

[54, § 14, and 29 & 30 Vict. c. 51, § 4. An order of the sheriff of the county in which the lunatic resides, or in which the asylum is situated, may be obtained on presenting a petition, in form prescribed, along with two certificates, bearing date within fourteen clear days preceding the date of the petition, by medical men having no immediate or pecuniary interest in the asylum. No superintendent of an asylum may receive or detain any person as a lunatic, without production of an order by the sheriff, dated within fourteen clear days prior to the reception (or twenty-one days, if granted by the sheriff of Orkney and Shetland); except that a lunatic may be detained for three days, without a sheriff's order, if his case is certified to be one of emergency by one medical man, who may be the medical attendant of the asylum. The case of persons voluntarily entering an asylum is provided for by 29 & 30 Vict. c. 51, § 15. Any person may, with the consent in writing of one of the Commissioners in Lunacy, be entertained in an asylum as a boarder; but no such boarder may be detained for more than three days after giving notice of his desire to leave the asylum, unless on certificates of insanity and a sheriff's order. With regard to pauper lunatics, see 20 & 21 Vict. c. 71, §§ 73-79, 95, 112; 25 & 26 Vict. c. 54, § 8; and 29 & 30 Vict. c. 51, §§ 8-11. Provisions with respect to the property of lunatics are contained in 20 & 21 Vict. c. 71, §§ 81-84, and 29 & 30 Vict. c. 51, § 17. The liberation of lunatics is provided for by 20 & 21 Vict. c. 71, §§ 92-94; 25 & 26 Vict. c. 54, § 16; and 29 & 30 Vict. c. 51, §§ 9-12. Dangerous and criminal lunatics are dealt with by 25 & 26 Vict. c. 54, § 15; 29 & 30 Vict. c. 51, §§ 12, 19; 34 & 35 Vict. c. 55. The Lunacy Acts are printed together in the Appx. to *Reid's Poor Law Digest*, p. 482. See *Insanity*.]

LYON-KING-AT-ARMS. This officer

takes his title of Lyon from the armorial bearing of the Scottish kings, the lion rampant. The officers serving under him are heralds, pursuivants, and messengers. The ancient duty of this officer was to carry public messages to foreign states; and it is still the practice of the heralds to make all royal proclamations at the cross of Edinburgh. The jurisdiction given to the Lyon-King-of-Arms by the acts 1592, c. 127, and 1672, c. 21, empowers him to inspect the arms and ensigns-armorial of all the noblemen and gentlemen in the kingdom, to distinguish the arms of the younger branches of families, and to give proper arms to virtuous and well-deserving persons; to matriculate such arms; and to fine those who use arms which are not matriculated, in £100 Scots, with the forfeiture of the goods and furniture on which the arms are represented. The Lyon-King-at-Arms may deprive or suspend messengers by the advice of the Court of Session; and he may fine them to the extent of the sum for which, at their admission to the office, they found caution. [The Court of Session may deprive the Lyon-King-at-Arms of office by its own authority; A.S. 4 Nov. 1738.] It has also the power of reviewing the decision of the Lyon Court, as to the matriculation of arms; [see *Hunter*, 31 Jan. 1882, 9 R. 492.] But a reduction of a matriculation of arms is incompetent at the instance of a party who does not claim right to the arms in question; [*Macdonell*, 20 Jan. 1826, 4 S. 371; *Cuninghame*, 13 June 1849, 11 D. 1139. The Lyon-King-at-Arms is now required to discharge his duties personally, and not by deputy; and his office and emoluments are further regulated by 30 Vict. c. 17.] See *Ersk. B. i. tit. 4, § 32*; *More's Notes on Stair*, cccclxx.; *Bank. ii. 507*; *Kames' Equity*, 316; [*Mackay's Prac. i. 233, 270.*] See *Arms. Messengers-at-Arms*.

M

MACER. The mace-bearers are officers attending on the Courts of Session, Teinds, and Justiciary. They are nominated by the Crown, or by a person deriving right from the Crown; and, properly speaking, they are the servants of the courts, and the attendants on the judges on the bench. It is the duty of the macers to preserve silence in the court, to execute the orders

of the judges, to call the rolls of court, and to execute such warrants for the apprehension of delinquents, &c., as are addressed to them. When processes, after being borrowed, are not returned in proper time, they, as well as messengers-at-arms, may execute the captions issued against the borrowers to force them back. See *Caption, Process*. The fixed salary of each

of the seven macers of the Court of Session is [£100 *per annum*; 1 & 2 Vict. c. 118, § 25; and the salary of each of the three macers of the Court of Justiciary is £200 *per annum*. Any macer of the Court of Session who is not at the time engaged in the court to which he is attached, shall, on a request addressed by the Crown Agent to either of the principal clerks of Session, be bound to perform the duties of macer at any sitting of the High Court of Justiciary; 52 & 53 Vict. c. 54, § 11.] Brieves for serving heirs were formerly sometimes directed to the macers of the Court of Session, as sheriffs in that part, under a special commission from the Scotch Chancery Office. The practice, however, was abolished by 1 & 2 Geo. IV. c. 38, § 11. [See *Service*.] See *Stair*, B. iv. tit. 3, § 18; *More's Notes*, cccclxxvi.; *Ersk.* B. i. tit. 4, § 33; B. iii. tit. 6, § 7; tit. 8, § 64; *Bank*. ii. 507, 471; *Kames' Stat. Law Abridg.* h. t.; [*Shand's Prac.* i. 119; *Mackay's Prac.* i. 160; *Journ. of Jurisp.* xxviii. 292, 351, 400. See *Criminal Prosecution*.]

MACHAMUIUM; according to Skene, is manzie, hurt, mutilation, demembration, or the loss or tinsel of any member of a man's body. *Skene, h. t.*

MACHINERY. Questions sometimes occur between landlord and tenant, or between heir and executor, as to the property of machinery in mills and manufactures; and in particular, as to whether certain parts of the machinery are heritable or moveable. Such questions are considered in the article *Fixtures*. And as to leases of machinery in manufactories or public works, see *Manufactories*.

MAGISTRATE. In a large acceptance, this term comprehends all in authority, including even the Sovereign. Magistrates, therefore, are either supreme or subordinate. The subordinate magistrates are those (as judges) who derive from the head of the state, or first magistrate, all their authority, and are accountable to him for their conduct. This term is colloquially applied to the provost and bailies of burghs. The magistrates of all burghs have the cognisance of debts and questions of possession between the inhabitants of the burgh; and it is generally supposed that the magistrates of royal burghs have as extensive a civil jurisdiction within the burgh as a sheriff has in his territory, except in so far as particular jurisdictions conferred by statute on the sheriff are exclusive. The criminal jurisdiction of the

magistrates of burghs is now very limited, extending merely to petty riots and matters of police; but, in some of the larger burghs (as Edinburgh, Glasgow, and Aberdeen), the magistrates have a right of sheriffship, which gives them the same jurisdiction within their bounds as the sheriff possesses in the county. The magistrates have been found competent judges concerning debts due to the burgh, and they have jurisdiction in a cause at the instance of a tacksmen of their customs; [*Town of Dunbar*, 1706, M. 3422; *Harvie*, 17 Nov. 1826, 5 S. 14;] but they are incompetent to judge as to the power of levying assessments laid on by themselves in questions between the collector of the assessments appointed by them, and the parties on whom they are imposed; [*Towers*, 23 June 1828, 6 S. 906.] They have also been found incompetent in a question between their own treasurer and other parties relative to an alleged violation of the right of the burgh; [*Guthrie*, 12 May 1832, 10 S. 515.] See *Stair*, B. iv. tit. 47, § 19; *More's Notes*, cccxxxii.; *Ersk.* B. i. tit. 4, § 21; *Ross's Lect.* i. 90, 324, 343; *Alison's Prac.* 61; *Macclaurin's Sheriff Process*, 40, 50; [*Marwick on Municipal Elections*, 345.] As to the election of magistrates, see *Burgh Royal*.

MAGNA CHARTA; the great charter of English liberties, granted [by King John, but not legally established until] the ninth year of King Henry III., and repeatedly confirmed during the reigns of the latter monarch and his successors. It relates to the freedom of the church; the nobility; the guardianship and marriage of heirs; the dowers of women; the duties of sheriffs; the liberties of towns and corporations; the appointment of courts; remedies for oppression, and appeals against unjust judgments: and contains other the like provisions calculated to preserve the liberty of the subject and promote the welfare of the country. *Magna Charta* is the most ancient written law of England. *Tomlins' Dict. h. t.*; [*Stephen's Com.* iv. 515.] See *Liberty*. *Habeas Corpus*.

MAIHEM or **MAYHEM**; in English law, the violently depriving another of the use of such of his members as may render him the less able, in fighting, either to defend himself or to annoy his adversary. A person who maims himself, that he may have the more colour to beg, or that he may not be impressed for a soldier, may be indicted and fined. *Tomlins' Dict. h. t.* See *Maiming*.

MAIL; is an old Scotch law term signifying *rent*. *Grass-mail* is the rent payable for cattle sent to graze on the pasture of another. See *Grass*. [*Rent*.]

MAIL COACHES. The proprietors of mail-coaches are, like other public carriers, liable under the edict *Nauta, caupones*, and are responsible for the negligence of their drivers. See *Carriers*. *Public Carriages*.

MAILLS AND DUTIES; are the rents of an estate, whether in money or grain; hence, an action for the rents of an estate is termed an action of mailles and duties. [It is raised in the sheriff court, or (if the amount sued for is not less than £25) in the Court of Session; 50 Geo. III. c. 112, § 8.] It is competent either to a proprietor or to one claiming right under a conveyance, legal or voluntary, or even an assignation to the rents. This action is either petitory or possessory. The petitory action is founded on a right in the pursuer on which no possession has followed; and in such an action it is necessary to call not only the tenants, but also the proprietor or liferenter, and the pursuer must support his right of action by the production of titles preferable or superior to theirs. In the possessory action there is no occasion to call any other than the parties in the natural possession of the ground. [In a recent case, it was observed by Lord Pres. Inglis, in reference to parties who were *ex facie* absolute disponees, but whose right was qualified by a recorded backbond, that "they required no process of law to enable them to enter into possession, as it is called, and if they had proposed an action of mailles and duties, for example, for the purpose of enabling them to uplift the rents, it would have been an idle formality, and indeed incompetent, because it is only an incumbrancer that requires to use a process of mailles and duties, in order to give him a title, in a question with the tenant, to uplift the rents;" *Scot. Herit. Security Co.*, 14 Jan. 1876, 3 R. 333. The question whether it is competent for a heritable creditor in a bond and disposition in security, in the form provided by 10 & 11 Vict. c. 50, § 1 (31 & 32 Vict. c. 101, § 119), to enter into possession without a decree of mailles and duties, was raised, but not decided, in *Neils*, 1 Dec. 1863, 2 Macph. 168. A superior has no title to pursue an action of mailles and duties for recovery of feu-duty; *Prudential Assurance Co.* 4 June 1884, 11 R. 871. Decree may be obtained, not only for past rents, but for all to become due, until satisfaction of

[the debt; *Bruce*, 23 Jan. 1824, 2 S. 657. See also *Robertson's Trs.* 31 May 1889, 16 R. 705. By the Bankruptcy Acts of 1839 and 1856 (2 & 3 Vict. c. 41, § 95; 19 & 20 Vict. c. 79, § 118), it was declared that, in case of the debtor's sequestration, no decree of mailles and duties, on which a charge had not been given sixty days before the date of sequestration, should be available in competition with the trustee, except for the interest of the current half-yearly term, and the arrears of interest for one year immediately before such term. See *Budge*, 12 July 1872, 10 Macph. 958. This provision, however, was repealed by § 55 of the Conveyancing Act of 1874; and now, at common law, execution of a summons of mailles and duties, at any time before confirmation of the trustee, secures a preference over the whole rents.] In the [petitory] action of mailles and duties there is an exception in favour of the tenant, who is not liable for arrears of rent after five years from the time of his removing from the lands. This quinquennial prescription was introduced by 1669, c. 9. See *Stair*, B. ii. tit. 12, § 32; B. iv. tit. 22, §§ 7, 15; tit. 26, § 4; *More's Notes*, cclxxiii.; [*Ersk.* B. iv. tit. 1, § 49;] *Bank.* ii. 170; *Bell's Princ.* §§ 634, 914, 923; *Hunter's Landlord and Tenant*, ii. 350; *Jurid. Styles*, iii. 35; *Bell on Leases*, ii. 51; *Ross's Lect.* ii. 235, 381, 431-9; *Kames' Equity*, 390; [*Mackay's Prac.* ii. 308; *M. Bell's Conv.* ii. 1168; *Mowbray's Analysis*, 87; *Begg's Conv. Code*, 408; *Dove Wilson's Sher. Court Prac.* 460; *Rankine on Leases*, 319. See *Pointing of the Ground*.]

MAIMING. Shooting, stabbing, or throwing of sulphuric acid with intent to maim or disfigure, is a capital offence; 6 Geo. IV. c. 126; *Alison's Princ.* 168.

MAINPRISE; in English law, the taking or receiving into friendly custody a person who otherwise might be committed to prison, upon security given that he shall be forthcoming at a time and place assigned. It differs from bail in this, that a person mainprised is said to be at large until the day of his appearance. A man let to bail is still within the judge's ward of time. *Tomlins' Dict. h. t.*

MAINTENANCE; in English law, the unlawful taking in hand or upholding of a cause or person; an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it. It also signifies the buying or obtaining of pretended rights to land, for the

purpose of raising actions upon them; or entering into an agreement by which a stranger gets the benefit of a suit, on condition of his conducting and prosecuting it. An attorney is guilty of maintenance, who undertakes a suit upon the understanding that he is to bear all the costs out of his own pocket, and that his client will be free from all loss; or who offers to recover a doubtful claim, on condition of getting part of the product of the suit. At common law, persons guilty of maintenance may be prosecuted by indictment, and be fined or imprisoned, or be compelled to make satisfaction by action. *Tomlins' Dict. h. t.*; [*Bell's Princ.* § 1395.] See *Pactum Illicitum*. *Buying of Pleas*. *Champerty*.

MAINTENANCE. See *Aliment*.

MAJESTATIS CRIMEN; or treason; a crime aimed against the Sovereign or the state, and intended to subvert the constitution. See *Treason*.

MAJOR; a person of full legal age, which, both in male and female, is the age of twenty-one years complete. See *Minor*. *Curatory*. *Pupil*. *Tutor*.

MAJOR and MINOR in a *libel*. The *major* proposition in a criminal *libel* [prior to the Criminal Procedure Act, 1887,] named the crime to be charged, or if it had no proper name, described it at large, and characterised it as a crime severely punishable. The *minor* proposition averred the panel's guilt of this crime, and supported the averment by a narrative of the fact alleged to have been committed; it being necessary that the minor should agree with the major. And the *conclusion* inferred that, on conviction, he ought to be punished with the pains of law applicable to his offence. See *Indictment*.

MAJORITY; the major or greater number of persons intrusted with the performance of a certain act or duty. Independently of special statute, or covenant, or of inveterate consuetude (as in the case of public assemblies, courts of justice, &c.), there seems to be no sound principle under which the majority can bind the minority. But, under various statutes, of which the bankrupt statute is one, as well as under contracts of copartnership, nominations of trustees, the constitutions or charters of joint stock companies, and other analagous associations, special enactments, conditions, or articles, are usually inserted, declaring that the majority shall decide. Under the bankrupt statute, the majority of creditors in value or extent of debt determines the election of trustee or commissioners, or gives directions as to the management of

the estate. More than a mere majority, however, is required to discharge the bankrupt or to accept of a statutory composition. See *Bell's Com.* ii. 368. See also *Quorum*. *Sine quo non*. *Composition*. *Discharge*. [*Trust*.]

MALA FIDES; bad faith. A *mala fide* possessor is a person who possesses a subject not his own, upon a title which he knows to be bad, or which he has reasonable ground for believing to be so. A *mala fide* possessor, who retains possession to the prejudice of the true owner, is obliged to restore to the proprietor all the fruits and profits, natural, industrial, or civil, accruing during his *mala fide* possession; and that whether he has actually reaped the fruits and profits, or might, by proper care and diligence, have done so; or whether he has consumed them or not. It is often difficult to determine when *bona fides* ceases and *mala fides* begins, since this depends very much upon the circumstances of the particular case. [See *Bona Fides*.] See also *Ersk.* B. ii. tit. 1, § 25; *Stair*, B. ii. tit. 1, § 24.

MALE APPRETIATA. See *Omissa*. *Confirmation*. *Inventory*.

[MALFEASANCE; in English law, the doing of an unlawful act.]

MALICE; a deliberate, preconceived design of doing mischief or injury to another. There can be no proper crime without the ingredient of malice; *crimen dolo contrahitur*. But if a man, having a malicious intention to kill one person, in putting his intention in execution, kills another, the malice will attach to this slaughter, and he will be adjudged a murderer. And although the maxim *Culpa lata dolo æquiparatur* does not apply to crimes in its full extent, yet gross negligence frequently subjects the person guilty of it to punishment. In actions of damages, it is sometimes necessary to allege and prove malice. In actions for wrongous imprisonment, this is not necessary, since such actions will lie against an individual merely for the improper use of diligence. Malice is an ingredient in the action for defamation; but in ordinary cases it is not necessary to aver malice, since it is implied in every insult and injury. There are, however, certain cases called privileged, in which the law presumes that the act complained of was done in the discharge of a duty, and requires that malice should be averred and proved. Such are injurious words written or spoken by judges or magistrates in the discharge of their duties;

by parties, or witnesses, or counsel in a cause; by reporters of judicial proceedings; by authors or critics in the fair course of literary criticism or observation, and other the like cases. [To prove legal malice, evidence of personal ill-will is not essential. In many cases recklessness, or culpable disregard of common justice, has been held tantamount to actual malice. See *Dunbar*, 11 Dec. 1849, 12 D. 284; *Macdonald*, 10 March 1853, 15 D. 545; *Bayne*, 14 March 1863, 1 Macph. 615; *Urquhart*, 21 Dec. 1864, 3 Macph. 283; *Auld*, 14 July 1875, 3 R. 940; *Green*, 12 Dec. 1878, 6 R. 318. See also *Borthwick on Libel*, 195; *Guthrie Smith on Damages*, 5;] *Hume*, i. 254; *Ersk.* B. iv. tit. 4, §§ 5, 8; *Alison's Princ.* 2, 49, 434; *Alison's Prac.* 150; *Bank.* ii. 645; *Bell's Princ.* §§ 2039, 2044; *Kames' Equity*, 36. See *Issue. Crime. Enmity to Panel. [Damages. Defamation. Wrongous Imprisonment. Informer. Church Judicatories. Appeal to Circuit Court.]*

MALICIOUS MISCHIEF. Any serious damage, wilfully occasioned to another's property, is an indictable offence, whether it has proceeded from malice or gross misapprehension of right. But inconsiderable damage, done through manifest ignorance, is not punishable as a criminal offence, unless aggravated by circumstances of tumult or outrage. [See *Black*, 29 Oct. 1879, 4 Coup. 276.] The punishment of malicious mischief is arbitrary. See *Hume*, i. 122; *Alison's Princ.* 448, 631; [*Macdonald*, 116.]

MALUM IN SE—MALUM PROHIBITUM. An act is called *malum in se*, the culpability of which does not arise from special enactment, but from its being contrary to the law of nature and the rules of morality. An act is called *malum prohibitum* which, although innocent in itself, has been prohibited by statute. It was at one time thought that there was a distinction between them; that a party could not violate the natural law without criminality; but that the fine or other penalty attached to an act forbidden by statute was merely the price at which liberty to commit the prohibited act might be purchased. This fallacy, however, is now exploded; and it is settled that, where an act otherwise innocent has been lawfully prohibited, no one can disregard the prohibition without incurring guilt. [See *Stephen's Com.* i. 38; ii. 514; iv. 12;] *Tomlins' Dict. h. t.* See *Penalties. Crime.*

MALVERSATION; misconduct in the discharge of a duty or trust. Malversation is a ground on which tutors may be

removed as suspect. It has been held malversation that a tutor did not make up an inventory. Malversation in office subjects an officer to the punishment of fine, and sometimes of deprivation, as most public offices are held *ad vitam aut culpam*. See *Brown's Synop.* 532, for several cases in which agents, officers, &c. were deprived or otherwise punished for unfaithful discharge of their duty. *Stair*, B. i. tit. 6, § 25; *Bank.* i. 171; ii. 474.

MANDAMUS; in English law, [a high prerogative writ of a most extensive remedial nature. In form it is a command issuing in the Queen's name from the Queen's Bench Division of the High Court, and addressed to any person, corporation, or inferior court, requiring them to do something therein specified, which appertains to their office, and which the court holds to be consonant to right and justice. It is used principally for public purposes, and to enforce performance of public rights or duties. It is a general rule that this writ is only to be issued where a party has no other specific remedy. There is also an interlocutory writ of mandamus, which may be granted in all cases in which it shall appear to the court to be just or convenient. *Wharton's Lex.*]

MANDATE; is a contract by which one employs another to act for him in the management of his affairs, or in some particular department of them, of which employment the person accepts and agrees to act. The person giving the employment is called the mandant—the person undertaking it is called the mandatary. This contract is not binding on the mandatary until it has been accepted of. A mandate, generally speaking, is presumed to be gratuitous; and no commission is demandable unless it has been promised, or is presumed to be due from the nature of the employment or the business of the mandatary. A mandate may be constituted by writing, or it may be constituted even tacitly. Thus, when a person, in the presence and with the knowledge of another, acts for him, this will be considered as a mandate, and have the effect of binding him for whom the other acts. The appearance of an advocate in court implies a mandate from the party for whom he appears, unless the party be out of the kingdom, in which case there must be a written mandate. [See *Counsel.*] The mandatary is bound to execute the mandate in conformity with its terms; and whatever is done beyond his instructions does not bind the mandant.

[But see *Swinburne*, 13 June 1856, 18 D. 1025.] Where no instructions are given, the mandatary may act according to his own discretion, and his constituent will be bound. Where the mandatary purchases at a lower price than he is authorised to give, this is not inconsistent with his powers, since the less is included in the greater sum. Even where it exceeds the sum, he may still render his constituent liable, by restricting his demand to the sum which he was authorised to give. A general mandate implies no power of gifting—it does not imply a power to sell, nor to enter the mandant heir, nor to enter into a submission; and where a general mandate specifies certain particulars, the general words must be restricted to particulars of the same kind with those specified. The mandatary, in a proper mandate, where he has no claim to any recompense, is not held to be liable farther than for his actual intromissions, and for such diligence as a person employs in his own affairs. But where a recompense is due, he must act with that care which a man of prudence bestows on his own affairs, and must repair the damage arising from his neglect; and where a mandatary exceeds his commission, he is liable for all the consequences of such excess of power. See *Culpa. Diligence*. Mandates expire by the revocation of the mandate, or even by the nomination of a new mandatary; they expire also by the resignation of the mandatary; and they expire by the death either of the one party or of the other. Although a mandate expires on the death of the mandant, yet if the mandatary be ignorant of his death, his actings will bind the heirs of the mandant. Even after he comes to know of the death of the mandant, the mandatary may proceed to complete transactions previously begun, and which require to be completed. After the death of the mandatary, his heir may finish what was left undone by the mandatary, if it requires dispatch, and there be no time to receive the directions of the mandant. See *Stair*, B. i. tit. 12; *More's Notes*, lxxi.; *Ersk.* B. iii. tit. 3, § 31; *Bank.* i. 392; *Bell's Com.* i. 278, 505; ii. 285, 352, 562; *Bell's Princ.* §§ 216–231; *Ross's Lect.* ii. 228; *Thomson on Bills*, 147. See *Bailment*. [*Factor. Proxy. Principal and Agent*, and authorities there cited.]

MANDATARY, in judicial proceedings.

When a party in a cause is resident out of Scotland, his opponent is entitled to insist that a mandatary for the absentee be sisted,

who will be liable for costs, if they should be awarded against his principal, [and who will also be responsible to the court for the proper conduct of the litigation; *Overbury*, 9 July 1863, 1 Macph. 1058; *Gunn & Co.* 22 Nov. 1871, 10 Macph. 116; *Thom, infra*. The rule applies to defenders as well as pursuers; but the discretion of the court is larger in the case of defenders; *Simla Bank*, 21 May 1870, 8 Macph. 781; *D'Ernesti*, 11 Feb. 1882, 9 R. 655.] Such a mandatary is unobjectionable if he be in the same condition of life with his constituent, and not bankrupt, nor living in the Abbey for the benefit of the sanctuary; [*Stephenson*, 11 Dec. 1841, 4 D. 248.] It is no good objection that he may be thought insufficient for the costs; *Duncan*, 4 March 1830, 8 S. 641; *Turnbull*, 26 Nov. 1829, 8 S. 124. If the pursuer go abroad during the dependence of the process, the action cannot proceed unless a mandatary be sisted. [But a pursuer resident in England or Ireland is not now required to sist a mandatary, unless other circumstances render it expedient that he should do so; because a Scotch decree for expenses may be enforced in England or Ireland, under the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54); *Lawson's Trs.* 20 June 1874, 1 R. 1065. As a general rule, a litigant who is proprietor of lands in Scotland does not require to sist a mandatary; but it is otherwise if the lands are themselves the subjects of the litigation, or if they are insufficient as security for the expenses; *Sandilands*, 31 May 1848, 10 D. 1091; *Caled. & Dumbartonshire Railway*, 21 Dec. 1849, 12 D. 406; *Lawsons, supra*. In *Overbury, supra*, a bankrupt, sequestrated in Scotland, who presented a petition for discharge when resident in England, was held bound to sist a mandatary; but see *Robertson*, 14 July 1857, 19 D. 996. In certain cases, a married woman pursuing has been exempted from sisting a mandatary; *Campbell*, 14 Feb. 1854, 17 D. 514; *Gale*, 7 March 1857, 19 D. 665.] A mandate, qualified with the condition that the mandatary is not to be liable for past or future expenses, will not be received, unless the party be upon the poor's roll; [*Pease*, 4 June 1822, 1 S. 490;] and the mandatary will not be liable for expenses, if the party be upon the poor's roll, even although the mandate be not so qualified; [*Carling*, 10 March 1826, 4 S. 556; *Middlemas*, 9 Feb. 1828, 6 S. 511. The proper form of sisting a mandatary is by minute in name of

[the mandatary, and signed by him, craving leave to be sisted; upon which an interlocutor sisting him is pronounced. But the liabilities of a mandatary may be incurred by any one who calls himself by that name, and carries on a process in that character; *Cullen*, 22 May 1860, 22 D. 1090.] The mandatary of a pursuer is liable in expenses, but not in damages, if he act *bona fide*; [*Cameron*, 13 Dec. 1821, 1 S. 211.] The summons should be raised in name of pursuer and his mandatary. The validity of proceedings in court is not affected by the want of a mandatary, it being the duty of the opposite party to state the objection if he mean to found on it. [Diligence may proceed without a mandatary; but if litigation ensue, as by suspension of a charge, a mandatary must be sisted; *Ross*, 8 March 1849, 11 D. 984.] When a mandatary intends to withdraw, it is not enough that his name be omitted in the proceedings; he must lodge a minute, withdrawing from the process; and in that case, if no other mandatary be named within a reasonable time, the court will pronounce decree of absolvitor, or in terms of the libel, as the case may be, and find the party and mandatary, conjunctly and severally, liable in expenses; [*Chapman*, 8 Jan. 1875, 2 R. 291.] And after such a judgment, the mandatary who has withdrawn is not entitled to resume and carry on the action, in order to show that no expenses should have been awarded; *Gordon*, 11 Dec. 1823, 2 S. 572. It has been said that a mandatary has no positive, but merely a relative existence, and that he is liable in costs only in the event of his principal being found liable; *Reoch*, 14 May 1831, 9 S. 588. [When a pursuer, who is mandant, dies abroad, the proper course is to order intimation to be made to his representatives; and if they decline to go on with the action, decree is procured against the mandatary for expenses; *Cairns*, 16 March 1841, 2 Rob. 29. A mandatary has no power to settle an action without special authority to do so; *Thom*, 20 March 1888, 15 R. 613.]

In the inferior courts, even when the defender is within Scotland, his procurator, upon stating defences, must either produce a written mandate from the defender, or the service copy of the summons or citation, which is held equivalent to one. A mandate of this description, however, does not make the mandatary liable for expenses, as in the case where the mandant is abroad. The rule, that a mandatary must be sisted

for a person abroad, is the same in the inferior as in the supreme court. [See *Ersk.* B. iii. tit. 3, § 33; *Shand's Prac.* i. 154; *Mackay's Prac.* i. 457; ii. 569; *M'Glashan's Sher. Court Prac.* § 666; *Dove Wilson's Sher. Court Prac.* 229. See *Mandate. Agent. Counsel.*]

MANELETA; in old law language, a kind of pestilent herb which grows amongst corn, called *guld*. The law of *maneleta* was instituted by King Kenneth, who ordained that he who through negligence suffered noisome herbs to spring up in sown land should for the first fault pay one ox, for the second, ten, and for the third be removed from the possession and labouring of the land. *Skene, h. t.*

MANERIUM; lands laboured with the hands. *Skene, h. t.*

MANNER; or *Mainour*; from the French *manier*. To be taken with the *manner*, is an English law phrase, used where a thief is taken with the stolen article about him; as it were in his *hands*, or *flagrante delicto*. *Tomlins' Dict. h. t.* See *Fang*.

MANOR; in English law, jurisdiction or right over a certain district of land. This was a noble sort of fee, granted partly to tenants for certain services to be performed, and partly reserved for the use of the lord's family, with jurisdiction over his tenants for their farms. Lords of manors were formerly in use to grant large parcels of land, which became manors themselves; the chief manor being called an *Honour*. *Tomlins' Dict. h. t.*

MANRENT; signifies personal service or attendance. It was the token of a species of bondage, whereby free persons became bondmen or followers of those who were their patrons, or defenders. See *Hope's Minor Practicks* (1734), 58; *Stair*, B. i. tit. 2, § 12; *Bank.* i. 69; *Ross's Lect.* ii. 157. See also "*Summary of Feodal Law*," anon. 1710. [See *Homagium*.]

MANSE. The term was originally applied to a portion of ground set apart for the clergyman; but now, in Scotland, it is used to signify the dwelling-house of the clergyman, the ground to which he is entitled being termed his glebe. Every rural parish minister is entitled to a manse, and to have it upheld by the heritors; and where there is no manse, the minister is entitled to have half an acre of ground designed to him by the presbytery for a manse, offices, and garden, and to have the heritors ordained to erect a manse and offices thereon. The heritors on whom

this burden lies are the proprietors of lands within the parish. Titulars or tacksmen of teinds are not liable; nor superiors in respect of the feu-duties of lands in the parish; nor liferenters. In the allocation of the expenses, the general rule is that each heritor pays in proportion to his valued rent, although this rule is not invariable; [*Downie*, 26 Oct. 1883, 11 R. 47.] In Shetland, where there is no valued rent, the real rent is taken as the criterion. Singular successors and creditors are not liable for arrears; but they are subject to this burden, in so far as it falls on the lands, for the years of their possession. The statutes on the subject require that the manse should be near the church, and except in special circumstances, this rule is observed. The leading statute is 1663, c. 21, which provides that where competent manses are not already built, the heritors shall build them, at an expense not exceeding £1000 Scots (£83, 6s. 8d. sterling), and not under 500 merks; and it has been questioned whether the heritors can be compelled to expend more than the statutory *maximum*. But this doubt is now confined to the case where a manse is proposed to be built in a parish where there has not been one previously; for where a manse has been once built, and the question is as to the rebuilding, adding to, or repairing it, the rule is, that the heritors must expend such a sum as may be necessary to render the manse a "competent" residence for the clergyman; [*Dingwall*, 2 March 1821, 1 S. App. 10; *Mags. of Elgin*, 17 Nov. 1841, 4 D. 25.] In this respect, however, while in repairing, adding to, or rebuilding the manse, a style and size consistent with the mode of living of the day will be adopted, regard must also be had to the extent of the parish, to the amount of the stipend, and to other circumstances; and above all, moderation in dimension and simplicity in ornament must be rigidly observed. Acting on this principle, the sum most commonly allowed for rebuilding a manse, [was for many years] £1000 sterling; although a larger sum was often voluntarily expended by the heritors in rendering the manse and offices suitable and comfortable. [More recently, the practice of the court has been to order a manse to be rebuilt according to a suitable plan, without regard to any precise limit.] It is frequently made a question whether the minister is entitled to have the manse rebuilt, or merely repaired and added to; but on this point it is impossible to lay

down any invariable rule. Every case must depend less or more on its peculiar circumstances; [but the following statement by Lord Pres. Inglis, in *Heritors of Inch*, 18 Dec. 1869, 8 Macph. 363, may be useful:—"When the repairs required on a manse to make it sufficient are slight, and of the nature of proper repairs,—that is, when they amount merely to the restoration of the manse against tear and wear, there is no doubt that the presbytery can go no further than merely to order such repairs, although it may be that the manse is not such as they would be authorised to order as a new manse, if the old one had fallen into ruin; and, on the other hand, when the manse is in such a state of decay that the repairs will amount very nearly to the cost of building a new manse, the presbytery are entitled to order a new manse to be built. . . . It appears to me that the cases in which a presbytery may order additions to a manse which is clearly unsuitable in capacity and accommodation for the minister, are those in which it has either become impossible to keep it up at all without structural alteration, or in which the extent and expense of the repairs, even assuming that they do not involve structural alteration, are very large, and approach to the cost of what is necessary to convert it, by additions and alterations, into a suitable residence." See also *Symington*, 25 May 1837, 15 S. 1020; *Heritors of Kingoldrum*, 24 Jan. 1863, 1 Macph. 325.]

The manse includes a dwelling-house, stable, barn, and byre; and the usual occasion for settling the matter between the minister and the heritors is the induction of a new incumbent. The manse is then either rebuilt, added to, or repaired, as circumstances may require; and when these operations are completed, the manse is, in the ordinary case, declared a *free manse*; that is, the presbytery, after due inspection, take the manse, as it were, off the hands of the heritors. This is a form introduced by practice for ascertaining that a competent manse has been provided. Its effect is to lay the burden of all ordinary repairs on the minister during his incumbency; and the heritors are entitled to have the manse declared free, whether it has been built or repaired voluntarily, or under a decree of the presbytery. But this declaration will not bar the same incumbent from insisting for such repairs or additions as may be rendered necessary by the decay occasioned by time, or by the manifest incompetency of the manse as a suitable residence. [By

[31 & 32 Vict. c. 96, § 12, any heritor may move the sheriff to declare a "free manse;" and a decree so given by the sheriff is effectual for fifteen years, or until the appointment of a new minister to the parish.] Where a manse stands in need of repairs or additions, or where a new manse is necessary, the course is for the clergyman either on his induction or when the necessity occurs, to apply to the presbytery by petition to hold a meeting for the purpose of inspecting the manse. On this petition a deliverance is pronounced, appointing a visitation on a day fixed, of which edictal notice is directed to be given from the pulpit, and also by letters addressed by the minister to the non-resident heritors. At the same time, skilful tradesmen are directed to attend the presbytery on the appointed day, the expense of the tradesmen's attendance being borne by the heritors. At this diet the tradesmen make a report on oath, which is the ground for a finding by the presbytery, which is followed by an order for plans, estimates, and a contract, and finally by a decree of the presbytery against the heritors for the sum necessary to defray the expense of the building and other incidental expenses. The presbytery may proceed in absence of the heritors; but, in the ordinary case, the matter is otherwise managed:—The subject is taken into consideration at successive meetings of presbytery, and it is only in comparatively rare cases that compulsory measures are requisite against the heritors; but where that happens, and where the parties insist on having their respective rights judicially determined, the decree of the presbytery may be brought under the review of the Court of Session by suspension. [By 31 & 32 Vict. c. 96, power is also given to appeal, within twenty days, from the presbytery to the sheriff, in regard to any determination as to the building, rebuilding, or repairing of churches or manses, or the designing or excambing of glebes, sites of churches or manses, and churchyards. The sheriff's decrees are final, unless within twenty days they are appealed to the Lord Ordinary in teind causes. The decrees of the latter are final, and not subject to review; *Presb. of Deer*, 5 July 1876, 3 R. 975; *Heritors of Pit-sligo*, 18 Jun. 1879, 6 R. 1062; *Walker*, 24 Nov. 1876, 4 R. (H.L.) 1; *Dove Wilson's Sher. Court Prac.* 411.] The higher church courts have no jurisdiction in this matter. While the rebuilding or repairs are in progress, or during the time that the minister

is excluded from his manse, either by those operations or by a relative litigation, he is entitled to an allowance from the heritors as manse-rent. This allowance must be claimed in a separate process at the instance of the minister against the heritors, unless they consent to the court awarding a sum as rent, in the suspension of the decree of the presbytery. If an action be raised for manse-rent, the summons must conclude against each heritor for his proportion of the rent, not against the whole heritors as jointly and severally liable; and where a difficulty had arisen as to the *quantum* of rent, the court, in one case, remitted to the sheriff to report as to what would be a reasonable allowance.

It has been said by some authorities that all ministers are entitled either to manses or to a pecuniary allowance in lieu of a manse; but this is a mistake. The ministers of royal burghs proper have no such right; although, where the royal burgh has a landward district attached, and forming part of the parish, the first minister is entitled to a manse; *Auld*, 13 June 1827, 2 W. & S. 600. The second minister of a parish, whether landward or burghal, seems to have no legal claim to a manse; [*Adamson*, 14 Feb. 1816, F.C.]; although, where a manse has been once provided by the heritors, they may be bound to keep it up; *Dunlop*, 88. By 5 Geo. IV. c. 72, a statutory provision is made for an allowance or additional stipend in lieu of manse and glebe to clergymen whose stipend is under £200, and who have no manse or glebe. The regulation of that statute is, that a payment shall be made from the public revenue, so as to raise the stipend to £200 where there is neither manse nor glebe, and to £180 where either the manse or the glebe is wanting. See *Small Stipend*. And the stat. 5 Geo. IV. c. 90, regulating the erection of government churches in the Highlands and Islands of Scotland, also provides for the erection of dwelling-houses for the clergymen of such churches. Those dwelling-houses are on a very moderate scale, the statutory sum at the disposal of the commissioners for the erection both of church and dwelling-house not exceeding £1500 sterling. [In *Heritors of Aberdour*, 14 Dec. 1871, 10 Macph. 221, the right of a minister to let his manse for two months in summer was affirmed; but no opinion was expressed as to his right to let it for a longer period.] See *Stair*, B. ii. tit. 3, § 40; *More's Notes*, clxx.; *Bank*, i. 667; ii. 29, 46; *Ersk.* B. ii. tit. 10, § 55; *Bell's*

Princ. § 1165; *Bell's Com.* i. 739; *Kames' Stat. Law*, h. t.; *Hunter's Landlord and Tenant*, i. 135; *Connell on Parishes*, 240; *Dunlop's Parish Law*, 92; *Hill's Prac. of Church Courts*, 149; [*Cook's Styles*, 191; *Duncan's Par. Eccl. Law*, 405; *Black's Par. Eccl. Law*, 86; *Mair's Church Laws*, 90; *Rankine on Land-Ownership*, 634. See *Church. Glebe.*]

MANSION-HOUSE. The heir in possession under a deed of entail is not entitled to grant a lease of the family mansion-house or pleasure-grounds to endure beyond the period of his own lifetime. If he should do so, however, the lease does not expire *eo ipso* on his death, but must be set aside by reduction. By the Montgomery Act, this prohibition is extended to the manor-place, offices, gardens, and adjacent inclosures, which have been usually in the natural possession of the proprietor; and building leases cannot be granted of any lands within 300 yards of the manor-place; 10 Geo. III. c. 51, § 6. By the same statute it is provided that, if the heir of entail expends money in building or repairing the mansion-house, he may become a creditor for three-fourths of the money expended to the next succeeding and subsequent heirs of entail, provided he take the steps prescribed by the statute for preserving evidence of the expenditure, and making it a proper charge against the succeeding heirs; § 27. [See *E. Breadalbane*, 16 March 1877, 4 R. 677.] If there are more entailed estates than one, the right to build a mansion-house is not barred by the existence of a mansion-house already on another estate. The mansion-house is one of the rights to which the eldest of two or more heirs-portioners is entitled as a *præcipuum*. See *More's Notes on Stair*, clxxv.; *Bell's Com.* i. 52; *Bell's Princ.* §§ 1752, 1770; *Bell on Leases*, i. 123; *Hunter's Landlord and Tenant*, i. 123, 454; *Sandford on Heritable Succession*, i. 8; *Sandford on Entails*, 163-5, 248; [*Rankine on Land-Ownership*, 552.] See *Entail*. [*Excambion.*] *Heirs Portioners. Terce.*

MANSLAUGHTER. See *Homicide*.

MANSUS; according to Skene, a habitation, dwelling-place, or bothie; also, so much land as will sustain a man and his family honestly, and pay the duty to his master. *Skene, h. t.*

MANUFACTORIES AND MACHINERY. Several statutes have been passed relative to the conduct of various manufactures, and the mutual rights and duties

of master and workman. The health of young persons in factories has been provided for in certain salutary acts. See *Factories*. [*Master and Servant. Workman. Trade Unions.*] A contract has come into use, by which the proprietor of a manufactory lets it for hire, along with the machinery which it contains, and sometimes with steam-power. Where let without steam-power, there is no difference between such a lease and an ordinary lease of shop,—the machinery or other articles being let according to inventory. When steam-power is included, the landlord lets the mill or building in whole or in part, with a right to each of the tenants to a proportionate share of the machinery, or of the chief mechanical power; and it is usually stipulated that the lessor shall keep the building and steam-engine, and the “great gearing” connected with the engine on the outside of the building, in proper repair; while the lessees are taken bound to keep the small machinery within their respective portions in repair. If the engine be not kept going regularly, the lessee may, upon notice in writing, appoint an engineer to superintend it, and to keep it going at the stipulated rate, and deduct the expense from the rent. A stipulation to make up stoppages, either by *extra* work or a deduction of rent, does not include extraordinary stoppages: the lessor is held to warrant the condition of his engine, and the lessee is entitled to damages to the extent of the loss sustained by any imperfection or fault in the engine. [When steam-power is let without any building attached, the contract is not lease, but *locatio operis*; but when a manufactory, or part of one, is let along with steam-power, the contract is lease; *Auld*, 31 Jan. 1827, 5 S. 264; *Catthers*, 15 May 1835, 1 S. & M'L. 694. In the latter case, where premises were let for a manufactory, and a separate rent or price was stipulated for steam-power, it was held that the contract with regard to the steam-power was one of pure location, and that the consideration payable for it was not affected by the landlord's right of hypothec. See *Hunter's Landlord and Tenant*, i. 285; *Rankine on Leases*, 254. See *Fixtures*.]

MANUMISSION; in the Roman law, was the act by which a master gave liberty to his slave, or freed his son from the *patria potestas*. The slave, when made free, became his master's freedman, and owed him certain duties as patron; and if he failed in these, he returned to servitude.

By the old law of England, while villanage subsisted, a lord might manumit his bondmen in various ways. Some were freed by delivery to the sheriff, and proclamation in the county; others by charter: one way was for the lord to take the bondman by the head, and say, "I will that this man may be free," and then push him forward out of his hands; and manumission was implied when the lord made an obligation for payment of money to the bondman, or sued him where he might enter without suit. *Stair*, B. i. tit. 2, § 13; *Bank*. i. 67; *Ross's Lect.* ii. 465; *Tomlins' Dict. h. t.*

MANURE. See *Dung*.

MANUS MORTUA. *Dimittere terras ad manum mortuam*, signifies to mortify lands, to dispoise them to a kirk or university, the term being so used either because all casualties must necessarily be lost to the proprietor, where the vassal is a corporation which never dies, or because the property of these subjects is made over to a dead hand, which cannot, contrary to the donor's intention, transfer it to another. *Ersk.* B. ii. tit. 4, § 10; *Skene, h. t.* See *Mortification*.

MAPS; may be founded on, when distinctly authenticated and sworn to. But a map is not evidence of itself; it is rather an adminicle, explanatory of other proper evidence. *Macfarlane's Jury Prac.* 183. See *Plan*.

MARCHES. By 1661, c. 41, ratified by 1685, c. 39, the proprietor of land may compel the conterminous proprietor to bear with him half the expense of a mutual fence or inclosure; and, in the same manner, fences once made may be kept in repair at the mutual expense of the parties, [or, when no longer reparable, may be reconstructed; *Paterson*, 16 June 1880, 7 R. 958.] Where the march is a rivulet, which is not a sufficient fence, a proper fence may be built upon the spot, if it be practicable. The fence may run along one side of the stream; but if it be desired, the stream ought to run a space within the fence and a space without, that both parties may have the benefit of watering; [*Pollock*, 25 May 1869, 7 Macph. 815.] A tenant, contrary to the general rule, is bound, independently of stipulation, to maintain march-fences erected by the landlord during the lease. See *Fences*. By 1669, c. 17, [where the march is crooked, application may be made to the judge-ordinary to straight it, and determine the compensation to which either may be entitled, by the operations necessary in straighting the

[march; *E. Kintore*, 18 June 1886, 13 R. 997.] Considerable portions of land may be exchanged. Entailed lands are comprehended under these regulations, provided the excambion be regulated by the entail statutes. See *Excambion*. The conterminous proprietor ought to be called as a party. The obligation to bear the expense of half-march does not take place in small properties; and practice has excluded it where the property does not exceed five or six acres. [The acts have been held not to apply, where there is in existence a natural boundary of steep cliffs, nor where the expense of erecting the fence would be disproportionate to the value of the pieces of ground to be benefited; *Sinclair*, 23 Nov. 1872, 11 Macph. 137. As to property in march-fences, see *Strang*, 31 March 1864, 2 Macph. 1015 (affd. 4 Macph. (H.L.) 5.) See *Kilkerran, Planting and Inclosing*, No. 1; *Ersk.* B. ii. tit. 6, § 4; B. iv. tit. 4, § 39; *Stair*, B. ii. tit. 3, § 73; B. iv. tit. 27; tit. 43, § 7; *Bank*. i. 282, 679; *Bell's Princ.* § 958; *Hunter's Landlord and Tenant*, ii. 222; *Bell on Leases*, i. 206; *Kames' Equity*, 114; [*Rankine on Land-Ownership*, 507. See *Planting and Inclosing*.]

MARCHETA MULIERIS; the "raide of a woman, or the first carnal copulation with her. King Evenus ordained that the lord of the ground should have the first night of each married woman within the same; but Malcolm III. abrogated this ordinance, and appointed each bridegroom to pay a piece of money, called *marcea* as a compensation;" *Skene, h. t.* Bankton doubts the infamous origin of this casualty, i. p. 595; and Hailes, in a treatise on this subject, annexed to his *Annals*, attempts to show that no such custom ever existed in Scotland. He explains the term *mar-cheta* to mean a fine paid to the lord by a sokeman or villain, when his unmarried daughter chanced to be debauched; or a composition by the sokeman for the lord's permission to give his daughter in marriage to a person not subject to the lord's jurisdiction; or the fine for giving her away without such permission. *Hailes' Annals*. [With regard to the *jus primæ noctis*, Prof. Cosmo Innes says:—"I think there is no evidence of a custom so odious existing in England; and in Scotland, I venture to say that there is nothing to ground a suspicion of such a right. The merchet of women with us was simply the tax paid by the different classes of bondmen and tenants and vassals, when they gave their daughters

[in marriage, and thus deprived the lord of their services, to which he was entitled *jure sanguinis*;" *Legal Antiquities*, 53.]

MARGINAL ADDITION, or NOTE.

A marginal addition to, or alteration on a deed, must be made before the final execution of the deed, by its being signed in presence of the witnesses. Marginal notes, being parts of the deed, require subscription. The practice is to comprehend them within the subscription; *i.e.*, to write the Christian name upon the left side, and the surname upon the other, which must be done before the subscribing witnesses. The marginal note or addition ought to be mentioned in the testing clause of the deed: it ought to be there stated by whom the note or addition is written, and that the witnesses were also witnesses to the party's having subscribed the marginal note; otherwise it will be held *pro non scripto*. Such notes are presumed to have been added after the execution of the deed, unless the contrary is stated in the testing clause. See *Ersk. B. iii. tit. 2, § 20*; *Stair, B. iv. tit. 42, § 19*; *More's Notes*, cccii.; *Bank. i. 336*; *ii. 635*; *Ross's Lect. i. 143, 158*; [*Menzies' Conv. 127*; *M. Bell's Conv. i. 43, 75*; *Dickson on Evidence, § 734.*]

MARINE STORES. Dealers in marine stores are bound to keep books, in which they are to enter the name and address of all with whom they deal, together with the price of the articles purchased by them. *Tomlins' Dict. h. t.* [See 17 & 18 Vict. c. 104, §§ 480 *et seq.*]

MARISCHAL. This officer, along with the Lord High Constable of Scotland, formerly possessed a supreme itinerant jurisdiction in all crimes committed within a certain distance of the court, wherever it might happen to be. *Ersk. B. i. tit. 3, § 37.* See *Constable of Scotland*.

MARITAGIUM; "tocher gude." *Skene, h. t.*

MARITAGIUM HÆREDIS; according to *Skene*, is the casualty of marriage which falls to the superior. *Skene, h. t.* See *Marriage, Casualty of*.

MARITIME LAW. The maritime law partakes more of the character of international law than any other branch of jurisprudence; and both English and continental collections and treatises are received as authority in our courts. Formerly the Judge-Admiral was judge in the first instance in all maritime causes; but his jurisdiction has been transferred partly to the sheriff, and partly to the Court of Session. See *Admiralty*. The doctrines

of maritime law are considered under the following heads in this Dictionary:—*Charter-Party. Bill of Lading. Freight. Salvage. Wrecks. Bottomry. Responsdientia. Insurance. Loading. Seaworthiness. Stranding. Barratry. Contribution. Demurrage. Lay Days. Reprisals. Deviation. Collision. Pilots. Stowage. Shipping Law, &c.*

MARK; an ounce, or half a pound, whereof the dram is the eighth part. *Skene, h. t.*

MARK; an old English coin. The mark of silver is now 13s. 4d.; although in the reign of Henry I. it was only 6s. and a penny in weight. *Tomlins' Dict. h. t.* See *Merk. Scots Money*.

MARK. [According to former editions of this work,] a subscription by a mark, and the name written around it in presence of witnesses, may, on a proof by the instrumental witnesses, be the ground of an obligation; but it requires the evidence of the witnesses to give it validity. [It is now, however, fixed absolutely that a deed cannot be executed by the subscription of a mark; *Graham, 30 Nov. 1848, 11 D. 173*; *Ersk. B. iii. tit. 2, § 8*; and other authorities *infra*.] The subscription of a bill by mark is irregular, and contrary to the nature of bills, which are intended for summary execution. [But, by custom and favour to commerce, bills and other writings *in re mercatoria*, authenticated merely by a mark, may in certain circumstances be sustained as the ground of an action for the debt, though they can never warrant summary diligence. See Bills of Exchange Act, § 91 (1) *supra*, p. 121. If the subscription be denied, there is no general rule as to the evidence which would be sufficient; *Kennedy, 25 May 1816, F.C.*] See *Stair, B. i. tit. 11, § 7*; *More's Notes*, cccci.; *Thomson on Bills, 33*; [*Ersk. B. iii. tit. 2, §§ 8, 26*; *Bell's Com. i. 415*; *Bell's Princ. § 2226*; *Dickson on Evidence, §§ 672, 793*; *Menzies' Conv. 107, 343*; *M. Bell's Conv. i. 49, 462.*] See *Initials, Subscription by. [Deeds.]*

[**MARKETS.** See *Fairs and Markets.*]

MARKET OVERT. The law of Scotland differs from that of England as to the legal effect of a sale in open market. For the security of purchasers, the English law recognises the principle that property may in some cases be transferred by sale, although the seller has no right of property in the goods. Thus, if one steal an article, or retain in his possession goods which he has already sold—and in England, the

contract of sale transfers the property without delivery,—and if he sell these goods in open market, the buyer is secure of his purchase: it being held that a sale of anything vendible in market overt is not only good between the parties, but also binding on all (except the Crown) having any right or property therein. Market overt in the country is only held on the special days provided for particular towns by charter or prescription; but in the city of London every day except Sunday is market-day. The market, place, or spot of ground set apart by custom for the sale of particular goods, is also the only market overt in the country. In the city of London, however, every shop in which goods are publicly exposed to sale is market overt, but only for such things as the owner professes to trade in. But there are certain exceptions to the general rule; such as, that the property is not changed by a sale in a *covert* place in a fair or market—e.g. in a back room or warehouse, behind a hanging or cupboard, or where the windows of the shop are shut. [And in regard to sale of horses the privilege is subject to statutory restrictions.] In Scotland, again, no such privilege is attached to sales in open market; and the owner of goods, sold by one who has stolen them, or to whom they have been lent, may reclaim them from the purchaser. [See *Faulds*, 5 Feb. 1861, 23 D. 437; *Todd*, 7 June 1882, 9 R. 901.] It is true that a second sale with delivery is effectual against the first sale without delivery; but this is not from any privilege of market, but from the universal doctrine of the law of Scotland, that the property of a thing sold is not transferred without delivery. [As to the effect of the sale in open market of corn subject to the landlord's hypothec, see *Hypothec*.] See *Stair*, B. ii. tit. 1, § 42; B. iv. tit. 25, § 6; *More's Notes*, xlviii., cli.; *Bell's Com.* i. 299, 306; *Bell's Princ.* §§ 527, 665, 1320; *Brown on Sale*, 15, 29, 420; *Tomlins' Dict. h. t.*; [*Stephen's Com.* ii. 76; *Benjamin on Sale*, 8.] See *Sale. Labes Realis*.

MARKING OF GOODS. The marking of goods is one of those forms of constructive delivery by which the property of a thing sold is transferred, while the seller retains possession. It cannot be said to be a general rule that marking goods is equivalent to delivery; *Bell's Com.* i. 192. But in the special case, where there is some difficulty in the way of immediate delivery, marking appears to be equivalent. Thus, where the thing sold is not yet separated

from the soil, and cannot instantly be separated and delivered, it is held as delivered when marked for the buyer; and the property of cattle sold while grazing seems to be transferred by their being marked for the buyer. Goods sold and sent to the buyer at a distance are not held as delivered while in the hands of a wharfinger or public warehouseman for the carrier's convenience; but if, in such circumstances, the buyer claim the goods and mark them as his, the delivery is completed. See *Bell's Com.* i. 192, 216; *Bell's Princ.* § 1303; *Brodie's Sup. to Stair*, 897, note d. See *Delivery*.

MARLE-PIT. The landlord has the sole right to sell marle found within the farm; and he may work it, and make roads, &c., on paying surface damage. A minister has been found entitled to sell the produce of a marle-pit discovered in his glebe, upon applying the price to the use of the benefice; [*Ramsay*, 1794, M. 5153.] See *Bell's Princ.* § 1226; *Bell on Leases*, i. 344; *Hunter's Landlord and Tenant*, ii. 207. See *Lease. Mines. Minerals. Glebe*.

MARQUE. See *Letters of Marque*.

MARQUIS; is a title of honour below a duke, but above an earl.

MARRIAGE; is a civil and solemn contract between a man and a woman, whereby they unite themselves for life in a domestic society, for the mutual solace and comfort of each other, and having in view chiefly the propagation of the species and the rearing of a family. This contract is indissoluble, except by the death of one or other of the parties, or by decree of divorce founded on adultery or desertion; for, although impotency or a natural incapacity on either side for procreation is a ground on which the marriage may be annulled, yet it is not so much a ground for divorce as an essential nullity, in respect of which the contract may be declared to have been void from the first. [Marriage is not merely a contract, but an institution, conferring a certain *status*, which is recognised throughout Christendom, and which cannot be affected, as to its duration or its legal consequences, by any private stipulation.] The subject will be briefly considered in the following order:—

I. *Of the Constitution of Marriage* (pp. 688–693).

II. *Of the Rights consequent on Marriage* (pp. 693–699).

III. *Of the Manner and Effects of its Dissolution* (pp. 699–700).

I. OF THE CONSTITUTION OF MARRIAGE.

Marriage is a contract completed by consent alone. The parties must have arrived at the age of puberty; that is, the male at the age of fourteen, the female at the age of twelve, before they are held legally capable of the requisite consent; but after that age parties, where there is no disqualification, may validly intermarry. A marriage entered into even before the age of puberty, if the parties, after arriving at that age, cohabit as man and wife, is effectual. The consent of parents or of curators is not required in order to constitute a legal marriage by the law of Scotland. A marriage, as regards the ceremony, may be either regular, clandestine, or by mere consent, without the intervention of a clergyman.

1. *Regular Marriage*.—A regular marriage is performed by a clergyman in presence of at least two witnesses, and is preceded by the proclamation of banns according to the rules of the church, [or by the publication of a notice of marriage, in accordance with the statutory provisions mentioned below. Formerly, the officiating clergyman required to be of the Established Church. By 10 Anne, c. 7, episcopal clergymen, who had taken the oaths to Government, were allowed to celebrate regular marriages; and by 4 & 5 Will. IV. c. 28, the privilege was extended to all dissenting ministers, provided banns were proclaimed in the parish churches.] A certificate of the session-clerk is received as evidence of proclamation of banns. See *Banns*.

[By the Marriage Notice Act, 1878 (41 & 42 Vict. c. 43), which is intitled "An act to encourage regular marriages in Scotland," an important change was made in the law as to regular marriages. While the ecclesiastical form of proclamation of banns in the parish church is retained for those who prefer to use it, a secular form of publication was sanctioned as an alternative. It is now lawful for ministers, clergymen, or priests in Scotland to celebrate marriages therein after such publication of notice of intention to marry as is prescribed by the act, and upon production to them of a certificate of such publication, as prescribed; and a marriage so celebrated is deemed to be a regular marriage, as if it had been celebrated after proclamation of banns; § 4. A registrar's certificate of the publication of a notice of marriage, in manner provided by the act, is of the same force

[and effect, for all purposes of law (save as after provided), as a certificate of proclamation of banns granted by the proper officer; § 6. When persons residing in Scotland intend that a regular marriage shall be contracted between them in Scotland without proclamation of banns, each of such persons shall, on or about the same date, give notice of the intended marriage, in form prescribed, to the registrar of the parish or district in which he or she shall have resided for a period of not less than fifteen clear days previous to the giving of such notice; a single notice being sufficient when both reside within the same parish or district; § 7. On receipt of a notice of intended marriage, along with the sum of one shilling and sixpence, the registrar, being satisfied that the notice is conformable to the requirements of the act, shall forthwith enter the particulars set forth in the notice in a "Marriage Notice Book," and shall on the same day post or put up in a conspicuous and accessible place on the door or outer wall of his office, a public notice of the intended marriage, in form prescribed, and shall keep the same so posted or put up for seven consecutive days thereafter. The marriage notice book shall be open for inspection at all reasonable times, upon payment of one shilling; § 8. The registrar, having complied with the requirements of the act, shall, on the expiration of seven clear days after receipt of the notice of an intended marriage, in the event of no objection to the marriage appearing on the face of such notice, or being stated to him, as after provided, and upon payment of a fee of one shilling, grant to the person who gave the notice, or any person authorised by him, a certificate in form prescribed of the due publication thereof, and shall therein set forth whether any objection had been offered to such intended marriage; § 9. The registrar shall disregard all objections to an intended marriage not appearing on the face of the notice, unless—(1) they shall be stated prior to the issuing of the certificate of publication: (2) they shall be stated in writing subscribed by the person taking the same: (3) the person taking the same shall appear personally to lodge the same with the registrar, and shall in his presence make and subscribe a declaration, in form prescribed, which the registrar shall indorse on the written statement of objections. And with regard to objections, timely and duly stated as above provided, the following

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[provisions shall have effect: (a.) Where the objection is that the persons intending to contract marriage, or either of them, had not resided fifteen clear days within the parish or parishes or districts or district before giving notice; or that such persons are wrongly named or described in the notice, or that either of them is so wrongly named or described; or that the notice is otherwise inaccurate in any detail; and generally where the objection does not set forth a legal impediment to a marriage between such persons, but relates to some formality or statutory requirement merely, the registrar shall suspend the issuing of his certificate, and shall consider the objection, and make such inquiry thereon as he shall see fit, and report thereon as soon as may be to the sheriff or sheriff-substitute of the county in which his office is situated, who shall, on such report, direct the notice to be amended and a certificate to be granted thereon without the republication thereof, if he shall see fit; or to be cancelled, if he shall see fit, in which case it shall be competent for the persons intending to contract marriage to give notice *de novo* of their intended marriage: (b.) Where the objection is that the persons intending to contract marriage are within the forbidden degrees of consanguinity or affinity, or are both or either of them already married, or are both or either of them not of a marriageable age, or are from any other legal incapacity disqualified to give such consent as is necessary for marriage; and generally where the objection sets forth any legal impediment to a marriage between them, the registrar shall suspend the issuing of his certificate until there shall be produced to him a certified copy of a judgment of a competent court of law to the effect that the parties are not in respect of the said objection disqualified from contracting such marriage; § 10. For the purposes of the act, a certificate from a session-clerk of the due publication of banns, and a registrar's certificate granted under the act, are of equal authority in authorising a minister, clergyman, or priest in Scotland to celebrate a regular marriage, and such marriage may be celebrated upon the production either of a certificate or certificates of due proclamation of banns, or of a registrar's certificate or certificates applicable to both parties, or a certificate of due proclamation of banns in the case of one of the parties, and of a registrar's certificate in the case of the other; provided always, that whenever a marriage shall not take place within three months of

[the date of such registrar's certificate as aforesaid, such certificate shall be utterly void; and provided further, that no minister of the Church of Scotland shall be obliged to celebrate a marriage not preceded by due proclamation of banns; § 11. Any person otherwise entitled to celebrate a marriage, who celebrates a marriage in Scotland with a religious ceremony without having produced or exhibited to him a certificate or certificates of the due proclamation of banns or a registrar's certificate or registrar's certificates applicable to both parties, or a certificate of due proclamation of banns in the case of one of the parties and a registrar's certificate in the case of the other, is guilty of an offence under the act, and is liable, on conviction thereof, to a penalty not exceeding £50; § 12. A registrar who wilfully grants a registrar's certificate to any person, without complying with all the requirements of the act in regard to the conditions on which and the time when the same may be granted, is guilty of an offence under the act, and is liable, on conviction, to a fine not exceeding £25, or to be imprisoned for a period not exceeding one month, and to be deprived of his office; § 13. Offences under §§ 12 and 13 may be prosecuted before the sheriff or sheriff-substitute under the provisions of the Summary Procedure Act, 1864, at the instance of the procurator-fiscal. Every person who wilfully makes or signs any false declaration, or signs or gives any false notice of an intended marriage, or who wilfully states any false objection to a marriage, or wilfully makes any false declaration relative to an objection to a marriage under the provisions of the act, is deemed to be guilty of the crime of perjury; § 14. Quakers and Jews may contract and solemnise marriage according to their respective usages; and every such marriage is by the act declared and confirmed as a regular marriage, provided that the parties be both Quakers or both Jews respectively; provided also that notice of intention to marry shall have been given to the registrar, and his certificate shall have issued, in manner provided by the act; § 5. Any person unable to write may duly subscribe any notice, declaration, or other writ under the act, by adhibiting thereto a cross or other mark in the presence of the registrar, or two witnesses, provided the registrar or witnesses shall duly subscribe a declaration relative to such cross or mark as having been so adhibited by such person in their presence; § 16. Nothing contained in any statute, law, or custom shall prevent the

[Church of Scotland as by law established from altering the existing regulations as to proclamation of banns of marriage, and in particular from shortening to any period not less than fifteen clear days the period of residence required in order to such proclamation; § 18. By 49 Vict. c. 3, no marriage solemnised in any church in England, after publication of banns in such church, is invalid by reason only that one of the parties was at the time of such publication resident in Scotland, and that banns may have been published or proclaimed in any church of the parish or place in which such party was resident, according to the Scottish law or custom, and not in the manner required for publication of banns in England.]

[*Registration of Regular Marriages.*—Before celebrating the marriage, the parties must procure from the registrar of the parish or district where it is to be solemnised, a statutory schedule containing particulars as to the names, occupations, ages, residences, &c., of the parties. The schedule, being filled up, shall be produced, upon solemnisation of the marriage, to the officiating minister (or to the person solemnising any marriage according to the rites and forms respectively observed by Jews and Quakers), or shall be filled up in the presence of such minister or person, and shall be signed by the parties contracting the marriage, and by the witnesses, male or female, present thereat, not being less than two, and also by the minister or person officiating. The schedule shall then be delivered to the parties contracting the marriage, who, within three days thereafter, shall either deliver it or send it by post to the registrar of the parish in which the marriage was solemnised; and in case of failure to do so, the husband (and, failing him, the wife) shall be liable in a penalty not exceeding £10; 17 & 18 Vict. c. 80, § 46; 23 & 24 Vict. c. 85, § 15. See *Registration of Births, Deaths, and Marriages*.]

2. *Clandestine Marriage.*—Clandestine marriages are also performed by clergymen, and are equally effectual with regular marriages: but they expose the clergyman and the parties to certain penalties. They differ from regular marriages in this, that they are not preceded by the publication of banns, [or of notice of marriage.] See *Clandestine Marriage*.

3. *Marriage by mere consent, without a Clergyman.*—[Such irregular marriage is constituted, or, more correctly, its constitution is evidenced, in three ways:—(1) By

[declaration *de præsenti*; (2) By promise *subsequente copula*; (3) By cohabitation, with habit and repute.]

(1.) *By Declaration de præsenti.*—Marriage, being a civil contract, may be completed by consent alone, solemnly and deliberately given *de præsenti*. In the case of an antenuptial contract of marriage, where the parties, according to the expression in the deed, agree to take each other as husband and wife, the effect of this agreement as a *de præsenti* acceptance is counteracted by the subsequent obligation which the deed also contains to enter *de futuro* into a regular marriage; thus indicating the understanding of the parties that the written contract imports a mere engagement to enter into the marriage hereafter. Deliberate consent *de præsenti*, without a *copula*, completes a marriage; for, according to the law of Scotland, *consensus non coitus facit matrimonium*. [The consent may be given either verbally, or in writing; or it may even be inferred from the conduct of the parties, as when there is tacit acknowledgment of a declaration, or acceptance of a writing. Whatever proves serious, deliberate, and unconditional consent of both parties to a present marriage is sufficient to prove marriage. See Lord Stowell's noted judgment in the case of *Dalrymple* (16 July 1811, 2 Haggard, 54, and Dodson's separate report), which in so far as it deals with this subject, was adopted by the House of Lords in the Scotch case of *M'Adam*, 21 May 1813, 1 Dow, 143. See also *Aitchison*, 20 Nov. 1838, 1 D. 42; *Hamilton*, 9 Aug. 1842, 1 Bell's App. 736; *Leslie*, 16 March 1860, 22 D. 993 (a decision whose soundness has been questioned); *Longworth*, 28 July 1864, 4 Macq. 745; *Forster*, 11 June 1872, 10 Macph. (H.L.) 68; *Maloy*, *infra*, 12 R. 431; *Dysart Peerage*, 1881, 6 App. Ca. 489. When a written acknowledgment is founded on,] it is necessary, in order to fix the *status*, that the written acknowledgment should have been produced and acted upon during the lifetime of both parties. It is not sufficient that, after a man's death, an acknowledgment by him is produced certifying that he was married to a certain woman. This will not give the woman the *status* of his widow; [*Anderson*, 1795, M. 12690, Hume's Dec. 365. 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.

[It is thus settled that by the law of Scotland interchange of present consent constitutes marriage, and that the church's sanction, however seemly and appropriate to the institution, is not of its legal essence. Lord Fraser, however, in his learned work on *Husband and Wife*, maintains that both before and after the Reformation, down to the date of the *Dalrymple* judgment (1811), the clerical benediction was necessary to a legally valid marriage. In the *Dalrymple* case, Lord Stowell's judgment was based to a large extent on the general canon law, which he held to have been the matrimonial law of Europe, and to be still the governing law in all countries in which it has not been superseded by the adoption of a separate matrimonial law. According to the general canon law, as it existed prior to the Council of Trent (1563), Lord Stowell held that consent *de presenti*, without sacerdotal benediction, made marriage; and no different matrimonial law having been shown to be in force in Scotland, judgment was given in conformity with the general canon law. In opposition to Lord Stowell's view, Lord Fraser maintains "that for many centuries anterior to the Council of Trent, marriage required to its constitution the sacerdotal benediction;" and further, even assuming the canon law to be as stated by Lord Stowell, "that Scotland was not subject to the general canon law in this particular, but had a special code of its own, passed by its own national councils and enforced in its own courts, and which required also the nuptial benediction as essential to matrimony;" and "that so far from the general canon law being the law of Scotland, it was expressly repudiated, and wherever the decrees of general councils had authority in Scotland, it was in consequence of their having been adopted by native provincial councils" (vol. i. p. 181). "Unless so far as they have been departed from by legislation, or by decisions of courts of law since the Reformation, these canons of the provincial councils are still the code of Scottish canon law" (p. 228). These propositions, which cannot, after the decisions in *Dalrymple* and *M'Adam*, practically affect the doctrine of marriage *per verba de presenti*, are urged by Lord Fraser as material in reference to the doctrine of promise *subsequente copula*, which was not involved in these decisions; as to which see *infra*. See article by Mr

[Taylor Innes in *Journ. of Jurisp.* xxi. 241, in which Lord Fraser's theory is impugned, mainly on the ground that the whole law of the old provincial councils was swept away by the Reformation statutes. In *Millis*, 1844, 10 Cl. & Fin. 534, the House of Lords held that by the common law of England, subsequent to the Reformation, the priestly benediction was essential to marriage. Regarding the opinion delivered in that case by Lord Chanc. Lyndhurst, Lord Fraser observes that it is "as complete a treatise on the constitution of marriage as can be found in the judgments of any court in any country" (p. 215); and further, that "there is scarcely a line of it that may not be read in consistency with the authorities as now known of the law of Scotland" (p. 206). It was dissented from, however, by Lords Brougham, Denman, and Campbell, and is at variance with Lord Stowell's opinion in the *Dalrymple* case.]

(2.) *By Promise subsequente copula*.—A promise or engagement to marry, followed by a *copula*, constitutes a marriage; for consent *de presenti* is presumed to have been adhibited at the time of the *copula*. [But this is not a *presumptio juris et de jure*: it may be rebutted by proof that, at the time of *copula*, there was no matrimonial intention on the part of the woman; *Morrison*, 17 Dec. 1869, 8 Macph. 347; and the court will look to the whole circumstances and conduct of the parties, after as well as before the alleged marriage, in order to ascertain their true understanding and intention; *Maloy*, 19 Dec. 1884, 12 R. 431. A conditional promise does not necessarily raise the presumption. "If the condition be of such a nature that it cannot be purified till after the *copula*, there is no marriage; but if it might be so, the law will presume that it in reality was purified or departed from at the subsequent *copula*;" *Fraser*, i. 379. Hence, if the promise is conditional on a child being born from the connection, there is no marriage; *Stewart*, 6 Oct. 1841, 2 Rob. 547; *Surtees*, 6 Feb. 1873, 11 Macph. 384.] It must be shown that the promise preceded the *copula*, for a promise after *copula* does not constitute marriage, unless the intercourse be renewed in such a way as to show that the new *copula* follows upon and is connected with the promise; [*Sim*, 20 Nov. 1829, 8 S. 89; *Ross*, 7 June 1861, 23 D. 972. The promise must be proved by writ or oath; 37 & 38 Vict. c. 64, § 3. It is sufficient, however, if

[there be an acknowledgment in writing of the fact that a promise had been given. The promise may be proved by construction of a course of correspondence; *Campbell v. Honyman*, 3 March 1831, 5 W. & S. 92. But it cannot be inferred from courtship or any other than documentary evidence; *Monteith*, 5 March 1844, 6 D. 934; *Ross*, *supra*; but see *Stewart v. Lindsay*, 1818, Hume's Dec. 380. It appears that both the promise and the *copula* must take place in Scotland; see *Longworth*, *supra*, 4 Macq. 745.] The question has been raised whether promise *subsequente copula* constitutes a marriage *ipso jure*? or whether it requires a declarator or subsequent completion of the marriage, which may be barred by another marriage intervening? It was held, but with some division on the bench, that the marriage is constituted *ipso jure*, [to the effect of annulling a second marriage subsequently celebrated *in facie ecclesie*;] *Pennycook*, 1752, M. 12677. [In that case the marriage was judicially declared in the lifetime of the parties. But the question remains, whether such declarator is essential to the constitution of marriage in this way. Lord Stowell, in the *Dalrymple* case, places consent *de presenti* and promise *subsequente copula* in the same category, as equally constituting *verum matrimonium*. Lord Fraser, on the contrary, holds that promise *cum copula* "only constitutes a pre-contract, the fulfilment of which the woman can enforce while both are alive (but not after the man's death), so as to obtain decree of declarator of marriage against him; but the promise and *copula* have not, until decree, or at least litis-contestation, the legal effects of marriage" (p. 322). "When the authorities are analysed, it will be found that the law truly is, that it is essential to the constitution of a marriage that the promise and the *copula* be followed up, either *first*, by solemnisation *in facie ecclesie*, or, *secondly*, that there be a decree of the consistorial court pronounced, ordaining the parties to celebrate the marriage," or a decree in the corresponding modern form of action by declarator (p. 323). This view was likewise held by Lord Moncreiff, in *Browne*, 30 June 1843, 5 D. 1288, and Lord M'Laren (Ordinary) decided in accordance therewith in *Maloy*, *supra*; in which case the judges of the First Division found it unnecessary to decide this point, and reserved their opinion. See also *Millis*, *supra*.]

(3.) *By Cohabitation, with habit and re-*

pute.—Marriage may also be inferred from cohabitation, and from the parties living together at bed and board, and being habit and repute husband and wife; 1503, c. 77. This statute gives the *terce* to a woman who has been reputed the wife of a man till his death. If the habit and repute have begun in avowed concubinage, a palpable change of purpose must be shown, in order to establish a marriage by habit and repute; [*Cunningham* (Balbougie), 1810, Hume's Dec. 376, *revd.* 1814, 2 Dow, 482; *Lapsley*, 19 Nov. 1845, 8 D. 34, *affd.* 1 Cl. & Fin. 498. But contrast with these the case of *Campbell* (Breadalbane), 16 July 1867, 5 Macph. (H.L.) 115; in which the cohabitation commenced in adultery, but the matrimonial consent was presumed to have been given as soon as the parties became free to marry. The cohabitation must have been regular and consistent, and for a sufficient period; and the repute must have been general, uniform, and undivided; *Cunningham*, *supra*; *Lowrie*, 28 May 1840, 2 D. 953; *Dysart Peerage*, *supra*.]

[*Consent given in Form, but not in Fact*.]—When a marriage is once fairly constituted, no subsequent acts of the parties (except such as warrant divorce) can dissolve it; but in the case of an irregular marriage, it is competent to found on subsequent facts and circumstances as qualifying the previous apparent consent, so as to show that the parties never had any deliberate or serious purpose of marriage. ["The most formal acknowledgment of marriage, even though made *in facie ecclesie*, will be of no avail, if it shall appear that such was not the true intention of the parties. It may be difficult, and often impossible, to show that the parties did not mean to be bound by what they have apparently done; and they will not be permitted lightly to disclaim their own solemn and deliberate proceedings; but still there is no form or ceremony which affords such conclusive evidence of marriage, as to make it incompetent to show that marriage was not truly intended by the parties;"] *More's Notes to Stair*, xiv. See also *Fraser*, i. 415; and *M'Innes*, 1782, 2 Paton 598; *Jolly*, 20 June 1828, 3 W. & S. 85; *Lockyer*, 3 March 1846, 8 D. 582; *Fleming*, 18 Dec. 1858, 21 D. 179; *Robertson*, 7 June 1875, 2 R. (H.L.) 83. But the mental reservation of one party will not bar marriage; *Stewart*, 6 Oct. 1841, 2 Rob. 547; *Fraser*, i. 436. With regard to force, fraud, and essential error, as grounds of nullity of marriage, see *Fraser*, i. 444.

[*Registration of Irregular Marriages.*—Persons convicted before a magistrate or justice of the peace of having contracted an irregular marriage are authorised and required to register such marriage in the parish where the conviction is obtained; and where an irregular marriage is established by a decree of a competent court, either party to the action may register such marriage in the parish of their domicile, or in that of their usual residence; 17 & 18 Vict. c. 80, § 48. The magistrate or clerk of court is required, under a penalty, to give notice to the registrar of such conviction or decree; *ib.* § 49. Persons who have contracted an irregular marriage may, within three months thereafter, present a joint application to the sheriff, for a warrant to register such marriage. Such warrant is granted by the sheriff, on proof of the marriage, and on proof that one of the parties usually resided in Scotland at the time of marriage, or had lived there for twenty-one days preceding the marriage. A certified copy of the entry in the register is evidence of the marriage; 19 & 20 Vict. c. 96, § 2. Without proof of previous residence in Scotland, as aforesaid, there can be no conviction for an irregular marriage, nor registration thereof; *ib.* § 3. See *Registration.*]

[*Breach of Promise of Marriage.*—A promise or engagement to marry, however formal, where no *copula* has followed, may be resiled from; the party so resiling, however, being liable in damages for breach of promise. [The promise may be proved *prout de jure*, and may be inferred from a course of conduct and correspondence; *Murray*, 4 July 1861, 23 D. 1243. Breach of promise may be inferred, without explicit refusal to marry; *Stoole*, 25 Feb. 1870, 8 Macph. 613. If a man, after promising marriage, discovers that the woman has had an illegitimate child, breach of promise is justifiable; *Fletcher*, 22 Oct. 1878, 6 R. 59. The action for damages and *solatium* is a proper jury cause; 6 Geo. IV. c. 120, § 28. See *Fraser*, i. 484.]

[*Impediments to Marriage.*—The legal disqualifications for marriage are, 1. Pupillarity, since a person before arriving at the age of puberty is not legally capable of giving consent. 2. Defect of judgment, as in the case of idiocy, because an idiot cannot give that consent which is requisite to complete the contract of marriage. [As to intoxication, see *Johnston*, 15 Nov. 1823, 2 S. 495.] 3. Impotency; but it is *jus tertii* in any other than the parties to plead impotency as a nullity.

4. The having entered into a previous marriage which still subsists. 5. By 1600, c. 20, a marriage between a divorced person and his or her paramour, mentioned as such in the decree of divorce, is declared illegal. See *Divorce. Adultery.* 6. Proximity within the forbidden degrees is a ground for dissolving a marriage; and the act 1567, c. 15, adopts the Jewish law, by declaring that marriage shall be as free as God has permitted it, and that seconds in the degrees of consanguinity and affinity, and all degrees further removed, contained in the Word of God, may lawfully intermarry. By Leviticus, c. xviii., the following rules are laid down: 1. Intermarriages between ascendants and descendants *in infinitum*, are prohibited. 2. Marriage in the collateral line *in infinitum*, is forbidden; that is, where the one party is brother or sister to the direct ascendant of the other party. 3. In every instance not falling under those rules, marriage is lawful in the second degree, according to the canon law, or in the fourth degree, according to the Roman law. See *Kindred*. Consequently, cousins-german, and all more remote relations, may intermarry. 4. The degrees in consanguinity which are prohibited are equally prohibited in affinity; and the rules are the same whether the parties are related by full or only by half-blood. [As to marriage with deceased wife's sister, see *Fenton*, 24 Jan. 1861, 23 D. 366; *Fraser*, i. 124.]

[*International Law.*—The validity of a marriage is determined by the *lex loci contractus*. Thus, a marriage contracted in England by simple declaration before witnesses would not be recognised by our courts. A marriage validly contracted according to the *lex loci*, is a valid marriage all the world over, unless it be incestuous or polygamous. The legal consequences of the marriage depend on the law of the domicile. See *Fraser*, ii. 1297; *Story's Conflict of Laws*, § 107; *Guthrie's Savigny*, 290. As to matrimonial domicile, see *Domicile*.

II. OF THE RIGHTS CONSEQUENT ON MARRIAGE.

A. At Common Law.

[*Status and Disabilities of Married Women.*—The wife's *persona* is said to be merged in that of her husband, and to have no separate legal existence; *Ersk.* B. i. tit. 6, § 19. On this fiction is based the general doctrine of the wife's inability to enter into contracts, or to become liable for debts. But the wife has rights, even at

[common law, which are inconsistent with such identity of person; *Fraser*, i. 508. A married woman may be a trustee, or executrix, or agent, with her husband's consent; but she cannot be tutor or curator; *Stoddart*, 30 June 1812, F.C.; *Darling*, 11 May 1825, 1 W. & S. 188. The wife drops her own surname, and assumes that of her husband. But a deed subscribed by a wife in her maiden name was sustained; *Dunlop*, 2 Nov. 1863, 2 Macph. 1.] The husband is the proper curator of his wife; and immediately on the marriage, the office of her curator, where she happens to be in minority and to have a curator, expires; the whole of his powers and duties being devolved on the husband. Hence, in every action brought against a wife, the husband must be called for his interest; [and in actions raised at the wife's instance, the husband must be a concurring party. But there are exceptions to this rule, as to which see *Fraser*, i. 566; and *Mackay's Prac.* i. 306.] In virtue of the husband's power over the person of his wife, she cannot be imprisoned for debt. He is imprisoned in place of her for the non-payment of her debts, or the non-performance of her obligations, unless where the diligence issues against the wife on account of her failure to perform an act within her power, or where she is imprisoned *in modum pœnæ* for a delict. [But see *Imprisonment*.] Another consequence of the curatorial power of the husband is, that he must sign as consentor to the wife's deeds; and where he does sign as such, the deed is not reducible on the head of lesion, as in the common case of a deed consented to by a curator. [As the general rule of common law,] personal obligations on the wife are null, though signed by the husband as consentor; [*Strathmore*, 29 June 1832, 6 W. & S. 56, 5 Sc. Jur. 5; *Miller*, 3 Feb. 1859, 21 D. 377; and other cases in *Fraser*, i. 519 *et seq.* To this rule, however, there are several exceptions, based on considerations of equity or of necessity. The following are noted in *Fraser*, i. 535 *et seq.*:—(1) Where the obligation is *de in rem verso* of the wife; *Harvey*, Bell's 8vo Cases, 255. (2) A wife can execute a testament without her husband's consent, and it has been said that a bond to take effect after the wife's death is good; *Bell's Princ.* § 1613. But this is doubtful; see *Miller, supra.* (3) Where a wife fraudulently holds herself out as unmarried, she is bound. (4) Where a wife is fined for a crime committed by her, her separate estate

[may be attached. The wife's person cannot, *stante matrimonio*, be attached for non-payment of a fine; but she may be arrested as *in meditatione fuge*. (5) Debts of the wife contracted before marriage may be recovered from her separate estate *stante matrimonio*. (6) Where the husband is civilly dead, or under sentence of penal servitude. (7) Where the husband is insane. (8) Where the husband is abroad, and the wife enters into business in order to obtain a livelihood; *Churnside*, 1789, M. 6082; *Orme*, 30 Nov. 1833, 12 S. 149. (9) Where the spouses are separated, whether judicially or not, the wife's aliment may be attached for necessary debts. See *Separation*. See also the provisions of the Conjugal Rights Act, quoted *infra*. When a married woman possesses funds exclusive of the *jus mariti* and right of administration of her husband (see *infra*), she may invest these in trade and incur personal obligations in respect thereof, which will be effectual against her separate estate, but not against her husband's estate; *Biggart*, 16 Jan. 1879, 6 R. 470. The wife's position in reference to such separate estate was held to be the same as that of an unmarried woman. But personal obligations unconnected with her separate estate do not bind her. See also *Forbes*, 21 June 1879, 6 R. 1122; and contrast with these *Thomas*, 31 Jan. 1879, 6 R. 607, and *Steedman*, 31 Oct. 1879, 7 R. 111; in which it was held that, if a husband authorises or allows a wife to use funds belonging to him for the purpose of a particular investment or adventure, in such a proceeding the wife is acting merely as the agent of the husband, for his behoof, and consequently that she binds not herself, but her husband only.

[The general rule that a wife's personal obligation is null has been further modified, to an important extent, by recent legislation, in particular by the acts of 1877 and 1881, which are set forth *infra*. Neither at common law, nor under the acts referred to, can a wife discharge a claim to legitim without her husband's consent; *Miller*, 16 March 1886, 13 R. 764.

[*Husband's Liability for Wife's Debts.*—At common law, the husband is liable for the wife's moveable debts contracted by her before marriage. He is also liable for the interests of her heritable bonds, and of other heritable debts due prior to the marriage, or falling due during its subsistence. He is liable for the aliment of illegitimate children born to the wife before

[the marriage; *Aitken*, 1815, Hume's Dec. 217. As to whether he is bound to maintain the wife's children by a former marriage, see *Fraser*, i. 589; also *Greig*, 2 March 1865, 3 Macph. 575. As to his obligation to maintain a mother-in-law, see *Aliment*, p. 39a; also *Fraser*, i. 590. The husband's liability for the wife's debts, being founded on the wife's disability created by the marriage, ceases as soon as the marriage is dissolved, except in so far as the husband is *lucratus*; *Cunningham*, 1662, M. 5870. In so far as the husband is *lucratus* by the marriage, he is liable for heritable debts, as well as moveable; *Leslie*, 1708, M. 5853. And when the husband has received from the wife a conveyance of her whole property *per aversionem*, he is liable for all her debts; *Ersk.* B. i. tit. 6, § 18. With regard to marriages taking place after 2d August 1877, this statement of the common law must be read as modified by 40 & 41 Vict. c. 29, § 4, which limits the husband's liability for his wife's antenuptial debts to the amount of property received through her; see *infra*. The husband's liability for the wife's contracts entered into *during* the marriage depends on, and is restricted by the principle of agency. The wife has no original power to bind her husband by her contracts; but in so far as they were entered into by the wife as her husband's agent, with his authority, he is liable. The wife may be constituted the agent of her husband either by his express appointment, or by his homologation or tacit recognition of her transactions. The law presumes that the wife is *preposita negotiis domesticis*, and is authorised to bind the husband for furnishings to the family. This presumption of *prepositura* can only be removed by inhibition at the husband's instance, or by private notice to individual tradesmen. See *Prepositura. Inhibition against a Wife*. When a husband consents to his wife undertaking an office, he becomes liable for the obligations incurred by her in that character, if she has no separate estate; *Pattison*, 5 Feb. 1886, 13 R. 550. As to the husband's liability when the spouses live separately, see *Separation*.

[*The Husband's Jus Mariti and Right of Administration, and the so-called Communio Bonorum*.—It is stated in former editions of this work (following Stair, Erskine, and Bell), that the first effect of marriage is to produce a communion of goods, extending to all subjects not heritable; that, though the goods of the

[married pair are in communion, yet the management of them is vested by law in the husband; and that this power of management is termed the *jus mariti*. Lord Fraser, however, has shown that "the term *communio bonorum* represents no patrimonial interest of either husband or wife, and is quite out of place in the legal nomenclature of Scotland;" and that the *jus mariti* is not a mere right of management or administration, but "the right by which the husband acquires to himself absolutely the personal property of his wife" (i. 648, 676). Lord Fraser traces the doctrine of *communio bonorum* to the ancient Germans, by whom it was introduced into France, whence it was transplanted to Scotland, towards the end of the 17th century. Before that time, the husband was uniformly held by Scottish jurists to be the absolute proprietor of the wife's moveables; and although Stair and Erskine, in their general definitions of the husband's powers, have stamped the doctrine of *communio* with their authority, yet in many instances, when they apply it to special cases, their language is inconsistent with the existence of a real *communio*; *Fraser*, i. 674. The doctrine was never consistently accepted by the courts as implying a proper partnership between the spouses, and it is expressly rejected by the later decisions. In *Shearer*, 18 Nov. 1842, 5 D. 132, the consulted judges observed:—"The absolute power of use and disposal being in the husband, we must consider the goods, *nominally* in communion, as truly his, not at all the wife's property." See also *Wight*, 27 Jan. 1849, 11 D. 464; *Muirhead*, 6 Dec. 1867, 6 Macph. 95; *Fraser*, 21 June 1872, 10 Macph. 837.

[*Effect of Jus Mariti*.—The legal effect of the *jus mariti* is to transfer from the wife to the husband all the personal property which either belongs to the wife at the time of marriage, or which she may acquire *stante matrimonio*. The wife's heritage remains her own property; but the rents, as they accrue, become the property of the husband. The *jus mariti* operates *ipso jure* like an assignation, without the necessity of intimation; and is available to the husband's creditors either on the arrestment of particular funds, or by adjudging the right so as to make it available against the rents of the wife's estate. In general, subjects that are heritable or moveable in questions between heir and executor, possess the same character as between husband and wife; *Breadalbane*, 11 March

[1843, 15 Sc. Jur. 389. See *Heritable and Moveable*; also *Fraser*, i. 687 *et seq.* But heritable securities, which by a recent act were made moveable in regard to the succession of the creditor, retain their heritable character as between husband and wife; 31 & 32 Vict. c. 101, § 117. As to the rights of the spouses under policies of insurance, see *Wight*, *supra*, 11 D. 464; *Muirhead*, *supra*, 6 Macph. 95; *Smith*, 5 June 1869, 7 Macph. 863; *Thomson's Trs.* 9 July 1879, 6 R. 1227; *Chalmer's Trs.* 16 March 1882, 9 R. 743; also *Fraser*, i. 698; ii. 981; *Guthrie's Bell's Princ.* § 1550 (h). See *Insurance*, p. 567.

[*Exclusion of Jus Mariti*.—At common law, the *jus mariti* may be excluded by the nature of the subject, as in the case of an alimentary provision, or of the wife's *paraphernalia*; see *Paraphernalia*. It may also be excluded by express arrangement. Thus, the husband may renounce his *jus mariti* before marriage; the wife may reserve her property exclusive of it; or a third party may convey or bequeath property to the wife exclusive of it. A renunciation of the *jus mariti* during marriage is revocable, and falls on the husband's bankruptcy; *Shearer*, 18 Nov. 1842, 5 D. 141. Such renunciation need not be in writing, but may be inferred from facts and circumstances; *Davidson*, 28 March 1867, 5 Macph. 710. The *jus mariti* and right of administration over a wife's *acquirenda* may be effectually excluded or renounced *per aversionem* by words to that effect in an antenuptial marriage-contract; *M'Dougall*, 20 June 1879, 6 R. 1089. The intention to exclude the *jus mariti* need not be expressed directly, but it must appear by clear implication, the presumption being against exclusion. See as to such exclusion, *Fraser*, i. 781 *et seq.*; also *Annand*, 1775, 2 Pat. 369; *Biggart*, 15 Jan. 1879, 6 R. 470; *Irvine*, 8 March 1883, 10 R. 731. With regard to the exclusion of the *jus mariti* by force of statute, see *infra*.

[*The Right of Administration*.—This is a separate right, distinct from the *jus mariti* (though the two rights are often confounded by the institutional writers). The right of administration is not a right of property, but a right of management, arising from the husband's curatorial power, in virtue of which his consent is necessary to every act of the wife dealing with her heritage, or with any portion of her moveable estate from which the *jus mariti* is excluded. See *Dick*, 1709, M. 5999. The earlier lawyers held that the renunciation of this right by

[a husband was incompetent, because he would thereby "unhusband himself, and renounce the privilege given him by the laws of both God and nature;" see *Dickson*, 1705, M. 10396; and the same view was entertained with regard to the *jus mariti*; see *Stair*, B. i. tit. 4, § 9. It is now settled that either or both of these rights may be renounced or excluded; but the exclusion of one of them does not necessarily imply the exclusion of the other. See *Keggie*, 25 May 1815, F.C.; *Bryce's Tr.* 2 March 1878, 5 R. 722; *Annand and Biggart*, *supra*. With regard to the recent statutory modifications of the right of administration, see *infra*.]

Where either party, during the subsistence of the marriage, makes a gift or donation to the other, it is in the power of the donor to retract it, either by an express revocation, or by implication, as by making a subsequent donation of the same subject. See *Donatio inter Virum et Uxorem*. ["By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband; with this difference, that by Scotch law she has the privilege, even after her husband's death, of reclaiming the subject of her gift in so far as it has not been *bona fide* consumed. The wife's consent to give need not be in writing, nor in terms express, but may be matter of inference from the circumstances of the case or the conduct of the spouses;" *per* Lord Watson in *Edward*, 12 March 1888, 15 R. (H.L.) 37. In that case, the question what circumstances should be held to imply donation was decided in accordance with the rule established by previous English decisions, which was thus stated by Lord Macnaghten:—"In England the rule in equity is clear from the earliest times, that when husband and wife have lived together, the wife cannot charge her husband or her husband's estate as her debtor for arrears of her separate income which she has permitted him to receive To displace the rule it is not sufficient to show that the wife's separate income has accumulated in the husband's hands and remains unspent, or that the husband is himself a trustee of the wife's separate income, or that the wife is restrained from anticipation by the terms of the instrument under which her title is derived." All deeds executed by a wife, or to which she consents, ought to be ratified by her in presence of a judge, and out of the presence of her husband. The ratification is a declaration by the wife, upon oath, emitted before a magistrate,

that she has acted freely and voluntarily in executing the deed; and, if regularly done, it precludes her from challenging the deed. The ratification, however, has no effect in preventing her from recalling a donation to her husband. See *Ratification*.

[With regard to other rights and obligations of the spouses *inter se*, see *Aliment*. *Adherence*. *Separation*. *Contract of Marriage*. See also *Domicile*.

B. Modification of the Common Law by Statute.

[The common law as to the property of married women having been deemed, in some circumstances, to operate oppressively against the wife, the course of recent legislation has tended progressively towards the withdrawal of her estate from the husband's control, and the protection of it from the consequences of his recklessness and insolvency. The following are the leading enactments:—

[1. *The Conjugal Rights Act*, 1861 (24 & 25 Vict. c. 86). By this act (as amended by 37 & 38 Vict. c. 31), a wife deserted by her husband may apply to the Court of Session or the sheriff court for an order to protect property acquired or to be acquired by her own industry, or by succession, after the desertion. Such order of protection, when granted and intimated, secures the wife's property to her in the same way as if she were unmarried, and has the effect of a decree of separation *a mensa et toro* in regard to the property, rights, and obligations of the spouses, and in regard to the wife's capacity to sue and be sued; §§ 1–5. See *Desertion*. After a decree of separation *a mensa et toro*, obtained at the instance of the wife, her property is secured to her, free of the *jus mariti* and right of administration; § 6. See *Separation*. By § 16, it is enacted that, when a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf; and in the event of dispute as to the amount of the provision to be made, the matter shall, in an

[ordinary action, be determined by the Court of Session according to the circumstances of each case, and with reference to any provisions previously secured in favour of the wife, and any other property belonging to her exempt from the *jus mariti*; provided always, that no claim for such provision shall be competent to the wife, if before it be made by her the husband or his assignee or donee shall have obtained complete and lawful possession of the property, or, in the case of a creditor of the husband, where he has, before such claim is made by the wife, attached the property by decree of adjudication or arrestment, and followed up the said arrestment by obtaining thereon decree of furthcoming, or has pointed and carried through and reported a sale thereof. This provision corresponds to what is called in England the wife's "equity to a settlement." On the construction of the section, see *Fraser*, i. 830, and the following decisions:—*Sommer*, 2 March 1871, 9 Macph. 594; *Taylor*, 23 June 1871, 9 Macph. 893; *Taylor*, 28 Oct. 1871, 10 Macph. 23; *Ferguson*, 7 Nov. 1871, 10 Macph. 54; *Jack*, 5 Feb. 1878, 5 R. 624; *Reid*, 5 Feb. 1878, 5 R. 630; *Clark*, 25 May 1881, 8 R. 723.

[2. *The Married Women's Property Act*, 1877 (40 & 41 Vict. c. 29).—This statute protects, on the one hand, the earnings of married women, and on the other hand restricts the liability of the husband for the wife's debts contracted before marriage. By § 3, the *jus mariti* and right of administration of the husband are excluded from the wages and earnings of any married woman, acquired or gained by her after the commencement of the act (2d Aug. 1877), in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name, and are excluded from any money or property acquired by her after the commencement of the act through the exercise of any literary, artistic, or scientific skill; and such wages, earnings, money, or property, and all investments thereof, are deemed to be settled to her sole and separate use, and her receipts are a good discharge for such wages, earnings, money, or property, and investments thereof. The terms of this section do not cover the stock-in-trade of a business carried on by a wife in her own name; *Ferguson's Tr.* 5 Dec. 1883, 11 R. 261. By § 4, in any marriage after the commencement of the act, the liability of the husband for the antenuptial debts of his wife is limited to the value of

[any property which he may have received from, through, or in right of his wife at, or before, or subsequent to the marriage, and any court in which a husband may be sued for such debt has power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, and value of such property. On the construction of § 4, see *Wishart*, 14 March 1879, 6 R. 823; and on the act generally, see *Fraser*, ii. 1509.

[3. *The Married Women's Policies of Assurance Act*, 1880 (43 & 44 Vict. c. 26).—By this act, married women were enabled to effect policies on their own lives, or the lives of their husbands, exclusive of the *jus mariti* and right of administration. For its provisions, see *Insurance*, p. 567.

[4. *The Married Women's Property Act*, 1881 (44 & 45 Vict. c. 21).—The general effect of this act, in regard to all marriages subsequent to 18 July 1881, is to abolish the *jus mariti* altogether (apart from special contract), and to abolish the right of administration in so far as regards the income of the wife's estate. The whole provisions of the act are here narrated together, for convenient reference, though some of its sections deal with the distribution of the wife's estate after dissolution of the marriage. The first section is in these terms:—(1) Where a marriage is contracted after the passing of this act (18 July 1881) and the husband shall, at the time of the marriage, have his domicile in Scotland, the whole moveable or personal estate of the wife, whether acquired before or during the marriage, shall, by operation of law, be vested in the wife as her separate estate, and shall not be subject to the *jus mariti*. (2) Any income of such estate shall be payable to the wife on her individual receipt or to her order, and to this extent the husband's right of administration shall be excluded; but the wife shall not be entitled to assign the prospective income thereof, or, unless with the husband's consent, to dispose of such estate. (3) Except as hereinafter provided, the wife's moveable estate shall not be subject to arrestment, or other diligence of the law, for the husband's debts, provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband. (4) Any money, or other estate of the wife, lent or entrusted to the husband, or im-

[mixed with his funds, shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate, after, but not before, the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied. (5) Nothing herein contained shall exclude or abridge the power of settlement by antenuptial contract of marriage. By § 2, where a marriage is contracted after the passing of the act, the rents and produce of heritable property in Scotland belonging to the wife shall no longer be subject to the *jus mariti* and right of administration of the husband. It is enacted by § 3 that, in the case of marriages which have taken place before the passing of the act:—(1) The provisions of the act shall not apply where the husband shall have before the passing thereof, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving him: (2) In other cases the provisions of the act shall not apply, except that the *jus mariti* and right of administration shall be excluded, to the extent respectively prescribed by the preceding sections, from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the act. By § 4, it shall be competent to all persons married before the passing of the act to declare by mutual deed that the wife's whole estate, including such as may have previously come to the husband in right of his wife, shall be regulated by the act, and upon such deed being registered in the register of deeds at Edinburgh or in the sheriff court register of the county or counties in which the parties reside, and being advertised, in terms of a schedule annexed to the act, in the *Edinburgh Gazette*, and three times in two local newspapers circulating in such county or counties, the said estate shall be vested in her as hereinbefore provided, and subject to the provisions of the act; provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured, in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband; but no such deed shall be of any effect as against any debt or obligation contracted by the husband prior to the date of the deed being so advertised and registered. By § 5, where a wife is deserted by her husband, or is living apart from him

[with his consent, a judge of the Court of Session or sheriff court, on petition addressed to the court, may dispense with the husband's consent to any deed relating to her estate. By § 6, after the passing of the act, the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be. By § 7, after the passing of the act, the children of any woman who may die domiciled in Scotland shall have the same right of legitim, in regard to her moveable estate, which they have according to the law and practice of Scotland in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof, as the case may be. By § 8, the act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts, or the law relating to donations between married persons, or to a wife's non-liability to diligence against her person, or any of the rights of married women under the act 40 & 41 Vict. c. 29. On the construction of this act, see *Poë*, 16 July 1883, 10 R. (H.L.) 73; where it was held that § 3 (2) is applicable only to the preceding provisions of the act, and does not restrict the application of § 6 to marriages contracted after the passing of the act. These acts do not enable a married woman to grant a promissory note; *M'Lean*, 2 Feb. 1887, 14 R. 448; nor to discharge a claim for legitim without her husband's consent; *Miller*, *supra*, 13 R. 764. Nor do the acts affect a husband's liability for his wife's expenses in an action of divorce against him, if she has no separate estate; *Milne*, 8 Dec. 1885, 13 R. 304. See *Birnie's Married Women's Property Act*.]

III. OF THE MANNER AND EFFECTS OF THE DISSOLUTION OF MARRIAGE.

Marriage is dissolved by the death of either of the parties, or by a sentence of divorce. Divorce is the sentence of the Court of Session (as coming in place of the late Commissary Court), declaring the marriage to be dissolved; and the divorce

may proceed either on the ground of adultery, or of wilful desertion. See *Divorce. Desertion*.

Effects of the Dissolution of the Marriage by Death.—[Formerly,] where the marriage was dissolved by death within year and day, without the birth of a living child, and where the matter was not otherwise regulated in the contract of marriage, all grants made in consideration of the marriage become void; the tocher returned to the wife, or to her executors, or to the giver; and every interest in the estate of the husband returned to the husband. But this related only to the provisions as between the parties; for a provision to one of them, by a grant, for example, and not given to the other, was effectual notwithstanding the dissolution of the marriage. It was therefore provisions by the one to the other, or provisions made *intuitu matrimonii*, which fell by the dissolution within year and day without a living child. In accounting for the tocher in the event of such premature dissolution, the husband was entitled to deduct the funeral expenses of the wife; and where matters could not be restored on either side, the rule as to restitution did not hold, as it would have been unjust to restore to one party and not to the other. Gifts by the friends of the new married pair did not fall under the rule, but were divided; *Waugh*, 1679, M. 6179. But the case of such a premature dissolution was usually regulated by a special clause in the contract of marriage, modifying or altering the legal rule. See *Ersk.* B. i. tit. 6, § 38. It was, therefore, where the dissolution of the marriage took place by the death of the husband or wife, after the year and day, or after the birth of a living child, that the rights consequent on the dissolution came properly into operation. [The law on this subject, however, was altered by § 7 of the Intestate Moveable Succession Act, 1855 (18 Vict. c. 23), which enacts that, where a marriage shall be dissolved before the lapse of a year and day from its date, by the death of one of the spouses, the whole rights of the survivor and of the representatives of the predeceaser shall be the same as if the marriage had subsisted for that period.]

1. *By the Death of the Wife.*—If there has been a living child born of the marriage, and if the wife has left no heir to her heritage by a former marriage, the surviving husband has a liferent right to the rents and profits of the wife's heritable estate, which is called the courtesy. [See *Courtesy*.] On the death of the wife, the goods in

communio[n] [formerly] suffered a division. Where there were no children, the free goods in communio[n], after deductio[n] of debts, were divided into two equal parts, one of which belonged to the husband, the other to the next of kin of the wife, unless she had destined it otherwise by a testamentary or other deed. Where there were children of the marriage, or children of the husband by a former marriage not foris-familiated, one-third only was the wife's share; *Stair*, B. i. tit. 4, § 21. On the death of the wife, the children had no claim to legitim, that being a claim which arose only on the death of the father; but if they were of age, they might have insisted for an immediate distributio[n] of their deceased mother's share of the goods in communio[n]. Where the children of the last marriage were under age, the father, as their administrator, was entitled to the management of this share; and if, in the course of such management, he became insolvent, before having accounted to the children for their mother's share, they had a *jus crediti* to the extent of that share, which entitled them to rank on their father's bankrupt estate. But before they could so rank, it must have appeared that at the date of the dissolution of the marriage the husband was solvent, and that the sum for which they claimed to be ranked was no more than the free third of the goods in communio[n]. The children of the wife by a former marriage, who, along with the children of her last marriage, are her next in kin, might also have insisted for their proportion of their mother's share of the goods in communio[n] immediately on the dissolution of the marriage; and where the wife had no children by either marriage, her next in kin of more remote degrees might also have insisted for an immediate distributio[n]. See *Ersk.* B. i. tit. 6, § 41. [But this law as to the wife's share of the goods in communio[n] was abolished by § 6 of the Intestate Succession Act, which provides that where a wife shall predecease her husband, the next of kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communio[n], nor shall any legacy or bequest or testamentary dispositio[n] thereof by such wife affect or attach to the said goods or any portion thereof. A further alteration was recently made by the Married Women's Property Act, 1881; which provides by § 6, that the husband of a woman dying domiciled in Scotland shall have the same interest in her

[moveable estate as a widow has in the moveable estate of her deceased husband (see *infra*); and by § 7, that the children of any woman dying domiciled in Scotland shall have the same right of legitim in regard to her moveable estate as they have by law in regard to the moveable estate of their deceased father. See these sections quoted in full, *supra*, p. 699.]

2. *By the Death of the Husband.*—Where the wife has no conventional provision, she has a right to the terce, which is a liferent of a third of the heritage in which the husband died infert; 1681, c. 10. [See *Terce*.] She has also the *jus relictæ*, which is a share of the free moveable estate, or goods in communio[n], amounting to one-half where there are no children of the marriage, and where the husband has left no children by a former marriage—and to one-third only where there are children. [See *Jus Relictæ*.] The widow has also a claim for aliment, from the time of her husband's death to the first term of payment of her provisions. She has likewise a claim to mournings; and where she is delivered of a posthumous child, she is entitled to the expenses attending the birth, &c.; *Ersk.* B. i. tit. 6, § 41. The children, on their father's death, have a right to legitim, which is a third part of the free goods in communio[n]. [See *Legitim*.] But although such are the legal rules, it generally happens that the parties, instead of leaving the law to operate, regulate their own rights and those of their children by special contracts of marriage or other settlements. In that case, the particular contract or deed will afford the rule, where it is not *ultra vires* of the contracting parties; as to which, see *Contract of Marriage*.

Effects of Dissolution by Divorce.—The effects of the dissolution of a marriage by divorce, whether on the ground of adultery or of wilful desertion, are fully explained under the article *Divorce*. The legal or conventional rights of the children of the marriage are not altered or affected by this method of dissolving the marriage. See also *Desertion*. [*Separation*.]

See, on the subject of this article generally, *Stair*, B. i. tit. 4; *More's Notes*, xiii.; *Bank.* i. 105, 140; *Bell's Princ.* § 1506; [*Ersk.* B. i. tit. 6; *Fraser on Husband and Wife*; *Riddell's Scottish Peerages*; *Ferguson's Consistorial Law*; *Lothian's Consistorial Law*; *Mackay's Prac.* ii. 247, 557, 574; *Report of Royal Commission* (1868); *Bishop on Marriage and Divorce*; *Eversley on Domestic Relations*.]

MARRIAGE; was a casualty in wardholding, which entitled the ward superior to demand a certain sum from the heir of his former vassal, on the heir's marriage, or on his becoming marriageable. Wardholding was abolished by the statute 20 Geo. II. c. 50; and as it had been customary for superiors in feu-rights to insert a clause, declaring that the vassal should be liable in the casualty of marriage, the same statute, § 10, prohibits such a clause, and declares it to be of no force, even although inserted in deeds prior in date to the statute. See *Stair*, B. ii. tit. 4, §§ 37-61; *More's Notes*, ccviii.; *Ersk.* B. ii. tit. 5, §§ 18, 20, 21; *Bank.* i. 637; *Kames' Stat. Law Abridg. h. t.*; *Brown's Synop. h. t.* See *Avail of Marriage*.

MARRIAGE-CONTRACT. See *Contract of Marriage*.

[**MARSHALLING**; the act of arranging or of putting into proper order. In English law, the doctrine of marshalling assets and securities depends upon the principle that a person having two funds out of which to satisfy his demands, shall not by his election prejudice a person who has only one such fund. If, therefore, one who has a claim upon two funds, resorts to the only fund upon which another has a claim, the other stands in his place for so much against the fund to which otherwise he could not have access; the object being that every claimant shall be satisfied as far as, by any arrangement consistent with the nature of the several claims, the property which they seek to affect can be applied in satisfaction of such claims. *Wharton's Lex. h. t.* See *Catholic Creditor*.]

MARTIAL LAW; that branch of the laws of war which respects military discipline, or the government and control of persons employed in the operations or for the purposes of war. Military law is not exclusive of the common law, for a man, by becoming a soldier, does not cease to be a citizen; he is still answerable in the ordinary courts of law for his conduct in that capacity. [See *Dicey on the Constitution*, 296.] See *Court-Martial. Law of Arms. [Soldier. Army.]*

MARTINMAS; the 11th of November. See *Terms, Legal and Conventional. Whitsunday*.

MASON LODGES. The acts 37 Geo. III. c. 123, and 39 Geo. III. c. 79, against unlawful societies, were declared not to extend to regular lodges of Freemasons which were in use to be held before these acts were passed. But this exemp-

tion is not to be enjoyed unless two members of each lodge claiming it certified, upon oath, before any justice of peace, or other magistrate, that such lodge had, before passing of the act, been usually held as a lodge of Freemasons, and according to the rules prevailing among such lodges in this kingdom; which certificate, attested by the magistrate, and subscribed by the persons certifying, must within two months after the act passed, have been deposited with the clerk of the peace for the place where such lodge is usually held. It was also necessary that the name of the lodge, the places and times of its meetings, and the names and descriptions of all its members, should be registered with the clerk of the peace within two months after passing the acts; and this must still be done on or before 25th March yearly. The clerk of the peace is directed to lay such certificate and registry once a year before the general sessions, who may order any lodge to be discontinued, if likely to be injurious to the public peace. Like most other societies constituted for other purposes than trade, mason lodges can neither sue nor be sued by their office-bearers; *Lodge of Lanark*, 1730, M. 14554. See *More's Notes on Stair*, ciii.; *Hutch. Justice*, i. 303; *Tait's Justice*, 341; *Blair's Justice*, 291; *Brown's Synop.* 2264.

MASTER AND SERVANT. [The contract between master and servant is a species of location. It is either *locatio operis*, the hiring of a person to do a particular piece of work, or *locatio operarum*, the hiring of a person's services, to act in a particular capacity, without relation to any specific business; *Fraser on Master and Servant*, 1.]

Constitution of the Contract.—Where the engagement is to continue for one year, it may be proved by witnesses; where it is meant to exceed that period, it must be established by writing. [Whether a verbal contract for more than one year is valid for one year, apart from *rei interventus*, is not settled; *Fraser*, 30. See also *Caddel*, 1749, M. 12416; *Paterson*, 17 June 1830, 8 S. 931; *Currie*, 17 May 1864 2 Macph. 1076; *Pickin*, 9 Feb. 1878, 5 R. 676; *Dickson on Evidence*, § 567. An "agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant," is exempt from stamp duty; 33 & 34 Vict. c. 97, schedule. Frequently, "earnest" or "arles" are given, in token of engagement; but this is not essential to the constitution of the con-

[tract (unless where established by uniform and notorious local custom); see *Earnest*. In some circumstances, where there is no express agreement, a contract of service may be implied, so as to found a claim for wages. In *Anderson*, 11 June 1847, 9 D. 1222, it was held to be a presumption of law that "where there is clear proof of service rendered and no wages paid, wages are due, unless it be made out that there was an agreement that the service should be gratuitous." But see *Ritchie*, 16 Nov. 1849, 12 D. 119; also other cases in *Fraser*, 39 *et seq.*

[*Duration of the Contract.*—When the period of service is not expressly fixed by the contract, the customary term of engagement in the particular kind of employment is presumed to have been contemplated by the parties. Menial or domestic servants are usually hired for six months. Farm servants are presumed to be hired for a whole year, because their occupation depends upon the revolution of the seasons. The same presumption seems to apply to grievers and overseers, and also to gamekeepers and gardeners; *Mabon*, 1808, Hume's Dec. 393; *Armstrong*, 4 June 1847, 9 D. 29, 1198; *Groom*, 18 May 1859, 21 D. 831. But in England, a head gardener has been held to be a menial servant, liable to dismissal at any time, on a month's notice; *Nowlan*, 1835, 2 Cr. M. & R. 54. A coachman is not presumed to be a yearly servant; *Scott*, 4 Feb. 1867, 6 S.L.R. 301. The position of tutors and governesses is not settled. Baron Hume says that where a governess leaves town to reside with a family in the country, she is presumed to be hired for a year; *Decisions*, 393; and this presumption is recognised in England; *Todd*, 1852, 8 Exch. 151; *Manley Smith on Master and Servant*, 95. But Professor Bell is of a contrary opinion; *Princ.* § 174; and in *Moffat*, 8 Feb. 1839, 1 D. 468, though, in the circumstances of the case, the contract was held to be for a year, the general view taken by the court was that an engagement as tutor or governess should be terminable as soon as confidence is lost between the parties, equitable notice being given beforehand. As to schoolmasters, see *Schools*. When the period of engagement has expired, the parties are held to continue their contract by tacit relocation, unless due notice is given by one or other of them; but the implied renewal can never be for a longer period than one year. This rule of tacit relocation, however,

[depends wholly on custom, and applies only to specific classes of servants—agricultural, domestic, and the like. See *Moffat*, *supra*, 1 D. 468; *Lennox*, 26 Oct. 1880, 8 R. 38. Notice, or warning, may be given either verbally or in writing, or even *rebus ipsis et factis*, when steps are taken which cannot fail to make the parties aware each of the other's intention, as if a gentleman tell his coachman that he is to give up his carriage at Whitsunday. But see *Maclean*, 4 Feb. 1813, F.C. Agricultural and domestic servants, engaged for a year or half a year, are entitled, by custom, to a warning of forty days before the expiry of their engagement; *Anderson*, 1818, 1 Murray, 429; *Morison*, 27 June 1823, 2 S. 434; *Cameron*, 7 Dec. 1870, 9 Macph. 233. But a servant hired by the month would only be entitled to a month's warning. In the case of servants other than agricultural, domestic, and the like, the absence of warning does not involve tacit relocation; but reasonable notice must be given, or an allowance in lieu thereof. See *Campbell*, 5 June 1851, 13 D. 1041; *Morrison v. Abernethy School Board*, 3 July 1876, 3 R. 945; *Robson*, 21 Nov. 1878, 6 R. 213; *Forsyth*, 9 June 1880, 7 R. 887.]

[*Obligations of the Servant.*—A servant, undertaking any particular work, ought to be acquainted with the work, and capable of performing it, and is liable for any loss arising from his want of skill, or carelessness. [His obligation is, to serve in the capacity, at the place, and for the time for which he engages, or to pay damages. A collateral and implied obligation is, to be faithful, honest, and observant of all the decencies of domestic life; to avoid insolence in his intercourse with his master and his family; to keep his master's hours; and not absent himself without leave. The servant is bound to perform all that fairly belongs to the line of service for which he is engaged; and slight deviations from such line of engagement do not justify a servant's disobedience of his master's orders. If such deviations, however, be often repeated, or if what is required be a manifest departure from the line of the servant's engagement, he is not bound to obey, as when a servant is turned from rural to domestic service, or *vice versa*; *Bell's Princ.* §§ 176–8. See *Fraser*, 70 *et seq.*, and cases there cited; also *Moffat*, 1 Feb. 1884, 11 R. 501. If an order is lawful and reasonable with reference to the kind of service contracted for, wilful disobedience

[is a breach of contract, and justifies dismissal; *Thomson*, 7 June 1888, 15 R. 806. If a servant does anything incompatible with the due and faithful discharge of his duty to his master, the latter has a right to dismiss him. Hence a clerk in a merchant's office was held to have been rightfully dismissed for having speculated largely in "differences" on the Stock Exchange; *Pearce*, 17 Q.B.D. 536. See also *Boston Deep Sea Fishing Co.*, 39 Ch. D. 339 (taking a concealed commission). A servant is not bound to work on Sunday, unless in so far as the service required comes under the exception of "works of necessity and mercy." But this exception includes many of the ordinary duties performed by domestic servants. See *Sunday*. Domestic servants, and others whose service relates to a person rather than to a place, are bound to accompany the master or his family. They cannot, however, be required to go to a foreign country. Professor Bell (*Princ.* § 180) says they are not bound to leave Scotland; but it is not likely that England, at all events, would now be held to be, in this sense, a foreign country. "Where servants are hired to come from a distance to the place of service, it is usual for the master to be at the expense of bringing them, but they must find their own way back. Should, however, the master during the currency of the engagement remove to a greater distance, he must bear any additional expense to which the servant may thus be put in returning to the place whence he originally came;" *Fraser*, 83; *Baird*, 1779, 5 Br. Sup. 514. It has been decided that, at common law, a workman or artisan, who deserts his service, after having entered on it, may be compelled by imprisonment to find caution to return to his service and continue in it. But this has never been held in the case of domestic servants. With regard to the common law right to enforce an obligation of service by imprisonment, see *Raeburn*, 4 June 1824, 3 S. 69; *Gentle*, 9 July 1825, 4 S. 163; *Tulke*, 1 June 1843, 5 D. 1096; *Cameron*, 8 March 1866, 4 Macph. 547; and with regard to the statutory modifications of that right, see *Workman*.]

[*Obligations of the Master.*—The master is bound to receive the servant, and to allow him to continue in his service till the termination of the contract. In general, *delectus personæ* is implied, and the master cannot assign the servant. But in some kinds of service, *delectus personæ* is not presumed; and in such

[cases the servant cannot object though the master assume a partner, or even substitute another altogether in his room, provided he does not alter the nature of the employment. See *Fraser*, 122, and cases there cited. The master is bound to treat the servant properly; and, in the case of domestic servants, to provide them with wholesome food and lodging, suitable to their condition. It would appear that a female domestic servant cannot be compelled to reside out of the master's house, on payment of board wages; because it is implied in her engagement that she shall have the protection of the master's house and family; *Fraser*, 127; *Bell's Princ.* § 183. A master is not, in general, bound to provide a servant with medical attendance and medicine in sickness. By 38 & 39 Vict. c. 86, § 6, "where a master, being legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, whereby the health of the servant is, or is likely to be, seriously or permanently injured, he shall, on summary conviction, be liable either to pay a penalty not exceeding £20, or to be imprisoned for a term not exceeding six months, with or without hard labour." A master is not legally obliged to give a character to his servant, at the termination of the contract; *Fell*, 12 Dec. 1809, F.C. When the master gives a character on application, his statement is privileged; and in some cases, a master would be justified even in ultroneously stating facts prejudicial to the servant. But the character must not be more prejudicial than the circumstances warrant. If it is not true to the best of the master's knowledge, he is liable in damages to the servant; *Anderson*, 1818, 1 Mur. 429. If the master give a false character in favour of the servant, he would probably be held liable in damages to a person injured thereby. This point has been decided in England, but not in Scotland; see *Fraser*, 132; *Manley Smith*, 467. See also the statutory penalties for giving or using false characters, enacted by 32 Geo. III. c. 56. In *Tait's Justice of Peace, voce Servant*, a doubt is expressed whether that act applies to Scotland; but Lord Fraser (p. 133) considers the doubt to have no foundation. In all kinds of service, the master's obligation to pay wages is presumed, in the absence of proof

[that the service was understood to be gratuitous; *Thomson*, 12 Jan. 1889, 16 R. 333. The amount of wages is generally made the subject of express stipulation. In the absence of special agreement, the amount may be fixed by the custom of trade, or by the previous usage of payment between the parties; or the *quantum meruit* will be assessed at the discretion of the court, or by the verdict of a jury. The wages of domestic servants are generally paid half-yearly. A servant is entitled to interest on unpaid arrears of wages; *Mansfield*, 18 Feb. 1833, 6 W. & S. 277; but if the wages are not fixed, interest runs only from the date of the decree ascertaining the amount; *Wallace*, 13 June 1821, 1 S. App. 42. Prof. Bell (*Princ.* § 179) says that the servant's inability, from hurts received in his master's service, will excuse his non-performance without forfeiting his wages. But Lord Fraser (p. 141) is of opinion that a servant disabled without fault on the part of the master, has no claim for wages during disablement, even though it be caused by injury sustained in performing his work. If the injury is imputable to the master's fault, the servant's remedy is an action of damages. If, on the other hand, the servant is disabled through his own recklessness or folly, the master is entitled to damages, and may retain a part, or even the whole, of the wages, in satisfaction of his claim; *Fraser*, 139, 318. Apart from fault on either side, sickness or inevitable accident will excuse the servant's non-performance for a short time; but if the inability should continue long, and a substitute should be required, the master will be discharged from his counter-obligation to pay wages; *Bell's Princ.* § 179; *Fraser*, 141. See also *White*, 1794, M. 10147; *Maclean*, 4 Feb. 1813, F.C.; *Manson*, 13 June 1885, 12 R. 1103. If the servant die during the term, his representatives are entitled to wages *pro rata* for the period he has actually served. If the master die, the servant is entitled to wages and board-wages (if he had board in the family) until the next term, or if the master died after the expiry of the time for warning, until the term following; but only in case of the servant not finding other employment, which he is bound to use due diligence to obtain. With regard to the right of a company's servant to wages, on termination of the contract by dissolution of the company, see *Hoey*, 4 June 1867, 5 Macph. 814. A servant dis-

[missed without fault is entitled to wages and board-wages. Where he is rightfully dismissed for fault before his engagement is finished, he cannot sue for any part of his salary or wages; *Boston Deep Sea Fishing Co.* 39 Ch. D. 339. But in Scotland, "the courts endeavour to temper the strict rule of law;" and "when the cause of dismissal is of a light nature, the servant, though justifiably dismissed, will be entitled to wages for the time he has served, or a part thereof;" *Fraser*, 114. As to the triennial prescription of wages, and their preference over other debts, see *Wages*.

[*The Master's Liability for the Servant's Contracts*.—This liability is founded on mandate, express or implied. If the master has been in the habit of dealing personally with the tradesman, or of paying ready money, he is not liable for furnishings made to the servant upon credit; *Mortimer*, 21 Nov. 1868, 7 Macph. 158. And a tradesman who does not regularly supply the master is not entitled to deal on credit with the servant. But where the master has been in the habit of ordering goods by his servants on credit, the tradesman is entitled to rely on the continuance of the system which the master has himself begun, unless express warning be given to the contrary; *Oliver*, 1792, Hume's Dec. 319; *Dewar*, 1804, *ib.* 340. A servant cannot bind his master to contracts of a kind different from what his office implies, or what has been sanctioned by previous usage. See *Fraser*, 52.

[*The Master's Liability for the Servant's Culpa*.—The master "is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself, or of those acting under his orders in the course of his business;" *per* Lord Cranworth in *Reid v. Bartonshill Coal Co.*, *infra*, 3 Macq. 283. This liability of the master constitutes an exception to the general rule, *Culpa tenet suos auctores*. It is founded rather on expediency than on principle; see Lord Shand in *Woodhead*, *infra*, 4 R. 508. The master's liability is subject to the following limitations:—(1) It does not extend to any wrongful act of the servant outside the sphere of his proper employment. This limitation raises distinctions of great nicety; see *Keith*, 10 June 1812, F.C.; *Linwood*, 19 March 1821, 1 S. App. 20; and other cases in *Fraser*, 267 *et seq.* "If a servant, driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce an

[accident, the master will not be liable; but if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment; *Croft*, 1821, 4 B. & Ald. 590. If the master, in authorising his servant to do a certain act, orders him to do it in a particular way, or even prohibits it being done in a different way, he does not thereby relieve himself of the consequences of the servant's disregarding such orders. On the other hand, if the master has positively forbidden the act to be done at all, there is no ground for attaching liability to him, as in such a case the servant is not acting within the scope of his employment. See *Fraser*, 282; *Keith*, *supra*; *Fraser*, 13 June 1867, 5 Macph. 861; *Stevens*, 6 Q.B.D. 318. (2) An employer is not liable for the *culpa* of any one between whom and himself there does not exist the relation of master and servant, in its strict and proper sense; *Fraser*, 284. Hence, in general, where one entrusts the execution of work to an independent contractor, the latter, and not the employer, is responsible for injury from the negligence of the workmen. In *Stephen*, 3 March 1876, 3 R. 535, Lord Gifford observed:—"The principle which governs the decision in such cases is that the person or superior, be he called either master or employer, who has reserved or who has assumed the direct and personal control over the subordinate, be he called servant or workman, who committed the fault or negligence, is liable for the damage thereby caused. In such case, *respondeat superior*; the superior is answerable for the negligence of his subordinate; and the test, I think, always is, had the superior personal control or power over the acting or mode of acting of the subordinate? Where this element of personal control is found, then responsibility, either for malfeasance or nonfeasance, for fault or negligence, will attach, not only to the servant or workman (he is always liable), but to him who had the personal control over him, who was his superior in the sense of the maxim. On the other hand, if an employer has no such personal control, but has merely the right to reject work that is ill done, or to stop work that is not being rightly done, but has no power over the person or time of the workman or artisan

[employed, then he will not be their superior in the sense of the maxim, and not answerable for their fault or negligence." See also *M'Lean*, 9 March 1850, 12 D. 887; *Nisbet*, 8 July 1852, 14 D. 973. But the employer remains liable, if the act contracted to be done is in itself unlawful, or if there is a legal obligation on him to do it, or if he interferes personally; *Manley Smith*, 356. (3) The master's liability to a servant for injury caused by the *culpa* of a fellow-servant is limited, at common law, by the doctrine of *collaborateur*, as to which see *infra*. See also *Damages*.

[*The Master's Liability to the Servant for Injuries sustained by him in the course of his employment.*

(1.) *At Common Law*.—A servant, in entering on an employment, takes upon himself all ordinary risks properly incident to the employment. But the master is bound to use all reasonable precautions, and is responsible for injuries arising from causes which he might have foreseen and obviated. He is not liable if the servant undertook the employment in full knowledge of the danger attending it, or if he continued in it after becoming aware of the danger, or if he had as good opportunity as the master had of ascertaining and obviating it for himself. See *Priestley*, 1837, 3 M. & W. 1; *Woodley*, 1877, 2 Ex. D. 384; *M'Neill*, 7 July 1853, 15 D. 818; *Cook*, 28 Nov. 1857, 20 D. 137; *Fraser*, 16 Dec. 1887, 15 R. 178. But if the continuing to work was not a matter of choice, but of compulsion, or of such obligation as lies (*e.g.*), on a seaman serving on board ship, the servant is not barred from recovering damages; *Rothwell*, 21 Jan. 1886, 13 R. 463; *Thrussel*, 20 Q.B.D. 359. Contributory negligence on the part of the servant exonerates the master; see *Damages*. Nor is he liable for any injury the servant may receive when not acting within the scope of his employment; *Sutherland*, 15 July 1857, 19 D. 1004. But the fact that the servant was leaving his work without proper cause, when he received an injury, does not relieve the master from liability; *Brydon*, 13 March 1855, 2 Macq. 30. The master is bound to provide sufficient machinery, and to keep it in proper repair, when the safety of the workmen depends on his doing so; but he is not liable for latent defects, such as he cannot reasonably be expected to have knowledge of. See *Fraser*, 174.

[*The Doctrine of Collaborateur or Fellow-servant*.—One of the ordinary risks incident

[to every employment is the danger of injury occurring to a servant through the carelessness of a fellow-servant. In accordance with the principle already mentioned, the master is not responsible for an injury so occasioned, provided he has exercised reasonable care in associating his servant with persons of ordinary skill and prudence. This doctrine (called the doctrine of *collaborateur*) was established as the common law of Scotland by the judgment of the House of Lords in *Reid v. Bartonshill Coal Co.*, 17 June 1858, 3 Macq. 268. A different view had previously been taken by the Scotch courts; see the decisions reviewed by Lord Cranworth in the *Bartonshill* case. But the doctrine of *collaborateur* had already been recognised in America (*Farwell*, 1842, 4 Metc. 49, reported also 3 Macq. 316), as well as in England (*Priestley*, *supra*; *Hutchinson*, 1850, 19 L. J. Ex. 296). It was further developed in *Wilson v. Merry & Cunningham*, 29 May 1868, 6 Macph. (H.L.) 84; where it was held to apply to all workmen engaged in a common employment, without distinction of grades or classes, and including a foreman or manager. In that case Lord Chanc. Cairns said:—"I do not think that the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not, or is, in any technical sense, the fellow-workman or *collaborateur* of the sufferer. In the majority of cases in which accidents have occurred, the negligence has no doubt been the negligence of a fellow-workman; but the case of a fellow-workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand upon higher and broader grounds. As is said by a distinguished jurist, *Exempla non restringunt regulam, sed loquuntur de casibus crebrioribus*. . . . What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do. . . . As was said in the case of *Tarrant v. Webb*, 'negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants.'" An extended application of the principle thus established was made in *Woodhead*, 10 Feb. 1877, 4 R. 469; where it was held that a mining company was not liable for the

[negligence of their underground manager, which had occasioned the death of a miner in the employment of contractors for driving a level in a mine belonging to the company. According to this judgment, the master's responsibility for his servant's fault is limited to cases where the person injured is a stranger, in a position "external to the master and his servants;" other cases being governed by the ordinary rule, *Culpa tenet suos auctores*. See Lord Shand's observations (p. 509). For other decisions, see *Fraser*, 192 *et seq.*; also *Wingate*, 8 Nov. 1884, 12 R. 91; *M'Guire*, 10 June 1885, 12 R. 1071; *Congleton*, 12 Jan. 1887, 14 R. 309.

(2.) *The Employers' Liability Act*, 1880 (43 & 44 Vict. c. 42).—By this act, the common law, as stated above, has been modified in the interest of the working classes. The object of the act is, "to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service." Its general effect is to make an employer liable (but only to a limited extent) to his employees for the result of negligence on the part of any person to whom he has delegated his authority; and an exceptional enactment is introduced in favour of railway servants, an employer being made answerable for the negligence of any person in his service who has the charge or control of any signal, points, locomotive engine, or train upon a railway. "The new liability introduced by the statute is that a workman employed in any kind of work is to have a remedy for any injury incurred in the course of his work just as if he were a stranger, and not a workman at all;" *per* Lord Pres. Inglis in *Morrison & Mason*, 14 Dec. 1888, 16 R. 212. The act is distinguished from other statutes by this peculiarity, that what is enacted in the first section is to a large extent abrogated in the second; so that the law can only be gathered by comparing the two sections. By § 1, "where, after the commencement of this act (1 Jan. 1881), personal injury is caused to a workman (1) by reason of any defect in the condition of the ways, works, machinery, or plant, connected with or used in the business of the employer (*Haston*, 11 March 1887, 14 R. 621; *M'Giffin*, 10 Q.B.D. 5; *Cripps*, 13 Q.B.D. 583); or (2) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him (see this term defined *infra*), whilst in the exercise of such superintendence (*Osborne*, 11 Q.B.D. 619); or (3) by

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[reason of the negligence of any person in the service of the employer, to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed (*Dolan*, 7 March 1885, 12 R. 804; *Sweeney*, 23 Nov. 1886, 14 R. 105); or (4) by reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or byelaws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or (5) by reason of the negligence of any person in the service of the employer, who has the charge or control of any signal, points, locomotive engine, or train upon a railway,—the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer, as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work.” “Railway” is construed in a popular sense, including a temporary railway; *Doughty*, 10 Q.B.D. 358. By § 2, “a workman shall not be entitled under this act to any right of compensation or remedy against the employer in any of the following cases; that is to say, (1) Under subsection one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in proper condition (see *Walsh*, 21 Q.B.D. 371). (2) Under subsection four of section one, unless the injury resulted from some impropriety or defect in the rules, byelaws or instructions therein mentioned; provided that, where a rule or byelaw has been approved, or has been accepted as a proper rule or byelaw, by one of Her Majesty’s Principal Secretaries of State, or by the Board of Trade, or any other department of the Government, under or by virtue of any act of Parliament, it shall not be deemed for the purposes of this act to be an improper or defective rule or byelaw. (3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the

[employer or such superior already knew of the said defect or negligence.” By § 3, the amount of compensation recoverable under the act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment, and in the district in which the workman is employed at the time of the injury. By § 4, an action for the recovery under the act of compensation for an injury shall not be maintainable, unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months, from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: provided always, that in the case of death the want of such notice shall be no bar to the maintenance of such action, if the judge shall be of opinion that there was reasonable excuse for such want of notice. See *Clark*, 13 June 1885, 12 R. 1092; *Trail*, 22 Oct. 1887, 15 R. 4. By § 5, any money payable under a statutory penalty is to be deducted from any compensation awarded under the act. By § 6, actions under the act are to be brought in the sheriff court, but may be removed to the Court of Session at the instance of either party, subject to the conditions prescribed by § 9 of the Sheriff Courts Act, 1877 (see *Sheriff*). The sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries. When the action is removed to the Court of Session, trial by jury is in general the appropriate mode of trial. See *M’Avoy*, 5 Nov. 1881, 9 R. 100; *Morrison*, 2 Dec. 1882, 10 R. 271. By § 7, notice in respect of an injury under the act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers. The notice may be served by delivering the same to, or at the residence or place of business of, the person on whom it is to be served. It may also be served by post by a registered letter addressed to the person at his last known residence or place of business; in which case it is deemed to be served at the time of delivery in the ordinary course of post; and in proving service, it is sufficient to prove that the notice was properly addressed and registered.

[When the employer is a body of persons corporate or unincorporate, the notice shall be served by delivery at, or registered post letter addressed to, any one of the offices of such body. A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy, unless the judge who tries the action shall be of opinion that the defender is prejudiced in his defence thereby, and that the defect or inaccuracy was for the purpose of misleading. See *Thomson*, 14 Nov. 1884, 12 R. 121; *M'Govan*, 26 June 1886, 13 R. 1033; *Keen*, 8 Q.B.D. 482; *Stone*, 9 Q.B.D. 76; *Carter*, 12 Q.B.D. 91. Notice must be in writing; *Moyle*, 8 Q.B.D. 116. By § 8, the expression "person who has superintendence entrusted to him" means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour: the expression "employer" includes a body of persons corporate or unincorporate: the expression "workman" means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies (see *Workman*). The term "workman" includes a fireman employed on board a steam canal-barge; *Oakes*, 21 Feb. 1884, 11 R. 579. This statute was declared (§ 10) to continue in force only till the end of the session of Parliament next after 31 Dec. 1887, but since then it has been renewed annually. A workman may contract himself out of the act; *Griffiths*, 9 Q.B.D. 357. There is no action under the act unless the relation of employer and employed subsisted between the parties; *Nicolson*, 7 July 1888, 15 R. 854. The defence of *volenti non fit injuria* is not affected by the act; *Thomas*, 18 Q.B.D. 685; *Baddeley*, 19 Q.B.D. 423; *Yarmouth*, 19 Q.B.D. 647. As the statute does not appear to take away any previously existing remedy, a workman may probably still sue for damages at common law, free from the limitations of the statute, in cases where he is not barred by the plea of *col-laborateur*. See *Fraser*, 172.]

See on this subject, *Stair*, B. i. tit. 9, § 5; *More's Notes*, lvii; [*Ersk.* B. i. tit. 7, § 60;] B. iii. tit. 3, § 16; *Bell's Com.* ii. 131; *Bell's Princ.* §§ 172, 547, 629, 2031; [*Fraser on Master and Servant*; *Ersk. Princ.* (17th ed.), 380, 404; *Guthrie Smith on Damages*, 322; *Sym's Analysis of Employers' Liability Act*; *Spens and Younger on Employers and Employed*; *Manley Smith on Master and Servant*; *Macdonell on Master and Servant*; *Roberts & Wallace on Duty and Liability of Employers*; *Beven*

[*on Negligence*, 271, 512.] See *Location. Workman. Apprentice.*

MASTER OF A SHIP. The ship-master is the person who has the sole direction of the course and conduct of the ship. [Formerly,] the shipmaster of a British ship required to be a British subject, [but this is not now necessary; 16 & 17 Vict. c. 131, § 31. He must, however, possess a certificate of competency; 17 & 18 Vict. c. 104, §§ 131 *et seq.*; *Heslop*, 3 June 1887, 14 R. (J.C.) 35.] Whoever holds the appointment may bind the owners in relation to third parties, even where he has not been appointed by the owners of the ship. While at home, the ship's-husband has the management of the outfit; but if there be no ship's-husband appointed, and the owners do not take the management into their own hands, the master has an implied power to order the outfit. While at home, he has no power to freight the ship; but when the ship is advertised for general freight, he has full authority to receive goods on board. When abroad, he may freight the ship, and take the management of the fitting out, victualing, and manning of the ship, and ordering of necessaries. He may even borrow money for those purposes, provided the bond or voucher specify the purpose to which the loan has been applied. But this dangerous power is not extended beyond what falls within the proper province of the ship-master. [He has no maritime lien for disbursements made, even in a foreign port, in respect of necessaries for the ship; *Hamilton*, 14 App. Ca. 209.] His fault or neglect binds the owners to the extent of the value of the ship; and he himself is also bound. He may be dismissed by his owners at once, his only remedy being an action. See *Ersk.* B. iii. tit. 3, § 43; *Stair*, B. i. tit. 13, § 18; *Brodie's Sup.* 953, 970; *Bank* i. 397; *Bell's Com.* i. 554; [*Bell's Princ.* §§ 450, 488; *Abbott on Shipping*, 76, 281; *Maclachlan on Shipping*, 130; *Maude & Pollock*, i. 111.] See *Shipping Law. Exercitor. Ship's-husband. Insurance. [Bill of Lading. Election.]*

MASTER OF THE ROLLS. See *Rolls, Master of.*

MATERTERA; the mother's sister, but sometimes improperly taken for the father's sister. *Skene, h. t.*

MAXIMS. The maxims, particularly of the Roman law, are of great value, as embodying important legal principles in concise and apposite language. In the investigation of legal questions involving

much nicety, and obscured, it may be, by perplexing details, it not unfrequently happens that a single legal maxim solves the difficulty, and enables the lawyer to systematise and arrange conflicting principles, and apparently inextricable involutions of fact. In the present work, many law maxims have been included in the alphabetical arrangement; but at the hazard of repetition, the principal maxims are here brought into one view,—referring to the separate articles for full expositions, where such have appeared to be necessary. Observe, however, that several of these maxims have not been adopted in the law of Scotland.

Accessorium sequitur principale.

Accessorium sequitur naturam rei cui accedit.

Actio personalis moritur cum persona.

Actio pœnalis in hæredem non datur, nisi ex damno locupletior hæres factus sit.

Actor sequitur forum rei.

[Actus Dei nemini facit injuriam.]

[Actus legis nemini est damnosus.]

Ædificatum solo, solo cedit.

Affirmanti, non neganti, incumbit probatio.

[Alii per alium non acquiritur obligatio.]

[Allegans contraria non est audiendus.]

Assignatus utitur jure auctoris.

Bona fides non patitur ut idem bis exigatur.

Bona fide possessor facit fructus consumptos suos.

Casus omissus habetur pro amisso.

Caveat emptor.

Certum est quod certum reddi potest.

[Cessante ratione legis, cessat ipsa lex.]

Chirographum apud debitorem repertum præsumitur solutum.

Cogitationis pœnam nemo patitur.

Communis error facit jus.

Conditio illicita habetur pro non adjecta.

Consensus non concubitus facit matrimonium.

Consensus tollit errorem.

Consuetudo est optima legum interpret.

Contra non valentem agere non currit præscriptio.

Corpus humanum non recipit æstimationem.

Crimina morte extinguuntur.

Cuilibet in arte sua credendum.

Cuique licet juri pro se introducto renunciare.

Cujus est commodum, ejus debet esse incommodum.

Cujus est solum, ejus est usque ad cælum.

Cujus est dare, ejus est ordinare.

Culpa lata dolo æquiparatur.

Culpa tenet suos auctores.

Dans et retinens nihil dat.

De minimis non curat Prætor.

De non apparentibus, et non existentibus, eadem est ratio.

Debitor non præsumitur donare.

[Deceptis, non decipientibus, jura subveniunt.]

Decimæ debentur parochio.

Delegatus non potest delegare.

Dies inceptus pro completo habetur.

Dies incertus pro conditione habetur.

Dies interpellat pro homine.

Dolus auctoris non nocet successori.

Dominium non potest esse in pendent.

Dominus aliquando non potest alienare.

Donatio non præsumitur.

[Duo non possunt esse domini ejusdem rei in solidum.]

Ejus est periculum cujus est dominium—aut commodum.

[Ex dolo malo non oritur actio.]

Ex facto oritur jus.

Exceptio falsi est omnium ultima.

Exceptio probat regulam in casibus non exceptis.

Exceptio quæ firmat legem, exponit legem.

[Expressio unius est exclusio alterius.]

[Falsa demonstratio non nocet, quum constat de corpore.]

Fiat justitia, ruat cælum.

Fraus auctoris non nocet successori.

Fraus latet in generalibus.

Frustra petis quod mox es restitutus.

Frustra probatur quod probatum non relevat.

Generalibus per specialia derogatur.

Hæres est eadem persona cum defuncto—pars antecessoris.

Hæres hæredis mei est meus hæres.

Hæres succedit in universum jus quod defunctus habuit.

Id nostrum solum quod debitis deductis est nostrum.

Id tantum possumus quod de jure possumus.

Ignorantia juris neminem excusat.

In alternativis electio est debitoris.

In claris non est locus conjecturis.

In commercio licet decipere.

In dubio pars mitior est sequenda.

In dubio pro dote,—libertate—innocentia—possessore—debitore—reo—respondendum est.

In dubio sequendum quod tutius est.

In favorabilibus, annus inceptus pro completo habetur.

In turpi causa potior est conditio possidentis.

Incommodum non solvit argumentum.
 Jura eodem modo destituuntur quo constituuntur.
 Juris executio non habet injuriam.
 Jus publicum privatorum pactis mutari non potest.
 Jus in re inhæret ossibus usufructuarii.
 Jus non patitur ut idem bis solvatur.
 Jus superveniens auctori accrescit successori.
 Legatum generis perit hæredi ;—legatum speciei perit legatario.
 [Leges posteriores priores contrarias abrogant.]
 Liberi corporis nulla est æstimatio.
 Locum facti impræstabilis subit damnum et interesse.
 Majori inest minus.
 Malitia supplet ætatem.
 Matrimonia debent esse libera.
 Messis sementem sequitur.
 Minor non tenetur placitare super hæreditate paterna.
 [Modus et conventio vincunt legem.]
 Mortuus sasit vivum.
 Multa impediunt matrimonium contrahendum quæ non dirimunt contractum.
 Multa non vetat lex quæ tamen tacite damnavit.
 Nemo cogi potest præcise ad factum, sed in id tantum quod interest.
 Nemo debet ex aliena jactura lucrari.
 Nemo ex suo delicto meliorem suam conditionem facere potest.
 Nemo mori potest pro parte testatus, pro parte intestatus.
 Nemo præsumitur donare.
 Nemo præsumitur malus.
 Nemo præsumitur ludere in extremis.
 Nemo tenetur jurare in suam turpitudinem.
 Non creditur referenti nisi constet de relato.
 Non exemplis, sed legibus, judicandum.
 Novatio non præsumitur.
 Nulla sasina, nulla terra.
 Nunquam concluditur in falso.
 Nunquam præscribitur in falso.
 Officium nemini debet esse damnosum.
 Omne majus in se continet minus.
 Omnia præsumuntur rite et solenniter acta.
 [Optimus interpret rerum usus.]
 Pactis privatis publico juri non derogatur.
 Pactum de assedatione facienda et ipsa assedatio æquiparantur—præcipue si possessio sequatur.
 Partes rei sunt favorabiliores.
 Partus sequitur ventrem.
 Pater est quem nuptiæ demonstrant.
 Paterna paternis, materna maternis.

Patrem sequitur sua proles.
 Patronum faciunt dos, ædificatio, fundus.
 Pendente lite nihil innovandum.
 Periculum rei venditæ, nondum traditæ, est emptoris.
 Plus valet quod agitur quam quod simulate concipitur.
 Posteriora derogant prioribus.
 Potior est conditio possidentis—prohibentis—defendentis.
 Primus actus judicii est judicis approbatorius.
 Prior tempore potior jure.
 Probatis extremis præsumuntur media.
 Pro possessore habetur qui dolo desiit possidere.
 Provisio hominis tollit provisionem legis.
 Quæ temporalia ad agendum, sunt perpetua ad excipiendum.
 [Quando lex aliquid concedit, conceditur et id sine quo res ipsa esse non potest.]
 Quem sequitur commodum, eum etiam sequitur incommodum.
 Qui approbat non reprobat.
 Qui cum alio contrahit, vel est, vel debet esse conditionis ejus non ignarus.
 Qui facit per alium facit per se.
 Qui in utero est, pro jam nato habetur, quoties de ejus commodo quæritur.
 Qui non habet in ære luat in corpore.
 Qui providet sibi providet hæredibus.
 Qui suum recepit, licet a non suo debitore, non tenetur restituere.
 Qui tacet, consentire videtur.
 Quisque est rei suæ moderator et arbiter.
 Quod fieri debet facile præsumitur.
 Quod fieri non debet factum valet.
 Quod inesse debet inesse præsumitur.
 Quod meum est, sine me alienum fieri nequit.
 [Quod naturaliter inesse debet, præsumitur.]
 Quod nullius est, fit domini regis.
 Quod nullius est, fit occupantis.
 [Quod pure debetur, præsentī die debetur.]
 Quod statim liquidari potest, pro jam liquido habetur.
 Reipublicæ interest voluntates defunctorum effectum sortiri.
 Res inter alios acta, aliis neque nocet, neque prodest.
 Res judicata pro veritate accipitur.
 Resoluto jure dantis, resolvitur jus accipientis.
 Res perit domino.
 [Respondeat superior.]
 Res sua nemini servit.
 [Salus populi suprema lex.]
 Scire debes cum quo contrahis.
 Scire et scire debere æquiparantur in jure.

Semel baro, semper baro.
 [Sic utere tuo, ut alienum non lædas.]
 Si ingratum dixeris omnia dixeris.
 Socius mei socii non est meus socius.
 Spoliatus ante omnia restituendus.
 Summum jus, summa injuria.
 Surrogatum sapit naturam surrogati.
 Testimonia ponderanda sunt, non numeranda.

Traditionibus et usucapionibus, non nudis pactis dominia rerum transferuntur.

Tutor in rem suam auctor fieri non potest.

Tutor datur personæ—curator rei.

Tutor præsumitur intus habere, ante red-ditas rationes.

[Ubi eadem ratio, ibi idem jus.]

[Ubi jus, ibi remedium.]

Unumquodque eodem modo dissolvitur quo colligatur.

Utile per inutile non vitiatur.

Uxor sequitur domicilium viri.

Vendor nominis tenetur præstare debi-tum subesse, non vero debitorem locupletem esse.

Verba interpretanda sunt contra profer-entem.

Veritas convicii non excusat a calumnia.

Vigilantibus, non dormientibus, jura sub-veniunt.

Volenti non fit injuria.

Voluntas est ambulatoria usque ad mortem.

[See *Broom's Legal Maxims*; *Trayner's Latin Phrases and Maxims*.]

MAYOR; the chief magistrate of a city or town-corporate in England. *Tomlins' Dict. h. t.*

MEASUREMENT. The effect of a sale of land by measurement depends upon the question, whether the measurement is taxa-tive or exegetical in its terms. Whenever it appears that the measurement forms part of the contract, and is looked upon by the parties as an essential condition, the pur-chaser's right is confined by that measure-ment as by a bounding description; but if the measurement is merely spoken of in advertisements, or appears upon a plan or survey of the estate, as giving a general idea of the extent of the estate, the purchaser is not bound or entitled to consider it as a condition, or as relieving him of his obliga-tion to satisfy himself by his own inquiries. ["The rule is, that the physical boundaries must govern, if they are clearly set forth; and that the particulars added are merely demonstrative or illustrative, not taxative of the extent;"] *Rankine on Land-Owner-ship*, 92.] In one case it was held that ineffectment in a mill and four acres of land was demonstrative and not taxative, and

entitled the holder, with immemorial pos-session, to resist a removing from land beyond the four acres; *Douglas*, 1630, M. 2262. [But contrast *North Brit. Railway*, 8 Feb. 1879, 6 R. 640.] In leases, it is often a difficult question, whether or not the measurement given of the farm is intended to be taxative; and it has been recom-mended that a measurement ought never to be admitted into the description without some qualifying words, to show that the contents are expressed in a demonstrative sense only. It is not settled what would be the effect of a false measurement,—whether it would invalidate the lease or give a ground for abatement of the rent; *Balmer*, 11 March 1830, 8 S. 715; considered in the House of Lords in 1832—see 10 S. 862. See *Quanti minoris*. The measurement of a commodity sold is often an important ele-ment in the question of the delivery of the commodity, and consequent transfer of the property. See *Bell's Com.* i. 192; ii. 264; *Brown on Sale*, 44; *Bell on Leases*, i. 201; *Hunter's Landlord and Tenant*, ii. 180, 181; [*Rankine on Leases*, 188; *Menzies' Conv.* 544; *M. Bell's Conv.* i. 599. See *Weights and Measures. Bounding Charter*.]

[MEDICAL ACTS. See 21 & 22 Vict. c. 90; 22 Vict. c. 21; 23 & 24 Vict. c. 7; 25 & 26 Vict. c. 91; 39 & 40 Vict. cc. 40, 41; 49 & 50 Vict. c. 48.]

MEDICAL JURISPRUDENCE; is the application of the principles of medical science to the administration of justice and the preservation of the public health. The subjects with which chiefly it is conversant are, the development of the human frame; the duration of life; personal identity; marriage; impotency; pregnancy; pater-nity; presumption of survivorship; mental alienation; nuisances; detection of forgery and coining by chemical tests; rape; mur-der; poison, and the like. See *Enc. Brit.*; [also the treatises on this subject by *Taylor, Guy, Tidy, and Ogston*.]

MEDIETAS LINGUÆ; in English law, a jury, half natives, half foreigners, used in pleas between a foreigner and a denizen. *Tomlins' Dict. h. t.*

MEDITATIO FUGÆ. When a credi-tor is in circumstances to make oath [or affirmation (see *Oath*)] that his debtor, whether native or foreigner, is *in medita-tione fugæ*, in order to avoid the payment of his debt, or where he has reasonable ground for apprehending that the debtor has such an intention, it is competent for the creditor to apply to a magistrate, who on inquiring into the circumstances, and

finding reason to believe that the creditor's application is well founded, will grant a warrant for apprehending the debtor for examination; and may afterwards grant warrant to imprison him until he find caution *judicio sisti*. But should the creditor have proceeded without sufficient grounds for his application, he will be liable in damages. Even the judge who incautiously and illegally grants such a warrant [has been held to] incur a similar responsibility; [but "it is doubtful whether the earlier cases to this effect are reconcilable with the views which now prevail respecting the protection due to the judicial office;" *Guthrie Smith on Damages*, 286. See *Judges*.] This application is of a summary nature, and may be presented to any magistrate or judge ordinary: to the Court of Session, — the sheriff, — magistrates of burghs, — justices of peace, and, when the debtor is in the Sanctuary, to the bailie of the Abbey. The last reported case of an application made to the Court of Session in the first instance was in the year 1700; but Hutcheson mentions a case which occurred in 1795; *Hutch.* i. 432. In general, the application is made to a magistrate exercising authority within the bounds where the debtor resides. [The usual form of application is by petition to the sheriff in the style prescribed by the Sheriff Court Act, 1876 (§ 6); *M'Dermott*, 9 Dec. 1876, 4 R. 217.] If the debtor has left that jurisdiction, he may be apprehended in any other place, on the warrant being indorsed by a magistrate exercising jurisdiction in the new territory; and, on being apprehended, he may be transmitted to the first magistrate for examination. The concurring magistrate cannot commit the debtor: to give him that power, there must be an original application to himself. [A sheriff's *fugæ* warrant may be executed beyond his county without indorsation; 1 & 2 Vict. c. 119, § 25. But no *fugæ* warrant can be executed furth of Scotland; *Adam*, 14 June 1887, 14 R. 800.] When the creditor is a company, one of the partners of the company must make oath. When the creditor resides out of Scotland, the application is made in his name; but he must have a mandatary in Scotland. See *Mandatary*. The creditor must make an affidavit before a qualified person, and the mandatary ought to make a corroborative affidavit before the magistrate in Scotland. There is no necessity to produce a ground of debt — a claim of debt attested by the affidavit of the creditor is sufficient. It is not

necessary that the debt be constituted by bill or decree, or that it be past due and payable. The court has allowed this remedy even in cases in which the debt was contingent; thus an application by a landlord for warrant to incarcerate a person as *in meditatione fugæ*, till he found security not only for certain arrears and current rents, but for the prospective rents under a lease having fifteen years to run, was held to be [competent and legal; *M'Gill*, 9 March 1838, 16 S. 934. In another case, a claim for the aliment of an unborn illegitimate child was held a sufficient ground for a *fugæ* warrant; *Davies*, 9 Feb. 1861, 23 D. 532.] The circumstances which led the creditor to believe that the debtor means to fly the country must be stated, and the creditor's oath [or affirmation] must bear this out. But in the special case where the debtor on examination admitted the debt and his intention to leave the country, the warrant of committal was supported without the creditor's oath. It is improper for the magistrate to delegate to any one the taking of the creditor's oath [or affirmation,] or the examination of the debtor. The reasons of belief must be sufficient to satisfy the judge. Immediately on the application to the judge, if the grounds of suspicion be pregnant, he grants a summary warrant for apprehending the debtor; and, on his apprehension, he ought to be examined by the judge; and it is from the circumstances as appearing on that examination that the judge will be enabled to determine as to the propriety of granting a warrant of imprisonment. The creditor's oath [or affirmation] is taken as *prima facie* evidence of the existence of the debt. But when the debtor denies his intention to leave the country, and admits no suspicious circumstances, the magistrate ought not to commit without further evidence. Where the debtor has not sufficiently explained himself on his first examination, he may apply for another. When a proof is to be taken, the debtor may be detained on a warrant during the time of proving; and he is sometimes committed till he find caution to abide the issue. In either case, he must be liberated on finding caution to abide the issue. It is not a sufficient ground for this warrant that the debtor means to remove from one place of the country to another; he must have intended to leave Scotland. But it may be granted wherever there is a real intention to leave the country, even although the debtor

should have a good reason for going, and no fraudulent design. So far, indeed, has this been carried, that an officer proceeding to join his regiment abroad was found liable to be arrested on a *meditatio fugæ* warrant. But the court have more recently disapproved of that extension of the doctrine; *Bryson*, 10 March 1812, F.C. [When the debtor has no fixed residence, and no goods in Scotland, the creditor's oath has been held sufficient ground for granting warrant; *Anderson*, 18 Nov. 1848, 11 D. 118; see also *Kidd*, *infra*.] The *meditatio fugæ* warrant is given equally against a foreigner as a native. There has been considerable fluctuation in the decisions as to what will be sufficient to expose a foreigner to this warrant. But there must at all events exist the grounds of jurisdiction for an ordinary action at law. The cases relative to the application against a foreigner are collected in *Barclay on Meditatio Fugæ*; and the conclusion at which the author arrives on a review of these cases is, that a foreigner is subject to the operation of this warrant—1st, Where he has acquired a legal domicile by forty days' fixed residence in Scotland, whether the debt be foreign or not; 2^d, He is liable to be attached for Scotch debts, even where he has not acquired a domicile; and this rule is strengthened if the debts have been contracted since his last arrival; 3^d, Where he has left another country to avoid his creditors, and is in this country not with the intention of fixing his residence here, but with the view of avoiding his creditors; and in this case he may be attached by foreign as well as by Scotch creditors. The possession of a landed estate in Scotland has no effect upon his liability. It would appear that a *meditatio fugæ* warrant cannot be competently taken out against a foreigner not resident in this country, but on a journey of pleasure or of business, with no intention of defrauding his creditors; *Bell's Com.* ii. 455; *Barclay*, 57. [See also *Muir*, 28 June 1861, 23 D. 1229; *Irvine*, 19 March 1869, 7 Macph. 723.] This warrant differs from the ordinary personal diligence of the law, in so far that, being *quodammodo* criminal, it may be executed on Sunday as well as on any ordinary day. It may also be executed within the Sanctuary of Holyroodhouse, in which case the concurrence of the bailie of the Abbey is necessary. Those, however, who are exempted from imprisonment by privilege, are free from the effects of the warrant; because it is a mere auxiliary to the right of imprisoning the debtor.

[Hence a *fugæ* warrant cannot be granted, upon a debt below the statutory amount for which a debtor can be imprisoned; *Marshall*, 18 Dec. 1844, 7 D. 232. The Debtors Act, 1880 (43 & 44 Vict. c. 34), which in most cases abolishes imprisonment for debt, is declared not to affect or prevent the apprehension or imprisonment of any person under a *fugæ* warrant (§ 4). But in *Kidd*, 19 May 1882, 9 R. 803, an application for a *fugæ* warrant by a creditor who held an extracted decree for his debt was held to be unnecessary, and therefore incompetent; as under the extracted decree all diligence competent might instantly have been taken. It would, of course, have been otherwise, if the debt had been one of the class in respect of which imprisonment is still competent. See *Imprisonment*.] Relief from the imprisonment on this warrant is obtained by the debtor finding caution *judicio sisti*. See *Caution judicio sisti*. [Apprehension on a *fugæ* warrant creates a *nexu*s, fixing the debtor's person within the territory of Scotland, till liberated on finding caution *judicio sisti*; and he cannot, if so liberated, plead want of jurisdiction; *Muir*, *supra*. But this applies only to the debt in respect of which the warrant was issued. When a debtor who has been apprehended as in *meditatione fugæ*, and found caution *de judicio sisti*, has been produced at the bar by his cautioner, he cannot be re-imprisoned unless upon a new warrant; *Clark*, 21 Dec. 1881, 9 R. 372.] See *Barclay on Meditatio Fugæ*; also *Bell's Com.* ii. 449; *Ersk.* B. i. tit. 2, § 21; *Stair*, B. iv. tit. 47, § 23; *Bell's Princ.* § 2318; *Macfarlane's Jury Prac.* 59; *Ross's Lect.* i. 345; *Kames' Equity*, 289; [*Barclay's Digest*; *Mackay's Prac.* i. 170; *Dove Wilson's Sher. Court Prac.* 461; *Goudy on Bankruptcy*, 577; *Guthrie Smith on Damages*, 284. See *Border Warrant*.]

MELIORATIONS. Questions as to a claim for the expense of improvements upon land may be raised in various situations: e.g. when the improvements have been made under a lease; when they have been made under a deed of entail; when they have been made on a liferented estate.

1. *Meliorations under a Lease.*—When a tenant, of his own accord, expends money and labour in the improvement of his farm, this is presumed to be done not for the permanent benefit of the farm, but for his own use during the remainder of his lease. [At common law, therefore, and in the absence of express stipulation,] a tenant is not entitled to any recompense for such im-

provements. [And this rule holds, even when the lease is prematurely terminated, and when the landlord is clearly *lucratus* by the improvements; *Scott's Exrs.*, 14 June 1876, 3 R. 816; *Walker*, 24 Feb. 1886, 13 R. 599 (correcting *Bell's Princ.* § 1255). In subjects, however, to which the Agricultural Holdings Act, 1883, applies, an outgoing tenant is now entitled to compensation for improvements. See *Agricultural Holdings Act*; also *Crofters Holdings Act*.] And it is usual to make repairs and meliorations the subject of express agreement. A clause binding the landlord to make the necessary meliorations is binding on the heir in the first instance. [The executors are equally liable to the lessee; but they have a right of relief against the heir; *Walker*, 18 July 1857, 19 D. 1099.] An heir of entail succeeding is not liable at common law to implement stipulations for improvements entered into by the heir in possession; [but this has been altered by statute; 41 & 42 Vict. c. 28, § 1; see *Entail*, p. 398.] A clause in a lease obliging the lessor to make meliorations, or to allow the lessee a sum for that purpose, or to reimburse him for outlay, will be binding upon singular successors. An obligation upon the tenant to uphold, with a right to indemnification of any excess of value in additions, limits the tenant to the mere rebuilding or reparation of what becomes ruinous, and to the making of necessary or suitable improvements, but gives no right to pull down old houses or erect new ones, not necessary or suitable to the farm; [*Graham v. Jolly*, 29 June 1831, 5 W. & S. 280; see also *Napier*, 24 June 1847, 9 D. 1354.] Express clauses supersede local customs, as to indemnification for meliorations. An obligation on the tenant to meliorate or repair, if not implemented by himself, falls upon his representatives. But the burden falls upon an assignee or a sublessee, whether acknowledged by the landlord or not. [When improvements are to be executed by the tenant, and the landlord is to pay a stipulated sum in respect thereof at the ish, destruction of the improvements by *damnum fatale* does not extinguish the landlord's obligation; *D. Hamilton's Trs.*, 23 Dec. 1870, 9 Macph. 328; nor does the premature termination of the lease by bankruptcy or renunciation of the tenant; *Pendreich's Tr.*, 19 July 1871, 9 Macph. 1037; *Walker's Trs.*, 17 July 1886, 13 R. 1198. Note the contrast between these two cases in regard to allowance of discount

[to the landlord in respect of immediate payment.] See *Stair*, B. i. tit. 15, § 6; B. ii. tit. 1, § 40; [*More's Notes*, cclii.; *Ersk.* B. ii. tit. 6, § 39;] *Bell's Com.* i. 70, 78; *Bell's Princ.* § 1253; *Hunter's Landlord and Tenant*, ii. 217; [*Rankine on Leases*, 228;] *Kames' Equity*, 111. See *Lease. Fences. Fixtures. Improving Lease. Repairs.*

2. *Meliorations by an Heir in Possession.*—Certain statutory powers have been conferred upon heirs of entail in possession, by the exercise of which they may throw a proportion of the expense of improvements upon the substitutes. See *Entail*, p. 397. *Mansion House. Improving Lease.*

3. *Meliorations on a Liferent Estate.*—A liferenter is bound to pay the interest of money laid out on necessary repairs of the liferented tenement. If the subject fall into decay or be destroyed by accident, neither the liferenter nor the fiar will be bound to repair or rebuild; and the liferenter may continue to draw the rent of the subject such as it remains. See *Ersk.* B. ii. tit. 9, § 60; *Bell's Princ.* § 1062; [*Rankine on Land-Ownership*, 604.] See *Liferent.*

[Other examples of a right to recompense for meliorations—in particular, the case of a *bona fide* possessor building on another's ground—are noticed under *Recompense*. See *Bell's Princ.* § 538; *Rankine on Land-Ownership*, 78.]

MELLETTUM; strife, dissension, debate. *Skene, h. t.*

MEMBERS OF PARLIAMENT. The members of the House of Commons are usually so styled, although, strictly speaking, the Peers, as well as the representatives of the Commons, are members of Parliament. See *Ersk.* B. i. tit. 2, § 24; tit. 3, § 7; B. iii. tit. 1, § 29; *Bell's Com.* ii. 157, 164, 460; *Bell's Princ.* § 2149; *Kames' Stat. Law Abridg. h. t.* As to the qualifications for electing, or being elected, a representative of either the Peerage or Commons of Scotland in the British Parliament, see *Election Law*. As to the privileges and usages of Parliament, see *Parliament. Privilege.*

MEMORANDUM. [In England, a memorandum on a bill or note, made before it is complete, is sometimes considered as part of the instrument, so as to control its operation, and sometimes not. If the memorandum makes the payment contingent, it is held incorporated in the instrument. But where it is merely directory, as if it points out the place of

[payment, it does not affect the operation of the bill or note. See *Byles on Bills*, 110;] *Thomson on Bills*, 13,291. As to the memorandum in a policy of insurance, see *Insurance*, p. 558*b*; [and as to a memorandum of association, see *Joint Stock Companies*.]

[MENAGE]; "a friendly society, of which every member pays in a fixed sum weekly, to be continued for a given term. At the commencement, the order of priority in receiving the sum collected is determined by lot. He who draws No. 1 as his ticket, receives into his hands the whole sum collected for the first week, on his finding security that he shall pay in his weekly share during the term agreed. He who draws No. 2 receives the contributions of all the members for the second week; and so on according to their order. Thus every individual has the advantage of possessing the whole weekly contributions for a term proportionate to the order of his drawing. Such friendly institutions are common in Edinburgh and the vicinity. The members usually meet in some tavern or public-house; a certain sum being allowed by each member for the benefit of the landlord;" *Jamieson's Dict. Supp. h. t.* This primitive institution, though no longer to be found in Edinburgh, still exists in some localities, *e.g.* in Stirlingshire.]

[MENEMIUM]; "the timmer of a house." *Skene, h. t.*

[MENETUM]; a stock horn. *Skene, h. t.*

[MENSAL CHURCH]. This was a term applied, during the times of episcopacy, to a church that had been appropriated by the patron to the bishop, and made thenceforth part of his own benefice. *Mensalia*; livings united to the tables of religious houses. These terms were derived from *mensa*, which signified everything necessary for living. *Ersk. B. ii. tit. 10, § 11*; *Stair, B. ii. tit. 8, §§ 27 and 25*; *Hutch. Justice of Peace, ii. 426*.

[MERCANTILE WRITINGS]; are excepted from the solemnities required by law in other deeds. See *Writings in re mercatoria*.

[MERCHANDISE MARKS ACT]; 50 & 51 Vict. c. 28. See *Trade Marks*.]

[MERCHANT COMPANY]. See *Dean of Guild*.

[MERCHANT, LAW]. See *Law*.]

[MERCHANT SHIPPING]. See *Shipping Law. Seamen*.]

[MERCHANTS' ACCOUNTS]. See *Accounts. Prescription, Triennial. Evidence*.

[MERCHETA]. See *Marcheta*.]

[MERCY, Recommendation to]. A jury is not entitled, in those cases in which the law seems to be rigorous, to return a verdict of acquittal in opposition to law. Their only course is to point out, in a recommendation to mercy, the circumstances which make the legal punishment of the panel severe in some peculiar case, and which therefore call for equitable consideration. *Steele*, 223.

[MERGER, in English Law]. It is a general principle of law that, where a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater. Thus, if there be a tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. *Stephen's Com. i. 316*. See *Consolidation. Confusion*.]

[MERK]; an old Scotch coin of the value of thirteen shillings and fourpence Scotch, or one shilling and one penny and four-twelfths of a penny sterling. See *Scotch Money*.

[MESE]; of herring, contains five hundred. *Skene, h. t.*

[MESNE, in English law]; middle or intermediate. An action of *mesne profits* is an action of trespass brought to recover profits derived from land, whilst the possession of it has been improperly withheld; that is, the yearly value of the premises. *Wharton's Lex*.]

[MESSENGER-AT-ARMS]; an officer appointed by and under the control of the Lyon-King-at-Arms. Messengers-at-arms are said to be subservient to the Supreme Courts of Session and Justiciary, and they are employed in executing all summonses and letters of diligence, both in civil and criminal matters. Our signet letters seem to have been devised by the judges of the King's Court to supply the ancient writs of the law, and they were constantly directed to messengers-at-arms, as sheriffs in that part. It is the character, therefore, of sheriff in that part which has placed this duty in the hands of messengers-at-arms. Messengers and their cautioners are liable for damage occasioned by their undue or defective execution of diligence; but they are not liable for the loss of the debt until it has been constituted against the debtor. It is incompetent for a messenger to execute diligence for his own behoof and that of another party, on a bill which he has in-

dorsed; *Dalgleish*, 18 June 1822, 1 S. 506. A messenger cannot be a procurator before a sheriff-court; *Bowhill*, 2 June 1825, 4 S. 61. In a simple reduction of a decree of suspension, the party who had, as messenger, signed the execution of intimation of sist, but was subsequently deprived of his office, was allowed to be called as a witness to disprove his own execution, and these circumstances were held only to affect his credibility; *Aitchison*, 28 Dec. 1836, 15 S. 360. [By 31 & 32 Vict. c. 100, § 19, a general authority is given to sheriff officers to serve Court of Session summonses and orders, or interlocutors pronounced by the court or Lord Ordinary on the Bills, upon parties within any of the islands of Scotland, or where there is no resident messenger in the county or district.] See *Stair*, B. iv. tit. 47, § 15; *Ersk.* B. i. tit. 4, § 33; *Bank.* ii. 503-7; *Bell's Com.* ii. 160, 435; *Bell's Princ.* §§ 296-7, [2041]; *Kames' Stat. Law Abridg. h. t.*; *Ross's Lect.* i. 286, 302, 338, 429, 446; *Kames' Equity*, 212. See *Execution. Deforcement. Lyon-King-at-Arms.*

MESSIS SEMENTEM SEQUITUR; the crop belongs to the possessor by whom it was sown; is a maxim applied to the case of *bona fide* possession, and also in questions between heir and executor. Where a person is in possession of land which he has reason to believe to be his own, and sows the land, he has right to reap the crop sown by him, although, before it be cut down, it should be discovered that another has a preferable title to the land. [On the same principle, though, by the ordinary rules of law, the right of a life-renter ceases with his possession, yet, if he was in the natural possession, and had before his death tilled and sown the ground, his executors are entitled to the whole crop, free from rent; *M'Math*, 1621, M. 15877.] See *Ersk.* B. ii. tit. 1, § 26; [tit. 9, § 65;] *Connel on Parishes*, 435. See *Bona Fides.*

MESSUAGE; signifies the principal dwelling-house of a barony, in which sense it is synonymous with the English expression *manor-house*. In the law of England, messuage signifies a dwelling-house with some land adjoining, assigned for its use. Under this name may be included a garden, shop, mill, cottage, chamber, cellar, or the like. See *Skene, h. t.*; *Ross's Lect.* ii. 137; *Tomlins' Dict. h. t.*

METUS. See *Force and Fear.*

MICHAELMAS HEAD-COURT; the annual meeting of the freeholders and commissioners of supply of a county, held at

Michaelmas for various county purposes. This was formerly one of those meetings at which the presence of the heritors was required under a fine; but, by 20 Geo. II. c. 50, abolishing ward-holding, no heritor can now be fined for absence, unless he shall have been summoned as a jurymen, or for some other legal purpose. It was at this meeting that, under the old election law, the roll of freeholders was revised, applications for enrolment disposed of, and freeholders put upon the roll, and the roll purged of those who had died, or disposed of the property on which they formerly stood enrolled; *Ersk.* B. i. tit. 4, § 5. See *Election Law. Commissioners of Supply.*

MID-COUPLES. Where an heir, assignee, or adjudger took infeftment in virtue of a precept of sasine granted in favour of his predecessor or author, it was necessary to deduce in the instrument of sasine the writings by which he was connected with the precept; 1693, c. 35. These writings are called the *mid-couples*. See *More's Notes on Stair*, clxx; [*Menzies' Conv.* 655; *M. Bell's Conv.* ii. 766.]

MID-IMPEDIMENT; the Roman law *medium impedimentum*; is anything which intervenes between two events, and prevents, *quoad* the former event, the retrospective operation of the latter. Thus anything occurring between the date of a sasine on a precept *a me* and the charter of confirmation, to prevent the superior from granting a charter of confirmation, is called a mid-impediment. If the former proprietor have granted a conveyance to another person, on the procuratory of which that person has resigned and obtained a charter of resignation on which sasine has followed, the right will be completely transferred, and the superior's confirmation of the other conveyance will be unavailing. See *Ersk.* B. ii. tit. 7, § 15; *Bell's Com.* i. 723; *Bell's Princ.* § 812; [*Menzies' Conv.* 634; *M. Bell's Conv.* i. 686; ii. 735.] See *Confirmation.* As to the mid-impediment of an intervening marriage, in questions of legitimation *per subsequens matrimonium*, see *Legitimation.*

MILITARY LAW. See *Martial Law. Court-Martial.*

MILITARY TESTAMENT. Among the Romans, certain ceremonies necessary in testaments were dispensed with in the testaments of soldiers, on account of their ignorance, or *ob imminens vite periculum*. In like manner, in this country, soldiers may make nuncupative wills, and dispose of their goods, arrears of pay and other

personal property, without the forms and solemnities required in other cases. *Heineccii Elementa*, p. 167; [*Stephen's Com.* ii. 602.]

MILITES; in old law language, freeholders holding their lands of barons in chief. *Skene, h. t.*

MILITIA; as distinguished from the regular forces, means the body of men who may be annually called out for a limited time, and armed and embodied for military service on occasions of emergency. After much uncertainty and change, the militia laws of England and Scotland were consolidated by 42 Geo. III. cc. 90 and 91. [Under these acts, all males, between the ages of eighteen and forty-five, are liable to be enrolled for service in the militia, unless specially exempted, on one or other of the grounds mentioned below.] The men to be enrolled are chosen by ballot from every parish; all who are not above four feet and five inches in height, or are not approved of on examination by a surgeon, being discharged, and others balloted for in their place. The following persons are exempted from serving:—Peers; commissioned officers of the other forces, whether on full or half pay; non-commissioned officers and privates of the other forces; persons serving, or who have served for four years, as commissioned officers in the militia; persons serving in the yeomanry or volunteers; persons serving, or who have served at any time within a year past, in the local militia; resident members of the several universities; clergymen of the establishments, and registered dissenting clergymen; parish schoolmasters; articulated clerks; apprentices; seafaring men; persons employed in the Royal Docks, [and certain other public works;] any poor man with more than one child born in wedlock, in England; and any man with more than two lawful children, and not possessing property to the value of £50, in Scotland. [In times of security, it has been the practice to suspend annually the operation of the ballot under these acts; and provision was made for keeping up the militia by voluntary enlistment, by 17 & 18 Vict. c. 106, and several subsequent statutes, which have been consolidated by 45 & 46 Vict. c. 49. This last-mentioned act now practically regulates the militia of the United Kingdom, so long as the ballot remains suspended. In case of imminent national danger, or of great emergency, it is lawful for Her Majesty in Council by proclamation to order the militia to be embodied, the occasion being first communicated to Parlia-

[ment, if it be sitting, or declared in council, and notified by proclamation, if Parliament be not sitting; and in the latter event it is provided that Parliament shall be assembled within ten days (§§ 18, 19). See also Regulation of the Forces Act, 44 & 45 Vict. c. 57; Reserve Forces Act, 45 & 46 Vict. c. 48; National Defences Act, 51 & 52 Vict. c. 31. See *Stephens' Com.* ii. 616.]

MILL. There is not an invariable rule as to the question, whether or not a charter or conveyance of lands carries a mill previously erected upon them, without express mention of it. The right of thirlage attaching to mills formerly made them of such importance, that they were frequently taken to be distinct tenements, and conveyed by charter and infeftment *per se*. In such circumstances the general rule is, that a mill does not pass as part and pertinent; but this is always a *questio voluntatis*; and wherever it appears that the mill never had been considered or transferred as a separate subject, and where the proprietor conveys all which is in his own titles, the mill is carried. From the indeterminate state of this matter, it is advisable that the deed of conveyance should expressly bear whether the mill is intended to be reserved, or to pass with the rest of the property. Where a mill already exists, with a thirlage in favour of another than the proprietor of the land, he is not entitled to build another mill, capable of grinding the astricted corn, since that might afford a temptation to defeat the thirlage. And in certain cases in which this had been done, the mill was either destroyed or ordered to be altered, so as to be incapable of grinding the astricted corn. The symbol for giving sasine in a mill is the clap and happer. See *Stair*, B. ii. tit. 3, § 75; *Ersk.* B. ii. tit. 3, § 44; tit. 6, § 5; *Bank.* i. 506, 569, 689; *Bell's Princ.* §§ 743, 1017, 1033, 1036; *Kames' Stat. Law Abridg. h. t.*; *Hunter's Landlord and Tenant*, i. 258; *Bell on Leases*, i. 249; *Ross's Lect.* ii. 169, 196; [*Rankine on Leases*, 80.] See *Thirlage. Part and Pertinent*. And for the regulations respecting the hours during which children may be required to work in mills and factories, see *Factories*.

MINERALS; in a limited acceptance, are such fossils as coal, lime, chalk, marle, &c. A coal-mine is legally a part of the lands within which it is situated, and passes with a conveyance of the lands. It may nevertheless form a separate estate. Thus a proprietor may sell or feu the surface, reserving the coals and minerals, or dis-

pose of them, reserving the lands; and the two thus separated become distinct feudal estates. [See *Gillespie*, 22 July 1859, 3 Macq. 757; *Graham*, 28 July 1871, 9 Macph. (H.L.) 98; *Blair*, 22 May 1876, 3 R. (H.L.) 41; *D. Hamilton*, 13 May 1885, 12 R. (H.L.) 65.] When a superior feus lands under a reservation of a right to coals, it is usual for him to come under an obligation to pay the vassal surface damage, for the injury which may be done to the lands, by working the coal-mines; an obligation which, in case of a sale of the coals by the superior, will attach to the purchaser of the coal, in virtue of the principle by which every obligation affecting an heritable subject is transferred from the former to the present proprietor. [Even without such stipulation, the vassal is entitled to surface damages. See *Andrew*, 10 March 1873, 11 Macph. (H.L.) 13; *Livingstone*, 13 Feb. 1880, 7 R. (H.L.) 1; *Neill's Trs.* 19 March 1880, 7 R. 741.] Minerals are not included under an agricultural lease, unless expressly conveyed to the tenant. A liferenter, whose right extends merely to the fruits, *salva rei substantia*, has no title to coal-mines without a special grant, even although they are open, and in course of being worked; nor will he be entitled to the rents of coal-mines unless the granter of the liferent shows that it was plainly his intention to include these rents in the liferent; [*Campbell*, 6 July 1883, 10 R. (H.L.) 65.] But a liferenter, although not entitled to dispose of the minerals, may yet use as much of the coal as is required in his own household. [With regard to the mode of estimating the annual value of minerals, to be taken into account in fixing the amount of a casualty payable to the superior, see *Allan's Trs.* 12 Jan. 1878, 5 R. 510; *Sivright*, 8 July 1879, 6 R. 1208; *Sturrock*, 21 May 1880, 7 R. 799. As to what is included in the expression "mines and minerals," see *Mags. of Glasgow*, 10 Aug. 1888, 15 R. (H.L.) 94.] See *Stair*, B. ii. tit. 3, § 74; tit. 9, §§ 39, 43; *More's Notes*, clxxv., cc., ccliv., cclxxi., ccciv.; *Ersk.* B. ii. tit. 6, §§ 1, 5, 22, 39; tit. 9, § 57; *Bell on Leases*, i. 343; ii. 43, 120, 261; *Bell's Com.* i. 61; *Bell's Princ.* §§ 740, 1042, 1051, 1070, 1226; *Hunter's Landlord and Tenant*, i. 119, 269, 395; ii. 206, 510; [*Rankine on Land-Ownership*, 144, 608; *Rankine on Leases*, 67, 73, 81, 384; *Bainbridge on Mines and Minerals*; *Rogers on Mines and Minerals*. See *Support. Lease*.] *Liferent. Marle-pit.*

MINES; are *inter regalia*. By 1424, c. 12, gold mines are declared to belong to the Crown without limitation; and silver mines, when of such fineness that three halfpence of silver can be extracted from the pound of lead. But it would appear, that not only gold and silver, but tin, copper, and lead mines were formerly annexed to the Crown. See an act of the year 1592, [printed in *Thomson's Acts*, iii. 556.] By that statute mines are dissolved from the Crown; and it is made lawful to the Crown to set in feu-farm to the baron, or other freeholder of the ground, all metals or minerals that may be found within his own lands, on payment of the tenth part to the Crown, without any deduction of charges; and in case the freeholder should refuse to work them, they may either be worked for the use of the Crown, or feued out to others. In the interpretation of this statute it has been found that a positive right is conferred on the freeholder, by which he may demand a right from the Crown, in pursuance of the statute; and that the word freeholder means the possessor of the *dominium utile*. [See *E. Breadalbane*, 16 June 1875, 2 R. 826. With regard to the statutory regulation and inspection of mines, see Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 57); *Chisholm's Manual* of said act; *Guthrie Smith on Damages*, 386.] See *Ersk.* B. ii. tit. 6, § 16; *Stair*, B. ii. tit. 3, § 60; *Bank.* i. 573; *Bell's Princ.* § 669; [*Rankine on Land-Ownership*, 144; *Bainbridge on Mines and Minerals*; *Rogers on Mines and Minerals*.] See *Gold Mines*.

MINISTER. See *Patronage. Admission. Deposition.* [*Translation. Clergy.*]

MINISTER'S RENTAL; the rental of the parish lodged by the minister in a process of augmentation and locality. See *Augmentation*.

MINOR. In a large acceptance, a minor is a person under lawful age, or majority; but the term, when used in contradistinction to *pupil*, signifies a person above the age of pupillarity (twelve in females and fourteen in males), and under that of majority, which in both sexes is twenty-one years complete. [In this latter sense, minority is a state, not of total incapacity, like pupillarity, but of limited capacity; in which the minor is held capable of consent, but of inferior judgment or discretion, requiring the protection of the law; *Bell's Princ.* § 2088.] Where a minor has curators, his deeds are not effectual to bind him without their consent; yet, in so far as

he derives any benefit from his deeds, they will be binding on those with whom he contracts; and all obligations into which he enters, where the consideration has been profitably applied to his use, will to that extent be effectual against him. A minor with curators may effectually marry without their consent; he may also, without their consent, execute a testament bequeathing all his moveable funds; but he cannot, even with their consent, execute a settlement of his heritage. [This rule, however, has been said not to apply to subjects which are heritable merely *destinatione*; *Brand's Trs.* 19 Dec. 1874, 2 R. 258, 271.] The curator of a minor merely consents, but cannot compel the minor to act; the minor has a right to inquire into the management of his affairs, and, if he sees reason, he may refuse to act. A minor's person is not subject to the control of curators. Where, again, a minor has no curators, he may act by himself; and his deeds will be equally effectual with the deeds of a minor having curators, who have concurred with him in the execution of the deed. [But the court will not in every instance compel a debtor to pay to a minor who has no curators, at least without his giving security to keep the debtor indemnified; *More's Lect.* i. 110. In *Jack*, 17 Dec. 1886, 14 R. 263, it was held that minor children could grant a valid discharge for money paid to them as damages, and that the appointment of a curator to concur in the discharge was unnecessary, the sums paid being of the nature of alimentary payments, and not capital sums for investment. Contrast *Anderson*, 4 June 1884, 11 R. 870.] Minors are entitled to be restored against all deeds done to their prejudice during their minority, whether they have been done by their tutors, or by themselves, with consent of their curators. In all cases, in short, where a minor can prove lesion, he is entitled to restitution, and the only difference is that, where the deed has been executed by a tutor, or by a minor with consent of his curator, or by the minor alone, where he has no curator, as the deed is effectual in law till set aside, a reduction of it becomes necessary; whereas deeds executed by pupils, or by minors having curators, but without their consent, are null, and the nullity may be pleaded by way of exception. In an action of restitution, the minor must prove lesion, proceeding from the want of judgment on the part of the minor, and not from any fraud or unjustifiable act on his part; nor will the

minor be protected against necessary payments, to his tutor or curator for example, though the payment may have been misapplied. Lesion is presumed in a donation by the minor; in a bond of caution entered into by him; even in a bond for borrowed money by the minor lesion is presumed, unless the creditor shall prove that the money was employed profitably for the minor. And it has been decided, that a party is not barred from pleading minority against an action for implement of a cautionary obligation, by his having previously made affidavit that he had attained majority to obtain the degree of M.D., and thereafter assumed the title of doctor; *Sutherland*, 19 Jan. 1825, 3 S. 449. But there is an exception to the plea of restitution in all transactions connected with any trade or commerce in which the minor may have been engaged; even a bond for borrowed money will not necessarily imply lesion, where the minor is engaged in trade. A minor *pubes* is not entitled to restitution against a marriage, although he may be restored against hurtful provisions in a marriage-contract. [As to whether a wife's renunciation of legal rights for inadequate consideration is a sufficient ground of reduction, see *Cooper*, 9 Jan. 1885, 12 R. 473. In regard to lesion generally, as a ground of restitution, see Lord Fraser's opinion. It was held in that case that the time at which lesion must be established is the date of the marriage, not that of its dissolution. On appeal to the House of Lords, the marriage-contract in question was held invalid, but on a different ground, viz., that it had been executed in Ireland by a minor domiciled there, who by the law of that country had not the capacity to contract; *Cooper*, 24 Feb. 1888, 15 R. (H.L.) 21.] The minor may be restored against judicial acts, as where competent pleas have been omitted, or where the minor has been entered heir, and the debts of the ancestor exceed the value of the succession. The privilege of restitution may be exercised by the minor at any time within four years after his arriving at majority. But to entitle him to this privilege, he must have raised and executed the action of reduction of the deed or transaction he means to challenge within the four years, called the *quadriennium utile*. This privilege does not die with the person entitled to it, but may be transmitted to his heir, according to these rules: 1. Where a minor succeeds to a minor, the time allowed for claiming restitution depends on

the minority of the heir, not of the deceased minor. 2. Where a minor succeeds to a major, who was not twenty-five years complete, the privilege continues with the heir during his own minority; but he cannot avail himself of his predecessor's *anni utiles*, except in so far as they were unexpired at his death. 3. Where a major succeeds to a minor, he has only the *quadriennium utile*, to be reckoned from the period of the minor's death. 4. If a major succeeds to a major dying within the *quadriennium*, he can avail himself of no more of the *quadriennium* than remained unexpired at the time of his predecessor's death; *Ersk. B. i. tit. 7, § 42*. Mere revocation within the *quadriennium utile* is not sufficient; [nor even a judicial statement of the plea of minority and lesion in defence to an action on a document granted during minority; *Stewart*, 20 Dec. 1860, 23 D. 187.] The deeds against which the minor is entitled to be restored, must be challenged by an action of reduction in the Court of Session within the four years. The minor is entitled only to be replaced in his former situation, not to derive an advantage which he could not otherwise have enjoyed. An objection to a decree, as pronounced by an incompetent court, is not barred by the lapse of the *quadriennium utile*; *Rankine*, 31 May 1821, 1 S. 43; [nor is an objection to a deed which bears evidence of fraud *in gremio*; *Leiper*, 9 July 1822, 1 S. 552. Homologation after majority, express or tacit, excludes the right of challenge.]

Another privilege of minority, [now practically in desuetude,] is that a minor cannot be compelled to defend his right to his ancestor's heritage, when that right is challenged by one who claims the heritage on a right preferable to that which was in the minor's ancestor; *minor non tenetur placitare de hereditate paterna*. This privilege is limited to proper feudal heritage, and does not extend to leases, however long the period of endurance. Nor does it apply to the settling of marches, nor to the division of land, nor to a possessory action, nor to an action at the instance of the superior for feu-duties or casualties, nor where the action has been commenced in the lifetime of the ancestor. In order to entitle the minor to state this plea, he must be served heir and infest; and his infestment, when produced, supersedes all further production till he be of age. It is the heir of investiture alone who can plead the privilege; and it cannot be pleaded to support the fraud of the ancestor, nor to oppose the

effect of the ancestor's obligation, nor in opposition to a minor suing for reduction on the head of minority and lesion; *Ersk. B. i. tit. 7, § 43*.

The persons of pupils are protected against imprisonment for civil debts; but this privilege does not extend to minors past the age of pupillarity, who are liable to personal diligence and imprisonment on account of non-payment or non-performance of civil debts or obligations; *Ersk. B. i. tit. 7, § 47*. Minors, under seven years of age, are not liable to criminal prosecution; from seven to fourteen they are liable on conviction to an arbitrary punishment; and, above fourteen, they are liable to the ordinary punishment, even capital. A minor may be indicted without calling his guardian; *Hume*, i. 33; *Alison's Princ.* 663; *Alison's Prac.* 227. Children under twelve cannot be examined upon oath, but they may be examined without it. The rule as to this is taken from the age as at the trial, provided the facts occurred not very long before; *Hume*, ii. 341.

[A minor cannot exercise any public right or franchise.] He cannot be elected a member of Parliament; and the election is by statute declared to be void, under the same penalties as if he had presumed to sit without being returned; 7 & 8 Will. III. c. 25, § 7. Minors may sit till displaced, because the law presumes them to be of full years till the contrary is proved. The claim of a minor to vote cannot be registered; 1681, c. 21; 1707, c. 8; [see *Election Law*, p. 372*b*. A minor does not seem to be disqualified from acting as a trustee; but in practice, when minors are appointed testamentary trustees, it is usual to declare their power of acting suspended until the attainment of majority; *M'Laren on Wills*, i. § 557.] See *Stair*, B. i. tit. 6; *More's Notes*, xlii., cxc.; *Ersk. B. i. tit. 7; Bank. i. 177; iii. 48, 97; Bell's Com. i. 129; Bell's Princ.* §§ 592, 625, 2022, 2065, 2088; [*Fraser on Parent and Child*, &c., 334; *Thoms on Judicial Factors*, 243; *Shand's Prac.* 141, 560; *Mackay's Prac.* ii. 152.] See *Curatory. [Pupil. Tutor.]*

MINT; the place or establishment in which the Queen's money is coined. [The law as to coinage and the mint was consolidated by 33 & 34 Vict. c. 10. The Chancellor of the Exchequer for the time being is Master of the Mint; § 14. See *Coining*.]

MINUTE; a short memorandum or sketch taken in writing. [The minutes of a meeting contain the import of what has

[been stated and agreed to at the meeting. "A minute of a meeting, at common law, is nothing more than a note of what takes place at the meeting, more or less regular and complete, but it does not prove itself. It requires to be set up by evidence, to be established as a correct record of what passed at the meeting, before it can become evidence, or be received as such by any court;" *per* Lord Pres. Inglis, in *City of Glasgow Bank Liquidators*, 20 July 1880, 7 R. 1196. The minute under consideration in that case was made under statutory authority, and it was held that such a minute proves itself, and that no parole or other evidence could be admitted to explain or contradict its terms. The Companies Act, 1862, directs that every company under the act shall keep minutes of all resolutions and proceedings of general meetings of the company, and meetings of the directors or managers; and that such minutes, if purporting to be signed by the chairman of the meeting, or of the next succeeding meeting, shall be received as evidence in all legal proceedings; 25 & 26 Vict. c. 89, § 67. See also 8 & 9 Vict. c. 17, § 101. When the minutes of proceedings form part of the records of a court of law, as minutes of meetings of creditors under the Bankruptcy Act, they appear to be the only admissible proof of the *res gestæ*; *Ogilvie*, 6 Feb. 1810, F.C.; *Smith*, 10 Jan. 1828, 4 Mur. 404. The minutes of meetings of a Senatus Academicus have been held not only to be admissible, but to be necessary evidence of their proceedings, so as to exclude parole proof; *Hamilton*, 27 March 1826, 4 Mur. 222, 239; and the like was held in reference to minutes of the proceedings of road trustees; *McGhie*, 2 Jan. 1850, 12 D. 442. But Mr Dickson (§ 1215) holds that these decisions go too far. The admissibility of the minute-books of such bodies arises from their having a recognised legal status, and from the fact that their records are usually entrusted to qualified officials. Minutes of meetings of private bodies are not recognised as evidence, save as against parties subscribing; but they are admissible as adminicles of evidence; *Macartney*, 13 Sept. 1831, 5 W. & S. 504 (creditors meeting extrajudicially); *Mathers*, 26 Dec. 1849, 12 D. 433 (kirk-session of Free Church); *Johnston*, 18 Jan. 1860, 22 D. 393 (provisional committee). Minutes of every kind (except those falling under the Companies Acts) are properly proved by the oath of the person who prepared them;

[see *Inglis*, 17 May 1852, 1 Macq. 112. In *L. Blantyre*, 3 Nov. 1885, 13 R. 116, it was considered doubtful whether a resolution of justices of the peace, contained in a minute unsigned but approved at the next meeting, was valid and binding. In *Lauderdale Peerage*, 10 App. Ca. 692, 700, a minute of date 1749, from an original unsigned minute-book of a missionary society, was admitted as evidence. See *Bell's Princ.* § 2222; *Dickson on Evidence*, §§ 212, 1205, 1213-19; *Kirkpatrick on Evidence*, §§ 73, 121; *Goudy on Bankruptcy*, 229; *Marwick on Municipal Elections*, 482. See *Evidence*.]

MINUTE. When it is necessary to preserve evidence of any incidental judicial act or statement, this is done in the Court of Session, and also in the inferior courts, by a minute. Thus, where the pursuer restricts his libel, or makes a reference to the defender's oath, or where the parties mutually consent to a judicial reference, or to a remit to persons of skill, or to waken a process, or to an interim decree, and, in short, wherever the object is to preserve special evidence of any of the *res gestæ*, this is done by a minute. Strictly speaking, those minutes ought to be prepared by the clerk of court, as their form imports. They commence with the name of the counsel (or in the inferior court, of the procurator) for the party, and purport to be a statement made by him; *e.g.*, "Patrick Robertson, for the pursuer, stated," &c. If the minute be answered, the answer proceeds in the same style. The minute is signed by counsel, or in the inferior courts by the procurator, and where it is a minute of reference to oath, it must also be subscribed by the party, referring, or he must subscribe a written mandate authorising it; A.S. 12 Nov. 1825. It sometimes happens, after an argument at the bar of the Inner House of the Court of Session, where questions of difficulty have been raised, that the court, instead of pronouncing an order for *Cases*, appoints the parties to prepare and lodge *Minutes of Debate*. These minutes, which must be prepared by counsel, contain an argument on the points in dispute; and, after having been interchanged, revised, and relodged, they are printed and boxed for the court in the usual manner; see *Cases*.

MINUTE OF SALE. See *Missives*. [*Auction*.]

MINUTE-BOOK of *Records*. The minute-book, as part of the system of records in Scotland, was first introduced by the general act 1672, c. 16, "*Concerning the*

Judicatories," § 32. That part of the enactment, however, having been but little observed, an attempt was made to revive it, by A.S. 15 July 1692, which was immediately followed by the subsisting statute, 1693, c. 14. This statute, on the preamble that the preceding enactments had been neglected, ordained all the keepers of the registers of sasines, reversions, hornings, inhibitions, interdictions, allowances of apprisings or adjudications, to keep minute-books of all writs presented to them, to be inserted in their several registers, expressing the day and hour when, and the names and designations of the persons by whom, the writs are presented, and that the said minute be immediately signed by the presenter of the writ, and also by the keeper, and be patent to all the lieges who desire inspection of it *gratis*; and that the writs be registered exactly in the order in which they are entered in the minute-book. The keeper not complying with these regulations is liable to deprivation, and to reparation of the loss which the parties may sustain. [By 31 & 32 Vict. c. 101, § 142, the date of entry in the minute-book is declared to be the date of registration; and where two or more deeds, transmitted by post, are received by the keeper of the Register of Sasines at the same time, such deeds are deemed to be presented and registered contemporaneously. See *Douglas*, 21 Feb. 1835, 13 S. 505; *MacLaine*, 6 July 1855, 18 D. (H.L.) 44.] In practice, persons searching the records usually confine their search to the minute-book, as being a statutory index, as it were, to the full register. And holding it to be settled that the minute-book is part of the record, it follows that a writ, although inserted *ad longum* in the register, will not be duly or availably recorded if it has not been entered, or if it has been imperfectly entered, in the minute-book. In *Park*, 10 July 1838, 16 S. 1363, the omission in the minute-book of the names of two out of three inhibited parties was held by the consulted judges to void the registration, *quoad* the parties whose names were thus omitted, although the inhibition was inserted *ad longum* in the register against all the parties. See *Stair*, B. iv. tit. 50, § 12, App. § 3; *Ersk.* B. ii. tit. 3, §§ 40, 42; *Bank.* ii. 498, 675; *Bell's Com.* i. 718; *Bell's Princ.* § 773; *Ross's Lect.* ii. 211; [*Menzies' Conv.* 584; *M. Bell's Conv.* i. 664.] See *Records. Inhibition.*

MINUTE-BOOK of Court of Session; is a book in which are minuted, or shortly

stated, the heads of the judgments, that is, acts and decrees pronounced by the court, or by Lords Ordinary. These minutes are intended to apprise the parties of the judgments which are pronounced: they are therefore entered by the different clerks of court of the date on which the judgments or interlocutors are signed. Protestations are also inserted in the minute-book; [see *Protestation.*] A sheet of this book is printed and circulated by the keeper of the minute-book twice a week during session; [A.S. 9 July 1872;] and unless where the court in its judgment or decree expressly dispenses with the minute-book, no decree can be extracted until twenty-four hours after it has been read (or may have been read) in the minute-book. [By 1 & 2 Vict. c. 118, § 21, the office of keeper of the minute-book was conjoined with that of keeper of the Record of Edictal Citations. See *Edictal Citations.* The keeper also prepares and publishes abstracts of petitions for service of heirs (A.S. 14 June 1847); and of petitions for the office of executor (21 & 22 Vict. c. 56, § 4). He is appointed by the Crown, and has a salary of £300 *per annum*. See *Bell's Com.* i. 760, 762; *Shand's Prac.* i. 115; *Mackay's Prac.* i. 156, 424, 611.]

MISCHIEF. See *Malicious Mischief.*

MISDEMEANOUR; in English law, a crime. Every crime is a misdemeanour; but a distinction has been taken between crimes of a higher and lower kind; the former being termed felonies, the latter misdemeanours. *Tomlins' Dict. h. t.* See *Felony*. [By 52 & 53 Vict. c. 63, § 28, in that and subsequent statutes, "felony" means, as respects Scotland, a high crime and offence, and "misdemeanour," an offence.]

MISERICORDIA; according to Skene, was a "merciament, amerciament, or unlaw." The word is still used in England to signify an arbitrary fine for an offence, called *miseri-cordia*, because the amercement ought to be less than that required by Magna Charta. If one be immoderately amerced in a court that is not a court of record, the writ called *moderata misericordia* lies for moderating the amercement. *Skene, h. t.; Tomlins' Dict. h. t.*

MISFEASANCE; in English law, [either the doing of a wrongful act, or (more commonly) the improper performance of a lawful act, as where one is guilty of negligence in performing a contract. *Sweet's Law Dict.*]

MISNOMER; misnaming a person. [See *Falsa demonstratio. Designation. Summons.*]

MISPRISION; [in English law, signifies

[in its larger sense every considerable misdemeanour which has not a certain name given to it by the law; and it is said that a misprision is contained in every treason or felony, and that one who is guilty of treason or felony may be proceeded against for a misprision only. The term is, however, rarely if ever used in this sense, being now practically confined to the two phrases, misprision of treason, and misprision of felony. The word is derived from Old French *mes*, wrongly, and *prendre*, to take: to commit an error. *Sweet's Law Dict.*] *Misprision of treason* is committed by him who, being in the knowledge of a treasonable act, does not reveal it to a judge or justice of the peace. Hence, whenever a new treason is enacted, there necessarily results a new misprision of treason. Misprision of treason, where accompanied with any probable circumstances of assent, may subject the offender to punishment as a principal in the treason. The form of prosecution for misprision is the same with that provided for actual treason. See *Hume*, i. 551; *Ersk.* B. iv. tit. 4, § 28; *Bank.* ii. 261; *Swint. Abridg. voce Treason*; [*Macdonald*, 226.] See *Treason*.

MISREPRESENTATION. See *Insurance*. [*Fraud*.]

MISSIVES; *in re mercatoria*; are exempted from the solemnities requisite for the authentication of other deeds. See *Deeds, Execution of*. [*Privileged Deeds*.]

MISSIVES AND MINUTES OF SALE AND LEASE. A binding sale of heritage may be concluded by an interchange of missives, as well as by a formal minute of sale. In the missives, the one party offers to buy or sell on certain conditions; the other party accepts of the offer. This constitutes a complete contract, which may be afterwards carried into effect by the execution of a disposition. [See *Corbett*, 17 Jan. 1872, 10 Macph. 329.] The minute is a regular deed with a clause of registration for diligence, and a testing clause, executed according to all the requisites of the act 1681, c. 5. The missives may be holograph of the parties, the acceptor prefixing a copy of the offer in his own handwriting. If not holograph, the missives must be tested and authenticated like other probative deeds. The oath of party acknowledging his subscription will not supply a defect in any of the solemnities; and both missives must be probative, for the contract is binding on both or neither of the contracting parties; subject always to the legal effect of *rei interventus* and homologation; [*Goldston*, 8 Dec. 1868, 7 Macph. 188; *Scot. Lands*

[*and Building Co.* 13 May 1880, 7 R. 756; *Sinclair*, 7 April 1881, 8 R. (H.L.) 78; *Gavine's Tr.* 12 Jan. 1883, 10 R. 448.] Conditions are sometimes inserted in these preliminary deeds. Security may be stipulated for the regular payment of the price; which may be done by agreeing that the disposition shall be retained in the hands of the seller until the price be paid, and in such a case it has been held that the seller is entitled to the subject or the price; *Baird*, 1758, M. 14156. Another mode of securing the price is to make the sale conditional on the payment of the price. Where the seller declares that the sale shall be effectual only in the event that the price is paid against a day certain, the neglect to pay is suspensive of the sale, and the seller may dispose of the subject to another. The missives by which the bargain is concluded ought to be written on paper duly stamped, or they ought to be stamped afterwards, before they can be founded on in a court of law. A written minute of lease with mutual stipulations, or an obligation or missive letter by the proprietor to grant a lease, accepted in like manner by the lessee, has equal force with a formal lease. It is necessary that the writings be probative, or that the defect be cured by possession or *rei interventus*. If there be a discrepancy between the formal lease and the previous minute or missive letter, the lease itself regulates the agreement. An essential defect in the missives of lease cannot be supplied by oath. Missives of lease, like missives of sale, require to be stamped, to found an action; [33 & 34 Vict. c. 97, § 96.] For the forms of minutes and missives of sale and lease, see *Bell's Deeds*, i. 144 *et seq.*; *Jurid. Styles*, i. 73, 103. See also *Bell's Princ.* §§ 889, 1190; *Bell on Leases*, i. 303-4, 312, 274; *Hunter's Landlord and Tenant*, i. 373, 420; *Bell on Purchaser's Title*, 141, 154; *Ross's Lect.* i. 359; [*Ersk.* B. ii. tit. 6, § 21; B. iii. tit. 2, § 2; *Menzies' Conv.* 879; *M. Bell's Conv.* ii. 695; *Rankine on Leases*, 89. See *Sale. Lease*.] *Rei Interventus. Homologation. Locus Penitentie.*

[**MISTAKE.** See *Error*.]

MITTIMUS; in English law, a writ for transferring records from one court to another. Also a precept in writing, under the hand and seal of a justice of peace, directed to the gaoler, for the receiving and safe keeping of an offender until he is delivered by law. *Tomlins' Dict. h. t.*

MOBBING; is a tumultuary assembly of a number of people, to the terror of the lieges and the disturbance of the public

peace. [The crime of mobbing is complete, wherever there are found together the three elements of concurrence of people, combination for an illegal purpose, and acting so as to alarm the lieges or disturb the public peace.] The meeting must be attended with circumstances of actual violence, or of such a tendency thereto as may be the ground of a reasonable apprehension of danger. A meeting or convocation of this kind may arise from an act in itself legal—as where a messenger unnecessarily raises the country to assist in ejecting a tenant, and proceeds in an irregular manner with a multitude of people to drive the cattle and turn out the furniture of the tenant, where no resistance has been made. There must not only be a tendency to violence in the convocation, but it must be a combination for violence in defiance of lawful authority. The offence of mobbing is distinguished from the crime of treason, by being confined to some matter of private concern, as a compulsory reduction in the price of grain—to prevent the division of a common—to rescue a criminal, &c. It is not necessary to the constitution of this offence that the assemblage shall have been brought together by preconcert. It is enough that an illegal outrage is committed or threatened, although the design of it should have been the result of a tacit confederacy, formed on the instant, and after the mob has been collected. In order to constitute the offence, it is only necessary that the property of individuals, or of the public, should be seized or damaged, or the persons of individuals in any way injured, or they themselves put in fear, or constrained to act contrary to their duty, interest, or inclination. The bare act of being tumultuously assembled for a violent purpose, though no further movement be made towards its execution, will fall under the offence of mobbing. [See *Robertson*, 25 March 1842, 1 Broun, 152; *Macrae*, 18 Jan. 1888, 15 R. (J.C.) 33.] He will be held as art and part guilty of this offence, who excites the mob, exhorts them to continue, or distributes money or liquor amongst them; even when the person is not present in the mob, if he should be able to communicate with, or direct the mob, or to influence their operations. The act of being present in a mob, if the person continues with them for any time, although he does not take an active part, may be construed into being art and part guilty of the offence; and, therefore, those who may be induced from curiosity to enter into a mob run a risk sufficient to deter any prudent

person from attempting to gratify an idle curiosity of this kind. [See *Cairns*, 18 Dec. 1837, 1 Swint. 597; *M'Ewan*, 9 July 1855, 2 Irv. 217; *Orr*, 12 Nov. 1856, 2 Irv. 502.] One who joins a mob does not *eo ipso* become art and part of a sudden and extraneous felony perpetrated by some rioters at the moment. When the libel on this crime is made at common law, the punishment is arbitrary. [The offence may be tried summarily by the sheriff; *Mackenzie*, 25 Oct. 1882, 10 R. (J.C.) 1.] The ancient law of Scotland, relative to convocations within burgh, seems now to be in a great measure superseded by the Riot Act, 1 Geo. I. c. 5. The first provision of that act relates to the pulling down, or demolishing of, or beginning to pull down, a church or place of religious worship, or dwelling-house, or barn, or out-house, by persons unlawfully, riotously, and tumultuously assembled; which shall be adjudged felony without benefit of clergy. [The act 52 Geo. III. c. 130, extends this provision to the demolition of manufactories and warehouses and colliery machinery and works.] The Riot Act farther provides that where persons are riotously and tumultuously assembled for any purpose whatever, to the number of twelve, a proclamation shall be made, ordering them to disperse, and declaring that, in case of their continuing together for the space of an hour, to the number of twelve or more, after such command or request made by proclamation, it shall be judged felony without benefit of clergy. Should this proclamation be impeded by any of the mob, this is made instant felony in those who are “offenders therein;” and the magistrates, peace-officers, and all whom they shall call to their assistance, are empowered to disperse, seize, and apprehend the persons riotously assembled, to the number of twelve, within an hour after proclamation; and if any of the mob shall be killed, maimed, or hurt, by reason of their resistance, all concerned shall be indemnified and discharged of the consequences; and should it happen before the expiration of the hour, that the meeting are not only tumultuous, but shall proceed to violence against the property or person of any one, force may instantly be repelled with force. Nothing can be more erroneous than the notion, that after the proclamation an hour must elapse before force can be used. The proclamation is in these terms: “Our Sovereign Lady the Queen chargeth and commandeth all persons being assembled immediately to disperse themselves, and

peacefully to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies.—God save the Queen." This proclamation may be made by a justice of the peace or other magistrate, [but not by an ordinary constable or peace-officer;] and if the mob continue assembled for one hour after the proclamation, they, and each of them, are guilty of the statutory offence, whether or not they have attempted to commit any felonious outrage. [The offence is punishable by penal servitude for life or not less than fifteen years, or by imprisonment for not more than three years; 7 Will. IV. & 1 Vict. c. 91, amended by 20 & 21 Vict. c. 3. As to the duty of magistrates to suppress riots, see *Pinney*, 1832, 5 C. & P. 254. And as to recovery of damages for riotous destruction, see 3 Geo. IV. c. 33; 25 & 26 Vict. c. 101, § 85.] See *Hume*, i. 416; *Alison's Princ.* 509; *Ersk.* B. iv. tit. 4, § 29; *Kames' Stat. Law Abridg. h. t.*; [*Macdonald*, 180; *Manual of Military Law* (War Office, 1887), 290. See *Breach of Peace*.]

MOBILIA SEQUUNTUR PERSONAM; a Roman law maxim, importing that moveables follow the owner's domicile; so that a deed of transference, executed according to the forms of the *lex domicilii*, is effectual to carry moveables situated in a country where such a mode of conveyance would not be effectual. *Ersk.* B. iii. tit. 2, § 40. See *Foreign. Heritable and Moveable Domicile*.

MODERAMEN INCULPATÆ TUTELÆ; is a Roman law expression, signifying that degree of self-defence which a person may legally use, although it should occasion the death of the aggressor, without incurring the guilt of murder, or even of culpable homicide. See *Hume's Crim. Law*, i. 227; *Ersk.* B. iv. tit. 4, § 41. See *Chaud Melle. Homicide. Justifiable Homicide*.

MODERATOR; the person who presides at a dispute or in a public assembly. The president or chairman of the General Assembly of the Church of Scotland is styled Moderator. The moderator is chosen on the day on which the Assembly meets, from among the ministers upon the roll prepared by the clerks. The chairman or president of the Commission of the General Assembly, of a synod, and of a presbytery, is also called moderator. The minister of a parish is *ex officio* moderator of the kirk-session, and he may appoint any other

person to preside in his stead. *Hill's Church Prac.* 2, 44, 90, 98, 109; *Gillan's Acts of Assembly*, 180.

MODIFICATION; is the term usually applied to the decree of the Teind Court, awarding a suitable stipend to the minister of a parish. The amount of the stipend is fixed by the court on a due consideration of the state of the teinds—the extent of the parish—its population—and the necessary expenses to which the clergyman is exposed. The court, although formerly restricted by the act 1617, c. 3, to a *maximum*, beyond which they could not augment the stipend of the minister, have not, by the subsequent commissions, been so restrained; and accordingly they are now in use to give a reasonable stipend to the clergyman, varying with the circumstances of the parish and the state of the teinds. The court may also grant an augmentation of stipend after an interval of twenty years from the date of the last final decree of modification. The stipend, unless where peculiar circumstances render it necessary to modify it in money, must be modified in grain or victual, and paid in money, convertible according to the fair prices of the year for which the stipend is payable; 48 Geo. III. c. 138. See *Ersk.* B. ii. tit. 10, § 46; *Bank.* ii. 60, 516. See *Augmentation. Locality. Stipend*.

MODUS; or *modus decimandi*; in England, is a particular manner of tithing allowed, different from the general law of taking tithes in kind. When teinds in Scotland have been valued, they are said to be paid by a *modus*. *Bell's Princ.* § 1147; *Tomlins' Dict. h. t.*

MOIETY. A sum payable in moieties is payable in two equal shares, though sometimes, erroneously, the term is applied to a sum payable in two or three different parts or instalments.

MOLESTATION; is the troubling of one in the possession of his lands. This is a delict which subjects the molester to a claim of damages. An action of molestation is a possessory action, calculated for continuing proprietors in the lawful possession of their lands during the dependence of any question in relation to the right thereto. The action may, by A.S. 1580, ratified by stat. 1587, c. 42, be brought before the judge ordinary, or the bailies of regality. [This process is now in disuse; a more convenient remedy being provided by declarator and interdict.] See *Ersk.* B. iv. tit. 1, § 48; *Stair*, B. iv. tit. 27; *Bank.* i. 280; [*Rankine on Land-Ownership*, 18;]

Jurid. Styles (2d edit.), iii. 128, 137. See *Ejection and Intrusion*.

MONEY. The current coin of the kingdom, which may be offered in payment, is of gold, silver, or copper, to which is affixed the royal stamp, and to which such nominal value is given as the Queen, by her prerogative, may think proper to fix. Money cannot be identified, unless separated and marked for the purpose. Money in possession of an insolvent person is a general fund for division among his creditors; and no sum, or part of it, can be claimed by any one, unless it be distinguished and earmarked as specific. At one time, gold coin was the only legal tender, except for taxes, or sums below forty shillings; but by 3 & 4 Will. IV. c. 98, § 6, Bank of England notes are legal tender, except at the bank itself and its branches, [for debts above £5. But this does not apply to Scotland; 8 & 9 Vict. c. 38, § 15. By 33 & 34 Vict. c. 10, § 4, a tender of payment of money, if made in coins issued by the Mint in accordance with the act, and not called in by any proclamation, nor diminished by wear or otherwise so as to be under the minimum current weight (as specified in schedule or by proclamation), is a legal tender—in the case of gold coins for payment of any amount; in the case of silver coins for payment of any amount up to 40s.; and in the case of bronze coins for payment of an amount not exceeding 1s. The Queen, with advice of the Privy Council, may by proclamation call in coins, or direct that foreign coins, or gold coined at a branch of the Mint in any British possession, shall be legal tender, or that any coins other than gold, silver, or bronze, shall be legal tender to an amount not exceeding 5s.; *ib.* § 11.] Tokens given by manufacturers to their workmen are not now, as formerly, permitted to be used as money; 57 Geo. III. c. 46, § 113. [Money Scots is the ancient money of Scotland, and is about one-twelfth of the value of sterling money. In *Easson*, 22 Nov. 1879, 7 R. 251, it was held, on a construction of certain testamentary writings, that the word "money" included the testator's whole moveable estate not otherwise specifically disposed of. See also *Dunsmure*, 22 Nov. 1879, 7 R. 261. In an indictment, "money" includes bank notes and post-office orders; 50 & 51 Vict. c. 35, § 14; see *Indictment*.] See *Tomlins' Dict. h. t.*; *Stair*, B. i. tit. 11, § 5; tit. 14, § 1; *Bank*, i. 356, 385, 407, 488; *Bell's Com.* i. 278, 283; ii. 318, 397; *Bell's Princ.* § 1333;

Kames' Stat. Law Abridg. h. t.; [*Stephen's Com.* ii. 549.] As to the offence of counterfeiting the King's coin, see *Coining*.

MONKS. The monks were the regular clergy, who had no *cura animarum*, nor the charge of any congregation, but were bound to close residence in their monasteries, unless when sent out on missions. They got the name of regular, because circumscribed by vow to certain rules of devotion and penance, according to the institution of their several orders. *Ersk.* B. i. tit. 5, § 4; *Stair*, B. ii. tit. 8, § 15; *Bank*, i. 73; ii. 5.

MONOGRAMS; the signatures formerly adhibited to deeds in place of full subscriptions, usually consisting of the letters of the subscriber's own name and of some tutelar saint fancifully combined. *Ross's Lect.* i. 126.

MONOPOLY; a licence or privilege bestowed by the Sovereign, by grant or otherwise, for the sole buying, selling, making, working, or using of anything. Monopolies are contrary to the spirit of the laws of this kingdom, and are void at common law. In England, by 21 James I. c. 3, all monopolies, grants, letters-patent, and licences, for the sole buying, selling, and making of goods and manufactures, were declared void, except in some particular cases; and persons aggrieved by putting them in use may recover treble damages and double costs by action on the statute. This does not extend to any grant or privilege conferred by act of Parliament, nor to any grant or charter to corporations or cities, nor to grants to companies or societies of merchants, for the benefit of trade; nor to inventors of new manufactures possessing patents; nor to grants or privileges for printing, making gunpowder, casting ordnance, &c. The Crown may grant to particular persons the sole printing of the Scriptures. In Scotland, an act was passed in the reign of Charles I. (1641, c. 76), declaring monopolies ineffectual; and since the Union, the same law rules both parts of the kingdom. A regulation made by the bailies of Leith, confining the office of procurator before their court to those who had been apprentices to their procurators, was voided as a monopoly; *Young*, 1765, M. 9564. See *Bank*, i. 411; *Bell's Com.* i. 104; *Kames' Stat. Law, h. t.*; *Kames' Equity*, 229, 341, 361; *Tomlins' Dict. h. t.* See *Pactum Illicitum. Exclusive Privilege. Patents. Copyright. King's Freeman*.

[MONTH.] In every act passed since 1850, "month" means calendar month,

[unless a contrary intention appears; 52 & 53 Vict. c. 63, § 3. See *Computation of Time*.]

[MONUMENTS. See Ancient Monuments Protection Act, 45 & 46 Vict. c. 73.]

MOOT; a hypothetical or debateable case, put and argued by young barristers and students of law at the inns of court in England, by way of practice, in a place formerly called Moot Hall. *Tomlins' Dict. h. t.* [The proper sense of *moot* is "meeting" (Anglo-Saxon *mót*, as in *witena-gemót*, meeting of wise men); *Skeat's Etymol. Dict.*]

MORA. *Mora*, or delay, is a general term applicable to all undue delay in the prosecution or completion of an inchoate bargain, diligence, or the like; the legal effect of which may be to liberate the contracting parties, or to frustrate the object of the diligence. The question, whether or not undue delay has occurred, may be said to be a jury question; and *in re mercatoria*, the determination of it will be regulated very much by the usage of trade, or the practice of merchants in the particular transaction to which it relates. A creditor who has begun diligence against his debtor's person or estate, which he does not complete within the legal and requisite time, is said to be *in mora*; and such diligence will not be allowed to defeat the rights or diligences of subsequent purchasers or creditors. A superior who unduly delays to obey a charge to enter his vassal forfeits the non-entry duties during his life. *Mora* in the performance of an obligation, subjects the debtor to liability for the direct loss sustained by the creditor; and if the subject to be delivered perish in the debtor's hands, after *mora*, the loss falls upon him, although he has not been otherwise in fault, unless it appear that it would have perished in the same manner in the creditor's hands. And even this is no defence, when it can be shown that the owner might have got it off his hands before the accident happened, especially if it be a thing for sale, and not for keeping. In the older law, on account of the disfavour in which the taking of interest was held, delay in the payment of a money debt did not entitle the creditor to interest without previous stipulation; but this doctrine has, in modern times, given place to more equitable rules. In general, the interest is held to be the loss which the creditor suffers by delay; but this rule is not inflexible; for when damage flows directly from the non-payment of money, the

party failing to pay may become liable, just as one failing to implement an ordinary obligation is liable for the direct damages. Thus, in one case, a trustee for creditors sold the trust-estate to a party who bound himself to pay the price by instalments at certain terms. Upon the faith of this, the trustee intimated to an heritable creditor on the estate, that the sum in his bond would be paid by a certain day; which intimation was accepted and acted upon. The buyer having made no payment till nearly a year after the last of the stipulated terms, the trustee was unable to fulfil his engagement to the creditor, who raised action against the trustee for the loss and damage thereby sustained. It was held that the buyer was liable to the trustee in relief; *Mansfield*, 27 Feb. 1836, 14 S. 585. Delay is incurred, in pure obligations, by disregarding the creditor's requisition; for when no term is stipulated, the time of performance is in the creditor's option. In obligations prestable at a stipulated day, the passing of the day puts the debtor in *mora*. See *Dies interpellat pro homine*. In conditional obligations, there is no *mora* until the condition has been purified; and even then, requisition, or the arrival of a previously stipulated term, is necessary. If requisition is impossible, *mora* is incurred if the obligation be not performed so soon as it may be; as in the case of restitution of things found, or coming in any other way into the possessor's hands without the owner's knowledge. In debts due to pupils, *mora* is incurred without requisition; and in obligations by delinquency, *mora* begins from the first moment that the obligation might have been implemented. In general, legal execution is not competent till there has been a failure to perform in terms of the obligation; but in some cases, precautionary steps for the creditor's security, by action or diligence, may be resorted to, before the arrival of the term of payment—*e.g.*, where the debtor is *vergens ad inopiam*. [In the prosecution of claims, it is not mere lapse of time that constitutes *mora*, but such delay as leads to the belief that the claim has been given up. But in the case of claims requiring constitution, such as claims for damages in respect of personal injury, it has been observed that the plea of *mora* will be justified by simple delay for a certain length of time, even without any presumption of acquiescence or abandonment; *Cook*, 1 March 1872, 10 Macph. 513. Where there is a controversy of fact, delay in bringing forward the case increases the burden of proof, but does not

[constitute an absolute bar ; *A.B.* 5 March 1885, 12 R. (H.L.) 36. See cases in Digests, *hac voce*.] also *Ersk.* B. ii. tit. 5, § 45 ; *Bell's Com.* i. 343 ; ii. 34, 145, 188 ; *Stair*, B. i. tit. 13, § 2 ; tit. 17, § 15 ; *More's Notes*, lxxviii. ; *Bank.* i. 471 ; *Bell's Princ.* § 79 ; *Bell on Leases*, i. 392 ; *Hunter's Landlord and Tenant*, ii. 432 ; *Kames' Equity*, 208. See also *Diligence. Arrestment. Inhibition. Adjudication. Acquiescence. Taciturnity. Laches.*

MORAVIANS ; a sect of dissenters, who, on account of conscientious scruples, are permitted, in lieu of an oath, to make a solemn affirmation in courts of justice, civil and criminal, and on all other occasions on which, either at common law or by statute, an oath is required to be taken. See *Affirmation*.

MORBUS SONTICUS ; a mortal sickness. It has been otherwise defined, an illness so severe as to furnish a just excuse from the performance of duty, or the transacting of business. More strictly, the term is applied to incapacitating diseases ; *Laird*, 1763, M. 3315. At one time it was necessary to prove a *morbus soticus* in reducing a deed *ex capite lecti*. See *Stair*, B. iv. tit. 20, § 41. See *Deathbed*.

MORTANCESTRY. The brieve of inquest is sometimes called a brieve of mort-ancestry. But the two brieves were originally distinct ; the brieve of inquest being intended for the purpose of proving the propinquity ; whereas the brieve of mort-ancestry was used for calling into court those in possession of the ancestor's property, for trying the title under which they possessed ; *Ersk.* B. iii. tit. 8, § 62. See *Brieve*.

MORTGAGE ; according to Skene, is a deed wed, as a sum given upon lands in wadset, and under reversion ; called a deed wed, because, by the old laws of the realm, the annual of the sum was reckoned a part of the stock and principal sum, contrary to the posterior practice, by which the annual was yearly paid until redemption. *Skene, h. t.*

MORTGAGE ; [a dead pledge ; a thing put into the hands of a creditor. A mortgage, in English law, is the creation of an interest in property, defeasible upon performing the condition of paying a given sum of money, with interest thereon, at a certain time. This conditional assurance is resorted to when a debt has been incurred or a loan of money or credit effected, in order to secure either the repayment of the one or the liquidation of the other. The debtor or borrower is then the mortgagor,

[who has charged or transferred his property in favour of or to the creditor or lender, who thus becomes the mortgagee. If the mortgagor pay the debt or loan and interest within the time mentioned in a clause technically called the proviso for redemption, he will be entitled to have his property again free from the mortgagee's claim ; but should he not comply with such proviso, the legal estate becomes perfected in the mortgagee, *i.e.*, indefeasible, and so lost at the common law to the mortgagor. It is redeemable, however, in a court of equity, upon payment of the debt or loan, with interest and expenses, at any period within twenty years after the last recognition of the mortgage security by the mortgagee ; and this because equity deems the non-compliance with the proviso for redemption a penalty, against which it always relieves when practicable. Seeing that in by far the greater number of loan transactions the mortgagor never performs the condition in the proviso for redemption, they have been denominated mortgages, as the pledge is then dead or lost (*mortuum vadum*) to the mortgagor at law. A mortgage differs from a vifrage (*vivum vadum*), so called because neither loan nor property is lost, for the creditor enters into possession of the estate, and receives its proceeds in satisfaction of his debt with interest, upon which the debtor becomes entitled to his own again. A Welsh mortgage is one in which the creditor receives the proceeds of his security in satisfaction of the interest of his debt, the principal remaining due and the estate never becoming forfeited, but redeemable at any time ; and the creditor not being entitled to sue at law in the absence of a covenant or bond, or to foreclose in equity.

[The right or equity of redemption is the chief and inseparable incident to a mortgage—an incident unextinguishable save by a foreclosure decree, a legislative provision, or unreasonable delay. Every kind of property may be mortgaged except the salaries and emoluments of public functionaries ; full pay and half pay of naval and military men, &c. ; commissions in the army ; church livings with cure of souls ; and canonries or other ecclesiastical offices. While an increase in the rate of interest upon default of regular payment is a penalty, and is not admissible, the reservation of a higher rate, with an abatement for punctual payment, may be made. The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41, §§ 15-17), con-

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[fers on mortgagors and mortgagees increased powers of transfer, lease, sale, insurance, &c. The above account of mortgages is taken from *Wharton's Lex.* See also *Coote on Mortgages*; *Fisher on Mortgages*; *Williams on Real Property*, 483; *Goodeve on Real Property*, 183. See *Foreclosure*.]

Mortgage is not a Scotch law term, as is sometimes supposed. The corresponding term in Scotch law is *wadset*; and the right of an heritable creditor by bond and disposition in security, or by heritable bond, is in some respects analogous to that of a mortgagee. The mortgage of ships is provided for by special statute; see *Ship*.

MORTIFICATION, or MORTMAIN.

These terms are nearly synonymous, and are applied to lands given formerly to the Church for religious purposes, or, since the Reformation, for charitable or public uses. Those lands vested in the Church were held to be given for superstitious purposes, and were declared, by the act 1587, c. 29, to belong to the Crown. By the present practice, when lands are given for any charitable purpose, they are usually disposed to the trustees of the charity, to be held either in blench or feu. When mortifications are made for behoof of the poor generally, and the management is not intrusted to particular individuals, or when it is given to the "patron or overseers" of the poor, they fall under the administration of the heritors and kirk-session, in the same way as the ordinary funds for support of the poor, each member of the meeting having a vote; and this whether the benefit of the fund extend to the whole parish, or only to a particular district of it; [*E. Galloway*, 22 Feb. 1810, F.C.] Those only who are entitled to relief out of the ordinary parochial funds can claim the benefit of mortifications for behoof of the poor generally. It is declared by statute to be unlawful to alter, change, or invert any mortifications for support of schools and hospitals, or pious purposes, to any other than the specific use to which they are destined by the disponent; 1633, c. 6. This statute also gives right of action for calling the managers to account when they misapply the fund. The managers of a mortification may let in lease, or feu out the mortified lands, when for the advantage of the fund; and they may sell the superiority for a fair price; [*Town of Edinburgh*, 1694, M. 9107; *Merchant Co.* 1765, M. 5750; *Moore's Trs.* 25 June 1814, F.C. A petition by trustees of a mortification for

[authority to feu is unnecessary; *Mags. of Elgin*, 9 Dec. 1882, 10 R. 342.] Where the managers of a mortified fund are changed, any set of administrators may call their predecessors to account; and any individual manager may call his brethren to account for malversation. Persons entitled to benefit under a deed of mortification have a right to pursue an action for enforcing their claims. The jurisdiction of the Court of Session extends over hospitals and mortifications, so as to entitle them to control the management of the administrators; [and, although the court cannot change the object of a charity, it may vary the means for attaining that object, when circumstances render a change expedient; *Clephane*, 26 Feb. 1866, 7 Macph. (H.L.) 7; *Allan*, 22 Nov. 1876, 4 R. 162.] In the event of a failure of the administrators in whom the management of a mortification for a definite purpose is vested, the Court of Session may supply the deficiency by a new nomination; but this rule is subject to limitation. Lands mortified by a private individual as glebe to the minister of a parish, are not teind-free; *Wilson*, 1 Feb. 1831, 9 S. 357. See generally, *Stair*, B. ii. tit. 3, § 39; *More's Notes*, clxix., cccxlii.; *Ersk.* B. ii. tit. 4, § 10; *Bell's Princ.* § 686; *Dunlop's Parish Law*, 403; [*McLaren on Wills*, ii. § 2097; and cases in Digests, *voce Trust*. See *Trust. Nobile Officium*.]

[*Mortmain* is a term more appropriate to English law. Numerous statutes have been passed, since the time of Edward I., to prevent alienation in mortmain, *i.e.*, alienation of lands or tenements to any corporation, ecclesiastical or temporal. By the Mortmain Act (9 Geo. II. c. 36), no lands or tenements, or moneys laid out thereon, may be given for, or charged with, any charitable uses whatever, unless by deed indented, executed before two witnesses, twelve months before the death of the donor, and enrolled in the Court of Chancery within six months after its execution (except stocks in the public funds, which may be transferred within six months previous to the donor's death), and unless such gift be made to take effect immediately (at least, within one year, 26 & 27 Vict. c. 106), and be without power of revocation. The Mortmain Act was repealed, and re-enacted with amendments, by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42). The necessity for indenting the deed was abolished by 24 Vict. c. 9; and many special exemptions and relaxations were introduced by subsequent statutes in

[favour of literary and other public institutions, parks, schools, museums, &c. These exemptions are for the most part embodied in the act of 1881. See *Wharton's Lex.*

[The Mortmain Act does not apply to Scotland. Hence a bequest, by English will, of money to be laid out in land or heritable securities in Scotland, to be applied to charitable uses there, does not fall within the prohibitions of the act; *Mackintosh*, 16 Ves. 334; *Mill*, 5 Bligh, 593. See *M'Laren on Wills*, i. § 47.]

MORTIS CAUSA. A deed *mortis causa* is a deed granted in contemplation of death, and which is not to take effect till after the grantor's death. See *Testament. Disposition. [Will. Donation.]*

MORTUUS SASIT VIVUM; a maxim of English law, implying that a right vests in the person of an heir simply by the death of his ancestor. This doctrine has never been adopted in the law of Scotland, which rejects the principle of an *ipso jure* transmission of rights requiring sasine, by mere survivance. *Bell's Princ.* § 1690; *Sandford's Herit. Suc.* i. 271. See *Heir. Service. [Clare Constat.]*

MOTE; "mute, pley, action, quarrell, placitum." *Skene, h. t.*

MOTHER. As to a mother's obligation to aliment her children, and her right [to their custody,] see *Aliment. [Parent and Child.]*

MOTIONS. A motion is an application to the court, by the parties or their counsel, in order to obtain some order of court, which becomes necessary in the preparation of the record or in the progress of a cause. In the Court of Session, the record in every cause is made up and closed under judicial superintendence; and in all defended causes the several orders requisite in the preparation of the record, including not only the usual orders for condescendences, answers, &c., but all demands for diligences for the recovery of writings, and, in general, all incidental applications, are made on motion to the Lord Ordinary in the cause. These motions are disposed of according to a roll called the *Motion roll*, called daily during session by the several Lords Ordinary. The course is, for the party making the motion to enrol the cause in the motion roll of the Lord Ordinary before whom it depends. Notice of the enrolment and of its purpose must be given to the opposite agent, by a written or printed billet, delivered or despatched through the post-office, on the day on which the enrolment is made—*i.e.*, always forty-eight hours, at the least, before the cause is

to be called in the course of the motion roll; and in addition to this notice, the roll of motions for each day is put out on a board exposed on the tables in the Outer House. [See A.S. 11 Aug. 1787. "This A.S. is frequently neglected, and, in particular, notice of motion is often given later than two days before the roll is to be called. But the act is still in force, and the opposite party may object to any motion of which he has not had such notice;" *Mackay's Prac.* i. 410, note.] See also A.S. 6 Feb. 1806. Motions are disposed of summarily, and almost invariably on the day specified in the roll; whereas causes frequently stand for many weeks in the Debate rolls of the Lord Ordinary. See *Beveridge's Form of Process*, i. 266; [*Mackay's Prac.* i. 410. As to motions in the sheriff court, see A.S. 11 July 1839, § 165; *M'Glashan's Sher. Court Prac.* § 1043.] See *Record. Rolls of Court. Notes.*

MOURNINGS. A widow has a legal claim to mournings for her husband, suitable to his quality, where his estate or rank requires mourning in point of decency; [and this claim constitutes a privileged debt upon the funds of the deceased husband, in a competition with creditors; *Sheddan*, 1802, M. 11855; *Bell's Com.* i. 679.] The claim of a widow for aliment and mournings will not be barred by her acceptance of provisions made for her by her husband, by a deed declaring these provisions to be in full of all claims whatever which she may have on her husband's effects; [*Buchanan*, 14 Feb. 1822, 1 S. 323; *M'Intyre*, 9 July 1865, 3 Macph. 1074.] Mournings for such of the deceased's children as are to assist at the funeral also form a privileged debt; but no claim can be made by the children who were not present at the funeral. A minor has been found liable for an account of mournings incurred by him for himself, his brothers, and sisters; and in an action pursued against an apparent heir, brother to a defunct, by a merchant who furnished mournings to the deceased's family, and to the defender in particular, although without any alleged order from him, the defender was found liable. See *Stair*, B. i. tit. 4, § 10; *More's Notes*, xxvii., ccclxii.; *Ersk.* B. i. tit. 6, § 41; B. iii. tit. 9, § 43; *Bell's Com.* i. 679; ii. 148; *Bell's Princ.* § 1403; [*Fraser on Husb. and Wife*, ii. 967.] See *Funeral Expenses. Privileged Debt. Marriage.*

MOVEABLES. Moveables are, in the phraseology of the law of Scotland, opposed to heritage; so that every species of pro-

erty, and every right a person can hold, is by that law either heritable or moveable. Hence, moveables are not merely corporeal subjects capable of being moved, but every species of property, corporeal or incorporeal, which does not descend to the heir in heritance; *Ersk. B. ii. tit. 2, § 3. See Heritable and Moveable. Executry. [Disposition of Moveables.]*

MUIRBURN. By 13 Geo. III. c. 54, every person setting fire to any heath or muir in Scotland, from 11th April to 1st November, forfeits 40s. sterling for the first, £5 sterling for the second, and £10 for the third and every subsequent offence; and on failing to pay the penalty within ten days after conviction, suffers six weeks' imprisonment for the first, two months' for the second, and three months' for the third and subsequent offences. The tenant is held liable, unless he prove that the fire was communicated from some neighbouring ground, or was raised upon his ground by some person not in his family or service. But the proprietors of high and wet muirlands are entitled to burn, or to authorise their tenant to burn, the heath between the 11th and 25th April. The act extends to the Highlands. [It is not necessary that heather should have been burned; the offence is committed by setting fire to anything whatever growing on muirland; *Rodger*, 12 March 1842, 1 Broun, 78. Apart from the statute, muirburning is a lawful act; but if one negligently permits the fire to extend to a neighbouring property, he is liable for injury done; *Mackintosh*, 15 July 1864, 2 Macph. 1357.] See *Ersk. B. ii. tit. 6, § 6*, note; *Kames' Stat. Law, h. t.*; *Watson's Stat. Law, voce Game*; [*Irvine's Game Laws*, 90; *Barclay's Digest*; *Rankine on Land-Ownership*, 141, 312; *Rankine on Leases*, 418.]

MULCT; a fine. *Tomlins' Dict. h. t.* See *Fines. Amerciament.*

MULIERATUS FILIUS; a lawful son, begotten with a lawful wife. *Skene, h. t.*

MULTIPLEPOINDING. This term means double poinding, or double distress, and gives name to an action which may be brought by a person possessed of money or effects which are claimed by different persons pretending right thereto. Thus, where money due by a debtor has been arrested in his hands by the creditors of his creditor, or where the rents of an estate are claimed by different claimants on the estate,—the arrestee, in either of those cases, may raise an action of multiplepoinding, calling the different parties who claim the fund *in medio*,

and all others, to settle their respective claims judicially; and also to have it found, that (whoever may be entitled to the fund) the arrestee is liable only "in once and single payment." This action may be raised by the arrestee, or by the person on whom the claim is made; but it may also be raised, in his name, by any of the parties interested in the competition, without his consent, or even against it; and every person interested though not made a party to it originally, may, in the course of that action, produce an interest in it, and plead the grounds on which he conceives himself to be entitled to a preference. In this way the action becomes a process of competition between the different claimants on the fund; the holder of which, having brought it into court, quits the field. The conclusions of the action are,—1. That the raiser shall be liable in once and single payment. 2. That the parties may debate their respective claims; that he or they who have the best right to the subject or fund *in medio* may be preferred; and that the raiser shall be entitled to the expense of raising the action and bringing the parties into court. [A form of summons is given by 13 & 14 Vict. c. 36, sched. (A.) No. 5. It must be distinctly stated in the body of the summons who is the real raiser; *ib. § 19*. The *induciae* are six days; but where there are conclusions for exoneration, the *induciae* are the same as in an ordinary action. See *Induciae*.] The subject of the action is in general a sum of money, but it may be any moveable property, or even a deed. [A competition with regard to land or other heritable property is not tried by this process; but a right to demand a conveyance of land may be determined in a multiplepoinding; *Campbell*, 1783, M. 3973.] Where the subject *in medio* is a sum of money, it must be such a debt as the holder may be obliged to pay. Rents to become due cannot competently form the subject of this process; [*Pentland*, 10 Dec. 1830, 9 S. 134; *Provan*, 14 Jan. 1840, 2 D. 298; *Nimmo*, 14 May 1863, 1 Macph. 791. A multiplepoinding is not competent unless there is double distress, *i.e.*, unless conflicting claims have been made, or at least unless conflicting interests exist, which may become claims, against the fund; *Connel's Tr.* 6 March 1878, 5 R. 735; *Kyd*, 5 June 1880, 7 R. 884; *Robb's Trs.* 3 July 1880, 7 R. 1049; *Stuart*, 8 Feb. 1883, 10 R. 581; contrasted with *Park*, 21 Nov. 1874, 2 R. 118; *Pollard*, 21 Oct. 1881, 9 R. 21; *N.B. Railway*, 4 Nov. 1881, 9 R. 97; *Dill*, 7 Jan. 1885,

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[12 R. 204. The only exception to this rule is when trustees bring a multiplepoinding, in order to obtain judicial exoneration, as well as a judicial adjustment of the rights of parties, in which case double distress need not be alleged; *M'Dougal's Trs.* 9 July 1830, 8 S. 1036; *Blair's Trs.* 12 Dec. 1863, 2 Macph. 284. But a judicial factor cannot obtain exoneration by a multiplepoinding; his proper course being to present a petition; *Campbell*, 14 July 1870, 8 Macph. 988.] When a multiplepoinding is raised in the name of a holder of a fund by one of the claimants, it must be intimated to the nominal pursuer, by being served on him by a messenger-at-arms, in the same manner, and on the same *inducie*, as if he were one of the defenders, and an execution of it must be returned along with the executions of citation; A.S. 11 July 1828, § 23. Where the person possessed of the funds is the real pursuer, he must give out a condescendence of the fund in his hands along with the summons; and where he is only the nominal pursuer, he must, at the first calling of the cause, either give in a precise and articulate condescendence of the amount of the funds in his hands, stating likewise any claim or lien which he may think he may have on the fund, or produce objections as his defences against the summons served as a claim on him; otherwise he is held as confessed, or a condescendence may be ordered from any of the claimants; *ib.* § 47. Where the amount of the fund is correctly stated in the summons, a condescendence is unnecessary. The holder of the fund is liable to the expense occasioned by his delaying to condescend. At the first calling of the cause, if the condescendence is lodged, and no objections are made to the competency of the action, the usual interlocutor is pronounced, finding the raiser of the multiplepoinding liable in once and single payment only, and appointing the creditors claimants to produce their claims and grounds of debt in the clerk's hands within ten days. The condescendence of the holder will at the same time be allowed to be seen. The defences of the raiser are in the form of objections, either to the competency, or that all having interest are not called. It is no objection to the competency that the nominal raiser has no funds of the common debtor. The claimants may also lodge objections. When a fund is proved to be in the hands of the raiser, it will be ordered to be consigned in a bank, on the motion of any of the claimants, the receipt to betaken payable

to such person as the court or Lord Ordinary may direct, and to be lodged with the clerk to the process. See *Consignation*. But the raiser cannot be ordered *de plano* to consign, if he have any claim to the fund. On consignation, the holder is entitled to decree of exoneration, if the summons contain conclusions of exoneration, and also to the expenses incurred by him, which he may retain from the fund *in medio*; or if he have consigned the whole, he will obtain warrant for payment. He does not get expenses if the multiplepoinding was unnecessarily raised by him, or if he occasioned unnecessary litigation; and in this last case he may even be found liable in expenses to the other party. On an interlocutor finding the holder liable in once and single payment, or on a decree of exoneration being pronounced, the holder has no further concern with the process. If any claimant, after appearing in the action, proceed with diligence against the holder, he will be liable in damages; *White*, 1772, M. 9133. The claimants in a multiplepoinding must state their respective claims in the form of condescendences, with the conclusions to be drawn from the facts so stated, in the shape of notes of pleas; A.S. 11 July 1828, § 48. [The condescendence must conclude with a separate article or *claim*, stating concisely what portion of the fund *in medio* is claimed; *Connel*, 6 March 1861, 23 D. 683. It is provided by the Court of Session Act, 1868 (31 & 32 Vict. c. 100, § 30), that "in actions of multiplepoinding it shall not be necessary to lodge answers to the original condescendences and claims, unless it is made to appear to the satisfaction of the Lord Ordinary that the claimants are at issue on matters of fact material to the action, and that answers are necessary; and in such actions it shall be competent for parties having opposing interests (where they are agreed upon the facts) to make their averments in the form of a joint case, appending thereto their respective claims and pleas in law; provided always that where the competition involves the construction of written documents, such documents shall not be set out at length on the record, but shall be printed separately, and referred to in the pleadings as set forth in such separate print."] All parties having an interest in the subject of the action may appear and produce their claims, though not cited; [and claims may be received after the time fixed in the order for claims has expired, on such conditions as to expenses as the court may impose; *Dymond*, 23 Nov. 1877, 5 R. 196; *Binnie's*

[*Trs.* 3 July 1883, 10 R. 1075.] An interlocutor preferring one creditor, has the effect of an interlocutor repelling the claims of all the rest; and each claimant who does not mean to retire from the contest must re-claim against the interlocutor preferring his competitor. By 1584, c. 3, one who can show a necessary cause of absence, or a minor who was without tutors or curators at the date of the proceedings, is entitled, if he had a preferable right to the fund, to reduce the decree, and even, although expressly called in the action, to claim from those preferred repayment of what he should have drawn; but if the party cited be a minor with tutors or curators, his only recourse is against them. Those who were not summoned will be entitled to show that the decree was erroneous, and that the fund should still be paid to them. To prevent such questions, it is the practice to publish advertisements in the newspapers, intimating the dependence of the multiplepounding, and requiring all having claims upon the fund to appear. These intimations generally contain a declaration, that those who do not appear shall be excluded from any share in the division. But no such declaration can deprive a creditor of his legal right of preference, should he afterwards challenge the decree of multiplepounding, and be able to establish such preference. [See *Morgan*, 14 June 1858, 3 Macq. 347.] Where any of the claimants have creditors, these creditors may claim to be ranked on the fund set aside for their debtor. Such claims are called riding interests. See *Riding Interests*. A multiplepounding has been called a "congeries of actions;" inasmuch as, in the competition, each claimant, as against the competing claimants, may maintain all legal pleas, including pleas reductive of the grounds of the competing claim; *Bell's Com.* ii. 278. See generally, *Stair*, B. iii. tit. 1, § 39; B. iv. tit. 17, § 7; *More's Notes*, cccxxxviii.; *Ersk.* B. iv. tit. 3, § 23; *Bank.* ii. 615; iii. 36; *Bell's Com.* ii. 276; *Kames' Stat. Law Abridg. h. t.*; [*Shand's Prac.* ii. 579; *Mackay's Prac.* ii. 108; *Dove Wilson's Sher. Court Prac.* 469; *Coldstream's Procedure*, 122.]

MULTURES. The multure is a quantity of grain, either manufactured or in kind, deliverable to the proprietor or tacksman of a mill in return for grinding the corn. There are other small dues, as the *knaveship*, *bannock*, *lock* or *gowpen*, exigible by the miller, or servant at the mill, by whom the work is performed. The multure is payable by every person who comes to the mill for

the purpose of grinding the grain. But the tenants and proprietors of some lands are bound to use a particular mill; and the lands so bound, or restricted to the mill, are termed the *thirl* or the *sucken*, and the tenants or proprietors the insucken multurers; while those who use a mill without being bound to use it, are termed the out-town or outsucken multurers. Hence, multures are of two sorts—those due by the persons astricted to the mill, termed insucken multures, and the multure exigible from those who voluntarily use the mill, called out-sucken multure. The former, of course, is much heavier than the latter; [and, having been originally composed in part of a *premium* to the proprietor of the mill, exceeds in amount what may be called the market price of grinding. Outsucken multure is merely a fair remuneration to the miller for manufacturing the grain,] the amount of which always depends on the situation of the mill, and the competition there may be with other mills to which the outsucken multurers have access. [Dry multures are duties in grain or money, paid whether grain be ground or not.] See *Ersk.* B. ii. tit. 9, § 20; *Stair*, B. ii. tit. 7, § 15; B. iv. tit. 15, § 2; *More's Notes*, cccxv., cclxxiii.; *Bank.* i. 684–9; *Bell's Princ.* § 1018; *Hunter's Landlord and Tenant*, i. 258; *Ross's Lect.* ii. 170. See *Abstracted Multures. Thirlage*.

MUNICIPAL LAW, MUNICIPIA.

Municipia were cities dependent on Rome, the citizens of which were allowed certain privileges as Roman citizens; and which preserved their own laws, under the name *leges municipales*. Hence the term municipal law came to signify the laws of any free city or kingdom, and municipal and civil law are synonymous; *Ersk.* B. i. tit. 1, § 18; *Kames' Equity*, 492–4.

[MUNUS PUBLICUM. Public officers, such as holders of benefices in the Established Church, are irremovable except for fault. See *Hastie*, 4 June 1889, 16 R. 715.]

MURDER; is the depriving a human being of life, deliberately and wilfully, without a cause. The deliberation and malice, or forethought, with which it is committed is one of the characteristics of the crime of murder. But the malice or forethought is merely that wicked and mischievous purpose which is the essence of the crime, and which may have been engendered at the meeting of the parties. The act of killing of itself implies malice; and it lies on the accused to prove any one

of those palliating or justifying circumstances which the law admits. See *Homicide*. Should a person, therefore, occasion the death of another, though there may be ground to presume that he meant only to inflict a severe beating, even this shows such a disregard to the safety of his fellow-creature, and a resolution to proceed to such extremities in order to gratify his resentment, that he must abide the consequences; and if death ensue, he will be held guilty of murder. [The state of health and strength of the person killed are a material consideration. The same violence which would prove a reckless disregard of life, when the victim is infirm from age, sex, or delicate health, would not do so, if he were in the vigour of manhood.] With regard to the nature of the weapon, there is this difference, that some, as fire-arms, &c., are perfectly inconsistent with any other than an intent to kill; but there are others which may be thought to favour the presumption that there was no such intention. The law, however, considers every weapon with which a murder is committed as lethal. In the same way, where a person gives a violent medicine in order to procure abortion, and death is the result, there is such a disregard of the safety of the person to whom the drug is administered, that the person by whom it has been administered shall be held guilty of murder. [If the act of killing have been committed under strong provocation, the crime may be reduced from murder to culpable homicide; but not if an interval have elapsed. Words, however insulting, are no excuse, nor even a blow with the open hand; there must be violence causing reasonable alarm. It is murder to kill a trespasser or a thief, unless in reasonable fear of violence. Weakness or aberration of mind, though not amounting to insanity, may reduce the crime from murder to culpable homicide; and even when murder alone is charged in the libel, it is always competent to bring in a verdict of guilty of the minor crime. See *Granger*, 14 Sept. 1878, 4 Coup. 86; *Ferguson*, 28 Dec. 1881, 4 Coup. 552; *Brown*, 15 March 1886, 13 R. (J.C.) 50. If a person assault another with a view to robbery, and cause his death, he is guilty of murder, even though no bodily injury was intended, and though the deceased was suffering from heart disease; *Brown*, 7 May 1879, 4 Coup. 225.] We have also in our law what may be termed statutory murder. Thus, by an old act, 1450, c. 30, the importers of poison, by which bodily harm may be taken, are to be

punished with death; but the act has been long in desuetude. Another species of statutory murder is constituted by 1690, c. 21, which enacts, that any woman who shall conceal her being with child, during the whole time of her pregnancy, and shall not call for, or make use of, help in the birth, is to be reputed the murderer, if the child be found dead or missing. In order to avoid the effect of this statute, the mother who is charged with this offence must, in her defence, be able to prove that she discovered her pregnancy, and called for help. But by 49 Geo. III. c. 14, the punishment of this crime is made imprisonment not exceeding two years. A person is art and part of murder—1. By accession at the fact; as *e.g.* if he has gone out in company with others to commit the crime, though he does not do it with his own hand. 2. By accession before the fact; as by giving orders for its committal, or furnishing the immediate means of committing it. [By the law of Scotland, accession after the fact, as by concealing the corpse or assisting the murderer, does not infer being art and part in the murder. The punishment of murder is death and confiscation of moveables.] See *Hume*, i. 254; *Ersk. B.* iv. tit. 4, § 40; *Bank.* ii. 669; *Alison's Princ.* 1; [*Macdonald*, 122.] See *Child-Murder. Concealment of Pregnancy. [Res Judicata.]*

MUSICAL COMPOSITIONS. See

Copyright.

[**MUSSEL.** See *Sea-Fisheries.*]

MUTILATION; is the crime of disabling or wounding another in his members. It is punishable arbitrarily. But mutilation is usually considered as an aggravation of assault, and in that case the punishment generally awarded is [penal servitude.] See *Hume*, i. 330; *Ersk. B.* iv. tit. 4, § 50; *Alison's Princ.* 195; *Kames' Stat. Law Abridg. h. t.* [The fraudulent mutilation of business books, or other documents valuable as evidence, is an indictable offence, punishable arbitrarily; *Malcolm*, 25 Sept. 1843, 1 Broun, 620; *Macdonald*, 94.]

MUTINY. [Mutiny implies collective insubordination, or a combination of two or more persons to resist, or to induce others to resist, lawful military authority. By the Army Act, 1881 (44 & 45 Vict. c. 58), § 7, every person subject to military law who (1) causes or conspires with any other persons to cause any mutiny or sedition in the regular, reserve, or auxiliary forces, or the navy, or (2) endeavours to seduce any person in these forces from allegiance to

[Her Majesty, or to persuade any person in these forces to join in any mutiny or sedition, or (3) joins in, or being present does not use his utmost endeavours to suppress any mutiny or sedition in these forces, or (4) coming to the knowledge of any actual or intended mutiny or sedition in these forces, does not without delay inform his commanding officer of the same, is liable on conviction by court-martial to suffer death, or such less punishment as is appointed by the act. Prior to 1879, an annual Mutiny Act was passed, which, along with annual Articles of War, constituted the military code. See *Army*. See also *Manual of Military Law* (War Office, 1887), 20, 343.]

MUTUAL CONTRACTS. A mutual contract is an engagement entered into by two or more persons, by which a reciprocal obligation is raised; the one party being bound to give, or do, or abstain from doing, something, in return for something to be given, or done, or abstained from, by the other party. *Consensus in idem placitum* is not a peculiar attribute of the mutual contract; there is no contract, whether mutual or unilateral, which is binding without a *consensus in idem placitum*, expressed or implied. *Stair*, B. i. tit. 3, § 9; *Bell's Princ.* § 70. See *Contract. Obligation. Offer. Locus Penitentiae*.

MUTUAL ENTAILS. If two persons enter into mutual obligations to execute entails in favour of each other, neither entail, when executed, is revocable without the consent of both parties; and if either party should sell his entailed lands, in consequence of the right which he still retained in them, with a fraudulent view to disappoint the succession, an action lies against him for damages. In the case of mutual and onerous entails, the prohibitions are effectual against the creditors of the entailer. See *Ersk.* B. iii. tit. 5, § 24; *Bell's Com.* i. 46; *Sandford on Entails*, 114; *Bell's Princ.* § 1747. See *Entail*.

[MUTUAL GABLE. See *Gable*.]

[MUTUAL SETTLEMENT. "A mutual will has this consequence, that it is not merely a declaration of intention, but an obligation not to revoke." Thus far, a mutual will is a sort of contract;" *per* Lord Fullerton, in *M'Millan*, 28 Nov. 1850, 13 D. 187. "The general character of a mutual settlement is this, that *quoad* third parties interested as beneficiaries only, it is testamentary, but that *quoad* the testators, it is pactional.

[. . . . So long as the granters are alive, the deed is as much under their own power, and may be altered or revoked by their joint act or deed, as any other testamentary deed may be altered or revoked by the testator. But, on the other hand, dealing with it as a contract between the two granters themselves, I think that the one cannot revoke it or alter it without the consent of the other; or, at all events, that one cannot revoke it or alter it after the death of the other, unless in the deed itself express power to do so be reserved;" *per* Lord Curriehill, in *Hogg*, 18 March 1863, 1 Macph. 647. In *Lang*, 24 May 1867, 5 Macph. 789, a mutual postnuptial settlement was held to be binding in regard to the provisions in favour of the spouses, but revocable in regard to the provisions in favour of the children. If only one of two parties to a mutual settlement is in right of property disposed thereby, the fact of the other having concurred in the disposition does not give the latter any right to the subject, unless there be words of contract in the deed, by which such a right is properly and indefeasibly created; *Stiven*, 10 Jan. 1873, 11 Macph. 262. See also *Fernie*, 30 Dec. 1854, 17 D. 233; *Graeme*, 16 July 1869, 7 Macph. 1062; *Craich's Trs.* 24 June 1870, 8 Macph. 898; *Traquair*, 1 Nov. 1872, 11 Macph. 22; *Renton's Trs.* 20 July 1876, 3 R. 1142. Mutual settlements between spouses are revocable as donations *inter virum et uxorem*, so far as not granted for onerous consideration, or in fulfilment of the natural obligation to make a provision; *Mitchell*, 5 June 1877, 4 R. 800; *Melville*, 15 July 1879, 6 R. 1286; *Beattie's Trs.* 23 May 1884, 11 R. 846. See *M'Laren on Wills*, i. §§ 494-6; *M. Bell's Conv.* ii. 970; *Fraser on Husb. and Wife*, ii. 1505; *Journ. of Jurisp.* xxiv. 23.]

MUTUUM; is that contract by which a loan is given of such things as are consumed in the use, or as cannot be used without their extinction or alienation, such as corn, wine, money, or the like; and as to which, therefore, the obligation on the borrower is to restore as much, and of the same kind, quality, and value, as he received. For a farther explanation of this contract, and of the difference between *mutuum* and *commodate*, see *Ersk.* B. iii. tit. 1, § 18; *Stair*, B. i. tit. 11; *More's Notes*, lxxi.; *Bank.* i. 354; *Bell's Com.* i. 275; *Bell's Princ.* § 200. See also *Commodate. Loan*.

N

NAMARE; or *Namos capere*; to take a poind or a distress. *Skene, h. t.*

NAME. It frequently happens, that under deeds of entail, or as a condition of bequests, or for other causes, a person changes his name. In such cases, where a royal licence or authority has been obtained, and inserted in the Gazette, authorising the change or the addition, a petition to the Court of Session for permission to use the additional name has been held unnecessary, not only in respect of the previous royal licence, but also on the general ground that there is no need of the authority of that court to entitle a man in Scotland to change his name. See *Kettle Young*, 14 Jan. 1835, 13 S. 262; [*Kinloch*, 13 Dec. 1853, 16 D. 197.] See, however, A.S. 30 June 1757, 20 Jan. 1764, 8 July 1774, 11 Aug. 1789, and some others, for examples of petitions to the court for authority to change the name; although in some of these instances the parties were not notaries-public. It is a common provision in entails, that the heir in possession shall bear the name and arms of the entailor; and if fenced by irritant and resolute clauses, this condition will be effectual. If the injunction be that the heir shall use the entailor's name and arms exclusively, and if the heir should succeed to another entailed estate, the entail of which contained a similar condition, it would be incumbent on him to make his election, since, consistently with such a condition, he could not take both. [The condition as to name is sufficiently complied with, if the name be assumed along with one or more other names, and it need not be the last in order; *Hunter*, 31 Jan. 1882, 9 R. 492.] See *Bell's Princ.* § 1725; [*M. Bell's Conv.* i. 213; ii. 1025.] See *Arms.*

NAME ON CARTS AND CARRIAGES. The general Road Act, 1 & 2 Will. IV. c. 43, provides (§ 108), that the owner of every waggon or cart, and also of every coach, post-chaise, or other carriage, let either in the whole or in part to hire, must paint in a straight line horizontally, upon some conspicuous part, on the off or right side of his waggon or cart, and upon the pannels of the doors of all such coaches, post-chaises, or other carriages, before they are used upon any turnpike road, the Christian and surname, and place of abode, of himself, or the principal owner or partner thereof, in large, legible Roman letters, either of a dark

colour upon a light ground or of a light colour on a dark ground, not less than one inch in height, with numbers beginning with No. 1, where more of such carriages respectively than one belong to the same owner, and proceeding in regular progression. This must remain so long as the vehicle is used upon any turnpike road. Every owner using, and every person driving, such a vehicle on a turnpike road without this provision being attended to, is liable to a fine not exceeding forty shillings for every offence, and the vehicle pays double toll. Every person driving any such vehicle, who refuses to stop and permit the name to be read or uncovered by any person requiring him so to do, forfeits over and above, for every such offence, a sum not exceeding forty shillings. [This provision is incorporated in the Roads and Bridges Act, 1878 (41 & 42 Vict. c. 51, § 123).]

NARRATIVE OF DEEDS. The narrative describes the granter and the person in whose favour the deed is granted, and states the cause of granting. [By the Stamp Act, all facts and circumstances affecting the liability of the deed to an *ad valorem* stamp duty, or the amount thereof, must be fully and truly set forth; 33 & 34 Vict. c. 97, § 10.] The effect of this clause, in all questions between strangers, is to prove against the granter the facts therein set forth, which he will not be allowed to disprove except by the oath or writing of the receiver. [But see *Hotson*, 7 June 1831, 9 S. 685.] Our practice, however, has introduced a different rule, where the deed is between conjunct and confident persons, and where creditors are concerned. In that case, it is not necessary for the creditors to prove want of value; but the *onus probandi* is on the granter to prove that he actually gave the value which the deed bears to have been given. See *Ersk.* B. ii. tit. 3, § 22; *Bell's Com.* ii. 179, 184; *Bell on Purchaser's Title*, 29; *Ross's Lect.* i. 163, 373, 293; [*Menzies' Conv.* 197, 593; *M. Bell's Conv.* i. 211, 580.] See *Consideration. Conjunct and Confident.*

NATIONAL DEBT; [the debt due by the nation to individual creditors, whether our own people or foreigners; *Tomlins' Dict.* The national debt is in part *funded* and in part *unfunded*; the former being that which is secured to the national creditor upon the public funds; the latter, that which

[is not so provided for. The unfunded debt is comparatively but of small amount, and is generally secured by Exchequer Bills and Bonds. See 33 & 34 Vict. c. 71; 50 & 51 Vict. c. 16; 51 Vict. cc. 2 and 15; also *Bell's Princ.* § 1342; *Stephen's Com.* ii. 603.]

NATIONS, LAW OF. See *International Law*.

NATIVI; or bondmen; were the slaves by whom, anciently, the ground was laboured. For the different ways in which men might be reduced to this state of bondage, see *Reg. Majest.* i. 2, c. 12, §§ 4, 5, and *Quon. Attach.* c. 56. See *Skene, h. t.* Slavery is said to have been abolished 100 years earlier in Scotland than in England; *Ersk.* B. i. tit. 7, § 60. See, however, *Colliers*.

NATURAL CHILDREN. A natural child is the child of a woman who was not married to the father at the time of conception, and who never was thereafter married to him. See *Bastard. Legitimation. Children*.

[**NATURALIA.** See *Essentialia*.]

NATURAL OBLIGATIONS; are those obligations which arise from the law of nature only, or from natural equity. Such is the obligation on parents, whose circumstances permit of it, to provide their children with reasonable patrimonies; or the obligation on a party who has bound himself, by an informal writing, to pay or to perform in terms of his engagement, even although, by reason of the informality, he may have contracted no binding obligation in law. The characteristic of a natural, as contrasted with a legal or civil obligation, is, that the latter may be legally enforced against the obligant, whereas the former cannot; although, where one has acted in implement of a natural obligation, he will not, generally speaking, be permitted to retract what he has done, by demanding repetition or restitution in an action. *Ersk.* B. iii. tit. 1, § 4.

NATURE, LAW OF. The law of nature is that sense of justice, and that feeling of right and wrong experienced by every human being, and which has been emphatically described as a law written by the finger of God on the heart of man. *Ersk.* B. i. tit. 1, § 7.

NATURALISATION; is a right conferred on an alien by act of Parliament, in virtue of which he acquires the privileges of a British subject. See *Alien*.

NAUTÆ, CAUPONES, STABULARII. This is the title given to the well-known edict of the Roman prætor, by which ship-

masters, innkeepers, and stablers were made answerable for the goods and effects of travellers which had been brought into the ship, inn, or stable. The edict is in these terms: "NAUTÆ, CAUPONES, STABULARII, QUOD CUJUSQUE SALVUM FORE RECEPERINT, NISI RESTITUENT, IN EOS JUDICIUM DABO."

This rule, from its expediency, has been, with some variations, received into the law of Scotland. Persons of this description are liable for their servants, or even for the acts of guests and passengers; and the extent of the damage may be proved by the oath of the claimant, *in litem*, as it is termed, although this rule has of late been considerably modified, both by statute and decisions. See *Innkeepers. Carriers*.

NAVIGATION. See *River. Sea*.

NAVIGATION ACTS. This term is applied to those statutes which were passed with the view of regulating the commercial intercourse of this country and her colonies. According to Professor Bell, the object of these acts was the creation of a body of skilful and hardy seamen; the increase of the shipping in the possession of British subjects; and the promotion of English ship-carpentry, by confining the privileges to ships British built; *Bell's Com.* i. 148. [The Navigation Acts have been repealed, in so far as they give protection to British shipowners; see 12 & 13 Vict. c. 29; 17 & 18 Vict. c. 5.] See *Bell's Com.* i. 147; *Bell's Princ.* § 1322; *Brodie's Sup. to Stair*, 948, 985; *Swint. Abridg. h. t.* See *Shipping Law*.

NAVY. [The discipline of the Royal Navy is regulated by 29 & 30 Vict. c. 109, as amended by 47 & 48 Vict. c. 39. See *Stephen's Com.* ii. 625; *Thring's Crim. Law of the Navy*.]

NECROMANCY; or the corresponding with evil spirits, and the practising of witchcraft by their assistance; was formerly held to be a crime cognisable by law. By statute 9 Geo. II. c. 5, however, all prosecutions on account of witchcraft are prohibited; but pretenders to a knowledge of the occult sciences and the telling of fortunes are punishable by imprisonment for a year, and the pillory once in every three months of that year; *Ersk.* B. iv. tit. 4, § 18. See *Witchcraft*.

NEGLIGENCE. The negligence from which a loss arises will throw that loss on the person guilty of the negligence; but different degrees of negligence are required in different situations to produce this effect. See *Diligence. Culpa. Damages. Mora*.

NEGOTIATION; is the procedure which the holder of a bill must follow to procure acceptance of it, and payment when it falls due. [The term has a different meaning in the Bills of Exchange Act, 1882; in which a bill is said to be negotiated "when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill" (§ 9).] See *Bill of Exchange. Acceptance. Protest. Noting a Bill. Indorsation.*

NEGOTIORUM GESTOR; is one who interferes spontaneously in the management of the affairs of another, without his knowledge and in his absence, and without any formal mandate or warrant from him for whom he acts. A *negotiorum gestor* is liable for all sums of money which come into his hands in the course of his actings; but he is entitled, on the other hand, not only to repayment of money paid by him for the principal, but to interest on the outlay. He is not entitled, however, to any remuneration for his trouble; neither is he liable for any loss the effects may suffer. The degree of diligence required from him depends upon the circumstances under which he has interfered. In a case of necessity, where immediate attention is required, the *gestor* is liable only for gross omissions; whereas cases may occur in which he engages him for whom he acts in transactions, as to which the *gestor* will be liable even for casual misfortunes. In the common case, he is liable in a middle kind of diligence. [See *Fulton*, 21 March 1864, 2 Macph. 893; *Fernie*, 19 Jan. 1871, 9 Macph. 437; *Bannatine's Trs.* 12 Jan. 1872, 10 Macph. 319.] See *Ersk. B. iii. tit. 3, §§ 52, 53; Stair, B. i. tit. 8, § 3; More's Notes*, liv., cclxiii.; *Bank. i. 232; iii. 66; Bell's Com. i. 287; Bell's Princ. § 540.* See *Diligence. Culpa. Mandate.*

NEMO DEBET EX ALIENO DAMNO LUCRARI. This is a maxim of the Roman law founded upon natural equity, and the principle of it may be said to be generally adopted in the law of Scotland. An illustration of its application occurs in the case where a person has erected a building on the property of another, in the *bona fide* belief that he was building upon his own ground. In that case, although the owner of the ground is entitled to take the building, he will be bound, under this maxim, to indemnify the person who built *bona fide*, to the extent at least of the benefit gained at his expense. *Stair, B. i. tit. 6, § 33; tit. 7, § 11; tit. 8, § 6; Ersk. B. i. tit. 7, § 33; Bank. iii. 87; Kames' Equity*, 92, 215,

317, 411, 440. See *Adjunction*. [*Recompense.*]

NEMO PRÆSUMITUR LUDERE IN EXTREMIS; a maxim which has been sometimes applied in questions as to the construction of ludicrous or jocular bequests, and which imports, that an impossible or absurd condition adjoined to a bequest is not to be held as a proof of want of a serious intention of bequeathing. [*Trayner's Latin Maxims.*]

NEMO TENETUR EDERE INSTRUMENTA CONTRA SE. This rule of the Roman Law, that no man is bound to produce writings against himself, is so far departed from in civil questions, that where writings in the hands of a defender are requisite to support the plea of the pursuer, the pursuer may specify what those writings are, and the defender will be bound to exhibit them; but the defender is not bound to make a production upon vague allegations. The same rule applies to the pursuer, where he has in his possession writings specially called for by the defender. In the prosecution of crimes, writings may be necessary in proof of the crime; but here the rule is rigidly adhered to, and no man is obliged to produce writings in his custody which may affect his life, estate, or good name. See *Ersk. B. iv. tit. 1, § 52; tit. 4, § 95; [Dickson on Evidence, § 1371.]* See *Exhibition. Diligence. [Commission.]*

NEMO TENETUR JURARE IN SUAM TURPITUDINEM. The rule, that no one can be forced to give his own oath in evidence of his guilt, is received in all trials of crimes where the punishment may affect the life, limb, liberty, estate or reputation, of the panel; but, in slight offences which are punishable only by a small fine or short imprisonment, the rule does not hold, and the offence may be referred to the oath of the accused, if no other means of proof is to be obtained. *Ersk. B. iv. tit. 4, §§ 94, 95.* See *Evidence.*

NEUTRALS. During a war between two countries, the ships of neutral states are entitled to trade with both parties, unless when the port to which they are carrying the goods is under blockade. Neutrals are not entitled to carry contraband of war to either of the belligerents, and they are subject to be searched. [By the Declaration of Paris, 16 April 1856, the neutral flag covers the enemy's merchandise, with the exception of contraband of war; and neutral merchandise, with the same exception, is not liable to seizure under an enemy's flag.] See *Stair, B. ii. tit. 2, § 7; Bell's Com. i.*

323; *Bell's Princ.* § 43. See *Reprisals. Capture. Blockade.*

NEW TRIAL. [The only way in which the verdict of a jury in a civil cause may be brought under review is by moving for a new trial, with or without a bill of exceptions; 55 Geo. III. c. 42, §§ 6, 7. See *Jury Trial.* By § 6, it is made competent for the party who is dissatisfied with the verdict to apply to the Division for a new trial, "on the ground of the verdict being contrary to evidence, on the ground of misdirection of the judge, on the ground of the undue admission or rejection of evidence, on the ground of excess of damages, or of *res noviter veniens ad notitiam*, or for such other cause as is essential to the justice of the case." But when the ground of dissatisfaction is misdirection of the judge, or undue admission or rejection of evidence, exception must be taken at the trial, and the case comes before the Division on a bill of exceptions; *M'Clelland*, 9 Feb. 1842, 4 D. 646. The procedure in such case is described in the article *Exceptions, Bill of.* "When the party against whom the verdict has been found intends, without lodging a bill of exceptions, to apply for a new trial in a cause which has been tried at the sittings after the end of the session, or during the Christmas recess or at the circuits, such party shall give notice of a motion for a rule to show cause why the verdict should not be set aside, and a new trial granted, within six days after the commencement of the next session, or of the meeting of the court after the Christmas recess, or ten days after the trial of the cause, if the cause has been tried during the session, or immediately before the sitting down of the session!;" A.S. 16 Feb. 1841, § 36.] It is competent to move for a third, or any number of trials, and the same rules apply to each motion. [See *Railton*, 11 March 1846, 8 D. 747.] The first step in the application is, to move the court for a rule on the opposite party to show cause why a new trial should not be granted. Notice must be given to the opposite agent, and a copy lodged [with the clerk.] When the motion is founded on averments to be supported by affidavits, they ought to be duly lodged and intimated to the opposite party before the motion is heard. If the party moving succeed in making out a *prima facie* case, the court grants a rule ordaining the opposite party to be ready to show cause why a new trial should not be granted; but if he fail in making out a *prima facie* case, the rule is *de plano* refused. After the rule has been

granted, and previous to hearing counsel against and for the granting a new trial, a report in writing of what passed at the trial must be delivered to the Division of the court in which the application for the new trial is to be heard, signed by the judge who presided at the trial; A.S. 29 Nov. 1825, § 55. ["But it shall not be competent for the party moving for a new trial to obtain from the judge who presided at the trial his notes of the evidence, until the Division, on a motion being made for that purpose, direct a copy of the notes to be furnished;"] A.S. 16 Feb. 1841, § 36. Where a Lord Ordinary, however, has presided at the trial, this application should be made to him; *Campbell*, 6 Jan. 1863, 1 Macph. 216.] The case is then again put out in the roll, and the counsel for both parties are heard. Every point in the case is open for discussion so far as relevant to the grounds on which the motion has been rested. [If the judge who tried the cause is not one of the judges of the Division, he is called in to hear the motion; 31 & 32 Vict. c. 100, § 58. He has no voice, however, in the decision; for it is enacted by § 61 of the same act, that "no verdict of a jury shall be discharged or set aside upon a motion for new trial, unless in conformity with the opinion of a majority of the judges of the Division, and in case of equal division judgment shall be given in conformity with the verdict." This enactment does not apply to hearings upon bills of exceptions. An interlocutor granting or refusing a new trial is not subject to appeal to the House of Lords; 55 Geo. III. c. 42, § 6. Putting aside those cases in which a bill of exceptions is requisite, the grounds on which a new trial may be moved for, in terms of the provision cited above, are the following:— (1) *Verdict being contrary to evidence.* The court will not upset a verdict merely on the ground that, if they had been the jury, they would have found differently. "The verdict must be contrary to evidence in this sense, that it is at variance with any reasonable view that can be taken of its effect as a whole;" *per* Lord Cowan, in *Morrison*, 27 Feb. 1862, 24 D. 625, 640. The weighing of evidence is peculiarly the province of the jury; and in that function they will not be interfered with. But if their finding is quite unsupported by evidence in any essential part, it will be set aside. See cases in which new trial has been granted on this ground, or refused, in *Mackay's Prac.* ii. 66. (2) *Excess of damages.* The excess must be exorbitant,

[—"such as to raise on the part of the court the moral conviction that the jury, whether from wrong intention or incapacity, or some mistake, have committed gross injustice, and have given higher damages than any jury of ordinary men fairly and without gross mistake exercising their functions could have awarded;" *Landell*, 6 March 1841, 3 D. 819, 825. See also *Shields*, 24 Nov. 1874, 2 R. 126; *Johnston*, 16 June 1875, 2 R. 836; *Young*, 29 Nov. 1882, 10 R. 242; *Wallace*, 13 Jan. 1888, 15 R. 307. (3) *Res noviter veniens*. See *Res Noviter*. (4) "*Such other cause as is essential to the justice of the case.*" This ground has been found to include cases where it appears doubtful whether justice has been done; [*Collins*, 15 Feb. 1838, 16 S. 514; *Gelot*, 4 March 1870, 8 Macph. 649;] where the damages are small and insufficient; [*Black*, 31 Jan. 1854, 16 D. 431;] where the verdict does not answer the issues, or proceeds on a manifest error, inconsistent with the justice of the case; where the unsuccessful party has been taken by surprise; [*Snare*, 18 June 1852, 14 D. 895; *Kerr*, 4 Nov. 1868, 7 Macph. 51; *Crawford*, 28 Oct. 1884, 12 R. 25; *Murray*, 9 June 1888, 15 R. 737;] where there are objections to the jurymen; where there has been fabrication of evidence, and falsehood and fraud in the procedure; [and where the conduct of the jury, or one or more of them, has rendered it impossible for them to return a verdict according to the evidence led before them; as when, in an action of damages for injury from an accident caused by machinery, one of the jury went by himself to inspect the *locus* of the accident, and the method of working the machinery; *Sutherland*, 2 March 1888, 15 R. 494. See also *Gordon*, 3 March 1865, 3 Macph. 595; *Rankine*, 26 Nov. 1873, 1 R. 225.] See on this subject, *Macfarlane's Jury Prac.* 253; [*Mackay's Prac.* ii. 63. See *Jury Trial Expenses*.]

NEWSPAPERS. When a creditor with an heritable security is vested with a power of sale, under condition of advertising in a newspaper, publication in a paper containing nothing but advertisements is held sufficient compliance with the condition; *Dickson*, 15 Jan. 1831, 9 S. 282. The good-will of a newspaper is held to be property transmissible *inter vivos*, or to heirs; and if, on the dissolution of a partnership carrying on a newspaper, by death of one of the partners, the surviving partners who may be desirous to continue the publication refuse to buy it, then, like the other rights

of the deceased in the dissolved company, it must be sold for behoof of his representatives; *McCormick*, 4 July 1822, 1 S. 541. [All statutes regulating the printing and publication of newspapers were repealed by 32 & 33 Vict. c. 24; but certain regulations were re-enacted by that act. As to the transmission of newspapers through the post, see 3 & 4 Vict. c. 96, § 43; 10 & 11 Vict. c. 85, § 5; 33 & 34 Vict. c. 79; 38 & 39 Vict. c. 22; 44 & 45 Vict. c. 19. The Newspaper Libel and Registration Act, 44 & 45 Vict. c. 60, does not apply to Scotland. As to whether there is copyright in newspapers, and on newspapers generally, see *Shortt's Law of Literature and Art*, 308. See *Post-Office. Letters. Advertisement. Copyright. Defamation*.]

NEXI; among the Romans, were free-born persons who had been reduced to a state of slavery for debt.

[NEXT FRIEND.] In England, an infant (minor) who desires to bring an action must, as a rule, do so through the intervention of a person called a next friend (*prochein ami*), generally a near relation. The same rule applies where a married woman sues without her husband, or an action requires to be brought by a person of unsound mind who has no committee, or whose committee has an interest adverse to his own. *Sweet's Law Dict.*]

NEXT OF KIN. See *Executors*. [On the construction of the term "next or nearest of kin," see *Young's Trs.* 10 Dec. 1880, 8 R. 242; *Tronsons*, 21 Nov. 1884, 12 R. 155; also *Bell's Princ.* § 1880; *M'Laren on Wills*, i. § 1361.]

NIGHT POACHING. See *Poaching. Game Laws*.

[NISI.] In England, a decree or order of the court is said to be made *nisi*, when it is not to take effect *unless* the party concerned fails to show cause against it within a certain time. *Sweet's Law Dict.*]

NISI PRIUS. [In the English High Court, a trial at *nisi prius* is where an action is tried by a jury before a single judge, either at the sittings held for that purpose in London and Middlesex, or at the assizes. The term is explained by the fact that, by the ancient practice, actions were appointed to be tried at Westminster by a jury returned from the county where the cause of action arose; but with this proviso, *nisi prius*, unless before the day fixed, the judges of assize should come into the county; and, since by 13 Edw. I., the judges were directed to try issues in the county where they arose, the trials have in

[modern times always taken place before the judges under their commissions of *nisi prius*. *Sweet's Law Dict.*; *Stephen's Com.* iii. 367.]

NOBILE OFFICIUM. The *nobile officium* of the Court of Session does not admit of a precise definition. Generally speaking, it may be said to be the equitable power vested in that court, whereby it interposes to modify or abate the rigour of the law, and, to a certain extent, to give aid where no remedy could be had in a court confined to strict law. [The following are mentioned in *Mackay's Prac.* i. 209, as the principal examples of its exercise :—(1) Summary applications in the form of petitions not founded on statute. Such are petitions for custody of children, for the appointment of judicial factors, &c., for special powers, and the like. See *Parent and Child. Judicial Factor.* (2) Applications for the appointment of public officers *ad interim*, in case of the death or incapacity of the existing officer. (3) Equitable jurisdiction with reference to charitable trusts—to declare their object, to settle schemes for their administration, to correct abuses, and to carry out the will of the founder; *University of Aberdeen*, 20 July 1869, 7 Macph. 1087. See *Trust*. The court has also, in a few cases of necessity, supplied omissions in the provisions of statutes, and even provided for a *casus improvisus* in a deed; see cases in *Mackay*, 214, 216. But the *nobile officium* is not so exercised, except in cases of necessity, or strong expediency, and where the ordinary procedure provides no remedy. In general, the *nobile officium* is exercised by the Inner House only; but there are exceptions to this rule, such as the large class of petitions which must, under 20 & 21 Vict. c. 56, § 4, be presented in the first instance to the junior Lord Ordinary. See *Petition*. In urgent cases, the Lord Ordinary on the Bills in vacation may exercise the *nobile officium*, on remit from the Inner House, or, in a few cases, such as the appointment of interim officers, without such remit. See *Bill Chamber*. See cases in the Digests under this head;] also *Stair*, B. iv. tit. 3, § 1; *More's Notes*, cclxxiv.; *Ersk.* B. i. tit. 3, § 22; *Bank.* ii. 517; [*Kames' Equity*; *Ivory's Forms of Process*, i. 39; *Mackay's Prac.* i. 209; *Thoms on Judicial Factors*, 1, 5–8, 515.] See *Equity*.

NOBILITY. Under this title are comprehended all degrees of dignity above a knight baronet. Those degrees are duke, marquis, earl, viscount, and baron. But although the scale of dignity is thus gradu-

ated, the holders of those dignities are equal in all public acts, and are hence denominated peers of the realm. See *Dignities. Peer*.

NOLLE PROSEQUI; in English law, [is an acknowledgment or undertaking entered on record by the plaintiff in an action, to forbear to proceed in the action, either wholly or partially. In criminal prosecutions, a *nolle prosequi* to stay proceedings may be entered by leave of the Attorney General at any time before judgment. *Sweet's Law Dict.*]

NOMEN DEBITI; the right to payment of a debt. *Legatum nominis*, is a legacy of a right to a debt due to the testator. *Ersk.* B. iii. tit. 9, § 4.

NOMINATE AND INNOMINATE. A nominate right is a right possessing a *nomen juris*, the use of which defines its boundaries, and settles the consequences to all concerned. Those rights generally receive a *nomen juris* which are frequently the subjects of contract and of legal discussion; while other rights of infrequent occurrence remain innominate, and must be determined by the application of the law to the circumstances in the particular case. The nominate and innominate contracts illustrate the doctrine. Where two parties enter into a bargain, recognised as a nominate contract, such as sale, the legal rules which regulate its operation are at once understood, and the reciprocal rights of the parties are implied in the mere *name* of the contract. The law thus supersedes the necessity of special stipulations, and creates an obligation in the one party to perform, and a right in the other to demand, whatever is necessary to the explication of that contract. In the case of the innominate contracts, again, the law supplies nothing beyond the express agreement of the parties; and there are no obligations or rights created, except such as have been matter of special covenant between the parties. In the Roman law, there were twelve nominate contracts; and for each of these there was a particular action, such as the *actio mutui*, the *actiones commodati directa et contraria*, the *actiones empti et venditi*, &c. When it was necessary to bring an action of implement of an innominate contract, the action was *in factum*, or *præscriptis verbis*. In the Roman law, innominate contracts could only be constituted *ex re*—that is, by the delivery of the subject of the contract. In the law of Scotland, [the proof of an innominate contract is not restricted to writ or oath, unless the stipulations are of an unusual or anomalous nature; *Forbes*, 20 July 1877,

[4 R. 1141; *Downie*, 5 Dec. 1885, 13 R. 271; contrasted with *Edmonston*, 7 June 1861, 23 D. 995. See *Dickson on Evidence*, § 565.] In courts of justice, the nominate are more favourably viewed than the innominate contracts; and hence, an irregularity which, in the case of an innominate contract, would release the parties, will not have the same effect where the contract is nominate. [See *Ersk. B. iii. tit. 1, § 35*; *B. iv. tit. 2, § 20*.] The same distinction holds between nominate and innominate servitudes. And although Erskine says that there may be as great a variety of conventional servitudes as there can be ways in which one man's property may be burdened or restricted in favour of another (*Ersk. B. ii. tit. 9, § 2*), yet it would rather appear to have been the rule of our older law, as laid down by Professor Bell, that only well-established and defined servitudes can be constituted as real burdens effectual against singular successors; *Bell's Princ. § 979*. [See *Servitudes*.]

NOMINATE TUTOR. See *Tutor*.

NOMINATION. In Scotland, this word is used to signify an appointment to an office. In England, it is applied to the appointment of a clergyman; in which sense it is synonymous with the Scotch term *presentation*. As to the nomination of candidates for a seat in Parliament, see *Election Law*.

NON COMPOS MENTIS; of unsound mind. See *Insanity*.

NON CREDITUR REFERENTI, NISI CONSTET DE RELATO; a maxim used by Erskine, as implying that reference made in one writing to another is no proof of the existence of that other. Thus, an instrument of sasine does not prove the existence of the charter to which it refers. *Ersk. B. iv. tit. 2, § 5*.

NON MEMINI. When a party to whose oath a debt or payment is referred swears *non memini*, it has generally the effect of absolving him; but if the fact is so recent that the swearer cannot be believed ignorant of it, he is held as confessed in the same manner as if he had refused to depone. *Non memini* is not equivalent to a denial of the fact, and does not shut out the person making the reference from establishing it by other proofs originally competent. *Ersk. B. iv. tit. 2, § 14*; [*Dickson on Evidence*, §§ 1499, 1796.]

NON NUMERATÆ PECUNIÆ. [See *Exceptio non numeratæ*.]

NON VALENS AGERE. See *Prescription*.

NONAGE; in English law, signifies, in

general, all the time that a person continues under the age of twenty-one; but, in a special sense, it corresponds to the Scotch term *pupillage*, and denotes all the time that a person is under the age of fourteen. *Tomlins, h. t.* See *Minor*.

NONCONFORMISTS; those who do not conform to the established religion. See *Nonjurors*. [*Church Judicatories*.]

NON-ENTRES; is where a vassal, vest and seised in the fee and property of the lands, deceases, leaving behind an heir, who, being of lawful age, may enter to the lands by taking of sasine thereof, and yet enters not; in which case the lands are in the hands and power of the immediate superior, by reason of non-entresse. *Skene, h. t.* See *next article*.

NON-ENTRY; is the casualty, [now virtually abolished, as mentioned below,] which fell to the superior where the heir of a deceased vassal neglected to obtain himself entered with the superior; or, as it is otherwise expressed, failed to renew the investiture. In virtue of this casualty, the superior was entitled to the rents of the feu; but in order to favour the vassal, those rents, previous to the period of the superior's raising an action of non-entry, were held to be no more than the retoured duties of the lands; or, where there was no retour, than the valued rent of the lands. But after an action of declarator of non-entry had been raised, then, from the date of citation, the superior was entitled to the full rent. In this action the superior, in the ordinary case, required to produce his sasine; the apparent heir (*i.e.*, the unentered heir) was made a party, but the action contained no personal conclusion for payment against him. The superior claimed the retoured duties, because it was only after citation that the full rent became due; and there was a conclusion for pointing the ground, in order to render the claim effectual, as no personal decree was pronounced against the heir. In virtue of the decree in this action, the superior recovered the duties due before citation (which were *debita fundi*) by a pointing of the ground; but the full rents which had become due after citation belonged to the superior as interim proprietor, and were therefore recovered, not by a pointing of the ground, but by an action against the tenants for payment of their rents. Where the vassal had died after having disposed, and where the purchaser had not entered with the superior, the superior's usual remedy was an action of reduction-improbation against the purchaser,

with a declarator of non-entry; and although it does not appear to have been indispensable in such an action to call the heir of the deceased vassal, yet, if the heir chose in such circumstances to enter, to the effect of becoming the mid-superior of the purchaser, the superior was bound to receive him; *Mags. of Dundee*, 26 June 1829, 7 S. 801; *Piggot*, 9 Dec. 1829, 8 S. 213. See *Confirmation*. Non-entry was excluded wherever the fee was held by a corporation, for then the fee was always full. A corporation never dies. The fee was considered as full, and therefore an action of non-entry was excluded, so long as the vassal lived, although he might have made over the feu to another. In the same way, where lands had been conveyed to a husband and wife in conjunct fee and liferent, and the infetment following on the right had been confirmed by the superior, the fee was held to be full so long as either the husband or the wife remained alive. An infetment on a public right to be held of the vassal's superior, when confirmed by the superior, rendered the fee full; and, lastly, non-entry was excluded by the husband's courtesy as to the whole of the lands; and to the extent of one-third by the widow's terce. Non-entry duties could not be claimed by a superior when the entry had been delayed through his own fault; and therefore, from the date of a charge at the instance of an heir, who, at the same time, offered the relief and non-entry duties, non-entry was excluded. It was excluded, also, by a charge at the instance of an adjudger of the vassal's property, who offered a year's rent; further, a superior forfeited the non-entry duties during his life, where he was unentered, and refused to complete his title. [This casualty was practically abolished by the Conveyancing Act of 1874 (38 & 39 Vict. c. 94), § 4 (4), which enacts that no lands shall in future be deemed to be in non-entry. But any superior, who would, but for the act, be entitled to sue a declarator of non-entry against the heir or singular successor of the vassal in the lands, may raise against such heir or singular successor, whether infet or not, an action of declarator and for payment of any casualty exigible at the date of such action. No implied entry is pleadable in defence against such action; and decree for payment has the same operation and effect as a decree of declarator of non-entry according to the previous law, but ceases to have such effect on payment of the casualty, and of the expenses (if any) contained in the decree. A form of sum-

[mons is prescribed by the act.] See *Ersk.* B. ii. tit. 5, §§ 29, 46; *Stair*, B. ii. tit. 4, § 18; B. iii. tit. 2, § 12; B. iv. tit. 8; *More's Notes*, ccvii., ccclxxvii.; *Bank.* i. 622; *Bell's Com.* i. 22; *Bell's Princ.* §§ 704-15; *Kames' Stat. Law Abridg. h. t.*; *Bell on Purchaser's Title*, 42; [*Menzies' Conv.* 524; *M. Bell's Conv.* i. 622. See *Casualties*.] *Composition. Entry of an Heir.*

[**NONFEASANCE**; in English law, neglect or failure to do an act which one ought to do. The term is not generally used to denote a breach of contract, but rather the failure to perform a duty towards the public, whereby some individual sustains special damage, as where a sheriff fails to execute a writ. *Sweet's Law Dict.* See *Malfeasance. Misfeasance.*]

NONJURORS; were those who, from attachment to the Stuart family, refused to take the oaths to the Government as established at the Revolution of 1688. The objection to take the oaths rested on the obligation under which the nonjuror supposed himself to lie to the King *de jure*, as he was called. In order to exclude from all public employments those who professed opinions unfavourable to the rights of the reigning family, certain oaths were required to be taken by all who held public offices; and as those of the Scottish Episcopal Church were remarkable for their adherence to the exiled royal family, preachers in Episcopal meeting-houses were required to take the oaths, and pray for the King by name; 5 Geo. I. c. 29; and where these were neglected, their hearers were punished; 19 Geo. II. c. 39, and 21 Geo. II. c. 34. [These statutes, however, were repealed, for the most part, by 34 & 35 Vict. c. 48.] See *Hume*, i. 575. See *Episcopalian*.

NON-OBSTANTE; a clause formerly frequent in statutes and letters-patent, importing a licence from the King to do a thing which at common law might be lawfully done, but which, being restrained by statute, cannot be done without such licence. A *non-obstante* is now against law. *Tomlins, h. t.*

NON-SUIT; in English law, the dropping or renunciation of a suit or action by the plaintiff. This most commonly happens upon the discovery of some error or defect in the plaintiff's proceedings, [or when he finds his evidence is insufficient to support his case. It may be done at any time before the jury have delivered their verdict.] *Tomlins' Dict. h. t.*

NOTARIAL INSTRUMENT. [A notarial instrument is a narrative under the hand of a notary, detailing procedure which has been transacted by or before him in his official capacity. Notarial instruments, when *actus legitimi*, are good evidence of the act which it is the province of a notary to perform, but not of extraneous facts recited in the instrument. In modern conveyancing, when a disponent does not desire to record the whole of a conveyance, he may expedite and record a notarial instrument setting forth generally the nature of the conveyance, and containing those portions of it by which the lands are conveyed; 31 & 32 Vict. c. 101, § 17. The instrument must have a warrant of registration engrossed upon it before being recorded. The production to any notary public of letters of administration of the will or other testamentary settlement of a person deceased issued by any Court of Probate in England or in Ireland, or in any British colony or dependency, or of an exemplification of such letters of administration, is, for the purpose of expediting a notarial instrument, or otherwise completing a title to any estate in land or to any heritable security, equivalent to production of the will or settlement itself; 50 & 51 Vict. c. 69, § 5. See *Stair*, B. ii. tit. 3, § 16; B. iv. tit. 42, § 9; *Ersk.* B. iv. tit. 2, § 5; *Dickson on Evidence*, § 1233; *Bell's Princ.* § 2221; *Shand's Prac.* i. 250. See *Protest, Notarial. Evidence. Sasine. Disposition. Assignment. Heritable Securities.*]

NOTARY PUBLIC. A notary public has been defined to be a public officer, who, upon examination and trial, being admitted by the Lords of Session, gets power to take instruments in any honest and lawful business, which instruments make faith in law. The candidate for the office must be of good fame, and possessed of a reasonable knowledge of law, and particularly of the law relating to the duties which, in the exercise of his office, he may be called upon to discharge. Where one [who is not an enrolled law agent] desires to be admitted a notary, the present form is for the candidate to apply to the clerk to the admission of notaries, who holds his office under the Crown, and by whom a petition for the candidate is presented to the Court of Session, setting forth that the intrant has been engaged in studying the laws, forms, and practice of Scotland; and that, being now desirous to exercise the office of a notary public, he prays to be examined as to his qualifications, and, if found qualified,

to be admitted; and also, that the court may grant warrant to the clerk to the admission of notaries, to mark his protocol book, receive his cautioner, &c. An attestation by an advocate and by a writer to the signet, setting forth their knowledge of the petitioner, and of his good fame and qualifications, must be subjoined to the petition; and, on its being moved, the court remits [to the two Junior Lords Ordinary to take trial of the petitioner's qualifications, and to report. These judges then remit the candidate to the Society of Writers to the Signet for examination. That Society formerly appointed separate examiners of notaries, but since 15 Nov. 1886, they have examined candidates for the office of notary by the same members (commissioners of the signet), and in the same manner, as if they were applicants for admission to the Society of Writers. See Report by Committee of Judges, and Order of Court, dated 20 March 1888, both printed in *Burness's Parliament House Book* for 1888-9, pp. 581-2. If the report of the examiners is favourable, the two Junior Lords Ordinary report to the Inner House that he is duly qualified; and the prayer of the petition is granted.

[When the applicant is already an enrolled law agent, this procedure is unnecessary; for, by § 18 of the Law Agents Act (36 & 37 Vict. c. 63), any enrolled law agent may apply to the court to be admitted a notary public, and the court may admit him and grant warrant to the keeper of the roll or register of notaries public to enrol him as a notary public on his paying the stamp-duty for the time exigible by law from a notary public on admission. See *M'Culloch*, 14 Feb. 1874, 1 R. 521. The same section provides that it shall no longer be necessary for any person to find caution on his admission as a notary public. See *Law Agents.*]

A notary being admitted to his office by royal authority, that authority is interposed in the form of a letter which passes the cachet, addressed to the Court of Session, declaring the King's intention to admit the intrant as a notary, provided the Court of Session find him qualified. This warrant, which is obtained as a matter of course, is recited in the act of admission of the notary, which is inserted in the register kept by the clerk to the admission of notaries, in which register, also, the sign, motto, and subscription of the notary are inserted for preservation. The clerk to the admission of notaries then gives the intrant his com-

mission, which recites the procedure above mentioned—the fact that the notary has taken the requisite oaths—that he has received a protocol book, and that he is to use the sign and subscription manual in the form annexed to his commission. This commission bears to be extracted from the records of the admission of notaries, and is signed by the clerk to the admission, and is the authority in virtue of which the notary exercises his duty as a notary. [If the notary is not a law agent, he must take the oath of allegiance before a Lord Ordinary, and also the oath *de fidei* before the clerk. If he is a law agent, the latter only is necessary.]

A deed subscribed by notaries, without the mandate of the person by whom it bears to be executed, is held to be forged; the same is the case if a man personates another who cannot write, and thus obtains a false notarial subscription, by imposing on the notaries; *Hume*, i. 143; *Alison's Princ.* 381. [By 31 & 32 Vict. c. 101, § 33, notaries, as well as justices of peace, may act as commissioners to take evidence in services of heirs. A deed executed by notaries is invalid, if either of the notaries has a beneficial, or even a fiduciary, interest under the deed; *Ferrie*, 23 Jan. 1863, 1 Macph. 291.] The duties of notaries in preparing instruments of sasine [now in disuse]—in executing deeds—in attesting copies of writings, and the like, and the evidence afforded by those notarial documents respectively, are necessarily treated of under different articles in this Dictionary. See, in particular, *Docquet. Evidence. Sasine. [Notarial Instrument. Protocol. Execution of Deeds.]*

Some law writers have bestowed considerable historical research on the subject of notaries public. Without citing special authorities on a matter really of no practical importance, the following points may be stated as ascertained:—1. That the office of a notary was known in ancient Rome. 2. That, after the establishment of Christianity, notaries were appointed by the Pope, originally for the purpose of preserving the records of the Church, but afterwards for purposes almost entirely secular. 3. That the authority of apostolical notaries was recognised all over Christendom. 4. That after a conflict, the progress of which it is of no consequence to trace, apostolical and all ecclesiastical notaries were abolished in Scotland at the Reformation, and the appointment of notaries vested in the Sovereign, under regulations which, with certain

modifications, remain in force at the present day. The statutes of the Scotch Parliaments connected with this subject are, 1469, c. 31; 1503, c. 64; 1540, c. 76; 1540, c. 78; 1551, c. 24; 1555, c. 43; 1563, cc. 78 and 79; 1587, c. 45; 1617, c. 22; A.S. 30 July 1691. The protocols mentioned in several of those statutes are still given out to the notaries; but, in practice, they are never called back by the clerk; and it is believed that very few notaries make any use of them. See *Ross's Lect.* ii. 201; *The Office of a Notary*; *Mackenzie's Obs. on Statutes*, 68, 112, 153, 167, 240, 356; *Stair*, B. ii. tit. 3, § 17; B. iii. tit. 8, § 34; B. iv. tit. 42, § 9; *Ersk.* B. iii. tit. 2, §§ 9, 23; B. iv. tit. 2, § 5; *Bank.* ii. 500; *Bell's Com.* i. 489, 716; ii. 16; *Bell's Princ.* §§ 19, 298, 338, 770–1; *Kames' Stat. Law Abridg.* voce *Public Officer*; *Bell on Purchaser's Title*, 217; *Thomson on Bills*, 308–312; *Kames' Equity*, 202; [*Begg on Law Agents*, 45.]

NOTE, PROMISSORY. See *Promissory Note. Bank Notes.*

NOTE. In the judicial proceedings of the Court of Session, the most important notes are *Reclaiming notes*, and *Notes of pleas in law*; as to which, see *Record. Pleas in Law. Reclaiming Note.* But the term is also applied to various incidental applications, the occasions for which it would be difficult to enumerate. In the Inner House, such incidental notes are usually presented where a prorogation of the term for lodging a paper ordered by the court is required; where it is necessary to have a remit of a depending cause to a new Lord Ordinary; where circumstances render it necessary to pray the court to retard or expedite the decision in a particular cause, or the like. These notes are usually in MS., and are addressed to the Lord President of the Division of the court in which the cause depends. They pray his Lordship *to move the court* to the effect required; and they must be regularly intimated to the opposite party, by leaving copies at the office or place of business of his agent; A.S. 9 July 1806. In effect, these notes are mere *memoranda*, or notices of motion. [See *Mackay's Prac.* ii. 353. Suspensions, which were formerly commenced by bill, are now brought by lodging a note of suspension in the Bill Chamber; 1 & 2 Vict. c. 86, § 6. See *Suspension.* Appeals from the sheriff court are commenced by note of appeal; 31 & 32 Vict. c. 100, § 66. See *Appeal to Court of Session.* And applications by judicial factors under the Pupils Pro-

[tection Act are made by note. See *Judicial Factor*.]

NOTING A BILL. When the debtor in a bill or note refuses acceptance or fails to make payment, the notary presenting the bill makes a minute at the time, on the bill or note, consisting usually of his initials and of the date. This is called *noting*, and is in effect a mere memorandum by the notary, to assist his memory in extending his protest. [See the provisions as to noting in §§ 51 and 93 of the Bills of Exchange Act, 1882, quoted *supra*, pp. 117, 121.] There can be no summary diligence on bills or notes, either against the acceptors, drawers, or indorsers, unless the extended protest is registered within six months from the date of the bill, in the case of non-acceptance, or from the term of payment, in case of non-payment. In practice, the bill, when dishonoured, is noted, and usually allowed to lie over for a day or two, so as to admit of a settlement; but if ulterior proceedings for the recovery of the debt become necessary, [in order to entitle the holder to summary diligence,] the protest must be extended, and in order to preserve recourse against the drawer and indorsers, the bill must be noted on the third day of grace; [see *Days of Grace*.] As against the acceptor of the bill or note, it may be protested at any time within the six months; and hence, where, for example, a bill has been discounted at a bank, and dishonoured and noted by the notary of the bank, and thereupon retired from the bank by the drawer or indorser, it is competent for him, after the days of grace, and within the six months, to protest the bill, as against the acceptor, by means of another notary, and to record that protest, and expedite summary diligence. In such a case, although it is usual, it is not indispensable, that the notary who noted the bill at the bank should take or extend the protest against the acceptor. [See *Thomson on Bills*, 311; *Byles on Bills*, 214; *Menzies' Conv.* 367; *M. Bell's Conv.* i. 496.] See *Bill of Exchange. Protest*.

NOTORIETY. According to Stair, proof by notoriety is when the judge knows that the point to be proved is commonly known or acknowledged to be true, whether it be known to a whole country, or to a whole vicinity. Such proof is not elided by showing that some particular persons are ignorant of the fact; but it may be redargued by stronger positive proof, when proposed in due time. Allegations for husbands, wives, parents or children, are received without

proof of their character as such; unless pregnant proof to the contrary be offered, and instantly verified. But such proof to the contrary is competent in an action of reduction. In services of heirs, or of widows to their terce, the fact of relationship being "commonly holden and reputed" in the vicinity is sufficient, without proving the marriage of the father and mother, or of the husband and wife. But proof that such persons could not have been lawfully married, if instantly verified, would stop or annul the service, or would be competent in a reduction. What is done in presence of the judge in judgment is accounted notorious; but this rule does not hold *ex intervallo*, since a judge deciding upon his individual recollection would be acting the part of a witness. Stair and Erskine consider the judge's knowledge of the notoriety admissible proof of the fact; but Glassford entertains a contrary opinion; *Glassford*, 602. See also *Stair*, B. iv. tit. 45, § 4; *Ersk.* B. iv. tit. 2, § 33; *Tait on Evidence*, 432; [*Dickson on Evidence*, § 248.] And as to the notoriety of dissolution of partnership, and of subscription [per procuracion,] see *Thomson on Bills*, 166, 406. See also *Habit and Repute. Partnership*.

NOTOUR BANKRUPT. See *Bankruptcy*.

NOVA DEBITA. Debts newly or recently contracted, in contradistinction to old or prior debts. In questions as to fraudulent preferences, security or payment granted as a consideration for a debt presently contracted is not reducible, [unless there be proof of fraudulent contrivance. A disposition granted in relief of a cautionary obligation previously undertaken is not a *novum debitum*; *Thomas*, 19 Dec. 1866, 5 Macph. 198.] See *Bell's Com.* ii. 188, 205; *Thomson on Bills*, 515, 531; [*Goudy on Bankruptcy*, 41, 59, 94.] See *Bankruptcy*, p. 92 b.

NOVA DISSASINA; recent spulzie or ejection. *Skene, h. t.*

NOVALIA; is a term applied to lands newly improved or cultivated, and in particular to those lands which, having lain waste from time immemorial, had been brought into cultivation by the monks. There are certain lands exempted from the payment of stipend, and this exemption has been ascribed to their formerly having been *novalia*, from which no teinds had ever been drawn. *Ersk.* B. ii. tit. 10, § 14; *More's Notes on Stair*, ccxxxix.; *Bank.* B. ii. tit. 8, § 146; *Connell on Tithes*, ii. 5, 10. See *Teinds. Decimæ Inclusæ. Labores*.

NOVATION; is a technical expression,

signifying the exchange, with the creditor's consent, of one obligation for another; so as to make the second obligation come in the place of the first, and to be the only subsisting obligation against the debtor, both the original obligants remaining the same. This change is not to be presumed, and must therefore be precisely expressed; *e.g.*, where the second obligation bears to have been granted "in satisfaction" of the first. [As above defined, novation is distinguished from delegation, which is the substitution of one debtor for another. But delegation is a species of novation; and the latter term is generally used, in modern mercantile law, to denote what is more strictly called delegation. "When the creditor assents, at the debtor's request, to accept another person as his debtor in place of the first, this is called novation;" *Pollock on Contract*, 193. When there has been a change in the members of a firm, the fact that a creditor of the old firm accepts the new firm as his debtors, *e.g.*, by taking a bill from them, is not sufficient to discharge the members of the old firm. "The new obligation is, *in dubio*, to be accounted merely corroborative of the old;" *Ersk. infra cit.* See *Pollock & Co.* 6 Nov. 1863, 2 Macph. 14; *Mackintosh*, 10 Jan. 1872, 10 Macph. 304. In order that the former partners may be freed, the creditor must not only accept the liability of the new firm, but must in some way show his consent to discharge the old. The question is entirely one of fact and intention in each case. "What would constitute implied consent to the original debtor's discharge by novation, it is difficult to say, and our law appears to be more stringent in the application of the doctrine of novation than the law of England is. It seems, however, that novation should be held to have occurred where, in addition to accepting the obligation of a new debtor, there is such conduct on the part of the creditor as amounts to a holding out or representation, on which the original debtor might reasonably act, to the effect that he was discharged;" *Campbell's Merc. Law*, 197. See *Buchanan*, 1779, M. 3402; *Pearston*, 18 Dec. 1856, 19 D. 197; *Rolfe*, 1866, L.R. 1 P.C. App. 27. The case of novation by policy-holders of life assurance companies amalgamating with other companies is specially regulated by 35 & 36 Vict. c. 41, § 7; see *Insurance*, p. 571.] See *Ersk. B. iii. tit. 4, § 22*; *Stair*, B. i. tit. 18, § 8; *Bank. i. 495*; *Bell's Princ.* § 576; *Thomson on Bills*, 96, 385; [*M. Bell's Conv. i.*

[352; *Lindley on Partnership*, 239; *Buckley's Companies Acts*, 349; *Thring's Joint Stock Companies*, 622; *Pollock on Contract*, 210; *Addison on Contracts*, 1226. See *Delegation*.]

NOVELS. An institute of the Roman law was compiled under the direction of Justinian; and the subsequent constitutions of that emperor, and of a few of his successors, were called the *Novels*. See *Roman Law*.

NOVODAMUS. A charter of *novodamus* is the name given to a charter by progress which contains a clause of *novodamus*. This clause is subjoined to the dispositive clause; and by it the superior, whether the Crown or a subject, grants *de novo* the subjects, rights, or privileges therein described. Such a clause is usually inserted where the vassal is sensible of some defect or flaw in the former right, [or where it is desired to effect any change in the contract between superior and vassal. See *Mags. of Inverkeithing*, 30 Oct. 1874, 2 R. 48. This was also the correct form of proceeding,] when the vassal wished to get free of burdens chargeable upon the subject for casualties due to the superior; for a charter of *novodamus* is accounted in law an original right, which imports a discharge of all prior burdens. [This method, however, though still competent for such purpose, is superseded by the provisions of the Conveyancing Act of 1874, as to redemption and commutation of casualties. See *Casualties*.] It is not necessary that the subjects or rights conveyed by the clause of *novodamus* (as might be inferred from the term) should have been formerly invested in the vassal; for such a charter may be itself a first grant, as well as a renovation of a former grant; and every subject conveyed by it is held to be effectually conveyed to the vassal, although he may have had no antecedent title thereto in his person. But, on the other hand, a subject which has been formerly granted by the superior to the vassal, and which subject remains *in hæreditate jacente* of the vassal's heir, cannot be conveyed by the superior to any other vassal, by a charter of *novodamus* or otherwise, to the prejudice of the heir's right; although, no doubt, such a grant, even although *ultra vires* of the superior, might be the foundation of a prescriptive title. [See *Grieve*, 1760, M. 3022. When a Crown charter of *novodamus* is sought, 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, must first be obtained, and written

[evidence thereof produced to the Sheriff of Chancery; and the charter, when revised and engrossed, must be lodged with the Queen's and Lord Treasurer's Remembrancer, to be by him transmitted for the sign manual of Her Majesty, and signature of at least two Commissioners of the Treasury, or for the sign manual of the Prince, if the lands are held of him; 31 & 32 Vict. c. 101, § 88; 37 & 38 Vict. c. 94, § 57. See *Charters from the Crown*. Charters of *novodamus* are excepted from the general abolition of writs by progress, by 37 & 38 Vict. c. 94, § 4. As to the form of a charter of *novodamus*, see 31 & 32 Vict. c. 101, § 100. No charter of *novodamus* is challengeable on account of the lands not having previously, and in order to the granting thereof, been resigned into the hands of the superior; 50 & 51 Vict. c. 69, § 3.] See *Ersk.* B. ii. tit. 3, § 23; *Stair*, B. ii. tit. 3, § 15; *More's Notes*, clviii.; *Bank.* i. 546; *Bell's Illust.* § 800; [*Menzies' Conv.* 817; *M. Bell's Conv.* ii. 739, 759, 1150; *Jurid. Styles*, i. 354, 374, 417.] See also *Charter*.

NUDUM PACTUM. See *Pactum*.

NUISANCE; anything noxious or offensive, or which makes life uncomfortable. In England, nuisances are of two kinds—public and private. The former of these is punishable by fine, and the removal of the offensive object; while private nuisances are remedied by a civil action at the instance of the person aggrieved. Public nuisances are such as affect the public generally; they are offences against the order and economy of the State. Among these may be enumerated annoyances in highways, bridges, and public rivers, disorderly inns, gaming-houses, lotteries; and, in general, everything detrimental to the public, which, if injurious to an individual, would be actionable. In Scotland, there is no such recognised distinction between public and private nuisances. Whatever obstructs passage along the public ways: whatever is intolerably offensive to individuals in their dwelling-houses, by stench, noise, or indecency; [“whatever causes material discomfort and annoyance for the ordinary purposes of life to a man's house or to his property,”] is a nuisance; [*Fleming*, 1 March 1886, 13 R. (H.L.) 43.] But the absolute right which a man has to use his property as he thinks fit will not be limited merely because he causes inconvenience to his neighbours; there must be positive discomfort or danger. Circumstances have always great weight in determining whether an operation is a nuisance or not. It makes a great

difference when works are established in a populous neighbourhood, or in a place thinly or not at all inhabited; in a part of the town where similar works already exist; or in a situation where less cause of offence is required to make life uncomfortable. [See *St Helens Smelting Co.* 11 H.L. 642. It has been said that] one coming to a nuisance cannot complain of it; [but this plea would not now be sustained. “It is clear that whether the man went to the nuisance, or the nuisance came to the man, the rights are the same;” *per* Lord Halsbury, in *Fleming*, *supra*.] In the ordinary case, redress is obtained by presenting a note of suspension and interdict to the Lord Ordinary on the Bills, or by means of an ordinary action to have the nuisance removed or put down, if necessary, concluding for the damages which the pursuer has thereby sustained. [See *Fraser's Trs.* 7 Jan. 1879, 6 R. 451; *Shotts Iron Co.* 26 July 1882, 9 R. (H.L.) 78. The right of action may be lost by acquiescence or prescription. Statutory nuisances have been created by recent legislation, especially by the Public Health Act, 1867 (30 & 31 Vict. c. 101). This act defines statutory nuisances (§ 16), and gives the local authorities power to remove them, and to inflict penalties. See *Local Authority of Dumfries*, 14 March 1884, 11 R. 694. See also the Smoke Nuisance Acts, 20 & 21 Vict. c. 73; 24 & 25 Vict. c. 17; 28 & 29 Vict. c. 102; the Alkali Act, 44 & 45 Vict. c. 37; the Factory and Workshop Act, 41 Vict. c. 16, §§ 3, 4, 33–37; and the General Police Act of 1862.] See *Ersk.* B. ii. tit. 1, § 2; *Bell's Princ.* § 973; *Kames' Equity*, 32; [*Rankine on Land-Ownership*, 322; *Guthrie Smith on Damages*, 216; *Wood on Nuisances*; *Pollock on Torts*, 324; *Addison on Torts*, 361.] See *Damages*. [*Acquiescence*.]

NULLA SASINA, NULLA TERRA; a maxim importing that the proper test or evidence of property in land is sasine, or infestment therein. *Ersk.* B. ii. tit. 1, § 11.

NUNCUPATIVE TESTAMENT, or NUNCUPATIVE LEGACIES. A nuncupative or verbal nomination of an executor is ineffectual; but a nuncupative legacy is good to the extent of £100 Scots (£8, 6s. 8d. sterling). If it exceed that sum, it will be effectual to that extent if the legatee choose so to restrict it, but ineffectual as to the surplus. *Ersk.* B. iii. tit. 9, § 7; *Stair*, B. iii. tit. 8, § 34; *More's Notes*, cccxxxviii.; *Bank.* ii. 378; *Bell's Princ.* § 1869; *Tait*

on *Evidence*, 305; *Kames' Equity*, 203. See *Legacy. Evidence. Testament.*

NUNQUAM CONCLUDITUR IN FALSO; a maxim importing that, in actions of reduction-improbation on the head of falsehood or forgery, any relevant defence may be pleaded, or any additional proof brought forward, however late in the proceedings, provided decree has not been extracted. The application of this maxim has been very much limited in civil proceedings by the introduction of the new

forms of process. *Ersk. B. iv. tit. 4, § 85; Bank. i. 639.*

NUNQUAM PRÆSCRIBITUR IN FALSO. This maxim is applied to actions of reduction on the head of falsehood or forgery, the right to pursue which is not lost even by the lapse of the negative prescription of forty years; since this omission on the part of the person entitled to complain can never confer a right on one whose title is founded on a forgery. *Ersk. B. iii. tit. 7, § 12.*

O

OATH; an affirmation, or denial, or promise, attested by the name of God. The judicial oath taken by a witness is in these terms; "I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth, and nothing but the truth, in so far as I know, or as the same shall be asked at me." This is the formula used by a witness when he is put upon his oath; he stands, and, with his right hand held up, repeats those words after the judge, or commissioner empowered to administer the oath. With regard to evidence on oath, see *Evidence*, p. 409.

Certain oaths are required to be taken under certain circumstances to Government. [The Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), prescribes forms of the oath of allegiance, the official oath, and the judicial oath, and specifies in a schedule by what officers these oaths are to be taken. The oath of allegiance is in these terms:—"I do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, her heirs and successors, according to law. So help me God." The official oath runs thus:—"I do swear that I will well and truly serve Her Majesty Queen Victoria in the office of . . . So help me God." And the judicial oath is as follows:—"I do swear that I will well and truly serve our Sovereign Lady Queen Victoria in the office of . . . and I will do right, to all manner of people, after the laws and usages of this realm, without fear or favour, affection or illwill. So help me God." See also the Parliamentary Oaths Act, 1866 (29 Vict. c. 19).] By 5 & 6 Will. IV. c. 62, provision was made for the abolition of unnecessary oaths, [and the substitution, in many cases, of declarations. By the same act,] it is not lawful for any justice of peace, or other person, to ad-

minister, or cause to be administered, any oath, affidavit, or solemn affirmation, touching any matter of which he has no jurisdiction or cognisance by some statute in force at the time being. This provision is declared not to extend to oaths or affidavits touching the preservation of the peace, or the trial of offences, or any proceeding before either House of Parliament, or a committee, nor to any oath, affidavit, or affirmation, which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in that country; [and the taking of oaths by married women in judicial ratifications was excepted from the operation of this act, by 6 & 7 Will. IV. c. 43. The Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), enumerates previous enactments regarding oaths, which are no longer in force. By 1 & 2 Vict. c. 105, all persons are bound by an oath lawfully administered, "provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding."] Persons in Great Britain administering any oath, binding the taker to commit treason, murder, or any other capital crime, are declared guilty of felony without benefit of clergy; and persons taking such oaths are declared felons, transportable for life; 37 Geo. III. c. 123; 52 Geo. III. c. 104; [1 Vict. c. 91.

[By 51 & 52 Vict. c. 46, every person, upon objecting to be sworn, and stating as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath;

[and if any person making such affirmation shall wilfully, falsely, and corruptly affirm any matter or thing, which, if affirmed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury; § 1. See *Perjury*. Forms of affirmation, spoken and written, are prescribed by §§ 2, 4; see *Affirmation*. Where an oath has been duly administered and taken, the fact that the person to whom it was administered had no religious belief, shall not for any purpose affect the validity of the oath; § 3. In every statute passed since 1850, unless a contrary intention appears, the expressions "oath" and "affidavit," in the case of persons allowed for the time being to affirm or declare instead of swearing, include affirmation and declaration, and the expression "swear" in the like case, includes affirm and declare; 52 & 53 Vict. c. 63, § 3. The Commissioners for Oaths Act, 52 Vict. c. 10, consolidates enactments relating to administration of oaths. See *Dickson on Evidence*; *Best on Evidence*, 43, 163; *Taylor on Evidence*, 1172.]

[OATH DE FIDELI. See *De Fidei*.]

[OATH IN LITEM. See *Evidence*, p. 419.]

[OATH IN SUPPLEMENT. See *Evidence*, p. 418. *Semiplena Probatio*.]

[OATH OF CALUMNY. See *Calumny*, *Oath of*.]

[OATH OF OPINION. See *Opinion*, *Oath of*.]

[OATH OF VERITY AND OF CREDULITY. See *Evidence*, p. 419. *Sequestration*, *Opinion*, *Oath of*.]

[OATH ON REFERENCE. See *Evidence*, p. 415.]

OBEDIENTIAL OBLIGATIONS; as opposed to conventional obligations, are such as are incumbent on parties in consequence of the situation or relationship in which they are placed. An example of obligations of this class is the obligation upon parents to maintain their children. *Stair*, B. i. tit. 3, § 3; tit. 9, § 1; *Ersk.* B. iii. tit. 1, § 9.

[**OBITER DICTUM**; an incidental opinion given by a judge, in the course of his judgment, on any point not essential to the decision of the case under consideration. An *obiter dictum* has not the same weight as a judicial deliverance, which is given under sanction of the judge's oath.]

OBLATI; secular persons, who devoted themselves and their estates to some monas-

tery, into which they were admitted as a kind of lay-brothers.

OBLIGATION. An obligation is "a legal tie by which one is bound to pay or perform something to another." The debtor, whom the English term the obligor, is in Scotland termed the obligant or granter, and the creditor in the obligation (termed in England the obligee), the receiver or grantee. The difference between a real right and an obligation of this kind is, that the former gives a *jus in re*, or right of possession or recovery of the subject; the latter gives no more than a *jus ad rem*, or right of action against the person who has become bound; by which he may be compelled to implement his obligation, and, in terms of it, to pay the money, or perform the act to which he has bound himself. Obligations are divided into merely natural, merely civil, and mixed; but mixed obligations only are those recognised by the law. Thus, an obligation granted under the influence of force or fear is an obligation merely civil, but imposes no natural obligation on the granter, and hence the obligant may get free of his obligation. Thus, an obligation, in order to its being effectual, must be mixed, since he alone is a proper obligant *a quo invito aliquid exigi potest*. See *Natural Obligation*. Obligations are—

1. Pure. 2. To a certain day. 3. Conditional. (1.) A pure debt is one to which neither day nor condition is adjoined, and which may therefore be instantly demanded. (2.) Obligations *in diem*—that is, exigible against a certain day—constitute a debt from the first, because it is certain that the day will exist; *Dies statim credit sed non venit*. (3.) A conditional obligation, dependent on an event which may never happen, has no obligatory force until the condition be purified. It creates not a debt, but the hope only of a debt. See *Conditional Obligation*. An obligation may be constituted in favour of persons ignorant of the obligation (see *Jus Quesitum Tertio*); and where the obligation is granted for certain uses and purposes, this does not suspend the obligation until performance. When a person has become possessed of property belonging to another, even where he has purchased it from an illegal possessor, he is under an obligation to restore the property to the rightful owner. The only exception to this occurs in the case of property in bank-notes, which is constituted by possession. Bills also are, in this respect, subject to rules peculiar to themselves. An obligation *ob turpem causam*, is not actionable. See *Pactum Illicitum*. An obliga-

tion to indemnify arises where one person is made richer through the act of another, without the intention of making a donation. Thus, if a person build in *bona fides* on the ground of another, supposing it his own, the proprietor of the ground claiming the house would be obliged to pay the expense of the building, to the extent, at least, of the benefit conferred. See *Adjunction. Contexture*. Obligations also arise from delict; since every one who can distinguish between right and wrong incurs an obligation to repair any damage befalling his neighbour from a wrong committed by himself. This wrong may arise from blameable omission or neglect of duty. Where several have been guilty of the wrong, either as principals or accessaries, any one of them may be sued for the whole damage; and the damage being paid by any one of them, the payer seems to have an equitable claim for relief *pro rata* against the rest. See *Delict. Damages*. Verbal obligations include all obligations which have no particular name by which they may be distinguished, as—1. Promises, or unilateral engagements. 2. Agreements where two or more different parties contract mutual obligations to one another; and these are binding, with the exception—(1.) Of all obligations relative to heritage, which are ineffectual if not constituted by writing. (2.) This extends even to a lease or other temporary right to lands. (3.) A verbal obligation relative to heritage cannot be competently proved by the oath of the party, or, what is the same thing, would not be effectual though proved; for as long as writing is not adhibited, either party has a right to resile. (4.) An agreement relative to heritage, in the form of mutual missives, requires to be probative, otherwise either party may resile; but payment of part of the price of lands, in terms of a verbal bargain, will bar the *locus penitentie*, which would otherwise have been competent to the parties. See *Rei Interventus. Homologation*. There is also another exception in the case where the agreement, though verbal, is to restrict an universal infeftment in security to certain parts of the lands. See *Pacta Liberatoria*. Writing is required in bargains where it forms part of the agreement, or is *pars contractus*, as it is expressed, that writing shall intervene; and in such a case, until the agreement be reduced into writing, there is *locus penitentie*. Obligations by writing require certain solemnities; and a written deed, in the execution of which these solemnities have been observed, affords complete evidence of the obligation or contract; and if such a deed contain a

clause of registration, the obligation thereby contracted may be summarily enforced by legal diligence. See *Deeds, Execution of. Notary. Decree of Registration*. On the subject of obligations, it may be farther observed—1. That certain things are exempted from commerce by nature, by destination, or by statute, or by having acquired a *vitium reale*, which renders them unfit objects of commerce, as stolen goods. 2. No person can be legally bound to do what is impossible, or unlawful, or immoral. 3. Conditions may be annexed to obligations; and where these are impossible, the obligation is void, unless the granter lie under a natural tie to the grantee, in which case the obligation is held to be pure. See *Ersk. B. iii. tit. 1, § 2; tit. 3, § 84; Stair, B. i. passim; Bank. i. 92; Bell's Com. i. 312, 351; Bell's Princ. § 5; Kames' Equity, 127, 317, 384; [Anson on Contract, 7; Pollock on Contract, 3.] See Contract. Jus ad Rem. Jus Crediti. Labes Realis*.

OBLIGOR; the debtor in an obligation, —*obligee*, the creditor in an obligation.

OBREPTION. See *Subreption*.

OCCUPANCY; is, by the law of Scotland, a mode of acquiring the property of moveables which have continued in their original state,—as precious stones, wild beasts, fowls, or fishes; but where these have been appropriated the right of occupancy ceases. In no case does it reach to heritage. Though land, therefore, were possessed for ever so long a time, if the possessor has no written title, he can have acquired no property in the land. *Ersk. B. ii. tit. 1, § 10; Stair, B. ii. tit. 1, § 33; Bank. i. 85, 505; Bell's Princ. § 1287. See Property. [Whales.]*

OCHIERN; ogetharius; according to Skene, a name of dignity, a freeholder. *Skene, h. t.*

ECUMENICAL; general or universal. Ecumenical councils were general councils. *Bank. ii. 591.*

OFFENCE; an act contrary to and punishable by law. Offences are either by commission, or omission. See *Crime. Misdemeanour*.

OFFER. [An offer is an obligation, conditional on acceptance. It is presumed to be continued till acceptance; but if it does not amount to a promise, it may be recalled at any time before acceptance. See *Promise and Offer*.] A simple offer may, in ordinary cases, be accepted at any time, if not withdrawn. But in mercantile transactions, on account of the danger of delay, and the risk that the market may alter, there is an

implied condition in an offer to buy or sell that it be accepted immediately, or at least without undue delay, and while there is no change injurious to the offerer. If a time be fixed within which acceptance must be made, it must be attended to; [*Farries*, 1800, 4 Pat. 131.] An offer, bearing that an answer is expected in course of post, is not binding after the arrival of that post without an acceptance. A letter by the first mail-packet from abroad is held to be in course of post, though private ships may have sailed previously. An acceptance making a change upon the proposed bargain is equivalent to a new offer, and must, in its turn, be agreed to by the offerer; [*Wylie & Lochead*, 22 Oct. 1873, 1 R. 41.] An order for goods must either be complied with or rejected without delay; but in this case a formal acceptance is not necessary to bind the person sending the order. [If an offer to sell is made by post, and a letter of acceptance is posted, the contract is complete, and is not affected by subsequent delay on the part of the post-office; *Dunlop v. Higgins*, 24 Feb. 1848, 6 Bell's App. 195. Hence a letter retracting an offer must be not only posted, but delivered to the offeree, before acceptance, in order to prevent completion of the contract; *Thomson*, 12 July 1855, 18 D. 1; *Css. Dunmore*, 15 Dec. 1830, 9 S. 190; *Byrne*, 1880, 5 C.P.D. 344 (but contrast *Dickinson*, 1876, 2 Ch. D. 463). The doctrine that despatch of the acceptance, no recall of the offer having been communicated, completes the contract, was settled in the English courts, after considerable fluctuation, by *Household Fire Insurance Co.* 1879, 4 Ex. D. 216. The theory on which this view rests is that the offerer, in posting his letter, makes the post-office his agent, and that the offer continues to be made during every instant while the letter is travelling. From the judgment of the Court of Appeal in *Household Fire Ins. Co.*, Lord Bramwell dissented, holding that the acceptance should be not only posted, but received, to bind the offerer; and in the recent Scotch case of *Mason*, 2 June 1882, 9 R. 883, Lord Shand indicated his concurrence with Lord Bramwell's opinion. Either view involves logical difficulties; but that which the English courts have ultimately adopted is in accordance with the judgments of the House of Lords in *Dunlop*, and of the Court of Session in *Thomson*, *supra*; and it is manifestly expedient that one rule should be fixed for the United Kingdom. "The practical conclusion seems to be, that every prudent man who makes

[an offer of any importance by letter should expressly make it conditional on his actual receipt of an acceptance within some definite time;"] *Pollock on Contract*, 37. An offer is revoked by death or incapacity before acceptance. See *Stair*, B. i. tit. 3, § 9; tit. 10, §§ 3 *et seq.*; *Ersk.* B. iii. tit. 3, § 88; *Bell's Com.* i. 343; *Bell's Princ.* § 72; *Bell on Sale*, 32; *Benjamin on Sale*, 42; *Addison on Contracts*, 18; *Pollock on Contract*, 4, 640; *Anson on Contract*, 11. See *Acceptance. Advertisement. Obligation. Locus Penitentie.*]

OFFER; *at a public roup or sale.* Such offers are usually made with reference to articles of roup, or conditions of sale, which regulate the reciprocal rights of exposor and offerer. And in connection with this subject the question of chief importance relates to the contingent obligation which, in sales of heritage by articles of roup, the offerer usually undertakes to take the subject, failing the higher offerer. See *Clause of Devolution.* [*Auction.*]

OFFICE. An office is a right to exercise a public or private employment, and to take the fees and emoluments belonging thereto. In Scotland all heritable offices may be voluntarily sold, or they may be adjudged for debt; and so also may all patrimonial offices descendible to heirs and assignees. But offices in which there is a personal trust reposed in the functionary are not saleable nor attachable for debt. By 49 Geo. III. c. 126, the sale of offices of public trust, and particularly of those offices connected with the administration of justice, is prohibited in Scotland; and the prohibition to sell offices and deputations is by the same statute extended to all offices in the gift of the Crown, and in the public departments of Government in the United Kingdom, or in the colonies—excepting certain offices in the palace, and also excepting sales of commissions in the army. The right of appointing deputies, upon the same principle, cannot be made a source of gain, or adjudged, or otherwise directly attached by creditors, where the office is of the nature of a public trust, or connected with the administration of justice. But the salary or profits of an office are attachable by creditors, with the exception, perhaps, of such an allowance as may be requisite for the decent discharge of the duties of the office. By the law of Scotland the salary of a judge, the stipend of a clergyman, and the pay or half-pay of a military officer, are held to be attachable to a certain extent; and the arrears, whether

of salary or of pay, are attachable to the whole amount. All arrangements, generally speaking, whereby the salary of a public officer is burdened with the payment of a sum in return for influence exerted in procuring the nomination, or as a consideration to another candidate for withdrawing from the contest, or the like, are *pacta illicita*, which cannot be enforced in a court of law. But an agreement by an officer in bad health to share the emoluments with an assistant, seems to be effectual. *Stair*, B. i. tit. 12, § 16; *Ersk.* B. ii. tit. 12, § 7; B. iii. tit. 6, § 7; *Bell's Princ.* § 36 (5); *Brown on Sale*, 115, 123; [*Mackay's Prac.* i. 161.] See *Cautionry. Pactum Illicitum. [Salaries. Munus Publicum.]*

OFFICERS OF STATE. The chief Officers of State in Scotland are the Keepers of the Great and Privy Seals, the Lord Clerk-Register, the Lord Justice-Clerk, and the Lord Advocate. The Officers of State, when called in any process for the interest of the Crown, must be cited as forth of the kingdom, and likewise at the Exchequer Chambers. A proper warrant must be inserted in the summons for that purpose. [They need not be mentioned by their individual names; *Lockhart*, 1752, M. 11993.] See *Ersk.* B. i. tit. 3, § 8; *Jurid. Styles* (2d edit.), iii. 7, 19, 971-5; [*Shand's Prac.* i. 240; also Lord Medwyn's opinion in *L. Dunglas*, 24 Dec. 1836, 15 S. 314.] See *Citation. Edictal Citation.*

OFFICIAL; in the canon law, was an ecclesiastical judge, appointed by a bishop, chapter, or abbot, with charge of the spiritual jurisdiction of the diocese. An official is now a deputy appointed by an archdeacon as his assistant, and who sits as judge in the archdeacon's court. *Tomlins' Dict. h. t.*

OFFICIUM NEMINI DEBET ESSE DAMNOSUM; a maxim importing that one is entitled to be indemnified, or at least that he ought not to be subjected to loss, by the discharge of an office or duty. Thus a mandatory is entitled to demand from the mandant all reasonable expenses disbursed by him *bona fide*, and the damage sustained by him in the execution of the mandate, even though the management should not have been prosperous or successful. *Ersk.* B. iii. tit. 3, § 38.

OKER; is the same with usury, or the taking of illegal interest for money. See *Usury.*

OLD AND NEW EXTENT. See *Extent.*

OLD WITNESSES. The depositions of

aged witnesses—*i.e.*, who are upwards of seventy years of age—may in certain circumstances be taken *in initio litis*, to lie *in retentis* in case of their death before the cause comes to be tried. [See *Commission for taking Proof.*]

OLERON, Laws of. The laws of King Richard I. of England, relative to maritime affairs, are called the laws of Oleron, because they were made by him when he was at Oleron, which is an island lying in the Bay of *Aquitain*, at the mouth of the River *Charente*. These laws are recorded in the Black Book of the Admiralty, and are accounted the most excellent digest of sea laws in the world. [Continental jurists do not admit that Richard Cœur de Lion was their author. They were first promulgated at all events some time in the twelfth century.] See *Bell's Com.* i. 548; *Tomlins' Dict. h. t.*

OMISSA ET MALE APPRETIATA.

When an executor confirms and omits in the inventory part of the defunct's effects, he may have the mistake corrected. But if he do not take steps for this purpose, any one interested in the succession may apply, either to have the executor compelled to confirm the omission, or himself to confirm it. Ordinary executors *ad omissa et male appretiata* ought to call the principal executor to their confirmation, or it will be null; but this rule does not hold in the case of executors-creditors. Every person requiring confirmation is bound, upon oath, to confirm the whole moveable estate known at the time; it being lawful to eik to such confirmation any part of the estate which may afterwards be discovered; 4 Geo. IV. c. 98, § 3. In the case of an innocent omission an additional inventory may be lodged; but it must specify the amount of the whole succession, and must be written on a stamp corresponding to the whole amount; and the solicitor of stamps is bound to repay the original duty thus twice paid. The distinction which subsists between the *omissa* and the *male appretiata*, and which was formerly of more importance, is that the former term applies to funds or effects actually omitted in the confirmation, the latter to effects or debts stated at an undervalue. From the precautions now taken to ascertain the value of the known funds, an important case of mal-appreciation is unlikely to occur; and Mr More (*Notes on Stair*, cccliv.) holds that confirmation *ad male appretiata* is now incompetent. [See *Lee*, 17 May 1816, F.C.; *Smith*, 27 June 1862, 24 D. 1142. Next of kin of a

[deceased intestate, alleging that his executor-dative has intromitted with part of the estate not included in the inventory, do not require to confirm *ad omitta*, but may sue the executor as creditors, in an action of count and reckoning; *Smith*, 24 June 1880, 7 R. 1013.] See *Stair*, B. iii. tit. 8, § 62; *Bank*. ii. 393; *Bell's Com.* ii. 81; *Jurid. Styles*, ii. 661; [*Ersk.* B. iii. tit. 9, § 36; *Bell's Princ.* § 1897; *M. Bell's Conv.* ii. 1129; *M'Laren on Wills*, ii. § 1683; *Currie on Confirmation of Executors*, 175.] See *Executor. Confirmation. Inventory Duty.* [Edict.]

ONERIS FERENDI; a Roman law urban servitude, importing a right in the dominant proprietor to rest the weight of his house on the servient proprietor's wall or pillar. *Bell's Princ.* § 1003. See *Support. Servitude. Common Interest.*

ONEROUS DEEDS; are deeds granted for valuable considerations. See *Consideration.*

ONUS PROBANDI; the burden of proving. The general rule is, that he who affirms must prove his affirmation. But this rule, in its application, frequently leads to questions of considerable nicety and of great importance, since the throwing the burden of the proof on one party is, generally speaking, tantamount to declaring that the right is established in his adversary. *Tait on Evidence*, 1; [*Dickson on Evidence*, § 24.] See *Evidence.*

OPEN CHARTER; a charter from the Crown, or from a subject, containing a precept of sasine which had not been executed. The advantage of such a charter was, that in the event of a sale the unexecuted precept might be assigned to the purchaser, and the expense of an entry with the superior saved during the purchaser's life, or during the life of the party who should first take infeftment on the precept. See *Charter. Confirmation. Disposition.*

OPEN DOORS. There are letters passing the signet, called *Letters of Open Doors*, which are requisite where goods are to be poinded, which are deposited in lockfast places. The messenger returns an execution, setting forth the fact that he cannot obtain admission; and on that an application by bill to the Lord Ordinary on the Bills may be made for a warrant for *Letters of Open Doors*, which authorise the messenger to break open the doors of those places in which the goods of the debtor are lodged. Where no violence is necessary, as where the removal of some trees which block up the entrance to a woodyard would procure

admittance, no letters of open doors are required; *Steven*, 1769, M. 10,539. Where the messenger or other officer who executes a poinding has got entrance into the house or other premises, he may force open presses or chests contained therein, in order to poind their contents, without any special warrant. [Warrant to open shut and lockfast places is included in the form of diligence introduced by 1 & 2 Vict. c. 114.] See *Stair*, B. iv. tit. 47, § 40; *More's Notes*, ccccxii.; *Ersk.* B. iii. tit. 6, § 25; *Bank*. iii. 25, 8; *Jurid. Styles*, iii. 373; *Ross's Lect.* i. 443. See *Caption.*

OPEN POLICY. In marine insurance, an open policy is a policy where the amount of the interest of the insured is not fixed, but is left to be proved by the insured in the event of a loss; whereas in a valued policy, a specified value is put on the ship or goods insured, to save the necessity of proof, in the case of a total loss. See *Insurance*, p. 557.

OPINION, OATH OF. In proving mercantile usage, as affecting the construction of a contract, the witnesses' opinion is not sufficient. It is from a judge only, and in matter of law, that opinion can be received by a jury; other persons speak only to facts. But in some cases, tradesmen or scientific persons are allowed to swear, not to a positive fact, but to what they believe to be a fact. [See *Dickson on Evidence*, § 391.] In such cases, perjury is not in general committed by a false oath of opinion, or pure belief, or credulity. But it is committed if it can be shown that the party did not believe what he swore he believed; or if the oath is only in appearance one of opinion. *Bell's Com.* i. 653; *Hume*, i. 375; *Alison's Princ.* 468; [*Macdonald*, 208, 486.] See *Perjury.*

[**OPTION.** See *Alternatives.*]

ORA; metal, such as brass or gold. *Skene, h. t.*

ORCHARD. The trees of an orchard fall under the act for preserving planting: 1698, c. 16; *Robertson*, 1743, M. 10,484. The breaking of orchards is an offence cognisable by the sheriff. *Ersk.* B. i. tit. 4, § 4; *Hutch. Justice of Peace*, ii. 445; *Bell on Leases*, i. 351. See *Planting and Inclosing.*

ORDER OF REDEMPTION. A wadset is a conveyance of land or other heritage in return for an advance of money, whereby a temporary exchange is made; the proprietor of the land enjoying the use of the money, and the proprietor of the money the use of the land in return, with power to either

party to put an end to the transaction. When the owner of the subject is desirous of repaying the advanced money and redeeming his lands, it is by the order of redemption that it is done—a form explained under the article *Wadset*. *Ersk.* B. ii. tit. 8, § 17; tit. 12, § 38.

ORDINARY; in England, a bishop, or other person having peculiar or original ecclesiastical jurisdiction in a diocese, in contradistinction to extraordinary or delegated jurisdiction. *Tomlins' Dict. h. t.*

ORDINARY, LORD. In the Court of Session, the judge before whom a cause depends in the Outer House is called the Lord Ordinary in that cause. And the judge who officiates in the Bill-Chamber is called the Lord Ordinary on the Bills. [*Mackay's Prac.* i. 52.] See *Session, Court of. Inner House. Outer House. Bill-Chamber.*

ORDINARY ENDURANCE. A lease of ordinary endurance is a lease of nineteen or twenty-one years, as contradistinguished from a lease of thirty-eight (twice nineteen), or fifty-seven (thrice nineteen) years, or for any period exceeding nineteen or twenty-one years. *Bell on Leases*, i. 215.

ORDINATION. See *Minister*.

ORDNANCE, BOARD OF. [By 19 & 20 Vict. c. 117, the whole powers, estates, &c., of the Board of Ordnance were transferred to the Secretary of State for War. See 5 & 6 Vict. c. 94.]

ORIGELLUM; a habergeon edged with mailzie, of a yellow colour like gold. *Skene, h. t.*

OUTER HOUSE; the name given to the great hall of the Parliament House in Edinburgh, in which the Lords Ordinary of the Court of Session [formerly] sat as single judges to hear causes. The term is used colloquially, as expressive of the business done there, in contradistinction to the *Inner House*, the name given to the chambers in which the First and Second Divisions of the Court of Session hold their sittings. See *Session, Court of. Inner House.*

OUTLAWRY or FUGITATION; is a sentence pronounced in the supreme criminal court in the absence of the panel at the calling of the diet—that is, the day on which he is summoned to appear and stand his trial. [Such absence is invariably followed by sentence of fugitation, unless strong evidence is produced of *bona fide* inability to attend; *Alcock*, 23 April 1856, 2 *Irv.* 615.] The effect of this sentence is a forfeiture of the panel's

person in law, so that he cannot bear testimony on any occasion, nor act as a jurymen, nor hold any place of trust, nor even pursue or defend in any civil or criminal process, nor claim any benefit of the law. This sentence is a warrant for denouncing him a rebel, the consequence of which is the escheat of his moveable estate; and if he shall remain a rebel for the space of a year, the profits of his heritage become forfeited to his superior for his lifetime. The prosecutor may also obtain letters of caption against the panel, and imprison him if he is to be found within the kingdom; and being thus imprisoned, he is not bailable, whatever the nature of the offence may have been; for, as an outlaw, he has no benefit from the law. The outlawed person may appear in the criminal court, and apply to be reponed against the sentence of outlawry. [See *Webster*, 29 Nov. 1858, 3 *Irv.* 285; *Hinchy*, 20 July 1864, 4 *Irv.* 559.] Whether he may be tried on the original libel is not so clear. [A sentence of outlawry does not deprive a party of the right of absolute disposal of the fee of his property; *Macrae*, 25 June 1839, *M'L. & Rob.* 645.] See *Stair*, B. iv. tit. 3, § 30; tit. 38, § 27; *Ersk.* B. iii. tit. 7, § 37; B. iv. tit. 4, § 83; *Bank.* ii. 250; *Hume*, ii. 125, 270; *Ross's Lect.* i. 244, 322; *Alison's Prac.* 349; [*Macdonald*, 458, 463; *Jurid. Styles*, iii. 888.] See *Diet. Denunciation. [Criminal Prosecution.]*

OUTSIDE PLENISHING; is the moveables without doors, as horses, cows, oxen, ploughs, harrows, carts, and other implements of husbandry; but fungibles, as corn, hay, &c., do not fall under the description of plenishing. *Ersk.* B. iii. tit. 8, § 18. See *Heirship Moveables*.

OUTSUCKEN MULTURE. See *Multures*.

OVERSEERS; in England, are the public officers elected to provide for the poor in every parish. [It is their duty to levy rates for the relief of the poor, and also, in some cases, to administer the rates so levied. They also make out lists of voters for parliamentary and municipal elections. The overseers in each parish consist of the churchwardens, and two, three, or four householders appointed yearly by two justices. *Sweet's Law Dict.*]

OVERSMAN. An oversman is an umpire appointed by a submission to decide where two arbiters have differed in opinion, or he is named by the arbiters themselves, under powers given them by the submission. In either case, it ought to appear that the

arbiters have accepted of the submission, and differed in opinion; and the nomination of an oversman by arbiters ought to be executed according to the statutory solemnities; although the court have sustained the nomination of an oversman in a case in which the requisites of the stat. 1681, c. 5, were not attended to; *Stewart*, 1804, M. 16,911. When an oversman has been appointed, it is he alone who pronounces the decree. But where, without a devolution subscribed by the parties, a person to whom some particular point is referred for his opinion assumes the character of oversman, a decree pronounced solely by him is inept; *Telfer*, 31 Jan. 1823, 2 S. 167. A decret-arbital pronounced by arbiters themselves is good, where, with powers to name an oversman, they have done so, but before any difference of opinion; *Brysson*, 10 June 1823, 2 S. 382. It has been found in England, that the appointment of an umpire should be an act of the judgment, and that an appointment by drawing lots or tossing up for the choice is inept; *Young*, 3 B. & C. 407, 5 Dowl. & Ry. 263; *Cassell*, 9 B. & C. 624. [But in *Smith*, 15 July 1887, 14 R. 931, the selection of an oversman by lot was held valid; the decision being thus made between two persons who were, in the opinion of both arbiters, equally eligible. A shareholder in an unincorporated company which is a party to the reference, cannot be oversman; *ib.* When arbiters, agreeing on certain points, devolve the decision of other points on an oversman, the latter can prorogate the submission only so far as relates to what is referred to him; *Lang*, 8 May 1855, 2 Macq. 93.] See the forms of a reference to an oversman, and of a decret-arbital pronounced by an oversman, *Jurid. Styles*, ii. 237, 243. [See also *Bell on Arbitration*, 138, 235; *M. Bell's Conv. i.* 383.] See *Arbitration*.

OVERT ACT; in English law, an open act, which by law must be clearly proved. *Tomlins' Dict. h. t.*

OVERTURES. In church law language, an overture is a proposal to make a new general law, or to repeal an old one; to declare the law; to enjoin the observance of former enactments; or generally, to take any measure falling within the legislative or executive functions of the General Assembly. No new law can be enacted by

the General Assembly, nor can an existing one be rescinded, without the consent of a majority of the presbyteries. [See *Acts of Assembly*.] It is competent for any member of presbytery to move the transmission of an overture on any particular subject to a superior court. It is usual for him to give notice of his intention to do so at a previous meeting. If the overture is adopted by the presbytery, it is transmitted in the form of an extract from the minute. When an overture is transmitted to the synod, some member of synod is heard in support of it, and he generally makes a motion for its transmission to the Assembly for the disposal of it, or otherwise, as the case may be. See *Gillan's Acts of Assembly*, 184; *Hill's Church Prac.* 82; [*Cook's Styles*, 264; *Mair's Church Laws*, 35, 107.] See *Church Judicatories*.

OXEN, HOUGHING OF. By the statutes 1581, c. 110, and 1587, c. 83, the killing or houghing of oxen, horses, or other cattle, is punishable as theft, with the pains of death. *Ersk. B. iv. tit. 4, § 62.*

OXGATE OF LAND. See *Aratrum Terræ. Ploughgate*.

OYER AND TERMINER; in English law, a commission directed to the judges and other gentlemen of the county to which it is issued, by virtue of which they have power to hear and determine treasons and all kinds of felonies and trespasses; *Tomlins' Dict.* A commission of *Oyer and Terminer* may be issued by the Queen for trying treason in Scotland, under 7 Anne, c. 21, provided three of the Lords of Justiciary be in such commission. At the desire of the Lord Advocate, and upon a writ of *certiorari* under the great seal of the United Kingdoms, any indictment of treason depending before justices of *Oyer and Terminer*, or before the judges in the circuit courts, may be removed for trial into the Court of Justiciary. *Hume*, i. 536; *Ersk. B. iv. tit. 4, § 84.* See *Treason*.

OYESS; the term employed by a messenger-at-arms in denouncing a person rebel, and on the occasion of other proclamations, in order to call the attention of the people. The word is a corruption from the French word *oyez!* (the old imperative of *ouïr*,) hark! or hear ye! *Stair*, B. iii. tit. 3, § 8; *Ersk. B. ii. tit. 5, § 56*; *Bank. ii.* 249; *Ross's Lect. i.* 307.

[**OYSTER**. See *Sea Fisheries*.]