the circumstances of each case; see *Anderson*, 18 Feb. 1875, 2 R. 443; *Taylor*, L.R. 1 C.P. 385. If the goods are marked "perishable," additional obligation is laid on the carrier; *Macdonald*, 20 May 1873, 11 Macph. 614. If a cause of detention is foreseen, and not disclosed when the goods are taken, the carrier's responsibility is enhanced; *M'Connachie*, 6 Nov. 1875, 3 R. 79. If the goods are unduly delayed, or in bad condition, the consignee is entitled to refuse to accept them; *Anderson*, *supra*; *Keddie*, 15 Dec. 1886, 14 R. 233. The goods must be delivered at the address of the consignee, if the carrier's business includes such conveyance; otherwise he must give notice to the consignee of the arrival of the goods, and the latter is entitled to reasonable time for their removal. Goods are presumed to

[have been delivered in good order, if objection is not at once intimated by the consignee; *Stewart*, 11 Jan. 1878, 5 R. 426.

[*Responsibility of Carriers. Carriage of Goods.*—The Roman edict, *Nautæ, cauponæ, stabularii*, which imposed a liability on shipmasters, innkeepers, and stablers, for goods entrusted to them, may be considered as part of the common law of Scotland (see *Innkeepers*), and the principle of the edict has been extended to the case of carriers by land as well as by water. No distinction will be made on account of the description of vehicle employed; [and the carriers, whether masters or owners of ships, steam-boats, canal-boats, ferry-boats, or barges; or railway carriers, mail or stage coach owners, carters or porters,] will be liable to make good any losses happening to the goods while in their custody, and until they are delivered agreeably to their address; the rule, founded on considerations of public policy, being, that a person who holds himself out as willing to perform, for hire, this sort of service, thereby incurs an universal responsibility. Such persons are liable to the fullest extent for their servants and others employed by them. [In England, carriers have the same responsibility; but there the doctrine rests, not on the Roman edict, but on the custom of the realm. The only exception to the liability of carriers at common law, is that they are not responsible for losses arising from the act of God, or of the King's enemies; but certain limitations have been enacted by the legislature. By the Carriers Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 68), common carriers by land are not liable for the loss of gold and silver coin, or gold and silver in a manufactured or unmanufactured state, precious stones, jewellery, watches, clocks, or time-pieces, trinkets, bills, bank-notes, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silk in a manufactured or unmanufactured state, and whether wrought up or not with other materials, furs or lace (not machine-made, 28 & 29 Vict. c. 94), or any of them, contained in any parcel or package which has been delivered, either to be carried for hire, or to accompany the person of any passenger, when the value of such property exceeds £10, unless its nature and value have been declared at the time of delivering the parcel or package containing it to the carrier, and an increased charge paid, if

[required; § 1. See *Stössiger*, 3 E. & B. 549; *Hart*, 6 Ex. 769; *Woodward*, 3 Ex. D. 121; *Whaite*, L.R. 9 Ex. 67; *Treadwin*, L.R. 3 C.P. 308; *Millen*, 10 Q.B.D. 142. The increased rate of charge is to be notified by notice affixed conspicuously in the carrier's office; and such notice is deemed to be sufficient proof of knowledge; § 2. The carrier must give a receipt for the increased charge, otherwise he is liable to refund it, and loses the benefit of the act; § 3. As to all other articles than those enumerated in § 1, the carrier's liability remains as at common law, notwithstanding any public notice; § 4. Delivery of the parcel at any office, warehouse, or receiving-house, used or appointed for receiving parcels, is sufficient for the purposes of the act; § 5; *Stephens*, 18 Q.B.D. 121. A person suing for loss or injury to articles specified in § 1, may also recover increased charges paid under § 2; § 7. The act does not protect the carrier from loss arising from the felonious act of any servant in his employ; § 8; *Campbell*, 18 Feb. 1875, 2 R. 433. But he continues liable even for gross negligence of a servant; *Hinton*, 2 Q.B. 646. A carrier is not excluded from the benefit of the act, by the fact that the loss or injury happened after the goods had been negligently taken beyond their destination; *Morritt*, 1 Q.B.D. 302. The act does not affect any special contract that may be made with a carrier; § 6. (As to whether a special stipulation or condition has been brought to the knowledge of the contracting party, so as to be imported into the contract, see *Henderson*, 1 June, 1875, 2 R. (H.L.) 71.) But the Railway and Canal Traffic Regulation Act, 1854 (17 & 18 Vict. c. 31), § 7, restricted the power of railway and canal companies to limit their liability by imposing conditions on the public. By this act such companies are declared to be liable for the loss of or injury to goods by their fault, notwithstanding any notice, condition, or declaration by the company limiting their liability. But companies may make such conditions, by signed special contract, with respect to receiving, forwarding, and delivering goods, as the court may deem just and reasonable. See *Peebles*, 20 Jan. 1875, 2 R. 346; *Rain*, 29 Jan. 1869, 7 Macph. 439; *Finlay*, 8 July 1870, 8 Macph. 959; *M'Connachie*, *supra*; *Gt. Western Railway*, 12 App. Ca. 218. The *onus* of shewing that a condition is reasonable lies upon the company alleging it; *Peek*, 10 H.L. Ca. 473; *Brown*, 8 App. Ca. 703, and other cases in *Macna-*

[mara, § 169 *et seq.* As to conditions limiting the company's liability on a contract partly by railway and partly by sea, see 31 & 32 Vict. c. 119, §§ 14, 16; 34 & 35 Vict. c. 78, § 12; 51 & 52 Vict. c. 25, § 28. By the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 60, § 17), all carriers for hire within Scotland are liable to make good to the owners of goods all losses arising from accidental fire, while such goods are in their custody or possession. But the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), § 503, exempts owners of seagoing ships from liability for loss of goods from accidental fire on board ship. The same act (*ib.*) declares also that shipowners shall not be liable for the loss of gold, silver, precious stones, &c., by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the true nature and value of such articles has been inserted in the bill of lading, or otherwise declared in writing to the master or owner of the ship. The liability of shipowners is further restricted by 25 & 26 Vict. c. 63, § 54, which enacts that the owners of any ship, whether British or foreign, shall not be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, goods, &c., to an aggregate amount exceeding £15 for each ton of the ship's tonnage, nor in respect of loss or damage to ships, goods, &c., whether there be in addition loss of life or personal injury, or not, to an aggregate amount exceeding £8 for each ton of the ship's tonnage. As to qualification by special stipulation, see *Bill of Lading*. See further, as to liability of carriers by sea, *Charter Party*; *Shipping Law*; and as to obligations of railway companies, *Railway*. See also *Public Carriages*. A carrier's liability as such ceases, if at the end of the transit the consignee cannot be found, or refuses or delays to take delivery; but he is still obliged to take proper care of the goods as an ordinary depository or warehouseman; *Chapman*, 5 Q.B.D. 278; *Heugh*, L.R. 5 Ex. 51. As to liability of van-hirer for loss during removal of furniture, see *Pearcey*, 8 Feb. 1883, 10 R. 564.

[*Carriage of Animals*.—As carriers of live animals, a railway company must take all reasonable precautions, but is not liable for damage arising from wholly unusual and unexpected causes; *Paxton*, 1 Nov. 1870, 9 Macph. 50; *Ralston*, 9 Feb. 1878, 5 R. 671. (Cf. *Nugent*, 1 C.P.D. 423, as

[to injury arising from "inherent vice.") The provisions of § 7 of the act of 1854, quoted *supra*, in reference to limitation of liability by conditions, apply to carriage of animals as well as goods; and in regard to animals, the liability of railway companies is restricted by the same enactment to £50 for a horse, £15 *per head* for neat cattle, and £2 *per head* for sheep or pigs, except when the value has been declared, and extra payment made.

[*Carriage of Passengers*.—Railway companies as carriers of passengers are not liable as insurers, but only for negligence. They are bound to exercise the greatest vigilance and care, but they do not warrant absolute immunity from accident. A company issuing a through ticket to a station on another company's line is responsible (in the absence of stipulation) for an accident occurring on the second company's line through its fault; *Horn*, 13 July 1878, 5 R. 1055; *Thomas*, L.R. 6 Q.B. 266. The company's obligation to carry in safety is independent of any contract by ticket or otherwise, beyond what is implied by receiving the passenger; *Foulkes*, 5 C.P.D. 157; *Austin*, L.R. 2 Q.B. 442. The publication of time tables by a company is an undertaking that their own trains, and those of other companies, will run as therein indicated; *Denton*, 25 L.J.Q.B. 129. But the undertaking is only that reasonable diligence will be used to ensure punctuality; *Le Blanche*, 1 C.P.D. 286. As to damages for delay, Lord Justice Mellish said in the last cited case:—"I think that any expenditure which, according to the ordinary habits of society, a person who is delayed on his journey would naturally incur at his own cost, if he had no company to look to, he ought to be allowed to incur at the cost of the company, if he has been delayed through a breach of contract on the part of the company; but that it is unreasonable to allow a passenger to put the company to an expense to which he could not think of putting himself if he had no company to look to."

[*Passengers' Luggage*.—Railway companies are bound, by the statutes under which they are incorporated, to carry a certain weight of personal luggage with each passenger; and they are liable as common carriers in respect thereof; *Macrow*, L.R. 6 Q.B. 612; *Campbell*, 27 May 1852, 14 D. 806. As to what is deemed personal luggage, see *Hudston*, L.R. 4 Q.B. 366. If the passenger takes luggage into the

[*feres* with the company's exclusive control of it during the transit, the company are not liable as common carriers in respect of it, but they are responsible for loss or damage arising from their negligence; *Bunch*, 13 App. Ca. 31. A railway porter receiving luggage at the entrance of a station for the purpose of labelling it and putting it in the train, does so as agent of the company, and the company's liability begins then; *Lovell*, 45 L.J.Q.B. 476. (It is otherwise when luggage is given to a porter for custody; *Bunch*, *supra*; *Hodkinson*, 14 Q.B.D. 228. See *Deposit*.) The company's liability as carriers continues until a reasonable time has been allowed for removal of the luggage by the passenger at the end of the journey; *Patscheider*, 3 Ex. D. 153; after which they are liable only as warehousemen (see *supra*).

[See on this subject, *Stair*, B. i. tit. 9, § 5; *More's Notes*, lvii.; *Ersk. B.* iii. tit. 1, § 29; *Bell's Com.* i. 219, 490; *Bell's Princ.* §§ 157, 235; *Guthrie Smith on Damages*, 135; *Ferguson's Railway Rights and Duties*, 109; *Smith's Merc. Law*, 275; *Addison on Contracts*, 519, 524; *Chitty on Contracts*, 445; *Story on Bailments*; and treatises on the law of carriers by *Angell*, *Browne*, *Ivatt*, and *Macnamara*.]

CARRUCATA; a ploughgate, as much land as may be ploughed and laboured within year and day by one plough, synonymous with a hide of land. *Skene, h. t.*

CARTA, *extensa*, or *extenta*; a charter containing a disposition of lands with certain meithes and marches, otherwise called a bounding charter. *Skene, h. t.*

[**CARTEL**; a special form of convention between two states as to the exchange and ransom of prisoners during war. *Sweet's Law Dict.*; *Hall's Internat. Law*, 376, 505.]

CASE. In the Court of Session a case is a written argument on the merits of a cause. [The Inner House may order parties to prepare and print cases; 6 Geo. IV. c. 120, § 18. But this power was taken from the Lord Ordinary by 13 & 14 Vict. c. 36, § 14.] According to the Judicature Act, the case must commence with a copy of the closed record; and each ground of law, or plea stated in the record, must be separately argued in the case; 6 Geo. IV. c. 120, § 22; [but this regulation has not been strictly observed.] The interlocutor making the order for cases appoints the mutual cases to be lodged, interchanged, revised, and reloaded, within a certain

limited time. [See *Shand's Prac.* 339, 960; *Mackay's Prac.* i. 570. See *Minute*. In appeals to the House of Lords, the statement prepared and printed by each party is called the case for the appellant or respondent. See *Appeal to House of Lords*. A case signifies also a written statement by an inferior court, raising a question of law for the opinion of a superior court, such as that provided by the Summary Prosecutions Appeals Act (38 & 39 Vict. c. 62, § 3). See *Summary Prosecutions*; also *Valuation of Lands. Property and Income Tax*. See observations on the form of such cases, in *Caled. Railway*, 18 Nov. 1880, 8 R. 89; see also *Summer*, 6 June 1878, 5 R. 863. By 22 & 23 Vict. c. 63, any court in Her Majesty's dominions may remit a case to one of the superior courts in any other part of Her Majesty's dominions, desiring it to pronounce its opinion on a question as to the law administered by it; see *Guthrie*, 14 July 1880, 7 R. 1141; and by 24 Vict. c. 11, the superior courts in Her Majesty's dominions may remit a case to a court of any foreign state with which Her Majesty may have made a convention for that purpose, to ascertain the law of such state. See *Special Case*. In English law, trespass on the case is a class of torts for which no remedy existed at common law until the Stat. of Westminster 2 (13 Edw. I. c. 24) directed that whenever a writ existed, and "in a like case" (*in consimili casu*) falling under the same right, and requiring a like remedy, no form of writ was to be found, then a new writ should be framed. The main difference between an action of trespass (*vi et armis*) and an action on the case, is that in the former the damage is direct, and in the latter consequential. Thus, if a man throws a log on a highway, and in so doing injures a person, this is trespass; but if the log lies on the ground, and a person is injured by falling over it, this is case. *Sweet's Law Dict.*]

CASH-ACCOUNT. See *Bank Credit*.

CASTLES. See *Fortalices*.

CASUALTIES OF SUPERIORITY.

The casualties of superiority are certain emoluments arising to the superior, which, as they depend on uncertain events, are termed *casualties*. The casualties proper to ward-holding, while it subsisted, were *Ward*, *Recognition*, and *Marriage*. The casualties common to all holdings are *Non-entry*, *Relief*, *Disclamation*, *Purpresture*, and *Liferent Escheat*. [See these titles. The *composition* due to the superior by a single successor, though in a strict sense

[not a proper feudal casualty, is commonly reckoned among the number. See *Composition*. Disclamation and purpresture have long been obsolete, and non-entry has been practically abolished by the Conveyancing Act, 1874 (37 & 38 Vict. c. 94). By the interpretation clause of that act, the term "casualties" includes only relief and composition, and sums payable in lieu of these. By § 23 of the same act, no casualties are due by law, irrespective of express stipulation, in any feu granted after 1st October 1874; and it is not now lawful to stipulate for any casualty to be paid on the succession of an heir, or the acquisition of a singular successor, or in any way except in the form of a fixed sum, payable at fixed intervals. With regard to feus created prior to 1st October 1874, the casualties are redeemable on such terms as may be agreed on between the superior and the proprietor of each feu. Failing such agreement all casualties, except those which consist of a fixed amount payable at fixed intervals, are made redeemable by the vassal, after payment of all casualties already due, on the following terms:—(1) Casualties payable only on the death of the vassal may be redeemed on payment of the amount of the highest casualty, estimated as at the date of redemption, with an addition of 50 per cent.; *M'Laren*, 18 Feb. 1886, 13 R. 580; (2) casualties payable on occasion of each sale or transfer of the property, as well as on the death of the vassal, may be redeemed on payment of two and a half times the amount of the casualty payable on such occasions; *School Board of Neilston*, 16 Nov. 1887, 15 R. 44; and (3), casualties consisting of an annual sum for each year may be redeemed on payment of eighteen times the amount of such annual sum; § 15. See *Morris*, 21 Feb. 1877, 4 R. 515. On tender of the above redemption-money, the superior is required to grant a discharge of all right to casualties (to which discharge, however, the consent of the creditor in any heritable security that may exist, affecting the superiority, must be obtained); § 16. Or otherwise, in the option of the superior, the redemption-money may be converted into an annual sum, equal to 4 per cent. upon the capital, to be added to the feuduty, in terms of a memorandum to be signed by the parties, and recorded; § 17. Casualties subject to the fetters of an entail may be redeemed or commuted, the redemption-money being consigned and applied as directed by the act; § 18. A proprietor of part of a feu may redeem the casualties

[applicable to that part; *Edinburgh Roperie Co.* 12 Nov. 1878, 6 R. (H.L.) 1. Formerly the superior's right to casualties was enforced by means of an action of declarator of non-entry, decree in which entitled the superior not only to poind the ground as a real creditor, but to enter into possession of the lands and draw the rents, until the vassal should enter and pay the casualties due. Now, however, non-entry being abolished, the superior may raise an action of declarator and for payment of any casualties that may be due and unpaid, decree in which has the same effect as decree of declarator of non-entry had according to the former law; 37 & 38 Vict. c. 94, § 4 (4).] See *Stair*, B. ii. tit. 4, § 1; [*Ersk.* B. ii. tit. 5, § 5;] *Bell's Com.* i. 22; ii. 26; *Bell's Princ.* § 704; *Sandford on Heritable Succession*, ii. 188; *Ross's Lect.* ii. 255, 302, 377; [*Menzies' Conv.* 523; *M. Bell's Conv.* i. 564, 622 *et seq.*; *Jurid. Styles*, iii. 64.]

CASUAL HOMICIDE; takes place when death is accidentally occasioned by a person lawfully employed, meaning harm to no one, and using all ordinary and reasonable caution. *Hume*, i. 191; *Alison*, 144. See *Homicide*.

CASUS AMISSIONIS. In an action for proving the tenor of a deed or other writing which has been lost, it is necessary to condescend upon the particular accident by which the document was lost or destroyed, or at least to give some satisfactory explanation of the manner in which the loss has happened. In technical language this accident is termed the *casus amissionis*. [See *Proving of the Tenor*.]

CATALA. When used in the old law-books of Scotland, this word is synonymous with the English law term *chattel*, and is applied to all moveable goods and gear. *Skene*, *h. t.*

CATCHPOLE. In England, sheriff's officers are so called. *Tomlins' Dict.* *h. t.*

CATHOLIC CREDITOR. A catholic or universal creditor is a creditor whose debt is secured over several subjects, or over the whole subjects belonging to his debtor; as, for example, one who has heritable securities over two or more estates for the same debt. Such a creditor is bound to claim his debt according to certain equitable rules, and is not entitled to exercise his right so as to injure unnecessarily the claims of secondary creditors. Thus, if, as he may, he draw his whole debt from one of the subjects, he

must assign his security to the secondary creditors on the subject from which he has drawn payment, to the effect of enabling them to draw a proportional part of the debt from the other subjects over which the catholic security extended. But where a catholic creditor, secured over two estates on each of which there is a secondary security, has *bona fide* purchased or otherwise acquired right to one of these secondary securities, it is held (although the soundness of the opinion has been doubted) that the catholic creditor, in these circumstances, is not bound to assign to the prejudice of the secondary security he has thus acquired, but that he may draw payment from one of the subjects over which the catholic security extends, so as to leave the other free to the operation of the secondary security over the other to which he has acquired right. It has also been held that a catholic creditor, before the bankruptcy of his debtor, may renounce his security over one of the subjects, reserving his claim for the whole debt against the other, although it should happen that the subject to which he has so restricted his security is burdened with a secondary security, the creditor in which, of course, suffers by the restriction; *Edie*, 1793, M. 3403. Where the subjects over which the catholic security extends belong to two different persons, one of whom is principal and the other cautioner, the catholic creditor, who has drawn payment from the subject of the principal debtor, cannot be required to assign so as to enable a secondary creditor on the principal's estate to claim upon that of the cautioner; and if the catholic creditor has drawn his debts from the cautioner's estate, the cautioner is entitled to assignation, so as to enable him to operate full relief from the estate of the principal debtor. [See *Boswell*, 15 Jan. 1841, 3 D. 352; *Littlejohn*, 13 Dec. 1855, 18 D. 207; *Morton*, 23 Dec. 1871, 10 Macph. 292; *Nicol's Tr.* 8 Feb. 1889, 16 R. 416.] See *Ersk.* B. ii. tit. 12, § 66; *Bell's Com.* ii. 417; [*Bell's Princ.* §§ 914, 1936; *Goudy on Bankruptcy*, 500;] *Kames' Princ. of Equity* (1825), 80; *Brown's Synop. h. t.*

CATHORIUS, *Catherius*; a word used in ancient legal phraseology, the precise import of which seems to be unknown. A fine of one *cathorius* was equivalent in value to nine cows. *Skene*, *h. t.*

CAUPES, *Calpes*, and *Carriet*; a word used in old acts of Parliament to signify a gift, such as a horse or any other article, given to a powerful neighbour or chief, in

return for his protection. It seems to have been something of the nature of black mail. *Skene, h. t.*

CAUTIONRY; is that obligation by which a party becomes surety for another; or, according to Stair's definition, it is "the promise or contract of one, not for himself, but for another." [All cautionary obligations must be in writing, and subscribed by the person undertaking them, or by some one duly authorised by him; 19 & 20 Vict. c. 60, § 6. See *Clapperton*, 20 July 1881, 8 R. 1004. But this does not apply to the indorsation of a bill or draft, though it be in substance a guarantee; *Macdonald*, 29 March 1864, 2 Macph. 963. See also *Walker's Trs.* 14 June 1880, 7 R. (H.L.) 85.] A simple cautioner, or *adpromissor*, as he was termed in the Roman law, is one who binds himself as cautioner with the principal, for the greater security of the creditor. Such a cautioner was [formerly] entitled to the benefit of discussion; that is, he was entitled to insist that the principal debtor should be discussed, by the execution of diligence both against his person and property, before the cautioner was called upon to satisfy the debt or obligation. [See *Discussion*. But a creditor may now proceed at once against the principal debtor and the cautioner, or either of them, unless it is otherwise stipulated in the instrument of caution; 19 & 20 Vict. c. 60, § 8; *Ewart, infra*.] There is another description of cautioner, who was termed in the Roman law *expromissor*. Such a cautioner comes under a distinct and separate obligation, in which he is himself the principal, having, however, claim of relief, as mandatory or negotiator for another. A cautioner of this description [never had] the benefit of discussion. Cautioners are frequently taken bound, conjunctly and severally, or as full debtors, with the principal, in which case both parties are liable *in solidum*. Where there is more than one cautioner, bound simply as such, and not jointly, each of them is liable, in the first instance, only for his own share, if the subject of the obligation be divisible, unless, from the insolvency of the other cautioners, the creditor cannot recover from them. See *Beneficium Divisionis*.

It follows from the nature of the obligation, that a cautioner who has paid the debt has an action *ex mandato* against the principal for relief; and for this purpose he is entitled to demand an assignation from the creditor, not only of the debt and whole diligence, but also of any other

securities held by the creditor; and should this claim of relief be cut off by any proceeding on the part of the creditor, the cautioner is thereby liberated from his obligation. [But a cautioner is not entitled, without making full payment of the debt, to demand from the creditor an assignation of collateral securities held by him; and payment of a dividend by the trustee on the bankrupt estate of a cautioner is not full payment to this effect; *Ewart*, 5 May 1865, 3 Macph. (H.L.) 36.] The cautioner's claim is for relief from the principal obligation, with the interest and expenses paid by him; but under this claim he is not entitled to include the expense of diligence against himself, because he ought to have paid without diligence. The cautioner is entitled to sue the principal debtor for relief from the cautionary obligation, even before payment: 1st, Where the debtor is taken bound to deliver the cautionary obligation, cancelled, at the same term at which he is bound to pay the creditor, and where the term of payment is past, because in that case the cautioner is as fully entitled to insist for implement of the obligation as the creditor himself is. 2^d, Where the principal debtor is *vergens ad inopiam*, the cautioner may attach his funds for his relief, before either payment or distress. 3^d, If the cautionary obligation be conditional, and may be long pendent, the cautioner will be allowed to adjudge in security, although there have been no previous distress, under the qualification that no execution shall follow on the decree until distress. Where an additional cautioner is interposed, and becomes bound in a separate deed, as in a bond of corroboration, it has been questioned whether the new cautioner has a total relief against the original cautioners, or a proportional relief only. The rule seems to be that, if the new cautioner have become bound on behalf of the former cautioners, he will be entitled to claim a total relief from them. If he is interposed solely on account of the principal debtor, he will be entitled to a proportional relief only, precisely as if he had become bound along with the original cautioners. See *Smiton*, 1792, M. 2138; [*Thorburn*, 18 July 1863, 1 Macph. 1169; *M'Phersons*, 15 Dec. 1881, 9 R. 306.]

[In the ranking of co-obligants (including the various parties to accommodation bills) on a bankrupt estate, the rule is that there can be no double demand for the same debt. Thus, when a creditor recovers

[a portion of his debt by ranking on the estate of his principal debtor, and recovers the balance from a cautioner, the latter cannot operate his relief by ranking on the estate of the principal, for that would be double ranking for the same debt. See *Bell's Com.* ii. 420; *Goudy on Bankruptcy*, 546; *Anderson*, 17 March 1876, 3 R. 608; *McKinnon*, 24 Dec. 1881, 9 R. 393; *Harvie's Trs.* 19 June 1885, 12 R. 1141.]

Extrajudicial cautioners have the benefit of a limitation or prescription of their obligation. This was introduced by the act 1695, c. 5, which provides that no person "binding and engaging for and with another, conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sums longer than seven years after the date of the bond; but that, from and after the said seven years, the said cautioner shall be *eo ipso* free of his caution; and that, whoever is bound for another, either as express cautioner, or as principal, or as co-principal, shall be understood to be a cautioner, and to have the benefit of this act, provided that he have either a clause of relief in the bond, or a bond of relief apart intimated personally to the creditor at his receiving of the bond, without prejudice to the true principals being bound in the whole contents of the bond or contract; . . . providing that what legal diligence by inhibition, horning, arrestment, adjudication, or any other way, shall be done within the said seven years, by creditors against their cautioners, for what fell due in that time, shall stand good, and have course and effect after the expiring of the seven years, as if this act had not been made." The limitation introduced by this statute does not extend: (1) to a letter of credit or of guarantee in a mercantile transaction, when it is not accompanied with any obligation of relief by the principal debtor; (2) to an obligation for an annual payment; (3) to an obligation *ad factum præstandum*; (4) to a cautioner in a bond of relief; (5) to a cautioner in a bond of corroboration; (6) to the case where the term of payment of the debt is beyond the seven years from the date of the bond; (7) to a cautioner in a contract of marriage, or for the discharge of an office; (8) to an engagement by letter or otherwise, to pay, or see paid, a sum already lent; [see *Wilson*, 21 July 1840, 1 Rob. 137;] (9) to the case of a bill of exchange wherein one signs as cautioner; or, *lastly*, to judicial cautionry. Where the cautioner has a

separate bond of relief, in order to secure the benefit of the act, it must be intimated either notarially or judicially to the creditor; mere private knowledge is not sufficient. [See *Drysdale*, 25 Jan. 1839, 1 D. 408.] The cautioner's obligation will be extended beyond the seven years, provided, 1st, that the bond has been renewed, or a corroboration granted by the cautioner, or negotiations carried on for paying the debt, so as to bar the cautioner, *personal exceptione*, from founding on the act; 2^d, that the creditor shall have raised diligence against the cautioner, or shall have obtained decree against him within the seven years, for it would seem that mere citation in an action is not sufficient in this, as it is in prescriptions. It is also to be observed, that the diligence or decree within the seven years does not operate in the septennial limitation like an interruption of prescription in the ordinary case. The effect of the limitation is effectually to liberate the cautioner from all responsibility beyond the seven years; and the diligence or decree against the cautioner can extend only to the sum in the bond, and the interest falling due within the seven years; *Bell's Com.* i. 374. A cautioner who has by mistake paid the debt after the expiration of the seven years, will be entitled to demand repetition from the creditor; *Carrick*, 1778, M. 2931. [See *Prescription*.]

With regard to the discharge of extrajudicial cautionary obligations, it may be observed generally, that a discharge of the principal is a discharge of the cautioner, for the cautioner has become bound, relying on his relief from the principal. A discharge of a co-cautioner was [formerly] a discharge to the remaining cautioners only to the extent of the share which the discharged co-cautioner would have borne. [But now a discharge of one cautioner operates as a discharge to all; 19 & 20 Vict. c. 60, § 9; *Church of England Assurance Co.* 17 July 1857, 19 D. 1079. This enactment, however, applies only to joint and several obligations; and in a case where payment of a debt of £105 was guaranteed by one cautioner separately to the extent of £70, and by another to the extent of £35, the discharge by the creditor of one of the cautioners did not affect the liability of the other for his proportion of the debt; *Morgan*, 9 March 1872, 10 Macph. 610. See Mr Guthrie's note in *Bell's Princ.* § 261 A. (c). In *Paterson*, 9 March 1844, 6 D. 987, it was held that "a party is entitled to the equities of a cautioner,

[wherever it appears clearly from the transaction, as set forth in the deed, that he is such, though by subscribing as a principal obligant, and the technical term cautioner not being used, he has not the benefit of discussion and other legal privileges which are conferred on cautioners;" and that one of several cautioners not having subscribed a bond, the others were not liable for advances made under it. See also *Scot. Provincial Assurance Co.* 28 Jan. 1858, 20 D. 465. Any change in the terms of the contract made without consent of the cautioner discharges the latter, unless it is evident to the court that the alteration is immaterial, or that it cannot be otherwise than beneficial to the cautioner; *Holme*, 3 Q.B.D. 495; see also *Murray*, 5 July 1882, 9 R. 1040.] The renunciation by the creditor of any security held by him over the principal debtor's estate will liberate the cautioner. Even the discharge of the debtor from prison by the creditor will have this effect; as will the acceptance of an extrajudicial composition on the debtor's estate by the creditor individually, without the consent of the cautioner. [A creditor claiming in a sequestration, drawing a dividend, or assenting to the bankrupt's discharge, or to a composition, does not liberate the cautioner; but the latter may, if he please, pay the debt, obtain an assignation to it, and claim on the debtor's estate; 19 & 20 Vict. c. 79, § 56.] If the creditor give the principal debtor time, without the cautioner's consent, the cautioner will be free. But mere delay or forbearance to enforce payment does not amount to "giving time." The creditor must farther have bound himself to delay beyond the term of payment stipulated in the obligation in security of which the cautioner interposed. The arrangement must be such, for example, that, if the cautioner were to pay the debt and take an assignation, he would be barred from proceeding against the principal debtor by the creditor's agreement to give time. This, or any other agreement whereby the creditor ties up his own hands and the hands of the cautioner *quoad* the principal debtor, without the cautioner's consent, is "giving time" in the legal acceptance of that expression; [*Bowe & Christie*, 19 March 1868, 6 Macph. 642; *Caled. Railway*, 15 June 1870, 8 Macph. 862. But a cautioner in a general guarantee against loss in a course of dealing is not liberated by time being given; *Stewart*, 24 May

[1871, 9 Macph. 763.] Mere negligence on the part of the creditor, unless it has been gross, will not free the cautioner. Thus, the creditor is under no obligation to execute diligence when the term of payment arrives, although, if he has completed diligence, he cannot himself discharge it, without forfeiting his claim against the cautioner. Unless fraud or collusion between the creditor and the principal debtor can be proved, it will not avail the cautioner to plead that, by due diligence, the debt might have been recovered from the principal; for the cautioner in such circumstances has in his own power the remedy of inhibition, adjudication, or arrestment, in security. The loss of recourse, in the case of undue negotiation of a bill of exchange, seems to be an exception to this general rule (see *Bill of Exchange*), and some cases of cautionry for the due execution of an office may afford another exception. [Even when there is an express agreement giving time to the principal debtor, if it is made "with a reserve of remedies against the surety," the latter is not liberated; *Kearsley*, 16 M. & W. 128. A guarantee or cautionary obligation to or for a firm is not binding after any change of the firm, unless the intention of parties that it should continue binding appear, either by stipulation or by necessary implication; 19 & 20 Vict. c. 60, § 7 (quoted *sub voce* *Partnership*).] See *Stair*, B. i. tit. 17, § 3; *More's Notes*, civ., cxiii.; *Ersk.* B. iii. tit. 3, § 61; [tit. 7, § 22; *Bell's Com.* i. 364; *Bell's Princ.* §§ 245, 600; *Menzies' Conv.* 213; *M. Bell's Conv.* i. 354; *Dickson on Evidence*, § 599; *Campbell's Merc. Law*, 46; *Addison on Contracts*, 648; *Chitty on Contracts*, 475; *Craigie's Digest* (Moveable), 139; *Jurid. Styles*, ii. 369; *De Colyar on Guarantees*; *Baylies on Sureties*. See *Relief*.]

Cautionry for the faithful Performance of an Office.—The cautionary obligations of this description are various; but it is unnecessary to enumerate them particularly. The most important are:—1. *Cautionary obligations for the intromissions of a bank-agent.* The responsibility which the cautioner in such a case undertakes is very serious; and on the failure of the agent, difficult questions of equity may arise, as to the degree of vigilance which the bank ought to have exercised in the periodical accountings with the agent. In all such questions much must necessarily depend on the terms of the particular bond; [*N. Scotland Bank*, 23 Nov. 1882, 10 R. 217.] Cases

of neglect may easily be figured which would bar all claim against the cautioner. The bonds given on these occasions refer to past as well as future losses; and any improper concealment by the bank at the time of arranging the caution would liberate the cautioner. [Any material alteration on the duties and responsibilities of the agent would also liberate the cautioner, unless he had assented; *Bonar*, 9 Aug. 1850, 7 Bell's App. 379. See also *Nicolsons*, 7 Nov. 1882, 10 R. 121 (case of a commercial traveller).] It may be observed here, that a clause, frequently inserted in these bonds, providing that no suspension shall pass except on consignment will not receive effect, as being a *pactum illicitum*. See *Bell's Com.* i. 380; [*Princ.* § 290.] 2. *Cautioners for a messenger-at-arms*. In this case the cautioners are taken bound to make good "the damage, interest, and expenses which the lieges shall sustain through the negligent, fraudulent, or informal execution of the messenger." Under this obligation it is held, (1) That the cautioners are liable only for what the messenger does in his character of messenger, and not for his actings as agent, a capacity in which messengers are frequently employed: (2) That the messenger, as such, has no discretionary power: (3) That the cautioners are liable not merely to the employer of the messenger, but to those against whom he has committed any fault: (4) That, in estimating the damage arising from the messenger's neglect, the law holds the damage to be the amount of the debt; nor will any proof be allowed of the desperate circumstances of the debtor in order to show that due execution of the diligence would not have secured payment; *Bell's Com. ib.*; [*Princ.* § 296.] It may be observed in general, with regard to cautioners for the due performance of an office, (1) That, having once engaged for the officer's fidelity, they are not entitled to withdraw suddenly, although they may do so after a reasonable notice; and, (2) That, on the death of the cautioner, the obligation will subsist against his representative, until he shall, by a similar withdrawal, terminate the obligation. *Bell's Com. ib.*

Judicial Cautionry.—There are several descriptions of cautionry required in judicial procedure.

1. *In a Suspension*.—[The obligation in the bond is that the suspender shall pay the sums charged for "in case it shall be found by the Lords of Council and Session that he ought to do so, after discussing the

[passed note of suspension; and also that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses (*i.e.*, expenses of process) in case of wrongous suspending." See A.S. 23 Nov. 1613, 27 Dec. 1709. The bond of caution is not recorded, and does not come into operation until the note of suspension is passed. Caution must be found within fourteen days from the date of presenting the note, unless prorogation is obtained. As to amendment of note as to caution, see A.S. 24 Dec. 1838, § 4; and as to application for new caution by the charger, see A.S. 11 July 1828, § 118.] The obligation on the cautioner is not affected by the death of either the charger or the suspender, during the dependence of the process; A.S. 29 Jan. 1650. An attestor is liable only *subsidiarie*, and is consequently entitled not only to insist that both the principal and cautioner shall be discussed before himself, but he may also claim a total relief against both of them. [See *Attestor*.] A person who has signed a bond of caution of this nature, which has been returned from the Bill-Chamber to get an attestor, may withdraw his obligation at any time before the attested bond has been accepted of by the opposite party, and received by the Bill-Chamber clerk; *Stewart*, 1786, M. 2157. After the bond has been lodged in the Bill-Chamber, and answers put in for the charger, however, although no express acceptance has been signified, the cautioner is not entitled to resile; *Crawford*, 26 May 1819, F.C. The cautioner in a suspension is not liberated by the circumstance of the decree under suspension being converted into a libel; A.S. 27 Dec. 1709. [But he is freed by the charger applying for new caution; *Eadie*, 19 Feb. 1833, 11 S. 415; or by the suspender, without his consent, taking the case out of court by judicial reference; *Stewart*, 1 Dec. 1843, 6 D. 151. When a cautioner in a suspension signs the bond on the faith of there being a co-cautioner, and the co-cautioner's signature turns out to have been forged, the former is not thereby liberated, as an extrajudicial cautioner would be; *Simpson*, 3 Feb. 1860, 22 D. 681.] See *Ersk. B.* iii. tit. 3, § 71; *Bell's Com.* i. 401; *Hume*, i. 144; *Ross's Lect.* i. 365; [*Bell's Princ.* § 276; *Jurid. Styles*, ii. 423; *Shand's Prac.* i. 447; *Mackay's Prac.* ii. 179. See *Suspension*.]

2. *Caution in Loosing Arrestment*.—The obligation extends no farther than to the sums arrested. The cautioner here was

never entitled to the benefit of discussion. [For the distinction between general and special loosing, in regard to the caution required, see *Loosing of Arrestment*.] See *Ross's Lect.* i. 458; A.S. 11 July 1826; *Jurid. Styles*, ii. 425; [*Shand's Prac.* ii. 573.] See *Arrestment*.

3. *Caution judicio sisti* lays the cautioner under an obligation to produce the party for whom he becomes bound at all diets of court, when required. In case of failure to do so, the bond is forfeited, and the cautioner incurs the penalty, which is generally the debt sued for, without the benefit of discussion. A cautioner *judicio sisti* may at any time liberate himself by producing the party in court, and protesting to be free from farther liability. In like manner, when the pursuer extracts the decree without calling upon the cautioner to produce the party, the obligation is at an end. [See *Douglas*, 17 Dec. 1842, 5 D. 338.] See *Ersk.* B. i. tit. 2, §§ 19, 21; B. iii. tit. 3, § 73; *Bell's Com.* i. 396; *Bell's Princ.* § 274; *Jurid. Styles*, ii. 428; [*Shand's Prac.* i. 415, 504. See *Meditatio fugæ. Cessio*.]

4. *Caution judicatum solvi*.—This species of cautionry was required only in maritime suits, such as were formerly pursued before the Court of Admiralty. The cautioner became liable for the solvency of the party during the dependence of the process, and for payment of the debt *subsidiarie*, and had, of course, the benefit of discussion. [*Caution judicatum solvi*, in maritime causes, was abolished by 13 & 14 Vict. c. 36, § 24, in the Court of Session; and in the sheriff court it is not required from any party domiciled in Scotland, except on special grounds stated by the judge; 1 & 2 Vict. c. 119, § 22.] See *Ersk.* B. i. tit. 2, §§ 19, 21; B. iii. tit. 3, § 73; *Bell's Com.* i. 400; *Bell's Princ.* § 275; *Jurid. Styles*, ii. 429; [*Shand's Prac.* i. 425; *M'Glashan's Sher. Court Prac.* 61.] See *Admiralty*.

5. *Cautio usufructuaria*; is that caution which liferenters may be required to give for the preservation of the liferented subjects against waste or injury. The act 1491, c. 25, authorises such caution to be insisted for at the suit of any party interested; and on refusal, the act 1535, c. 15, imposes the penalty of exclusion from the profits of the subject until security be given. [Such caution is not now required, unless there is reason to apprehend deterioration through the fault of the liferenter; see *Ralston*, 1803, *Hume's Dec.* 293.] See *Ersk.* B. ii. tit. 9, § 59; [*Stair*,

[B. ii. tit. 6, § 4; *Bank.* B. ii. tit. 6, § 27; *Bell's Princ.* § 1064; *Rankine on Land-Ownership*, 621. See *Liferent*.]

6. *Juratory caution*; is a description of security sometimes received in suspensions, where the party is unable to procure other caution. It consists of an inventory of his effects given up upon oath, and assigned in security of the sums which may be found due in the suspension. See *Juratory Caution*.

7. *Cautioner in Bail*.—This cautionry is applicable to criminal cases, and resembles the caution *de judicio sisti*. The cautioner becomes bound, under a specific penalty, to produce the person of the accused, "to answer to any libel that shall be offered against him for the crime or offence with which he is charged, at any time within the space of six months." The six months will be computed from the date of the bail-bond; and unless there is an express obligation to produce the person of the accused "*at all diets of court*," the cautioner will be discharged of his obligation, by producing him on the first diet; and if the trial is then delayed, bail must be applied for of new. Upon failure to implement the obligation, the cautioner's bond will be declared forfeited, and the penalty will be recovered by the Exchequer. *Hume*, ii. 94; [*Alison's Prac.* 173; *Jurid. Styles*, ii. 429.] See *Bail*.

8. *Caution in Lawburrows*.—The caution here is, that the complainer shall not be molested in his person or property by the party complained of, under a certain penalty, which, on contravention, will be levied from the cautioner. One-half of the penalty goes to the complainer, the other to the public; 1581, c. 117. [*Jurid. Styles*, ii. 427.] See *Lawburrows*.

CAVEAT; is an intimation made to the proper officer to prevent the taking of any step (the presenting of a signature for instance) without intimation to the party interested, so as to enable him to appear and object to it. [A caveat lodged in the Bill-Chamber endures only for one month, after which it may be renewed; *Mackay's Prac.* ii. 174. See *Suspension*. As to caveats against a petition of service, see 31 & 32 Vict. c. 101, § 31.]

[**CAVEAT EMPTOR**; let the buyer beware. Where he has himself seen the thing purchased before concluding the contract, he cannot afterwards complain, unless in the case of latent fault, or of fraud in the seller. *Trayner's Maxims*; *Broom's Maxims*, 723; *Bell's Princ.* § 96. See *Sale*.]

[**CEMETERY.** See *Burying-Place. Churchyard.*]

[**CENTRAL CRIMINAL COURT**; a court having jurisdiction to try all offences committed within the city of London, the county of Middlesex, and parts of the adjoining counties. The judges or commissioners are the Lord Mayor of London, the Lord Chancellor, the judges of the High Court, the Dean of Arches, the Aldermen of London, the Recorder and Common Serjeant of London, the judge of the City of London Court, and other persons appointed by the Crown. Sessions are held by two or more of the judges at least twelve times in the year. *Sweet's Law Dict.*]

CEPUM animalium; used in the *leges burgorum*; the fat of animals. *Skene, h. t.*

CERTIFICATE; a declaration of a fact by an officer or other person acting in a public character. A certificate of bad health by a physician or surgeon must bear to be on soul and conscience. In cases of homicide, and other crimes against the person, medical certificates produced respecting the nature of the injuries must be verified on oath by the medical persons who granted them. [Certificates of previous good character are allowed to be used, in mitigation of punishment, by a prisoner who pleads guilty; but when the case goes before a jury, such evidence is inadmissible.] See *Stair, B. iv. tit. 42, § 15; tit. 43, § 1*; [*Dickson on Evidence, §§ 1924, 1933. See Character.*]

CERTIFICATE; in English law, a writing made in any court, to give notice to another court of anything done therein, usually by way of transcript. *Tomlins' Dict. h. t.*

CERTIFICATE OF REGISTRY OF A SHIP. [Upon the completion of the registry of a ship, the registrar grants a certificate of registry, containing the following particulars:—(1) the name of the ship and of the port to which she belongs; (2) details as to her tonnage, build, and description; (3) the name of her master; (4) particulars as to her origin, as stated in the declaration of ownership; (5) the names and descriptions of her registered owner or owners, and the proportions in which the owners (if more than one) are interested; 17 & 18 Vict. c. 104, § 44. Change of owner or of master must be indorsed on the certificate; §§ 45, 46. In case of loss, a new certificate may be granted; §§ 47–49. The certificate is to be used only for the lawful navigation of the ship, and cannot be pledged. Penalties are imposed upon

[any person detaining a certificate; § 50. See *Bell's Com. i. 152; Bell's Princ. § 1326; Abbott on Shipping, 46; Maclachlan, 88. See Ship.*]

CERTIFICATION; in judicial procedure, signifies properly the assurance given to a party of the course to be followed in case he disobeys the will of the summons or other writ, or the order of the court. Erskine defines it to be “the penalty to be inflicted on the defender if he shall neither comply with the will of the summons, nor show a reason why he is not bound in law to comply with it;” B. iv. tit. 1, § 7. Certification is either expressed or implied. In the ordinary summons, the defender is ordered to appear in court against a certain day, “with certification as effeurs.” This certification was at one time so severe, that reiterated contumacy on the part of the defender was punished with confiscation of his property (1449, c. 29); but now the certification in the summons amounts to nothing more than an absolute assurance to the defender, that if he fails to appear in the usual manner, the judge will decern in his absence. The most important certification in our law, however, is that in the process of reduction-improbation. In that action two terms are allowed to the defender for the production of the writ sought to be reduced, and, after the expiration of these terms, ten days longer are allowed; but should the writ not then be produced, decree of certification may be pronounced by the judge, the effect of which is to hold the writ as forged and fabricated; and such a decree, once pronounced, can hardly be recalled, even although it has been pronounced in absence. In the simple reduction, the certification is merely that the deed called for shall be held as void until produced. See *Stair, B. iv. tit. 3, § 31; More's Notes, cccxxvi.; Ersk. B. iv. tit. 1, §§ 21, 24; Bell's Com. ii. 249, 258.* [See *Reduction*. As to certification of a case from the Circuit Court to the whole Court of Justiciary; see *Justiciary Court. Circuit Courts.*]

CERTIORARI; is an English writ, directed in the Queen's name to the judges or officers of inferior courts, commanding them to *certify*, or to return the records of a cause depending before them, to the end that the party may have more sure and speedy justice before such judges as may be assigned to try the cause. [Its principal use is to remove civil causes from inferior courts of record into the High Court, when it is desirable that they should be tried

[there, or to remove an indictment from an inferior criminal court into the Central Criminal Court or the Queen's Bench Division, or from the Central Criminal Court into the Queen's Bench Division, in order the better to consider and determine the validity of the indictment and the proceedings thereon, and to prevent a partial and insufficient trial. *Sweet's Law Dict.*]

CESS. See *Land Tax*.

[**CESSER.** The cesser of a term, annuity, or the like, takes place when it determines and comes to an end. *Sweet's Law Dict.* As to cesser clause, see *Charter-Party*.]

CESSIO BONORUM. The process of *cessio bonorum*, [under the former law,] might be termed an equitable relief from the severity of the law of imprisonment for debt. This process was sued out in the Court of Session, in the form of a summons at the instance of the imprisoned and insolvent debtor, in which the whole of the creditors were called as defenders. When the process came into court, the pursuer was bound to exhibit a condescence, containing a full statement of his affairs, and to satisfy the court that his inability to pay his debts had arisen from innocent misfortunes. By 6 & 7 Will. IV. c. 56, the jurisdiction in cases of *cessio* was extended to sheriffs; [and by 39 & 40 Vict. c. 70, § 26 (1), it was appropriated exclusively, in the first instance, to the sheriff court. The main character and purpose, however, of the process of *cessio* were altered by the abolition of imprisonment for debt, which was effected by the Debtors Act, 1880 (43 & 44 Vict. c. 34), as amended by the Civil Imprisonment Act, 1882 (45 & 46 Vict. c. 42). It is true that in certain kinds of debts, which are excepted by these acts, imprisonment is still competent (see *Imprisonment*); but it would appear that in these excepted cases *cessio* is either incompetent, or unlikely to be sought after in practice; see *Goudy on Bankruptcy*, 440. As a protection against imprisonment, therefore, *cessio* is now practically unnecessary. The process still subsists, but its object is not to relieve the debtor, but to secure, at the instance either of debtor or creditors, a cheap and speedy distribution of the estate in small bankruptcies. The modern *cessio* is regulated mainly by the Debtors Act, 1880, the Bankruptcy and Cessio Act, 1881 (44 & 45 Vict. c. 22), and the A.S. 22 Dec. 1882; but some of the provisions of the old Cessio Act (6 & 7 Will. IV. c. 56),

[and of the 39 & 40 Vict. c. 76, are still applicable.

[*Petition for Cessio.*—By § 7 of the Debtors Act, any debtor who is notour bankrupt (see *Bankruptcy*, pp. 88–9) may present a petition for decree of *cessio bonorum*, in the same manner and subject to the same provisions and conditions, as nearly as may be, in and subject to which a person formerly entitled to apply for decree of *cessio* might do so under the acts 6 & 7 Will. IV. c. 56, and 39 & 40 Vict. c. 70, § 26; and the provisions of these acts shall apply, as nearly as may be, to such petition and the procedure thereunder, subject to the provisions hereinafter contained. The petition sets forth that the debtor is notour bankrupt, and is ready to surrender his estate for behoof of his creditors; and it must contain a list of all the creditors, specifying their names, designations, and places of residence so far as known; 6 & 7 Will. IV. c. 56, § 3. By § 8 of the Debtors Act, any creditor of a debtor who is notour bankrupt may present a petition to the sheriff of the county in which such debtor has his ordinary domicile, setting forth that he (the debtor) is unable to pay his debts, and praying that he may be decerned to execute a disposition *omnium bonorum* for behoof of his creditors, and that a trustee be appointed who shall take the management and disposal of his estate for such behoof, and such process shall be taken and deemed to be a process of *cessio*. In the petition there shall be inserted a list of all the creditors of the debtor, specifying their names, designations, and places of residence, so far as known to the petitioner, and with the petition shall be produced evidence that the debtor is notour bankrupt. Notice of intention to present such petition on a day specified must be given to the debtor at least six and not more than fourteen days before presentation thereof; A.S. 1882, § 1. Such notice may be posted in a registered letter, in which case the six or fourteen days are to be reckoned from twenty-four hours after the date of posting. The notice must indicate the amount of the creditor's claim. A signed certificate of posting or delivery of the notice, and (if posted) the post-office receipt, must be produced with the petition; *ib.*

[*First Meeting of Creditors, and Proceedings prior thereto.*—By § 9 of the Debtors Act, on a petition for *cessio* being presented either by the debtor or by a creditor (—the side-heading of the section,

[which restricts its application to petitions by creditors, is wrong, see *Goudy*, 440-1—), the following provisions shall have effect: (1) The sheriff, if he is satisfied that there is *prima facie* evidence of notour bankruptcy (see *M'Nab*, 16 March 1889, 16 R. 610), shall issue a warrant appointing the petitioner to publish a notice in the "Edinburgh Gazette," intimating that such petition has been presented, and requiring all the creditors to appear in court on a certain day, being not less than eight days (44 & 45 Vict. c. 22, § 12) from the date of the "Gazette" notice, the petitioner being bound, within five days after the date of such notice, to send letters to all the creditors specified in the petition, containing a copy of the said notice, and the sheriff shall further ordain the debtor to appear on the day so appointed for the compareance of the creditors in the presence of the sheriff for public examination; and the debtor shall, on or before the sixth lawful day prior to the day so appointed, lodge, to be patent to all concerned, a state of his affairs subscribed by himself, and all his books, papers, and documents relating to his affairs, in the hands of the sheriff clerk; and the petitioner shall, on or before the same date, lodge in the hands of the sheriff clerk a copy of the said "Gazette," and a certificate subscribed by his agent, or by a messenger-at-arms, or sheriff officer, and a witness, stating the date and the place where the letters to the creditors were put into the post-office, and that they were severally addressed as specified in the petition. The sheriff's deliverance issuing the warrant for publication of the notice is not appealable; *Adam*, 27 Feb. 1883, 10 R. 670. (2) On the day appointed for the compareance of the creditors, the debtor shall appear in public court in presence of the sheriff for examination as to his affairs, and the sheriff shall have power to put him on oath or affirmation, as the case may be, and the debtor shall be bound to answer all pertinent questions put to him by the sheriff, or by any creditor with the approbation of the sheriff, and it shall be competent for the sheriff to adjourn the examination for such time as to him shall appear fit and reasonable; and the provisions of § 93 of the Bankruptcy Act (under which bankrupts refusing to answer or to produce documents may be imprisoned), shall, as nearly as may be, apply to the examination of debtors, and the production of books, deeds, or other documents by them under

[this act. See *Sequestration*. (3) The sheriff shall, on such examination being taken, allow a proof to the parties, if it shall appear necessary, and hear parties *vivâ voce*, and either grant decree decerning the debtor to execute a disposition *omnium bonorum* to a trustee for behoof of his creditors, or refuse the same *in hoc statu*, or make such other order as the justice of the case requires. See *Robertson*, 15 Dec. 1888, 16 R. 235. The trustee shall be nominated by the sheriff on the suggestion of the creditors represented at the meeting for examination, and if they do not agree on a person, the sheriff shall make his own selection. (4) Any judgment or interlocutor, or decree, pronounced in such petition may be reviewed on appeal in the same form and subject to the like provisions, restrictions, and conditions as are by law provided in regard to appeals against any judgment or interlocutor, or decree, pronounced in any other process of *cessio bonorum*. The sheriff's interlocutors may therefore be appealed against in the same way as in any other action; 39 & 40 Vict. c. 70, § 26 (4). See *Meikle*, 31 May 1884, 11 R. 867; *Adam*, *supra*; *Ross*, 29 Oct. 1884, 12 R. 26; also *Appeal to Court of Session*. (5) Until the debtor shall execute a disposition *omnium bonorum* for behoof of his creditors, any decree decerning him to do so shall operate as an assignation of his moveables in favour of any trustee mentioned in the decree for behoof of such creditors. (6) The expense of obtaining the decree and of the disposition *omnium bonorum* shall be paid out of the readiest of the funds thereby conveyed. A subsisting sequestration, in which the debtor has not been discharged, is a good objection to decree of *cessio* being granted; *Huyssens*, 29 Jan. 1884, 11 R. 471. Where a debtor sought *cessio*, alleging that he had no estate to distribute, and his object seemed to be to get rid of a particular debt by discharge in the *cessio*, the petition was refused, as an abuse of the process of *cessio*; *Ross*, 16 Nov. 1885, 13 R. 207. If the debtor fails to appear in obedience to the citation in a *cessio* at any meeting to which he has been cited, and the sheriff is satisfied that such failure is wilful, he may in the debtor's absence pronounce decree of *cessio*; 44 & 45 Vict. c. 22, § 9. See *M. Lothian*, 4 Nov. 1884, 12 R. 58. In order to secure the attendance and examination of the debtor, or of any one who can give information as to his estate, the sheriff may exercise all the powers, and grant the

CESSIO BONORUM

159

[warrants and commissions which are lawful to him in sequestrations, under §§ 88, 90, and 91 of the Bankruptcy Act; *ib.* § 10. See *Sequestration*.

[*Trustee's Functions, and Proceedings prior to Second Meeting of Creditors.*—The disposition *omnium bonorum* is a conveyance by the debtor to the trustee of all his estate for behoof of his creditors. A form is prescribed by A.S. 1882, § 2. The granting of a disposition may be dispensed with by the trustee when the debtor has no heritable estate; *ib.* The sheriff may order the trustee to find caution, or he may dispense with caution; § 3. Within seven days after the trustee has obtained extract of the decree ordaining the debtor to execute a disposition *omnium bonorum*, he reports orally to the sheriff at what date the debtor's estate may probably be realised and ready for division, and the sheriff then fixes, by deliverance in the process, a suitable time and place for the second meeting of creditors; § 4. Within seven days after this deliverance, the trustee notifies in the "Edinburgh Gazette," and intimates by circular to each of the creditors the transfer of the debtor's estates to him, the date for lodging affidavits, claims, and vouchers, and the date of the second meeting; § 5. The rules of the Bankruptcy Act as to affidavits, claims, valuation of securities, deductions, and documents of debt to be produced, apply *mutatis mutandis* to cessios; § 6. See *Sequestration*. Creditors must transmit their affidavits and claims and documents of debt to the trustee twenty-one days before the second meeting, or in case of a dividend being declared at a subsequent period, fourteen days before the date fixed for payment thereof. Creditors who fail to lodge their claims in time for a first dividend, if they do so in time for a second dividend, are entitled to an equalising dividend, as well as to the new dividend, upon the amount of the claim that may be sustained; § 7. Ten days before the second meeting, the trustee adjudicates upon the claims, prepares and lodges with the clerk of court a list thereof, with his deliverances thereon (which are subject to inspection by the debtor and creditor), and posts a notice to every creditor whose claim is rejected in whole or in part; § 8. If the debtor or any creditor intends to object to any deliverance, he must give notice to the trustee and to any creditor whose claim is objected to, of the nature and particulars of his objection, by registered letter posted

[at least three days before the second meeting; § 9. The sheriff clerk issues to the debtor, the trustee, or any creditor desiring to lead evidence at the second meeting, a diligence to cite witnesses and havers. The sheriff may, when necessary, grant letters of second diligence; § 10. If before the second meeting it is apparent to the trustee that there will be no funds for division, he reports that fact to the sheriff, who may thereupon dispense with deliverances on claims and a list of ranking; § 12.

[*Second Meeting of Creditors, and Subsequent Proceedings.*—At the second meeting the debtor and trustee must attend, and the creditors may also attend by themselves or their mandatories or agents. Parties are heard orally in support of objections, and the sheriff, if desired, makes a note of the objections and answers thereto; and after such proof, if any, as he may allow (which proof is recorded if desired), the sheriff disposes of the objections summarily, and settles the ranking of the creditors. The debtor is bound to submit to such further examination at this meeting as the sheriff appoints. Where funds have been realised, the sheriff may order an interim or final dividend, or may postpone payment of dividend. He may also adjourn the diet; A.S. 1882, § 11. If at any time subsequent to the second meeting, the trustee possesses, or is about to possess, funds which will admit of a dividend, he applies to the sheriff to fix a date for payment of a dividend; § 13. Before making up a state of ranking for such dividend, or for a postponed dividend, the trustee sends notice to any creditor who had previously failed to lodge his claim, and he then remodels the ranking as may be required; § 14. The sheriff on application by the trustee or any creditor, may at any time call a special meeting of creditors; § 15. The debtor must at all times when required, attend upon the trustee, and give all necessary information as to his affairs; § 16. Provision is made, by §§ 17, 19, 20, for dismissal of the petition for cessio in the event of no one accepting the office of trustee, removal of a trustee for negligence or misconduct, and nomination by the sheriff of a new trustee when necessary.

[*Discharge of Trustee.*—After a final division of the funds, the trustee may obtain from the Accountant in Bankruptcy (who has, by A.S. 1882, § 18, the same powers of supervision and audit in cessios as in sequestrations) a certificate that he is entitled to his discharge, on laying before

[him the sederunt book and accounts, and paying over any unclaimed dividends, provided the Accountant is satisfied that the trustee has complied with the provisions of § 167 of the Bankruptcy Act, and is otherwise entitled to be discharged; and such certificate has to all intents and purposes the effect of a decree of exoneration and discharge; 44 & 45 Vict. c. 22, § 8 (where § 147 of the Bankruptcy Act is mentioned, by an obvious error, instead of § 167; see *Goudy*, 454-5).

[*Discharge of Debtor*.—A debtor with respect to whom decree of *cessio bonorum* has been pronounced shall be entitled on the expiration of six months from the date of such decree to apply to the sheriff to be finally discharged of all debts contracted by him before the date of such decree; and the provisions of § 146 of the Bankruptcy Act, with regard to the conditions on which a bankrupt shall be entitled to obtain his discharge on the expiration of six months, twelve months, eighteen months, and two years respectively from the date of sequestration, shall, subject to the qualifications hereinafter contained, apply to debtors with respect to whom decree of *cessio* has been pronounced, substituting the date of the decree of *cessio* for the date of awarding sequestration. It shall not, however, be necessary to convene a meeting of creditors with reference to such discharge, but the consents required shall be given in writing and produced to the sheriff in such application for discharge. A deliverance by the sheriff granting, postponing, or refusing a discharge under this section shall be final and not subject to review; 44 & 45 Vict. c. 22, § 5. But a debtor shall not be entitled to be discharged of his debts unless it is proved to the sheriff that one of the following conditions has been fulfilled: (a) that a dividend of 5s. in the £ has been paid out of the estate of the debtor, or that security for payment thereof has been found to the satisfaction of the creditors; or (b) that the failure to pay 5s. in the £ has in the opinion of the sheriff arisen from circumstances for which the debtor cannot justly be held responsible. In order to determine whether either of the foresaid conditions has been fulfilled, the sheriff shall have power to require the debtor to submit such evidence as he may think necessary, and to allow any objecting creditor or creditors such proof as he may think right. In the event of a discharge being refused under the provisions of this

[section the debtor shall at any time, if his estate shall yield or he shall pay to his creditors such additional sum as will, with the dividend previously paid out of his estate during the said proceedings, make up 5s. in the £, be entitled to apply for and obtain his discharge in the same manner as if a dividend of 5s. in the £ had originally been paid out of his estate; *ib.* § 7.

[*Conversion of Cessio into Sequestration*.—If, in any proceedings under the *Cessio* Acts, where the liabilities of the debtor exceed the sum of £200, it shall appear to the sheriff that it is expedient, having regard to the value of the debtor's estate and the whole circumstances of the case, that the distribution of the estate should take place under the provisions of the Bankruptcy Acts, he shall have power forthwith to award sequestration of the estates which then belong or shall thereafter belong to the debtor before the date of the discharge, and declare the estates to belong to the creditors for the purposes of the Bankruptcy Acts; and thereupon the provisions of the said acts shall apply as if sequestration had been awarded upon a petition for sequestration in terms of § 29 of the Bankruptcy Act. See *Sequestration*. The sheriff shall have power to direct that the expenses *bona fide* incurred by a creditor in any proceedings under the *Cessio* Acts superseded by the awarding of sequestration shall be paid by the trustee in the sequestration out of the readiest funds of the bankrupt; 44 & 45 Vict. c. 22, § 11. See *Jaffray*, 1 March 1883, 10 R. 719.

[No fee fund or other dues of court are exigible in respect of any proceedings in *cessios*; nor is any stamp or other Government duty exigible in respect of any disposition which the debtor may be required or decreed to execute, any law or statute to the contrary notwithstanding; Debtors Act, § 11. The sheriff has power, upon cause shown by any creditor, or without any application if he thinks fit, at any time after the presentation of a petition for *cessio*, to grant warrant to take possession of and put under safe custody any banknotes, money, bonds, bills, cheques, or drafts, or other moveable property belonging to or in the possession of the debtor; and, if necessary for that purpose, to open lockfast places, and to search the dwelling-house and person of the debtor; § 12. And "dwelling-house" here includes shop, counting-house, warehouse, or other premises; 44 & 45 Vict. c. 22, § 13. The

[Debtors Act further provides, by § 13, for the punishment of fraud on the part of the debtor in a process of cessio, and defines the offences which are deemed to constitute fraud under the act; see *Fraudulent Bankruptcy*. By § 14, provision is made for the punishment of any creditor making a false claim in a cessio. And by § 15, the trustee in a process of cessio is directed to report all offences under the act to the presiding judge, who, if he thinks the case ought to be prosecuted, directs information to be laid before the Lord Advocate.

[*Effect of Cessio*.—A decree of cessio does not, apart from the above statutory provision, discharge the debtor,] and it affords no protection against the attachment by his former creditors of any property which he may subsequently acquire, either by his own industry or otherwise. The creditors, however, before proceeding with diligence against the new acquisitions of the debtor, are bound to realise the property conveyed by the disposition *omnium bonorum*, and to apply it, as far as it will go, in extinction of their debts. In surrendering to his creditors either new acquisitions or the property formerly belonging to him, the debtor is not entitled to retain anything but his working tools, properly so called (see *Beneficium Competentie*); and where the debtor has a fixed salary or fixed wages, he must give up all that exceeds a proper aliment. Thus clergymen have been held bound to give up part of their stipend, and officers in the army a proportion of their half-pay; [and this rule is not displaced by the recent acts. See *Scott*, 5 March 1823, 1 S. App. 363; *Robertson*, 29 Nov. 1873, 1 R. 237; *Mitchell*, 13 July 1875, 2 R. 930; *Simpson*, 23 Nov. 1888, 16 R. 131; *Bell's Com.* ii. 483. As to the contrast between cessio and sequestration in regard to equalising diligences, see *Simpson*, *supra*. A debtor who applies for cessio must have been previously made notour bankrupt, and this has the effect of equalising diligence done within sixty days prior to the bankruptcy, and within four months thereafter (see *Sequestration*). But this effect is not due to the cessio. "All that the trustee in a cessio has to do is to realise the estate and distribute it. His position is not the same as that of a trustee in a sequestration. The latter is a pointing and arresting creditor, and his diligence of pointing and arrestment is universal, and extends to everything in the bankrupt's possession, and to the whole of what may be due to him, in the same way as if he

[had used pointing and arrestment. A cessio has not the effect of a universal diligence in favour of the trustee in the cessio, and there is nothing in that appointment which can in any way prevent a pointing creditor from going on with his diligence. It is possible that the effect of notour bankruptcy may be that other creditors will come in and share in the sale of the pointed effects. But that takes place apart from the process of cessio, and the trustee has nothing to do with the sale, although of course it is always subject to the effect of § 12 of the Bankruptcy Act, which equalises diligences in the way which I have explained" (*per* Lord Pres. Inglis).

[On the subject of *cessio bonorum*, see *Stair*, B. iv. tit. 52, § 17; *More's Notes*, cccclxxxiv.; *Ersk.* B. iv. tit. 3, § 26; *Bell's Com.* ii. 470; *Bell's Princ.* § 2321; *Mackay's Prac.* i. 80; *M'Glashan's Sher. Court Prac.* §§ 263, 2252; *Murdoch on Bankruptcy*, 26, 191; *Goudy on Bankruptcy*, 439; *Mackenzie's Law of Cessio*; *Notes by Accountant in Bankruptcy*, printed in *Goudy*, 711. See *Dyvoour*.]

CESTUI QUE TRUST; in the law of England, is the party beneficially interested under a trust; or, according to the English law definition, "is he in trust for whom or to whose use or benefit another man is infeoffed or seised of lands or tenements." *Tomlins, h. t.*

CHALDER, a chaldre of victual consists of 16 bolls.

CHALKING OF DOOR; a mode of warning tenants in burgal tenements to remove. In Edinburgh this is performed by a town-officer, acting *ex officio*, and at the request of the landlord, but without any express judicial warrant. It is not clear that the officer need notify to the tenant the purpose of his visit; although the safe course is to do so. The chalking consists of marking the principal door of the tenement with chalk forty days before Whitsunday; and a certificate, or execution of chalking, being returned, subscribed by the officer and two witnesses, becomes the warrant for a summary removing before the burgh court, under which decree of removal will be pronounced, immediately on the arrival of the removing term; and if the tenant do not then remove, he may be ejected on the expiration of a charge of six days. [See *Robb*, 20 Jan. 1859, 21 D. 277; also *Stair*, B. ii. tit. 9, § 40; *Ersk.* B. ii. tit. 6, § 47; *Bell's Princ.* § 1278;] *Bell on Leases*, ii. 118; *Hunter's Landlord*

and *Tenant*, ii. 82; *Ross's Lect.* ii. 551; [*Rankine on Leases*, 499.] See *Removing*.

CHALLENGE; an invitation or defiance to fight a duel, whether given verbally or in writing. By 1696, c. 35, the person, whether principal or second, or other interposed person, concerned in giving a challenge, was punishable with banishment and escheat of moveables, although no fighting ensued. This statute was repealed by 59 Geo. III. c. 70; but both the sender and acceptor of a challenge are still guilty of an indictable offence. The challenge must be serious and formal, and not mere intemperate expressions or words of defiance, which, though importing a design to fight, are not followed up by more deliberate proceedings. [Challenging to fight is usually treated as a breach of the peace.] See *Hume*, i. 442; [*Bell's Notes*, 111; *Alison's Princ.* 580; *Macdonald*, 187; *Barclay's Digest*.] See *Duelling*.

CHALLENGE OF JURORS. To challenge a juror, is to object to his acting as a jurymen. The English Treason Laws, which were extended to Scotland by 7 Anne, c. 21, allow a person tried for that crime thirty-five peremptory challenges, *i.e.*, challenges without cause assigned. In other criminal cases the prosecutor and panel have, each of them, five peremptory challenges, [of which not more than two may be challenges of special jurors; 6 Geo. IV. c. 22, § 16. Such challenge must be made at once on the jurymen being balloted; *Dawson*, 2 April 1863, 4 *Irv.* 357. But any number may be objected to on reasonable cause shown. See *Hume*, ii. 310; *Alison's Prac.* 385; *Macdonald*, 469.] See *Jury*. By the act establishing the jury court for civil causes in Scotland (55 Geo. III. c. 42, § 51), peremptory challenges to the number of four to each party are allowed; and challenges, on cause shown, are of course unlimited. The act 59 Geo. III. c. 35, by which the jury court is made permanent, makes no alteration in regard to the right of challenge. See *Jury Trial*.

CHAMBERLAIN. The chamberlain of Scotland was an officer of high dignity and of supreme jurisdiction. He had the inspection of all royal burghs, and power to inquire into the conduct of the magistrates, and to apply the burgh revenues to their proper use. He decided disputes betwixt burgh and burgh, and held circuits for the exercise of his jurisdiction. He judged also in matters of public police within burghs, a power now exercised by the Dean of Guild. The office of chamber-

lain of Scotland has been long since abolished. *Stair*, B. iv. tit. 1, § 4; *Ersk.* B. i. tit. 3, § 38.

The *Lord Great Chamberlain of England* is an officer of considerable importance. He is governor of the Palace of Westminster; and, upon all solemn occasions, such as the coronation of the King, the keys of Westminster Hall are delivered to him. He has the care of providing all things in the House of Lords during the sitting of Parliament. The Gentleman Usher of the Black Rod, Yeoman Usher, &c., are under his authority. [The office is hereditary. *Wharton's Lex.*]

The *Lord Chamberlain of the Household* has the superintendence and government of all affairs belonging to the King's Chamber (except the bed-chamber), and also of the wardrobe; of artificers in the King's service, King's messengers, comedians, &c. The sergeants-at-arms are also under his inspection, and the King's chaplains, physicians, apothecaries, surgeons, &c. He has a vice-chamberlain under him; and both are Privy-Councillors. *Tomlins' Dict.*; [The Lord Chamberlain is a member of the Government for the time being. As to his power of licensing theatres, see 6 & 7 *Vict.* c. 68. By § 12 of that act, a copy of every new play, or addition to an old play, must be submitted, seven days before it is acted, to the Lord Chamberlain, who has power to suppress it, if he thinks fit to do so, for the preservation of good manners, decorum, or the public peace.]

CHAMPARTY, or *Champerty*; in English law, a bargain with the plaintiff or defendant in any suit, to have part of the land, debt, or other thing sued for, if the party that undertakes it prevails therein; whereupon the champertor is to carry on the party's suit at his own expense. It is strictly forbidden by several English statutes, being a species of maintenance, and punished in the same manner. *Tomlins' Dict. h. t.*; [*Wharton's Lex.*] See *Maintenance*. *Buying of Pleas*.

CHAMPERT; [*campi pars*=part of the field;] in old law language, a gift taken by a great man or by a judge for delaying a just, or expediting a wrongous action. *Skene, h. t.*

CHANCELLOR OF A JURY; is the preses or foreman of the jury, who announces the verdict when it is a verbal one, and who delivers it in, and, along with the clerk, subscribes it in name of the jury, when it is in writing; *Hume*, ii. 426; [*Alison's Prac.* 639; *Macdonald*, 519.]

By the Jury Court Act, 55 Geo. III. c. 42, § 33, it is provided that the chancellor of the jury in civil causes shall be elected by a majority of the jury after they are sworn, and in case of an equality of votes, the juror first sworn shall have a double vote. See *Verdict*. [*Jury*.]

CHANCELLOR, LORD. The office of Lord High Chancellor of England is the highest under the Crown. The Lord Chancellor is appointed to the office by the mere delivery of the King's great seal into his custody. He is a Privy Councillor *ex officio*, and Speaker of the House of Lords by prescription. He has the appointment of all justices of the peace throughout the kingdom. In England he is the guardian of all infants, idiots, and lunatics, and has the general superintendence of all charitable institutions. In his judicial capacity, [he is President of the Court of Appeal, of the High Court of Justice, of the Chancery Division of the High Court, and of the House of Lords when sitting as a Court of Appeal.] He not only keeps the King's great seal, but all patents, commissions, warrants, &c., from the King are perused and examined by him before being signed. The highest branch of his jurisdiction is that of cancelling the King's letters-patent when granted contrary to law. The Lord Chancellor is superior in point of precedence to every temporal lord. [*Sweet's Law Dict.*]

The office of Lord Chancellor in Scotland was abolished at the Union in 1707. The Chancellor of Scotland was formerly an officer of very great importance. He presided in the Scots Parliament, and in all courts of judicature (1661, c. 1), and had the principal direction of the Chancery. He had the custody of the great seal, and was chief counsellor to the King (*Balfour's Practicks*, 15); and took precedence of all others *ratione officii*. On the abolition of the office, a keeper of the great seal for Scotland was appointed; in affixing the seal, however, to the writs passing under it, he acts merely ministerially. See *Great Seal*.

CHANCERY or CHANCELLARY. The Chancery in Scotland is an office managed by the Director of Chancery and his deputies, in which are recorded all charters, patents of dignities, gifts of offices, remissions, legitimations, presentations, commissions, brieves, retours, precepts thereon, and all other writs appointed to pass the great or the quarter seals. The Director of Chancery is keeper of the quarter seal, or testimonial of the great seal as it is also

termed; and in this office all writs passing under the quarter seal are written. All writs passing through Chancery are recorded before they are given out to be sealed. It is from Chancery that all brieves are issued, and to it all retourable brieves are returned to be recorded. *Stair*, B. iv. tit. 1, § 2; tit. 3, § 1; tit. 47, § 39; *Brown's Synop. h. t.* See *Brieve. Seals*. [*Charters from the Crown*.]

[CHANCERY, SHERIFF OF.] The office of Sheriff of Chancery was created by 10 & 11 Vict. c. 47, § 27, and is now regulated by the Consolidation Act, 1868, § 50 *et seq.* The holder of this office has jurisdiction in all questions relating to the service of heirs. He also discharges, under § 57 of the Conveyancing Act, 1874, the duties formerly pertaining to the office of Presenter of Signatures.]

CHANCERY; in England, was the highest court of judicature next to the Parliament. Its jurisdiction was [formerly] of two kinds, ordinary and extraordinary, in the former of which the Lord Chancellor, Lord Keeper, &c., is bound in his proceedings and judgments, to observe the order and method of the common law; the latter is that which the court exercises in cases of equity. [Under the Judicature Act of 1873, the Court of Chancery became the Chancery Division of the High Court of Justice, retaining its extraordinary, but not its ordinary jurisdiction. The main part of the latter, relating to lunacy, patents, &c., was transferred to the new Court of Appeal. See *Wharton's Lex.*]

CHAPELS AND ALTARAGES. Before the abolition of Popery, it was usual for pious persons to found and endow chapels, which were served by a chaplain; or altarages, which were small endowments for the maintenance of a priest to perform divine service at an altar, on behalf of the soul of the founder, or some of his deceased friends. At the Reformation, when these came to be suppressed, the founders were allowed to convert the endowments to the maintenance of bursars in any of the universities; 1567, c. 12. See *Stair*, B. ii. tit. 8, § 35; *Ersk.* B. i. tit. 5, § 3.

CHAPTER. In times of Popery and Episcopacy the chapter was the bishop's council, consisting of an archdeacon, dean, and canons or prebendaries, who were generally ministers within the diocese. By the advice of this council, the bishop managed both his spiritual affairs and the temporal affairs of the diocese. See *Stair*, B. ii. tit. 8, § 15; *Ersk.* B. ii. tit. 10, § 5.

CHARACTER OF PANEL. Evidence of the prisoner's general bad character cannot be brought to support a specific charge. The charge of habit and repute in theft is of course excepted. In certain cases of homicide, proof of a vindictive temper, and of a series of cruelties practised towards the individual killed, is competent; but such cruelties must be set forth in the libel. Proof of character is allowed on the part of the panel, as, for instance, in homicide on sudden quarrel, that he is of a mild temper, and that the deceased was the reverse; [*Shiells*, 7 Nov. 1846, Arkley, 171.] Where the character of the injured person is impeached by a panel, the prosecutor may bring evidence to support it. In cases of rape, the woman's loose manners may be proved; [but the prosecutor must have notice of this line of defence; *M'Millan*, 28 Dec. 1846, Arkley, 209; and such evidence must relate to a period shortly before the crime libelled; *Reid*, 9 Dec. 1861, 4 Irv. 124. See *Hume*, ii. 413; *Alison's Princ.* 215; *Alison's Prac.* 629; *Macdonald*, 490; *Dickson on Evidence*, § 13; *Kirkpatrick*, §§ 90, 188. See *Evidence. Certificate of Character*.]

CHARACTER OF PARTIES. In an action of damages for defamation, it is competent to the pursuer to adduce evidence in support of his general character, as upon that the amount of his damages in some degree depends. When a pursuer leads evidence in support of his character, the defender is entitled to attack it and lead counter evidence, but not to impugn a general character in favour of which evidence has been led, by questions as to particular acts. [And although evidence has not been led in support of the pursuer's character, it would seem that evidence may be led against it by the defender, if he has attacked it on record, or taken an issue of justification.] It is incompetent to lead evidence as to the defender's general character, either *pro* or *contra*. See *Macfarlane's Jury Prac.* 216-8; [*Dickson on Evidence*, § 6, 1616; *Kirkpatrick*, §§ 88, 187. See *Defamation. Evidence*.]

CHARACTER TO SERVANT. There is no legal obligation upon a master to give his servant a character; but if he give a false one, he is liable to the servant in damages. [See *Master and Servant*.]

CHARDONES, *vel Cardones*; cards with which wool is carded and wrought. *Skene*, h. t.

CHARGE. In the technical language of Scotch law, a charge is the command of

the Sovereign's letters to perform some act, as to enter heir. The term is also applied to the messenger's copy for service, requiring the person to obey the order of the letters; as a charge on letters of horning, or a charge against a superior.

Charge to enter Heir.—General Charge.

—This was a writ [now abolished, as *infra*,] issued in the Sovereign's name, and passing the signet, ordering the heir within forty days to enter heir to his predecessor, under certification that, if he failed, the creditor should have action against him, in the same manner as if he had entered. The general charge was intended merely as the foundation of proceedings against the heir; and although such a charge might be given during the currency of the *annus deliberandi*, yet no summons could be raised for constituting the debt until after the expiration of the year, unless, during the course of it, the heir had intromitted with the effects of the deceased, and so incurred a passive title. When the action had been raised on the expiration of the general charge, the heir, if he chose, might appear and renounce the succession; in which case decree *cognitionis causa* might be obtained at the instance of the creditor. This decree was termed a decree of cognition, because its chief object was to ascertain the amount of the debt; but such a decree, proceeding on a renunciation by the heir, could not affect either his person or separate property. Where no appearance was made for the heir, decree was pronounced against him as lawfully charged to enter heir, which had the effect of constituting him debtor personally, and gave the creditor action against him and his estate, as well as against the estate of the ancestor. The debt being thus constituted, it still remained that the heritable rights which belonged to the ancestor should be vested in the heir, or made liable to the diligence of the creditor; and for this purpose it was necessary that the heir should receive either a *special* or a *general special* charge.

The Special Charge was a writ also issued in the Sovereign's name, and passing the signet. It narrated the general charge and procedure for constituting the debt, and that the heir would not enter himself heir in special to the heritage in which his ancestor died infert, so as to enable the creditor to adjudge that property; and it ordained the heir, within forty days, to enter himself heir in special to his ancestor, under certification that, if he failed, the creditor should have action of adjudication

against him and the lands, precisely as if he had so entered. The execution of this charge was by 1540, c. 106, made equivalent, *fictione juris*, to the heir's actual entry; and on the expiration of the forty days, an adjudication at the instance of the creditor effectually carried the subjects to which the heir was charged to enter.

The General Special Charge.—The only difference between this charge and the special charge is, that it was applicable to those heritable subjects to which the ancestor had personal rights, not completed by sasine; and the heir was charged to make up his titles to the unexecuted procuratories or precept, &c., under certification that, if he failed, the creditor should have the same action against the heir and the heritage, that he would have had if he had been retoured heir in general to his ancestor. By 54 Geo. III. c. 137, § 8, after one charge, whether general or special, had been given on *induciae* of forty days, every subsequent charge might be on *induciae* of twenty days only.

Where the heir himself, and not the ancestor, was the debtor, there was no occasion for a general charge. All that the creditor had in view in such a case was that his debtor should complete his titles to the property to which he had succeeded, so that it might be attached for his debt; and for this purpose it was necessary to raise letters either of special or of general special charge, according to the state of the titles to the subjects of the succession; and on the expiration of this charge, whether the heir entered or not, the subjects were effectually attached by adjudication at the creditor's instance; 1621, c. 27. But, even in this case, the heir was not obliged to answer the charge until the expiration of the *annus deliberandi*; and the creditor could not go on with his proceedings during the year, unless the heir chose either to obey the charge, or to assume possession of the estate, or grant conveyances of it. It has been doubted whether the heir, when he was himself the original debtor, was at liberty to renounce the succession which had opened to him, and which might have enabled him to discharge his debts; and it was once held that such a renunciation was competent; *Carse*, 1627, M. Supp. 40; but the correctness of that decision has been questioned; *Bell's Com.* i. 748.

The act 1540, c. 106, authorised charges to enter to be given only where the heir

was of perfect age; but by immemorial usage, it was the practice to charge minors. It has been already observed, that the charge might be given during the currency of the *annus deliberandi*; and in those cases where the general charge was meant to be the foundation of an ordinary summons, the action was sustained if the summons on which it proceeded was not executed until a year after the ancestor's death, although the forty days of the charge were not elapsed at the date of the execution. But where a special charge had been given with a view to an adjudication, the summons of adjudication, according to the construction put on the statute, could not be raised until the expiration of the *annus deliberandi*, and of "the forty days next ensuing that year, within which the heir is charged to enter." [Charges to enter heir were abolished by 10 & 11 Vict. c. 48 and 49; citation in an action of constitution being declared equivalent to a general charge, and citation in an action of adjudication equivalent to a special charge or general special charge. By the Titles Acts of 1858 and 1860, actions of constitution and adjudication may be conjoined; and the *annus deliberandi* was reduced to six months. These provisions are contained in the Consolidation Act, 1868, §§ 60, 61. By § 12 of the Conveyancing Act, 1874, an heir is not now liable for his ancestor's debts beyond the value of the estate.] See *Stair*, B. iii. tit. 4, § 32; tit. 5, § 22; B. iv. tit. 51, § 10; *Ersk.* B. ii. tit. 12, § 15; *Bell's Com.* i. 778; *Bell's Princ.* § 1855; [*Menzies' Conv.* 789; *M. Bell's Conv.* ii. 819.] See *Adjudication for Debt*.

CHARGE ON LETTERS OF HORNING.

The will of letters of horning commands messengers-at-arms, as sheriffs in that part, to order the debtor to pay the debt within a certain number of days; and this the messenger does by leaving for the debtor what is termed a copy of charge; by which in virtue of the letters of horning, he commands and charges the debtor to make payment of the debt, specifying the sum, and describing the voucher of debt as in the narrative of the letters of horning, and that within the days and under the pains expressed in the letters. This must be signed by the messenger (1592, c. 141). The date must be in writing (1693, c. 12), and the names and designations of the witnesses inserted. The form of giving this charge is regulated by the act 1540, c. 75; and the cases provided for are—(1) Where the charge is delivered personally,

and then the form is simple. (2) Where the debtor is not found, and the charge is left with the servant. In this case, it must be left at the principal dwelling-place, and with the servant within the dwelling-place; and this fact must be stated in the execution. (3) The other case provided for by the act is where the party cannot be found, and access cannot be got. In that case, the messenger must knock six audible knocks on the door, and then affix a copy of the charge on the most patent door of the house. The execution returned by the messenger is a certificate of his having gone through the form of delivering the charge; which execution must be signed by him and by the witnesses, whose names and designations must also be inserted; 1681, c. 5. When the debtor is furth of the kingdom, this charge may be given edictally, provided the letters contain a proper warrant for such charge. [Under the Personal Diligence Act (1 & 2 Vict. c. 114), extracts of decrees of the Court of Session, Teind Court, Court of Justiciary, and Sheriff Court, and decrees proceeding upon any deeds or documents upon which execution may competently proceed, contain warrant to charge the debtor to pay. On expiration of the days of charge, and within year and day, the execution of charge may be registered in the Register of Hornings, to the effect of denouncing the debtor as rebel, and of accumulating the debt and interest into a principal sum to bear interest. See *Ersk. B. ii. tit. 5, § 55*; *Bell's Com. ii. 187, 436*; *Bell's Princ. § 2312*;] *Ross's Lect. i. 114, 237, 292, 478, 534*; [*Menzies' Conv. 291*; *Campbell on Citation and Diligence, 179*. See *Diligence. Horning. Execution. Suspension.*]

CHARGE AGAINST SUPERIORS.

These charges were used by heirs, by adjudgers, or by purchasers. [They are unknown now, as entry with the superior is implied by law in the case of every registered conveyance. See *Confirmation. Conveyancing.*]

Charge by an Heir.—The charge was used against a superior, or against the heir of a superior. (1) *Against the superior.*—By the 20 Geo. II. c. 50, the heir, on production of his special retour, obtained a warrant for letters of charge, to charge the superior to enter him on fifteen days' notice, which he was bound to do on receiving the non-entry and relief duties, and exhibition of the ancient titles; and this charge might be enforced by personal diligence against the superior. *Ersk. B. iii. tit. 8, § 79.*

(2) *Against the heir of the superior.*—When the superior was dead, and the heir unentered, the superior's heir was, in terms of the act 1474, c. 57, charged by the heir of the vassal to infest himself within forty days, under certification that, should he fail, he would lose the tenant for his lifetime (which was explained to mean the casualties arising from the delinquency of the vassal), and besides be liable in damages; and should the heir fail to enter, the vassal might proceed to charge the intermediate superiors, until he came to the Crown, from whom he received a title. *Ersk. ib. § 80.*

Charge by an Adjudger.—Where an adjudger wished to render his debt real, and capable of competing with other real rights, he required to obtain infestment; and, with this view, where the superior refused to enter him, he raised letters of horning (the warrant of which was contained in the decree of adjudication), and upon these charged the superior to enter him within twenty-one days. This was introduced by 1647, c. 43; and although that act was rescinded, the practice continued; and the superior was bound to give an entry on payment of a year's rent of the subject. Should the superior neglect the charge, the next highest superior might be charged to give an entry to the adjudging creditor, and so on up to the Crown, from which a charter was obtained, which vested a feudal right in the adjudging creditor. *Ersk. B. ii. tit. 12, § 25.* See *Adjudication.*

Charge by a Purchaser.—By 20 Geo. II. c. 50, § 12, every purchaser possessed of a disposition with a procuratory of resignation, might demand an entry from the superior, on payment of the entry-money stipulated in the original charter, or of a year's rent. On the superior's refusal, the purchaser might apply to the Lord Ordinary on the Bills, praying a warrant for letters of horning to charge the superior to receive him; and upon production in the Bill-Chamber of the disposition or other conveyance, containing procuratory of resignation in favour of the purchaser, warrant was granted for letters of horning, on fifteen days *inducie*, to charge the superior to enter the purchaser. Should the superior be himself unentered, the purchaser might proceed and charge him in the manner above explained. This was [formerly] the only way in which a superior could be compelled to give an entry; for although the purchaser might be entered by confirmation, that entry was the voluntary act

of the superior, and admitted of no charge at the instance of the purchaser, [until the legislature, in 1847, gave power to compel entry by confirmation as well as by resignation.] *Stair*, B. iv. tit. 3, § 30; *Bell's Princ.* § 806; *Ross's Lect.* ii. 301. [See *Confirmation*.]

[**CHARGÉ D'AFFAIRES**; a diplomatic agent, accredited to the minister, not the sovereign, of a foreign state, and representing a minister, not the sovereign, of his own state. *Manning's Law of Nations*, 106.]

CHARITY. [See *Nobile Officium. Cy Près. Property and Income Tax. Election Law*.]

CHARTER. A charter is the written evidence of a grant of heritable property, made under the condition that the grantee shall annually pay a sum of money, or perform certain services to the granter; and by our law it must be in the form of a written deed. The granter of a charter is termed the superior,—the grantee the vassal,—the vassal is said to hold the subject of the superior,—and the annual sum or service stipulated is termed the duty. Charters are called blench or feu, from the nature of the stipulated prestation, and original, or by progress, from being first or renewed grants of the same subjects.

Blench and Feu Charters.—In former times, the duty which superiors almost always required from their vassals was military service, and the vassal was then said to hold ward. This holding, however, was abolished by 20 Geo. II. c. 50; and since that act took effect, the only duties which it is lawful to insert in charters are blench and feu duties. A blench-duty is a mere nominal payment; as a penny Scots, or a red rose, *si petatur tantum*. A feu-duty is a consideration of some value. Charters containing these different duties are termed, according to their nature, blench or feu charters. Original blench-charters are not common in modern practice. [See *Blench-Holding. Feu. Feu-duty*.]

Original Charters and Charters by Progress.—An original charter is one by which the first grant of the subject is made: a charter by progress is one renewing the grant in favour of the heir or singular successor of the first or succeeding vassals.

I. *Original Charter.*—According to its modern form, the original charter contains the following clauses:—(1) The narrative, which contains the name and designation of the granter or superior, and the induc-

tive cause or consideration, onerous or gratuitous, which may have induced the superior to grant the right; and where the consideration is pecuniary, the narrative also contains a receipt and discharge for the sum paid. (2) The dispositive clause, in which the superior declares that he has granted and disposed, and thereby grants and disposes, the lands to the vassal: it specifies the heirs who are to succeed to them: it contains a minute description of the lands, stating the county, parish, &c., in which they are situated; and when the superior means to reserve any right in the subjects to himself or others, or to make the grant under any peculiar conditions, such reservations or conditions are inserted here. (3) The *tenendas*, stating that the grantee is to hold the lands of the granter as superior. (4) The *reddendo*, which expresses the duty in money or services to be paid by the vassal to the superior, with the sum which an heir, and sometimes a singular successor, is to pay for a renewal of the grant, termed relief and entry money. (5) The clause of registration, which is only for preservation, and in the books of Council and Session. (6) The precept of sasine, which is a mandate to give symbolical delivery to the vassal of the subjects conveyed; [but which is not now necessary; 31 & 32 Vict. c. 101, § 5.] And, (7) the testing clause. Besides these clauses, it is usual to insert a clause of absolute warrandice, which warrandice, however, is implied; [an assignation to writs;] an assignation to rents, which is only useful before infeftment is taken on the precept; [a clause specifying the term of entry; and an obligation to relieve the grantee of feu-duties and public burdens. These clauses are more fully described under their respective heads.] Original charters are now seldom granted by the Crown, most of the lands in the kingdom having already been inserted in charters from the Sovereign. Nevertheless, when property has fallen to the Crown as *ultimus hæres*, by forfeiture or otherwise, there is no other mode by which the donatary to whom such property may be gifted, can complete his right, than by obtaining an original charter from the Crown. But even such a charter is assimilated in its form more to a charter by progress than to an original grant, as it contains the clause termed a *Queequidem*, stating to whom the property last belonged, and how it reverted to the Crown, and was gifted to the new grantee. *Jurid. Styles*, i. 10.

II. *Charters by Progress*.—[By the Conveyancing Act of 1874, entry with the superior was declared to be implied in the case of every recorded conveyance, and charters by progress were abolished. But prior to 1874,] after an original charter had once been granted, and the vassal infeft on it, no person claiming either as his heir or singular successor could obtain a complete title to the subjects as they stood in his person, without a renewal of the grant from the superior. The requisites to enable the claimant to demand such a renewal from the superior differed, according as he was an heir or a singular successor. [The warrants for infeftment of an heir, which are not in practice called charters, are explained in the articles *Entry of an Heir*. *Clare Constat. Service*.] Charters to singular successors are of various kinds.

Charter of Resignation.—When a person had purchased lands from a vassal, to be held of his superior, and when he wished to be placed in precisely the same situation in which his author stood, by becoming immediate vassal of the superior, this could only be accomplished with the superior's consent. To obtain this consent, certain forms were necessary. One of these forms, and that most consistent with feudal principles, was for the original vassal to grant a procuratory of resignation in favour of the purchaser, which was a mandate to a procurator to appear before the superior, and there for the vassal to resign the lands into the superior's hands, for the purpose of his granting them again to the purchaser. The resignation was made symbolically, by the procurator delivering a staff and baton to the superior. When the superior was thus reinvested with the property, he made a new grant of it to the disponee; and, in evidence of this grant he executed a charter in his favour. This charter, as being preceded by a resignation of the subjects, was called a charter of resignation. It differed from an original charter, in having a clause called, from its first word, a *Quæquidem*, inserted immediately after the dispositive clause. The object of the *Quæquidem* was to specify that the subjects belonged formerly to the granter of the procuratory of resignation, and were, by virtue of that procuratory, resigned for new infeftment in favour of the grantee, as having right, either as the disponee named in the procuratory, or as the heir or singular successor of that disponee. It also differed from an original charter, in having a clause saving and reserving the

rights of all parties, so that the superior incurred no new warrandice, not incumbent on him already by the original grant. At one time, no superior could be compelled, against his inclination, to receive as vassal in the lands, any person who was not the heir expressed in the original grant; but by 20 Geo. II. c. 50, superiors were obliged to enter all singular successors who had got from the vassal dispositions containing procuratories of resignation,—they receiving the fees or casualties to which law entitled them on a vassal's entry, viz., a year's rent of the lands. [See *Charge against Superiors*.] Superiors were also bound to give the new grant under all the conditions specified in the procuratory of resignation, in so far as they did not alter or impair their own rights. *Jurid. Styles* (4th ed.), i. 406; *Ross's Lect.* ii. 285. [See *Resignation*. *Conveyancing*.]

Charter of Confirmation.—Besides the mode just explained, there was another by which a disponee might be received as vassal in the lands, in place of the disponent. In its more modern form, the disposition included the clauses of a charter *a me*; and when the disponee had taken infeftment on the precept it contained, the superior might declare that infeftment to be equivalent to sasine on a precept granted by himself. This was accomplished by means of a charter of confirmation, so called because it ratified and confirmed the otherwise invalid title of the grantee. The clauses of this charter were all similar to those of an original grant, except the dispositive, which in this case narrated and confirmed the title-deeds in favour of the disponee; and, as the infeftment had already been taken, it contained no precept of sasine. [Until the act 10 & 11 Vict. c. 48, superiors could not be compelled to grant charters of this description.] *Jurid. Styles* (4th ed.), i. 413; *Ross's Lect.* ii. 294. [See *Confirmation*. *Disposition*.]

[*Charter of Resignation and Confirmation*.—When a vassal, A, had disposed to B, with obligation to infeft *a me vel de me*; and B being infeft, but not entered with the superior, had again disposed to C, with similar holding; C might complete his title by means of a combined charter of resignation and confirmation. The effect of this was, first, by confirming B's base infeftment, and thereby placing him in the position of entered vassal as at the date of his disposition to C, to validate the procuratory of resignation contained therein; and then to substitute C in B's place as vassal, in virtue of the procuratory of resignation. Infeftment on the charter completed C's title.

[This combined charter was rendered unnecessary by the provision of the Titles to Land Act of 1858, that all charters and writs of resignation should operate a confirmation of all prior writs and instruments requiring to be confirmed in order to complete the investiture. See 31 & 32 Vict. c. 101, § 115. See *Bell's Princ.* § 822; *Menzies' Conv.* 650, 811; *M. Bell's Conv.* ii. 743.]

Charters of Adjudication and of Sale.—

The mode of entering adjudgers and purchasers at judicial sales differed from that of entering a disponent who had right to a procuratory of resignation, only in so far as it was not necessary to resign the lands into the superior's hands to entitle him to grant the charter in their favour. The charter of adjudication, therefore, or of sale, was almost precisely similar to that of resignation, only the *Quequidem* omitted the mention of the resignation, and recited merely the decree and other deeds, by which the lands were transferred to the new vassal. Superiors were compelled to enter appraisers, on payment of a year's rent, by 1469, c. 36; and this rule was extended to adjudgers by 1672, c. 19, and to purchasers at judicial sales by 1681, c. 17, joined with 1690, c. 20. [*M. Bell's Conv.* ii. 817.] See *Adjudication*.

Charter of Novodamus.—It sometimes happened that an heir or singular successor applied for a charter, when he could not exhibit a sufficient legal title to require the superior to grant one, though, at the same time, from immemorial possession of the lands, or other circumstances, there could be no doubt of his right. In such cases, superiors were in the practice of giving new grants of the subjects, under the reservation, however, of their own rights, and the rights of all others, as accords of law. As such charters were not granted upon the resignation of a vassal, or in obedience to a decree, they proceeded *a non habente potestatem*, and therefore they were ineffectual till prescription had followed on them. [See *Novodamus*.]

[CHARTER FROM THE CROWN.]

Prior to the Crown Charters Act of 1847 (10 & 11 Vict. c. 51),] certain previous warrants were necessary, to authorise the issuing of a Crown charter in favour of a singular successor. The first and most important of these was the *signature*. This was a writ prepared by a writer to the signet, containing all the clauses of the charter which it was wished to expedite. It was presented to the Baron of Exchequer, who held a commission from the Crown for

this purpose, and was revised by him. When the charter was a charter of resignation, the lands were resigned in the hands of the Crown; and instruments were taken by a notary upon the act of resignation. The signature was then signed by the Baron; and the cachet—a stamp containing a *fac-simile* of the royal sign-manual—was exhibited. When the charter was one of *novodamus*, or if it created a barony or the like, the signature was superscribed by the Sovereign. The signature became the warrant of a precept under the signet, directed to the Keeper of the Privy Seal, and framed in Latin. [At one time this precept was followed by a second precept under the Privy Seal, but this intermediate precept was dispensed with by 49 Geo. III. c. 42, § 13. The precept under the signet then formed the only legal warrant to the Director of Chancery to prepare the charter.] The Great Seal completed the charter, and rendered it equivalent to a formally subscribed private deed.

[A simpler mode of expediting Crown charters is provided by 31 & 32 Vict. c. 101, §§ 63–96, re-enacting, with variations, the provisions of the Crown Charters Act of 1847 (10 & 11 Vict. c. 51), which abolished signatures and precepts, as preliminary to Crown charters. A draft of the proposed charter, prepared by a writer to the signet, is now lodged with the Sheriff of Chancery (who by § 57 of the Conveyancing Act of 1874, was invested with the functions previously discharged by the Presenter of Signatures), along with a short note praying for a charter in terms of the draft. But before any Crown charter is applied for, it is necessary to obtain the consent of the Commissioners of Woods and Forests, or any one of them, and of the Commissioners of the Board of Trade, under the hand of their secretary, and written evidence thereof must be produced to the Sheriff of Chancery. The applicant must also produce the last charter or other writ flowing from the Crown, along with the subsequent titles, and evidence of the valued rent, in order that the composition may be fixed. The draft is then revised by the Sheriff of Chancery, along with the agent; and thereafter transmitted to the Chancery, where the deed is engrossed. When the party is dissatisfied with the revisal or with the amount of composition fixed, or when the Sheriff of Chancery refuses to revise, on the ground of insufficient title, a note of objections may be lodged with the Lord Ordinary in Exchequer

[causes. Crown writs of confirmation and of resignation were abolished, like other writs by progress, by the Conveyancing Act of 1874. But when a Crown vassal desires to obtain any alteration in the manner of holding, or extension of the grant, it is still competent for the Crown to grant a charter of *novodamus*, embodying the desired alterations; the same consents, however, being requisite, as have been already mentioned as necessary to the granting of an original charter. On a Crown charter being engrossed, it must receive the sign-manual, and (if the lands are held of the Sovereign) be subscribed by at least two Commissioners of the Treasury. Sealing is now unnecessary, unless required by the receiver. These regulations apply for the most part to lands held of the Prince, as well as to those held of the Sovereign. Crown charters are now always expressed in the English language.] See *Stair*, B. ii. tit. 3, § 14; *More's Notes*, clxvii.; *Ross's Lect.* ii. 117; *Jurid. Styles*, i. 359; [*Ersk.* B. ii. tit. 5, § 82; *Menzies' Conv.* 824; *M. Bell's Conv.* ii. 756. See *Crown Lands. Novodamus. Clare Constat.*]

CHARTER-PARTY; is a mutual contract between the owners of a ship and the freighter, by which the freighter hires the vessel, [or part thereof,] either to perform a particular voyage, or for a certain specified time, at a stipulated hire or freight. Where the vessel is hired by time, the commencement and termination of the time must be accurately stated; and where hired by the voyage, the voyage must be properly described, and provision made for deviations or accidental interruptions. The charter-party also specifies the freight, and whether it is to be paid by the voyage, or by the day, week, or month; and contains various other regulations and provisions arising out of the nature of the contract; and it [sometimes] contains a clause of registration, which may be the ground of summary execution without a previous action. [A charter-party is either in the form of a regular written contract, or (more frequently) in the form of a printed memorandum, the particular stipulations being filled up in writing.] Writing is not absolutely necessary to prove the contract [of affreightment.] It may be proved by the oath of the owners; but before either informal missives or any other writings can be founded on in court to prove the contract, such writing must be stamped. The stamp for a regular charter-party, or for any memorandum or other writing

equivalent to it, [is 6d., which may be denoted by an adhesive stamp, to be cancelled by the person by whom the instrument is last executed, or by whose execution it is completed as a binding contract. Where it has been first executed abroad, any party thereto may, within ten days after it has been first received in the United Kingdom, and before it has been executed by any person within the United Kingdom, affix the proper adhesive stamp, and cancel it. The instrument may be after-stamped within seven days, on payment of the duty and a penalty of four shillings and sixpence; and within one month, on payment of the duty and a penalty of ten pounds; 33 & 34 Vict. c. 97, §§ 66-68, and sched.] The owners are bound, by the nature of this contract, that the vessel shall be seaworthy, or fit for the stipulated purpose, and that the master and seamen shall be skilful; that the ship shall be at the destined port on the day appointed, and shall sail at the stipulated time; and that the goods shall be delivered according to the bill of lading, and in good condition, unless prevented by the act of God or the Queen's enemies. The freighter, on the other hand, is bound to furnish the cargo and pay the freight in terms of the bargain, and, in case of delay occasioned through his fault, to indemnify the owners for the lost time. These conditions, which may be termed the *naturalia* of the contract, may, of course, be modified or varied by express stipulation. Difficult questions may also arise as to the owner's right to demand freight *pro rata itineris*; but these and all other questions depending upon the construction of the special contract, or arising out of accidents in the course of the voyage, must depend so much on the circumstances under which they occur, that they can hardly be comprehended under any general rule. [Where there is in a charter-party a *cesser* clause, in such terms as these—"charterer's liability to cease as soon as the cargo is shipped,"—"that has the effect of discharging the charterer of all liability both before and after the time of shipping the cargo, and on the other hand it gives the captain an absolute lien on the cargo for demurrage and freight which would otherwise have accrued against the charterer. In short, the charterer's personal liability is extinguished, and a lien over the cargo is substituted for it;" *per* Lord Pres. Inglis, in *Salvesen & Co.* 28 Oct. 1885, 13 R. 85. See *Gardiner*, 20 March 1889, 16 R. 658. The loss to a ship from unexpected detention

[by quarantine on arriving at the port of loading falls upon the shipowner, even when the charter-party binds the charterer to load within a fixed time after the ship's arrival, in respect that the ship cannot be regarded as having arrived at the port of loading until it is placed by the shipowner at the disposal of the charterer; *White*, 5 Feb. 1886, 13 R. 524. The word charter-party is generally understood to be a corruption of the Latin *charta partita*; the two parts having been usually written in former times on one piece of parchment, which was afterwards divided by a straight line cut through some word or figure, so that one part should tally with the other; *Abbott*, 175.] See *Bell's Com.* i. 586; *Bell's Princ.* § 406; [*Ersk. B.* iii. tit. 3, § 17; *Ersk. Princ.* (17th ed.) 413; *Smith's Merc. Law*, 289; *Abbott on Shipping*, 174; *MacLachlan on Shipping*, 341; *Maude & Pollock*, i. 289; *Jurid. Styles*, ii. 789. See *Shipping Law. Freight. Dead Freight. Demurrage. Bill of Lading. Pilot. Deviation. Seaworthiness.*]

CHASE. In the older law of England, a chase was a large extent of ground, open, and privileged for wild beasts and wild fowl. It differed from a park in not being inclosed, and also in this, that a man might have a chase in another man's ground. *Tomlins' Dict. h. t.*

CHATELS; is an English law term, signifying all goods moveable or immoveable, except such as are in nature of freehold, or parcel of it. *Tomlins' Dict.*; *Bell's Com.* i. 269; *Ross's Lect.* i. 40. [Any estate in lands and tenements, not amounting to freehold, is called a chattel real. Such are estates for years, at will, by sufferance, and various interests of uncertain duration. The term "chattels personal" is generally applied to tangible things, such as furniture, jewels, animals, and the like. Choses in action, and incorporeal personal property, such as copyrights, patent rights, and the like, are not generally included in the term chattels. *Sweet's Law Dict.*]

CHAUD MELLE, or *rixia*; is a term in our ancient law, applied to homicide committed on a sudden, and in heat of blood. Skene defines it, a hot, sudden "tulzie" or debate, contradistinguished from forethought felony. *Skene, h. t.* The person guilty of this offence had the benefit of sanctuary, from which, however, he might have been taken for trial; but if he proved *chaud melle*, he was returned safe in life and limb. The privilege of sanctuary to criminals was abolished at the Reformation;

but the act 1649 (re-enacted by 1664, c. 22), seems to be held in practice to include the case of homicide in *chaud melle*. The object of that statute is to fix the different degrees of casual homicide, and to remove doubts in future. The cases specified are—homicide committed in lawful defence, or upon thieves or robbers breaking houses during the night, or homicide committed in the time of masterful depredation, or in pursuit of denounced rebels for capital crimes, in none of which cases is a capital punishment to be inflicted. But as homicide in *chaud melle* is not specified, it has been doubted whether the benefit of the statute ought to be extended to that offence. Our practice, however, has been favourable to such an extension; and this construction of the statute has the sanction of the highest authority in the criminal law of Scotland. See *Hume*, i. 240. See also *Homicide*.

CHECKER; the Exchequer. See *Skene, voce Scaccarium*.

[CHEQUE. The law relating to cheques is codified in Part III. (§§ 73 to 82) of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). The act provides as follows:—

Cheque Defined.—A cheque is a bill of exchange drawn on a banker payable on demand. Except as otherwise provided in this part, the provisions of this act applicable to a bill of exchange payable on demand apply to a cheque; § 73. See *M'Lean*, 27 Nov. 1883, 11 R. (H.L.) 1. See *Bill of Exchange*.

Presentment of Cheque for Payment.—Subject to the provisions of this act—(1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage; that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid. (2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. (3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him; § 74.

Revocation of Banker's Authority.—The

[duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—(1) countermand of payment; (2) notice of the customer's death; § 75. See *Waterston*, 6 Feb. 1874, 1 R. 470; *Brit. Linen Co.* 6 June 1883, 10 R. 923. In the latter case it was held that a cheque granted for value, though for an amount greater than the amount of the drawer's funds in the hands of the bank, when presented for payment operates as an intimated assignation of such funds of the drawer as are in the hands of the bank.

Cheques are liable to a uniform stamp-duty of one penny, which may be paid by using stamped paper, or an inland revenue adhesive stamp; 33 & 34 Vict. c. 97, §§ 48, 50.

Crossed Cheques.—To obviate risk arising from cheques being lost or stolen, the custom has arisen of crossing them with the name of a banker, or with the words "and Co." written between two parallel lines across the face of the cheque. See *Smith v. Union Bank*, 1875, 1 Q.B.D. 31; *Clydesdale Bank*, 11 March 1876, 3 R. 586; *Thorburn on Bills of Exchange Act*, 175. The provisions of the Bills of Exchange Act regarding crossed cheques are as follows:—

General and Special Crossings Defined.

—(1) Where a cheque bears across its face an addition of—(a) the words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable;" or (b) two parallel transverse lines simply, either with or without the words "not negotiable;" that addition constitutes a crossing, and the cheque is crossed generally. (2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker; § 76.

Crossing by Drawer or After Issue.—

(1) A cheque may be crossed generally or specially by the drawer. (2) Where a cheque is uncrossed, the holder may cross it generally or specially. (3) Where a cheque is crossed generally the holder may cross it specially. (4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable." (5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection. (6) Where an uncrossed cheque, or a cheque crossed generally, is

[sent to a banker for collection, he may cross it specially to himself; § 77.

Crossing a Material Part of Cheque.—

A crossing authorised by this act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorised by this act, to add to or alter the crossing; § 78.

Duties of Banker as to Crossed Cheques.

—(1) Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof. (2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be; § 79.

Protection to Banker and Drawer where Cheque is Crossed.—Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the check, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof; § 80.

Effect of Crossing on Holder.—Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving

[a better title to the cheque than that which the person from whom he took it had; § 81.

Protection to Collecting Banker.—Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment; § 82. See *Matthiessen*, 1879, 5 C.P.D. 7; *Clydesdale Bank*, *supra*.

See *Bell's Com.* ii. 19, 197, 202; *Bell's Princ.* § 308; *Menzies' Conv.* 383; *M. Bell's Conv.* i. 519; *Thomson on Bills*, 116; *Byles on Bills*, 16; *Chitty on Bills*, 353; *Cavanagh on Securities*, 26; *Robertson's Banker's Law*, 56; *Jurid. Styles*, ii. 29. See *Bill of Exchange*.]

CHEVISANCE; in English law, an agreement or composition; in ancient statutes, an unlawful contract. *Tomlins' Dict. h. t.*

CHILD-MURDER. The trial for child-murder differs from that of other cases of murder in nothing, except that stronger evidence of intentional violence is required; since, in unassisted births, the mother is sometimes unconsciously the cause of her child's death. The exposure and desertion of infant children may amount to murder, culpable homicide, or misdemeanour merely, according to the circumstances attending the commission of the offence. *Hume*, i. 299; *Alison's Princ.* 158; [*Macdonald*, 172.] See *Concealment of Pregnancy*.

CHILD-STEALING. [See *Plagium*.]

CHILDREN; are either lawful or unlawful. Lawful children are those children who are either procreated in marriage, or afterwards legitimated by the intermarriage of the parents. The legal presumption is, that all children born of a woman who, at the time of conception, was lawfully married, are legitimate; nor can this presumption be defeated, except by direct evidence that the husband could not possibly be the father of the child. [See *Parent and Child. Legitimacy*.] For the construction of terms in marriage settlements, see *Heirs and Bairns. Bairns of a Marriage. Destination*.

CHILTERN HUNDREDS. The Steward of the Chiltern Hundreds was formerly an officer to protect the inhabitants of a part of Buckinghamshire from banditti. The duties have long since ceased; but the office is nominally retained, and any member of the House of Commons wishing to resign his seat, attains his object indirectly, by applying for the stewardship

of the Chiltern Hundreds, which is granted as a matter of course; and being a place of honour and of nominal profit under the Crown, his acceptance of it vacates his seat. The place is in the gift of the Chancellor of Exchequer. This practice in vacating seats began in 1750. [*May's Parl. Prac.* 708.]

CHIMNEY-SWEEPERS. From motives of humanity, chimney-sweepers have been made the subjects of various statutes, [the leading act being 3 & 4 Vict. c. 85. Any person compelling or knowingly allowing a child or young person under the age of twenty-one years to ascend or descend a chimney, for the purpose of sweeping, cleaning, or coving the same, or of extinguishing fire therein, is made liable to a penalty of ten pounds; § 2. No child under sixteen years may be apprenticed to a chimney-sweep; § 3. See also 27 & 28 Vict. c. 37; and the Edinburgh Police Act (42 & 43 Vict. c. cxxxii.), §§ 246, 307.]

CHIROGRAPHUM *apud debitorem repertum præsuntur solutum.* The written voucher of debt being found in the possession of the debtor affords a presumption that payment has been made by him. This, however, is not a *præsumptio juris et de jure*, and may therefore be elided by an express proof that the voucher did not come into the hands of the debtor by the consent of the creditor. *Stair*, B. i. tit. 18, § 3; B. iv. tit. 32, § 3; *More's Notes*, cxxv.; *Ersk.* B. iii. tit. 4, § 5; *Bell's Princ.* § 566; [*Dickson on Evidence*, § 618; *Kirkpatrick*, §§ 114, 134, 145, 157. See *Payment*.]

[CHOOSING CURATORS. See *Curator. Minor*.]

CHOSE IN ACTION; in the English law, is a thing to which a man has only a bare right, or *jus ad rem*, as distinguished from *jus in re*, without any occupation or enjoyment. A thing sold but undelivered, is the vendee's property, but only a chose in action. See *Bell's Com.* i. 100; *Bell's Princ.* § 1338; *Tomlins' Dict. h. t.*; *Brown on Sale*, 6; *Ross's Lect.* i. 39, 177; [*Williams on Personal Property*, 9.]

CHRISTMAS DAY. [See *Holidays*.]

CHRISTMAS RECESS; a vacation at Christmas, [not exceeding fourteen days, during which the Court of Session is adjourned; 31 & 32 Vict. c. 100, § 4.] See *Box-Day. Reclaiming Note*.

CHURCH OF SCOTLAND. The Roman Catholic religion was abolished in Scotland by the act 1560, ratified by 1567, c. 2. After the Reformation, the form of church government inclined to episcopacy or to presbytery, as the influence of the one party

or the other predominated; until, at last, by the Treaty of Union in 1707, presbytery was finally established as the form of church government in Scotland. Immediately after the Reformation, the government of the church was given to parochial presbyters, under the control of officers termed superintendents. In 1572, the titles of Bishops and Archbishops were given to the clergymen who were then, or should thereafter, be ordained ministers of the cathedral churches. They had also the privilege of sitting in Parliament; but by 1592, c. 116, presbyterian church government was established in kirk-sessions, presbyteries, provincial synods, and general assemblies. Episcopacy was restored by 1606, c. 2, and gave place to presbytery in 1638. Episcopacy was a second time restored in 1662; and in 1689 was again succeeded by presbytery, which, from that time, has continued to be the established religion of Scotland. Presbytery being thus established, those presbyterian ministers who had been expelled from their churches in 1661 were, by 1690, c. 2, ordered to be replaced; and the church government is declared, by 1690, c. 5, to be in their hands, and in the hands of the ministers and elders chosen by them, or whom they may thereafter choose: a general assembly is appointed, with directions to settle all the disorders of the late times, and a confession of faith is recognised. This act is confirmed as the foundation of the Treaty of Union betwixt the two kingdoms by 1707, c. 6, and the confession of faith and form of church government, as established in Scotland by law, are declared to be a fundamental and essential condition of the Treaty of Union. See *Ersk. B. i. tit. 5, § 5*; [*Taylor Innes on Creeds*.]

CHURCH LANDS. See *Benefice*.

CHURCH. Churches, and other things destined to sacred purposes, are held to be *extra commercium*, and cannot be applied to uses of private property; yet, from expediency, it frequently happens that the situation of churches is changed, church bells and communion cups are disposed of, and new ones purchased in their place; and the parishioners also acquire a *quasi* property in the seats or area, for the special purpose of attending divine service. [See *Mags. of Hamilton*, 21 Feb. 1850, 7 Bell's App. 1; *D. Roxburghe*, 29 June 1877, 4 R. (H.L.) 76; also *Seats in Churches*. The church cannot be used except for proper ecclesiastical purposes; *Easson*, 20 July 1843, 5 D. 1430. As to church bells, see *Mags. of Peebles*, 7 June 1875, 2 R. (H.L.) 117.]

The burden of upholding parish churches and the walls of the churchyard is, by long usage, imposed on the heritors of the parish; and where the parish is partly within burgh and partly in the country, the expense must be borne by heritors and proprietors of houses, in proportion to their real rent; [see 17 & 18 Vict. c. 91, § 33; 31 & 32 Vict. c. 96, § 23; *Trades' House of Glasgow*, 8 July 1887, 14 R. 910.] But although this is a burden which attaches to the lands, it is not properly a *debitum fundi*. Singular successors in the lands, and creditors, are not liable for arrears, but only for that part of the expense applicable to the years of their possession. "The heritors are joint-proprietors of the parish church itself, in trust; but the portion of area that is assigned to each heritor, is given to him not to be occupied exclusively by himself and his family—not to be shut up, for that is illegal,—not to be hired out for money, for that is equally illegal, but to be used for the benefit of the parishioners who are resident upon his estate; so that each individual heritor, after the division is made, is equally a trustee for a portion of the parishioners, as the whole heritors, before the division was made, were trustees for the entire parish;" *per* Lord Pres. Inglis, in *D. Roxburghe*, *supra* (3 R. 734). When a new church is erected, the sheriff may be applied to, that it may be divided according to the heritors' legal rights; *D. Roxburghe*. But an application for reallocation of seats is not competent when a church has merely been reseated; *Stiven*, 14 Nov. 1878, 6 R. 174. The presbytery may, when necessary, decern for a new church, after appointing a visitation, and report by tradesmen, with public notice from the pulpit; but this under review of the sheriff, with final appeal to the Lord Ordinary on Teinds; 31 & 32 Vict. c. 96. See *Manse*. In rebuilding a church, accommodation must be provided for two-thirds of all examinable persons (*i.e.* not under twelve years of age) in the parish; *Min. of Tingwall*, 1787, M. 7928. But the heritors are not bound to rebuild, when the church is in good repair or repairable; nor even to enlarge it, for an augmented population. See *L. Lynedoch*, 14 May 1828, 6 S. 791; *M'Leod*, 9 Feb. 1830, 8 S. 475; *E. Glasgow*, 7 April 1834, 7 W. & S. 185; *Bertram*, 20 July 1864, 2 Macph. 1406. Churches erected by voluntary contribution in connection with the Established Church, are regulated by 4 & 5 Will. IV. c. 41; parliamentary churches, by 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90; and churches

[in *quoad sacra* parishes, by 7 & 8 Vict. c. 44. See *Ersk. B. ii. tit. 1, § 8*; *tit. 10, § 63*; *Bell's Com. i. 739*; *Bell's Princ. § 1164*; *Dunlop's Par. Law, 1*; *Duncan's Par. Eccl. Law, 156*; *Black's Par. Eccl. Law, 52*; *Mair's Church Laws, 280*; *Rankine on Land-Ownership, 157, 629.*]

CHURCH JUDICATORIES, [*and Jurisdiction in Ecclesiastical Causes.*] The judicatories of the Church of Scotland, [as established by law,] are kirk-sessions, presbyteries, provincial synods, and general assemblies. The constitution of these shall be explained in their order:—(1) *Kirk-Session*, composed of the minister of the parish and ruling elders. (2) *Presbyteries*, which include a certain number of parishes, varying in number, according to local situation and other circumstances. The presbytery is composed of a minister and ruling elder from each parish within its bounds, [and of the professors of divinity in any university within its bounds, provided they be clergymen.] There is a moderator of the presbytery chosen twice a-year, a clerk of the presbytery, and an officer to execute its orders. [See *Presbytery.*] (3) *Provincial Synods*.—These are composed of three or more presbyteries: the number of provincial synods is at present [sixteen.] Every minister within the bounds of the synod is a member of court; and the same elder who last represented the kirk-session in the presbytery is the representative of the kirk-session in the provincial synod. A communication is established amongst the different provincial synods, by sending one minister and one elder, who are entitled to sit, to deliberate, and to vote with the original members of the synod. The synod has a moderator, clerk, and officers of its own choosing. (4) *General Assembly*.—This is the supreme ecclesiastical court, consisting of representatives from the presbyteries, royal burghs, and universities in Scotland, and from the churches in the East Indies connected with the Church of Scotland. [The representation of presbyteries, in proportion to the number of parishes of which they consist, is regulated by Act v. Ass. 1694, and Act vi. Ass. 1712.] The sixty-six royal burghs of Scotland [may be] represented in the General Assembly by ruling elders; Edinburgh [being entitled to] send two, and every other burgh one. Each university in Scotland is represented by one of its members. The General Assembly of the Church of Scotland meets by the joint authority of the Church and of the Crown, the meeting being appointed both by the moderator and of the

Sovereign's commissioner. See *Commissioner*. The act 1592, establishing presbyterian government, declares it "lawful to the kirk and ministers, every year at the least, and oftener, *pro re nata*, as occasion and necessity shall require, to hold and keep general assemblies." And the act 1690, by which presbyterian government was restored at the Revolution, allows the general meeting and representation of the ministers and elders, according to the custom and practice of presbyterian government throughout the whole kingdom. In pursuance of these acts, the General Assembly meets annually in the month of May, and continues to sit for ten days. The Assembly has a moderator, chosen by itself, who presides in its deliberations; a procurator or advocate; principal and depute clerks, agent, printer, and other officers. The annual meeting of the General Assembly is honoured with a representative of the Sovereign, in the person of a Lord High Commissioner. When the Assembly is dissolved, it is done first by the moderator, who appoints the time for holding the next General Assembly, and then by the Lord High Commissioner, who, in the Sovereign's name, dissolves the present, and appoints another Assembly to be held on the same day named by the moderator; thus uniting the civil and ecclesiastical powers of the state, which indeed seem to be indispensably necessary to the constitution of a regular Assembly.

The ecclesiastical powers of the Church of Scotland are legislative, judicial, and executive. The *legislative power* has been explained under the article *Acts of the General Assembly*. [See also *infra.*] The *judicial power* of the church consists in the infliction or removal of those censures which belong to a spiritual society; and in regard to the clergy, a judgment of deposition will have the effect of depriving the individual of the emoluments of his office as minister of the parish. But a difference takes place in the origin of the procedure, where it is directed against a layman, from what takes place when it is directed against a clergyman. The procedure against a layman of the Established Church must commence in the kirk-session of his own parish; and the judgment of the kirk-session may be brought under review of the presbytery, while that of the presbytery may be again brought before the synod, and from that the case may still be carried to the General Assembly. The procedure against a clergyman cannot commence in the kirk-session, because the clergyman is the moderator of that

court; and the other members being inferior, he cannot be tried there. It is therefore before his superiors, the presbytery, that the procedure against a clergyman must commence; and the judgment of the presbytery may be reviewed by the synod, and that of the synod by the General Assembly. It is by this gradual progress, from judicatory to judicatory, that the injustice of inferior courts may be rectified by the more unbiassed and enlarged views of the supreme ecclesiastical court of the country. This system of review differs from that in civil causes, from the situation of the judges, who have all an interest equally with the parties, to have the doctrines and principles of church discipline and order preserved entire. Although, therefore, in civil causes, the power of appeal rests in the parties, yet in ecclesiastical causes, the members of the different courts have an interest that entitles them, as well as the parties, to carry the decision of their own court to the review of a superior one. Thus, a point may be brought before a superior court—(1) *By reference*: and then, in place of deciding, the inferior court refers to the superior court, and may sit and vote in that superior court; a circumstance which is an objection to this form of procedure, since the joining of so many members may give a bias to the decision of the superior court. (2) *By appeal*: where the party is entitled to bring the whole proceedings of the inferior court under review of the superior court; and in defending the judgment, the members of the inferior court are entitled, and in some degree bound, to defend the judgment which they have pronounced. (3) *By complaint*: where a decision appears to the members of a court to be wrong, the minority may enter their grounds of dissent in the minutes; and they may also, if they see cause, complain to the superior court, which will bring all the members of the inferior court, as well as the parties, to the bar of the superior court, which may decide on the cause in the same manner as if the cause had come before them by appeal of the parties.

The executive power of the church is exercised in a great measure by the presbyteries, though the supreme executive power remains with the General Assembly. The most important occasions of exercising this power are the settlements of vacant parishes, in which the General Assembly gives directions to the presbytery within which the parish lies as to the manner in which they are to proceed; or, when any reluctance appears on the part of the presbytery, the

whole course of procedure is prescribed by the General Assembly; and the presbytery act in a ministerial capacity, and must implicitly obey the instructions they receive.

[The above description of the judicatories of the Church of Scotland, as established by law, applies also, for the most part, to the judicatories of the other presbyterian churches in Scotland. But the Established Church differs from all non-established churches, in possessing a constitution known to the law, and a proper jurisdiction, derived from the sovereign power of the state; whereas other churches have, in the eye of the law, only a prorogated jurisdiction, based on contract, the terms of which, in so far at least as alleged to be peculiar, must be established by evidence, like the terms of any private association. See *M'Millan* (1st Cardross), 23 Dec. 1859, 22 D. 290; in which case Lord Deas observed (p. 323):—"All jurisdiction flows from the supreme power of the state. The sanction of the same authority which enacted the laws is necessary to the erection of courts, and the appointment of judges and magistrates to administer the laws. The Established Church of Scotland had, and has, this sanction. The statute law of the land conferred upon it ecclesiastical jurisdiction, to be exercised by kirk-sessions, presbyteries, provincial synods, and general assemblies. But there is no such statute law applicable to the association called the Free Church No voluntary association can, by an agreement among its members, assume jurisdiction, which flows only from the legislative power and royal prerogative. The Free Church of Scotland is a voluntary association, tolerated and protected by law, as all voluntary associations, for lawful purposes, in this free country, are. . . . But the presbyteries, synods, and assemblies of the Free Church have not been erected into courts, either ecclesiastical or civil. The constituent members of these presbyteries, synods, and assemblies are not judges in any legal sense. They sit, and act, and vote solely in virtue of private contract, regulating their proceedings among themselves, and such contract neither does nor can confer upon them any jurisdiction whatever." See also Lord Fullerton in *Dunbar* (Episcopal Church), 3 March 1849, 11 D. 945, 961; and Lord Ivory, in *M'Millan* (2d Cardross), 19 July 1861, 23 D. 1314, 1333.]

[In matters which belong properly to the sphere of the church courts, *i.e.* in matters pertaining to the doctrine and worship, or

[to the government and discipline of the church, the jurisdiction of the civil courts is excluded. But if the courts of the Established Church exceed their jurisdiction, the Court of Session may reduce any unwarranted act and award damages in case of injury to patrimonial rights. In 1834, the General Assembly of the Church of Scotland passed the Veto Act, which declared it to be "a fundamental law of this church that no pastor shall be intruded on any congregation contrary to the will of the people;" and directed that no presbytery should take on trial any presentee, who was disapproved of by the major part of the male heads of families, members of the vacant congregation. In the Auchterarder case, it was held that this act was *ultra vires* of the Assembly, being an encroachment on the right of patronage, as established by statute; and that a presbytery, which had rejected a presentee, in conformity with the Veto Act, was bound to admit him to trial in terms of the statute; *E. Kinnoul*, 5 March 1838, 16 S. 661, affd. 3 May 1839, M'L. & Rob. 220. In the Lethendy case, a presentee having been rejected under the Veto Act, and a second presentee having been presented by the patron, and accepted by the congregation, the court interdicted the presbytery from inducting the second presentee; *Clark*, 14 June 1839, 1 D. 955. In the Strathbogie cases, the conflict between the civil and the ecclesiastical courts came to a head. The majority of a presbytery resolved, in obedience to the Court of Session (which involved disobedience to the General Assembly), to admit a presentee who had been rejected under the Veto Act. The majority of the presbytery were thereupon suspended from their spiritual functions by the Commission of the General Assembly; and the minority of the presbytery were instructed to supply ministerial services in the churches of the majority. The Court of Session then, on the application of the majority, granted interdict, prohibiting the General Assembly from intimating or carrying out their sentence, and from authorising ministers or licentiates to preach or administer ordinances within the parishes of the majority; and also interdicted all such ministers or licentiates from preaching or administering ordinances, when appointed to do so. And finally, the General Assembly having deposed the ministers who constituted the majority, the court reduced the sentence of deposition, reinstated the deposed ministers in their spiritual office, and interdicted the commissioners elected

[by the minority from sitting in the General Assembly; *Presb. of Strathbogie*, 20 Dec. 1839, 2 D. 258, 585; 27 May 1842, 4 D. 1298; *Cruickshank*, 10 March 1843, 5 D. 909. See also *Middleton* (Culsalmond), 10 March 1842, 4 D. 957; *Cunninghame* (Stewarton), 20 Jan. 1843, 5 D. 427. These decisions were dissented from by a strong minority of the judges of the Court of Session; but they have not been overruled, and must still be regarded as marking the limits of the spiritual jurisdiction enjoyed by the Established Church. "The general result was ascertained to be that, wherever patrimonial interest was involved, even though incidentally, there the civil court could interfere; and could interfere, even by controlling the ecclesiastical proceeding;" *per* Lord Cockburn, in *Sturrock*, *infra*. On the other hand, in *Lockhart*, 5 July 1851, 13 D. 1296, and in *Wight*, 29 June 1870, 8 Macph. 921, the court refused to suspend judgments of the General Assembly pronounced in cases of discipline. In *Sturrock*, 3 July 1849, 11 D. 1220, it was held that no action of damages lies against a court of the Established Church, for any sentence regularly pronounced by them in a proper case of discipline, even though malice and want of probable cause be averred. But this judgment is authoritative only to the effect of establishing that a mere vague allegation of malice and want of probable cause will not suffice to found an action. "The general rule, that judges, civil or ecclesiastical, if they, in the exercise of their functions, commit a wrong maliciously and without probable cause, must be liable in damages," applies to the courts of established and non-established churches alike; (the only exception to the rule being the case of judges of the supreme civil court, who are responsible to Parliament alone). See *Edwards*, 28 June 1850, 12 D. 1134; *M'Millan* (3d Cardross), 9 July 1862, 24 D. 1282; *Lang*, 5 March 1864, 2 Macph. 823. In the last of these cases, it was further held that a party cannot bring an ecclesiastical judgment under consideration of the civil courts, until he has exhausted the remedies open to him in the church courts. The sheriff, as judge ordinary, may enforce the attendance of witnesses, on the citation of a presbytery or other recognised judicature of the Church, by issuing letters of first and second diligence; *Presb. of Leus*, 16 May 1874, 1 R. 888.

[Non-established churches, as already mentioned, are regarded by the law as

[private associations; and the authority of their judicatories depends entirely on contract. The civil court will not take cognisance of the constitution of such churches, except so far as necessary to decide a question of property, or to protect a civil right. Hence an action was held irrelevant, which concluded for reduction of certain alleged incompetent alterations in the canons enacted by the Synod of the Scottish Episcopal Church; *Forbes*, 11 April 1867, 5 Macph. (H.L.) 36. But a sentence of deposition is such an act as the court will take cognisance of, if complained of as wrongful. In the Cardross case, an action of reduction and damages was raised against the Free Church in respect of such sentence. The court sustained the reduction, to the effect of requiring production of the documents necessary to the inquiry, whether the sentence was in violation of the constitution of the church, and whether the pursuer had not precluded himself from seeking redress in the civil court. But they sustained the reduction only as ancillary to the conclusion for damages. Hence an averment of malice and want of probable cause was held requisite; and the action of damages having been held irrelevant for lack of such averment, the reduction was likewise dismissed; *McMillan*, 23 Dec. 1859, 22 D. 290; 19 July 1861, 23 D. 1314; 9 July 1862, 24 D. 1282. It seems probable, therefore, that though damages may be obtained in respect of a sentence of deposition pronounced in excess or in violation of the constitution of a non-established church, yet such sentence would not be reduced, to the effect of reinstating the deposed person in his spiritual office (as was done in the Strathbogie case, in regard to the Established Church).

[But it is in connection with questions of property, that the civil courts have most frequently been called upon to inquire into the constitution of non-established churches. "If funds are settled to be disposed of amongst members of a voluntary association, according to their rules and regulations, then the court must necessarily take cognisance of these rules and regulations, for the purpose of satisfying itself who is entitled to the funds,—so if the rules of a religious association prescribe who shall be entitled to occupy a house, or to have the use of a chapel or other building. This is the principle on which the courts have administered funds held in trust for dissenting bodies. There is no direct power in the courts to decide whether A or B holds

[a particular station according to the rules of a voluntary association; but if a fund held in trust has to be paid over to the person who, according to the rules of the society, fills that character, then the court must make itself master of the questions necessary to enable it to decide whether A or B is the party so entitled;" *per* Lord Cranworth, in *Forbes*, *supra*. See also Lord Pres. Inglis, in *Ferguson Bequest Fund*, 16 Jan. 1879, 6 R. 487, 508. The non-established churches, not being corporations, cannot directly hold property. Their property is held by individuals in trust for them; and, by 13 Vict. c. 13, it may be vested, in a perpetual trust, in the existing trustees and their successors. Therefore, when a division takes place in a congregation, and a dispute arises as to the use of the church, the rights of parties are to be determined according to the principles of the law of trusts; and the distinctive religious principles of the association must be examined as facts, for the ascertainment of the purposes of the trust. In some cases, the trust-deed provides that, in the event of division, the property shall belong to the majority of the congregation; and in some other cases, the property is held by the trustees for behoof of the governing body of the association. But in the ordinary case, the property is held in trust for the congregation, and the right to use it belongs to those who adhere to the original principles of the congregation. See *Craigdallie* (Perth), 14 June 1813, 1 Dow, 1; 21 July 1820, 2 Bligh, 529, 6 Pat. 626. In *Galbraith* (1st Campbeltown), 10 March 1837, 15 S. 808, Lord Meadowbank advanced the view that a judgment of the governing body is to be regarded as *probatio probata* of the principles of the sect. But it has been since decided that, though adherence to the superior judicatories of the church *may* be a principle and condition of the trust, it is not presumed to be so. See *Craigie* (Kirkintilloch), 25 Jan. 1850, 12 D. 523; *Smith* (2d Campbeltown), 6 June 1839, 5 D. 665. In the Kirkintilloch case, and also in *Couper* (Thurso), 2 Dec. 1859, 22 D. 120, the farther question arose, how far a congregation, or section of a congregation, may refuse to concur with the general ecclesiastical body to which it belongs, in entering into union with another ecclesiastical body; and it was decided that union with a separate body is in itself, and without farther proof of divergence from original principles, such an act as may be resisted by a congregation, or a section of a con-

[gregation, whether majority or minority, to the effect of retaining the property of the congregation. It would probably be otherwise, if the union were shown to be in accordance with, or called for by the principles of the ecclesiastical body. See *Kennedy*, 20 March 1879, 6 R. 879; *Innes on Creeds*, 356; *Guthrie Smith on Damages*, 118, and American case there cited. A party taking no steps *debito tempore*, may be barred by *mora* from opposing a union; *Cairncross* (Carnoustie), 9 Aug. 1860, 3 Macq. 827; *Ferguson Bequest*, *supra*.

[See on this subject, *Ersk. B. i. tit. 5*, §§ 16, 24; tit. 7, § 64; *Dunlop's Parochial Law*, 64, 330; *Innes on Creeds*; *M'Laren on Wills*, i. § 845; *Mackay's Prac.* i. 247, 326; ii. 512; *Guthrie Smith on Damages*, 107; *Black's Par. Eccl. Law*, 174; *Mair's Church Laws*.]

CHURCH RATES; in England, a taxation or assessment [formerly] laid on the parishioners to defray the expense of upholding and repairing the fabric of the church. The rate was usually imposed by the parishioners, convened by the churchwardens; and the vote of a majority of such meeting bound the whole parishioners. [Compulsory church rates were abolished in England by 31 & 32 Vict. c. 109. See *Wharton's Lex. h. t.* In Scotland, church rates are imposed on the heritors of parishes, for the provision and maintenance of churches, churchyards, manses, and glebes. See *Church. Manse. Glebe. Heritor*.]

CHURCH-ROAD. It frequently happens that there are in the country bye-ways or paths, sometimes mere footpaths, and sometimes foot and horse roads, used chiefly, if not solely, by the parishioners in going to the parish church. These are called church-roads; and although statute-labour and turnpike road trustees have power to shut up useless roads, or to substitute others for them, they are not empowered to shut up any horse or foot road to kirk or mill. *Blair's Justice's Manual*, 122; [*Smith*, 11 March 1825, 3 S. 652; but see *M'Gavin*, 12 June 1874, 1 R. 1016.] See *Road*.

CHURCHWARDENS; in England, are ecclesiastical officers, chosen by the parishioners and minister jointly, sometimes by the minister alone, sometimes by the parishioners assembled in vestry, as custom directs, to protect the edifice of the church; to superintend the ceremonies of public worship; to promote the observance of religious duties; to form and execute parochial regulations; and to become, as occasion may require, the legal represen-

tatives of the body of the parish. [See *Wharton's Lex.*; *Prideaux's Churchwarden's Guide*.]

CHURCHYARD. The parish churchyard is, generally speaking, subject to the same regulations with the area of the church; and in landward parishes belongs to the heritors, for the special purpose of interring the dead of their families, and those resident on their properties. [But the heritors have no power to alienate the churchyard, unless, perhaps, in exchange for other more convenient ground; *Russell*, 8 Dec. 1882, 10 R. 302; nor to apply it to uses foreign to its proper purpose; *Wright*, 20 July 1881, 8 R. 1025.] In England, a churchyard has been described as "a consecrated place entitled to public protection, and in which nothing should be done but under the direction of public authority" (*per Sir W. Scott, Haggard's Reports*, i. 19). In Scotland, a churchyard is not recognised as a consecrated place; but it is a place which considerations of public decency require to be protected against outrage; and which the heritors will be entitled to protect against any attempt at exclusive appropriation by parties using it as the place of interment of their family or friends. See *Dunlop's Parochial Law*, 72; [*Duncan's Par. Eccl. Law*, 231; *Black's Par. Eccl. Law*, 65; *Mair's Church Laws*, 288; *Ersk. B. ii. tit. 10*, § 63; *Rankine on Land-Ownership*, 163, 634. As to designing of churchyards by the presbytery, see *Manse*.] See also *Burying-Place. Gravestone*.

CINQUE-PORTS. Those havens which lie towards France, and have therefore been thought to require peculiar vigilance. They have an especial governor, called *Lord Warden of the Cinque-Ports*, and various privileges granted them, as a peculiar jurisdiction, their warden having not only the authority of an admiral amongst them but sending out writs in his own name. They are Dover, Sandwich, Romney, Hastings, and Hythe; to which are now added Winchelsea and Rye. The constable of Dover Castle is Lord Warden. [The jurisdiction of the Lord Warden in civil proceedings was abolished by 18 & 19 Vict. c. 48, § 1.] *Tomlins' Dict.*; [*Sweet's Dict.*]

CIRCUIT COURTS. The act 1672, c. 16, divides the kingdom into three districts, and appoints circuits to be made by the Justiciary judges. This regulation is affected by different statutes, as 20 Geo. II. c. 43, [§§ 31-34,] 23 Geo. III. c. 45, [and others after-mentioned.] The circuit

courts of the southern district are presently held at Jedburgh, Dumfries, and Ayr; the western at Stirling, Inveraray, and Glasgow; and the northern at [Dundee,] Perth, Aberdeen, and Inverness. [Till recently, there were only] two circuits in the year,—one in spring, and another in harvest; besides a circuit court held at Glasgow, for criminal cases only, during the Christmas recess of the Court of Session, [under 9 Geo. IV. c. 29, § 1. By § 3 of that act, however, the Sovereign was empowered, by order in council, to direct additional circuit courts to be held in any circuit town; see also 27 Vict. c. 30. In pursuance of an order of date 18 May 1881, and relative act of adjournal of date 12 July 1881, three additional circuit courts are now held in Glasgow, in October, February or March, and June or July in each year; and two additional circuit courts are held in Perth, Dundee, and Aberdeen, in January or February, and June or July. These additional courts have the same jurisdiction, criminal and civil, as the ordinary circuit courts; *Sinclair*, 9 Nov. 1881, 9 R. (J.C.) 1. But the business of the winter Glasgow Circuit is limited by statute to “trying criminal causes;” and appeals, whether civil or criminal, cannot competently be brought before it; *Davidson*, 6 Jan. 1844, 2 Broun, 9. This incompetency is not affected by the Criminal Procedure Act of 1887 (50 & 51 Vict. c. 35), though that act declares (§ 46) that all sittings of the Court of Justiciary in Scotland are sittings of the High Court; *Mackenzie*, 29 Dec. 1888, 16 R. (J.C.) 43. Under the act of 1887, the circuit sittings may in certain circumstances be dispensed with (see *Justiciary Court*); and the judges do not require to remain in any town longer than is necessary for the disposal of the business (§ 46). The judges on any circuit may sit separately, and, although the business at one circuit town is not completed, one of the judges may go on to the next circuit town, and open the court there; 31 & 32 Vict. c. 95, §§ 2, 3.] When necessary, the circuit court may certify a case commenced before it to the whole Court of Justiciary for consideration. [As to whether there can be certification on a question as to admissibility of evidence, see *Davie*, 22 April 1881, 4 Coup. 450. There is no appeal from the circuit court. The jurisdiction of each circuit court is, in general, confined to offences committed within the counties included within the circuit; but certain exceptions to this rule

[are mentioned under *Criminal Prosecution*. And in regard to certain crimes, power is given by statute to try offenders at the place of apprehension. See 5 Geo. IV. c. 84, § 22; 18 & 19 Vict. c. 91, § 21; 33 & 34 Vict. c. 90, § 16; also *Douglas*, 2 July 1866, 5 Irv. 265.] As to the jurisdiction of the circuit court in certain appeals, civil and criminal, see *Appeal*. [See *Hume*, ii. 19; *Ersk.* B. i. tit. 3, § 26; *Macdonald*, 248.] Issues in civil jury causes may also be tried before one or more of the Justiciary judges on circuit, at any circuit town. [See *Jury Trial*.] By 1 Vict. c. 41, circuit courts were established in Scotland, for the trial of small debt causes by the sheriffs. See *Small Debts*.

[CIRCULAR NOTES; are instruments similar to letters of credit, drawn by bankers in this country upon their foreign correspondents, in favour of persons travelling abroad. See *Grant on Bankers*, 101; *Cavanagh on Money Securities*, 87. See *Letter of Credit*.]

CIRCUMDUCTION OF THE TERM; is the sentence of a judge declaring the time elapsed for leading a proof; after which the party is precluded from adducing farther evidence. When the time limited for leading and reporting a proof or a diligence for the recovery of writings has expired, the opposite party may move for circumduction; and the term will be circumduced, unless upon cause shown, when a prorogation may be granted. [See *Paterson*, 27 Feb. 1856, 18 D. 663; *Kennedy*, 8 March 1867, 5 Macph. 557. Under the modern form of procedure, the term circumduction is not applied to the closing of proof.] See *Stair*, B. iv. tit. 46, § 6; *Ersk.* B. iv. tit. 2, § 32; [*Shand's Prac.* i. 359; *M'Glashan's Sher. Court Prac.* § 1415. See *Proof*.]

CIRCUMSTANTIAL EVIDENCE; is evidence deduced from the existence of a fact, or of a group of facts, bearing immediately upon, and inferring the existence of, the principal fact which is sought to be proved. This evidence, on a superficial view, is often thought inferior to direct evidence; and there can be no doubt that it is a matter of considerable difficulty to draw the conclusion which the evidence warrants. But when that conclusion is correctly drawn, and every other hypothesis by which the facts may be accounted for is excluded, or shown to be exceedingly improbable, the conviction produced upon the mind is, and justly ought to be, as strong as if the same fact were proved by the most

direct testimony. And it enjoys this decided advantage over direct evidence, that there is less chance of witnesses combining to establish a falsehood, and less chance of their escaping detection. In criminal cases the utmost caution ought to be employed in weighing circumstantial evidence; and until every other supposition, besides the panel's guilt, which might have been attended with the same circumstances, has been shown to be *morally* impossible, *i.e.*, so certainly false, that, upon the conviction of its falsehood, any one would hazard his own most important interests, a verdict of guilty is not warranted. But it is no reason to acquit a prisoner, that his innocence is not *absolutely* impossible, since no evidence, however direct and complete, will establish that. When the probability of the prisoner's guilt bears to his innocence a finite ratio, however great, conviction is not warranted, since the principle of sacrificing one innocent person, for the sake of punishing ninety-nine guilty persons, has always been repudiated. "When the proofs of a crime are dependent on each other, that is, when the evidence of each witness, taken separately, proves nothing, or when all the proofs are dependent upon one, the number of proofs neither increases nor diminishes the probability of the fact; but when the proofs are independent on each other, the probability of the fact increases in proportion to the number of proofs" (*Beccaria*, c. 14). Circumstantial proof of a civil contract is little favoured, as the party can, and therefore ought, to provide direct evidence. But in civil questions arising from delict, it is freely admissible; as in such cases it is not usually in the party's power to provide direct evidence. *Ersk.* B. iv. tit. 2, § 34; *Alison's Princ.* 78; *Hume*, ii. 383; [and authorities cited in article *Evidence*.]

CIRCUMVENTION; deceit or fraud. All bargains, in which an intention to take undue advantage by either of the parties is apparent, may be set aside on the ground of dole or extortion, without proving any special circumstance of fraud or circumvention. But it is not enough that the deed challenged be merely hurtful and irrational; for, unless it be evidently oppressive, it is not reducible without an actual proof of dole, even although the granter of it be of a facile temper, if he be not absolutely an idiot. If, however, there be lesion in the deed and facility in the granter, the most slender circumstances of

fraud or circumvention will be sufficient to set it aside. [See *Morrison*, 27 Feb. 1862, 24 D. 625; *Love*, 16 Dec. 1870, 9 Macph. 291. See also *Stair*, B. i. tit. 9, § 9; *More's Notes*, lix.; *Ersk.* B. iv. tit. 1, § 27; *Bell's Com.* i. 136; *Bell's Princ.* § 14. See *Fraud. Facility*.]

CITATION; [is the calling of a party in an action to appear in court; or the summoning of a person to give evidence, or to do some other judicial act. Citation is made either (1) personally, or (2) at the dwelling-place, or (3) through the post-office, or (4) edictally.

[1. *Personal citation* consists in the delivery to the party cited of a copy of the summons or other warrant, with schedule of citation annexed. It must be done by a messenger-at-arms, or by a sheriff-officer, if no messenger is resident in the district; 1693, c. 12; 31 & 32 Vict. c. 100, § 19; and he must have in his hands the original warrant, or a certified copy thereof; 31 & 32 Vict. c. 100, § 16. There must be one witness to the execution; but one is enough (except in poindings, where two are required); 1 & 2 Vict. c. 114, § 32; 9 & 10 Vict. c. 67. These provisions apply both to personal citation and to citation at the dwelling-place.

[2. *Citation at the dwelling-place* is competent only when the party cannot be found in person; 1540, c. 75. In practice, however, "personal service is not insisted on wherever the officer has not seen the defender in going to look for him at his principal dwelling-place;" *Dove Wilson*, 118. For the purpose of citation, a dwelling-place may be defined as "any house in Scotland in which the defender has personally resided for forty days continuously, and from which he has not been absent for forty days;" *Mackay's Prac.* i. 397; 6 Geo. IV. c. 120, § 53; A.S. 14 Dec. 1805. But when a true domicile has been established, where a man's family or servants reside, he may be cited there, though he have been absent more than forty days. If, however, there has been a clear *animus* to remove out of the country, the citation should be edictal; *Brown*, 1 Feb. 1849, 11 D. 474. If the party has more than one proper residence, citation at any one of these is good; *Douglas & Heron*, 1779, M. 3700; *Macdonald*, 21 June 1843, 5 D. 1253; but see *Gordon*, 1702, M. 3702. If the servant or other inmate of the house will not accept delivery of the warrant of citation, it must be affixed on the most patent door of the house. If the house

[cannot be entered, the messenger is directed by the act to give six knocks, and then to affix the warrant on the door; 1540, c. 75. In practice this is commonly done by putting the copy of the writ and schedule of citation into the keyhole. But by 34 & 35 Vict. c. 42, citation in small debt actions cannot be executed by affixing the writ to the gate or door of any house or premises, nor, where the defender has removed, by leaving it with an inmate; unless the officer is satisfied that the defender is refusing access or concealing himself to avoid citation or service, or has removed within forty days, his place of dwelling for the time not being known; in which case the officer may affix the writ or leave it with an inmate, and send a registered letter by post, with copy of the writ, to the defender's last known address, or to that which the officer, after diligent inquiry, deems most likely to find him. An individual is not properly cited at his place of business; *Sharp & Co.* 21 Feb. 1822, 1 S. 337. But a corporation or company is cited at its principal place of business; *Young*, 13 March 1860, 22 D. 983. In the case of many public and corporate bodies, provision is made by statute for their being cited in the person of their secretary or other officer.

[3. *Citation by registered letter* through the post-office was introduced by 45 & 46 Vict. c. 77. By § 3 of that act, in any civil action or proceeding in any court or before any person or body of persons having by law power to cite parties or witnesses, any summons or warrant of citation of a person, whether as a party or witness, or warrant of service or judicial intimation, may be executed in Scotland by an officer of the court from which such summons, warrant, or judicial intimation was issued, or other officer who, according to the present law and practice might lawfully execute the same, or by an enrolled law agent, by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served, or to his last known address, if it continues to be his legal domicile or place of citation, or to the office of the keeper of edictal citations where the summons, warrant, or judicial intimation is required to be sent to that office, a registered letter by post containing the copy of the summons or petition or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, or containing

[such other citation or notice as may be required in the circumstances; and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation. See *Stewart*, 23 Jan. 1885, 12 R. 563. By § 4, the following provisions apply to service by registered letter:—

(1) The citation or notice subjoined to the copy or other citation or notice required in the circumstances shall specify the date of posting, and in cases where the party is not cited to a fixed diet, but to appear or lodge answers or other pleadings within a certain period, shall also state that the *inducie* or period for appearance or lodging answers or other pleadings is reckoned from that date. (2) The *inducie* or period of notice shall be reckoned from twenty-four hours after the time of posting.

(3) The execution to be returned by the officer or law agent shall be accompanied by the post-office receipt for the registered letter. The execution returned by a law agent shall for all purposes be equivalent to an execution by an officer of court. Execution returned by a law agent's apprentice is not sufficient; *Wilson*, 16 Dec. 1885, 13 R. 342. The execution may be in the form contained in a schedule appended to the act. (4) On the back of such registered letter besides the address there shall be written or printed the following notice or a notice to the like effect:—This letter contains a citation to or intimation from [*specify the court.*] If delivery of the letter cannot be made, it is to be returned immediately to [*give the official name and office or place of business of the clerk of court.*] (5) If delivery of the letter be not made because the address cannot be found, or because the house or place of business at the address is shut up, or because the letter carrier is informed at the address that the person to whom the letter is addressed is not known there, or because the letter was refused, or because the address is not within a postal delivery district and the letter is not called for within twenty-four hours after its receipt at the post-office of the place to which it is addressed, or for any other reason, the letter shall be immediately returned through the post-office to the clerk of court, with the reason for the failure to deliver marked thereon, and the clerk shall make intimation to the party at whose instance the summons, warrant, or

[intimation was issued or obtained, and shall, where the order for service was made by a judge or magistrate, present the letter to a judge or magistrate of the court from which the summons, warrant, or intimation was issued, and he may, if he shall think fit, order service of new, either according to the present law and practice or in the manner hereinbefore provided, and if need be substitute a new diet of appearance. Where the judge or magistrate is satisfied that the letter has been tendered at the proper address of the party or witness and refused, he may in the case of a witness, without waiting for the diet of appearance, issue second diligence to secure his attendance, and in the case of a party hold the tender equal to a good citation. This mode of service is optional in every case, but the act specifies the fees chargeable for service under it, and declares that no higher fees shall be exigible for service in any other mode, unless the judge or magistrate deciding the case shall be of opinion that it was not expedient in the interests of justice that service should be as provided by the act; §§ 5, 6. See *M'Leod*, 6 Jan. 1887, 14 R. 298. By § 7, "person" includes corporation, company, firm, or other body requiring to be cited or to receive intimation. The date of posting is the date of execution; *Alston*, 18 Nov. 1887, 15 R. 78.

[4. When the party to be cited is resident furth of Scotland, he is cited *edictally*, by delivery of the warrant at the office of the Keeper of Edictal Citations at the General Register House; 6 Geo. IV. c. 120, § 51; A.S. 24 Dec. 1838, § 7. See *Edictal Citations*. In the same manner, in actions against minors, their tutors or curators are cited edictally; and in actions of choosing curators, the next-of-kin of the minors; 13 & 14 Vict. c. 36, § 22. If a defender has a known residence or place of business in England or Ireland, besides edictal citation, reasonable notice of the summons or other writ to be served must be given to his known agent in Scotland, if he have any, or to the defender himself at his residence or place of business; and it is sufficient for this purpose, if a registered letter, addressed to the defender, and enclosing the warrants of citation, be posted at the General Post-Office in Edinburgh, fourteen days before the first enrolment of the cause; A.S. 18 Dec. 1868.

[In consistorial actions, the summons must be served on the defender personally, if possible, when he is not resident within

[Scotland; but if it is shown to the satisfaction of the court that he cannot be found, edictal citation is sufficient; in which case, however, the summons must also be served on the children of the marriage, if any, and on one or more of the next-of-kin of the defender, exclusive of the children, if such are known and resident in Scotland; 24 & 25 Vict. c. 86, § 10. In some cases where citation of next-of-kin is required, as in actions for choosing curators under 1555, c. 35, and for making up tutorial and curatorial inventories under 1672, c. 2, the court, on application by petition, dispenses with such citation on the ground of necessity, where there are no next-of-kin, or none resident in Scotland; see *Buchan*, 7 June 1873, 11 Macph. 652. See *Curatory*. A certificate of the citation, stating the mode in which it has been made, is returned by the officer who has executed it, and is called the execution. See *Execution*. After a party has once appeared in an action or proceeding in the Court of Session, he cannot object to the validity of his citation; 31 & 32 Vict. c. 100, § 21.] See *Stair*, B. iv. tit. 3, § 27; tit. 38, § 2; *Ersk.* B. i. tit. 2, §§ 18, 19; *Kames' Equity* (1825), 284-6; *Hume*, ii. 50, 84, 242; *Ross's Lect.* i. 237, 292; [*Dickson on Evidence*, ii. § 1246; *Campbell on Citation*, 14; *Shand's Prac.* i. 235; *Mackay's Prac.* i. 394; *Dove Wilson's Sher. Court Prac.* 116; *Jurid. Styles*, iii. 3, 215. See also *Jurisdiction. Foreign. Absence. Domicile. Summons. Induciae*.]

Citation for Interrupting Prescription.—The currency of either the positive or the negative prescription may be interrupted by a citation in a process. Thus, the positive prescription may be interrupted by a citation in a process at the instance of the party in right of the property, against the party in possession, for recovery of possession; or the negative prescription may be interrupted by a citation in a process at the creditor's instance against the debtor for payment of the debt. By 1669, c. 10, citations used for interrupting prescription, whether in real or personal rights, must be renewed every seven years, otherwise to prescribe; unless the parties be minors, in which case the act is not to extend to them during the years of their minority. As this statute is limited to citations, if it should happen that the citation is followed by the appearance of the parties in court, or any other judicial step, it is no longer to be accounted a bare citation, but becomes a depending action, which will subsist for forty years without being renewed, unless it be an action

limited by statute to a shorter period; *e.g.*, an action on arrestment, which prescribes in five years. For the security of purchasers and other singular successors, the act 1696, c. 19, ordains that all summonses used for interrupting the prescription of real rights shall pass upon a bill under the signet, and specify all the grounds on which they proceed; and that the summons and execution shall be registered within sixty days, in a particular register to be kept at Edinburgh for the purpose, [now in the General Register of Sasines, the Register of Interruptions of Prescriptions being abolished by 31 & 32 Vict. c. 64, § 15;] otherwise that they shall be of no effect in interrupting prescription against singular successors. See *Ersk. B. iii. tit. 7, § 38*; *Bell's Princ.* § 615, 2007. See *Prescription*.

[As to citation in criminal causes, see *Criminal Prosecution*.]

CIVIL LAW; from *Civitas*, is, properly speaking, the law of a state. In this sense it is synonymous with positive or municipal law. But the term civil law is generally applied to the Roman law. This law, which was the law at one time of all Europe, has materially influenced the jurisprudence of this, as well as of every other European state. But, besides this general influence on what may be termed the common or traditional law of those countries, the Roman law is directly received as legal authority in all of them, to a certain extent at least. In this country, the establishment of the Court of Session, and the bias towards the civil law which the judges of that court (who were principally ecclesiastics) had received, produced a very remarkable effect on the municipal law of Scotland. From that time our ancient common law gave place to the civil law, except in those cases where the principles of feudality were opposed to it. But, gradually, the statutory law, the feudal law, the mercantile law, and the principles recognised and established by the decisions of the Court of Session, have formed a system of wise and equitable rules, which leave to the civil or Roman law nothing more of its former influence than what naturally and necessarily arises from the equity of its principles, and the force of the reasoning on which its decisions are established. *Stair, B. i. tit. 1, §§ 12, 16*; [*Ersk. B. i. tit. 1, § 27*.] See *Roman Law*.

CIVIL LIST. This term is derived from the distinction which was, at the Restoration, made between the military and extraordinary expenses of government, and

those incurred in the maintenance of the ordinary establishments of the country; the revenues appropriated to the latter being called the hereditary or *civil list* revenues. [It now denotes "an annual sum granted by Parliament at the commencement of each reign, for the expenses of the royal household and establishment, as distinguished from the general exigencies of the state; it is the provision made for the Crown out of the taxes, in lieu of its proper patrimony, and in consideration of the assignment of that patrimony to the public use. This arrangement has prevailed from the time of the Revolution downwards, though the amount fixed for the civil list has been subject in different reigns to considerable variation. At the commencement of the present reign, a civil list was settled upon Her Majesty for life, to the amount of £385,000 *per annum*, payable quarterly, out of the consolidated fund, of which the sum of £60,000 is assigned for Her Majesty's privy purse." *Wharton's Lex.* Her Majesty is entitled to grant pensions to the amount of £1200 *per annum*, chargeable on her civil list revenues; 1 & 2 Vict. c. 2.]

CLAIM. To claim is used synonymously with to demand what is due. Where a proprietor insists for what belongs to him against the person withholding it, he is said to make a claim. [See *Multiplepoinding. Sequestration*.]

CLAN ACTS; a name applied to certain statutes passed in the reign of George I. providing for the bestowal of forfeited estates. See *Swint. Abridg. voce Forfeited Estates*; *Brown's Syn.* 732, 2357.

CLAN MACDUFF; the law of clan Macduff was a barbarous privilege, anciently enjoyed by any homicide who could claim kindred, as near as in the ninth degree, to the blood of Macduff, Earl of Fife. If such a person came to Macduff's cross, at the line of march between Fife and Strathern, above Newburgh, and near Lindores, and gave nine kye and a colpindach (a young cow), he was free of the slaughter committed by him; *Skene, h. t.*

CLANDESTINE MARRIAGE; is a marriage contracted without the due observance of the ceremonies which the law has prescribed, *viz.*, the regular proclamation of banns, and the nuptial benediction pronounced by a clergyman properly qualified. [But Lord Fraser points out that down to the middle of last century, the term "clandestine," or "inorderly marriage," always implied celebration by a minister of religion of some kind (*Husband and Wife, i. 229*).

[Proclamation of banns is not now necessary, where notice of marriage is published in terms of 41 & 42 Vict. c. 43. See *Banns*.] By the law of Scotland, clandestine marriages are as valid and effectual as regular marriages; but the parties, celebrator and witnesses, are liable to certain penalties. By 1661, c. 34, the parties are liable to imprisonment for three months, and to certain fines according to their rank. The act 1672, c. 9, also provides a forfeiture of the legal rights of *jus mariti* and *jus relictæ*; but this act falls under the general repealing statute, 1690, c. 27. See *Caruthers*, 1705, M. 2252. The witnesses to such irregular marriages are liable, by 1698, c. 6, to a fine of £100 Scots each. The celebrator, by 1661, c. 34, is punishable with banishment from Scotland, under pain of death in case of his return; and by 1698, c. 6, which ratifies the former act, he is liable "to such pecuniary or corporal pain as the Lords of the Privy Council shall think fit to inflict." But this discretionary power has never been exercised by the Court of Justiciary. The celebrator formerly incurred the penalties of the statutes, if he was not a regularly ordained clergyman of the Church of Scotland, or an Episcopalian clergyman admitted to orders by an English or Irish bishop, or if he had omitted to produce and record his orders, or to take the oaths to Government, as required by 10 Anne, c. 7, and 19 Geo. II. c. 34. So also a Roman Catholic priest was liable to the penalties if he celebrated a marriage. But by 4 & 5 Will. IV. c. 28, it was made lawful for all persons in Scotland, after due proclamation of banns, to be married by Roman Catholic priests, or ministers not of the Established Church, and also for such priests or ministers to celebrate marriages, without being subject to any punishment, pains, or penalty whatever. The penalties, however, are still incurred by the celebrator, if banns have not been duly proclaimed; but a magistrate, before whom the parties appear to declare themselves married persons, so as to complete the civil contract, is not accounted a celebrator in the sense of the statutes, unless he takes upon him to pronounce the nuptial benediction; the statutes having in view merely the religious part of the ceremony. [See *Dickson*, 7 Sept. 1844, 2 Broun 278; *Thorburn*, 4 Jan. 1844, 2 Broun 4; *Ballantyne*, 14 March 1859, 3 Irv. 352.] In prosecutions before the civil judge for the recovery of penalties, the procurator for the church is made joint prosecutor along with

the Lord Advocate. By 10 Anne, c. 7, the right of action is limited to two months after the transgression; but it is doubtful whether this limitation relates to anything but the pecuniary fines, and at any rate, it is for the benefit of the clergy of the Episcopal communion only. [By 19 & 20 Vict. c. 96, § 1, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, is valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage. By § 3 of the same act, there can be no conviction for or registration of an irregular marriage, without proof, other than the acknowledgment of the parties, that one of them had resided in Scotland for twenty-one days preceding the marriage. As to the registration of irregular marriages, see 17 & 18 Vict. c. 80; 18 Vict. c. 29; 23 & 24 Vict. c. 85.] See *Bell's Princ.* § 1514; [*Ersk. B. i. tit. 6, § 11; Fraser on Husband and Wife*, i. 229;] *Kames' Stat. Law Abridg. h. t.; Hume*, i. 463. See *Marriage*.

CLARE CONSTAT. A *Precept of Clare Constat* is a deed executed by a subject-superior, for the purpose of completing the title of his vassal's heir to the lands held by the deceased vassal, under the granter of the precept. The deed is addressed to the superior's bailies in that part, whose names are left blank, so that the office of bailie may be exercised by any one; it then sets forth that, from documents shown to him, the superior is satisfied that his late vassal died infert in the lands, which are described, and that the heir, in whose favour the precept is granted is the nearest and lawful heir of the deceased. The holding and *reddendo* are then mentioned, and the deed concludes with a precept of sasine, directing sasine to be given to the heir. The precept of *clare constat* may proceed on any evidence, whether judicial or not, which satisfies the superior that the person claiming the entry is heir of the last vassal. Where, however, extrajudicial evidence to the satisfaction of the superior cannot be obtained, a service of the heir in the proper character must be produced before the superior can be required to grant the precept. Where the title is at all doubtful, it is for the advantage of the heir to have a service; for although a precept of *clare constat* and infertment form a good title of prescription, yet the title thus completed may be challenged at any time within the period of the long prescription of forty

years; whereas a special service cannot be challenged after the lapse of twenty years, and a precept of *clare constat*, when proceeding on a service, has the benefit of this shorter prescription. The superior's title to grant a precept of *clare constat* is limited by the terms of the investiture. He can renew the right in the person of the heir called to the succession by the investiture, or, where there is no special destination, he may give an entry in this form to the heir-at-law; but he cannot give it to a general donee, nor even to the heir of investiture in liferent, and to his son in fee. In order to authorise any such variation, the heir must first complete his own title; after which, if the destination does not prevent him, he may transmit the property in any line he thinks proper. It follows from the nature of the precept of *clare constat*, that the heir cannot assign the unexecuted precept of sasine contained in it, so as to be the warrant of infeftment in favour of any other person than himself.

[*Writs of clare constat* differ from precepts of *clare constat* in containing no precept of sasine. They were introduced by the act 21 & 22 Vict. c. 76, § 11, and from their simplicity have come into general use. Precepts of *clare constat*, however, are still competent; and a statutory form is provided by § 101 of the Consolidation Act of 1868. Writs of *clare constat* may be granted either by the Crown or by subject superiors. Crown writs are regulated by §§ 84–86 of the act of 1868. They are null, unless recorded before the first term of Whitsunday or Martinmas after being issued. They cannot be obtained except on production of a decree of service, special or general; and as an heir holding such decree now obtains entry by simple infeftment, under the Conveyancing Act of 1874, a Crown writ of *clare constat* is rarely, if ever, applied for. The form and effect of writs of *clare constat* from subject superiors are regulated by § 101 of the act of 1868 (or by § 102, in the case of burgh subjects). Such writ on being recorded, with warrant of registration, in the appropriate register of sasines, has the same effect as if a precept of *clare constat* had been granted, and an instrument of sasine thereon had been expedited and recorded at the date of recording the writ, in favour of the person on whose behalf such writ is presented for registration. Subject superiors are bound to grant such writs if required by the heir; but the heir must, if required, produce a charter or other writ showing the *tenendas*

[and *reddendo* of the lands, and must pay or tender to the superior all duties or casualties. Precepts of *clare constat* formerly became void by the death of the granters or receivers, being excepted from the act 1693, c. 15; but now, by § 103 of the act of 1868, (re-enacting 10 & 11 Vict. c. 48, § 15), writs or precepts of *clare constat*, granted by subject superiors, remain in full force during the whole life of the grantee. Under the Conveyancing Act of 1874, precepts and writs of *clare constat* are excepted from the general abolition of writs by progress. By § 11 of that act, an error in the statement of the character in which the heir is entitled to succeed, does not affect the validity of a precept or writ of *clare constat*.] See *Stair*, B. ii. tit. 3, § 14; B. iii. tit. 5, § 26; *More's Notes*, clx., ccvi.; *Ersk.* B. iii. tit. 8, § 71; *Bell's Com.* i. 737; *Bell's Princ.* §§ 777, 1817; *Ross's Lect.* ii. 533; *Sandford on Heritable Succession*, i. 270; ii. 2; [*Menzies' Conv.* 805; *M. Bell's Conv.* ii. 1096; *M'Laren on Wills*, §§ 204, 1204; *Begg's Conv. Code.*]

CLAREMETHEN. The law of claremethen was an ancient regulation concerning the warrandice of stolen cattle or goods, as to which see *Skene, h. t.*

CLARIFICATIO; the clearance given by the verdict of an assize. *Clarificatio debiti* was synonymous, apparently, with the constitution of the debt by legal evidence. The word is used in the *Regiam Majestatem*. *Skene, h. t.*

CLAUSE OF A DEED; is one of the subdivisions of a deed. The ordinary clauses inserted in deeds are expressed according to certain technical forms which have been sanctioned by practice, and the legal import and effect of many of which have been settled by adjudged cases; so that it is at all times unsafe to vary the usual form of expression of such clauses. See *Dispositive Clause. Testing Clause. [Registration. Union. Warrandice. Also the following articles.]*

CLAUSE OF DEVOLUTION. A clause of devolution may be defined generally to be a clause devolving some office, obligation, or duty, on a party in a certain event, *e.g.*, on the failure of another to perform. It is unnecessary to specify the various deeds in which such a clause may occur. The most important instance of it is to be found in the articles of roup in a judicial sale, and in other articles of roup, in which a clause is inserted, binding the highest offerer to find caution for the price within thirty days, and, on his failure to do so, devolving the

purchase on the next highest offerer, under a similar obligation, and so on downwards; intimation of the devolution being made within ten days of the offerer's failure to find caution, and the offerer so failing being bound to make good the difference between his offer and the offer taken. This clause, which has been introduced solely for the benefit of the exposers, is attended with evident hardship to the bidders at a sale; for even the second highest may be kept in a state of suspense for forty days after the sale, and the remaining bidders for a much longer time. In construing the clause, it seems to be understood,—1st, That on the failure of the highest offerer to find caution, it is optional to the exposers either to re-expose the lands or to claim against the second offerer, although the soundness of this construction has been doubted. 2d, That where the exposers, on the highest offerer's failure to find caution, have made their election to abide by the sale, without re-exposing, and have made a demand upon the second offerer, the second offerer has full right to the purchase, and cannot be deprived of it by any subsequent attempt on the part of the highest offerer to implement his bargain. 3d, The exposers' claim against the highest offerer for the difference between the amount of the first and second offer is not of the nature of a penalty, but properly a debt arising *ex contractu*. *Bell's Com.* ii. 255. [See *Auction*. A clause of devolution is also frequently inserted in a deed of submission, to confer power on the arbiters, if more than one, and in case of their differing in opinion, to refer to an oversman or umpire, to determine the difference. See *Arbitration*. In an entail, a clause of devolution binds the heir of entail, on succeeding to a peerage or to some other estate, or on the occurrence of some other event specified, to surrender the estate to the next substitute. See *Entail*.]

CLAUSE DE NON ALIENANDO. This was a clause formerly in use to be inserted in feu-rights, by which the vassal was taken bound not to alienate the feu without the superior's consent. But by 20 Geo. II. c. 50, § 10, all such clauses, restraining the power of alienation, are prohibited and declared of no force. *Stair*, B. ii. tit. 3, § 58; *More's Notes*, clxxxiii.; *Bell's Com.* i. 27; [*Ersk.* B. ii. tit. 5, § 28.] See *Clause of Pre-emption*.

CLAUSE OF PRE-EMPTION; is a clause sometimes inserted in a feu-right, stipulating that, if the vassal shall be in-

clined to sell the lands, he shall give the superior the first offer, or that the superior shall have the lands at a certain price fixed in the clause. A clause of this kind is not struck at by 20 Geo. II. c. 50, by which clauses *de non alienando* are prohibited; [*Preston*, 1805, M. App. Pers. and Real, No. 2, Ross's L. C. iii. 289; *E. Mar*, 28 Nov. 1838, 1 D. 116.] *Erskine* holds that, without a clause of irritancy, the clause of pre-emption will be unavailing against singular successors. This, however, does not seem to be well founded. But it is quite clear that a clause of pre-emption can have no operation against singular successors, unless it appear in the sasine. [See *Tailors of Aberdeen*, 3 Aug. 1840, 1 Rob. 296, 312, 320; also *Ersk.* B. ii. tit. 3, § 13; tit. 5, § 28; *Bell's Com.* i. 27; *Bell's Princ.* §§ 864, 865; *Menzies' Conv.* 600; *M. Bell's Conv.* i. 612, 619. See *Conditions in Feudal Grants*.]

CLAUSE OF RETURN; is a clause by which the granter of a right makes a particular destination of it, and provides that, in a certain event, it shall return to himself. A clause of this kind, where not protected by prohibitory, or by irritant and resolute clauses, has been held to be of the nature of a simple substitution, which may be defeated by the gratuitous act of the grantee or any of the substitutes; [*Hamilton*, 1762, M. 4358.] A distinction, however, has been drawn between a substitution and a clause of return, in a gratuitous deed in favour of a stranger, the former of which, it is said, vests the right absolutely in the donee, subject to his power of disposal, whereas a clause of return creates a conditional right, which is not defeasible, at least by any gratuitous act, on the part of the donee or substitutes. [In *Mackay*, 13 Jan. 1835, 13 S. 246, Lord Medwyn laid down the following propositions:—“(1) If the conveyance or grant be onerous, fulfilling a legal obligation, a clause of return is considered gratuitous, without any just consideration, and may be defeated gratuitously. (2) If the grant is gratuitous without any antecedent or obligation, a clause of return is held to be a condition of the grant, so that the grant must be taken and held *secundum formam doni*, and cannot be defeated by any gratuitous grant of the donee. (3) If the clause of return be not in favour of the granter himself, but to a third person, it is held to be gratuitous in his person, without any due consideration given by him for it, and of course is defeasible by the

[grantee or substitute. (4) If the clause of return, even in a gratuitous grant, does not immediately follow the grant to the grantee and his heirs, but there are other substitutes prior to the clause of return, it may be defeated gratuitously by the grantee or his heirs, as the substitutes have no sufficient *jus crediti* to prevent the alienation, and of course the granter and his heirs have no right, as their interest has been by his own act still further postponed."] See *Ersk. B. iii. tit. 8, § 45; Bell's Princ. § 1705; [Kames' Elucidations, Art. XII.]* See *Substitution*.

CLAUSES IRRITANT AND RESOLUTIVE. These two clauses were devised for limiting the right of an absolute proprietor, and making effectual the conditions imposed on him, which otherwise would have inferred no more than a personal obligation, ineffectual against creditors or singular successors. By the irritant clause, the deeds done by the proprietor, contrary to the conditions of the right, are declared to be void and null; and, by the resolute clause, the right of the person contravening is resolved and extinguished. [See *Entail*.]

CLAY. The landlord or his assignee, and not the tenant, has a right to the use of pipe-clay. *Bell on Leases, i. 345.*

CLEP AND CALL; a certain formula anciently used in petitions and libels, especially in criminal matters. *Skene, h. t.*

CLERGY. Before the Reformation, the clergy of Scotland were divided into regular and secular. The regular clergy had no charge of any congregation, but were bound to close residence in their monasteries; they were called regular, because they were bound to obey certain rules. These were the monks, under the direction of the abbots or priors; which order of clergy was abolished at the Reformation. The secular clergy were those who discharged the pastoral office over a certain district, as the bishops, presbyters, and deacons. But the introduction of presbyterian church government has reduced this order to presbyters alone. [No ordained clergyman of the Established Church, either in Scotland or in England is capable of being elected member of Parliament; 41 Geo. III. c. 63. Roman Catholic clergymen are also excluded by 10 Geo. IV. c. 7, § 9; but there is no disability in the case of Protestant dissenting clergymen. By 33 & 34 Vict. c. 91, a minister of the Church of England may execute a deed of relinquishment of his office, and thereby discharge himself from all disabilities attaching thereto.] See

Ersk. B. i. tit. 5, § 3; [Nicolson on Elections, 14; May's Parl. Prac. 35.] For an account of the provision of the clergy of the Church of Scotland, see *Teinds*. See *Benefit of Clergy*.

CLERICAL ERROR. A clerical error is an error accidentally committed in the transcription of a deed or other written instrument; and where such an error is obviously accidental, not in *substantialibus* of the instrument, it will not be fatal to its validity or efficacy. [See *Error. Interlocutor*.]

CLERK OF THE CROWN; an officer in Chancery, whose function it is constantly to attend the Lord Chancellor. Under warrant of the Lord Chancellor in case of a new Parliament, or of the Speaker on casual vacancies, he makes out writs for the election of members of Parliament. All returns are made to the Clerk of the Crown. [He certifies the election of representative peers. See 37 & 38 Vict. c. 81. See also *May's Parl. Prac. 195, 198, 594, 701; Nicolson on Elections, 197, 239, 255.* See *Election Law*.]

CLERK OF JUSTICIARY; is the clerk of the Court of Justiciary. There are a principal [and two assistant clerks,] whose duty it is to attend the sittings of the Justiciary Court in Edinburgh, to keep the books of Adjournal, and to write out the interlocutors and sentences of the court. They have also an apartment in the Register Office, where they transact the business connected with the Justiciary and Circuit Courts. [For other duties of the Clerk of Justiciary, see *Criminal Prosecution*.] Besides the principal [and assistant] clerks of Justiciary, there were [formerly] three circuit clerks; [but by 50 & 51 Vict. c. 35, § 73, vacancies occurring in the circuit clerkships are not to be filled up; and the circuit duties are to be performed by the first assistant-clerk of Justiciary and the depute-clerks of Session, in rotation.] The clerks of Justiciary and the circuit clerks [are appointed by the Crown, under 2 & 3 Vict. c. 36, § 3. See *Justiciary Court*.]

CLERK OF THE PEACE; is the clerk to the justices of the peace for the county. His duty is to attend the Justice of Peace Court, and to keep the books of record, &c. The clerks of the peace in Scotland are appointed by the Secretary of State (1685, c. 16; 1686, c. 20; 1690, c. 28); and the principal clerk of the county appoints the depute and district clerks. [They must not practise in the courts of which they

CLERKS OF COURT

189

[are clerks; A.S. 6 March 1783. A principal clerk can only be removed or suspended by the Court of Session.] By 7 Will. IV. & 1 Vict. c. 83, clerks of the peace and others are compelled to take the custody of documents directed to be deposited with them under the standing orders of either Houses of Parliament. [See *Barclay's Digest*, h. t.]

CLERK OF THE PIPE. The office of Recorder of the Great Roll, or Clerk of the Pipe, was an office in the Scotch Court of Exchequer, established by 6 Anne, c. 26; but as, by 2 & 3 Will. IV. c. 103 and 112, a great part of the duties of the office was transferred to offices in England, it was, by 4 Will. IV. c. 16, abolished, and its powers and authorities transferred to the Lord Treasurer's Remembrancer of the Exchequer of Scotland. *Tomlins' Dict.*; [*Clerk & Scrope's Court of Exchequer*, 280. See *Remembrancer*.]

CLERK OF SESSION; is the title given to the clerks of the Court of Session. [The principal clerks of Session are by statute four in number, two being attached to each Division of the Inner House; 11 Geo. IV. & 1 Will. IV. c. 69, § 13; 1 & 2 Vict. c. 118, §§ 5-7. But two vacancies, which have occurred in recent years, have not been filled up, and it appears that there are now to be only two.] The appointment of the principal clerks is in the Crown; and by act of regulations, 1695, to qualify them for the office, they must be either advocates or writers to the signet of three years' standing. Their appointment, however, disqualifies them from practising as advocates or agents before the Court of Session; 1 & 2 Geo. IV. c. 37, § 9. Their duty is to attend the judges in the Inner House, and under their direction to write out the judgments or interlocutors, or other orders pronounced by the court, and to keep the books of Sederunt. [They act as clerks of the bills in the Inner House, and as clerks in proofs and jury trials before judges of the Inner House in Edinburgh. They also receive bonds of judicial caution, and have to satisfy themselves as to the amount of caution and sufficiency of the cautioners; see 31 & 32 Vict. c. 100, § 102. They act as deputies of the Lord Clerk-Register at the election of representative peers of Scotland. There are five depute-clerks of Session, one attached to each of the Lords Ordinary in the Outer House; 1 & 2 Vict. c. 118, §§ 12, 15. By 31 & 32 Vict. c. 100, § 31, and A.S. 14 Oct. 1868, § 19, certain motions in the

[rolls of the Lords Ordinary were to be disposed of by the clerks to the processes; but after a short trial this experiment was abandoned.] Each principal clerk and each depute-clerk has a distinct apartment, or closet as it is called, in the Register Office, in which he keeps the processes to which he is clerk. The duty of taking charge of the Outer House processes, of transmitting them to the judges to be considered, and of attending at the closets of the depute-clerks to lend out the processes, is discharged by the assistant-clerks or closet-keepers, who also attend in the Outer House while the court is sitting. [On the existing circuit clerkships becoming vacant, the duties of clerk of the High Court of Justiciary when sitting elsewhere than in Edinburgh are to be performed by the first assistant-clerk of Justiciary and the depute-clerks of Session, in rotation; 50 & 51 Vict. c. 35, § 73.] The principal clerks have also assistants, who officiate at their apartments in the Register Office, and take charge of the processes depending before the Inner House. The clerks of Session are entitled to no fees, but have fixed salaries; the principal clerks having £1000 *per annum* each, [under 50 Geo. III. c. 112, § 16; the depute-clerks having £550, and the assistant-clerks £475, as fixed by the Treasury, under 31 & 32 Vict. c. 100, § 105. See *Shand's Prac.* i. 102; *Mackay's Prac.* i. 148.] 44

CLERK OF TEINDS. [The duties of the Clerk of Teinds, under 1 & 2 Vict. c. 118, § 26, are to attend the court, and write out, under its direction, the whole acts, orders, and decrees of the court. There was formerly a Depute-Clerk of Teinds, who extracted the acts and decrees, and attended at the Teind Office in the Register House; but, under a recent arrangement, these duties are likewise discharged by the Clerk of Teinds. The salary of the Clerk of Teinds, as fixed by the Commissioners of the Treasury, under 31 & 32 Vict. c. 100, § 105, is £500, with an allowance of £340 for clerks. There is also a Keeper of the Records of the Teind Court, whose salary is £100.]

[**CLERKS OF ADVOCATES.** See *Advocates' Clerks*.]

CLERKS OF COURT. Every court has necessarily a clerk, whose duty it is to write out the judgments, and extract the decrees of the court. In like manner, each royal burgh has a clerk chosen by the magistrates, whose duty it is to keep a

record of their proceedings. See *Sheriff Clerk*. [*Bill-Chamber*.]

CLERKS TO THE SIGNET. [See *Writers to the Signet*.]

CLOSE TIME. See *Fishing*. *Salmon-Fishing*.

CLOSING RECORD. See *Record*.

[CLUBS.] A club is a voluntary association of persons, mainly for social purposes, though other objects, *e.g.*, literary or political, are frequently conjoined with these. Clubs are either proprietary or members' clubs. As to difference between a club and a partnership, see *Fleming*, 2 M. & W. 172; *Smith*, 15 Ch. D. 273; and as to position of a member of an ordinary members' club, see *St James' Club*, 2 D. M. & G. 383. A person joining a club assents thereby to its rules, and is bound by them. The rules cannot be altered except with consent of all the members, unless they contain a provision sanctioning alteration by a majority; *Dawkins*, 17 Ch. D. 615 (*per Jessel, M.R.*). The court will not interfere with the expulsion of a member, if it has been decided in accordance with the rules, in a judicial manner, and without caprice or improper motive; *Hopkinson*, L.R. 5 Eq. 67; *Wood*, L.R. 9 Ex. 190; *Lyttelton*, 45 L. J. Ch. 219; *Dawkins*, *supra*; with which contrast *Fisher*, 11 Ch. D. 353; and *Labouchere*, 13 Ch. D. 346. See *Sweet's Law Dict.*; *Wertheimer on Clubs*.]

COAL-MINE. [See *Minerals*.]

COCKET; a seal belonging to the custom-house; or rather a scroll of parchment sealed and delivered from the custom-house to merchants, as a voucher that their goods are customed. *Tomlins*.

CODE; a collection of the laws and constitutions of the Roman emperors made by order of Justinian. The code is the second volume of the *Corpus Juris Civilis*, and contains twelve books. Before the time of Justinian similar collections had been made, such as the *Gregorian* and *Hermogenian*, which are collections of the imperial constitutions from Hadrian to Diocletian and Maximinus; and the *Theodosian*, from Constantine the Great to Theodosius the Younger. There are several modern systematic collections of laws called codes, the most celebrated of which is the Code Napoleon. See *Roman Law*.

CODICIL; [is a supplementary writing, explaining, revoking, or adding to the provisions of a will previously executed. The word is from *codicillus*, diminutive of *codex*, a book or writing. A codicil may

[either be appended to the will, or written on a separate paper. The will and all the codicils are construed together as one testament. The law as to execution and construction of wills applies also to codicils. See *Bankes*, 6 July 1882, 9 R. 1046; *Stirling Stuart*, 6 Feb. 1885, 12 R. 610. A codicil written in pencil is effectual, if it be clear that it is a testamentary writing, and not a mere jotting; *Muir's Trs.* 23 Oct. 1869, 8 Macph. 53; *M'Intyre*, 1 March 1821, F.C.; but see *Lamont*, 10 March 1887, 14 R. 603. Codicils prior in date to the leading settlement, and ancillary to a previous settlement, which is revoked by implication, are not effectual; *Stewart*, 27 Jan. 1841, 3 D. 463; but see *Fleming*, 1800, M. App. Implied Will, No. 1. As to the effect on vesting, of the constitution of a liferent by a codicil, see *Nolan*, 12 Dec. 1866, 5 Macph. 153.] See *Stair*, B. iii. tit. 8, §§ 16, 23; [*M'Laren on Wills*, i. § 519; ii. § 1438; *Williams on Executors*, 7; *Jurid. Styles*, ii. 573. See *Will. Legacy. Deeds, Execution of*.]

COFFERER; a principal officer of the king's household, who has a special charge and oversight of other officers of the household, to all of whom he pays their wages. *Tomlins' Dict. h. t.*

COGNATE. A cognate is a relation connected by the mother's side; and as there is no succession through the mother, a cognate cannot succeed as heir to the father's property. But where there is room for a tutor-at-law, who is chosen from the relations on the father's side, or agnates, as they are called, the custody of the child is given to the mother, or, failing her, to the nearest cognate. *Stair*, B. iii. tit. 4, §§ 8, 34; *Ersk.* B. i. tit. 7, § 4; *Bell's Princ.* § 2078.

COGNITION. This term was anciently applied to an action for ascertaining disputed marches. The Court of Session was in use to remit the matter in dispute to the sheriff, to be tried by a jury; but the later practice was to have the proof taken by commission, and reported to the Court of Session. *Stair*, B. i. tit. 9, § 28; B. ii. tit. 3, § 73; *Ersk.* B. iv. tit. 1, § 48. As to the cognition, or cognoscing, of idiots and insane persons, see *Brieve. Idiot*. [*Insanity*.]

COGNITION AND SALE; is the name given to a process before the Court of Session, at the instance of a pupil and his tutors, for obtaining a warrant to sell the whole or a part of the pupil's estate. In this action, the next heirs and creditors are

called as parties; the summons must contain a statement of the nature and amount of the pupil's heritable estate; and, either in the summons or in the course of the action, a full state of the pupil's affairs must be exhibited, so as to enable the court to judge of the necessity of the sale. When the action comes into court a proof of the value of the property is led, and a memorial and abstract prepared, as in the case of a judicial ranking and sale; upon advising which, the court authorises a sale either of the whole or part of the property, as it may think proper, by public roup, and at an upset price, not under the value proved in the course of the process. When this warrant is obtained, the tutors may proceed to sell extrajudicially, at such time and place as they think best. In granting such warrants, the Court of Session acts as a court of equity; but it will not interpose unless in a case of great necessity, and where the estate is so burdened as to afford no reasonable prospect of beneficial management for the pupil without a sale; *Finlayson*, 22 Dec. 1810, F.C. [The modern practice is to apply to the court for special powers by summary petition; see *White*, 7 March 1855, 17 D. 599.] See *Ersk. B. i. tit. 7, § 17*; *Bell's Com. ii. 239*; *Bell's Princ. § 2084*; *Jurid. Styles, iii. 191, 200*; [*Shand's Prac. ii. 940*; *Menzies' Conv. 32, 782*; *M. Bell's Conv. ii. 829*; *Mackay's Prac. i. 362*.] See *Judicial Factor. [Tutor.]*

COGNITION AND SASINE; was a form of entering an heir in burgage property. Where the ancestor had died infert, one of the bailies of the burgh, at the request of the heir, examined two or more witnesses as to his propinquity; upon whose evidence the bailie cognosced, and declared him heir to the ancestor, and infert him by hasp and staple, the symbols used in burgh tenements. The ceremony was performed by the heir's taking hold of the hasp and staple of the door, and entering the house and bolting the door; and on his coming out, he took instruments in the hands of the town-clerk, who always acted as notary on the occasion. An instrument of cognition and sasine was then extended, stating the *res gestæ*, and closed by the notary's docquet. The instrument of sasine was recorded within sixty days of its date, in a particular register kept by the town-clerk; 1681, c. 11. Where the heir, before infertment, made over the subject to another, the cognition of the heir's propinquity, and the purchaser's infertment, might be inserted in the same

instrument; and where the ancestor's right had been merely personal, the cognition of the heir, the resignation by the ancestor's author, and the new infertment in favour of the heir, might all be inserted in the instrument of cognition and sasine, which was then called *resignation, cognition, and sasine*. [In the latter case, the heir had to expedite a general service, to connect himself with the procuratory in the disposition to his ancestor.] The form just explained seems to have been the regular method of completing an entry by cognition and sasine. By the practice of the city of Edinburgh, however, no witnesses were examined as to the heir's propinquity; but on the simple application of the party, and production of the last sasine, an instrument was returned, stating the cognition and infertment of the heir under the usual *salvo jure cujuslibet*. The same form of entry might be used by the heir of the creditor in an heritable bond over burgage subjects. [Service and entry *more burgi* were specially excepted from the operation of the Service of Heirs Act of 1847 (10 & 11 Vict. c. 47, § 26). But by the Titles Act of 1860 (23 & 24 Vict. c. 143, § 7), an heir in burgage subjects was empowered to make up his title by obtaining a writ of *clare constat* from the magistrates, or by obtaining decree of special service from the sheriff, in the same way as if the lands had not been burgage. See 31 & 32 Vict. c. 101, §§ 27, 46, 102. By the Conveyancing Act of 1874, the distinction between feu and burgage, in so far as regards the completion of titles, was abolished; 37 & 38 Vict. c. 94, § 25. [See *Ersk. B. iii. tit. 8, § 72*; *Bell's Princ. § 845*; *Menzies' Conv. 838*; *M. Bell's Conv. ii. 1117*. See *Burgage-Holding*.]

COGNITIONIS CAUSA. Where the creditor of a deceased heritable proprietor pursues the heir, with a view to constitute the debt against him, and attach the defunct's heritage, and the heir appears and renounces, the court will pronounce a decree for the amount of the debt, which is called a decree *cognitionis causa*. And in virtue of this decree ascertaining the debt, the creditor may proceed to adjudge the heritage of his deceased debtor. See *Adjudication*. So also in the case of moveable succession, the creditor of a deceased person whose debt is not constituted, may charge the defunct's nearest of kin to confirm executor to him within twenty days after the charge; which charge shall be a passive title against the person charged, unless he renounce; and then the creditor may pro-

ceed to have his debt constituted, and the *hereditas jacens* of moveables declared liable by a decree *cognitionis causa*; upon obtaining which, he may be confirmed executor-creditor; 1695, c. 41. See *Stair*, B. iv. tit. 19; *More's Notes*, cccclxxx.; *Ersk.* B. ii. tit. 12, § 47; *Bell's Com.* ii. 82; [*Shand's Prac.* ii. 690; *Mackay's Prac.* ii. 340, 553.] See *Executor-Creditor*.

COGNOVIT, in *English law*. [Where the defendant in an action in the Queen's Bench Division of the High Court of Justice has no defence, he may give the plaintiff a written confession of the action, upon condition that he shall be allowed a certain time for payment of the debt or damages the amount of which is generally agreed upon. This is called a *cognovit (cognovit actionem)*. It impliedly authorises the plaintiff's solicitor to do everything necessary to obtain judgment against the defendant, if he fails to comply with the conditions on which time is given. *Sweet's Law Dict.*]

COHABITATION. The living together at bed and board, that is, living as husband and wife, and being reputed as such, will constitute a marriage. See *Marriage*.

COIF; in England, the badge of a sergeant-at-law, who is called sergeant of the coif, from the lawn coif, which he wears under his cap when he is created. *Tomlins' Dict.*

COIN; is the current money of the realm. The coining of money is part of the king's prerogative; and he may, by proclamation, make any foreign coin lawful British money at his pleasure. The current coin of Great Britain is composed of gold, or silver, or copper. The denomination, or value of the coin, is also fixed by the king's proclamation. [The Coinage Act, 1870 (33 & 34 Vict. c. 10), consolidates the laws relating to coinage and Her Majesty's Mint, and fixes the standard of all coins, as specified in a schedule.] See *Bell's Princ.* § 1334; *Tomlins' Dict.*; [*Stephen's Com.* ii. 551, 578.] See *Coining*. [*Money.*]

COINING. By our earlier practice, all offences against the current coin of the realm, *e.g.*, counterfeiting, vending, disguising, or importing it, seem to have been considered treasonable, and were punished capitally, whether the coin was gold, silver, or brass. [The law on this subject has been consolidated by 24 & 25 Vict. c. 99, under which statute all such offences are now prosecuted, though an indictment at common law would appear still to be competent. By this act, the counterfeiting gold or silver

[coin (§ 2); colouring coin or metal, with intent to make it pass for genuine gold or silver coin (§ 3); buying, selling, or importing counterfeit gold or silver coin (§§ 6, 7); unlawfully making, mending, buying, selling, or possessing instruments used in fabricating gold or silver coin (§ 24); and conveying such instruments out of the Mint (§ 25), are declared to be high crimes and offences, punishable with penal servitude for life. The impairing or lightening gold or silver coin, with intent to pass it, is punishable with penal servitude for fourteen years (§ 4). The unlawfully possessing gold or silver taken from any coin (§ 5); counterfeiting copper coin (§ 14); unlawfully making, mending, buying, selling, or possessing instruments for counterfeiting copper coin (*ib.*); buying, selling, or otherwise dealing in base British copper coin (*ib.*); uttering or importing base foreign gold or silver coin (§§ 18, 19), are punishable with penal servitude for seven years. Various minor descriptions of crimes and offences against the currency, and provisions relative thereto, are contained in the act, which is referred to for details. Previous conviction may aggravate the offence charged into one of a higher grade (§§ 12, 21). Such previous convictions are to be libelled in the usual manner, irrespective of the provision of § 37, which enacts that the substance and effect of such convictions shall be set forth, this provision not being applicable to procedure in Scotland; *Davidson*, 2 Feb. 1863, 4 Irv. 292. A coin may be proved to be counterfeit by the evidence of any credible witness, scientific testimony not being requisite (§ 29). The offence of counterfeiting is deemed complete, though the coin counterfeited be not in a fit state to be uttered, or the counterfeiting be not finished or perfected (§ 30). The sale of medals resembling current coin is prohibited by 46 & 47 Vict. c. 45. See *Alison's Princ.* 451; *Bell's Notes to Hume*, 130; *Macdonald*, 102, 234, 382; *Stephen's Digest*, art. 369 *et seq.*]

[**COLLABORATEUR**; fellow-workman. See *Master and Servant*.]

COLLATERAL SECURITY; is an additional and separate security for the due performance of an obligation. Such securities, of course, can never be made available to any greater extent than that of securing implement of the principal obligation; but in ranking on the bankrupt estates of principal and collateral obligants, the rule is, that while the whole debt remains unpaid, the creditor is entitled to

rank for the whole upon the estate of each obligant, whether principal or collateral, whose obligation extends to the whole, to the effect of drawing full payment of the debt. See *Bell's Com.* ii. 416; [*Goudy on Bankruptcy*, 193, 312, 498. See *Sequestration*.]

COLLATERAL SUCCESSION; is the succession of the brothers and sisters of the deceased. [See *Succession*.]

COLLATION; is a provision of the law of Scotland, by which the heritable and moveable succession of a deceased person may, in certain circumstances, be accumulated into one mass, and distributed in equal shares amongst his next-of-kin. Collation may take place either between the heir in heritage and the executors, or amongst children [claiming *legitim*.]

1. *Collation between the Heir and Executor*.—Where the estate of the deceased consists partly of heritage and partly of moveables, the heir in heritage has no share of the moveable estate, if there be others as near in degree to the deceased as himself. But although this be the provision of the law where the heir chooses to accept the heritage, yet, if he considers it for his interest, he has the privilege of claiming a share of the moveables as one of the next-of-kin, provided he collates the heritage with the executors, who are bound to collate the executry with him; so that the whole estate, heritable and moveable, of the deceased may be thrown into one mass, and distributed by equal portions amongst all the next-of-kin. The same rule holds in collateral succession: Thus, a brother who succeeds as heir, may collate with his younger brothers and sisters, and claim an equal share of the whole succession. Erskine [B. iii. tit. 9, § 3] seems to hold that the heir is entitled to this privilege, even although he be not one of the next-of-kin, [*e.g.*, if he be a grandson by the eldest son of the deceased;] but the contrary was found by an unanimous decision of the court; *M'Caw*, 1787, M. 2383. [It was enacted, however, by § 2 of the Moveable Succession Act (18 Vict. c. 23), with regard to the issue of a predeceasing heir, that “where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate, had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the other

[issue of the predeceaser, if there be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation, if he had survived the intestate; and daughters of the predeceaser, being heirs-portioners, shall be entitled to collate to the like effect; and where, in the case foresaid, the heir shall not collate, his brothers and sisters, and their descendants in their place, shall have right to a share in the moveable estate equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation.”]

It is only the heir of line, or the heir *ab intestato*, who can be required to collate, in order to have a share of the moveable succession. The eldest heir-portioner who succeeds to an heritable estate by an entail, or by her father's destination, is entitled, on her father's death, to a share of the moveables without collating, [provided the heirs-portioners are the sole next-of-kin of the deceased;] *Riccart*, 1720, M. 2378. [See *Sinclair's Trs.* 7 June 1881, 8 R. 749 (and observations there on *Blair*, 12 D. 97). It is different, however, where the favoured sister is in competition with other next-of-kin, who are not heirs-portioners; *Balfour*, 1787, M. 2379, revd. (on a separate ground) 3 Pat. 300; *Anstruther*, 16 Aug. 1836, 2 S. & M.L. 369.] It is settled that an heir of entail who is one of the next-of-kin, and not heir *alioqui successurus*, is entitled to a share of the moveables without collating the entailed estate, although he has succeeded to it through the deceased; *Crawford*, 1794, M. 2384. But an heir of entail *alioqui successurus* is not entitled to receive a share of the moveable estate without collating the rents of the entailed estate; *Little Gilmour*, 13 Dec. 1809, F.C.; [*Anstruther*, *supra*; *Fisher's Trs.* 5 Dec. 1850, 13 D. 245; *Napier*, 24 Jan. 1868, 6 Macph. 264.] Where lands have been purchased and taken to a father in liferent, and to his heir *alioqui successurus* in fee, with a power of disposal in the father, the heir must collate before he can claim any share of his father's moveable succession; *Baillie*, 23 Feb. 1809, F.C.; and it would also appear that, where a father has, during his own lifetime, put forward his heritage to his eldest son *præceptione hæreditatis*, the son, on his father's death, cannot claim a share of the moveables without collating the heri-

tage so put forward; *Bank. B. iii. tit. 8, § 28*. An heir cannot claim a share of his father's moveables from the executors without collating the heritage to which he has succeeded as heir to his father, although that heritage lies in a foreign country; *Robertson*, 18 Feb. 1817, F.C. Where a father has possessed heritage on apparen- cy, without completing any feudal title, and his son has made up his titles by serving to the person last infeft, the son can claim a share of his father's moveable succession without collating the heritage possessed by his father on apparen- cy. [See *Spalding*, 18 Nov. 1812, Hume's Dec. 119. Where an heir who is also one of the next-of-kin of an intestate dies without having collated the heritage with the other next-of-kin, his representatives are not entitled to a share of the moveable estate, when they cannot collate the heritage; *Neubigging's Trs.* 20 Feb. 1873, 11 Macph. 411. See *Stair, B. iii. tit. 8, § 26*; *More's Notes*, clxxxviii.; *Ersk. B. iii. tit. 9, § 3*; *Bell's Com. i. 95*; *Bell's Princ. § 1910*; *M'Laren on Wills, § 292*; *M. Bell's Conv. ii. 856, 926*; *Fraser on Husband and Wife, ii. 1045*.]

2. *Collation amongst Children [claiming Legitim].*—The object of this collation is to preserve equality in the distribution of the *legitim*, and it is confined exclusively to the children entitled to *legitim*. Under this provision of the law, every child claiming *legitim*, who has already got a provision from the father, is bound to collate that provision with the other children, and impute it in part of the *legitim*. Every provision given by the father falls under this collation; e.g., tocher, provisions granted to the child on his or her marriage, bonds of provision, and all sums advanced for behoof of the child, except the expense of education, or inconsiderable presents made by the father. [See *Nisbet's Trs.* 10 March 1868, 6 Macph. 567; *Douglas*, 8 Nov. 1876, 4 R. 105; *Welsh*, 19 Jan. 1878, 5 R. 542; *Monteith*, 28 June 1882, 9 R. 982.] But this collation is not required where it appears to have been the granter's intention that the child should have the provision as a *precipuum* over and above the share of the *legitim*. Neither is a child bound to collate a bond of provision granted to him by the father on death-bed, in so far as such provision does not exceed the dead's part; for, although a father cannot diminish the *legitim* by a death-bed deed, yet he may dispose of the dead's part *in articulo mortis*, even to a

stranger, and much more to his own child; *Ersk. B. iii. tit. 9, § 25*. Where an heritable estate is provided to a younger child, he is not bound to collate it, for such provision does not diminish the fund from which *legitim* is taken. This kind of collation cannot affect the rights of third parties: Thus the widow cannot be required to collate legacies or donations made to her by the husband so as to increase the *legitim*, nor, on the other hand, are the children obliged to collate their provisions with the widow, in order to increase her *jus relicte*. *Stair, B. iii. tit. 8, §§ 45, 46*; *More's Notes*, cclxxiii.; *Ersk. B. iii. tit. 9, §§ 24 and 25*; *Bell's Princ. § 1588*; [*M'Laren on Wills, § 315*; *Fraser on Husband and Wife, ii. 1033*.] See *Legitim: Jus Relictæ*.

COLLATIO BONORUM; in the Roman law, was somewhat different from collation in our law. Any one of the *sui hæredes* who wished to participate in the succession, was obliged to collate or bring into the common stock, to be divided among the several heirs, or imputed as part of his own share, whatever he had received by gift out of the estate, during the defunct's lifetime.

Collatio Bonorum, in English law, is where a portion, or money advanced by the father to a son or daughter, is brought into *hotch-pot*, in order to have an equal distributory share of his personal estate at his death. *Tomlins' Dict. h. t.*

COLLATION OF BENEFICES. Collation was a form of introducing a parochial minister to his church, during the times of Episcopacy. It was done by writing under the hand of the bishop, approving of the person presented, and conferring on him the vacant benefice, and requiring the inferior clergy to induct him to the church. [*Ersk. B. i. tit. 5, § 19*.]

COLLECTIONS IN CHURCHES. By proclamation, 29 Aug. 1693, one-half of the sums collected at parish churches, and of the dues received by the kirk-session, shall be paid over into the general fund for the support of the poor. The other half has generally been applied for the temporary relief of sudden distress. [See *Heritors of Neilston*, 1 June 1831, 9 S. 659; *L. Panmure*, 30 May 1839, 1 D. 840. By the Poor Law Act (8 & 9 Vict. c. 83), § 54, in all parishes in which it has been agreed that an assessment should be levied for the relief of the poor, all monies arising from the ordinary church collections are declared to belong to and be at the disposal of the kirk-session of each parish, but to be applied to the same purposes as those to

[which they were legally applicable when the act was passed. The heritors have the same right as before to examine the accounts of the kirk-session, and to enquire into the application of the funds; and the kirk-session must report annually to the Board of Supervision thereanent; *ib.*] Collections at dissenting meeting-houses are entirely at the disposal of the congregation. [See *Dunlop's Par. Law*, 399, 400; *Duncan's Par. & Eccl. Law*, 672 *et seq.*; *Mair's Church Laws*, 63.]

COLLEGE OF JUSTICE. The term college, which, in general, is applied to a society of learned men associated for scientific purposes, has been applied to the supreme civil court, composed of the Lords of Council and Session, and of the members and officers of court. This court receives the title of College of Justice in the act 1537, c. 36, and the judges of it that of Senators, 1540, c. 93. The judges consisted originally of seven churchmen and seven laymen, with a president, the Abbot of Cambuskenneth being the first president; and, from the act 1579, c. 93, it appears that, at the institution of the court, the president must have been a clergyman. By the Treaty of Union, art. 19, no person can be appointed a judge of this court who has not served as an advocate or principal clerk of session for five years, or as a writer to the signet for ten; and in the case of a writer to the signet, he must undergo the ordinary trials on the Roman law, and be found qualified two years before he can be named. The judge must be at the least twenty-five years of age. The admission is made by the judges, in virtue of a letter directed to them by the Sovereign, requiring them to try the qualifications of the nominee, and to admit him. The form of trial is laid down by A.S. 31 July 1674. It consists in the presentee, or Lord Probationer as he is called, hearing, and reporting, and delivering an opinion on, certain of the causes depending in court. And although this injunction to make trial of his qualifications seems to imply a power of rejecting him, yet the court are deprived of the power of rejecting the presentee by 10 Geo. I. c. 19. It was anciently the practice to name extraordinary Lords, whose number was increased to no fewer than seven or eight. But James VI., by a letter recorded in the Books of Sederunt, 28 March 1617, promised to restrict himself to the nomination of only three or four, in terms of the act 1537; and it is not till the 10 Geo. I. c. 19, that the power of naming these extraordinary Lords was

renounced. The proper number of judges, until the stat. 1 Will. IV. c. 69, was fifteen, and is now thirteen; *Ersk. B. i. tit. 3, § 12 et seq.* See *Session. [Judges.]* In addition to the judges, the College of Justice, by A.S. 23 Feb. 1687, includes the advocates, clerks of session, clerks of the bills, writers to the signet, deputies of the clerks of session who serve in the Outer House, their substitutes, one in each clerk's office, the depute-clerks of the bills, the directors of Chancery [now only one], their depute and two clerks, the writer to the privy-seal and his depute, the clerks to the general registers of sasines and hornings, the macers of the Court of Session, the keeper of the minute-book, the keeper of the rolls of the Inner and Outer House, one clerk to each of the judges, one clerk to each advocate, the extractors in the Register Office, and the keeper of the Advocates' Library. The barons and members of the Scotch Court of Exchequer were members of the College of Justice by 6 Anne, c. 26, § 11; the Lords Commissioners and officers of the Jury Court by 59 Geo. III. c. 35, § 36; and the keeper of the judicial records of the Court of Session, the assistants to the principal clerks of session, the auditor of the Court of Session, and the collector of the fee fund [now abolished,] are, by 1 & 2 Geo. IV., *ex officio* members of the College of Justice. [The Solicitors of the Supreme Courts are not by statute or Act of Sederunt members of the College of Justice, but they have been generally recognised as such; *Bruce*, 24 Jan. 1833, 11 S. 313.] The privileges of the College of Justice, according to several acts of the Scotch Parliament, consisted in a general immunity from taxation; [and in the right to sue and be sued exclusively before the Court of Session. See 1532, c. 68; 1555, c. 39; 1587, c. 42; 1661, c. 23; 1672, c. 16, § 16. The immunity from taxation extended practically only to local assessments; and was defined in 1687, by decree in an action between the advocates and the Town of Edinburgh (see M. 2402), to consist of an exemption (1) from watching and warding, (2) from payment of the annuity for ministers' stipends, and (3) from all the city imposts on goods carried to and from the city. This privilege has now altogether ceased to exist, either by express abolition (as by 8 & 9 Vict. c. 83, § 50, with regard to poor-law assessments), or by desuetude. The privilege as to actions also no longer exists; the jurisdiction of the sheriff court having been extended to members of the College of Justice

[in small-debt causes by 1 & 2 Vict. c. 41, § 35, and in all other causes by 16 & 17 Vict. c. 80, § 48; and their peculiar right of suing in the Court of Session having been taken away by 13 & 14 Vict. c. 36, § 17.] See *Stair*, B. ii. tit. 3, § 3; B. iv. tit. 1, § 21; *Ross's Lect.* i. 361, 423, 542; [*Ersk.* B. i. tit. 3, § 12; *Shand's Prac.* i. 39, 133; *Mackay's Prac.* i. 84. See *Buying of Pleas.*]

COLLEGIATE CHURCH; was a church founded by a person of property, at his private expense, in which certain canons or prebendaries officiated under a head *propositus* or provost. *Ersk.* B. i. tit. 5, § 3.

COLLIERS AND SALTERS. The workmen at coal-pits and salt-works in Scotland were formerly in a state of servitude, similar to that of the *adscripti* of the Romans, and the ancient *nativi*, or bondmen of this country. Colliers and salters were bound by the law itself, independent of paction, merely by entering to a coal-work or salt-work, to perpetual service there; and in case of sale or alienation of the ground on which such works were situated, the right to the service of these workmen passed to the purchaser as *fundo annexum*, without any express grant. But by 15 Geo. III. c. 28, it was declared that, after 1 July 1775, they should be no otherwise bound than as other workmen, and the benefit of the act 1701 was extended to them. [See *Liberation.*] The object of this statute, however, having been in a great measure defeated, partly by the nature of its provisions, and partly by transactions between the workmen and their masters, by which their bondage was continued, it was provided by 39 Geo. III. c. 56, that all the colliers in Scotland who were bound colliers at the time of the act 15 Geo. III. should be free from their servitude; and all action is denied to coalmasters for money advanced to colliers prior to, or during their service, with a view to their engagement at the works, except only sums advanced during their service for the support of their families in case of sickness, for which advances the coalmaster may retain from their weekly wages one-twelfth of the sums so advanced, till the principal and interest be repaid; and the master has action for the balance in case the term of service end before the advance is repaid. Persons seducing, or attempting to seduce colliers from Great Britain, are to be punished in the same manner as persons seducing manufacturers. In questions under the act no coalmaster or lessee of coals can act as a justice. *Ersk.* B. i. tit. 7, § 61; *Hunter's Landlord and Tenant*, i. 271.

COLLISION OF SHIPS; the collision of one vessel against another, whereby the ship or cargo suffers damage. The question, whether the collision has been caused by accident, or by design, or through negligence, necessarily depends upon the circumstances under which it happens; but where it is clear that a fault has been committed, the owners of the vessel in fault must answer for the damage resulting from it, at least to the value of the ship. [See *Mills*, 13 App. Ca. 1.] Where the loss or damage arises from pure accident, or the act of God, as it is termed, the rule is, that the loss falls where it lights. Where there may have been a fault, but it is impossible to say to whom the blame attaches, the case seems to be considered as one of average loss, or contribution, in which both ships are to be taken into account, so as to divide the loss equally; although there is some difference amongst authorities as to whether the ships are to contribute equally, or in proportion to their respective values. But however that question may be determined, it rather appears to be fixed that the contribution is confined exclusively to the ships, and that no share either of the benefit or of the loss arising from the contribution falls upon the cargo. In questions between the owners of the ship and the owners of the cargo, if the damage has arisen from the fault of the master or mariners, the shippers are entitled to claim indemnification from the master and owners. On the other hand, if the loss be accidental, it is a mere peril of the sea, which forms an exception in the charter-party, and must fall where it lights. In like manner, if the injury to the cargo has arisen from an inscrutable accident, which, as between the ships, gives rise to a claim for contribution, this also, in so far as the cargo is concerned, is a mere peril of the sea within the exception of the charter-party. [When damage arises from the fault of both vessels (though more of one than of the other), the loss is equally divided; *Boettcher*, 17 Jan. 1861, 23 D. 322. But no owner or master of a vessel is liable for damage occasioned by the fault or incapacity of any qualified pilot acting in charge of the ship within any district where pilotage is compulsory; 17 & 18 Vict. c. 104, § 388. See *Clyde Navigation Trs.* 23 May 1876, 3 R. (H.L.) 44. And where the owner is free from actual fault, his liability is limited, in respect of loss of life or personal injury (either alone or together with damage to ships and goods), to £15 per ton of the ship's tonnage; and in respect of damage to ships, goods, &c., to £8 per ton; 25 & 26 Vict.

[c. 63, § 54. See *Flensburg Shipping Co.* 18 July 1871, 9 Macph. 1011; *M'Arthur*, 15 June 1878, 5 R. 936. If the regulations for preventing collisions (as to which see *Shipping Law*) are infringed, the party infringing is deemed to be at fault, unless special circumstances necessitated a departure from the regulations; *Little*, 16 Nov. 1881, 9 R. 118; "*Hilda*," 7 Nov. 1884, 12 R. 76; "*Thames*," 20 Nov. 1884, 12 R. (H.L.) 1. In case of collision, it is the duty of the master of each vessel to stay by the other vessel, and give all possible assistance; failing which, he is deemed responsible for the collision, in absence of contrary proof; 36 & 37 Vict. c. 85, § 16. See *Bell's Com.* i. 625; *Bell's Princ.* § 553; *Guthrie Smith on Damages*, 160; *Abbott on Shipping*, 573; *MacLachlan on Shipping*, 303; *Marsden on Collisions*.]

COLLISTRIDIVM; the "jouis" or collar round the neck, with which a delinquent is bound to the pillory or stocks. *Skene, h. t.*

COLLUSION; is a deceitful and fraudulent agreement between two or more persons to defraud a third party of his right. When proved, it has the effect, at common law, of voiding any transaction in which it occurs. Arrangements between bankrupts and their creditors, on the eve of bankruptcy, present the most frequent instances of collusion; and as the proof in such cases is necessarily difficult, our bankrupt statutes have created certain legal presumptions of collusion. Such are the provisions of 1621, c. 18, as to alienations to conjunct and confident persons, and of 1696, c. 5, regarding securities granted within sixty days of bankruptcy, by which presumptions of collusion and fraud are established. Independently, however, of those statutes, wherever collusion can be proved, or where the transaction is of such a nature as to imply fraud or collusion, it is reducible at common law. Such are conveyances *omnium bonorum* to the prejudice of creditors, or such conveyances as necessarily render the debtor insolvent; payment by anticipation to a favoured creditor on the approach of bankruptcy; securities given on the approach of bankruptcy, accompanied with concealment or false appearances; arrangements for granting preferences by circuitous transactions or otherwise. These, and all similar transactions in which there is either direct evidence of collusion, or conclusive real evidence in the nature of the transaction itself, are reducible at common law, although they should not fall within the letter of

any of the bankrupt statutes. See *Stair*, B. i. tit. 9, § 12; *Ersk.* B. iii. tit. 1, § 16; B. iv. tit. 1, § 27; *Bank.* B. i. tit. 10, § 72; *Bell's Com.* ii. 226; *Bell's Princ.* § 1316. See *Fraud.* [*Divorce. Bankruptcy. Insolvency. Sequestration.*]

COLPINDACH; a young beast or cow of the age of one or two years, now called a quey. According to Skene it is an Irish word, and properly signifies a foot-follower. *Skene, h. t.*

COLUMBARIA. See *Dovecot*.

COMBAT. Single combat was anciently admitted as a legal mode of proof, both in criminal and civil actions; and this kind of evidence appears to have been received as far down as the reign of Robert III. in questions regarding capital crimes. [It was only abolished in England by 59 Geo. III. c. 46.] *Ersk.* B. iv. tit. 2, § 2; *Ross's Lect.* i. 121; ii. 136. See *Duelling*.

COMBINATION. [See *Workmen. Trade Union.*]

COMEDIAN; an actor or actress. The salary of a comedian is held to be alimentary, and cannot be attached, except in so far as it exceeds what is necessary for subsistence; although the debtor may be incarcerated for the debt, and thus forced to bargain with his creditors; *Bell's Com.* i. 127. It is not hamesucken to assault a comedian in a play-house; *Hume*, i. 313. [See *Chamberlain*.]

COMES; or *Earl*, was an ancient officer with territorial jurisdiction; *Ersk.* B. i. tit. 4, § 1.

COMITAS; as used in international law, signifies the courtesy of nations, by which effect is given in one country to the laws and institutions of another, in questions arising between the natives of both. In consequence of the intimate connections and relations of small states with each other on the Continent, such questions are there frequent; and many treatises have been written on the *Conflictus Legum*, and the *Comitas*, by which they are reconciled. See *Foreign*.

[COMMANDITE]. Partnership *en commandite*, or limited partnership, though not recognised in Scotland or England, is a well-known feature in most of the Continental and American systems of law. Such a partnership has been defined as a firm containing one or more limited partners; and a limited partner is a partner whose liability for the debts and obligations of the firm is limited to a certain amount which he has contributed or undertaken to contribute to the partnership property; *Pollock*

[on *Partnership*, 181. It is essential to *commandite* partnership that at least one general or ordinary partner, whose liability for the partnership debts is unlimited, be conjoined with one or more partners whose liability is limited to the amount of their contributions. The position of a *commanditaire*, who is a real, though limited, partner, is distinct from that of a person advancing money as a creditor only, whose immunity from partnership responsibility is secured by the Partnership Act of 1865; see *Partnership*. *Commandite* is from *commenda*, i.e., "societas mercatorum, qua uni sociorum tota negotiationis cura commendatur certis conditionibus;" *Ducange*. See *Kent's Com.* iii. 35; *Troubat on Limited Partnership* (Philadelphia); *Code de Commerce*, B. i. tit. 3, art. 23; *Allgemeines Deutsches Handelsgesetzbuch*, B. ii. tit. 2.]

COMMENDATOR. During Popery the commendator was the person by whom the fruits of a benefice were levied during a vacancy. He was properly a steward or trustee; but the Pope, who was entitled to grant the higher benefices *in commendam*, abused the power, and gave them to commendators for their lives. This abuse led to a prohibition of all commendams, excepting those granted by bishops for a term not exceeding six months. 1466, c. 3; *Ersk.* B. i. tit. 5, § 4.

COMMISSARIES. The commissaries or officials were anciently the delegates of the clergy, for judging in those questions which fell within the ecclesiastical jurisdiction. By the acts 1560 and 1567, c. 2, all jurisdiction depending on Papal authority was abolished. But the Commissary Court of Edinburgh, consisting of four commissaries, was erected by Queen Mary, under a grant dated 8 Feb. 1563. The Commissary Court of Edinburgh had a double jurisdiction,—one *diocesan*, which it exercised over the special territory contained in the grant, viz., the counties of Edinburgh, Haddington, Linlithgow, Peebles, and a part of Stirlingshire (although, in practice, his jurisdiction was confined to the three Lothians); another *universal*, by which it confirmed the testaments of all who died in foreign countries, or who died in Scotland without a fixed domicile, and reviewed the decrees of inferior commissaries. There was but one commissary in each diocese until the erection of the Commissary Court of Edinburgh, after which inferior commissaries were established, under a commission from James VI., in most of the principal towns in Scotland. The Commissary Court

of Edinburgh is now abolished (see *infra*); but while it existed, it had, as regarded inferior commissaries, a privative jurisdiction in declarators of marriage, actions of adherence or divorce, executions of testaments, and declarators of bastardy during the bastard's life; and a cumulative jurisdiction in actions of aliment against husbands, and of slander and defamation,—actions for sealing up repositories,—actions for verbal injuries arising from hasty words,—the authenticating of tutorial and curatorial inventories, and civil actions in absence to the extent of £40 Scots, and to a greater amount, if the jurisdiction was prorogated by consent of parties. By 49 Geo. III. c. 42, § 2, the registration of probative writs, and of protests on bills, was taken from the commissaries. The number of inferior commissariots was formerly twenty-three; but by 4 Geo. IV. c. 97, they were abolished, and their jurisdiction vested in the sheriffs. [By 1 Will. IV. c. 69, and 6 & 7 Will. IV. c. 41, all separate commissary courts were abolished, and their jurisdiction in consistorial actions transferred to the Court of Session; see also 13 & 14 Vict. c. 36, § 16; 21 & 22 Vict. c. 56; 24 & 25 Vict. c. 86, § 13; A.S. 19 March 1859. The sheriffs, acting as commissaries, retained jurisdiction in the confirmation of testaments; but by 39 & 40 Vict. c. 70, § 35, the commissary courts of the sheriff were abolished, and their remaining jurisdiction transferred to the sheriffs as such. The same act provides for the abolition of the office of commissary clerk in every county except Edinburgh, where it is retained on account of special duties being assigned to it; § 38. See *Ersk.* B. i. tit. 5, § 26; *Stair*, B. iv. tit. 1, § 36; *Bell's Com.* ii. 77; *Bell's Princ.* § 1888; [*Fraser on Husband and Wife*, i. 14; *Shand's Prac.* i. 420; *Mackay's Prac.* i. 190; *M'Glashan's Sher. Court Prac.* § 279; *Dove Wilson's Sher. Court Prac.* 46, 539; *Alexander's Prac. of Commissary Courts*; *Currie's Confirmation of Executors*, 1. See *Consistorial Actions*.]

COMMISSION. [The authority given by a principal to his agent to contract on his behalf. See *Mandate*. The word is also used to denote the remuneration paid to an agent for his services; which is determined either by contract, usage, or enactment. See *White*, 11 July 1876, 3 R. 1011; *M'Caig*, 19 March 1889, 5 Sher. Court Rep. 229; also *Chitty on Contract*, 516; *Smith's Merc. Law*, 117. See *Principal and Agent*. *Factor*. *Del Credere*.]

COMMISSION IN THE ARMY. The acceptance of a commission in the army by a member of Parliament, not then holding one, vacates his seat, and that although he had formerly held a commission which he resigned. But acceptance of a new commission in the army or navy by a member already holding one (*e.g.*, on promotion), does not disqualify from being elected, sitting, or voting. The acceptance of a commission in the militia by one not previously in the service, does not disqualify; [*May's Parl. Prac.* 706. By royal warrant, dated 20 July 1871, all regulations regulating or authorising the purchase, sale, or exchange of any commissions in Her Majesty's forces, were cancelled. The prices obtainable, on retirement, by officers holding saleable commissions, were regulated by 34 & 35 Vict. c. 86. By 38 Vict. c. 16, the Queen may from time to time, by regulation, authorise exchanges made by officers in the regular forces from one regiment or corps to another. See *Army*.]

**COMMISSION FOR TAKING PROOF,
[OR FOR RECOVERY OF WRITINGS.]**

1. *For Taking Proof.*—In the Court of Session, as well as in inferior courts, parole proof may, [in certain circumstances,] be taken under a commission granted by the court. The commissioner is delegated by the court to take the oaths, and to report to the court the depositions of the witnesses; and the judicial warrant, whereby the power is conferred on the commissioner, is called a commission. The commission is invariably accompanied by a *diligence*, which is in like manner a judicial warrant, under which the witnesses are cited, and may be compelled to attend the commissioner for examination. [See *Diligence*. Proof before a commissioner was at one time the common mode of taking evidence in civil causes; but the introduction of jury trials, in 1815, made an important change on the former practice. Proof by commission continued, however, to be used in causes other than those enumerated by the Judicature Act, 1825, as appropriate to be tried by jury; and by § 49 of the Court of Session Act, 1850, the court might allow proof on commission even in such enumerated causes, where the action was not one for libel or for nuisance, or was not properly and in substance an action of damages. But by the Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86, § 13), proof in consistorial causes was directed to be taken before a judge of the

[Court of Session. And by the Evidence Act, 1866 (29 & 30 Vict. c. 112), § 1, proof by commission was made incompetent in all causes, with certain exceptions, and proof before a judge was substituted. The exceptions are contained in § 2, which provides "that it shall be competent to the judges of either Division of the Court or to the Lord Ordinary to grant commission to any person competent to take and report in writing the depositions of havers (see *infra*); and also upon special cause shown, or with consent of both parties, to grant commission to take the evidence in any cause in which commission to take evidence may, according to the existing law and practice, be granted (*i.e.*, in any cause not a consistorial cause, nor a cause appropriated to jury trial); and also to grant such commission to take and report in writing according to the existing practice the evidence of any witness who is resident beyond the jurisdiction of the court, or who, by reason of age, infirmity, or sickness, is unable to attend the diet of proof; provided that nothing herein contained shall affect the existing practice in regard to granting commission for the examination of aged and infirm witnesses to take their evidence to lie *in retentis* before a proof has been allowed." Proof by commission is incompetent, even where both parties consent, in causes appropriated to jury trial by the Court of Session Act, 1850, § 49; *Nicol*, 19 Jan. 1872, 10 Macph. 351. With regard to proof to lie *in retentis*, the court has an inherent power, at common law, to order the examination of a witness, if there is danger, from age or infirmity, of his testimony being lost; and this power was conferred on the Lord Ordinary on the Bills in vacation, by A.S. 11 July 1828, § 117. The grounds for such examination, as stated in the A.S., are (1) "great age (not under seventy years)," (2) "severe indisposition," or (3) "intending to go abroad and to remain abroad for a considerable period." The last of these grounds is mentioned in *Mackay's Prac.* (ii. 78) as still existing, and probably it was not intended to be affected by the Evidence Act; but it is noticeable that the saving clause in § 2 (quoted *supra*) mentions only "aged and infirm witnesses." In certain circumstances the deposition of a party to a cause may be taken to lie *in retentis*, when his presence in this country would cause serious inconvenience; but there is no absolute rule on this point; see *Samson & Co.* 13 July 1886, 13 R. 1154.

[The commission for this purpose is granted *in initio litis*, at any time after execution of the summons, but before issues are adjusted, or proof fixed. The depositions lie *in retentis*, and cannot (except of consent) be used at the trial, unless where the death of the witness, or his absence from the country, is proved; *Watson*, 7 March 1837, 15 S. 753; *Boettcher*, 17 Jan. 1861, 23 D. 322. After issues have been adjusted, or proof before a judge fixed, the witnesses must be examined on adjusted interrogatories (unless these are dispensed with) in terms of A.S. 16 Feb. 1841, § 17. That section directs that, "when it shall be made out upon oath, to the satisfaction of the court, that a witness resides beyond the reach of the process of the court, and is not likely to come within its authority before the day of trial, or cannot attend on account of age, or permanent infirmity, or is labouring under severe illness, which renders it doubtful whether his evidence may not be lost, or is a seafaring man, or is obliged to go into foreign parts, or shall be abroad, and not likely to return before the day of trial, it shall be competent to examine such witness by commission, on interrogatories to be settled by the parties, and approved of by one of the principal clerks of session, or record clerk; and it being established at the trial, to the satisfaction of the court, by affidavit, or by oath in open court, that such witness is dead, or cannot attend owing to absence, age, or permanent infirmity, it shall be competent to use at the trial the evidence so taken, subject to all legal objections to its admissibility." This provision applies to proofs before a judge, as well as to jury trials; *McLean & Hope*, 9 March 1867, 5 Macph. 579. In practice, it is usual to dispense with interrogatories, especially in proofs. With regard to the provision in § 2 of the Evidence Act, that, on special cause shown, the whole evidence in a cause may be taken on commission, see *Fairholme*, 16 Dec. 1856, 19 D. 178; *Watt*, 5 June 1857, 19 D. 787; *Hogg*, 9 June 1864, 2 Macph. 1158. With regard to commissions in the sheriff court, the taking of proof to lie *in retentis* is regulated by A.S. 10 July 1839, § 73; and the taking of evidence after a diet of proof has been fixed, by 16 & 17 Vict. c. 80, § 10. See *Dove Wilson's Sher. Court Prac.* 281. The report to be given by the commissioner to the court narrates the procedure at the examination of witnesses, and contains their depositions. Forms of reports, applicable to the examination both

[of witnesses and havers, are printed in the Appx. to *Dickson on Evidence*.] The interrogatories are put by the counsel or agent of the parties, under the control of the commissioner; and the answers, as given by the witness, are taken down in writing by the clerk to the commission. If there be any objection to the competency of the questions, or to the admissibility of the witness, the objection is stated to the commissioner, who either disposes of it immediately, or reserves it for the opinion of the court; his judgment, either repelling or sustaining the objection, being subject of course to the review of the court. Those objections, with the whole pleadings upon them before the commissioner, were formerly in use to be engrossed *verbatim* in the report of the proof; but the A.S. 11 March 1800, in order to put an end to this practice, directs that, in proofs taken on commission from the Court of Session, the commissioner shall exercise his own judgment in excluding from the report of the proof all unnecessary pleading or altercation about the competency of questions, or the admissibility of witnesses, and that he shall take separate notes of such objections as he thinks of importance, for the information of the court. He is also directed to take a note of any peculiarity in the witness's manner of giving his testimony. The examination of the witness being finished, the deposition is read over to him, so as to give him an opportunity of correcting any error which may have been fallen into in taking it down; and it is closed by a declaration that the whole of it is truth, as the deponent shall answer to God. The deposition is authenticated by the subscriptions of the deponent, the commissioner, and the clerk to the commission. If the deponent cannot write, that circumstance is mentioned in the deposition; and the subscriptions of the commissioner and the clerk are sufficient. [As to taking evidence by commission abroad, see 22 Vict. c. 20; 48 & 49 Vict. c. 74.]

[2. *For Recovery of Writings*.—Commission and diligence are also granted for recovery of writings; see 1672, c. 16, § 25; and the procedure described above in reference to the examination of witnesses on commission, applies also, for the most part, to the examination of *havers*, or holders of documents.] The haver must either exhibit, upon oath, the writing called for, or depone that he has it not, and has not had it since he was cited as a haver, and that he has not fraudulently put it away, and has

no knowledge or suspicion where it is. The user of the diligence, if dissatisfied with the haver's deposition in general terms, may, under A.S. 22 Feb. 1688, put special and pertinent interrogatories, which the haver is bound to answer. [If the haver depones that he has had the document, but has put away or destroyed it, he may be asked when, where, and why he did so; see *Cullen*, 22 Jan. 1863, 1 Macph. 284; *Gordon*, 13 June 1865, 3 Macph. 938.] If the writing be in the haver's possession, he is bound to produce it, whether, in his opinion, it be pertinent to the cause or not; but if he have it not, no questions can competently be put *in modum probationis*, under an incident diligence, as to the haver's recollection of the contents or import of the writing; far less is it competent to put any question which may bring out an answer connected with the merits of the cause. The production of the writing called for, and, failing that, the means of recovering it, or tracing it into the hands of others, are the only legitimate purposes of an incident diligence against havers. A diligence of this kind may be used not only against third parties, but also against the principal defender in the cause, who may be thus compelled to exhibit such writings as may verify the pursuer's plea—the pursuer being under a reciprocal obligation, when required, to produce all writings in his hands called for by the defender in support of his defence. In either case, however, the writing which the party requires from his adversary must be particularly specified and described; for no party is bound to make an unreserved production of all the writings in his possession, on a general requisition by the opposite party. The maxim, *Nemo tenetur edere instrumenta contra se*, applies to such a case, and is at the same time qualified by the general doctrine above stated. [See *Morton*, 6 June 1844, 6 D. 1105. The party applying for commission and diligence against havers must lodge a specification, or articulate description, of the documents, or classes of documents, sought to be recovered. The Lord Ordinary may take the depositions of havers himself; but this course, in ordinary circumstances, is not favourably regarded; see *Gray*, 10 July 1874, 1 R. 1138. A doubt, arising from the terms of § 13 of the Conjugal Rights Act, 1861, as to the power of a Lord Ordinary to grant commission to examine havers resident in Scotland in consistorial causes, was removed by § 100 of the Court

[of Session Act, 1868. Diligence against havers is not generally granted before the record is closed, except upon cause shown; *M'Ilquham & Co.* 20 Dec. 1850, 13 D. 403; *Greig*, 11 Dec. 1855, 18 D. 193. After the record is closed, diligence is generally granted for the recovery of all documents bearing on the issue of the case, the question of their admissibility in evidence being reserved. But when the documents are plainly inadmissible, diligence will not be granted; *Livingstone*, 28 June 1860, 22 D. 1333. In *Maitland*, 20 March 1885, 12 R. 899, diligence for recovery of documents in custody of foreign courts was refused; the proper course being to cite the custodiers as witnesses.

[See *Stair*, B. iv. tit. 41, § 7; *More's Notes*, cccxcv.; *Ersk.* B. iv. tit. 1, § 52; tit. 2, § 31; *Bank.* B. iv. tit. 30, § 27; *Ivory's Forms of Process*, ii. 339; *Macfarlane's Jury Prac.* 88, 186; *Dickson on Evidence*, ii. §§ 1361, 1727, 1742, 1799; *Kirkpatrick*, §§ 208, 214; *Shand's Prac.* i. 348, 365; *Mackay's Prac.* i. 467; ii. 76; *Dove Wilson's Sher. Court Prac.* 162, 277. See *Evidence*.]

COMMISSIONER. The Lord High Commissioner to the General Assembly of the Church of Scotland represents the Sovereign in that Assembly. The Church of Scotland claims the right of meeting in a General Assembly, as well as in inferior courts, by its own appointment; but it also recognises the right of the Sovereign to call synods, and to be present at them. According to Erskine, the royal sanction seems to be necessary to the meeting of the Assembly, and the commissioner asserts the right of dissolving it. But during the last century and a half no conflict in the exercise of those rights has occurred. In the years 1638 and 1692, however, the commissioner having dissolved the Assembly against their wish, and without fixing a day for the meeting of another, the Assembly continued its sittings, and appointed the day when the next Assembly should be held. In the years 1746 and 1760, when, by accident, the King's commissioner had not arrived, the Assembly met on the day appointed, and elected a moderator, but did not proceed to business until the commissioner arrived. In 1798 the commission was sent down, and laid on the table on the first session of the Assembly; but the commissioner did not make his appearance until the fourth session. When, from temporary indisposition, or any other cause, the commissioner is unable to attend, the

business of the Assembly proceeds without him; the former practice of resolving into a committee of the whole house, on these occasions, being now considered unnecessary. *Ersk. B. i. tit. 5, § 6; Hill's Prac. 87. See Church Judicatories.*

COMMISSIONERS; private factors. A commissioner or factor is a person who holds a power from his constituent to manage his affairs, either generally or in a particular department, with full authority to act as he himself might do if present. Extensive land estates are generally placed under the management of a commissioner or commissioners. See *Factor*.

COMMISSIONERS OF JUSTICIARY.

See *Justiciary Court*.

COMMISSIONERS ON A SEQUESTERED ESTATE. [By the Bankruptcy Act (19 & 20 Vict. c. 79, § 75), it is enacted that at the meeting for election of a trustee, the creditors present, or their mandatories, shall, after election of the trustee, elect three commissioners (if there be so many creditors who have claimed), who shall be either creditors or mandatories of creditors, and the like proceedings shall take place in regard to their election as is provided in regard to election of a trustee, except that they shall not be bound to find security. No person may be a commissioner who is disqualified from being a trustee. A commissioner may be removed, and another elected in his place, by a majority of the creditors at any meeting duly called for that purpose; § 76. It is the duty of the commissioners to advise with the trustee, as to the management, recovery, and realisation of the estate, to superintend his proceedings, to concur with him in submissions and transactions, and to decide as to paying or postponing payment of a dividend; §§ 82, 85. They may assemble at any time to ascertain the situation of the bankrupt estate, and any one of them may make such report as he thinks proper to a general meeting of creditors; § 98. See *Bell's Com. ii. 320; Goudy on Bankruptcy, 219; Murdoch on Bankruptcy, 98, 283. See Sequestration.*]

COMMISSIONERS OF SUPPLY. The Commissioners of Supply are named in the acts imposing the land-tax, and are authorised to act within their respective counties. [They were first appointed by the Act of Convention of 1667. In order to qualify them to act, they required formerly to be possessed of £100 Scots of yearly valued rent, in property, superiority, or liferent. But by the Valuation Act,

[1854 (17 & 18 Vict. c. 91, § 19), the qualification is "the being named as an *ex officio* commissioner of supply in any act of supply, or the being proprietor, or the husband of any proprietor, infert in liferent, or in fee not burdened with a liferent, in lands and heritages within such county, of the yearly rent or value, in terms of this act, of at least £100, or the being eldest son and heir-apparent of a proprietor infert in fee, not burdened with a liferent, in lands and heritages within such county of the yearly rent or value, in terms of this act, of £400; and the factor of any proprietor or proprietors infert, either in liferent or in fee unburdened as aforesaid, in lands and heritages within such county of the yearly rent or value, in terms of this act, of £800, shall be qualified to act as a commissioner of supply in the absence of such proprietor or proprietors; provided always that, with reference only to the qualification of commissioners of supply under this act, the yearly rent or value of houses and other buildings, not being farm-houses or offices or other agricultural buildings, shall be estimated at only one-half of their actual yearly rent or value in terms of this act." A person entered more than once on the roll, as proprietor and as factor, or as factor for more than one proprietor, is only entitled to one vote; *Craigie, 18 Oct. 1879, 7 R. 52. See also Walker, 28 Jan. 1870, 8 Macph. 443. By the Commissioners of Supply Acts of 1856 and 1857 (19 & 20 Vict. c. 93, and 20 Vict. c. 11), provision is made for all qualified persons being constituted commissioners, without being named in an act of supply; for the lodging of claims by persons desirous of being placed on the list, and of objections to such claims; and for the disposal of such claims and objections by the commissioners of supply, with appeal to the Lord Ordinary on the Bills, whose judgment is final. The annual statutory meeting of commissioners was always held on 30th April; but by 28 Vict. c. 38, the day of meeting may be altered, on requisition by six commissioners, to any day between 1st April and 12th May. By 31 & 32 Vict. c. 82, § 8, the commissioners are declared to be an incorporation, and as such they may hold property, and may sue and be sued. By the same act, in lieu of rogue money, which was thereby abolished, the commissioners of supply were authorised to levy a "county general assessment," to be applied to the purposes therein specified. In *Wakefield, 29 Nov. 1878, 6 R. 259, it**

[was held to be *ultra vires* of the commissioners to apply this county general assessment in payment of the expenses of their opposition to a Roads and Bridges Bill in Parliament. The valuation roll of every county is annually made up by the Commissioners of Supply, for which purpose they are empowered to appoint assessors; 17 & 18 Vict. c. 91, §§ 1-4. They are directed annually to hold a court for hearing appeals against the valuations made by their assessors; §§ 8-10. See *Valuation of Lands*. See *Ersk. B. i. tit. 4, § 31*; *Bell's Princ.* §§ 1127-9; *Barclay's Digest*; *Rankine on Land-Ownership*, 177. See *Land-Tax*.]

COMMISSIONERS OF TEINDS. See *Teind Court*.

COMMISSIONERS OF WOODS AND FORESTS. See *Woods and Forests*.]

COMMISSORIUM PACTUM. See *Pactum legis Commissoriae*.

COMMITMENT FOR TRIAL. After the declaration of an accused person, and the precognition have been taken, if there be reasonable grounds of suspicion against him, the magistrate grants warrant to commit him to prison, to abide the result of his trial for the crime charged against him. This warrant, by 1701, c. 6, must be in writing, and duly signed. It must specify distinctly the particular offence charged; and it must proceed on a signed information. [A petition for warrant to commit may set forth the charge in the simplified form now authorised for indictments; Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35, § 16).] The officer executing the warrant, before imprisonment, must serve the accused party personally with a copy of the warrant. The ordinary practice is, to subjoin the warrant to the information, and to serve the prisoner with a full copy of both. Commitment for trial, on a warrant defective in the statutory requisites, exposes the granter, the officer executing it, and the keeper of the prison, to [an action of damages for] wrongous imprisonment. But inferior magistrates, justices of the peace, &c., are empowered by the act 1701, to take security for good behaviour, and to keep the peace, as they were in use to do before the passing of the act; and also to commit for trial for indignities done to themselves, or to imprison vagabonds, &c.; or for riots, batteries, pickeries, &c.; the persons so committed, however, having the benefit of the statute, in so far as concerns bail and the expediting of the trial. It is also provided by the statute, that the Privy Council, or any five

of them, in case of imminent or actual invasion, rebellion, or insurrection, may commit, upon suspicion of accession thereto, without being liable to the penalties of the statute; the person so committed having his relief for trial or liberation under this act; 1701, c. 6. See *Hume*, ii. 84; [*Alison's Prac.* 151; *Macdonald*, 263. See *Criminal Prosecution. Imprisonment. Bail*.]

COMMITTEE; are those to whom the consideration or management of any matter is referred by some court or assembly to whom it belongs. The powers of a committee must, of course, depend upon the particular authority given to them by their constituents. [See *Delegation*. In England, the committee of a lunatic is a person to whom the custody of his person or estate is committed by the Lord Chancellor. *Sweet's Law Dict.*]

COMMIXTION; is a species of specification, including under it *commixtio* properly so called, which is the mingling of solids; and *confusio*, which is the mixing of liquids. It may be proper to distinguish between that commixtion which produces a new subject, and that which mingles without altering the nature of the subjects, as in the case of two parcels of grain, or the mixing of two quantities of wine. (1) Where, from the commixtion of two or more substances of different kinds a new substance is produced, which does not admit of the materials being restored to their original state, the person by whom the new property has been made becomes the sole proprietor, and he must consequently be liable to the owners of the materials for their value. (2) Where it is a mixture of the same substances, and no new one is formed, the original right of property remains; and whether the mixture has happened through accident, or has been made by design, the right of property in the materials will render the subject a common property, divisible amongst the parties according to the value of their respective shares. *Stair*, B. ii. tit. 1, § 37; *Ersk. B. ii. tit. 1, § 17*; *Bell's Princ.* § 1298. [See *Specification*.]

COMMODATE; is a species of loan, [for a certain use,] gratuitous on the part of the lender, by which the borrower is obliged to restore the same individual subject which was lent, in the same condition in which he received it. [The property and risk remain with the owner; but, as the loan is gratuitous, the slightest fault makes the borrower responsible.] *Stair*, B. i. tit. 11, § 8; *More's Notes*, lxxi.; *Ersk. B. iii.*

tit. 1, § 20; *Bell's Princ.* § 195. See *Loan. Mutuum.*

[COMMON.] In England, a right of common is the right of taking some part of any natural product of the land or water belonging to another man in common with him. Commons are of four principal kinds: common of pasture, or the right of feeding one's beasts upon another's land; common of estovers, or the right of taking from another's woods or waste lands timber or underwood for necessary use; common of turbary, or the right of taking peat or turf for fuel; and common of piscary, or the right of taking fish from another's water. Common also signifies a piece of land subject to rights of common. *Sweet's Law Dict.*]

COMMON AGENT; is an agent or solicitor before the Court of Session, employed to conduct a cause in which several parties have a common interest. The most important occasion for this appointment is in the process of augmentation and locality. In that process, after the augmentation has been granted, and the case enrolled before the Lord Ordinary [on Teinds], in order to proceed with the locality, he pronounces an interlocutor, ordering the heritors or their agents to meet, to name a person to be suggested to him as common agent for conducting the locality. A notice of this interlocutor is inserted in certain of the Edinburgh newspapers; and the name of the person chosen is then reported to, and approved of by, the Lord Ordinary; A.S. 9 July 1809. No one who is agent for the minister, titular, or for any heritor in the parish, can be common agent; A.S. 12 Nov. 1825, § 13. It is the duty of this common agent to prepare a state of the teinds, according to the rules elsewhere explained. See *Teinds. Locality.* [A common agent is also elected by the creditors claiming in a process of ranking and sale, to act for their common behoof. His duties are prescribed by A.S. 17 Jan. 1756, and 11 July 1794. The common agent cannot himself be the purchaser at the sale; *York Buildings Co.* 1795, 3 Pat. 378. See *Shand's Prac.* ii. 881; *Bell's Com.* ii. 247; *M. Bell's Conv.* ii. 829. See *Ranking and Sale.* A common agent may also be elected in a multiplepoinding, under A.S. 11 July 1828, § 48; but this course is hardly known in modern practice. See *Bell's Com.* ii. 279; *Shand's Prac.* ii. 596; *Mackay's Prac.* ii. 111. See *Multiplepoinding.*]

COMMON DEBTOR. Where the effects of a debtor have been arrested, and there

are several creditors claiming a share of them, the debtor, as being debtor to all the claimants, is distinguished by the name of the *common debtor* in the proceedings which take place in the competition. *Ersk.* B. iii. tit. 4, § 2. See *Arrestment.*

COMMON GOOD. This term, in its widest acceptation, includes all the property of a corporation, over which the magistrates have a power of administration, solely for behoof of the corporation. By 3 Geo. IV. c. 91, § 5, [no feu, alienation, or lease, for more than one year, can be granted of any part of the common good of a burgh, until the subjects have been exposed to public roup duly advertised, nor, in the case of feus or alienations, without a previous Act of Council authorising them.] Common lands feued by the magistrates to a private purchaser hold not of the Crown in burgage, but of the burgh in feu-farm. Neither are lands purchased by a burgh *tanquam quilibet*, out of their common stock, to be accounted burghal tenements. See *Ersk.* [B. i. tit. 4, § 20;] B. ii. tit. 4, § 9; *Brown's Syn.* 398; *Hunter's Landlord and Tenant*, i. 146; [*Marwick on Municip. Elections*, 364.] See *Burgh, Royal.*

COMMON INTEREST; as contradistinguished from common property, is applied to that right arising from mutual interest in a subject which, although not amounting to common property, vests the parties interested with certain rights which they may legally vindicate. The most familiar example of a right or interest of this class is afforded by those large tenements or buildings in Edinburgh, and other towns in Scotland, called *lands*; consisting of several storeys or floors, each of which is the separate property of an individual proprietor; and although there is no common property amongst the several owners of those floors, yet all the proprietors in the land have a common interest in the preservation of the walls and roof of the entire tenement. This common interest differs from *servitude*, in so far as each proprietor is bound to maintain his own portion of the walls. It differs from *property*, in so far as no one having merely a common interest, is entitled to break or to touch the wall or space which belongs to the upper or under proprietor. He can merely prevent injury, and insist on support. And it differs from *common property*, in so far as each of the several proprietors may make what alteration he pleases *in suo proprio*, provided he does not endanger the common interest, or expose those who hold

it to reasonable alarm. The extraordinary alterations and transformations which have taken place in the older part of the New Town of Edinburgh, in the process of converting dwelling-houses into shops, have contributed to settle the law on this subject. ["When divers owners have parts of the same tenement, it cannot be said to be a perfect division, because the roof remaineth roof to both, and the ground supporteth both; and therefore, by the nature of communion, there are mutual obligations upon both—viz., that the owner of the lower tenement must uphold his tenement as a foundation to the upper, and the owner of the upper tenement must uphold his tenement as a roof and cover to the lower, both which, though they have the resemblance of servitudes, and pass with the thing to singular successors, yet they are rather personal obligations, such as pass in communion even to the singular successors of either party;" *Stair*, B. ii. tit. 7, § 6. In accordance with this statement of the law, it has been decided that, unless the titles declare otherwise, the *solum*, *area*, court, and back green belong to the lowest heritor, subject to a right of common interest in the upper heritors, entitling them to resist any injurious alteration. See *Johnston*, 18 May 1877, 4 R. 721; *Barclay*, 21 May 1880, 7 R. 792; *Boswell*, 19 July 1881, 8 R. 986; *Arrol*, 27 Jan. 1887, 14 R. 394; but see *Urquhart*, 22 Dec. 1853, 16 D. 307. The roof belongs to the uppermost heritor, subject to the common interest of the others, entitling them to object to any operation causing reasonable apprehension of injury; *Taylor*, 1 Nov. 1872, 11 Macph. 25. The owner of each flat has sole property in his own walls; but if he proposes any material alteration, the *onus* lies on him to show that it is not attended with appreciable detriment or danger; *Dennistoun*, 10 March 1824, 2 S. 784; *Gray*, 18 June 1825, 4 S. 105; *Fergusson*, 12 Nov. 1816, F.C.; *Pirnie*, 5 June 1819, F.C. As to a common gable in a flatted house, see *Gellatly*, 13 March 1863, 1 Macph. 592; *Rankine on Land-Ownership*, 558. The boundary between two flats is an ideal line drawn through the centre of the joists; *Alexander*, 24 Nov. 1875, 3 R. 156; *M'Arty*, 8 Feb. 1883, 10 R. 574. The upper and lower neighbours have been said, on the analogy of common gables, to have a right of common property in the floor or ceiling; *Rankine*, 561. Apart from what may be declared in the titles, the common passage and stair, with walls enclosing it,

[are the common property of all the owners of the tenement; see *Gellatly and Taylor*, *supra*, and other cases in *Rankine*, 562.] In Edinburgh, and in other royal burghs, in every case of projected alterations on tenements within burgh, application for a warrant must be made to the Dean of Guild Court; those interested being called as parties. [See *Ersk. B. ii. tit. 9, § 11*; *Bell's Princ. § 1086*; *Rankine on Land-Ownership*, 544.] See *Dean of Guild. Jedge and Warrant. Edinburgh*.

COMMON LAW. The term common law is used by many of the writers on the law of Scotland, and in some of the acts of the Scotch Parliament, to signify the Roman law; but in its proper acceptation, it means our consuetudinary law, whether founded on the Roman law, the feudal customs, or the ancient unwritten law of the country from whatever other source derived. *Ersk. B. i. tit. 1, § 28*; *Kames' Princ. of Equity* (1825).

COMMON PASTURAGE. See *Pasturage*.

COMMON PLEAS. [The Court of Common Pleas (or Common Bench) was originally the only superior court in England, having jurisdiction in ordinary civil actions between private persons, although subsequently, the Courts of King's Bench and Exchequer acquired concurrent jurisdiction in all except real actions. It was a superior court of record, consisting of a chief justice and five *puisne* judges. Under the Judicature Act, 1873, the Courts of Queen's Bench, Common Pleas, and Exchequer became Divisions of the High Court of Justice; and by Order in Council, dated 16 Dec. 1880, these Divisions were consolidated and merged in one, called the Queen's Bench Division, presided over by the Lord Chief Justice. *Wharton's Lex.*; *Broom's Common Law*, 27, 34. See *High Court of Justice*.]

COMMON PRAYER; the liturgy or prayers used in the English Church. It is the particular duty of clergymen, every Sunday, &c., to use the public form of prayer prescribed by the book of common prayer; and if any incumbent be resident upon his living, and keep a curate, he is obliged, by the act of uniformity, once every month at least, to read the common prayers of the church in his parish church, in his own person. The book of common prayer is to be provided in every parish, and the common prayer must be read before every lecture, the whole appointed for the day, with all the circumstances and cere-

monies, &c.; [13 & 14 Car. II. c. 4. See also 34 & 35 Vict. c. 37; 35 & 36 Vict. c. 35; 37 & 38 Vict. c. 85.]

COMMON PROPERTY; is property, whether heritable or moveable, belonging to two or more proprietors *pro indiviso*. The common proprietors are mutually bound to communicate the profit, or to share the loss arising from their common property, according to their respective shares in it; and the consent of all the common proprietors is requisite in the management or disposal of the subject. Each joint owner may sell his *pro indiviso* right, the purchaser coming into his place; and the right may be in like manner adjudged by the creditors of the common proprietors, or any of them. [See *Schaw*, 15 Jan. 1889, 16 R. 336.] As to the management, the maxim, *In re communi melior est conditio prohibentis*, applies; and hence, one co-proprietor may prevent the others from removing tenants, unless better rents or better security is offered. He may also prevent any extraordinary use of the subject; e.g., a lease of the privilege of shooting over the property. Or he may prevent operations on the common subject, whereby its condition is to be altered; e.g., striking out a door in a common stair or passage. But necessary operations in rebuilding, repairing, &c., cannot be stopped, by the opposition of any of the joint owners; and in general, the court seems disinclined to countenance wanton and emulous opposition. Where anything is built or planted on the common subject, it accretes to the common right. Where the parties cannot agree, either the will of the majority rules, or matters remain *in statu quo*. The expense of erecting or repairing a common wall between conterminous proprietors must be borne in proportion to the value of the share which each has in the subject; and in urban subjects, a division wall has been held to be common property, although built at the expense of one of the parties. [See *Gable*.] Where the common property is heritable, and the proprietors wish a division, this may be done either extra-judicially [or by action of division, or division and sale.] See *Brieves. Heirs-Portioners. [Division]*. Where the subject is not divisible, e.g., a brewhouse, or other indivisible heritable subject, any one of the common proprietors seems to be entitled to require the others, either to purchase his share at a certain price, or to sell him their shares at the same rate, or to concur with him in exposing the subject to sale by public roup. Moveable subjects, again, held in common,

may be divided, when divisible, in an action before the judge ordinary; or, when indivisible, as in the case of a ship, a majority of the joint owners may sell by public roup; or any one of them may oblige the others to take his share at a fixed price, or to sell him theirs at the same rate, by means of an action of sett. [See *Sett*. See also *Loch. Specification*.] See *Stair*, B. i. tit. 16, § 4; tit. 7, § 15; *Ersk.* B. iii. tit. 3, § 56; *Bank.* B. i. tit. 8, § 40; *Bell's Princ.* § 1072; [*Rankine on Land-Ownership*, 485.]

COMMONS, HOUSE OF. The House of Commons consists in all of [670] members, viz., [253] for counties in England and Wales, [85] for counties in Ireland, and [39] for counties in Scotland; [237 for English, 16 for Irish, and 31 for Scotch burghs; and 5 for English, 2 for Irish, and 2 for Scottish Universities. See *May's Parl. Prac.* 16; *Stephen's Com.* ii. 354. See *Parliament. Election Law*.]

COMMONTY. A common or commonty is a piece of ground belonging in property to one or more persons, and in general burdened with sundry inferior rights of servitude, such as pasturage, feal and divot, and the like, in which last respect a commonty differs from common property held *pro indiviso*. There being no regular method at common law of ascertaining the rights of parties in a commonty, and dividing it among them, the act 1695, c. 38, makes all commonties, except those belonging to the king and to royal burghs, divisible at the instance of any having interest, by an action in the Court of Session. The court is empowered by this statute to discuss the relevancy, and to determine on the rights and interests of the parties, to grant commission for perambulating and taking all necessary proof, and to divide the common amongst the parties concerned. It is also declared, that the interest of the heritors having right to the common shall be estimated according to the valuation of their respective lands and properties, and that the portion of the common adjacent to the property of each heritor be adjudged to him; with power to the court also to divide the mosses in the common, or in case they cannot be conveniently divided, that they shall remain common, with free ish and entry, whether divided or not. Where there is only one proprietor burdened with rights of servitude competent to other heritors, it has been settled, after considerable fluctuation of opinion, that this is not a commonty within the meaning of the statute; [*Stewart*, 1740, M. 2469.] But if

there be two co-proprietors, the statutory division may be made; and the device of a conveyance by the sole proprietor, of a small portion of the lands proposed to be divided, to an adjoining proprietor, made even *pendente processu*, has been held sufficient to warrant the court in proceeding with the division; [*Maitland*, 1769, M. 2483. A right of servitude is not a sufficient title; *Laurie*, 1771, M. App. Commonty, No. 2; *Gordon*, 12 Nov. 1850, 13 D. 1.]

It is not at all times easy to ascertain whether the right be a right of common property, or a right of servitude merely. If the proprietor's title-deeds convey his lands to him, "with parts, pendicles, and pertinents," or with "mosses, commonties, parts, pendicles, and pertinents," with "the commonty," or the like expression, the right is a right of property in the common. If, on the other hand, the expression be, "with parts, pertinents, and common pasturage," or "with pasturage of cattle and privilege of commonty," a servitude merely is held to have been conveyed, although, in both cases, the possession may have been identical. And an infetment "with parts and pertinents," followed by prescriptive possession of the adjoining common, will amount to a right of common property; although, where the charter is a bounding charter, the clause "with pertinents" will found no more than a right of servitude. See *Bounding Charter*. Where the expressions are more ambiguous, they will be construed or explained by usage. The statute expressly exempts from division commonties the property of the Crown or of royal burghs. [To be exempted from division the property of a royal burgh must be held in burgage; *Hunter*, 22 Feb. 1854, 16 D. 641;] and if the property be vested in the Crown, although the benefit is conferred by grant upon a subject, such a common cannot be divided; [*Sandilands*, 19 Jan. 1809, F.C.]

In the action of division, all parties having interests, whether of common property or servitude, must be called; but tenants need not be cited. The summons is executed, called, and enrolled, in the usual manner. [It is framed in terms of the Court of Session Act, 13 & 14 Vict. c. 36, § 1; and the annexed condescendence must set forth, in reference to a plan or sketch to be produced along with it, the description of the boundaries of the common, according to natural or other objects, or the names of hills, mosses, and other localities occurring along or near the line

[of the boundaries; A.S. 18 June 1852, §§ 1, 2. The condescendence must set forth the nature and extent of the right and interest the pursuer claims in the commonty, his titles, and the claim he proposes to advance, which claim may be subject to any alteration which the evidence and the pleas of parties may render necessary; *ib.* § 3. The parties who intend to appear must lodge defences, stating the nature and extent of the right and interest they mean to advance in the process; the extent and boundaries of the commonty, if they do not admit those stated by the pursuer; the lands, if any, within the pursuer's boundaries which they claim as private property, and as not forming part of the common; along with their titles and claim; § 4. After these papers are lodged the Lord Ordinary considers them, "both in reference to the requirements of the said statute, and also in order to consider whether any questions of law ought to be determined before proof, or to what points the proof should in the first instance be directed; and also with a view to consider whether such proof should, in whole or in part, be by commission or before a jury, or in what other form; and whether there are any separate and distinct points which should be so tried before the general boundaries are to be remitted to proof, and between what parties;" *ib.* § 5. Proof is almost invariably by remit to a qualified commissioner; and the whole practical work is generally done by the commissioner and surveyors appointed by him. In giving effect to the scheme of division prepared by the commissioner, the court will not interfere with his decision in matters of detail; *Bruce*, 22 Nov. 1883, 11 R. 192.] The statutory rule of division is the valued rent of the properties to which the right to the common belongs; and where, as in Shetland, there is no valuation, the division is regulated by the number of merks belonging to each proprietor, according to which the taxes are paid; [*Spence*, 25 Jan. 1839, 1 D. 415.] The other rules are—1st, To allocate to the parties the shares most adjacent to their own property, looking to the quality as well as the quantity; especially where the adjacent heritor has improved the border or the common nearest his lands. In that case, however, the land is allocated to the heritor at its improved value, the presumption being, that he has been reimbursed for the expense of the improvement by the possession,—a presumption which doubt-

less would yield to the fact in cases where it was otherwise; [*Kinloch*, 14 Jan. 1814, F.C.; *Innes*, 18 May 1859, 21 D. 832.] 2*d*, To preserve the servitudes over the undivided portions, or to commute them if those in right of the servitudes will consent, and to give them a portion of land in lieu. 3*d*, To allocate to the proprietor of a barony his share, according to the state of his possession. But where the proprietor of a barony, to which a common was attached, had feued out the whole barony, and given the feuars rights of servitude over the common, it was decided that he was still to be held as possessing by means of his feuars, and that he was entitled, accordingly, to have a share of the common set apart for him, corresponding to the aggregate valuation of the feuars, and subject to their servitudes; *D. Buccleuch*, 16 June 1812, F.C. 4*th*, To continue as common such mosses as are indivisible, with free ish and entry to the moss, whether divided or not. In the case of mosses the rule is not the valued rent, but the extent of the respective lands lying along the edge of the moss. In making the division, the common is first subdivided amongst the joint proprietors, as above. Then each proprietor divides his share with those whose servitudes are derived from him or his authors; although this seems to be an arrangement which can only be made of consent of parties; and in questions between the common proprietors and those having rights of servitude, the division is regulated not by the valued rent, but by the number of cattle the parties in right of the servitudes have been in use to pasture on the common, or according to the value of their interests in the common, whatever they may be; *Maitland*, 1772, M. 2485. Formerly the proprietor, in such cases, got a *præcipuum* of a fourth, over and above his share in the division; but no such rule is now acted on: all that the proprietor gets is the residue, after deducting the value of the servitudes. The proprietor has also a right to the coals and minerals, the parties in right of servitudes having right merely to the surface. If there be no objections [to the report of the commissioner,] decree of division is pronounced by the Inner House in terms thereof. If there be objections, they are either disposed of at once, or a remit is made by the Inner House to the Lord Ordinary to prepare the cause, and decide on the objections in the usual way, and subject of course to the review of the court. The expense of the

division is paid proportionally to the benefit each heritor has derived from the division, as proved by the value of the portion allocated to him. Tenants, however, are not liable in any part of the expense, nor even for the interest of the expense so disbursed by their landlords. [This action is now competent in the sheriff court, when the subject in dispute does not exceed in value £50 by the year, or £1000 value; 40 & 41 Vict. c. 50, § 8 (3). Decree of division has the effect of a conveyance by all the joint proprietors, with assignation of writs, and may be recorded; 37 & 38 Vict. c. 94, § 35; *Begg's Conv. Code*, 376.] See *Ersk. B. iii. tit. 3, § 56 et seq.*; *Bell's Princ.* § 1087; *Kames' Stat. Law, h. t.*; *Jurid. Styles*, iii. 49; [*Rankine on Land-Ownership*, 496; *Shand's Prac.* ii. 845; *Mackay's Prac. i. 361*; ii. 303.]

COMMUNI DIVIDUNDO ACTIO; in the Roman law, was an action for the division of what was possessed in common by more than one; *Stair, B. i. tit. 7, § 15*. [See *Brock*, 27 Jan. 1852, 19 D. 701.]

COMMUNION ELEMENTS. [See *Sacraments. Tennds.*]

COMMUNION OF GOODS. See *Goods in Communion*.

COMMUNIS ERROR. Where, through oversight or negligence, an erroneous practice has prevailed, and has become inveterate, and especially where parties in the transactions have relied on the prevailing practice as correct; or where there is danger of disturbing judicial procedure in past cases; the Court of Session is in use, instead of correcting the error by a decision in a particular case, to overrule the objection when so stated, but to pass an Act of Sederunt, enjoining the observance of the correct practice in future; and certifying all concerned that they will hereafter decide accordingly. Such are the Acts of Sederunt, 26 Feb. 1684, 17 July 1741, and 17 Jan. 1756; in some of which cases the erroneous practice had been directly in the face of statutory enactments. See also *Beattie*, 22 May 1830, 8 S. 784, where the *commun error* was in the will of a summons; and *Russel*, 7 July 1837, 15 S. 1263, where the error was in the ordinary form of the prayer of bills of suspension. See *Acts of Sederunt. Suspension*.

COMMUNITY. [See *Corporation*.]

COMPANY. [See *Joint Stock Company. Partnership. Firm*.]

COMPARATIO LITERARUM. The comparison of handwritings. This is one of the means of proving the truth or falsehood