something said or done in the course of a process, or before an action has been brought into court, but which is not intended to form any part of the record, or of the judicial pleadings or admissions of the parties, such as communings or correspondence, having in view a private settlement of the matter in dispute, or the like. Extrajudicial concessions or admissions made by a party in the course of communications for a compromise, or in order to avoid a lawsuit cannot be competently founded upon, or proved against him judicially, where the object of the negotiation has failed; *Smythe*, 20 May 1809, F.C. [Neither was it, until recently, competent to prove an extrajudicial statement by a witness, different from his judicial statement, in order to discredit him. But this rule was altered by 15 Vict. c. 27, § 3; see *Evidence*, p. 413 *b*.]

EXTRAORDINARY LORDS OF SESSION. After the original institution of the College of Justice in 1537, it continued to be the practice of the Scottish Kings, in addition to the fifteen ordinary Lords of Session, or Senators of the College of Justice, to nominate other Lords of the King's Council, as extraordinary Lords of Session. The number of those extraordinary Lords was limited, by the 1537, c. 40, to "*three or four;*" but the Kings, greatly to the prejudice of the adminstration of justice, frequently nominated seven or eight. This abuse, together with the power of appointing extraordinary Lords of Session, was put an end to by 10 Geo. I. c. 18. See *Kames' Stat. Law Abridg. h. t.; More's Notes on Stair*, ccclxvi.; *Ersk.* B. i. tit. 3, § 16; [*Mackay's Prac.* i. 27.] See *College of Justice.*

[**EXTRAVAGANTES.** See *Canon Law.*]

EXTRINSIC. See *Evidence*, p. 416.

F

FACILITY. A person is said to be of a facile disposition, when, although not a fit subject for cognition as an idiot, he is easily imposed upon, and liable to be induced to do deeds to his own prejudice. And the Court of Session, either *ex officio*, when in the course of an action they discover a party to be of that disposition, or on the application of his heir or next of kin, will interdict him; thereby preventing him from granting deeds, unless with the consent of the interdictors whom they appoint. A person, who is conscious of such an infirmity, may also voluntarily place himself under interdiction. See *Interdiction.* A facile disposition, though it may authorise the interference of the court, is not of itself a ground of reduction of any transaction into which a facile person may have entered; nor has interdiction any retrospect. In order, therefore, to support a reduction of the deed of a facile person, there must be evidence of circumvention and of imposition in the transaction, as well as of facility in the party. But, "where lesion in the deed, and facility in the granter concur, the most slender circumstances of fraud or circumvention are sufficient to set it aside." [In order to reduce a deed on the ground of facility and circumvention, there must be correspondence between the facility and the kind of arts practised against the granter; *Morrison*, 27 Feb. 1862, 24 D. 625. It is not necessary to establish general facility on the part of the granter, but only facility in relation to the fraud and circumvention used; *Munro*, 18 June 1874, 1 R. 1039. See also *Clunie*, 11 March 1854, 17 D. 15; *M'Culloch*, 3 Dec. 1857, 20 D. 206; *Baird*, 6 July 1858, 20 D. 1220; *Love*, 16 Dec. 1870, 9 Macph. 291.] See *Ersk.* B. iv. tit. 1, § 27; B. i. tit. 7, § 53; *Stair*, B. i. tit. 9, § 8; *More's Notes*, liv.; *Bank.* i. 191; *Bell's Com.* i. 136; *Kames' Equity*, 67; *Bell's Princ.* §§ 13, 14, 2113, 2123; [*Mackay's Prac.* ii. 138. See *Fraud. Circumvention. Insanity.*]

FACTOR; a person employed to do business for another for hire. Factory, which, in modern times, has almost entirely superseded the *Mandate* of the Roman law, differs from that contract in not being gratuitous. ["A factor is distinguished from a merchant in this, that a merchant buys and sells for his own direct mercantile profit; a factor only buys or sells on commission. Again, a factor is distinguished from a broker by being entrusted with the possession and apparent ownership, as well as with the management and disposal, of the property of the principal. He is distinguished from an agent, in his authority being extended to the management of all

[the principal's affairs in the place where he resides, or in a particular department. He is distinguished from an institor, in being in point of law a person separate from his principal; whereas an institor (at least where that term is confined to shop-keepers and clerks) is assimilated in all respects to his master, so far as relates to his transactions in that character;" *Bell's Com.* i. 506.] Factory is either express or implied; special or general. The factor, unless he can plead the excuse of illness or some inevitable accident, is liable in damages for not performing his engagement. He must account to his principal for his administration, and pay over to him all that he may have received in his name. In remitting money the factor must follow his principal's directions, or take the risk. In absence of express directions he must remit through a chartered bank, or a banker in good credit, or follow the mercantile or local usage. If he pay the money into a bank on his own account, it perishes to him on the banker's failure; and he becomes liable for the money if he put his own name as drawer or indorser on the bill by which it is sent. An agent or factor is not entitled to delegate his powers; although he may employ a third party in any ministerial capacity which he cannot fulfil himself. If, therefore, without permission, he delegate his power, he is liable for the competency and solvency of the delegate. But if he has received permission to delegate, he is only liable by his own fault or fraud in the choice. A factor binds his employer to any engagement which he contracts, within his powers. Where these powers are expressly limited, the limits are absolute, both as regards the right which the factor has to demand from the principal relief of his obligations, and as regards the right of third parties to call upon the principal for implement. But, in the latter case, the limits will have no effect, if they are expressed in a private stipulation between the principal and agent, or if the commission is of such a nature that it is not usual for parties dealing with the factor to examine the extent of his powers. The powers, too, of the factor in relation both to his employer and the public, are frequently extended or restricted by the usage of trade. Power is implied to perform any act necessary for the accomplishment of the engagement; and a factor at a distance, and in difficult circumstances, is entitled to exercise a sound discretion. Third parties are entitled to deal with the factor as with a principal. [But where one [contracts *factorio nomine* for a disclosed principal, he binds his principal alone, and not himself, unless the principal is abroad; see *Principal and Agent*. When the factor has sold in his own name, concealing the principal, the buyer may set off a debt due to him by the factor against the principal's demand for the price. As to the factor's right of retention against the principal, see *Retention*. A factor has power, at common law, to pledge the goods of his principal. This power did not exist in England, till introduced by the Factors Acts. These are 4 Geo. IV. c. 83, 6 Geo. IV. c. 94, 5 & 6 Vict. c. 39, and 40 & 41 Vict. c. 39. By § 1 of 5 & 6 Vict. c. 39, "any agent intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security, *bona fide* made by any person with such agent so intrusted; . . . . . and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent." And by § 2 of 40 & 41 Vict. c. 39, "where any agent or person has been intrusted with and continues in the possession of any goods, or documents of title to goods, ... any revocation of his intrustment or agency shall not prejudice or affect the title or rights of any other person who, without notice of such revocation, purchases such goods, or makes advances upon the faith or security of such goods or documents." See *Stephens' Com.* ii. 82. These acts apply to Scotland; *Vickers*, 20 March 1871, 9 Macph. (H.L.) 65.] The risk of the goods, &c., in the factor's possession, is, by the general rule, with the employer, unless fault (*culpa levis*) be established against the factor. Factory is recalled by revocation if done *tempestive*, though that may not be sufficient to reach third parties, unless accompanied by notice. It also falls by the death of the principal; but transactions already begun may go on, and those done in ignorance of the death are effectual. A factor may renounce, provided things are entire. Revocation is implied by the employer's appointing a new agent to do the same act. The mandate subsists notwithstanding the mandant's supervening insanity. Where goods are consigned generally for sale, a mandate is implied, empowering

the consignee to sell them at his discretion, as to price and time; and if the consignee have made, or got, advances on the goods, his mandate to sell is held to subsist, and to be assignable, till he is reimbursed. A mandate is implied by the principal's acquiescence in the factor's acts. Factors, duly empowered, may grant leases, which bind the constituents in the same manner as if granted by the constituents themselves. But factors with common powers cannot grant rental rights; nor can they pursue removing without express powers. See *Bell's Com.* i. 278, 505; *Bell's Princ.* §§ 216, [1364, 1417, 1450; *Ersk.* B. iii. tit. 3, § 31; *Mackay's Prac.* i. 348;] *Hunter's Landlord and Tenant*, i. 187; ii. 22. See *Mandate. Principal and Agent*, and authorities there cited. [As to judicial factors, see *Judicial Factors.*]

FACTORIES. [The law relating to factories and workshops was consolidated and amended by the act 41 Vict. c. 16. Part I. of the act contains general sanitary provisions (§§ 3–4); provisions regulating the fencing of machinery, &c. (§§ 5–9); employment and meal hours (§§ 10–21); holidays (§ 22); education of children (§§ 23–26); certificates of fitness for employment (§§ 27–30); accidents (§§ 31–32). Part II. contains special provisions relating to particular classes of factories and workshops (§§ 33–66). Part III. deals with inspection (§§ 67–70); certifying surgeons (§§ 71–74); miscellaneous administration (§§ 75–80); penalties (§§ 81–88); legal proceedings (§§ 89–92). Part IV. contains definitions, exemptions, &c. (§§ 93–107). See the act annotated in *Fraser on Master and Servant;* see also *Guthrie Smith on Damages*, 372. The act has been amended by 46 & 47 Vict. c. 53, and 51 & 52 Vict. c. 22.]

[**FACTORY AND COMMISSION.** A factory is a deed whereby one person empowers another to exercise a right or rights in his place. Such a deed is also called a commission, when the powers devolved are of higher importance. The deed may be either (1) general, conferring only ordinary powers of administration, (2) special, authorising only a specified act or acts, or (3) general and special, conferring both general powers, and also special powers which would not otherwise have been included. See *Menzies' Conv.* 472; *M. Bell's Conv.* i. 446; *Craigie's Digest.* (Mov.), 188; *Jurid. Styles*, ii. 31. See *Factor. Mandate.*]

FACTUM PRÆSTANDUM. An obligation *ad factum præstandum*, is an obligation to perform an act. The rule of the civil law is, that on the debtor's refusing to implement his bargain, the creditor is only entitled to sue for damages, on the maxim, *Nemo cogi potest præcise ad factum, sed in id tantum quod interest.* The law of Scotland is not quite fixed upon this point, some authorities adhering to the Roman law doctrine; while Stair (B. i. tit. 17, § 16) holds that, in equity, the creditor should have the alternative of compelling performance; and Bell (*Com.* i. 352) says that the specific implement of bonds *ad facta præstanda*, may be enforced by the personal diligence of imprisonment. [See also *Ersk.* B. ii. tit. 5, § 59; B. i. tit. 6, § 19; B. i. tit. 7, § 24; B. iii. tit. 3, § 86.] There are several decisions establishing the principle, that servants refusing to work may be imprisoned on a summary warrant. [But this matter is now regulated by certain statutes, which visit such refusal with penal consequences; 4 Geo. IV. c. 34; 30 & 31 Vict. c. 141. See *Master and Servant.*] In certain circumstances, where a party fails or refuses to perform an act to which he is bound, the want of his voluntary act may be judicially supplied. Thus, when a party under an obligation to convey land, refuses to grant a voluntary title, the want of it may be supplied by adjudication in implement. See *Adjudication in Implement.* [See also 31 & 32 Vict. c. 100, § 89.] When performance becomes impossible, damages are substituted, on the maxim, *Locum facti impræstabilis subit damnum et interesse;* [and if performance have been fraudulently or wilfully rendered impossible, the debtor is liable, not only for the direct, but also for the consequential damages.] Joint obligants for the performance of a fact are bound *singuli in solidum;* [and the mere resolving into a claim of damages does not alter the obligation *in solidum* into one *pro rata.* See *Co-obligant.*] Cautioners *ad factum præstandum* can in no instance be sued till the principal debtor has been discussed. A debtor *ad factum præstandum* is denied the benefit of the act of grace, the privilege of sanctuary, and the *cessio bonorum;* [and such debtor is still liable to apprehension and imprisonment, notwithstanding the general abolition of imprisonment for debt; 43 & 44 Vict. c. 34, § 4; *Mackenzie*, 12 June 1883, 10 R. 1147. See *Imprisonment.* An obligation *ad factum præstandum* may be made a real burden on lands; *Edmonstone*, 16 Oct. 1888, 16 R. 1.] See *Ersk.* B. iii. tit. 3, § 62; *Bell's Com.* ii. 446, 462; *Bell's Princ.* §§ 29, 33,

58, 569; *Ross's Lect.* i. 236, 294; *Kames' Equity*, 214; [*Goudy on Bankruptcy*, 575.]

FACULTY. In the language of the law, a faculty means a power which a person is at liberty to exercise; hence it follows that a faculty does not fall under the negative prescription, since it is of the very essence of the right that it may be exercised at any time. Faculties may be adjudged: thus, an heir's right to reduce his ancestor's deed on the head of deathbed,—a minor's right to reduce a deed on the head of minority and lesion,—a faculty to burden lands,—a power to recall an annuity,—may all be adjudged. But it has been held that the right to pursue a declarator of irritancy against the heir of entail in possession cannot; [*Wedderburn*, 1789, M. 10426.] See *Ersk.* B. ii. tit. 12, § 6; B. iii. tit. 7, § 10; *Stair*, B. ii. tit. 6, § 10; *More's Notes*, cxciii., ccc.; *Kames' Equity*, 451; [*Shand's Prac.* ii. 644. See *Trust.*]

FACULTY; in the law of England, is used for a privilege, or special dispensation, granted to a man by favour and indulgence, to do that which, by law, he ought not to do. For the granting of these, there is an especial court under the Archbishop of Canterbury, called the *Court of the Faculties*, the chief officer of which is called the *Master of the Faculties. Tomlins' Dict. h. t.*

FACULTY OF ADVOCATES. See *Advocate.*

FACULTY TO BURDEN. A faculty to burden is a power reserved in the disposition of an heritable subject, to burden the disponee with a certain sum of money. This refers either to a real or to a personal burden. Where it is personal, the disponee only is burdened; and the lands can be burdened with the debt only by diligence against the disponee as proprietor. Where the faculty is that of constituting a real burden, it is only by an heritable bond and infeftment that the faculty can be exercised. [But it is otherwise if the faculty is exercised merely to the effect of regulating succession; *Hyslop*, 11 Feb. 1834, 12 S. 413; *Bannatine's Trs.* 7 July 1869, 7 Macph. 993. Where a right flowing from the exercise of a reserved faculty to burden has not been made real in the lifetime of the party in whose favour the power is reserved, the onerous singular successors of the disponee are not affected by the right; *Rome*, 1719, M. 4113; *Ogilvie*, 1737, M. 4125. Where a party conveys lands under a reserved power to burden with debt, debts contracted either [before or after the date of the disposition are held to be a valid exercise of the reserved power; *Elliot*, 1698, M. 4130; *Rusco*, 1724, M. 4117. Lands may be conveyed to one party under burden of a power reserved to another party to burden with debt, and an infeftment granted by the party in whose favour the power is reserved, although himself uninfeft, is effectual; *Anderson*, 1784, M. 4128.] See *Stair*, B. ii. tit. 3, § 54; *More's Notes*, cxciii.; *Bell's Com.* i. 39; *Bell's Princ.* § 924; [*Ersk.* B. ii. tit. 3, § 50; *Elchies, voce Faculty; Ross's L. C.* iii. 38.] See *Burdens.*

FAIRS AND MARKETS. The right of fairs and markets is vested in the Crown. No person or burgh, therefore, can claim a fair or market without a grant from the Crown or prescription equivalent to a grant. The toll or custom leviable by the owner is regulated by act of Parliament, or usage, without which no power to levy can exist. Dues cannot be levied upon goods until they have been sold, unless by immemorial custom. The monopolies of burghs were occasionally relaxed in favour of fairs and markets; and it was at one time the rule that, while attending them, neither person or property could be arrested for previous debt, although cattle may be distrained in a pasture on the way. [See *Mags. of Edinburgh*, 18 Feb. 1886, 13 R. (H.L.) 78, particularly Lord Fraser's observations on the law of markets (11 R. 789).] *Forestalling*, — *i.e.*, buying merchandise while on the way,—and *regrating*, or reselling victuals in the same market, or within four miles thereof, are forbidden by special statute. [See 10 Vict. c. 14; 50 & 51 Vict. c. 27 (weighing cattle).] See *Bell's Princ.* § 664; *Tomlins, h. t.*; *Ersk.* B. i. tit. 4, § 29; *Bank.* B. i. tit. 19, §§ 12, 15; *Kames' Stat. Law, h. t.* See *Market. Forestalling.*

FALCIDIA PORTIO; in the Roman law, was a fourth part of the free goods of the testator, secured to all heirs, whether *sui* or *extranei*, against legacies. The testator could effectually prohibit the heir from taking the benefit of the *falcidia*, in which respect it differed from the natural portion of children. *Stair*, B. iii. tit. 8, § 12–13; *Bank.* B. iii. tit. 8, § 30.

FALLOW. Where an outgoing tenant, [following the rules of good husbandry,] has left fallow which he was not bound by his lease to leave, and as to which the lease contains no other stipulation, it is [settled] that he has a claim against the landlord for its value. [This value is represented by

[the difference in money to the outgoing tenant, between the return from the farm during the last year of his lease with the fallow so left, and what it would have been if he had taken a crop of the fallow land; *Purves*, 3 Dec. 1822, 2 S. 59; *Marshall*, 26 May 1869, 7 Macph. 833; *Thomson*, 20 May 1874, 1 R. 895.] See *Bell's Princ.* § 1263; *Hunter's Landlord and Tenant*, ii. 489; *Bell on Leases*, i. 341; [*Rankine on Leases*, 372. See *Lease.*]

FALSA DEMONSTRATIO; is an erroneous description of a subject or person in a writing. Its effect depends almost entirely upon the specialties of the case; but, generally, if the description is taxative—*i.e.*, if it is to be looked on as a condition—its falsity vitiates the conveyance; if, however, it is only exegetical or expository, *falsa demonstratio non obest nec vitiat cum constat de corpore.* See *Brown's Synop. h. t.*; [*Scottish Missionary Society*, 19 Feb. 1858, 20 D. 634; *Donald's Trs.* 26 March 1864, 2 Macph. 922; *Macfarlane's Trs.* 3 Dec. 1878, 6 R. 288; *L. Lovat*, 18 July 1884, 11 R. 1119; also *Broom's Legal Maxims*, 584; *M'Laren on Wills*, § 708.]

FALSEHOOD; is defined to be a fraudulent imitation, or suppression of truth, to the prejudice of another; *Ersk.* B. iv. tit. 4, § 66. Of this crime, forgery, which is the adhibiting a false name to a writing, is the most important branch. [The less serious forms are charged as falsehood and fraud, or falsehood, fraud, and wilful imposition.] See *Forgery. Swindling.* [*Fraud, in criminal law. Perjury.*]

FALSE IMPRISONMENT; in English law, a trespass committed against a person, by arresting and imprisoning or detaining him without just cause, and contrary to law. *Tomlins' Dict. h. t.* The corresponding Scotch law term is *Wrongous Imprisonment*, which see.

FALSE WEIGHTS. See *Weights and Measures.*

FALSING OF DOOMS; reduction of decreets. *Skene, h. t.* See *Doom.* [*Appeal to House of Lords.*]

FAMA CLAMOSA; in the ecclesiastical law of Scotland, is a prevailing report, imputing immoral deportment to a clergyman, probationer, or elder of the church. No process is commenced by the presbytery against a minister, unless a complaint has been given in, or unless the *fama clamosa* against him is so great, that the presbytery, for their own vindication, see themselves necessitated to begin the process without any particular accuser. When there is such a *fama clamosa*, the presbytery first inquires into the rise, occasion, broachers, and grounds thereof, and if it appear, after this inquiry, that there ought to be a process against a minister, and if no private party come forward to institute it, they resolve to serve him with a libel. A libel cannot be sustained which rests only on hearsay. *Hill's Church Prac.* 49. See *Deposition.*

FAMILIÆ ERCISCUNDÆ ACTIO; in the Roman law, was an action competent to any one of co-heirs for the division of what fell to them by succession. It has no place in heritable succession by the Scotch law. *Stair*, B. i. tit. 7, § 15; *Bank.* B. i. tit. 8, § 36.

FANG. A thief taken with the fang (or in the manner), is one apprehended while carrying off, "in hand having, or upon back bearing," the stolen goods. *Ersk.* B. i. tit. 4, § 4; *Bank.* B. iv. tit. 16, § 4; *Hume*, ii. 64.

FARANDMAN; a stranger or pilgrim. *Skene, h. t.*

FARDING-DEAL, *or farundel of land*; is, in England, the fourth part of an acre. *Tomlins' Dict. h. t.*

[**FAST AND LOOSE.** See *Whale.*]

FATHER. A father is the administrator-in-law to his children, and, as such, the manager, and, as it were, the tutor of his children while in pupillarity, and their curator during minority. [See *Parent and Child. Tutor. Curatory.*]

FATUOUS. A fatuous person, or an idiot, is one who, from a total defect of judgment, is incapable of managing his affairs. He is described as having an uniform stupidity and inattention in his manner, and childishness in his speech. [See *Insanity.*]

FAULT; in the quality of a commodity agreed for, may be the ground of rejection, if the commodity have been sold unseen, and turn out inferior to what was represented. Even if the buyer saw the goods, a latent fault may entitle him to reject them, and should they perish in consequence of it, he will be relieved from payment, or entitled to repetition of the price. But if the fault or deficiency of a commodity seen by the buyer is manifest, the rule is, *Caveat emptor*, and the buyer's eye is his merchant. The challenge of a fault must be made immediately, or without unnecessary delay. *Bell's Com.* i. 464; *Bell's Princ.* § 95. [See *Sale. Warranty. Culpa.*]

FEAL AND DIVOT; a rural servitude, importing a right in the proprietor of the dominant tenement to cut and remove turf

for fences, or for thatching or covering houses, or the like purposes, within the dominant lands. And of the same description is the servitude of *fuel*, which is a similar right to cut, winnow, and carry away peats from the servient moss or peat land, for fuel to the inhabitants of the dominant lands. These servitudes will not be extended further than to the uses of the actual occupants of the dominant tenement, and will not extend even to extraordinary uses, such as to burn limestone for sale, or to carry on the trade of brewing or distilling for sale. The servitudes of feal, divot, and fuel, are distinct from the servitude of pasturage, and are not [necessarily] included under it. They may be constituted either by express grant, or by use or possession following on the usual clause of *parts and pertinents*. [See *Grierson*, 21 Jan. 1882, 9 R. 437.] See *Stair*, B. ii. tit. 7 § 13; *Ersk.* B. ii. tit. 9, § 17; *Bank.* B. ii. tit. 7, § 31; *Bell's Princ.* § 1014; [*Rankine on Land-Ownership*, 378.]

FEALTY; in English law, an oath taken on the admittance of any tenant, to be true to the lord of whom he holds his land. By this oath the tenant holds in the freest manner, since all who have fee hold by fealty at the least. *Tomlins' Dict. h. t.*

FEAR. See *Force and Fear.*

FECIALES; an order of priests among the Romans, consisting of twenty persons, appointed to proclaim war, to negotiate peace, &c. The *jus feciale* was all that the Romans had corresponding to the modern international law.

FEE. [See *Honorarium. Counsel. Wages.*]

FEE, *where an estate is held feu.*—The interest held by the feuar is termed the fee. According to Erskine, this term sometimes denotes "the subject itself granted to the vassal. Thus, it is said that a vassal falls from his fee, or that a fee opens to the superior. But it is more properly used to express the right resulting from the feudal contract; and in this acceptation it may be defined a gratuitous right to the property of lands, made under the conditions of fealty and military service, to be performed to the granter by the grantee, the radical right of the lands still remaining in the granter." Thus the right acquired by a feu-vassal under his charter is denominated his fee. *Ersk.* B. ii. tit. 3, § 7.

FEE AND LIFERENT. [The full and unlimited right of a proprietor is called *fee;* the inferior right of usufruct during life is called *liferent.* These rights may subsist at one and the same time in different persons. The law of Scotland does not recognise a fee in a pendent state, *i.e.*, where there is no person alive to take it up. The principle on which this rests is, that the superior on the one hand, and the vassal on the other, must have some one to fill the feudal place of superior or vassal; and that creditors shall be able to know with whom the right of property is. The fee, therefore, is not *in pendente* merely by the death of the proprietor; for the creditors of the ancestor can affect it as *in hæreditate jacente*, and the heir, or any one in his right, can take it. It is *in pendente* only when there is no one in whom it can be vested. In order to avoid the difficulty arising from the fee being thus *in pendente*, the following rules have been settled (which are given as stated in *Bell's Princ.* §§ 1713–1715):—(1) Under a destination "to a person named and his heirs," or "to a husband and wife in conjunct fee and liferent, and their heirs," or to them and "their children to be born of the marriage," or "to the father in liferent and the children of his marriage in fee," the fee is held to be in the parents, or in the father, and a *spes successionis* merely in the heirs or future children. (2) In such a destination, the addition of words exclusive of a substantial fee in the life-renter still leaves in him (to satisfy the legal maxim) a fiduciary fee. Such is the expression "for liferent use allenarly." But the construction which has been put on the word "allenarly," as restricting to a liferent what would otherwise be held a fee, is not so fixed that opposite indications of a fee may not prevail. Such are, a power to uplift money, a power to sell land, &c., without any obligation to re-invest. (3) Wherever the right, though conceived as a fee, is given as a fiduciary or qualified fee, the liferent provided is not to be extended beyond its usufructuary nature, nor construed as a fee. And this also holds where a trust is constituted in another, with an interest declared of liferent to a person, and fee to his children unborn or unnamed. The trust fee satisfies the maxim, and the liferent is construed according to the true meaning of the words. This last rule, however, applies only to the case of a continuing trust. A simple direction to trustees to pay or convey, during the subsistence of the marriage, to a parent in liferent, and the children in fee, does not receive effect as a trust of

[the fee for the children; *Ferguson's Trs.* 19 July 1862, 4 Macq. 397. The decisions exemplying the above rules are innumerable. See *Digests;* also *Ross's L. C.* iii. 602. The more important recent cases are *Ferguson*, 19 March 1875, 2 R. 627; *Cumstie*, 30 June 1876, 3 R. 921; *Dawson*, 10 Nov. 1876, 4 R. 597; *Boustead*, 4 Nov. 1879, 7 R. 139. The fiction of a fiduciary fee is only needed until the heir entitled to the proper fee is ascertained, when the fiduciary fee disappears, and the proper fee vests in the heir as disponee; *Maule*, 14 June 1876, 3 R. 831. When a transfer of stock in a public company is accepted by two persons, in liferent and fee respectively, both are partners and liable as contributories in liquidation for the whole amount of the stock; *Wishart*, 4 March 1879, 6 R. 823. See *Ersk.* B. ii. tit. 1, § 4; B. iii. tit. 8, § 34; *Bell's Princ.* § 1707; *Menzies' Conv.* 447, 681; *M. Bell's Conv.* ii. 833; *M'Laren on Wills*, i. §§ 1220, 1236. See *Liferent. Fiar. Conjunct Rights. Destination.*]

FEE-FUND; the name applied to the dues of court payable on the tabling of summonses, the extracting of decrees, &c., out of which the clerks and other officers of the court are paid. [By 31 & 32 Vict. c. 55, power was given to the Commissioners of the Treasury to direct that the fees payable in money in any of the supreme or inferior courts in Scotland should be thenceforth payable in stamps. This direction was given by the Treasury on 25 March 1873. The offices of collector and accountant of the fee-fund were then abolished. See *Shand's Prac.* i. 118; *Mackay's Prac.* i. 160. A table of the fees now payable is given in *Mackay's Prac.* (Appx.) A fee-fund was also established by the Pupils Protection Act, 1849, consisting of payments from estates under charge of judicial factors, &c.; see 12 & 13 Vict. c. 51, § 39. In regard to the collection, either in money or in stamps, of fees payable in public offices, see 42 & 43 Vict. c. 58.]

FEE-SIMPLE, [in English law, imports a simple inheritance, clear of any condition, limitation, or restriction, to any particular heirs, and descendible to the heirs general, whether male or female, lineal or collateral. "A tenant in fee-simple is he who hath lands or tenements to hold to him and his heirs for ever. And it is called in Latin *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say lawful or pure." See *Littleton, Tenures*, i. 1, § 1; *Tomlins, voce Tenure*, iii. 5. [In Scotch law, the term is frequently used in contradistinction to an entailed estate.]

FELO DE SE; in English law, one who becomes a felon by committing suicide, in his sound mind. *Tomlins, h. t.* See *Suicide.*

FELONIA; signifies not only the falsehood or the contumacy of the vassal toward his overlord, or of the overlord toward his vassal, but also all and whatsoever capital crime, or any other fault or trespass. *Skene, h. t.*

FELONY; in English law, a term applied to all crimes punished by forfeiture either of the fee of the goods and chattels of the criminal. To this punishment that of death may or may not be superadded, according to the degree of guilt. But the idea of felony has long been closely connected with that of capital punishment, and the term has been applied to all capital crimes below treason; although, originally, treason itself was considered felony, and although there may both be felony not capital, and capital crimes not felonies. Until of late, when a new offence was made felony by statute, the law implied the punishment of death by hanging; and in like manner, an offence declared capital became felony, though the express term was not employed. But, since the recent restrictions of capital punishment, it would appear that the connection between felony and the punishment of death is severed, a great many felonies, formerly capital, being now punished [with penal servitude. By 33 & 34 Vict. c. 23, no conviction for felony or treason shall cause any attainder or corruption of blood, or any forfeiture, or escheat.] The word felony occurs in Scotch law but very rarely. *Tomlins, h. t.; Bank.* B. i. tit. 10, § 18; *Hume*, ii. 239, note 3; [*Alison's Prac.* 18.]

[**FEMALES.** See *Women.*]

FEME COVERT; in English law, a married women. *Tomlins' Dict. h. t.*

FENCES. On the entry of the tenant, the landlord, independently of any stipulation in the lease, is bound to put the fences on the farm in due repair; and the tenant on his part must maintain them, and leave them in the state in which he received them. The landlord is not, however, entitled to increase the burden on the tenant, by erecting new fences not stipulated for, unless they be march fences, which, under the statute [1661, c. 41,] contiguous proprietors may compel him to erect—a liability which the tenant is presumed to be aware of when he enters. With regard to

fences erected spontaneously by the tenant, it has been held that if, being entitled to remove them, he allows them to remain, he must put them in repair; but if he is not entitled to remove them, neither is he bound to repair them; [*Andrew*, 19 Jan. 1818, F.C. But see *Marches*. See also *D. Buccleuch*, 18 July 1871, 9 Macph. 1014; *Tod's Trs.* 30 Jan. 1872, 10 Macph. 422; *Graham*, 18 Feb. 1875, 2 R. 438. See *Ersk.* B. ii. tit. 6, § 39;] *Bell's Princ.* § 1254; *Bell on Leases*. i. 243; *Hunter's Landlord and Tenant*, i. 312; ii. 218, 222; *Rankine on Leases*, 222. See *Lease. Fixtures. Crofters Holdings Act.*]

FEODUM; commonly signifies the heritable fee and property of any thing; also the fee, wages, or stipend, given to a servant for his service. *Skene, h. t.*

FEOFMENT; in English law, is the gift or grant, with livery and seisin, of any corporeal hereditament to another in fee, to him and his heirs for ever; the granter being termed the *feoffor*, the receiver the *feoffee*. Littleton says, that the difference between a feoffor and a donor is, that the former gives in fee-simple, the latter in fee-tail. *Tomlins' Dict. h. t.; Bank.* i. 598.

FERCOSTA; an Italian word, a kind of ship or little boat. *Skene, h. t.*

FERDINGMANUS; a Dutch word, a treasurer, penni-maister, or thesaurar. *Skene, h. t.*

FERIÆ; in Roman law, were holidays. In the Scotch law, *feriat-times* are those seasons in which it is not lawful for courts to be held, execution to proceed, or any judicial step to be taken. *Bank.* B. iv. tit. 42, § 2. See *Sunday*. [*Holidays.*]

FERRIES; are *inter regalia*, and belong to the Crown, for the public benefit, unless where they have been given out by a royal gift, in which case the grant lays the grantee under an obligation to keep sufficient boats on the ferry for the use of travellers. Public ferries are under the management of the trustees of the roads connected with them, or are regulated by the justices of peace, or by special acts of Parliament. The donatory of a private ferry is empowered to levy fair and reasonable rates; the amount of which, unless when fixed in the grant, is regulated by the justices of peace. Although the grant does not exclude neighbouring heritors from having a boat to transport themselves and their families, and servants, yet no rival ferry will be allowed to interfere with the right. The right of ferry is not permitted to interfere with the general navigation; or to supersede the right of any subject of Great Britain to navigate, in the course of the passage, as a part of the sea, provided it be not done for the sake of avoiding the regular ferry. It is said that the ferry is in respect of the landing place, and not of the water, and that in every ferry the land on both sides ought originally to have been in the same person, otherwise he could not have granted the ferry; but this is now mere matter of antiquity. [See *Crawfurd*, 22 June 1881, 8 R. 826. A right of ferry may be acquired by prescriptive possession on a barony title; *D. Montrose*, 10 March, 1848, 10 D. 896. In *Baillie*, 20 March 1866, 4 Macph. 625, the proprietor of a ferry was held not to be liable, in respect of the pier, for assessments leviable on lands and heritages. See 8 & 9 Vict. c. 41; 21 & 22 Vict. c. 148, § 52.] In leases of ferries there is no hypothec; but where there is a sub-lease, the lessor has a preference over the sub-rents. For the form of a lease of ferries, see *Hunter*, ii. 683. See also *Ersk.* B. ii. tit. 6, § 17; *Bell's Princ.* § 652; [*Hunter's Landlord and Tenant*, i. 340, 399; *Rankine on Land-Ownership*, 254.]

FEU; in Latin *feudum*, was used to denote the feudal-holding, where the service was purely military; but the term has been used in Scotland in contradistinction to ward-holding, the military tenure of this country, to signify that holding where the vassal, in place of military service, makes a return in grain or in money—a species of holding which is coeval with feudality; for, even in the purest ages of the military system, innumerable instances are to be found of grants of land in the feudal form, where the vassal annually delivered victual, or performed agricultural services to his superior. Hence, this species of right was scarcely to be distinguished from the lease; and, in this country, the rental-right and the feu-right, before writing was common in the constitution of such rights, must have been undistinguishable, farther than by the period of their endurance. See *Ersk.* B. ii. tit. 3, § 7. See also *Charter. Holding. Superior and Vassal. Entry.*

FEU-CONTRACT. The contract of feu regulates the giving out of land in feu, between the superior and vassal. It contains a narrative; a dispositive clause; [a clause expressing the manner of holding;] a clause of warrandice; an obligation on the superior to make the title-deeds furthcoming to the vassal; and an assignation

to the rents. These clauses bind the superior. Then there is a *reddendo* or obligation on the vassal to pay the feu-duties, and an obligation to relieve the superior of the public burdens after the vassal's entry. Whatever other obligations the vassal may come under are inserted in this part of the deed; which is followed by a clause of registration, and a testing clause. The difference between the feu-contract and the feu-charter is that, by the contract, the vassal obliges himself personally, and, in virtue of the clause of registration, may be compelled by direct diligence to implement his obligation; whereas, in the feu-charter, although the vassal is equally liable, the means of compelling performance is not so direct: it is through the medium of an action and decree that diligence can be obtained. Hence, the feu-contract is the preferable form in all transactions where machinery is to be erected or manufactures established, in which the interest of the superior requires to be guarded by personal obligations, admitting of prompt enforcement. *Jurid. Styles*, i. 35; [*Hendry's Styles*, 43.] See *Charter*. ["The relation of superior and vassal may be constituted either by a feu-charter or by a feu-contract; the difference between the two is very slight, and indeed is immaterial. Under a feu-charter the vassal, by acceptance of the feu, puts himself under a personal obligation to pay the *reddendo*, and subjects his representatives to pay whatever feu-duties may become due during his possession of the feu. That obligation becomes on his death a personal debt. On the other hand, his heir, if he takes up the succession, in like manner becomes liable for future feu-duties; and if the feu be sold by the original or by any subsequent vassal, then the successor in the feu, after he is infeft, becomes liable for the feu-duty, and the seller is discharged. Such is the ordinary effect of a feu-charter. In that way the feuar binds himself and his executors to a certain extent, and his successors in the feu to a further extent. All that is implied in a feu-charter, although it is not expressed. In the present case it is expressed and not implied, because the writ is in the form of a feu-contract and not of a feu-charter. The feuar in words binds 'himself and his heirs, executors and successors whomsoever;' that is, he binds them in such a way as they would be bound in a feu-charter;" *per* Lord Pres. Inglis, in *Aiton*, 19 March 1889, 16 R. 625. See *Feu-Duty*.]

FEUDAL SYSTEM. In the conveyancing of Scotland, the forms of the feudal law have been preserved, and our titles to heritable property are framed in accordance with strict feudal principles. Hence, our lawyers and antiquaries have indulged in much historical speculation as to the origin of what has been called the feudal system. Such disquisitions would be out of place in a practical work such as the present; but the subject is interesting, and will be found fully treated in the following works: — *Hallam's Middle Ages*, i. 200 *et seq.*; *Encyc. Brit. voce Feudalism*, and writers there cited; *Robertson's Charles V.* vol. i; *Kames' British Antiquities*; *Craig de Feudis*; *Ross's Lect.* ii. 23 *et seq.*; [*Duff's Feudal Conv.* 38; *Menzies' Conv.* 502; *M. Bell's Conv.* i. 561.]

FEUDUM EX CAMERA AUT CAVENA; in feudal law, was an annual sum of money or supply of corn, wine, and oil, paid out of the lord's possessions to a soldier or other well-deserving person. It resembled a pension. *Stair*, B. ii. tit. 5, § 16; *Craig*, lib. i. dieg. 10, § 11.

FEU-DUTY; the *reddendo* or annual return from the vassal to the superior in feu-holding. The feu-duty is truly a rent in cattle, grain, money, or services, generally agricultural; varying in amount from an adequate to a merely elusory rent. [It must now always be of fixed amount or quantity; 37 & 38 Vict. c. 94, § 23.] If payable in kind, the feu-duty may be demanded in kind, unless otherwise stipulated; and the vassal is bound to bring it to the superior if within the barony. The superior cannot compel the feuar to grow the stipulated grain, but he may demand in kind whatever other grain is grown, although more valuable. [See *Ferguson's Trs.* 27 Jan. 1876, 3 R. 401.] If the feu-duty be payable in produce no longer to be found on the land, the obligation is not thereby at an end, unless "such as is produced in the land" be expressly stipulated. In alternative payments, the vassal has the election, unless it be otherwise expressed. [See *Hope*, 18 Jan. 1872, 10 Macph. 347. In general, arrears of feu-duties do not bear interest, without express stipulation, until judicial demand; *M. Tweeddale*, 2 March 1842, 4 D. 862; *M. Tweeddale's Trs.* 25 Feb. 1880, 7 R. 620, 642.] Feu-duties are heritable, although the arrears are moveable. Feu-duties are *debita fundi*; and, in addition to his personal action, an action for poinding the ground lies at the superior's instance. He has also, as his means of compelling payment of the feu-duties, a

real right in the lands, and a consequent preference over purchasers and creditors; a hypothec over the crop for the last or current feu-duty; and an action of declarator of irritancy of the feu, *ob non solutum canonem*, [in the event of the feu-duty being two years in arrear. In such event, when the subjects do not exceed £25 in yearly value, warrant to remove the vassal may be granted by the sheriff; 16 & 17 Vict. c. 80, § 32. A superior has no title to pursue an action of maills and duties for recovery of feu-duty; *Prudential Assurance Co.* 4 June 1884, 11 R. 871. A *quondam* superior, who has parted with the superiority, has no title to sue a poinding of the ground for arrears of feu-duties; *Scot. Heritages Co.* 23 Jan. 1885, 12 R. 550. An over-superior has not a direct personal action for the *cumulo* feu-duty against a subvassal holding part of the feu; *Sandeman*, 8 June 1881, 8 R. 790. The personal liability of the vassal for feu-duty continues, even after he has sold the feu, until the purchaser is entered as vassal with the superior; *Hyslop*, 13 March 1863, 1 Macph. 535. And, as a disponee duly infeft is now held to be entered with the superior as at the date of registration of his infeftment, without the superior's intervention, it is further required of the disponer, in order to be relieved of liability for feu-duty, that he give formal notice to the superior of the change of ownership; 37 & 38 Vict. c. 94, § 4 (2). But, should the disponer omit to give such notice, and in consequence have to pay feu-duties after he has ceased to be vassal, he is empowered to recover such feu-duties from the disponee, the superior's remedies being held as assigned to him; *ib.* The obligation of the feuar, whether constituted by feu-charter, or by feu-contract in the ordinary terms (being imposed on the feuar, his heirs, executors, and successors whomsoever), is an obligation on himself so long as he remains vassal and lives, and after his death on his heirs and executors for payment of arrears, and on his successors in the feu for payment of the feu-duty in the future. There is no obligation on the executors to pay feu-duties accruing after the vassal's death; *Aiton*, 19 March 1889, 16 R. 625. But it is otherwise if the feu-contract imposes the obligation on the vassal, "his heirs, executors, and successors, conjunctly and severally;" *Dundee Police Commrs.* 22 Feb. 1884, 11 R. 586. And where the vassal has bound himself by a separate obligation for payment of feu-duty, his liability continues, notwithstanding [transference of the property, until it is discharged by the creditor in the obligation; *King's College of Aberdeen*, 11 Aug. 1854, 1 Macq. 526. When it is desired to apportion a *cumulo* feu-duty among several parts of a feu, so as to restrict the amount exigible from each part, a memorandum of allocation, in form prescribed, may be indorsed on the deed, either before or after it has been recorded; 37 & 38 Vict. c. 94, § 8.] See *More's Notes on Stair*, cxxxix.; *Ersk.* B. ii. tit. 5, § 2; *Bell's Princ.* §§ 693, 1479, 1484; [*Menzies' Conv.* 553, 598; *M. Bell's Conv.* i. 633.] See *Hypothec. Heritable and Moveable. Irritancy.* [*Tinsel of the Feu.*] *Superior. Vassal. Poinding of Ground.*

FIAR; as contrasted with liferenter, is the person in whom the property of an estate is vested, burdened with the right of liferent. The fiar cannot interfere with the liferenter's possession, unless for the necessary preservation of his own right, as to prevent waste, on cause shown. He may work coal, lime, minerals, &c., which are excepted from the liferent. But he must reserve enough for the liferenter's use, and he must not hurt the amenity of the liferenter's possession; yet, if there be a going coal-pit, however disagreeable the effects may be, the liferenter is not entitled to stop it. The fiar is liable for surface damage. He cannot cut the ornamental timber, though he may make the necessary thinnings, not hurting the amenity. See *Liferent*, [and authorities there cited;] also *Timber. Conjunct Rights. Fee and Liferent.*

FIARS; are the prices of grain in the different counties, fixed by the sheriffs respectively, in the month of February, with the assistance of juries. The form of striking the fiars is prescribed by A.S. 21 Dec. 1723, and 29 Feb. 1728. A jury must be called, and evidence laid before them of the prices of the different grains raised in the county; and the prices fixed by the opinion of the jury, and sanctioned by the judge, are termed the fiars of that year in which they are struck, and regulate the prices of all grain stipulated to be sold at the fiar prices; nor will an error in striking them afford a ground of suspension; *Town of Aberdeen*, 1760, M. 4415. The fiar prices also regulate the price in contracts concerning grain to be delivered, the produce of the county, and where no price has been otherwise agreed upon between the parties. By 5 & 6 Will. IV. c. 63, § 16, the fiar prices of all grain in every

county shall be struck by the imperial quarter, and any sheriff-clerk, clerk of a market, or other person, offending against this provision, shall forfeit a sum not exceeding £5. See *Weights and Measures.* [See *Howden*, 25 Jan. 1851, 13 D. 522;] also *Ersk.* B. i. tit. 4, § 6; B. iii. tit. 3, § 4; *Hunter's Landlord and Tenant*, ii. 290, 692; *Bell on Leases*, ii. 187; [*Connell on Tithes*, i. 431; *Barclay's Digest; Paterson's Historical Account of the Fiars;* and pamphlets by *N. Elliot*, and *W. Hector.*]

FICTIO JURIS; is a legal assumption that a thing is true, which is either not true, or which is as probably false as true. Thus, an heir is held to be the same person with the ancestor, to the effect of making the heir liable for the debts of the ancestor. But the Scotch law has seldom recourse to fictions. *Ersk.* B. iv. tit. 2, § 38; *Stair*, B. ii. tit. 45, § 15; *Bank.* iii. 669, § 9.

FIDEICOMMISSA; or trusts, in the Roman law, were either universal or singular. A universal fideicommiss (called also *hæreditas fideicommissaria*, or trust inheritance) consisted in the appointment of an heir, with directions *verbis precativis*, that he should restore the inheritance to a third person mentioned, the heir being called *fiduciarius*, and the third person *fideicommissarius*. As the *fideicommissarius* was sometimes directed to pass the inheritance to a second, he to a third, and so on, some authors have traced a resemblance between *fideicommissa universalia* and entails in the Scotch law. The singular fideicommiss was simply a trust-legacy, differing from the common legacy in nothing but the form and the words employed. See *Trust. Bank.* B. ii. tit. 3, § 135; *Stair*, B. iii. tit. 8, § 12; *Kames' Equity*, 322. In German civil law, the *fideicommiss* is intimately connected with the law of inheritance among the nobility, being the regulation according to which the whole, or part of a family property, is enjoyed by a certain member of the family, on the condition of leaving it unimpaired to the person pointed out by the particular family arrangement; either to the first-born male, when it is called *majorat*, or to the last-born male, when it is called *minorat*, or to the oldest member of the family, without regard to direct descent, when it is called *seniorat.* The family property is by this means rendered inalienable, but it may nevertheless be mortgaged. [See *Holzendorff, Rechtslexicon, voce Familien-fideicommiss* (vol. ii. p. 406).]

FIDEJUSSOR. See *Expromissor. Cautionry.*

FIDELITY; homage made to superiors and overlords. *Skene, h. t.* See *Homagium.*

FIERI FACIAS; [usually abbreviated *fi. fa.*] in English law, a writ that lies where a person has recovered judgment for debt or damages, by which the sheriff is commanded to levy the debt and damages on the defendant's goods and chattels. *Tomlins, h. t.*

FILIATION; the filiation of a child means the determination of his paternity. The general rule as to children born in wedlock is, *Pater est quem nuptiæ demonstrant;* but this presumption may be defeated by proving the husband's impotency, or his continued absence from his wife during the period between the eleventh solar and the sixth lunar month preceding the birth; [or, in general, by "such clear evidence as satisfies the tribunal which has to decide the question that *de facto* the husband is not the father of his wife's child;" *Mackay*, 24 Feb. 1855, 17 D. 494; *Steedman*, 20 July 1887, 14 R. 1066. See *Legitimacy.*] With regard to natural children, a *copula* at the distance of more than ten months does not filiate, affording only a *semiplena probatio*, which may, however, be completed by the oath of the mother. [See *Cook*, 4 Dec. 1880, 8 R. 217; *Whyte*, 15 March 1884, 11 R. 710; *M'Donald*, 27 Oct. 1883, 11 R. 57 (proof of intimacy subsequent to conception); *Scott*, 2 Feb. 1884, 11 R. 518 (action raised four years after birth; evidence admitted of intimacy three years after birth). Actions of filiation are generally raised in the sheriff court; and a sheriff court has jurisdiction against a person within its jurisdiction notwithstanding that he ordinarily resides, or the child was born, or the mother ordinarily resides, in England; 44 & 45 Vict. c. 25, § 6.] See *Ersk.* B. i. tit. 6, § 50; *Stair*, B. iv. tit. 45, § 20; *More's Notes*, xxxiv.; *Bank.* B. i. tit. 2, § 3; B. ii. tit. 5, § 105; [*Bell's Princ.* § 2060; *Shand's Prac.* ii. 782; *Fraser on Parent and Child*, 131.] See *Marriage. Bastard. Parent and Child. Semiplena Probatio.*

FINAL JUDGMENT. The term final judgment is applied in its most extensive signification to a judgment which exhausts the merits of a cause, and is not subject to any review whatever. But it is more frequently used in contradistinction to the expression interlocutory judgment; [and in this sense it denotes a decree "by which

[the whole cause is determined by the judge or court before whom it depends" (*Mackay's Prac.* i. 584). The whole cause is held to have been decided in the Outer House, "when an interlocutor has been pronounced by the Lord Ordinary, which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided, that expenses, if found due, have not been taxed, modified, or decerned for;" 31 & 32 Vict. c. 100, § 53. See *Malcolm*, 19 Oct. 1877, 5 R. 22. A final decree in the sheriff court is defined in similar terms by 39 & 40 Vict. c. 70, § 3. A final judgment in the Inner House, such as to warrant an appeal to the House of Lords, is] one which exhausts the whole merits of the cause, also disposing of the question of expenses; and which, if not appealed against, would put an end to the difference between the parties; 48 Geo. III. c. 157, § 15; 6 Geo. IV. c. 120, § 21. [A judgment of the Lord Ordinary or sheriff is not final, when the question of expenses is reserved; *Lamond's Trs.* 14 May 1872, 10 Macph. 690; *Greenock Par. Board*, 25 May 1877, 4 R. 737. See also *Reclaiming Note. Appeal to Court of Session. Expenses.* See *Ersk.* B. iv. tit. 2, § 40; *Shand's Prac.* i. 453; ii. 1063; *Mackay's Prac.* i. 584; ii. 486. See *Decree.*]

FINE; is the pecuniary penalty for an offence, usually imposed by statute, and awarded against the offender by the judge who tries him. Generally speaking, there is a certain latitude left to the court to regulate the amount of the fine, according to the circumstances of the case. The payment of a fine may be enforced by imprisonment. [See *Barclay's Digest, h. t.*; *Tomlins' Dict. h. t.*

[**FINE**; in English law, denotes a fictitious judicial proceeding, which was formerly in common use as a mode of conveying land. It was really a compromise of a fictitious suit commenced concerning the lands to be conveyed, and the operation (called levying a fine) was thus performed. A *præcipe* or writ was sued out and the parties appeared in court; a composition of the suit was then entered into, with consent of the judges, whereby the lands in question were declared to be the right of (that [is, to belong to) one of the parties. This agreement was reduced into writing, and was enrolled amongst the records of the court, so that it had the effect of a judgment of the court. Such fines were abolished by the Fines and Recoveries Act (3 & 4 Will. IV. c. 74). *Sweet's Law Dict.; Williams on Real Property*, 66. A fine denotes also a money payment made by a feudal tenant to his lord. The only existing fines of any importance occur in copyhold lands, where upon a change in the tenancy a fine is commonly due to the lord. *Sweet.*]

FINIS; finance, or composition made with thieves, called also theft-bote. *Finis curiæ*, composition given in court to the King. *Skene, h. t.* See *Theft-Bote. Fine.*

FINIUM REGUNDORUM ACTIO; in the Roman law, was an action for the distinction and clearing of the marches of contiguous grounds. It was almost precisely analogous to the action of molestation in the Scotch law. *Stair*, B. i. tit. 7, § 15; B. iv. tit. 27, § 2.

FIRE, LOSS BY. Agricultural subjects damaged or destroyed by fire through the negligence of the lessee, must be restored by him. But if the fire be accidental, neither the landlord nor the tenant is bound, independently of stipulation, to repair the loss, even although, under his lease, the tenant should be taken bound to keep the houses "in tenantable and habitable repair." See *Bayne*, 3 July 1815, 3 Dow, 233; [*Duff*, 18 May 1870, 8 Macph. 769.] Fire is, in our law, considered an inevitable accident; and the persons contemplated in the edict, *Nautæ caupones*, are not held responsible for loss occasioned by it. [An exception, however, to this rule was introduced by the Mercantile Law Amendment Act (19 & 20 Vict. c. 20, § 17), which provides that all carriers for hire of goods within Scotland shall be liable to make good to the owner all losses arising from accidental fire, while such goods are in the custody or possession of the carriers.] See *Hunter's Landlord and Tenant*, ii. 259; *Bell on Leases*, i. 240; *Ersk.* B. ii. tit. 6, § 39; B. iii. tit. 1, § 28; *Bell's Com.* i. 499, 609; [*Bell's Princ.* § 239.] See *Lease. Innkeepers. Nautæ, Caupones.* [*Carriers.*] *Insurance.*

FIRE AND SWORD. Letters of fire and sword were the means anciently resorted to when tenants retained their possession, contrary to the order of the judge and the diligence of the law. [See *Ejection, Letters of. Removing.*]

[**FIREARMS.** By 10 Geo. IV. c. 38, § 2,

[the wilful, malicious, or unlawful shooting at any of Her Majesty's subjects, or presenting, pointing, or levelling any kind of loaded firearms, and attempting, by drawing a trigger, or in any other manner, to discharge the same at their persons, is made a capital crime, with power to the prosecutor to restrict the pains of law.]

FIRE-RAISING. To constitute the crime of fire-raising, there must have been actual burning, but it matters not how small the portion of the subject consumed has been. Ignition of furniture alone, not considered fixtures of the building, makes the culprit liable to the charge of an attempt at fire-raising. [It is essential that the fire have been applied wilfully, or at least recklessly;] but it is immaterial whether the incendiary had the intent to consume the subject destroyed, or merely another subject which communicated the fire; or whether the burning was his ultimate aim, or only the means of furthering another crime. Fire-raising is capital, where the property burned is houses, corn, coal-heughs, or woods and underwoods; the word houses comprehending all classes of buildings, except mere hovels or temporary places of shelter. The burning by a man of his own house, [occupied by himself,] and not so situated as to endanger the property of others, is not indictable, [unless it has been done to defraud the insurers, in which case it is a criminal offence, but not the crime of wilful fire-raising.] But if the fire be communicated from a person's own to a neighbouring proprietor's tenement; [or if a proprietor burn his house, while it is occupied by a tenant; or if a tenant set fire to a house, of which he is in possession, the crime of fire-raising is committed.] The burning of ships to defraud insurers is capital; [29 Geo. III. c. 46.] The destruction of other property by fire may be punished with anything short of death; and the attempt at fire-raising, as also threats and solicitations, are punishable arbitrarily. The sudden breaking out of fire in an uninhabited house, or the finding of combustibles strewed about in such a way as to excite or accelerate combustion, form strong presumptions of wilful fire-raising; but the latter should be received with caution. Having ill-will at, or having been heard to utter threats against, the sufferer; preparing combustibles, and carrying them in the direction of the house; insuring the premises or their furniture at a high value; insuring in several offices at the same time, and claiming from more than one, will all form presumptions against the prisoner. [Wilful fire-raising, though a capital offence, is generally punished with penal servitude, or imprisonment if the case be not a grave one. "Wicked, culpable, and reckless fire-raising" is an offence punishable with imprisonment; *Macbean*, 15 April 1847, Arkley, 262; *Smillie*, 20 June 1883, 10 R. (J.C.) 70.] See 1525, c. 10; 1526, c. 10; 1540, c. 33; 1592, c. 148; 1 Geo. I. c. 48. See also *Hume*, i. 125; *Alison's Princ.* 429; [*Macdonald*, 112.] See *Arson*. [*Indictment.*]

FIRMARIUS; a maill-payer, a mailler, or mill-man. *Firma* signifies the duty which a tenant pays to the landlord, whether it be silver-maill, victual, or other duty. *Skene, h. t.*

FIRM OF A COMPANY; is the social name applied to an avowed partnership. It is either proper or descriptive. A proper or personal firm is a firm designated by the names of one or more of the partners, as *Hare & Co., Bell, Rannie, & Co.* A descriptive firm has reference to some such circumstance as the place where the company is established, or the transactions in which it is engaged, as the *Portsoy Distillery Co.*, the *Muirkirk Iron Co.* [A company carrying on business under a proper firm, may sue or be sued under the company name; *Forsyth*, 18 Nov. 1834, 13 S. 42; and the partners, though not called as individuals, may be charged individually on a decree obtained against such company; *Thomson*, 2 July 1812, F.C.; *Knox*, 12 Nov. 1847, 10 D. 50. But a company with a descriptive firm cannot sue or be sued under its company name, without the addition of the names of some (three at least, if there are as many) of the individual partners; *Culcreuch Cotton Co.* 27 Nov. 1822, 2 S. 47; *Kerr*, 8 June 1839, 1 D. 901; *London and Edinburgh Shipping Co.* 19 June 1841, 3 D. 1045; *Antermony Coal Co.* 30 June 1866, 4 Macph. 1019.] A mercantile company cannot prosecute criminally in name of its firm. See *More's Notes to Stair*, ci.; *Bell's Com.* ii. 503, 507, 516, 558; *Bell's Princ.* § 357; [*Ersk.* B. iii. tit. 3, §§ 20, 28; *M. Bell's Conv.* i. 389, 527; *Clark on Partnership*, i. 527; *Lindley on Partnership*, 110; *Shand's Prac.* i. 186; *Mackay's Prac.* i. 328. See *Partnership.*] *Joint Stock Companies.*

[**FIRST OFFENDERS.** By the Probation of First Offenders Act (50 & 51 Vict. c. 25), where a person is convicted before any court of larceny or false pretences, or any other offence punishable with

[not more than two years' imprisonment, and no previous conviction is proved against him, if it appears to the court that, regard being had to his youth, character, and antecedents, to the trivial nature of the offence, and to any extenuating circumstances, it is expedient that the offender be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering a recognisance, with or without sureties, and during such period as the court may direct, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour. The court may also direct that the offender shall pay the costs of the prosecution, or part thereof; § 1. Before directing such release, the court must be satisfied that the offender or his surety has a fixed place of abode or regular occupation in the county or place for which the court acts, or in which the offender is likely to live during the period named; § 3. If the offender fail to observe any of the conditions of his recognisance, a warrant may be issued for his apprehension by any court having power to deal with him in respect of his original offence, or by any court of summary jurisdiction; and if not brought forthwith before the court having power to sentence him, he may be brought before a court of summary jurisdiction, and by that court either remanded by warrant, and committed to prison, till the time at which he was required by his recognisance to appear for judgment, or till the sitting of a court having power to deal with his original offence, or admitted to bail with a sufficient surety; § 2.]

[**FISHERY BOARD.** See *Sea-Fisheries.*]

FISHES; become the property of him who catches them, with the exception of those which belong to the Crown, *jure coronæ;* which right seems to be confined to whales of a large size. Salmon-fishing is *inter regalia;* but although it requires a royal grant to entitle a man to fish for salmon, yet the salmon, when taken by one who has no such grant, do not belong to Her Majesty, but to the person who takes them. *Ersk.* B. ii. tit. 1, § 10. See *Whales.*

FISHINGS. The most important is salmon-fishing, which belongs to the Crown, and may or may not be given out with the lands. Where it is given in express words, the right is constituted from the first; but even the general expression of fishings, when joined with forty years' possession of a salmon-fishing, constitutes a right to that species of fishing. Where the right has not been given out expressly, nor acquired by prescription, it may, notwithstanding that the lands on each side of the river have been given out, be conveyed to a third party; and as the right of salmon-fishing implies a power of drawing the nets on the banks, that power will, under the grant, be conferred on the disponee from the Crown. See *Salmon-Fishing.* Other fishing, as white-fishings in the sea, or trout-fishings in rivers, may be conferred by a grant from the Crown, though a charter of the lands on the bank of a river, followed by the possession of a trout-fishing for the years of prescription, will secure the proprietor against the effect of a special grant; *Carmichael*, 1787, [M. 9645, Hailes, ii. 1033.] See *Ersk.* B. ii. tit. 6, § 6; *Stair.* B. ii. tit. 3, § 69; *More's Notes*, cci.; *Bank.* i. 574, 111; *Ross's Lect.* ii. 172, 196. See *Sea-Fisheries. Trout-Fishing.*

FISK; is the Crown's revenue. This term is usually applied by Scotch law-writers to the moveable estate of a person denounced rebel, which was, by our older practice, forfeited to the Crown. *Ersk.* B. ii. tit. 2, § 10; *Bank.* i. 263, 83; ii. 305, 46. See *Escheat.*

FIXTURES; are articles of a personal nature attached to land or other heritable subjects, and acceding thereto on the principle, *Inædificatum (vel plantatum) solo solo cedit.* Whatever is requisite to render the premises entire and complete, or whatever appears intended for perpetual use in connection with them, is a fixture, but whatever is separable, and intended to be separated, is not a fixture. The determination of this point in reference to any moveable connected with any heritable subject leads to the decision of the two questions, —1. Whether the moveable subject may be removed by the lessee, who voluntarily constructed it; and 2. Whether or not, by its connection with the heritable subject, the moveable also becomes heritable. With reference to the first of these, the doctrine of accession has been very much relaxed in favour of the lessee's claim to have certain articles considered moveable, [or rather in favour of his right to bring them back to a moveable condition by severance.] With reference to the second, the strictness with which the rule is enforced, varies according as the question arises between the heir and the executors; the heritable and the personal creditors; or the fiar and the life-

renter's executors—the law inclining much more readily to consider a subject as heritable in the first of these cases than in the other two. But, in the whole of them, it seems to hold as a general rule, that whatever it is impossible to remove without injuring the heritable subject, or impairing the use for which it was intended, is a fixture, and becomes heritable by accession. The most important subjects of this class are constructions for agricultural purposes, and fixed machinery of all sorts. With regard to fences, see the article *Fences*. Houses erected by the lessee, which are in general classed with fences, differ in this, that he may not remove them; [*Murray*, 1805, Hume's Dec. 818; *Thomson*, 8 Feb. 1822, 1 S. 307.] The built part of a thrashing-mill is considered heritable, the machinery moveable; [*Hyslop*, 18 Jan. 1811, F.C.;] but when the lessee receives a sum of money to build a thrashing-mill, the machinery becomes the property of the lessor; [*Campbell*, 22 Feb. 1825, 3 S. 569.] Trevisses, racks, and mangers, put up in a building, not used as a stable, may be removed; but it appears that this would not be the case were they put up in a stable; [*Scott*, 1 Dec. 1824, 3 S. 344.] In questions between the heir and the executor, the buckets, chains, and other accessory instruments for working coal, are considered heritable; but in questions between lessor and lessee it is held that they may be removed; [*Dirleton and Stewart*, 133; *Hunter's Landlord and Tenant*, i. 316.] A brewer's copper cauldron is a moveable, and may be removed; [*Smeton*, 1698, M. 10524.] There has been some doubt as to whether the machinery of a cotton mill is to be included in an heritable security over the mill; but it is certain that it may be removed; [*Arkwright*, 3 Dec. 1819, F.C.; *Bell's Com.* i. 789; *Hunter*, i. 316.] Large vessels in a manufactory, which require to be taken to pieces before removal, are included in an heritable security, but may be removed by the lessee; [*Niven*, 6 March 1823, 2 S. 270.] In an action of count and reckoning arising out of the dissolution of a copartnership of cotton-spinners, the bell of a spinning manufactory was found to be a fixture; it is probable, however, that, in a question between landlord and tenant, it would be considered removable; [*Barr*, 13 Nov. 1821, 1 S. 124; *Hunter*, i. 318.] The doctrine of fixtures has been much more frequently discussed in England than in Scotland, perhaps from greater attention being bestowed in the former country in arranging contracts of temporary occupation. The same interests, however, are concerned, and the law has the same inclination; relaxing the rule of accession much more readily in questions between lessor and lessee than between heritable and personal claimants. Whatever has been constructed by the tenant for trade or manufacture, may be removed by him, if it can be done without material injury to the subject to which it is attached,—as vessels, utensils, furnaces, vats, machinery, steam-engines, &c. It is not, however, so clearly established that the tenant may remove more substantial and permanent additions, as lime-kilns, windmills, and other buildings actually let down into the earth; but he may in general prevent the accession of buildings, by erecting them on rollers, pillars, stilts, or plates of wood laid on brick-work. An urban tenant may remove whatever articles he has fixed up for ornament or domestic use, as hangings, wainscot, stoves, &c. Tenants must remove their fixtures before the expiration of their tenancy, for they cannot insist on their claim after the term, unless they have continued in possession. Of course, all these rules may be varied by special covenant.

[The leading modern cases are *Fisher*, 26 June 1845, 4 Bell's App. 286; and *Brand's Trs.* 16 March 1876, 3 R. (H.L.) 16. In *Fisher*, the doctrine was established, in a question between the heir and the executor of an owner of land containing coal-mines, that machines, and parts of machines, are heritable, which are attached, either directly, or indirectly by being joined to what is attached, to the ground, for the uses of the minerals, though they may only be fixed in such a manner as to be capable of being removed, either in their entire state or after being taken to pieces, without material injury; including such loose articles as, though not physically attached to the fixed engines, are yet necessary for their working, provided they be so constructed and fitted as to form parts of the particular machinery, and not to be equally capable of being applied, in their existing state, to any other engines of the kind. In *Brand's Trs.* the House of Lords held that the same kind of machinery, erected by one who was not owner, but only tenant of the lands, under a lease of ordinary duration, passed to the heir of the tenant succeeding to the lease, and was removable by him during his tenancy. In that case Lord Chelmsford observed:—"The law as to fixtures is the same in Scotland as in England.

[The meaning of the word is anything annexed to the freehold, that is, fastened to or connected with it, not in mere juxtaposition with the soil. Whatever is so annexed becomes part of the realty, and the person who was the owner of it when it was a chattel loses his property in it, which immediately vests in the owner of the soil, according to the maxim, '*Quicquid plantatur solo, solo cedit.*' Such is the general law. But an exception has been long established in favour of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them during the continuance of the term. When he brings any chattel to be used in his trade and annexes it to the ground, it becomes a part of the freehold, but with a power as between himself and his landlord of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed." See also *Syme*, 14 Dec. 1861, 24 D. 202; *Tod's Trs.* 30 Jan. 1872, 10 Macph. 422; *Dowall*, 11 July 1874, 1 R. 1180. In estimating the amount of casualty due by a vassal to his superior, the rule for determining what are fixtures is that applicable to cases between landlord and tenant; *Marshall*, 2 July 1886, 13 R. 1042.

[In regard to subjects to which the Agricultural Holdings Act, 1883, applies (*i.e.*, agricultural, pastoral, or market garden holdings), it is enacted by § 30 of that act that where, after 1st January 1884, "a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy. Provided as follows:—(1) Before the removal of any such fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all his other obligations to the landlord in respect to the holding: (2) In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding: (3) Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to [any building or other part of the holding by the removal: (4) The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it: (5) At any time before the expiration of such notice the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building specified in the notice given by the tenant as aforesaid, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a reference under this act, as in case of compensation (but without appeal)." See *Agricultural Holdings Act.*

[See *Ersk.* B. ii. tit. 2, § 4; *More's Notes on Stair*, cxlv.;] *Bell's Com.* i. 786; ii. 2; *Bell's Princ.* §§ 1473, 1255; *Hunter's Landlord and Tenant*, i. 294; [*Rankine on Landownership*, 10[illegible]; *Rankine on Leases*, 251, 257; *Amos and Ferard on Fixtures; Brown on Fixtures; Grady on Fixtures; Smith's Leading Cases*, ii. 182.] See *Heritable and Moveable.*

[**FLAT.** See *Common Interest.*]

[**FLOGGING.** See *Whipping.*]

FLOTSAM; in English law, is where a ship is sunk or cast away, and the goods are floating upon the sea. Where the owners are not known, flotsam goes to the Crown; where they are known, they have a year and day to claim their goods. *Tomlins, h. t.*

FLUMEN; in the Roman law, signifies running water of any sort; but, in the servitude of stillicide, the term is specially applied to water gathered in a spout. *Ersk.* B. ii. tit. 9, § 9; *Stair*, B. ii. tit. 7, § 7. See *Eavesdrop.*

FODDER AND STRAW. A tenant must consume upon the farm the straw produced by it, and he is not entitled, even in the absence of prohibitory stipulation, to sell any part of the straw or fodder grown upon his lands, except the hay and straw of his outgoing crop; a rule applicable to assignees and sub-lessees as well as to the principal lessee. The tenant of two neighbouring farms, belonging to different proprietors, must not consume the green crop or fodder of the one upon the other. Yet in a case where, by special agreement, a lessee was entitled to manage two farms by means of the steading of one of them, this rule was held to apply only where

there are proper means of manufacturing the grain, and consuming the fodder upon the farm. In absence of special stipulation, the outgoing tenant, who cedes possession of the houses and grass at the term of Whitsunday, retains the arable land, until he has cut down and carried off the corn, straw, and fodder of that year's crop, which is called his away-going crop; although in some counties, fodder used for making dung is considered steelbow, and given to the incoming tenant. These matters, however, are generally settled by stipulation in the lease. See *Ersk.* B. ii. tit. 6, § 39; *Bell's Princ.* § 1261; *Bell on Leases*, i. 327; *Hunter's Landlord and Tenant*, i. 329; ii. 491. See *Steelbow. Dung.*

FŒNUS NAUTICUM; that rate of interest, proportioned to the risk, which a person lending money on a ship, or on bottomry, as it is termed, is entitled to demand. *Ersk.* B. iv. tit. 4, § 76; *Stair*, B. i. tit. 15, § 6.

FŒTUS. The destruction of an unborn infant, though an indictable offence, is not homicide. *Hume*, i. 186; [*Alison's Princ.* 71; *Macdonald*, 120. See *Abortion.*]

FŒTUS OF CATTLE. The young of cattle, as foals, calves, &c., are an accessory of the mother, and belong to the owner of the mother by natural accession. *Ersk.* B. ii. tit. 1, § 14. See *Accession.*

[**FOGGAGE**; a term frequently occurring in the old forest laws. Foggage is described by Dr Jamieson as rank grass which has not been eaten in summer, or which grows among grain, and is fed on by horses or cattle after the crop is removed. Legally, the term signifies the right of pasturage after removal of the crops. The time of foggage commenced after the feast of All-hallowmass. See *Balfour's Practicks*, 139; *Jamieson's Dict. Supp.; Innes' Legal Antiquities*, 252.]

FORCE AND FEAR. Force and fear are grounds for the reduction of a contract; but it is not every degree of fear that will be sustained as sufficient. It is a fear which may shake a mind of ordinary firmness and resolution which constitutes a sufficient ground of reduction. But the degree is in every case relative to the situation and disposition of the contracting party; since comparatively little violence is required to force the consent of a person of weaker age, sex, or condition. Among the instruments of force and fear which have been held to annul engagement, are threats and terror of death; or pain to one's self or child. The reverential fear arising from the authority of parents, of husbands, or of magistrates; or that proceeding from the execution of lawful diligence, is not admitted as a ground of reduction; unless where legal diligence is held out as the means of extorting a deed from the debtor, unconnected with the debt on which the diligence proceeds. But even where the obligation relates to the debt on which the diligence proceeds, if the diligence be erroneous, the obligation is reducible; *Henderson*, 1782, M. 14349. Mere vexation and inconvenience, as the threat of a lawsuit, is not sufficient to vitiate the consent thereby obtained. It has been doubted whether a deed obtained by force, is null *ab initio*, or only reducible. Stair (B. i. tit. 9, § 8) says that the plea of force and fear is competent, "either by way of action, or sometimes by exception." But it may be questioned whether it can be pleaded by way of exception to the action of a *bona fide* onerous assignee. In *Wightman*, 1787, M. 1521, it was held that the exception of violence, arising from legal concussion, in extorting a bill of exchange, would be available even against a *bona fide* onerous indorsee; but it has been said of this case that it requires reconsideration; [*More's Notes*, lix.] Indeed, upon this point, text writers seem in danger of falling into a controversy. By one, the effect of compulsion is declared to be equally subversive of consent with error *in essentialibus*, and to be a "good objection against third parties" (*Bell's Com.* i. 316); and in another part of the same work it is said, "Restitution will therefore be given, not only against the buyer, but even against purchasers from him, where the seller is incapable of full and legal consent; or where the sale has proceeded from such fear and compulsion as in law annuls and makes it void;" *ib.* 261. Another author takes a distinction between the act of taking goods by violence, and the act of compelling a party to sell his goods. In the former case, he holds that the violence *inurit labem realem*, so as to entitle the owner to recover the goods even from a *bona fide* purchaser. In the latter case he holds, upon the maxim *Voluntas coacta est voluntas*, that, although the contract is clearly voidable, it is not *ipso jure* void, and that the property is, in the first instance, transferred so as to enable the wrong-doer to give a good title to a *bona fide* purchaser. See *Brown on Sale*, 397. [The soundness, however, of the doctrine laid down in *Wightman*, *supra*, and adopted by Pro-

[fessor Bell, is acknowledged by recent writers. If consent is wanting, there can be no contract; and the forced subscription is as invalid as if it had been forged. See *Gelot*, 4 March 1870, 8 Macph. 649; 21 June 1871, 9 Macph. 957; *Stewart*, 19 July 1871, 9 Macph. 1057. As to document granted to creditor by imprisoned debtor on condition of liberation, see *M'Intosh*, 17 Oct. 1883, 11 R. 8. For the form of the summons of reduction on the head of force, see *Jurid. Styles*, iii. 214; and on the subject of this article generally, see *Ersk.* B. iii. tit. 1, § 16; B. iv. tit. 1, § 26; *Stair*, B. i. tit. 9, § 8, and tit. 17, § 14; *More's Notes*, lviii.; *Bank.* i. 311; *Bell's Com.* i. 314; *Bell's Princ.* § 12; *Brown on Sale*, 395; *Thomson on Bills*, 62; [*Menzies' Conv.* 70; *M. Bell's Conv.* i. 187; *Mackay's Prac.* ii. 132.] See *Extortion.* [*Reduction. Duress.*] *Defending Forcibly.*

FORCIBLE ENTRY; in English law, an offence against the public peace, committed by violently taking or keeping possession of lands and tenements without the authority of law, so that the legal proprietor is excluded. *Tomlins, h. t.* The corresponding Scotch law terms are *Ejection* and *Intrusion*, which see.

[**FORECLOSURE.** In English law, when a mortgagor has failed to pay off the mortgage debt within the proper time, the mortgagee is entitle to bring an action in the Chancery Division of the High Court, asking that a day may be fixed on which the mortgagor is to pay off the debt, and that in default of payment he (the mortgagor) may be foreclosed of his equity of redemption, that is, deprived or debarred of his right to redeem. The judgment fixes a place and time for payment, at the expiration of six months from the date of the judgment, and orders that the mortgagor be foreclosed if the debt is not paid on that day. The effect of foreclosure is to bar the mortgagor's right or equity of redemption, and thus to vest the property absolutely in the mortgagee. By 44 & 45 Vict. c. 41, § 25, in any action for foreclosure, the court may direct a sale of the mortgaged property. *Sweet's Law Dict.; Williams on Real Property*, 492.]

FOREHAND RENT. Rent is said to be forehand, when it is made payable before the crop of which it is the rent has been reaped. After the period when it is due and exigible, forehand rent is *in bonis* of the lessor, and passes to his executor, not his heirs. [See *L. Herries*, 6 Feb. 1873, 11 Macph. 396.] See *Bell's Princ.* §§ 1204, 1230, 1499; *Hunter's Landlord and Tenant*, i. 387; ii. 327, 331; [*Rankine on Leases*, 304, 309, 312.] See *Terms Legal and Conventional.* [*Heir and Executor.*]

FOREIGN. Persons resident out of Scotland may be cited to the courts of this country in civil actions, where they have an estate, either heritable or moveable, in Scotland. Where the foreigner has an heritable estate, he may be cited edictally as a native (see *Edictal Citation*), because it is presumed that he employs an attorney in this country to attend to his interest, and appear in all actions that may affect that estate. Where he has only a personal estate in Scotland, his effects must first be attached by an arrestment *jurisdictionis fundandæ causa*, and then an action must be raised on which he may be cited edictally. See *Arrestment jur. fund. causa. Abroad.* The Court of Session is the *commune forum* of all foreigners; and hence, although an inferior court has sufficient jurisdiction to attach the funds of a foreigner within the territory or jurisdiction of the inferior judge, *jurisdictionis fundandæ causa*, yet the action itself must be pursued before the supreme court. A Scotchman forth of Scotland, *animo remanendi*, is, in this question, in the same situation as a foreigner, for it is now settled that the *forum originis* gives no jurisdiction *per se.* Proceedings in Scotland cannot be stopped because analogous proceedings could not be carried on in another country. Thus, an English creditor, who has imprisoned his debtor in England, may attach his property in Scotland, although, by the law of England, a creditor cannot both incarcerate his debtor and attach his effects. But wherever a debt is discharged by the law of one country, it must be discharged in every other. Foreign or English law is in this country matter of evidence, and the only competent mode of proving such law is to adduce a barrister or other person skilled in the law of the particular country, or to produce his written opinion on an adjusted case; [*Dickson on Evidence*, § 394. See *Res Judicata.*] It has frequently been a question with regard to debts contracted in a foreign country, and sued for in Scotland, whether the *lex loci contractus*, or the *lex fori*, is to determine the rules of evidence, obligation, and dissolution. The principle of decision in all such cases has been very clearly announced and illustrated by Lord Brougham, in *Don*, 26 May 1837, 2 S. & M'L. 682. A distinction is taken between the contract and the remedy. Whatever relates to the nature of the

obligation, *ad valorem contractus*, is governed by the *lex loci contractus:* whatever relates to the remedy, by suits to compel performance, or by action for a breach, *ad decisionem litis*, is governed by the law of the country to whose courts the application is made for performance, or for damages. Thus, in an action before a Scotch court, [before the repeal of the laws against usury,] the pursuer could claim higher interest than five per cent. upon a debt contracted in a country where higher interest was exigible; *Campbell*, 15 Feb. 1809, F.C.; *Graham*, 19 Feb. 1820, 2 Dow, 17; [*Bell's Princ.* § 32;] *Illust. ib.* Under the second head of questions, arising upon the remedy, are ranked the rules of evidence, and law of prescription and limitation. When an action is brought in Scotland upon an obligation contracted in a foreign country, the law of Scotland and the right of action fall under the Scotch prescription, however entire the obligation might be, were it founded on in the courts of the country where it was entered into. Such is the principle as established in the case of *Don;* previous to which there had been many conflicting decisions of the Court of Session, on the question whether the doctrine of limitation relates to the contract or the remedy. See Lord Brougham's judgment; [also *Dickson on Evidence*, § 529.] As to the citation of persons abroad, see *Edictal Citation.* See *Stair*, B. i. tit. 1, § 16; B. iii. tit. 8, §§ 35, 55; *More's Notes*, i.; *Ersk.* B. i. tit. 2, § 18; B. iii. tit. 2, § 39. See *Abroad.* [*Jurisdiction.*] *Domicile. Defender. Alien.*

[**FOREIGN ENLISTMENT.** The Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), makes it an offence, punishable by fine or imprisonment, for any British subject, without licence from Her Majesty, to accept or agree to accept a commission in the military or naval service of any foreign state at war with any state at peace with Her Majesty, or to induce any other person to do so, or to build or equip any ship for the service of such foreign state, or to be knowingly concerned in increasing the warlike force of a ship in the service of such foreign state. See *Phillimore's Internat. Law*, iii. 233; also *Smith, Fleming & Co.* 5 May 1864, 2 Macph. 1032. See *Enlisting.*]

FORENSIS; an unfree man who dwells not within burgh; an out-dwelling man, called therefore *rure manens*, who, dwelling alandward, has no privilege or immunity within burgh. *Skene, h. t.*

[**FORESHORE.** See *Sea and Seashore.*]

FORESTALLING, or *Regrating;* is the crime of purchasing goods coming to market, with a view to sell them again, and so to raise the price on the consumer. A person purchasing articles on the way to market, for his own use, is guilty of no crime. The essence of the crime seems formerly to have been thought to consist in interposing between the raiser of the article and the consumer. Thus, the act 1592, c. 148, declares it criminal for a person to get into his possession the growing corn on the field, by sale, contract, or promise. Prosecutions for this offence are now unknown. *Hume*, i. 510; *Ersk.* B. iv. tit. 4, § 38; *Bank.* i. 412, 414; *Kames' Stat. Law Abridg. h. t.* See *Engrosser. Fairs and Markets.*

FORESTARIUS; a forester or keeper of woods, to whom, by reason of his office, pertains the bark and the hewn branches. *Foresta* is a large wood, without dyke or closure, which has no water, wherein are included wild beasts, and where some have liberty of hunting. *Skene, h. t.*

FORESTRY. Lands granted by the Crown with a right of forestry carried all the privileges of a royal forest, which were very oppressive to the country, and accordingly the practice of making such grants was reprobated by the Court of Session in 1680; since which time, grants of forestry have fallen into disuse. [See *D. Athole*, 28 Feb. 1862, 24 D. 673.] See *Ersk.* B. ii. tit. 6, § 14; *Stair*, B. ii. tit. 3, § 67; *Bank.* i. 573, 100; *Bell's Princ.* §§ 670, 753; *Watson's Stat. Law, h. t.;* [*Rankine on Land-Ownership*, 142.] See *Deer.* [*Woods. Woods and Forests.*]

FORETHOUGHT FELONY; is murder committed in consequence of a previous design, which anciently was distinguished from murder committed on a sudden. But the act 1661, c. 22, takes away all distinction, and punishes both equally; at the same time it declares that casual homicide, or homicide in self-defence, shall not be punished capitally. *Ersk.* B. iv. tit. 4, § 40; *Hume*, i. 239. See *Chaud Melle.* [*Homicide.*]

FORFEITURE; is the loss of property consequent either upon the contravention of some condition on which the property is held, or upon the commission of a crime to which forfeiture has been annexed by law as the penalty. Thus, forfeiture is either civil or criminal:

1. *Civil Forfeiture.*—Forfeiture may arise

in civil cases either from statutory regulation, from the rules of common law, or by private agreement. Thus, the act 1597, c. 246, provides that all feu-vassals failing to pay their feu-duties for two years "haill and together," shall lose their right, in the same manner as if an irritant clause had been inserted in the right. This irritancy must be declared by an action; and in that action the vassal, by paying up the feu-duty, will escape the forfeiture. [See *Irritancy. Tinsel of the Feu.* See also *Superiority. Tinsel of Superiority.*] The forfeitures at common law arose also from the relation of superior and vassal; [but these are now obsolete. See *Disclamation. Purpresture.*] The conventional forfeitures are, for example, where a vassal becomes bound in his original right to certain conditions, as that he shall not sell without first offering the feu to the superior, under the condition of forfeiture; or a forfeiture may arise from neglecting the conditions of an entail guarded by irritant and resolutive clauses. See *Conditions in Feudal Grants. Clause of Pre-emption. Clause de non alienando.* [*Entail.*]

2. *Forfeiture for Crimes.*—A forfeiture of moveables follows upon the sentence of death being pronounced. It follows also on conviction of perjury, of bigamy, of deforcement, of breach of arrestment, and of usury. Formerly, too, a forfeiture of moveables, or the falling of the single escheat, as it was called, took place where a debtor was denounced rebel, on letters of horning, for not payment of a debt, and remained unrelaxed for the period of a year; but this last species of forfeiture was abrogated by the act abolishing ward-holding. The forfeiture of heritage, which followed on a conviction for high treason, according to the laws of England, [was extended to Scotland by 7 Anne c. 21. The English law, however, has been altered by 33 & 34 Vict. c. 23, which abolishes forfeiture for treason and felony. But this act does not apply to Scotland.] The court will not give judgment on a pleading lodged under a forfeited title; [*Shand's Prac.* i. 170.] This forfeiture may affect,—1. Claimants under a title preferable to that of the attainted person; 2. His heirs-at-law; 3. His creditors and singular successors; and, 4. Heirs of entail. 1. *Claimants under a preferable title.*—By the act 1584, c. 2, it was enacted that all heritage, which had been possessed by the attainted person for the space of five years before the attainder, should be held to be the absolute property of the attainted person; but the severity of this short prescription was mitigated by the act 1690, c. 33, whereby forfeited estates were subjected to all real actions and claims, though not raised within the five years. 2. *The heir-at-law of the attainted person.*—The heirs-at-law are not only deprived, by the attainder, of all that their ancestor possessed, but they are deprived even of the privilege of taking other successions, which they can claim only through him. There seems to be an exception in the case of dignities and honours. See the case of *D. Athole*, noticed by *Ersk.* B. iv. tit. 4, § 26. 3. *The creditors and singular successors of the attainted person.*—Creditors originally had no security in Scotland; and, on the attainder, the whole estate fell to the Crown. This was thought so unjust as to require the interposition of the legislature; and, by the act 1690, c. 33, the rights of creditors were preserved entire; but, after the Union, it became a question whether this statute, or the articles of Union, by which the law of England was made the rule, should be held to regulate those rights; when it was at last determined that the matter was to be regulated by the law of England. By that law, debts, heritably secured on the estate, are not affected by the attainder; but personal debts cannot be made the grounds of attaching the estate; in consequence of which, special statutes were passed after the Rebellions 1715 and 1745, extending the rule as to heritable debts to all the lawful creditors of the forfeited person. 4. *Heirs of Entail.*—In the case of an heir of entail, the forfeiture, on conviction of high treason, extends to the descendants of the forfeited person, and deprives them of the right of succession, so as to give possession to the substitute, not a descendant of the body of the forfeited person; [*Gordon*, 1751, 1 Paton, 508, 558;] *Fac. Coll.* i. No. 3; [see also *E. Perth*, 13 Dec. 1877, 5 R. (H.L.) 26.] See *Hume*, i. 546, 551; ii. 482; *Stair*, B. iii. tit. 3, § 28; *More's Notes*, cccxi.; [*Ersk.* B. iv. tit. 4, § 24;] *Bank.* ii. 249, § 1; 261, § 46; *Swint. Abridg. h. t.; Kames' Stat. Law Abridg. h. t.; Ross's Lect.* i. 208, 255, 392. [See *Attainder.*]

FORGERY; is the crime of [falsely fabricating a deed,] and putting that deed to use, by acting under it, or receiving property in virtue of it, by founding on it in judgment as a title to sue, or to defend, or by making it over to another. [Forgery

[may be committed by fabricating an entire document, including the signature, by simulating the signature only, or by placing a writing above a genuine signature, without the authority of the writer of the signature. It does not appear to be essential that the document be of an obligatory nature; *Macdonald*, 80; *Cregan*, 23 Dec. 1879, 4 Coup. 313. But see Lord Deas in *Imrie*, 18 Sept. 1863, 4 Irv. 435. It is not necessary that there should be any imitation of handwriting; nor that the name adhibited be that of a person who can write, or even of a really existing person. It is forgery even to use one's own name, with the design that it should be received as the signature of another person of the same name. To alter a bill of exchange, with intent to defraud, is forgery; *Mackenzie*, 2 April 1878, 4 Coup. 50. The crime is not complete till the writing has been uttered or put in circulation; which is sufficiently done, if the forger have put the document out of his own possession, with fraudulent intent to pass it as genuine, even though no injurious effect should have been produced. The uttering or vending forged notes, knowing them to be forged, to an associate, at less than their nominal value, for the purpose of being passed by him as genuine, does not amount to forgery, but is a relevant charge. In an indictment for forgery, the forgery and the uttering were formerly generally charged separately, to provide for the case of the uttering alone being proved, which is of itself a crime. But the form of indictment prescribed in the schedule to the Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35), contains only a statement of uttering (*e.g.*, "you did utter as genuine a bill," &c.). By 45 Geo. III. c. 89, § 6, it is a punishable offence to have in one's possession or custody "any forged or counterfeited bank-note, bank bill of exchange, or bank post bill, or blank bank-note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged or counterfeited." But this applies, so far as bank-notes are concerned, to notes of the Bank of England only; *Clunie*, 14 March 1882, 9 R. (J.C.) 15.] The proof of forgery is either direct or indirect. 1. The direct proof of forgery consists in the examination of the writer of the deed, and of the instrumentary witnesses—that is, the witnesses who sign the deed and attest the subscription. The subscription of witnesses is an attestation to which the law gives effect, so as on their death to hold their subscriptions as evidence of the regularity of the deed. Even where a witness does not recollect, weight is given to his subscription; so that, to cut down the effect of a deed regularly attested, the instrumentary witnesses must be brought to swear to circumstances sufficient to invalidate the evidence afforded by their subscriptions—a proof which the law does not reject. 2. The indirect mode of proof is by an investigation of all those circumstances, which may infer that the person, by whom a deed is said to have been subscribed, actually did not subscribe it—*e.g.*, an error in the date, an *alibi*, the stamp, the contexture, or date even of the paper, a *comparatio literarum*, or comparison of the handwriting. The comparison of the handwriting is made with genuine subscriptions of the same date with the one alleged to be a forgery; and, where the real subscriptions differ from the one founded on, the forgery may be pronounced upon with a considerable degree of certainty. See *Comparatio Literarum. Handwriting.* The indirect mode of proof is not resorted to where the direct mode is practicable. Formerly, though the punishment was not expressly laid down by statute, all gross cases of forgery were capital at common law; and, in cases of less moment, an arbitrary punishment was inflicted. But the punishment of death was first much restricted by 1 Will. IV. c. 66, and 2 & 3 Will. IV. c. 123; and at length, by 1 Vict. c. 84, totally abolished in cases of forgery, —transportation [now penal servitude] for life, or for a term of years, being substituted. Forgery is one of the crimes in which the Court of Session has a criminal jurisdiction. Such a criminal prosecution for forgery may originate by a petition and complaint at a private party's instance, with concourse of the Lord Advocate, or with the Lord Advocate alone. The complaint is in substance an indictment, and must have attached to it a list of witnesses, and be served on the panel like an indictment, on an *induciæ* of fifteen days. As the party cannot be punished unless he appear, the court, on the pursuer's application, grants warrant to incarcerate the defender. If, however, forgery is not directly charged, but merely facts stated, from which the inference is drawn, warrant is given to bring the defender before the court for examination. After the process is in court, but before going to proof, the defender has usually been examined in presence of the court. Parties are then

heard, and judgment pronounced on the relevancy of the libel and defences, and the proof is taken. The court hears any relevant defence, at however late a stage it be brought forward. If the panel is found guilty, the writs are reduced, and generally torn in the presence of the court. The offender may also be punished to any extent short of death; but formerly, when the court found the forgery deserving of capital punishment, they merely reduced the deeds, found the panel guilty, and remitted him to the Court of Justiciary. The criminal jurisdiction of the Court of Session in cases of forgery is now, however, more a matter of historical curiosity than of practical utility; since, for upwards of [a century,] the trial in all cases of forgery, whether the evidence be direct or circumstantial, has taken place before the Court of Justiciary. Some interesting information on the subject will be found in *Alison's Princ.* 423. See *Hume*, i. 137; [*Bell's Notes*, 49;] *Ersk.* B. iv. tit. 4, § 67; *Bank.* i. 295, § 213; 415, § 16; *Alison's Princ.* 371; *Macdonald*, 79; *Shand's Prac.* ii. 1035. See *Reduction. Bail.*]

FORIS FACTUM; an unlaw, otherwise called an *amerciamentum. Skene, h. t.*

FORISFAMILIATION; is the separation of a child from the family of his father. The son is said to be *foris familiat* by the father, when, with his own consent and good will, he receives from his father any lands, and is put in possession thereof before his father's decease, and is content and satisfied therewith; so that he nor his heirs may not claim or crave any more of his father's heritage. *Skene, h. t.* Where a child receives a separate stock from the father, the profits of which become his own, he is said to be forisfamiliated, even although he should remain in family with the father. The same is the case where the child marries, or lives in a separate family with the consent of the father. Forisfamiliation is also used to signify either an onerous or gratuitous renunciation of the *legitim* by a child. While children remain in family with their father, he has the entire management of them, and is entitled to all the profits of their labour and industry. *Ersk.* B. i. tit. 6, § 53; B. iii. tit. 9, § 23; *Stair*, B. i. tit. 5, § 13; B. iii. tit. 8, § 45; *Bank.* i. 154, 8; *Bell's Princ.* §§ 1583, 1630; [*Fraser on Parent and Child*, 76, 348.] See *Legitim.*

FORNICATION; is the act of incontinency in unmarried persons. The stat. 1567, c. 13, provides for the punishment of this indecency; but the statute is in desuetude. *Hume*, i. 468; *Bank.* i. 121, 54. See *Disorderly House.* [*Criminal Law Amendment Act.*]

FORTALICE. A fortalice, as a place of strength, was formerly considered as belonging to the King, or, in other words, it was accounted public property, from its connection with the public safety; and therefore, anciently, a fortalice was not carried by a charter, without an express grant of the fortalice; now it goes as part and pertinent of the ground. *Ersk.* B. ii. tit. 6, § 17; *Stair*, B. ii. tit. 3, § 66; *Bank.* i. 567, 91; *Bell's Princ.* §§ 743, 752; *Ross's Lect.* ii. 166, 196.

FORTHCOMING; is the action by which an arrestment is made available to the arrester. The arrestment secures the goods or debts in the hands of the creditor or holder: the forthcoming is an action in which the arrestee and common debtor are called before the judge to hear sentence given, ordering the debt to be paid, or effects delivered up to the arresting creditor. This is the form when the arrester proceeds to make his claim effectual. Where the arrestee is desirous of ascertaining to whom he ought to pay, or where second arresters wish to ascertain their rights, this is accomplished by a process of multiplepoinding. In an action of forthcoming, in which the arrestee and the common debtor must be called, it is necessary to prove both the debt arrested, and the debt on which the arrestment proceeds; the former is a question between the arrester and arrestee. Where the debt has been constituted by writing, the written obligation may be recovered from the common debtor by a diligence; or, where there is no proof, it may be referred to the oath of the arrestee. [Professor Bell (*Com.* ii. 64) holds that the arrester should have the benefit of all evidence which would be open to the common debtor himself.] The debt, again, due by the common debtor to the arrester must be proved; but that is a point in which the arrestee has no interest, and which is competent to the common debtor alone, who is therefore always made a party to the action. [See *Houston*, 20 July 1849, 11 D. 1490.] Where the arrestment has been loosed on caution, the cautioner, as well as the arrestee and common debtor, must be made parties to the action. Where the funds have been paid away by the arrestee after the loosing, it is sufficient that he be

called for his interest, without directing any petitory conclusions against him. A forthcoming may be raised, notwithstanding the death of the arrester, arrestee, or common debtor. The representative of the arrester must, of course, make up a proper title to the debt; and if the arrestee also be dead, the forthcoming will be raised against his representative. Where the arrestee dies during the dependence of the forthcoming, the action must be transferred against his representative before decree can be obtained. Where the common debtor dies before the claim is constituted by decree, or otherwise, it must be constituted against his representatives before the forthcoming is raised. But if decree be recovered against the common debtor himself, there is no necessity for transferring against his representatives. Where the common debtor dies during the dependence of the action of forthcoming, the process cannot proceed till the representative is called as common debtor; but, in such a case, it is not necessary to charge the apparent heir to enter. Another creditor, obtaining confirmation as executor-creditor before decree of forthcoming is pronounced, will be preferred. Even after decree of forthcoming has been obtained, the arrester may proceed with other diligence for the recovery of his debt. In the forthcoming may be recovered both the principal sum arrested and the interest due from the date of arrestment, provided arrestment was used both for principal and interest. Arrestment on a depending action entitles the arrester in the forthcoming to claim all expenses laid out in the action, on the dependence of which the arrestment was used. The expenses of the process of forthcoming are not covered by the arrestment. But where the ground of debt on which arrestment proceeded contains a penalty, the sum recovered under the forthcoming will only extinguish as much of the principal and annualrents as comes to the arrester, after deduction of his expense. And if the arrester have a separate security over property of the common debtor, and have been paid his principal and interest, in virtue of his arrestment, he will not be compelled to assign that separate security to another creditor of the common debtor until he be paid his expenses. The cautioner in the loosing cannot object to the expense of raising and executing the arrestment being comprehended in the forthcoming. The decree of forthcoming is held to be a legal assignation in favour of the arrestee; and where the subject arrested consists in goods or effects, the decree ordering them to be sold for behoof of the arrester gives him a complete legal title, which cannot be defeated by the poinding of co-creditors. [The action of forthcoming is competent either in the Court of Session or the sheriff court. It may now be raised in any sheriff court to whose jurisdiction the arrestee is subject, although the common debtor may not reside within such jurisdiction; 39 & 40 Vict. c. 70, § 47.] See *Ersk.* B. iii. tit. 6, § 15; *Bell's Com.* ii. 63, 280; *Stair*, B. iii. tit. 1, § 36; B. iv. tit. 50, § 26; *More's Notes*, clxxxix.; *Kames' Equity*, 389; *Jurid. Styles*, iii. 23; *Bell's Princ.* § 2283; *Bank.* i. 218; ii. 199; [*Shand's Prac.* ii. 570; *Mackay's Prac.* ii. 101; *Dove Wilson's Sher. Court Prac.* 358, 520, 531. See *Arrestment.*]

FORTUNE-TELLER. Vagabonds may, by 1579, c. 74, be imprisoned and brought to trial; and under the description of vagabonds, are comprehended all who go about pretending to foretell fortunes. The statutory punishment is scourging and burning on the ear. [This act is practically in desuetude. But see *Vagabond.*]

FORUM COMPETENS; means a court, to the jurisdiction of which a party is amenable. Under this head, in digests and dictionaries, such as Morison's and Lord Kames', are usually classed questions as to the competency of a court's jurisdiction over parties furth of the kingdom, who have never had a domicile in this country, or who have lost it; questions as to arrestment *jurisdictionis fundandæ causa*,—the jurisdiction over executors, factors, &c., appointed by the court,—the district within which a testament must be confirmed,—the court competent to discuss the validity of presentations, &c. For these questions, reference is made to the following articles in this Dictionary:—*Arrestment jurisdictionis fundandæ causa. Domicile. Confirmation. Jurisdiction. Foreign. Abroad. Citation.* [The term *forum non competens* has also been frequently used in a sense more correctly expressed by the term *forum non conveniens.* In this sense, it denotes a plea to the effect that, though there is jurisdiction, the action ought to be dismissed or sisted, on the ground that it relates to property situated, or duties falling to be discharged, in another country. The cases in which this plea has been sustained are mostly those in which foreign executors

[have been called to account for executry estate situated abroad, or in which a person has been sued as a partner of a foreign company, the books and funds of which are in a foreign country. A party maintaining this plea must show that he will be put to unfair disadvantage by the case being tried here, and must also show that another more convenient forum is accessible. See *Macmaster*, 17 June 1834, 12 S. 731; *Tulloch*, 6 March 1846, 8 D. 657; *Longworth*, 1 July 1865, 3 Macph. 1049; *Clements*, 16 March 1866, 4 Macph. 583; *Thomson* 1 Feb. 1868, 6 Macph. 310; *Lynch*, 21 June 1871, 9 Macph. 860; *Martin*, 4 Dec. 1879, 7 R. 329; *Brown*, 17 July 1883, 10 R. 1235; *Williamson*, 28 Feb. 1884, 11 R. 596; *Orr Ewing*, 24 July 1885, 13 R. (H.L.) 1; *Bank of Scotland*, 8 Dec. 1886, 14 R. 213. See also *Mackay's Prac.* i. 274. See *Jurisdiction.*]

FOSSA; a pit or fowsie, as *furca* is a gallows. King Malcolm gave power to the barons to have a pit wherein women condemned for theft should be drowned, and a gallows whereon men should be hanged. *Skene, h. t.* See *Furca.*

FOXES; may be pursued and destroyed as vermin even upon the property of others; with no other liability than for the damage actually done in the pursuit. But fox-hunting for sport, without leave, is punishable as a trespass. *Blair's Justice's Manual*, 87; *Colquhoun*, 1785, M. 4997; *Marquis of Tweeddale*, 1778, M. 4992.

FRANCHISE; in English law, is used as synonymous with liberty, and is defined to be a royal privilege, or branch of the prerogative of the Crown, subsisting in the hands of a subject. It must be held by a grant from the Crown, or by prescription, which presupposes a grant. The kinds of franchise are almost infinite. It may mean an exemption from ordinary jurisdiction, an immunity from tribute or toll, the privilege of being incorporated, and subsisting as a body politic, the elective franchise, and the like. *Tomlins' Dict. h. t.* [See *Election Law.*]

FRANK, or *livre;* a French coin, worth 10½d. English money. *Tomlins' Dict. h. t.*

FRANKING; the privilege of dispatching and receiving letters through the General Post Office, [formerly] possessed by members of both houses of Parliament, and by certain government functionaries.

FRAUD. Where fraud enters into a contract, it destroys that consent which is requisite to render an agreement binding in law. Where, through the fraud of the one party, there is an error *in essentialibus* of the contract, consent cannot be said to have been given, and the contract is void *ab initio*, even in questions with the fraudulent party's *bona fide* onerous singular successors. See *Error.* But, even where such error does not exist, fraud giving rise to the engagement—*dolus dans causam contractui*—may be pleaded as a ground of reduction, or as a personal exception to an action for implement; though it will have no effect in questions with *bona fide* onerous assignees. Fraud incident to a contract—*dolus incidens*—only gives a claim for damages. Where the fraud is not that of the party contracting, but of a third party, the remedy can only be sought at the hands of that third party. [It is an established principle, however, in England, that a person cannot avail himself of what has been obtained by the fraud of another, unless he is not only innocent of the fraud, but has given some valuable consideration; *Scholefield*, 4 De G. & J. 429; and it has been held that the principle is applicable in Scotland; *per* Lord Shand, in *Clydesdale Bank*, 8 May 1877, 4 R. 626, and *Gibbs*, 23 June 1875, 4 R. 630. It applies *a fortiori* when the fraudulent person is the agent of the person benefited; *National Exchange Co.* 9 March 1855, 2 Macq. 103; *Traill*, 2 June 1876, 3 R. 770. If the right fraudulently obtained is a personal obligation transmissible by assignation, the fraud of the cedent is pleadable against the assignee, according to the rule *assignatus utitur jure auctoris; Scot. Widows' Fund*, 18 Feb. 1878, 5 R. (H.L.) 64. But this rule does not apply to corporeal moveables, nor to negotiable instruments, nor to heritable rights acquired on the faith of the records. By 19 & 20 Vict. c. 60, § 15, when a bill or note has been fraudulently obtained, the holder suing or doing diligence thereon is bound to prove that value was given by him for the same. See *Bill of Exchange.*

[A contract induced by fraud is not void, but only voidable at the option of the party defrauded. It is therefore valid until rescinded; and as rescission implies *restitutio in integrum*, the option to void the contract is barred, where innocent third parties have, in reliance on it, onerously acquired rights which would be defeated by its rescission. Hence, after a joint stock company has declared its insolvency and stopped payment, it is too late for a shareholder to rescind the contract by which he acquired his stock; *Graham*, 2 Feb. 1864,

[2 Macph. 559; 8 March 1865, 3 Macph. 617; *Addie*, 20 May 1867, 5 Macph. (H.L.) 80; *Tennent*, 20 May 1879, 6 R. (H.L.) 69; *Oakes*, L.R. 2 E. & I. App. 325; *Henderson*, 30 Jan. 1857, 7 E. & B. 356.

[Besides rescission of the contract, and even where that is incompetent, the defrauded party has in his option the alternative remedy of suing for damages. The party liable in damages is the person actually guilty of the fraud; but a principal is liable for the fraud of his agent while acting in the principal's business and within the scope of his authority, for the principal's benefit; *Jardine's Trs.* 10 Feb. 1864, 2 Macph. 1101; *Barwick*, L.R. 2 Exch. 259; *Mackay*, L.R. 5 P.C. 394. The application of this rule to joint stock companies was discussed in *Addie*, *supra*, and *Houldsworth*, 12 March 1880, 7 R. (H.L.) 53; in both of which it was held that parties who had been induced by fraud of the agents of a company to become partners in the company, and who had remained partners until the company went into liquidation and rescission of the contract had therefore become impossible, could not recover damages against the company itself. In *Addie*, Lord Chanc. Chelmsford observed:—"Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors in the name of the company seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action of damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally. The action of Mr Addie is for the reduction of the deeds of transference of the shares, and alternatively for damages. But as it is brought against the company, it will follow from what has been said, that he cannot recover, unless he is entitled to rescind the contract." In the same case Lord Cranworth observed:—"An attentive consideration of the cases has convinced me that the true principle is, that these corporate bodies, [through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the fraud of those agents to the extent to which the companies have profited by those frauds, but that they cannot be sued as wrongdoers by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally." In *Houldsworth*, Lord Chanc. Cairns pointed out the distinction between the purchase of chattels or goods, and the acquisition of shares or stock in a company. In the former case, when the vendor makes fraudulent representations, the purchaser may, on finding out the fraud, retain the chattel or the goods and have his action to recover any damage he has sustained by reason of the fraud. This is according to the law of England, and Lord Cairns assumed (without expressing any opinion) that the law of Scotland is the same. See *Quanti Minoris*. But a person acquiring shares in a company "has not bought any chattel or piece of property for himself; he has merged himself in a society, to the property of which he has agreed to contribute, and the property of which, including his own contributions, he has agreed shall be used and applied in a particular way, and in no other way." See also the observations on Addie's case made, in *Houldsworth*, by Lords Selborne and Blackburn, and by Lord Shand in the Court of Session (6 R. 1181). Lord Blackburn suggests that, though some observations made by the judges were not expressly limited, the principle on which *Addie* and *Houldsworth* were decided might not apply equally to all contracts. "There are reasons which would not apply to every case in which a contract has been induced by fraud—as, for example, if an incorporated company sold a ship, and their manager falsely and fraudulently represented that she had been thoroughly repaired and was quite seaworthy, and so induced the purchase, and the purchaser first became aware of the fraud after the ship was lost, and the underwriters proved that she had not been repaired, and was in fact not seaworthy, and so that the insurance was void, when it would be too late to rescind." See *Joint Stock Company*.]

Fraud may be either by false representation; concealment of material circumstances; underhand dealing; or by taking

advantage of intoxication or imbecility. In mercantile dealings there is some allowance for those petty frauds, or rather misrepresentations, which the parties make use of to overreach one another; and a distinction has been taken between *dolus malus*, or that gross fraud for which there is no excuse, and *dolus bonus*, or those artifices which it is well understood that merchants practise in order to enhance the value of what they sell. Neither is concealment of circumstances known to one of the parties necessarily a ground for reduction, or even for an action of damages. Merchants are often at great expense and trouble in acquiring early information, and it is just that they should be allowed to turn it to account. But if the obligor relies on the obligee for his information, as in insurance contracts, there is no excuse for concealment or fraud, however trifling, and the contract will be void if such fraud has been practised. [See *Irvine*, 2 Aug. 1850, 7 Bell's App. 186; *Broatch*, 5 July 1866, 4 Macph. 1030; also *Insurance.*]

Fraud is proveable by evidence *prout de jure*. [The facts and circumstances must be specifically set forth; *Smith*, 20 Jan. 1854, 16 D. 372; *Shedden*, 15 May 1854, 1 Macq. 535. The degree of unfairness which must be established in order to found a claim for redress, varies according to the relation of the parties. Mere inadequacy of consideration is not sufficient of itself. Where there is facility on one side, less direct proof of fraud is required than if the parties were dealing on equal terms. See *Facility. Circumvention.* And where the parties stand to each other in a relation which implies ascendency on the one side, and dependence or confidence on the other, the undue exercise of influence arising from such relation may be sufficient, without proof of fraud in the strict sense, to invalidate a transaction whereby material benefit is procured gratuitously, or for grossly inadequate consideration; *Tennent*, 15 March 1870, 8 Macph. (H.L.) 10; *Gray*, 5 Dec. 1879, 7 R. 332 (the report of which contains a full list of authorities). An issue of fraud is generally sent to a jury; but in some recent cases it has been decided by a judge without jury; *Life Association*, 31 Jan. 1873, 11 Macph. 351; *Scot. Widows' Fund*, 14 July 1876, 3 R. 1078; *Dunnet*, 7 Dec. 1887, 15 R. 131.] See, on this subject, *Bell's Princ.* § 13; *Ersk.* B. iii. tit. 1, § 16; *Bell's Com.* i. 261, 296, 309, 316; ii. 226; *Stair*, B. i. tit. 9, § 9; *More's Notes*, lix.; *Brown on Sale*, 395, 405; *Bank.* i. 259; *Kames' Equity*, 56, 107, 219, 290; [*Dickson on Evidence*, §§ 43, 630; *Brodie's Stair*, 90; *Menzies' Conv.* 68; *M. Bell's Conv.* i. 170; *Mackay's Prac.* ii. 132; *Kerr on Fraud; Benjamin on Sale*, 400; *Pollock on Contract*, 479, 511; *Anson on Contract*, 161; *Chitty on Contracts*, 631; *Parsons on Contracts*, ii. 767; *Story on Contracts*, § 485; *Story's Equity*, §§ 218, 311, 323.] See *Circumvention. Deceit. Bankruptcy.* [*Insolvency.*] *Conjunct and Confident. Collusion.* [*Reduction.*]

[**FRAUD**, *in Criminal Law.* The crime of fraud is generally charged as falsehood and fraud, or falsehood, fraud, and wilful imposition. It is popularly called swindling, but this term is not now recognised as a *nomen juris.*] Under this head is comprehended that numerous class of cases in which the offender, by the assumption of a false character, or a false representation of some sort, obtains the possession of money, or other property, which he appropriates to himself. Swindling differs from theft in this, that the thief takes the property, while the swindler obtains the owner's consent to his getting it. [A person indicted for falsehood, fraud, and wilful imposition, may be convicted of theft, and *vice versa*; 50 & 51 Vict. c. 35, § 59. The punishment of fraud is arbitrary. See *Hume*, i. 173; *Alison's Princ.* 362; *Macdonald*, 77, 89, 376. See *Theft. Reset. Breach of Trust.*]

[**FRAUDS, STATUTE OF.** See *Statute of Frauds.*]

FRAUDULENT BANKRUPTCY; is the wilful cheating of creditors by an insolvent person, or one who conducts himself as such. Creditors may be defrauded by the funds of their debtor being concealed, or illegally diminished, or by their being conveyed to favourite creditors, to the prejudice of the rest, or by the undue increase of debts or claims against the debtor's estate. Wherever any of those objects has been fraudulently accomplished, redress may be had either at common law or under the bankrupt statutes. If debts be improperly increased, or if any other fraudulent device be fallen upon, either to conceal the debtor's funds, or to confer undue preferences (where the case does not fall within any of the statutes), the common law affords a remedy; the burden of proving the fraud being laid, in common law actions, on the person objecting to it. But, besides an action for fraud at common law, the several bankrupt statutes have introduced certain legal frauds, or presumptions of fraud, which either have

the effect of annulling entirely the transactions in which they occur, or which lay the *onus probandi* on the person favoured by the deed. The point upon which the proof of fraudulent bankruptcy generally turns, is, that the accused was accessory to the diminution, by alienation, abstraction, or concealment, of the funds divisible among his creditors, with a fraudulent intent, and in the knowledge that the legal rights of the creditors were thereby infringed. The embezzlement may have been carried into effect, either in contemplation of, or after sequestration; and, in either case, the proof of fraud depends upon the accompanying circumstances. [See *Neill*, 3 Feb. 1873, 2 Coup. 395; *Sneden*, 10 April 1874, 1 R. (J.C.) 19; *Clendinnen*, 2 Dec. 1875, 3 R. (J.C.) 3.] The punishment of this offence is arbitrary, varying from imprisonment to [penal servitude.] The acts 1621, c. 18, and 1696, c. 5, denounce certain punishments against fraudulent bankrupts, [including infamy and ineligibility for office. See *Conjunct and Confident. Insolvency. Bankruptcy.*] The Court of Session has a criminal jurisdiction in cases of fraudulent bankruptcy; and is empowered, by the act 1696, to inflict any punishment short of death. See *Macalister*, 21 Feb. 1822, 1 S. 339. The prosecution in that court commences with a petition and complaint, which must have the concurrence of the Lord Advocate. [Prosecutions before the Court of Session are now unknown in practice. For the procedure, see *Shand's Prac.* ii. 1038; *Mackay's Prac.* ii. 439;] *Jurid. Styles* (2d edit.), iii. 198, 841. It was at one time questioned whether the Court of Justiciary was competent to try this offence; but all doubt was removed by 7 & 8 Geo. IV. c. 20, whereby it was made lawful to prosecute persons accused of fraudulent bankruptcy before the High Court, or any of the Circuit Courts of Justiciary; and the trustee under a sequestration, or any creditor ranked, with concourse of the Lord Advocate, was empowered to prosecute, but without prejudice to the right of the public prosecutor to insist in all such prosecutions.

[The Bankruptcy Act, 19 & 20 Vict. c. 79, § 97, provides that, if it shall appear to a majority of the creditors in number and value assembled at any meeting after the examination of the bankrupt, that he has not made a full and fair surrender of his estate, or that he has disposed of or concealed any part of his funds, to the prejudice of his creditors, or that his bankruptcy has been fraudulent, they may authorise the trustee to proceed against him in terms of law, at the expense of the estate. By § 162 of the same act, if the Accountant in Bankruptcy has reason to suspect fraudulent conduct on the part of the bankrupt, he may give information to the Lord Advocate, who is directed to take such proceedings as he may think proper.

[By the Debtors Act, 1880 (43 & 44 Vict. c. 34), § 13, the following provision was made for the punishment of fraudulent debtors:—The debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence, and on conviction before the Court of Justiciary, or before the sheriff and a jury, shall be liable to be imprisoned for any time not exceeding two years, or by the sheriff without a jury for any time not exceeding sixty days, with or without hard labour:—(A.) In each of the cases following, unless he proves to the satisfaction of the court that he had no intent to defraud; that is to say,—(1) If he does not to the best of his knowledge and belief, fully and truly disclose the state of his affairs in terms of the Bankruptcy Act, 1856, or the Cessio Acts, as the case may be; *Simpson*, 16 July 1883, 10 R. (J.C.) 73: (2) If he does not deliver up to the trustee all his property, and all books, documents, papers, and writings relating to his property or affairs which are in his custody or under his control, and which he is required by law to deliver up, or if he does not deal with and dispose of the same according to the directions of the trustee; *Simpson, supra:* (3) If after the presentation of the petition for sequestration or cessio, or within four months next before such presentation, he conceals any part of his property, or conceals, destroys, or mutilates, or is privy to the concealment, destruction, or mutilation of any book, document, paper, or writing relating to his property or affairs: (4) If after, or within the time above specified, he makes or is privy to the making of any false entry in, or otherwise falsifying any book, document, paper, or writing affecting or relating to his property or affairs: (5) If within four months next before the presentation of the petition for sequestration or cessio he pawns, pledges, or disposes of, otherwise than in the ordinary way of trade, any property which he has obtained on credit and has not paid for; *Wilson*, 3 July 1882, 5 Coup. 48: (6) If, being indebted to an amount exceeding £200 at the date of the

[presentation of the petition for sequestration or cessio, as the case may be, he has not, for three years next before such date, kept such books or accounts as, according to the usual course of any trade or business in which he may have been engaged, are necessary to exhibit or explain his transactions: (B.) In each of the cases following: (1) If, knowing or believing that a false claim has been made by any person under the sequestration, he fails for the period of a month from the time of his acquiring such knowledge or belief to inform the trustee thereof: (2) If after the presentation of the petition for sequestration or cessio, or at any meeting of his creditors within four months next before such presentation, he attempts to account for any part of his property by fictitious losses or expenses: (3) If within four months next before the presentation of the petition for sequestration or cessio he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same; *Macleods*, 12 Sept. 1888, 16 R. (J.C.) 1: (4) If, after the date of granting sequestration or cessio, or within four months prior thereto, he absconds from Scotland, or makes preparations to abscond for the purpose of avoiding examination or other proceedings at the instance of his creditors, or taking with him property which ought by law to be divided amongst his creditors to the amount of £20 or upwards, or if he fails, having no reasonable excuse (after receiving due notice), to attend a public examination appointed by the Lord Ordinary or the sheriff, or to submit himself for examination in terms of the statutes: (5) If, being insolvent, and with intent to defraud his creditors, or any of them, he makes, or causes to be made, any gift, delivery, or transfer of or any charge on or affecting his property. In *Robertson*, 17 Aug. 1885, 13 R. (J.C.) 1, a conviction, under clauses (A 3) and (B 5) of this enactment, of a person who was not a debtor, but who had knowingly assisted a debtor to conceal his effects, was suspended. By § 14 of the Debtors Act, if any creditor under any petition for sequestration or cessio, or disposition *omnium bonorum*, wilfully and with intent to defraud makes any false claim, or makes or tenders any proof, affidavit, declaration, or statement of account which is untrue in any material particular, he is guilty of a crime and offence, and liable on conviction to imprisonment for one year, with or without hard labour. By § 15, it is the [duty of the trustee in a sequestration or cessio to report all offences under this act to the presiding judge, who may direct information to be laid before the Lord Advocate. By § 16, where any person is liable under any other statute or at common law to any punishment for any offence made punishable by this act, he may be proceeded against under this act, or such other act, or at common law, so that he be not punished twice for the same offence.

[It was further enacted by the Bankruptcy Frauds and Disabilities Act, 1884 (47 & 48 Vict. c. 16), § 4, that where an undischarged bankrupt (*i.e.*, by § 3, a person whose estate has been sequestrated, or with respect to whom decree of cessio has been pronounced, and who has not received his discharge from a competent court) obtains credit to the extent of £20 or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a crime and offence, and may be dealt with and punished as if he had been guilty of a crime and offence under the Debtors Act, and the provisions of that act shall apply to proceedings under this section. See *Duncan*, 3 Feb. 1886, 13 R. (J.C.) 36; *Small*, 12 March 1886, 13 R. (J.C.) 45; *Livingstone*, 29 Feb. 1888, 16 R. (J.C.) 48.]

See, on this subject, *Hume*, i. 509; [*Bell's Notes*, 128, 147;] *Alison's Princ.* 567; [*Macdonald*, 100, 276, 379; *Ersk.* B. iv. tit. 4, § 79; *Goudy on Bankruptcy*, 594.]

[**FREEBENCH**; in English law, a widow's dower out of copyholds, to which she is entitled by the custom of some manors. The term is also applied to the estate which, by the custom of some manors, a husband takes in his wife's copyhold lands after her death. *Wharton's Lex.*]

FREEHOLD; in English law, is a land, tenement, or office which a man holds in fee-simple, fee-tail, or for life. Freehold is either in deed or in law; the first is the actual possession, the second is the right before entry. [An estate, to be freehold, must possess these two qualities: (1) immobility, that is, the property must be either land or some interest issuing out of or annexed to land; and (2) indeterminate duration, for if the utmost period of time to which an estate can endure be fixed and determined, it cannot be a freehold.] *Tomlins' Dict. h. t.*; [*Wharton's Lex.*]

FREEHOLDER; is a person holding of

the Crown or Prince, though the title is, in modern language, applied to such as, before the passing of the Reform Act of 1832, were entitled to elect or be elected members of Parliament, and who must have held lands extending to a forty shilling land of old extent, or to £400 Scots of valued rent. See *Election Law.*

FREIGHT. Freight is the price paid for the use of a ship to transport goods from one port to another. It is generally settled in writing by a contract of charter-party, in which the course of the voyage and the number of days the ship is to remain at a port or ports on her voyage, are prescribed; and where the vessel is detained a greater number of days than has been provided for, the amount of the charge for each extra day is fixed. The freight is not due until the whole voyage is finished, by unloading the cargo, and discharging the ship at the last port; [freight being properly the reward payable for safe carriage and delivery; *Kirchner,* 12 Moo. P.C. 361. But if the voyage be divisible into distinct parts, or if the owner voluntarily accepts the goods at a point short of their destination, in such a mode as to raise a fair inference that the further carriage is intentionally dispensed with, freight may be demanded *pro rata itineris peracti; Taylor & Co.* 1802, M. 10113. Where the goods are damaged, the freight may be retained; *Shankland,* 28 March 1865, 3 Macph. 810. By the law of Scotland, and of every other trading country except England, an advance made on account of freight is recoverable from the shipowners, on the loss of ship and cargo; *Watson & Co.* 27 Nov. 1871, 10 Macph. 142 (affd. on special ground, 11 Macph. (H.L.) 51).] The goods and merchandise are under a hypothec for the freight; as the freight is to the mariners for their wages; [but this is rather a right of lien or retention.] Besides the freight, the shipowner has a claim for the expense of pilots, or on the loss of masts, anchors, &c., which is termed average. See *Average.* A merchant who freights a whole ship is liable to pay freight for the goods transported, and a compensation for any loss arising from his failure to supply a full cargo. The sum paid for the unoccupied space is called *dead freight;* it is not, however, properly freight, but, strictly speaking, a claim of damages for the loss of freight; and, therefore, the shipmaster has no lien over the goods on board, entitling him to retain them against the consignee in security of this claim, which must be made effectual by a personal action against the freighter. But, although there be no such lien by implied contract, it may be constituted by an express stipulation to that effect in the charter-party. [See, as to dead freight, *M'Lean & Hope,* 27 March 1871, 9 Macph. (H.L.) 38; *Gray,* 6 Q.B. 352. As to freight generally,] see *Abbott on Shipping,* 346; *Brodie's Supp. to Stair,* 918, 982 *et seq.; Bell's Com.* i. 204, 586; ii. 94; *Bell's Princ.* §§ 409, 420 *et seq.,* 1399, 1423; [*Ersk.* B. iii. tit. 3, § 17; *Maclachlan on Shipping,* 105, 452; *Maude & Pollock,* 62, 632; *Smith's Merc. Law,* 314. See *Charter-Party. Bill of Lading. Insurance.*]

FRIEBORGH; a cautioner. *Skene, h. t.*

FRIENDLY SOCIETIES. [These are now regulated by the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), as amended by the statutes cited *infra.* Friendly societies, in the sense of the act, are such as are established to provide by voluntary subscriptions of the members thereof, with or without the aid of donations—(1) For the relief or maintenance of the members, or their near relatives, during sickness or other infirmity, or of the orphan children of members during minority; (2) For insuring money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the husband, wife, or child of a member, or of the widow of a deceased member; (3) For the relief or maintenance of the members when on travel in search of employment, or when in distressed circumstances, or in case of shipwreck, or loss or damage of or to boats or nets; (4) For the endowment of members, or nominees of members, at any age; (5) For the insurance against fire to any amount not exceeding £15 of the tools or implements of the trade or calling of the members. Such societies may be registered under the act, provided they do not contract with any person for the assurance of an annuity exceeding £50 per annum, or of a gross sum exceeding £200; and besides these, the following may also be registered under the act, viz., cattle insurance societies, benevolent societies, working men's clubs, and any societies which the Treasury may specially authorise; § 8. The registry office consists of a chief registrar and assistant registrars for England, Scotland, and Ireland, all appointed by, and holding office during the pleasure of the Treasury. The assistant registrar for Scotland must be an advocate, writer

[to the signet, or solicitor of seven years' standing. The central office is directed to prepare model forms, publish tables, and circulate information as to statistics, &c. The chief registrar reports yearly to Parliament; § 10. Every registered society must have at least seven members; and the application for registry must be signed by seven members and the secretary; and a copy of the rules, with a list of the names of the secretary and of every trustee or other officer authorised to sue and be sued on behalf of the society, must be sent to the registrar. No identity or deceptive similarity in the names of societies is allowed. An acknowledgment of registry is issued by the registrar, and is conclusive evidence, unless proved to be suspended or cancelled. If the registrar refuse to register, the society may appeal to the Court of Session; § 11. Provision is made by § 12 for cancelling and suspension of registry; and § 13 deals with the rules and amendments of rules, which latter are not valid till registered. Every registered society must have a registered office, and must appoint trustees by a majority of members at a meeting of the society. The accounts must be audited annually, and an annual return made of receipts and expenditure. A quinquennial valuation of assets and liabilities is required by § 14; but it may in certain cases be dispensed with by the chief registrar, and it is not required from societies other than friendly societies, registered under the act. A quinquennial return of sickness and mortality was also required by the same section; but this is no longer necessary; 45 & 46 Vict. c. 35. Registered societies have various privileges under § 15; *e.g.*, exemption from stamp-duty; a power of nomination by a member of a person to receive on his death a sum not exceeding £50; validity of payment made to a person appearing to the trustees to be entitled thereto; limitation of cost of certificates of birth and death, &c. Provisions are made by §§ 16–19 with regard to the property and funds of societies, loans to members, &c. For the remaining provisions, reference is made to the act itself, as well as to the following amending acts:—39 & 40 Vict. c. 32; 46 & 47 Vict. c. 47 (Provident Nominations); 48 & 49 Vict. c. 27; 50 & 51 Vict. c. 56; 51 & 52 Vict. c. 66. See *Blue*, 12 July 1866, 4 Macph. 1042; *Davie*, 9 Nov. 1870, 9 Macph. 96; *Manners*, 5 March 1872, 10 Macph. 520; *M'Kernan*, 19 March 1873, 11 Macph. 548; *Simpson*, 24 Nov. 1874, 2 R. 129; *Macintosh*, 20 July 1886, 13 R. (J.C.) 96; [*Allan*, 16 Nov. 1887, 15 R. 56. See also *Ersk.* B. i. tit. 7, § 64; *Barclay's Digest; Pratt's Friendly Societies; Davis' Friendly Societies.* See *Trade Unions. Menage. Building Societies. Industrial and Provident Societies.*]

FRUCTUS PENDENTES; are fruits not yet separated from the subject which produced them. Natural fruits pass, upon the death of the proprietor, to his heir, or upon a sale of lands to the purchaser. All *fructus pendentes* at the termination of *bona fides*, with the exception of corn sown by the *bona fide* possessor, go to the proprietor. *Ersk.* B. ii. tit. 1, §§ 14, 26; *Kames' Equity*, 370. See *Fruits.*

FRUCTUS PERCEPTI; are fruits separated from the subject which produced them. They become the property of the *bona fide* perceptor. *Ersk.* B. ii. tit. 1, § 25; *Kames' Equity*, 370. See *Fruits. Bona Fides.*

FRUITS; as part of the soil, belong to the proprietor of the soil. This is the general rule. Hence, on the death of a proprietor, the fruits go to the heir, or to a purchaser, along with the lands; but there is an exception of such fruits as are raised by annual industry. In this view, trees or planting, even natural grass or fruit not yet plucked from the tree, belong to the proprietor, that is, to the heir or to the purchaser; but wheat, barley, &c., which are reared by annual culture, belong to the person, or his executors, by whom the crop was sown, so as to exclude either an heir or a purchaser. With regard to a purchaser, however, in place of regulating his interest by abstract rules of this kind, the payment of the price, the period of the currency of the interest, or the views of the parties in the sale, will affect the question as to the property of the fruit. *Stair*, B. i. tit. 7, § 12; *Ersk.* B. ii. tit 2, § 4; *Bell's Com.* ii. 2, 27, 28; *Bell's Princ.* §§ 1044, 1473; *Bell on Leases*, i. 421, 430; *Bank.* i. 213, 474, § 78; [*Rankine on Land-Ownership*, 75, 613.] See *Bona Fides. Grass.* [*Liferent.*

FUEL. See *Feal and Divot.*

FUGITATION. Where a person accused of a crime does not obey the citation to answer in the criminal prosecution brought against him, the court pronounces sentence of fugitation against him, by which [he is deprived of all personal privilege or benefit by law,] and all his moveable property falls as escheat to the Crown. [See *Outlawry.*]

[**FUGITIVE OFFENDERS.** See 44 & 45 Vict. c. 69; *Carlin*, 18 July 1885, 12 R. (J.C.) 50.]

FUNERAL EXPENSES. The funeral expense is a privileged debt, which must be paid, along with others of the same class, preferably to other debts. Under these expenses are included the expenses necessary for the suitable performance of the funeral, and for mournings for the widow, and for such of the children of the deceased as are present at the funeral. See *Ersk.* B. iii. tit 9, § 43; *Stair*, B. iii. tit. 8, § 72; *More's Notes*, xxv., ccclvi.; *Bell's Com.* ii. 148; *Bell's Princ.* §§ 1241, 1403, 1572; [*Fraser on Husb. and Wife*, ii. 989; *Goudy on Bankruptcy*, 504.] See *Executor. Privileged Debt.*

FUNGIBLES; are moveable goods and effects, which perish in the use, and which may be estimated by weight, number, or measure, as grain or coin. In this sense, jewels, or paintings, or other works of art and taste, are not fungibles, their value differing in each individual without possessing any common standard. *Ersk.* B. iii. tit. 1, § 18; *Stair*, B. i. tit. 10, § 12, and tit. 11, § 1; also B. ii. tit. 1, § 33; [*Bell's Com.* i. 275, 277;] *Bell's Princ.* § 137.

FURCA ET FOSSA; the pit and gallows. In ancient privileges granted by the Crown, it signified a jurisdiction over felons, to punish the men by hanging and the women by drowning. *Tomlins' Dict. h. t.* See *Fossa.*

FURCHE; a fork. Anciently, when any person was served and retoured nearest and lawful heir to any of his predecessors, the King directed precepts to the superior to infeft him. If the first and second were disregarded, he directed a third, called the *furche*, or forked, because alternative, in which the King commanded the superior to give sasine, and certified that if he did not, he would command the sheriff to give the same. Similar to this was the third precept on the allowance of an apprising. *Ersk.* B. ii. tit. 12, § 25; *Skene, h. t.*

FURIOSITY; or madness, by which the judgment is prevented from being applied to the ordinary purposes of life, is one of the grounds on which a curator may be appointed to manage the affairs of the person labouring under that infirmity. See *Insanity.*

FURLONG; a lineal or superficial measure; the eighth part of a mile or of an acre. *Tomlins' Dict. h. t.*

FURLOUGH. [If any soldier on furlough is detained by sickness or other casualty rendering necessary an extension of such furlough in any place, and there is no officer of the rank of captain within convenient distance, any justice of the peace who is satisfied of such necessity may grant an extension of furlough for one month, certifying the same, and the cause of it, by letter to the commanding officer if known, and if not, to a Secretary of State; Army Act, 1881 (44 & 45 Vict. c. 58), § 173. See *Army. Desertion.*]

FURNITURE. Household furniture is comprehended under the *invecta et illata*, over which, [in urban leases,] the landlord's hypothec for rent extends. [See *Hypothec.* In rural leases, the hypothec does not include household furniture; 30 & 31 Vict. c. 42, § 6.] A sale of furniture *retenta possessione* is not available against the hypothec, [though it is against the claims of ordinary creditors; 19 & 20 Vict. c. 60, §§ 1, 4.] Furniture may be liferented; and it is often provided in marriage-contracts, that the wife shall have the furniture in liferent; but as, during the subsistence of the marriage, her claim is only personal, it cannot be preferable to that of her husband's creditors. The liferent of furniture gives the full use of it, *salva substantia.* Giving the liferent of the furniture of a house is only demonstrative, and the furniture may be carried thence. Where, however (as in *Cochran*, 1775, M. 8280), it is combined with a mansion-house, it is held only as an accessory to the possession of the house. See *Liferent.* See *Ersk.* B. ii. tit. 6, §§ 57, 64; B. iii. tit. 6, § 6; *Bell's Com.* i. 126; ii. 29; *Bell's Princ.* §§ 1043, 1276, 1946; *Bell on Leases*, i. 384; *Hunter's Landlord and Tenant*, ii. 374; [*Rankine on Leases*, 328.]

[**FURTHCOMING.** See *Forthcoming.*]

FUTURE DEBT; is a debt not yet due. Neither debts depending on the event of a lawsuit, nor conditional debts, are considered as future debts; for the decree ascertaining the debt in the one case, and the purifying of the condition in the other, have each of them a retrospect, and render the debt effectual from the first. *Ersk.* B. iii. tit. 6, § 9; *Bell's Com.* i. 332; ii. 64, 136, 288; *Bell's Princ.* §§ 46, 911, 2326; *Thomson on Bills*, 562. See *Contingent Debts.* [*Bankruptcy. Arrestment. Inhibition.*]