being cut, stoles out again for another cutting, so as, by proper management, to yield a yearly profit, which may be turned to account by a temporary usufructuary, as a liferenter or wadsetter on a good title, but not by a mere tenant, unless his lease expressly so provide. *Stair*, B. ii. tit. 3, §§ 74 *et seq.*; *Bank.* i. 658; *Hunter's Landlord and Tenant*, i. 122, 126–27, 275. See *Liferent. Wood. Trees. Timber.*

SYMBOLS. Heritable property was formerly transferred by the delivery of symbols. Thus lands were resigned by a vassal to his superior by the symbol of staff and baton; and in giving sasine, the symbols were varied according to the nature of the subject. In giving sasine of lands, the symbols were *earth and stone* of the lands; of an annual rent out of lands, *earth and stone, with a penny money;* of fishings, *net and coble;* of mills, *clap and happer;* of houses within burgh, *hasp and staple;* of patronage teinds, *a sheaf of corn;* of patronage, *a psalm-book and the keys of the church;* of jurisdictions, *the book of court. Ersk.* B. ii. tit. 3, § 36; *Stair*, B. ii. tit. 1, § 15; tit. 3, §§ 17, 44; B. iii. tit. 2, § 6; *More's Notes*, clxi.; *Bank.* i. 509, 549; ii. 209; *Bell's Princ.* §§ 769, 794, 844; *Ross's Lect.* ii. 87, 196, 216, 374. See *Delivery. Resignation. Sasine.*

SYNOD. See *Church Judicatories.*

T

TABLING OF A SUMMONS. At the institution of the College of Justice (1537), there was appointed a table, in which were set down all summonses, to be called in their turns; those from each quarter into which Scotland was divided, having a particular quarter of the year allotted to them. *Stair*, B. iv. tit. 2, § 5; *Bank.* B. iv. tit. 23, § 27; *Kames' Stat. Law, h. t.* See *Calling of a Summons.*

TABULÆ; the twelve tables upon which the laws of Rome were first inscribed for public inspection.

TABULÆ. Deeds *contra fidem tabularum* are all private covenants, whether before or after a contract of marriage, whereby the interests of the bride or bridegroom are injured, and which are held fraudulent and void on this account. *Bank.* B. i. tit. 5, § 21.

TACIT RELOCATION. See *Relocation.*

TACITURNITY; a mode of extinguishing an obligation in a shorter period than by the forty years' prescription. This manner of extinguishing obligations is by the silence of the creditor, and arises from a presumption, that in the relative situations of himself and his debtor, he would not have been so long silent, if the debt had not been paid, or the obligation implemented. ["In order to found the plea, the relation of the parties, and the whole surrounding circumstances, must be considered, and unless these, coupled with silence, are sufficient to infer a presumption of payment, satisfaction, or abandonment, there is no ground for the plea;" *per* Lord J. C. Inglis, in *Moncrieff*, 11 Jan. 1859, 21 D. 216. Contrast *Cullen*, 16 [Nov. 1838, 1 D. 32; *Thomson*, 6 Dec. 1849, 12 D. 276; *Robson*, 19 March 1870, 8 Macph. 757; and *Spence*, 24 Oct. 1873, 1 R. 46; in which the plea was admitted; with *Seath*, 21 Jan. 1848, 10 D. 377; and *Allan*, 24 June 1851, 13 D. 1220; in which it was repelled.] See *Ersk.* B. iii. tit. 7, § 29; *Brown's Synop.* p. 1694. See *Acquiescence.* [*Mora.*] *Presumption. Prescription. Evidence.*

TACK. See *Lease.*

TAILZIE. [See *Entail.*]

[TAXATION OF ACCOUNTS. See *Expenses. Auditor.*]

TAXED WARD AND MARRIAGE. See *Tenure. Casualty. Marriage.*

TAXES; are supplies granted by the House of Commons, and confirmed by acts of Parliament, constituting the extraordinary revenue of the Crown, and paid yearly towards the expenses of Government. [See Taxes Management Act, 1880 (43 & 44 Vict. c. 19). See also *Property and Income Tax. Legacy Duty. Inventory Duty. Succession Duty.*] *Stamp Laws. Land-Tax. Public Burdens.* Taxes and the arrears of taxes are Crown debts. See *Crown Debt.* As to the supposed power of the magistrates of royal burghs to impose taxes with consent of the majority of burgesses, see *Ersk.* B. i. tit. 4, § 22.

TEIND COURT; *or Commissioners of Teinds.* Several expedients to provide the reformed clergy with proper stipends having failed, a commission of Parliament was appointed by the act 1617, c. 3, to plant churches and modify stipends out of the tithes of every parish within the kingdom. Other commissions were afterwards granted,

with powers to unite or disjoin parishes, to value and sell tithes, &c. The last of these commissions was authorised by 1693, c. 23; and by 1707, c. 9, the powers of it and of all former commissions were transferred to the judges of the Court of Session, who, since that time, have continued to exercise the powers thus conferred on them, as a parliamentary commission, under the name of the *Teind Court*, or "*The Commission for Plantation of Kirks and Valuation of Teinds.*" [By 2 & 3 Vict. c. 36, § 8, the judges of the two Divisions of the Court of Session, along with the Lord Ordinary on Teinds, were constituted the Court of Commissioners of Teinds, any five being a quorum. By 31 & 32 Vict. c. 100, § 6, it was provided that the quorum should include the Lord Ordinary on Teinds, except in case of indisposition or necessary absence; and that the sittings of the court should take place fortnightly, on Mondays, during the sitting of the Court of Session. The second Junior Lord Ordinary officiates in teind causes; 1 & 2 Vict. c. 118, § 2.] This court is distinct from the Court of Session, having a special jurisdiction, and a separate establishment of clerks and officers. All summonses before this court pass under the signet of the Court of Session; but instead of being subscribed by a writer to the signet, they are subscribed by the clerk of the Teind Court; [see *Matheson*, 5 Feb. 1862, 24 D. 436.] By the Judicature Act, 6 Geo. IV. c. 120, § 54, a distinction was made between the judicial and ministerial duties of this court. As to its judicial duties it was provided that all actions for the valuation or sale of teinds, or of proving the tenor thereof, all actions of suspension or reduction of localities, and all actions of declarator or reduction connected with teinds, formerly competent before the Teind Court, should be brought before one or other of the Divisions of the Court of Session, which Division is to be held as a *quorum* of the Commissioners of Teinds. The procedure in such causes is to be assimilated to the procedure in ordinary cases in the Court of Session; the Lord Ordinary having the same power to determine and to report as in that court, and his interlocutors being in like manner subject to review in the Division of the court to which the cause belongs. [On the other hand, whatever jurisdiction the Court of Teinds possesses of a ministerial and discretionary nature, *e.g.*, in assigning or modifying stipends, in uniting and disjoining parishes, &c., continues to be exercised by the whole Lords Commissioners of Teinds, or a quorum thereof. But in all actions relating to the localling of modified or augmented stipends, and in several other cases, the court remit to the Lord Ordinary to carry out their decrees; and his interlocutor is subject to the review of one of the Divisions, which to that effect is held as a quorum of the Lords Commissioners. The judgments of the Teind Court may be appealed to the House of Lords; *Kirkden*, 1784, M. 7479, and App. Stipend, No. 6 (note). As to the time allowed for appealing, see *Appeal to the House of Lords.*] See *Ersk.* B. i. tit. 5, § 21; *Stair*, B. ii. tit. 8, § 12; *More's Notes*, ccxxxvii.; *Connell on Tithes*, i. 157; [*Buchanan on Teinds*, 432; *Mackay's Prac.* i. 45, 191. As to reduction of Teind Court decrees, see *Mackay's Prac.* ii. 508. See *Teinds. Augmentation. Locality. Clerk of Teinds.*]

TEINDS *or* **TITHES.** Teinds or tithes are, in their original signification, the tenth part of the annual produce of the land and industry of the laity, which the clergy began, in the earlier ages of the church, to claim and to receive as a fixed provision for the maintenance of religious instructors. Teinds are of two kinds, *personal* and *predial*. The former are unknown in Scotland. The latter, affecting the fruits of land, are either *natural* or *industrial*; of which the industrial correspond to the *mixed* tithes of some writers; *Stair*, B. ii. tit. 8, §§ 5–6; *Decretal*, L. 3, tit. 30, c. 20; although others confine the term *mixed* to the tithes of cattle and their fruits; *Bank.* B. ii. tit. 8, § 136. In Scotland, until teinds came to be regulated by the valued rental, there was hardly any teinding of natural fruits; so that predial tithes of industrial fruits have all along, with a few local and consuetudinary exceptions, constituted the whole teinds leviable by the church in Scotland. They consisted of the tenth of all profit produced by the application of industry to land; with the exception of certain lands, such as glebes, temple-lands, and those belonging to the Cistercian and other religious orders; and of lands, the proprietors of which have acquired their teinds from churchmen originally. They were leviable without any deduction *propter curam et culturam* in favour of the possessor, and were of two kinds, *Parsonage* and *Vicarage*; of which parsonage, due exclusively to the parson, or others having right to the parochial benefice, and called *Decimæ Rectoriæ*, or *Decimæ Garbales*, were levi-

able from corn alone at the terms of Whitsunday and Michaelmas; 1672, c. 13. Vicarage teinds were paid to the vicar, if originally appointed by the patron; yet, where he was not, they also went to the beneficiary, who might make what agreement he pleased with assistants of his own appointment. Those teinds were drawn from all other and minor fruits, such as cattle, fowls, eggs, milk, hay, lint, fishings, &c., &c., not, as parsonage teinds, according to any general rule, but according to the usage of every individual benefice or parish. Hence, in parsonage teinds, although the negative prescription may destroy the right of those of each year, and although the positive prescription will operate in favour of one infeft in his own parsonage teinds, yet, because they are due by law, and form an inherent burden on the land, the right to levy them cannot be lost *non utendo;* whereas vicarage teinds are regulated, both in kind and in amount, by the use of payment; are established by use alone; and are lost by the negative prescription. [Provision was made for the commutation of vicarage teinds on fish, by 27 & 28 Vict. c. 33. See *Scott*, 23 May 1851, 13 D. 991.]

Prior to the Reformation, the church, enjoying tithes *de jure communi*, had, besides, accumulated a great deal of landed property. But notwithstanding this, the tithes were gradually almost entirely carried away from their proper destination, and the acting parochial clergy thus left in a state of comparative indigence. Religious houses were always, on account of their apparent sanctity and austerity, regarded by the laity with greater favour than that shown to the secular clergy. Donations and mortifications thus became frequent; and it often happened that, on the emerging of a vacancy in the parochial charge, patrons, considering themselves then absolute proprietors of the benefice which they had founded, appropriated great part of its tithes to some favourite monastery, and frequently, indeed, conveyed away to some religious institution the right of presentation also; thus making it, as it were, the perpetual beneficiary of the church annexed, with an unlimited power in restricting the clergyman's allowance,—a practice attempted to be checked by 1471, c. 43, but which continued to prevail till the Reformation. Moreover, grants of part of the tithes were often made by the patron, as opportunity offered, to needy lay friends. The religious houses, also, which had acquired rights to tithes, often profited, and, at any rate, saved themselves from odium and trouble, by the disposal of them to the Crown, or to lay subjects. [But the disposing of tithes to laymen was prohibited by several Lateran Councils, especially those held by Alexander III. in 1180, and by Innocent III. in 1215. Erskine mentions also Papal exemptions, granted to religious houses, among the means by which teinds were diverted from the parochial clergy. But these exemptions did not apply to all the lands held by the monasteries, but only to the *Labores*, *i.e.*, lands cultivated by the monks themselves, or at their own expense, and the *Novalia*, *i.e.*, such as had been newly brought under cultivation by the monks. See *College of Glasgow*, 16 June 1813, F.C. And the exemption was restricted, in the 12th century, to lands held by the three orders of Cistercians, Templars, and Hospitallers, and, in 1216, to lands acquired by these orders before that year. The privilege was of a strictly personal nature, and came to an end when the ecclesiastics ceased to be the immediate occupants and cultivators of the lands. See *L. Blantyre*, 4 Dec. 1838, 1 D. 148. Shortly before the Reformation, the practice arose of giving out feus of church lands *cum decimis inclusis et nunquam antea separatis;* and this provision, under certain conditions which are noticed elsewhere, is recognised as transferring to the grantee the same exemption which had formerly been enjoyed by the church. See *Decimæ Inclusæ.*]

At the Reformation, the King, whether by resignation or by confiscation, became the proprietor of all church lands, especially of those formerly belonging to religious houses, of whatever description, unconnected with parochial charges; and on the death or dispersion of the abbots and prior, he first appointed lay commendators for life, and then created the monasteries and priories into temporal lordships, the grantees to which were styled *Lords of Erection*, or *Titulars of the Tithes;* thus transferring the possessions of the church permanently into the hands of laymen holding of the Crown; while, at the same time, the Crown, coming in place of the Pope, became patron of every regular parochial charge to the patronage of which no subject could show a good title, and thus acquired a great accession to its influence. The property of the lands erected, and their exemption from tithe (where it existed), constituted the *temporality*, and the tithes themselves the *spiritu-*

ality of the benefice; and the Lords of Erection continued the exercise of the rights which their predecessors had exercised, in presenting such ministers, and assigning such stipends, as they chose; although a very limited independent provision was confirmed to the reformed clergy by 1572, c. 52. These Lords of Erection themselves, however, soon became objects of jealousy, and their possessions objects of importance. It became, therefore, advisable to check the practice of erections; and, in consequence, by 1587, c. 29, all church lands were inalienably annexed to the Crown, with the following exceptions: 1*st*, Of the temporal lordships erected by the Crown, prior to the date of the act. 2*d*, Of lands made over to hospitals, schools, and universities, and not diverted from their original uses. 3*d*, Of benefices which, before the Reformation, had either been retained by the original lay patrons, or had been feued out to laymen by the church; the feu-duties, on the Reformation, vesting in the Crown with certain limitations. 4*th*, Of the manses and glebes of the Popish churchmen, which were not annexed, because regarded, like those teinds which were appropriated to parsonages and vicarages, as part of the spirituality of benefices, and were, like them, reserved either to the possessors at the time, or to the Protestant churchmen who were to come in their place. See 1593, c. 190. 5*th*, Of certain pensions granted by the Pope, or his successor the King, or by bishops, with consent of the incumbent, provided they were either authorised by the Lords of Council, or followed by possession. See 1606, c. 3. [As to the teinds of church lands, Erskine (B. ii. tit. 10, § 22) seems to incline to the view that these were annexed by the act of 1587, as well as the lands themselves; but the other authorities concur in holding that the teinds were not annexed.] Notwithstanding this act, further erections were made by the Crown, which gave rise to a second act, 1592, c. 121, voiding all erections subsequent to 1587, except those in favour of persons created, since that period, Lords of Parliament. On the restoration of bishops, the annexations of their benefices and those of their chapters were rescinded respectively, by 1606, c. 2, and 1617, c. 2; but these measures were cancelled by the act 1690, c. 29, on the re-establishment of Presbytery; and the King has since applied the bishops' tithes to public uses and pensions. Thus, it appears that, after the Reformation, the whole teinds of the country belonged either to the *Crown*, to the Lords of Erection, called *titulars*, to the original founding *patrons*, or to the *feuars* from the church,—the whole rights of the church to teind being thus transferred to, and vested in, these parties.

The teind was originally made effectual by *drawing* it; which was performed by the beneficiary carrying off from the ground every tenth sheaf, the remainder of the produce being termed the *stock*. This practice was attended with great inconvenience, and became a constant instrument of oppression, from the proprietor being obliged to allow his whole crop to stand on the ground, exposed to all the vicissitudes of the seasons, until the beneficiary should choose to draw away his teind. It became a frequent custom for the beneficiary to commute his tithes for either a certain yearly tack-duty, or a stated number of *rental bolls;* to which both parties were, under certain limitations, bound permanently to adhere. And it often happened that the beneficiary persevered in nimiously delaying to draw his teind, for the purpose of thereby making better terms in any proposed arrangement with the proprietor. Various remedies provided for this evil by the acts 1606, c. 8, 1612, c. 5, and 1617, c. 9, were found to be in a great measure inoperative; so much so, that Charles I. was induced, soon after his accession, to execute a revocation of all grants of church lands or tithes made by James VI. to the Crown's prejudice; and, the year after, to bring a reduction of all erections, both those before and those after the Act of Annexation; of the former, on the ground that they proceeded on the resignations of the beneficiaries; and of the latter, on the ground that no annexation to the Crown could be dissolved but by Parliament; and contending,—1*st*, That the titulars should yield to the Crown the superiority of the church lands, and that a certain yearly annuity should be paid out of the tithes to the Crown. 2*d*, That the titular (*i.e.*, beneficiary) should sell the tithes to the proprietor at a fixed number of years' purchase; and that tithes set aside yearly for the support of the clergy, universities, schools and hospitals, should be valued at the suit of the proprietor, who, on payment either of the price, or of the valued yearly duty, should have the entire management of the crop, stock, and tithe.

All parties having interest entered, in

1628, into four submissions, referring to the King himself; the first and fourth signed by the Lords of Erection with their tacksmen, and by the landlords,—the second by the bishops and clergy,—and the third by the commissioners of several royal burghs. On the 2d September 1629, the King pronounced separate decrees-arbitral. The first and fourth declare the King's right to the superiorities of erection, resigned to him by their submissions. They give 1000 merks Scots from him to the Lords of Erection, as the purchase-money of each yearly chalder of feu-farm, or each 100 merks of yearly feu-duty or other constant rent of superiority, deducting an equivalent to the blench-duties,—the feu-duties to be retained until payment. All this is confirmed by 1633, c. 14; but the Crown's right of redemption was renounced, as unprofitable, by 1707, c. 11. See *Ground-Annual*. Still, however, there remained the other important provision—viz., the power given to the heritor to have his teinds valued, and his yearly charge thus permanently fixed, and also to bring an action of sale against the titular or his tacksman. [These provisions of the decrees-arbitral were ratified by the acts 1633, cc. 15, 17, 19.] The rule fixed as to valuation was, on the one hand, that where, by whatever arrangement, the teind, being under the managemeut and in the possession of the heritor along with his stock, was of necessity joined with that stock in one common valuation, then the yearly duty payable by the heritor to the titular or beneficiary should be *one-fifth of that whole annual valuation of the rent of stock and tithe together*, which fifth was deemed a reasonable *surrogatum*, in place of a tenth of the whole increase; and, on the other hand, that, where the tithe was drawn every harvest by the titular, and its value thus admitted yearly of a proof separate from that of the stock, the commissioners appointed for the valuation of teinds were to take proof of its amount, and take its value *communibus annis;* which value the proprietor was to pay annually to him who had right to the teind, under deduction of a fifth, called the *King's Ease*, because granted in his awards as an allowance of abatement to the proprietor. Where, however, the teinds, though drawn *ipsa corpora*, had been mixed with others, so as to prevent discrimination, or where the titular was not a party, their value was to be taken at one-fourth of the valued rent of the heritor's stock, [on the ground that one-fourth of the stock was equivalent to one-fifth of the total rent;] *Campbell*, 1773, [M. 15762; *Connell*, i. 176. See *Jamieson*, 19 June 1867, 5 Macph. 914, where a subvaluation was approved of, which only fixed the value of the stock.] With regard to the sale of teinds, the rule fixed was, that where the seller had an heritable and unburdened right to his tithes, *e.g.*, that of the titular, he should be obliged to sell for nine years' purchase; and that, where the teinds were enjoyed by a tacksman, or where the purchaser himself was tacksman, the commissioners should allow a deduction regulated by the endurance of the tack,—a matter generally so arranged by them, that, while the titular or other seller received his purchase-money at the expiration of the tack, the tacksman, whether the purchaser or a third party, retained in the one case, and drew in the other, the interest of the price during the currency. This is ratified by 1633, c. 17; but the limitation of the action of sale to two years after the valuation has been overlooked in practice; *Irvine*, 1794, M. 15698. [The practice is to deduct the stipend from the valued teind, and also six per cent. for the King's annuity: then nine years' purchase of the balance is the price, upon payment of which the court decern the titular to grant the pursuer an heritable right to his teinds; see *Connell*, i. 316.] The grain, in which teinds have been already valued, must be valued at the medium fiars for seven years preceding; [see 48 Geo. III. c. 138, §§ 8–13.] The King's decreets on the other submissions were much to the same effect, except that the King's power of valuation extended to those only of the bishops' tithes which they did not actually possess by rental bolls or drawn tithe, but which were in tack or other use of payment.

In 1627, commissioners had been appointed by the King to fix his annuity, [and to confer with those who had any interest in church lands or tithes, with the view of arranging a settlement. This commission, called the "Commission of Surrenders and Teinds," gave no power to value teinds or to name sub-commissioners. "It is quite true that, in one sense, valuations took place under the commission 1627; but then not by force of that commission in itself, but by virtue of the subsequent letters to the commissioners, authorising them to appoint sub-commissioners for valuation, which authority was not given until 1628

[and 1629, after the submissions had been entered into, giving the Crown a right so to interfere;" *per* Lord J. C. Hope, in *Dunlop*, 2 June 1858, 20 D. 1031.] In order, however, that the decrees-arbitral, in the valuations of teinds, might be executed under authority of a proper court, [another commission, called the "High Commission," or the "Commission for Plantation of Kirks and Valuation of Teinds,"] was appointed by 1633, c. 19, with power generally to value and sell tithes, and approve the valuations of the sub-commissioners. Valuations were, under it, carried on for a long time, although part of the records were carried off by Cromwell, and others were destroyed by fire in the year 1700. [After the Restoration, the commission was renewed at various times, with enlarged powers, until, by 1707, c. 9, its functions were transferred to the Court of Session. See *Teind Court*.]

The teinds vested in the lay patrons are in a different situation from those vested in the titulars. When they lost the right of presentation by 1649, c. 39, they received, as indemnification, all those tithes of the parish which had not previously been disposed of. [This act was rescinded at the Restoration; but by 1690, c. 23, their right of presentation was again taken away, and their right to the teinds, in so far as not heritably disponed, confirmed,] but "with the burden always of the minister's stipend, tacks, and prorogation already granted of said teinds, and of such augmentations of stipend, future prorogations, and erections of new kirks, as shall be found just and expedient, providing the said patrons getting right to the teinds by virtue of this present act, and who had no right thereto before, shall be, likeas they are hereby obliged to sell to each heritor the teinds of his own lands at the rate of six years' purchase, as the same shall be valued by a commission for valuation of teinds." [See *Kames' Eluc.* art. 38.] Thus, the heritor is entitled to have his teinds in all cases valued, and to purchase them from the titular at nine years' purchase, and from the patron, where not titular also, at six years' purchase—this last privilege belonging to the heritor alone. But there are still certain teinds, which, though they may be valued, can never be bought by the heritor or feuar of the lands titheable: 1*st*, Teinds either allocated to or belonging to ministers; 1690, c. 30. 2*d*, Teinds granted to colleges, schools, or hospitals. 3*d*, Teinds formerly belonging to bishops, and thereafter to the Crown on the abolition of episcopacy, so long as these teinds remain with the Crown. 4*th*, Teinds which the heritor is bound to pay to a former heritor, or to a titular, his superior, who having either bought his own teinds, or enjoying the teinds of his own lands, retained them, in subsequently feuing out the lands to him; 1693, c. 23.

The action for valuation of teinds proceeds now before the Court of Session, by 6 Geo. IV. c. 120, § 54, and may be raised at the instance of the heritor, or sometimes of the minister. In the one case, the titular or his tacksman, and generally the minister, or, if there be none, the moderator of presbytery; and, in the other, the titular or tacksman, and the heritor, are made parties. [The Teind Court forms also a court of review of the proceedings before the sub-commissioners appointed for carrying out valuations. The sub-valuations, or reports of these sub-commissioners, have no legal force or authority, until approved of by the High Commission, or by the Court of Teinds as coming in its place. They belong exclusively to the period between 1629 and 1660, no new nomination of sub-commissioners having been made after the Restoration. In dealing with them, a large effect is given to the principle, *Omnia præsumuntur rite et solenniter acta;* see Lord Westbury in *Deans of Chapel Royal*, 18 March 1869, 7 Macph. (H.L.) 19. The fact that the minister, being a stipendiary, had not been cited, was held to be no ground of objection to a sub-valuation; *M'Neill*, 20 Feb. 1809, 5 Pat. 244. Valuations by the High Commission have in several cases been held invalid on this ground; but the House of Lords have now decided that a valuation by the High Commission is good, though the minister was no party to it, his interest being sufficiently protected by the presence of the titular, who is only entitled to the residue of the teind, after deducting the minister's stipend; *Minister of Old Machar*, 26 July 1870, 8 Macph. (H.L.) 168. See also *Ministers of Islay*, 16 July 1868, 6 Macph. 1074; *Hay*, 19 Feb. 1886, 13 R. 585. It would, of course, be otherwise, if the minister were himself the titular; *Elder*, 8 Jan. 1869, 7 Macph. 341. In *M'Gibbon*, 16 July 1862, 24 D. 1344, a decree of approbation, by which the authority of the Commission was interponed to an agreement as to the value of teinds entered into between a heritor and a tacksman, was found ineffectual as a valuation of teinds, in a question with the titular. See also

[*Deans of Chapel Royal, supra*; *Lady Willoughby de Eresby*, 17 July 1885, 12 R. 1330.

[By A.S. 12 Nov. 1825, a summons of valuation must set forth the rent of the lands according to the current leases, when they are under lease (see *Fothringham*, 22 Feb. 1870, 9 Macph. 172); and when they are in the natural possession of the proprietor, the fair and just rent of the lands must be set forth, under a lease for nineteen years if arable, eleven years if pasture, or nineteen years if partly arable, partly pasture. "In ascertaining the precise amount of the teindable rental, the court have been careful to confine that inquiry to the sum which the heritor receives as the true consideration paid for the land itself, or its produce; for, as the teind is a burden on the fruits of the land, the rent, or that proportion of it which is given as a compensation for the land, ought to be confined to what is truly paid in consideration of the land or its proper fruits, as distinguished from incidental charges for accessory advantages or conveniences enjoyed by the tenant in articles not *per se* teindable. Such charges are either excluded from the computation in adjusting the rental, or deducted from what is stated as the *prima facie* amount, so as the same may be confined to that sum of rent whereof the fifth part is taken as the teind;" *Buchanan*, 200. If the value of the lands has been recently and suddenly increased, as by the erection of buildings, manufactories, or valuable enclosures, either the old rental as it stood prior to these improvements is taken, or deduction is made from the existing rental in respect thereof. But if the lands have been not suddenly, but gradually improved, the titular is entitled to have them valued in their improved condition. See *Smith*, 17 Dec. 1817, F.C. Where deductions are claimed on account of recent improvements, the amount of such deductions must be stated in the summons of valuation, and documentary evidence thereof produced; A.S. 12 Nov. 1825. The cases in which claims of deduction have been allowed or refused by the court are collected in *Buchanan*, 200 *et seq.*, where it is remarked that "on no subject are the decisions of the court more conflicting."

[Teind is originally, and in its own nature, a burden affecting the crop or produce of the land. But the result of the valuation acts passed in 1633, as interpreted by recent decisions, has been "to substitute a burden on the rent or annual value of the lands for a [burden on the fruits. The burden is to be equal to one-fifth of the rent, both in the case of valued and unvalued teinds, the only difference being that, until a valuation was obtained, the amount of the fifth would necessarily vary with the amount of the rent; whereas, after valuation, the amount annually payable would be fixed and subject to no increase, however great the expenditure in improving the lands." "What was formerly exigible was one-tenth, or the value of one-tenth, of the produce of the particular year in which the exaction was made. What is now exigible is one-fifth of the rent of that year if there is no valuation, and one-fifth of the permanent or constant rent if there be a valuation;" *per* Lord Deas, in *Burt*, *infra*; see also *D. Athole*, 20 March 1885, 12 R. 882. Hence lands wholly in pasture, and never known to have been in tillage, are teindable, and liable to be localled upon for stipend, without a decree of valuation, at one-fifth of the rent; *L. Glenlyon*, 15 Nov. 1842, 5 D. 69; *Learmonth*, 3 Dec. 1857, 20 D. 190, and 1 June 1859, 21 D. 890. In *Burt* (Loc. of Calton), 12 Jan. 1878, 5 R. 445, lands in the heart of a city, wholly built over with houses and shops, which had never paid stipend, nor been valued for teind, were held liable to allocation; and the teindable rental was fixed at £4 per acre, being an estimate of the probable agricultural rent which would be obtainable if the ground were converted into tillage. This decision seems to establish the principle, which the standard authorities hardly appear to have contemplated as one of universal application, that all land, however occupied, is subject to the burden of teind. The only exceptions now recognised are glebe lands (if regularly designed according to law), and lands held *cum decimis inclusis*. See *Glebe*. *Decimæ Inclusæ*. With regard to Crown lands, the question of their exemption is said by Buchanan (p. 75) to be still open to discussion; but in *E. Moray*, 16 Nov. 1869, 8 Macph. 142, though a decision of the point was not called for, the inclination of the judges was against the exemption.]

Teinds are *debita fructuum*, not *debita fundi*. Their arrears, therefore, do not affect singular successors; [*E. Callander*, 1662, M. 15632.] Action lies for arrears against none but such as have intromitted with them as teinds, whether the intromitter be the heritor or his tenant; [*Univ. of Glasgow*, 27 May 1868, 6 Macph. 878. Claims for arrears of teinds are unfavour-

[ably regarded; *Scott*, 1795, M. 15700, Bell's Folio Cases, 152. As to the plea of *bona fide perceptio* against a claim for arrears, see *Haldane*, 8 Nov. 1871, 10 Macph. 62; *Drysdale*, 24 April 1874, 1 R. (H.L.) 27; *E. Cawdor*, 2 March 1878, 5 R. 710.

[Where a right to teinds has never been feudalised, it admits of being completed by prescriptive possession on a personal title. But no prescriptive right to teinds which have been feudalised can be acquired without infeftment in the teinds. A decree of adjudication, however, followed by possession for forty years, though not completed by infeftment, has been held to give a good prescriptive right; *Gordon*, 1758, M. 10825; *Irvine*, 1764, M. 10830. Possession of teinds, maintained upon tacks only, though for forty years, is not sufficient to constitute a heritable right, because the title of possession implies that the heritable right belongs to another; *Sinclair*, 1771, M. 10835. A decree of valuation is not a title on which a proprietor can acquire by prescription a right to the teinds of lands not included in the valuation; *Macleod*, 10 July 1873, 11 Macph. (H.L.) 62. The negative prescription, though (as already mentioned) it cannot destroy the right to the teind, is applicable to the effect of protecting a decree of valuation or approbation against challenge, except on the ground of nullities appearing *ex facie*; see Lord Pres. M'Neill, in *Deans of Chapel Royal*, 20 Feb. 1867, 5 Macph. 414. But a decree of valuation cannot be lost *non utendo*, "because such decree establishes no right or claim of tithes in the obtainer of it against another, and can be used by him not otherwise than as a defence against the claim of the titular;" *Ersk.* B. iii. tit. 7, § 11. A sub-valuation, however, may be lost by *dereliction*, *i.e.*, by payment of teind beyond the amount fixed by the sub-valuation, or by any act implying the adoption of a different rule; *E. Kinnoull*, 7 June 1826, Sh. Teind Cases, 105; *Fogo*, 6 Dec. 1867, 6 Macph. 105. It is not necessary that the overpayments have been continued for forty years; *L. Gray*, 1799, M. 15773. But if they have been made in ignorance of the existence of the sub-valuation, or with no intention of abandoning it, dereliction is not inferred; *Alexander*, 13 Nov. 1840, 3 D. 40; *L. Elibank's Trs.* 16 July 1888, 15 R. 927. A decree of valuation by the High Commission or the Court of Teinds cannot be derelinquished, but fixes absolutely the amount of the teind; *Maxwell*, 3 July [1816, F.C. Hence, even when payments have been made, for more than forty years, in excess of the teind as valued by the High Court, no prescriptive right can be acquired to have such overpayments continued; *Chisholm-Batten*, 16 Jan. 1873, 11 Macph. 292; *Colquhoun*, 18 July 1873, 11 Macph. 919. In like manner, when the value of teinds has been fixed by decree of approbation of a sub-valuation, although payments in excess thereof have been subsequently made for forty years, no right can be prescribed to have these overpayments continued; because they have been made not out of teind but out of stock, and the court has no jurisdiction to order payments out of stock; *Colquhoun, supra; E. Minto*, 7 Nov. 1873, 1 R. 156. But when, *before* decree of approbation, payments have been made for more than forty years in excess of a sub-valuation, a prescriptive right may be acquired to have these payments continued, and any subsequent decree of approbation will be limited and qualified by such prescriptive right; *Loc. of Madderty*, 9 July 1817, F.C.; *Colquhoun, supra.* See *Locality.*]

Besides the other powers granted to the commission of tithes by 1633, c. 19, they were authorised to modify reasonable stipends out of the tithes to the parochial clergy. By a former commission (1617, c. 3), the lowest stipend modified was to be 500 merks Scots, or five chalders of victual, or the whole fruits of any benefice which might fall short of this; and the highest, 1000 merks or ten chalders, the chalder of oatmeal being sixteen bolls, at eight stones to each boll. The act 1633 raised the *minimum* to eight chalders, or proportionally in money, amounting to £44, 8s. $10\frac{2}{3}$d. sterling; but it did not limit the commissioners in their alteration of the old *maximum* of ten chalders. So that they exercised a discretion in giving a stipend often exceeding it, when there was enough of free tithe in the parish, if they saw cause for so doing. This practice was continued by the Lords of Session after the commission was vested in them by 1707, c. 9; the respective teinds being valued either by decrees of valuation or in any other competent way. It was, however, long held to be *ultra vires* of the court to grant a second augmentation; but that idea has never been acted upon since 1789, and repeated augmentations have been given to the same stipend. [See *Minister of Prestonkirk*, 1808, M. App Stipend, No. 6, and *Connell*, ii. 34 (App.

[No. 20); 48 Geo. III. c. 138.] By 50 Geo. III. c. 84, £150 sterling is made the *minimum* annual value of any stipend, any deficiency of teinds being made up by Government. As to the process of augmentation, see *Augmentation*. When the increase of stipend is granted, each heritor is liable in payment to the whole extent of his teinds if valued, or their rent, if let to him, although with right of recourse against the rest; and all intromitters whatever are similarly liable. Hence the process of augmentation is combined with what is called a locality, whereby the proportion payable by each heritor is allocated on him, after which he is liable for his share, and for no more. See *Locality*. The modified stipend is a *debitum fructuum* simply, like the teinds from which it is taken, and is free of all tacks and burdens whatsoever—1593, c. 162; so that no minister can do anything as to it, any more than as to the glebe or manse, to prejudice his successor. It is a rule strictly adhered to, that the teinds of one parish cannot be taken to provide stipend to the minister of another; and where any portion of the teinds of a parish has been so appropriated in former times, it may be reclaimed by the parish minister whenever the other teinds of his parish are inadequate to afford him a competent stipend. [But the minister of a parish to which lands have been annexed, with stipend payable out of them to the minister of the old parish, from which they have been disjoined, is entitled, when it becomes necessary, to have the teinds of these lands given to him, and taken away from the minister of the old parish, if there be free teind in the old parish to supply the place of the stipend which the minister of the old parish thus loses; *Johnson*, 1820, M. 14,834; *Simpson*, 8 Dec. 1882, 10 R. 313.] The Court of Session, as the commission of teinds, are empowered to unite parishes, or to disjoin or divide such as are too large, and to modify stipends out of the teinds to the additional ministers thereby rendered necessary; but under this qualification, that parishes cannot be disjoined or divided, except with the consent of [a majority] of the heritors, reckoning not by the number of the heritors, but by the amount of their valued rent within the parish. [See *Disjunction*. *Parish*.

[All teinds are subject to the burden of a suitable provision to the minister. Some teinds, however, are liable primarily, and others only *subsidiarie*, according to the different titles under which they are enjoyed.] The following is the order in which the teinds of a parish are liable for payment of existing stipends and augmentations: 1*st*, Teinds never erected—*i.e.*, never granted by the Crown to any layman, [of which few, if any, examples are now to be met with; see *Connell*, i. 480.] 2*d*, Teinds which have been erected and are yet in the hands of the lay titular, including the tack-duties or rents drawn by the titular for teinds let in lease, and the feu-duties payable by parties having right to their own teinds, and holding them under the titular as superior. 3*d*, Teinds let in lease by the titular. 4*th*, Teinds heritably disponed by the titular, and the teinds of the titular's own lands. 5*th*, Bishops' teinds [in the hands of the Crown.] 6*th*, Teinds belonging to colleges or universities, or appropriated to other pious uses, including the teinds formerly belonging to the Chapel Royal. [The bishops originally enjoyed their teinds exempt from the burden of paying stipend to the parish clergy, though they were bound to support the incumbents of their own mensal churches. In their submission to Charles I., the bishops stipulated that they should continue to enjoy the fruits and rents of their benefices as then possessed by them; but their privilege seems to have been changed, in the discretion of the commissioners, into one of postponed liability for stipend, beginning only when all teinds in the hands of laymen had been exhausted. Such at least was found to be the privilege of bishops' teinds after they had passed into the hands of the Crown, in the case of *Arngask*, 1715, mentioned in *Connell*, i. 504, and in *Campbell*, 1770, M. 14796. "This privilege does not attach to the teinds merely because the Crown is the titular; that circumstance does not give the privilege. Nor does it attach to all teinds in the hands of the Crown, which formerly belonged to the church dignitaries—all those, for instance, which belonged to religious houses, or to college churches or chapels—but only to such teinds as belonged to bishops, and not to all the teinds which belonged to bishops, but only to such as belonged to the bishops at a certain period, that is, before the Reformation, and not to all that were possessed by the bishops at that period, but only to such as had been appropriated to the bishop for his own personal support and maintenance. It did not belong to teinds which had belonged to religious houses and had come to the bishops or their chapters,

[or to which they had a right as patrons, or to which they had acquired a right after the Reformation (see *Christie*, 1788, M. 14,818). The privilege, therefore, only belongs to a certain class of teinds formerly belonging to bishops, and now in the hands of the Crown as in place of the bishops, namely, those which had been appropriated to the bishop for his personal use. The purpose for which such teinds were appropriated suggests the reason why they were privileged while in the hands of the bishops. It is not so clear why the privilege should exist after that purpose ceased, nevertheless there are repeated decisions in Scotland to the effect that the privilege does attach to such teinds so long as they are in the hands of the Crown;" *per* Lord Colonsay, in *Gordon's Trs.* 8 June 1871, 9 Macph. (H.L.) 73. But such teinds lose their privilege on being disponed by the Crown to a subject; *Loc. of Prestonkirk*, 14 Nov. 1846, 9 D. 61. Teinds belonging to colleges are postponed even to bishops' teinds, in the allocation of stipend; *New College of St Andrews*, 7 Dec. 1808, F.C. But this privilege does not apply to teinds acquired by a college from an ordinary titular, in whose hands they would have been liable for stipend; *College of Glasgow*, 25 May 1814, F.C.

[A heritor whose teinds have been valued is entitled at any time to surrender his teinds at the valuation, even though he have previously paid beyond his valued teind under prior decrees of locality; see *Connell*, i. 523; *Maxwell*, 3 July 1816, F.C. This right, being *meræ facultatis*, is not affected by the negative prescription; *E. Minto*, 7 Nov. 1873, 1 R. 156. After a surrender has been made, the heritor has no concern with subsequent localities, nor is he liable in any part of their expense; *Loc. of Eddleston*, 1805, M. App. Teinds, No. 13. The effect of a surrender is to make the minister titular of the teinds *quoad* the surrendered teinds; *Colquhoun*, 18 July 1873, 11 Macph. 919. The court will not sustain a surrender if it is conditional, or if it is only of an unascertained proportion of a *cumulo* valuation; *Richmond*, 26 Jan. 1866, 4 Macph. 554; *Macvicar*, 12 July 1866, 4 Macph. 1058.]

In decrees of modification, an *extra* sum is generally allowed for communion elements; see 1572, c. 54, and 1593, c. 162; although no proper part of the stipend. See *Sacraments*. It cannot, however, be modified out of the stock, but must come from the teind; *Wilkie*, 1793, M. 2493. Of course, this provision goes, not to the minister, but to the parish poor, for all those years in which he does not administer the sacrament; [*Abdie*, 1713, M. 2490; *Hay*, 1780, M. 2492.

[A conveyance of lands, without mention of the teinds, by one who has also right to the teinds, is subject to construction, and may, on sufficient grounds, be construed as importing by implication a conveyance of the lands with the teinds; *Watt's Trs.* 10 Nov. 1869, 8 Macph. 132; *Menzies' Conv.* 810.]

See generally, on the subject of teinds, *Ersk.* B. ii. tit. 10; *Bank.* ii. 1; *Stair*, B. ii. tit. 8; *More's Notes*, ccxxix., ccxxxix., clxxi., cxxxviii., cxcii.; *Bell's Princ.* §§ 837, 1147; *Ross's Lect.* i. 461; [*Forbes on Tithes; Connell on Tithes; Buchanan on Teinds; Elliot's Papers on Teinds.*]

[**TELEGRAPH**. See 26 & 27 Vict. c. 112; 29 & 30 Vict. c. 3; 32 & 33 Vict. c. 73; 41 & 42 Vict. c. 76; 52 & 53 Vict. c. 34; 48 & 49 Vict. c. 49, and 50 Vict. c. 3 (submarine); 48 & 49 Vict. c. 58 (sixpenny telegrams).]

TELLER. See the form of a bond with cautioners, by the cashier or teller of a bank, in *Jurid. Styles*, ii. 392.

TEMPLE LANDS. Temple lands were originally the property of the Knights-Templars, an order which existed from 1128 to 1312, when their lands were variously disposed of. The exemption from tithe which attached to those lands, while in possession of the knights, adhered to them long after. [But see *E. Hopetoun*, 2 March 1841, 3 D. 685.] See *Bank.* B. ii. tit. 8, §§ 19, 207, 208; *Stair*, B. ii. tit. 8, § 7; B. iv. tit. 24, § 9; *Connell on Parishes*, 359; *Dunlop's Parish Law*, 115; *Brown's Synop.* 294, 1201, 1202, 2317.

TEMPORALITY. The temporality of benefices consists in such lands or other property (except tithes, manses, and glebes) as may have accrued to the church by gifts to, or purchases by, its members as such, and not *tanquam quilibet*. It is opposed to the *spirituality*, and has been annexed to the Crown. See *Teinds*.

TENANT. In Scotland, the term tenant is used only for the lessee or party to whom a lease is granted. But in England, a tenant is any one who holds or possesses lands or tenements, by any kind of title, either in fee, for life, for years, or at will. A tenant in dower is the possessor of lands in virtue of her dower; a tenant in mortgage is a possessor of lands by a mortgage, &c. *Tomlins' Dict. h. t.* [The word is also used in reference to personal property, *e.g.*, a

[tenant for life or tenant in common of stock; *Sweet's Law Dict.* An estate in *joint tenancy*, is where an estate is acquired by two or more persons in the same land, by the same title (not being a title by descent, in which case the tenants would be coparceners), and at the same period. There is thus among joint tenants unity of title, unity of period of vesting, unity of interest as regards the quantity of the estate, and unity of possession, each being equally entitled to the whole. "*Tenants in common*" on the other hand, "are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously. This tenancy therefore happens where there is an unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For, if there be two tenants in common of lands, one may hold his part in fee simple, the other in tail, or for life; so that there is no necessary unity of interest: one may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B.; so that there is no unity of title: one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would soon be destroyed;" *Blackstone*, ii. 191. See also *Stephen's Com.* i. 338; *Williams' Real Property*, 157; *Goodeve's Real Property*, 238.]

TENDER. In an action of damages, a tender is a judicial offer made by the defender, of a specific sum in name of damages and of expenses down to the date of the tender. A tender is usually made in a separate minute or other writing, and need not be expressed according to any particular *formula*. All that is necessary is that it should contain a distinct offer of a specific sum in name of damages, along with the pursuer's expenses up to the date of the tender; with a *proviso*, that in the event of the tender being rejected, and the case going to trial, the pursuer is not to be entitled to read the tender to the jury, or to found on it as evidence at the trial. The effect of a tender in freeing a defender from liability for the subsequent expenses is stated in the article *Expenses*, p. 442 *b*. See also *Macfarlane's Jury Prac.* 289.

[**TENDER, LEGAL.** See *Money.*]

TENEMENTUM; the property of lands or other immoveable subjects. *Skene, h. t.*

TENENDAS; is that clause of a charter by which the particular tenure, *e.g.*, feuholding, is expressed. [See 31 & 32 Vict. c. 101, §§ 5, 100. With regard to the effect of the *tenendas* in explaining the dispositive clause of a charter, in a question as to a grant of salmon-fishings, see *Sinclair*, 7 June 1867, 5 Macph. (H.L.) 97, and *M'Culloch*, 20 Oct. 1874, 2 R. 27.] See *Stair*, B. ii. tit. 3, § 16; *Ersk.* B. ii. tit. 3, § 24; *Bank.* i. 548, 688; *Bell's Princ.* § 761; *Ross's Lect.* ii. 159, 290; [*Menzies' Conv.* 551; *M. Bell's Conv.* i. 632. See *Charter. Holding. Dispositive Clause.*]

TENOR. The tenor of a deed lost may be proved. See *Proving the Tenor. Casus Amissionis.*

TENURE. See *Holding.*

TERCE; is one of the two legal liferents known in the law of Scotland; being a real right constituted without either covenant or sasine, whereby a widow, who has not accepted of any special provision, is entitled to the liferent of one-third of the heritage in which her husband died infeft. [By the former law, terce was due only where] the marriage had endured for year and day, or had produced a living child; [but this condition was abolished by 18 Vict. c. 23, § 7. The right is not excluded by the wife being an alien; 33 & 34 Vict. c. 14. The husband's infeftment must be "of fee" as at the time of his death; and real, not merely nominal, or in trust; *Bell's Princ.* § 1599. Terce may be claimed by wives who have obtained decree of divorce against their husbands, as well as by widows; *Ralston*, 1803, Hume's Dec. 293.] By 1681, c. 10, wherever a particular provision is granted by a husband to his wife, either in an antenuptial or postnuptial contract of marriage, or in any other deed, the wife is thereby excluded from her terce, unless the contrary is expressly provided in the contract of marriage, or other deed containing the provision. This liferent can be affected by such burdens only as affect the husband's sasine, and bears no more than its proportion of any burden affecting the estate. [See *Robson*, 2 Feb. 1861, 23 D. 429. The widow has no claim of terce over entailed property, where the entail contains a clause expressly excluding such claim; *Hay Newton*, 9 May 1870, 8 Macph. (H.L.) 66.] Custom has excluded from the terce the mansion-house, where only one exists, burdens by reservation, rights of reversion, superiority and patronage, leases, and feu-duties. [Subjects held by burgage tenure were also formerly excluded; but

[this was altered by 24 & 25 Vict. c. 86, § 12.] Lesser terce is that which is due out of lands still burdened with terce to the widow of the former proprietor, and is therefore one-third of the remaining two-thirds, but extends to a complete third on the death of the former tercer. Where a husband has disponed property in which he stands infeft, but dies before the disponee has taken infeftment, the widow's terce will form a burden on the property so disponed, since the disponer was not feudally divested of it during his life; and this rule holds, even although, before the dissolution of the marriage, the disponee should have attained actual possession; *M'Culloch*, 1788, M. 15866. And the same principle applies to the courtesy; *Bell on Purchaser's Title*, 353. Although the husband's infeftment of fee at the time of his death is said to be the measure of the widow's terce, yet, if the infeftment be reduced on account of informalities in making up the titles, the widow's claim to her terce will, notwithstanding, be good in questions with her husband's representatives. The terce is diminished by all real burdens completed by infeftment before the husband's death. And, in a case in which a husband, a short time before his death, feued out the greater part of his estate by a single transaction, at a feu-duty greatly beyond its agricultural rent, it was nevertheless held that the widow's right of terce did not extend to the feu-duties, but only to the rent of the land unfeued; *Nisbet*, 24 Feb. 1835, 13 S. 517. [The process for making the terce effectual consists of two parts: serving to the terce, for vesting the right; and kenning to the terce, for giving actual possession. Service to the terce is a judicial process proceeding on a brieve from Chancery, and directed to the sheriff of the shire in which the subjects are, or to the sheriff of Edinburgh, if they are in more than one shire. See *Brieve of Terce;* and *Fraser on Husb. and Wife*, ii. 1101. Without service, the widow has no active title, and transmits to her heirs no right to claim arrears; *M'Leish*, 21 Feb. 1826, 4 S. 485, F.C. But see *Bell's Princ.* § 1602; *Fraser*, ii. 1105; and *Pringle's Exrs.* 2 March 1870, 7 Macph. 622. By service, the widow acquires a *pro indiviso* right, along with the heir, to the possession of the property, and all its pertinents, to the extent of one-third. She may sue for rents, but cannot sue a removing, without kenning, which changes her right from a *jus ad rem* to a *jus in re.*] See *Kenning to Terce.* See *Ersk.* B. ii. tit. 9, § 44; *Stair*, B. ii. tit. 6, § 12; *More's Notes*, ccxvi.; *Bank.* B. ii. tit. 6, § 11; *Bell's Com.* i. 56; *Bell's Princ.* §§ 1595, [1947;] *Bell on Completing Titles*, 87, 372; *Bell on Leases*, ii. 61; *Hunter's Landlord and Tenant*, i. 235; ii. 14, 611; *Sandford on Heritable Succession*, ii. 106; *Sandford on Entails*, 237; [*Fraser on Husb. and Wife*, ii. 1079; *M'Laren on Wills*, i. § 157; *Menzies' Conv.* 672; *M. Bell's Conv.* ii. 853; *Jurid. Styles*, i. 342.] See *Marriage. Liferent. Entail.* [*Contract of Marriage.*]

TERM; in judicial procedure, is a certain time fixed by authority of a court, within which a party is allowed to establish by evidence his averment. If he fails to do so, at its expiration the term may be circumduced against him at the desire of his opponent. But he will get a second term, or a prorogation of the first, on showing cause, and paying such previous expense as shall be modified at the time. *Stair*, B. iv. tit. 46, § 6; A.S. 12 Nov. 1825. See *Circumduction.*

TERMS, LEGAL AND CONVENTIONAL. The term is the day at which rent or interest is payable. Terms are either legal or conventional. The legal terms are *Whitsunday*, the 15th of May, and *Martinmas*, the 11th of November. [The act 49 & 50 Vict. c. 50, proceeding on the preamble that in many counties and burghs a custom exists whereby, for the purpose of a tenant's entry to or removal from a house, a period beyond the date of the legal term of entry or removal is allowed, within which such entry or removal may take place, and that it is expedient that the terms for such entry and removal should be uniform, enacts as follows:—Where under any lease entered into after the passing of the act (25 June 1886), the term for a tenant's entry to or removal from a house shall be one or other of the terms of Whitsunday or Martinmas, the tenant shall in the absence of express stipulation to the contrary, enter to or remove from the said house (any custom or usage to the contrary notwithstanding) at noon on the 28th day of May, if the term be Whitsunday, or at noon on the 28th day of November, if the term be Martinmas, or on the following day at the same hour, where the said terms fall on a Sunday; § 4. See *Thomson*, 27 Feb. 1883, 10 R. 694. But where warning is required 40 days before Whitsunday or Martinmas, it must be given 40 days before 15th May or 11th November. The word "house" means a dwelling-house, shop, or other building and their appurten-

[ances, and includes such as are let along with land for agricultural or other purposes; § 3. This act repeals the act 44 & 45 Vict. c. 39, which had made similar provisions, but only in reference to houses within burgh.]

Conventional terms are any terms agreed upon between the contracting parties. When the conventional are later than the legal terms, the rent is called backhand rent; when they are earlier, it is called forehand rent. See *Forehand Rent.* [By the former law,] the terms at which rent was payable determined the period at which they were *in bonis* of the landlord, and were therefore of importance in settling the interests of heirs and executors, of life-renters and fiars, and of purchasers. [But under the Apportionment Acts of 1834 and 1870 (4 & 5 Will. IV. c. 22, and 33 & 34 Vict. c. 35), rents and other periodical payments are now considered as accruing from day to day, like interest on money lent, and are apportionable in respect of time accordingly. See *Heir and Executor.* For the former law, see earlier editions of this work. The division of rents between seller and purchaser of lands under lease is usually governed by special stipulation; but it is a fixed general rule that, when the purchaser's entry is declared to be at the term, or with a crop specified in the contract of the sale, the purchaser has a right to the rents payable for the subsequent possession, while the rents exigible for prior possession belong to the seller; *Sinclair*, 1 Dec. 1847, 10 D. 190; *L. Glasgow's Trs.* 27 Feb. 1889, 16 R. 545; *Hunter's Landlord and Tenant*, ii. 341.] See on this subject generally, *Kames' Elucid.* art. 9; *Ersk.* B. ii. tit. 9, § 64; *Stair*, B. ii. tit. 8, § 33; B. iii. tit. 8, § 57; *More's Notes*, cxxxix.; *Bank.* ii. 109; *Bell on Leases*, i. 213, 220; *Hunter's Landlord and Tenant*, i. 387; ii. 326; *Ross's Lect.* i. 57, 290; ii. 237, 488; *Bell's Princ.* §§ 1047, 1204, 1230, 1499; [*M'Laren on Wills*, i. § 389; *Rankine on Land-Ownership*, 613; *Rankine on Leases*, 302. See *Liferent. Lease. Removing.*]

TERRÆ DOMINICALES; in old charters and infeftments, "maines, or domaine lands, laboured and occupied by the proprietor." *Skene, h. t.*

TERRITORIAL JURISDICTION; was at one time universal, but, becoming formidable, was repeatedly discouraged by different acts, as 1455, cc. 43 and 44, and 1 Geo. I. c. 50; and, by 20 Geo. II. c. 43, all heritable jurisdictions, whether of barony, regality, sheriffship, stewartry, or any other, were abolished or annexed to the Crown, with the exception of those of admiralty, and an insignificant jurisdiction reserved to barons; so that almost all jurisdiction is now personal. *Ersk.* B. i. tit. 2, § 12. See *Jurisdiction. Heritable Jurisdiction.*

TERRITORY OF A JUDGE; is the district over which his jurisdiction extends in causes and in judicial acts proper to him, and beyond which he has no judicial authority; *Ersk.* B. i. tit. 2, §§ 3, 15; *Kames' Equity*, 473. See *Jurisdiction. Judges. Justices of Peace.*

TEST ACT. See *Oath.*

TESTAMENT; in the strictly legal acceptation of the word, is a deed or a writing, by which the granter appoints an executor—that is, a person to administer his moveable estate after his death, for behoof of all who may be interested in it; and of which the other clauses, if any, relate exclusively to moveables, and do not operate till the death of the granter. A testament may thus consist merely of the nomination of an executor, or it may contain, along with such a nomination, clauses bequeathing, in the form of legacies, either the whole or part of the moveable estate. A deed, containing legacies without the nomination of an executor, is not strictly termed a testament, but a codicil. In its more common meaning, however, a testament is a declaration of what a person wills to be done with his moveable estate after his death; [and since the recent alteration of the law by § 20 of the Consolidation Act of 1868, by which it is made competent to settle the succession to heritage as well as moveables by testamentary writing, the word is applicable to any *mortis causa* settlement of estate. For the law as to testamentary writings, see *Will.*]

[**TESTAMENT TESTAMENTAR**, *and* **TESTAMENT DATIVE.** See *Confirmation.*]

TESTATOR; the granter of a testament, or more generally of a legacy.

TESTIFICATE; was a solemn written assertion, not an oath, used in judicial procedure, principally for instructing reasons of advocation, or of suspension, where founded upon matter of fact; although it did not prove in the principal cause. The term is now obsolete. *Stair*, B. iv. tit. 40, § 3; tit. 42, § 15; tit. 43, § 5.

TESTING CLAUSE. The testing clause is the technical name given to the clause whereby a formal written deed or instrument is authenticated according to the forms of the law of Scotland. The

following is the usual form of that clause: *In witness whereof, these presents, consisting of this and the preceding pages, written by I. F. (designing him), on paper duly stamped, are subscribed by the said A. B. (the party), at the day of one thousand eight hundred and years, in presence of these witnesses, P. Q. and R. S. (designing them). A. B. P. Q., witness. R. S., witness.*

Of the particulars mentioned in this form, some are [former] statutory requisites, and some merely consuetudinary. Thus the name and designation of the writer,—the mention of the number of pages of which the deed consists,—and the names and designations of the witnesses, were statutory requisites, [until they were dispensed with by § 38 of the Conveyancing Act of 1874.] The attestation that the deed has been subscribed, and the mention of the date and place of subscribing, are consuetudinary requisites, the want of which would not annul the deed. [Deeds partly written, and partly printed or engraved or lithographed, were sanctioned by § 149 of the Consolidation Act of 1868, but subject to the following conditions:—"Provided always that in the testing clause the date, if any, and the names and designations of the witnesses, and the number of the pages of the deed, if the number be specified, and the name and designation of the writer of the written portions of the body of the deed, shall be expressed at length." The act of 1874, however, provides (§ 38) that "it shall be no objection to the probative character of a deed, whether relating to land or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of such deed, or in the testing clause thereof, provided that, where the witnesses are not so named and designed, their designations shall be appended to or follow their subscriptions." See *Deeds, Execution of.* The effect of this enactment is that, in the general case, the only solemnities now essential to a probative deed are the subscriptions of the party and of witnesses. But, in the case of deeds partly written and partly printed or engraved, as the mention of their date (if any), in the testing clause, is a condition precedent of their validity under the act of 1868, and as that particular is not specially dispensed with by § 38 of the act of 1874, it is thought that the absence of [the date in the testing clause might still be held fatal to the probative character of such a deed. The deed, however, would not now be necessarily invalid; for, by § 39 of the act of 1874, no deed subscribed by the granter, and bearing to be attested by two witnesses subscribed, is deemed invalid or denied effect because of any informality of execution; but the burden of proving that the deed was subscribed by the granter and witnesses is laid on the party using or upholding it. Notwithstanding the option conferred by § 38 of this act, the old form of testing clause, as given above, is still in general use, being in many cases more convenient than the new style, *e.g.*, when there are several parties to a deed.] Where marginal notes or additions have been made, or where parts of the deed have been erased or deleted, the name of the writer of the marginal note, and the extent and number of the erasures, are mentioned in the testing clause. It is a frequent although a dangerous practice, not to fill up the testing clause at the date of executing the deed. It is not, however, illegal to delay filling up the testing clause, as that may be done at any time before the deed is judicially founded upon or put on record. [See *Hill*, 6 Dec. 1870, 9 Macph. 213; *Veasey*, 2 June 1875, 2 R. 748; *Stewart*, 1 Feb. 1877, 4 R. 427. Where a deed with an incomplete testing clause was produced in process by a party who did not found on it, the opposite party was held entitled to have the testing clause completed, and effect given to the deed in the process; *Millar*, 8 Nov. 1876, 4 R. 87. The question, whether a substantive provision, which has been omitted in the dispositive and other clauses of a deed, may legitimately be inserted in the testing clause, is not satisfactorily settled. In *Chambers' Trs.* 15 April 1878, 5 R. (H.L.) 151, the testing clause of a trust settlement bore that the deed was subscribed "under this express provision and declaration, viz., that the whole of the legacies, &c., shall be strictly alimentary, and shall not be arrestable or attachable for the debts" of the beneficiaries; and the judges of the First Division (5 R. 97) unanimously held that this restriction, occurring only in the testing clause, could not qualify the terms on which the legacies had been given in the previous part of the deed. The judgment of the House of Lords proceeded on other grounds; but it was indicated by some of the judges that the view taken by the First Division was not consistent with two

[previous decisions, viz., *Johnstone*, 30 June 1843, 5 D. 1297, and *Dunlop*, 2 June 1865, 3 Macph. (H.L.) 46.] See *More's Notes to Stair*, ccccvi.; *Ersk.* B. iii. tit. 2, § 7; *Bell's Com.* i. 340; *Bell's Princ.* §§ 19, 2225; *Bell on Purchaser's Title*, 75, 279; *Ross's Lect.* i. 121; [*Bell on Testing of Deeds; Menzies' Conv.* 123, 173; *M. Bell's Conv.* i. 233; *Dickson on Evidence*, § 707; *Jurid. Styles*, i. 32; *Hendry's Styles*, 4. See *Deeds, Execution of.*]

THANUS; a name of dignity, supposed to be equal in rank to the son of an earl, because the *cro* or satisfaction was the same for the death of both. *Thanagium regis*, a part of the king's lands, governed by a person thence called Thane. Thane was likewise a servant; and "unter thane," an inferior servant or subject; *Skene, h. t.*

THEFT; [is the felonious taking and appropriation of property without the consent of the person to whom it belongs, or in whose possession it is. It is essential that the thing stolen be the property of another. Hence there can be no theft of wild animals, unless they have been appropriated by being captured or confined. See *Wilson*, 2 Feb. 1872, 2 Coup. 183. It is theft by special statute to take oysters or mussels from beds, the property of others, and sufficiently marked out or known as such; 3 & 4 Vict. c. 74; 10 & 11 Vict. c. 92. See *Garrett*, 4 June 1866, 5 Irv. 259. Children under puberty may be stolen; see *Plagium*. So also may dead bodies before interment; but the violating of sepulchres is a distinct crime; see *Dead Body*. If the taking be accompanied by violence, the crime is robbery and not theft. But if the violence be only momentary, as when an article is abstracted by a snatch or sudden pull, without any attempt to subdue the strength or overawe the will, the crime is theft. See *Reid*, 19 Feb. 1844, 2 Broun, 116. If a man induces another, on false pretences, to part with the property of an article belonging to him, the former is not guilty of theft, but would be libelled for falsehood, fraud, and wilful imposition. See *Fraud, in criminal law*. If, however, the consent of the owner extends not to the passing of the property, but only to the acquiring by the other of a temporary possession or custody of the article, as when a person obtains delivery of goods at a house by falsely representing himself to be a tradesman's messenger, the crime is theft; *Menzies*, 21 Sept. 1842, 1 Broun, 419. And if a man goes to a person who has custody [of the property of another, and by any false pretext obtains it from the custodier, and appropriates it, he is guilty of theft; *Hardinge*, 2 March 1863, 4 Irv. 347. In all these cases the crime consists in the abstraction of an article from the possession or custody of another. But in many cases of theft no change takes place in the corporeal possession of the thing stolen; viz., where a person, having lawfully obtained the custody of an article, thereafter theftuously appropriates it. Thus, knowingly to retain an accidental overpayment is theft; *Potter*, 2 May 1844, 2 Broun, 151. So also is the appropriation of things found, the owner being known; *Smith*, 12 March 1838, 2 Swin. 28. If the owner is unknown, the finder may lawfully retain the article for behoof of the owner. See *Lost;* also *Campbell*, 20 March 1888, 15 R. (J.C.) 55. Even long-continued retention is presumed to be innocent; but it may at any moment become theftuous by appropriation *animo furandi*. When a person feloniously appropriates an article, of which the owner had entrusted to him the possession or custody, a question arises, often of extreme delicacy, as to the distinction between theft and breach of trust and embezzlement. The elements which bring the offence up to theft are thus summarised in *Macdonald's Crim. Law*:—"(1) A person employed to carry a specific article (even notes or coin) to a certain place or individual, or to get a specific article from a person named, and bring it then and there to his master, commits theft if he appropriates it. (2) A person employed to assist the owner in his business, not as an agent taking a general charge, or superintending over a local branch of the business, but only as an assistant to serve customers under the master's eye, and on the master's premises, commits theft if he appropriates his employer's goods, or money he receives from customers on his behalf. (3) A person who is sent with a specific article, that he may dispose of it by sale or pledge, and then and there bring the money received to his master, commits theft if he appropriates it. (4) A person who receives an article, that he may perform a certain operation upon it and return it, commits theft if he appropriates it." See *Brown*, 3 July 1839, 2 Swin. 394; *Smith*, 18 May 1842, 1 Broun, 342; *Watt*, 8 Dec. 1851, J. Shaw, 365; *Anderson*, 21 April 1858, 3 Irv. 65. On the other hand, if a limited right of ownership has been conferred on

[the holder, as in pledge; or if his obligation is not to deliver *in forma specifica*, but only to account for the article when called upon, the appropriation is not theft, but breach of trust and embezzlement. See *Breach of Trust.* Under an indictment for theft, the accused may be convicted of breach of trust and embezzlement, or of falsehood, fraud, and wilful imposition, or of reset; or of theft, though the facts proved may in law amount to robbery; and under an indictment for robbery, or for breach of trust and embezzlement, or for falsehood, fraud, and wilful imposition, the accused may be convicted of theft; Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35), § 59. Theft is not now punishable capitally, but various aggravations are recognised by law, which have the effect of enhancing the sentence of penal servitude or imprisonment. Such aggravations are:—Previous conviction of any crime inferring dishonest appropriation of property, or of attempt to commit such crime (50 & 51 Vict. c. 35, § 63); the offender being habit and repute a thief; housebreaking, shipbreaking, or opening of lockfast places; the thief having been in a position of trust, &c. See *Habit and Repute. Housebreaking. Lockfast.* Letter-stealing is generally prosecuted as a statutory offence. See *Post-Office Offences.* On this subject, see *Hume*, i. 57; *Alison's Princ.* 250; *Ersk.* B. iv. tit. 4, § 58; *Macdonald*, 18. See *Reset. Indictment.*]

THEFT-BOTE; is the crime of taking a reward from a thief to shelter him from justice, or of compounding with him, which was once punishable in private persons as theft, and in magistrates, &c., with death; 1515, c. 2; 1436, c. 137. These laws are now in desuetude, though the crime is still punishable. *Hume*, i. 411; *Ersk.* B. iv. tit. 4, § 30; *Kames' Stat. Law, h. t.; Brown's Synop.* 531. See *Bote.*

[**THELLUSSON ACT.** The act 39 & 40 Geo. III. c. 98, or Thellusson Act (so called from the name of the plaintiff in a lawsuit which gave occasion to the passing of the act), prohibits the accumulation, by deed or will, of the annual proceeds of heritable or moveable property for a longer period than twenty-one years after the death of the granter or testator. The words of the enacting clause are "that no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor or testator, or during the minority or respective minorities of any person or persons who shall be living or *in ventre sa mere* at the time of the death of such grantor, devisor or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed;" § 1. The act does not extend to any provision for payment of debts, or for raising portions for children, or touching the produce of timber; § 2. By § 3, it was declared that the act should not apply to dispositions of heritable property in Scotland; but this section was repealed by 11 & 12 Vict. c. 36, § 41. The repeal, however, has no retrospective effect, and only applies to deeds that came into operation subsequent to 14 August 1848; *Keith's Trs.* 17 June 1857, 19 D. 1040; *M'Larty's Trs.* 23 Jan. 1864, 2 Macph. 489. It is not necessary, for the application of the Thellusson Act, that there should be an express direction to accumulate, nor even that the accumulation should have been contemplated by the testator. If the result is that *de facto* the accumulations extend beyond twenty-one years, they are struck at by the act; *Lord* v. *Colvin*, 7 Dec. 1860, 23 D. 111. The exception, by § 2, of provision for payment of debts, applies only to debts in existence and owing at the death of the testator; *Smyth's Trs.* 20 July 1880, 7 R. 1176. In *Cathcart's Trs.* 13 July 1883, 10 R. 1205, the application of income in payment of premiums of insurance was held not to be illegal accumulation. "If the fund directed to be accumulated is not the subject of any present gift, then the right of the eventual

[beneficiary will not be accelerated or arise at the term of twenty-one years, but the heir-at-law *in mobilibus* will take it as intestate succession. But if there be a present gift of the fund itself, and the direction to accumulate be only a burden on the gift, then the burden will terminate at the expiration of twenty-one years, and the gift will become absolute in the person of the donee;" *per* Lord J. C. Moncreiff, in *Maxwell's Trs.* 24 Nov. 1877, 5 R. 248. Contrast *Maxwell's Trs.*, *Ogilvie's Trs.* 18 July 1846, 8 D. 1229, and *Mackenzie*, 29 June 1877, 4 R. 962; with *Lord*, *Smyth's Trs.*, and *Cathcart's Trs.*, *supra.* The act having been passed from views of public policy cannot be defeated by a plea of personal bar; *Maxwell's Trs. supra.* See *Bell's Princ.* § 1865; *M'Laren on Wills*, i. § 593; *M. Bell's Conv.* ii. 1072; *Goodeve's Real Property*, 103; *Hargrave on the Thellusson Act.* See *Trust. Entail.*]

THEME. According to Skene, he who was infeft with *theme* had a right to possess territorial bondmen or slaves; *Skene, h. t.*

THINGS; are objects of law, only in so far as rights in regard to them exist. They are, 1*st*, Things common, or the *res communes* of the Romans, which belong to all alike, as air, running water, wild animals, and unappropriated ground in countries where the sovereign is not held the proprietor. The sea, however, and its shores within water-mark, are common merely for the purposes of navigation, and in other respects belong to the community. 2*d*, Things public, *res publicæ*, which are common, not to the whole world, but to the estate or community, as navigable rivers, highways, harbours, bridges. With us, though their use is common, they are *inter regalia*, the sovereign being head of the State, and their use is often turned to profit. There are other things which fall to the Queen, not in her character of guardian of the State, but according to the maxim, *Quæ nullius sunt, cedunt dominæ reginæ;* such are game, royal fish, treasure trove, &c., many of which belong now to donataries. 3*d*, Things styled *res universitatis*, belonging to some lawful corporation or society, as a burgh, an hospital, &c., of which the use is with the individual members, and the property with the managers for the time; 1491, c. 36. 4*th*, Things sacred, called *res nullius*, because *juris divini*, of which there were a great variety under the Roman and Papal laws, but which have been unknown in Scotland since the Reformation, except in so far as they are *extra commercium* while sacredly employed, and as their price, when they are sold, is usually applied to some similar purpose. The heritors and inhabitants of a parish have a *quasi* right of property in them, *e.g.*, in the seats, and area, and burying-ground of a church; and private burial-grounds are *juris privati*, and may be sold either separately or with the proprietor's other lands. See *Burying-Place.* Things are also moveable, such as pass constantly from hand to hand; or immoveable, *i.e.*, the soil or houses, or things not separable, or not separated from the soil. Things have also been divided into corporeal, *i.e.*, the *ipsa corpora*, and incorporeal, *i.e.*, rights; but if refinement is to be carried thus far, it will be found that the sole property in things consists in the right to receive or to use them. *Ersk.* B. ii. tit. 1, § 5; *Bank.* B. i. tit. 3, § 1. See the different articles under *Res.*

THIRDS. At one period, before the annexation of the year 1587, the king, in order to prevent the entire abstraction of their provisions from the acting clergy, and after other measures had proved ineffectual, assumed into his own hands a third of the revenues of all ecclesiastical benefices, which he intrusted to the Commissioners of Plat (1567, c. 10), who assigned to the ministers respectively sufficient provisions, and reserved the remainder for the king. *Bank.* ii. tit. 8, § 164; *Ersk.* B. ii. tit. 10, § 17. See *Teinds.*

THIRLAGE; is that servitude by which the proprietors or other possessors of lands are bound to carry the grain produced on them to a particular mill to be ground, for payment of the duties specified in the conveyance or other writing whereby the servitude is constituted. The principal duty is *multure*, consisting of a proportion varying from about one-thirtieth to about one-twelfth of the grain carried, or of the flour made, deliverable to the miller or other possessor of the mill under the proprietor, or to the proprietor or superior himself. The smaller duties of knaveship, bannock, lock and gowpen, called *sequels*, fall to the servants of the mill, according to the particular usage of each mill. The astricted lands are called the *thirl* or *sucken*, their possessors *suckeners*, and the multures which they pay *insucken* multures, in contradistinction to those paid by voluntary employers not thirled, called *outsucken* multures, and in general not nearly so much above the real value of the labour of grinding as the insucken, being commonly every twenty-fourth peck only. Thirlage is con-

stituted by writing, directly or indirectly: *Directly*, 1*st*, By the proprietor thirling his tenants to his mill; which, however, requires the written or the tacit consent of these tenants. 2*d*, By his expressly reserving the thirlage of lands conveyed by him, even where the purchaser is to hold of his author's superior; for a proprietor need not be superior of all lands thirled. 3*d*, By the proprietor of a mill conveying it with the multures of formerly astricted lands, by implication and *per expressum* along with the multures of his own lands; which multures, however, can apply neither to lands in his own cultivation nor to tithes, if not his own as purchaser or titular, even though acquired by himself posterior to the conveyance. *Indirectly*, By the lands in question being part of a barony; with these exceptions, that though the mill of the barony be made over as such, yet the expression, *multures used and wont*, conveys merely the former thirlage; and that, if the baron, before his conveying the mill *cum astrictis multuris*, had feued part of the barony to another for a *reddendo*, *pro omni alio onere*, and with a clause of multures, though only in the *tenendas*, the feuar will be exempt from astriction. This is a doctrine which holds *a fortiori* where there is no erection into a barony. Thirlage, constituted by writing, may either express or not the nature and quantity of grain astricted. In the first case, it is either, 1*st*, Of *omnia grana crescentia* (comprehending even barley), with the exception of corn expended in sowing and cultivation, and of grain-rent payable unground, or of victual due to the titular, provided it is not consumed within the thirl, and of feu-duty. 2*d*, Of *grindable corns*, which is interpreted to mean, those corns alone which are ground for use within the thirl (and which the mill is fitted to grind), whether grown or bought with the price of grains grown on the lands, provided the surplus is not ground elsewhere. This second description of thirlage will not prevent a tenant from laying down his lands in grass, provided he do so in *bona fides*. 3*d*, Of *invecta et illata*, meaning *all grain brought within the thirl that tholes fire or water therein*, an expression which does not mean baking and brewing. This thirlage is imposed generally on burghs and villages. Thirlage may thus become twice exigible on the same corn; but where the two mills belong to one and the same proprietor, he cannot demand the multure twice over. In indefinite thirlage, the easiest is presumed where usage has not otherwise fixed it. Thirlage cannot be acquired by the long prescription alone (as other servitudes are) without some title, however irregular, except in mills belonging to the Queen in property, *jure coronæ*, or to churchmen (A.S. 16 Dec. 1812), in whose favour thirty years' possession operates; and in *dry multures*, *i.e.*, a yearly payment fixed in money or grain, whether the tenant grind his grain at the mill or not. But the kind and *quantum*, both of multures and sequels, and of services, may be fixed by prescription alone. Interruption for less than a year will not stop this prescription. Thirlage is extinguished for the time by the ruin of the mill, and permanently by discharge, or forty years' exemption, and could not be constituted by a voluntary grinding of corn at the mill, although immemorially practised. Two distinct actions are competent to one having a right of thirlage—viz., a declarator of astriction, and an action of abstracted multures. The former is resorted to where the right of thirlage is denied, and the action must be raised in the Court of Session; the latter where, without disputing the right, the multure is illegally abstracted. This last action may be raised before the judge ordinary. See *Abstracted Multures*. The act 39 Geo. III. c. 55, enables the proprietor of astricted lands, or of the mill, to petition the judge ordinary for commutation of the thirlage. In the consequent action, all concerned must be called; [and an annual payment is fixed by the verdict of a jury, summoned in manner directed by the act.] An abbreviate of the verdict [is to] be recorded, within sixty days, in the Register of Sasines; and after three years from this recording, the verdict is safe from all review. [The provision as to recording the abbreviate within sixty days of the verdict is merely directory, not imperative; and the words of the act protect against challenge any verdict that may be recorded, though after sixty days; *Ds. Sutherland*, 25 Feb. 1881, 8 R. 514. Prof. Bell (*Princ.* § 1017) says thirlage "is not a servitude (which consists *in patiendo* merely); nor a restraint on the absolute or exclusive use of property. But being devised originally as an expedient for indemnifying the builder of a mill for extraordinary outlay in a rude age, it has degenerated in times of more improved manufacture into a burdensome and inexpedient tax on the produce of land, and is now in a state of gradual extinction."

[See *Harris*, 29 May 1863, 1 Macph. 833; *Stobbs*, 14 March 1873, 11 Macph. 530.] See *Ersk.* B. ii. tit. 9, § 18; tit. 10, § 41; *Bank.* B. ii. tit. 7, § 38; B. ii. tit. 1, § 19; *Stair*, B. ii. tit. 7, §§ 2, 15; *More's Notes*, ccxxv.; *Bell's Princ.* § 1017; *Kames' Stat. Law Abridg. h. t.; Hunter's Landlord and Tenant*, i. 258; *Ross's Lect.* ii. 169, 496.

[**THOLED AN ASSIZE.** See *Res Judicata.*]

THREATS. [A threat, whether verbal or by writing, to do any serious injury to a man's person, property, or reputation, is an offence at common law, punishable arbitrarily. But an indictment, libelling simply "the wickedly and feloniously writing and sending threatening letters," was held irrelevant, because a threat that is not serious is not criminal, and the term "threatening letters" is not a *nomen juris; Miller*, 24 Nov. 1862, 4 Irv. 238. A threatening letter may be criminal, whether signed or anonymous; and the crime is complete when the letter is despatched, though it never reach the party intended. If such a letter contain an accusation, the sender is in no way exculpated by proving the accusation to be true; and proof of the *veritas* is, therefore, incompetent; *M'Ewan*, 12 July 1854, 1 Irv. 520. In England, this offence is prosecuted under the statutes 24 & 25 Vict. c. 96, §§ 44–46; c. 100, § 16. See *Hume*, i. 439; *Alison's Princ.* 576, 631; *Ersk.* B. iv. tit. 4, § 78; *Macdonald*, 175; *Stephen's Digest of Crim. Law*, arts. 234, 314, 379.] Threats, when used so as to infer *justus metus*, or even if less violent, when accompanied with importunity, will void a deed granted by any person while under their influence. [See *Force and Fear. Extortion. Conspiracy.*]

TIGNI IMMITTENDI; the Roman law urban servitude, whereby the servient proprietor was bound to permit the dominant proprietor to insert a beam or joist in the wall of the servient tenement. See *Support.*

TIMBER, GROWING. Questions regarding the right to use growing timber may occur between the fiar and the liferenter, the landlord and the tenant, and between the heir in possession under an entail and the next substitute. [With regard to the rights of a liferenter, it was decided in *Macalister's Trs.* 27 June 1851, 13 D. 1239, (1) that though a liferenter is entitled to ordinary windfalls of wood, he is not entitled to cut for sale any growing timber, or to sell trees blown down by an extraordinary storm; but he is entitled, at [the sight of the fiar, to cut grown timber, or use blown-down trees, for repairing the fences and other purposes of the estate; (2) that he is not entitled at his own discretion to thin plantations, but he is entitled to do so at the sight of the fiar, to whom the thinnings belong; (3) that he is entitled to cut down copse-wood, which was in use to be cut down at intervals of twenty-two years, provided he is in possession, when the usual period of cutting arrives; but he is not entitled to anticipate that period.] See *Liferent. Sylva Cædua.* Woods are reserved to the landlord *ex lege.* And even a lease of lands with "woods" gives only the power of cutting wood for repairing or building houses upon the ground, but not of selling or otherwise disposing of the wood. The tenant in such a lease may cut willows when young, as a crop, but he is not entitled to cut willow trees of a large size. A tenant selling or destroying the timber on his farm, renders himself liable to a claim of damages, or to certain statutory forfeitures. See *Planting and Inclosing.* An heir in possession under an entail is entitled to cut the timber as long as his possession lasts. In one case, in which an heiress of entail, who was eighty years of age, quarrelled with the next heir, and advertised a sale of all the planted timber on the estate, the court refused to grant an interdict, although the heir offered the value of the whole if preserved; *Hamilton*, 1757, M. 15408. The court have, in a few instances, granted interdict against the sale of unripe timber, or ornamental timber, necessary to the amenity of the mansion-house; but it has been remarked that it requires a strong case to authorise judicial interference; [*Paul*, 3 July 1840, 2 D. 1286; *Boyd*, 2 March 1870, 8 Macph. 637.] There has been some fluctuation in the decisions on the question, whether the heir in possession can give a right to cut timber, to last beyond his own life; but it would appear that he cannot. [See *Huntly's Trs.* 5 Nov. 1880, 8 R. 50; *Gordon*, 8 Nov. 1883, 11 R. 67.] The destruction or injuring of growing timber has been prohibited by different acts, as 1535, c. 11; [1685, c. 39;] 1698, c. 16; 1 Geo. I. c. 48; 6 Geo. III. c. 48 [repealed.] See *Planting and Inclosing.* See on this subject, *Stair*, B. ii. tit. 3, § 73; *More's Notes*, clxxxvii.; *Brodie's Sup.* 897; [*Ersk.* B. ii. tit. 6, § 22;] tit. 9, § 58; [B. iii. tit. 8, § 29;] *Bell's Com.* i. 51, 61, 187, 792; ii. 27; *Bell on Leases*, i. 82, 348; ii. 10, 299, 430; *Hunter's Landlord and Tenant*,

i. 121, 273; ii. 208; *Bank.* i. 239; *Bell's Princ.* §§ 1046, 1058, 1070, 1224–6, 1303, 1754; *Ross's Lect.* ii. 175; [*Rankine on Land-Ownership*, 595, 606; *Rankine on Leases*, 192, 224.]

TIMBRELLUM; a kind of torment, as "stockes or jogges with which craftsmen, such as browsters," were punished. *Skene, h. t.*

TIMBRELLUS; a little whale. *Skene, h. t.*

TIMBRIA; or timmer of skins; an old Scotch mercantile term, signfying so much money as is "included within twa broddes of timmer," which was commonly forty skins; for in this way merchants used to bring home "martrik, sable, and other costly skins and furrings." *Skene, h. t.*

TIME. [By 43 & 44 Vict. c. 9, expressions of time in any statute, deed, or other legal instrument, denote, in Great Britain, Greenwich mean time, unless it is otherwise specifically stated.] See *Computation of Time.*

TIN AND LEAD MINES; are, by 1592, No. 12 (unprinted), freed from being annexed to the Crown as gold and silver mines are. *Ersk.* B. ii. tit. 6, § 16. See *Mines.*

TINNELLUS; the sea-mark, the tide-mouth, the farthest part where the sea flows. *Skene, h. t.*

TINSEL OF THE FEU; is an irritancy incident to every feu-right, by the failure to pay the feu-duty for two years whole and together. It was established by the act 1597, c. 249 [or 250.] This is a penal irritancy, and therefore requires to be declared by an action; and if the vassal appear at any time before decree be pronounced, and pay the arrears, the irritancy will be discharged. There is sometimes an irritancy stipulated in the charter; and where such a clause is inserted, it was formerly the practice to allow the irritancy to take place, without the necessity of a declarator. But by the present practice, even where the statutory irritancy is fortified by a conventional irritancy, a decree of declarator of the irritancy is required, and the irritancy may be purged by payment of the arrear [at any time before decree is extracted; *Ballenden*, 1792, M. 7252. Where the subjects do not exceed £25 in yearly value, a warrant of removing having the effect of a decree of irritancy of the feu may be obtained in the sheriff court; 16 & 17 Vict. c. 80, § 32. See *Caledonian Railway*, 9 July 1875, 2 R. 917. When a vassal incurs the irritancy *ob non solutum* [*canonem*, whether under the statute or conventional, the feu reverts to the superior unaffected by any subfeu-rights granted by the vassal; *Sandeman*, 29 June 1885, 12 R. (H.L.) 67; *Cassels*, 6 March 1885, 12 R. 722.] See *Ersk.* B. ii. tit. 5, § 25; *More's Notes on Stair*, ccvi.; *Bell's Princ.* § 701; *Kames' Stat. Law*, voce *Irritancy; Kames' Equity*, 150, 235; *Jurid. Styles*, iii. 62; *Brown's Synop.* 280; [*Duff's Feudal Conv.* 76; *Menzies' Conv.* 524; *M. Bell's Conv.* i. 625. See *Feu-Duties. Irritancy. Purging an Irritancy.*]

TINSEL OF SUPERIORITY; is a remedy introduced by statute for unentered vassals, whose superiors are themselves uninfeft, and therefore cannot effectually enter them; 1474, c. 58. In such a case, the vassal must charge the superior to obtain himself infeft in the superiority, within forty days, under certification that, if he fail, he shall "lose the tenant for his lifetime," *i.e.*, lose the casualties that may fall to him through the act or delinquency of the vassal, besides making up the damage sustained through his failure. [The vassal might then bring a process of declarator of tinsel of superiority against the superior, and, on obtaining decree, take his entry with the next superior, whether Crown or subject.] Mackenzie (in *Observ.* on 1474, c. 58) mentions an Act of Sederunt interpreting "for his lifetime" to mean the superior's lifetime. But no such A.S. now exists, and it has been assumed that the forfeiture is for the vassal's life; *Dickson*, 1802, M. 15024. [See also *Rossmore's Trs.* 23 Nov. 1877, 5 R. 201. This procedure was practically superseded by the provisions as to forfeiture and relinquishment of the superiority, introduced by various acts, and consolidated by 31 & 32 Vict. c. 101, §§ 104–112; and is now rendered wholly unnecessary by the Conveyancing Act of 1874, which provides that every vassal duly infeft shall be deemed to be entered with his immediate superior, whether the title of the latter has been completed or not; 37 & 38 Vict. c. 94, § 4 (2).] See *Stair*, B. iii. tit. 5, § 46; B. iv. tit. 7; *Ersk.* B. iii. tit. 8, § 80; *Bank.* ii. 335, 431; *Bell's Princ.* § 735; [*Menzies' Conv.* 820; *M. Bell's Conv.* ii. 789. See *Superiority.*]

[**TIPPLING ACT**; 24 Geo. II. c. 40. See *Pactum Illicitum*, pp. 759–60.]

TITHES. See *Teinds.*

[**TITLE**, *of a Statute.* See *Rubric.*]

TITLE TO EXCLUDE. In an action of reduction, a title to exclude is a title in

the defender preferable to that on which the pursuer founds. A title to exclude must be pleaded before taking a day to satisfy the production. A title to exclude may be sufficient, though it be part of the titles called for to be reduced; and if sufficient, it must be reduced before the pursuer can insist for a further production. If it be insufficient, the defender cannot produce a further title to exclude. *Ersk.* B. iv. tit. 1, § 23; [*Mackay's Prac.* ii. 159.] See *Reduction.*

TITLE TO PURSUE. [The pursuer of an action must have both a legal title to sue and a real interest in the result of the plea. It rarely happens that there is a title, but no interest; see *Interest.* But the want of title is a frequent barrier, even where a proper interest exists. "For example, a general legatee cannot sue the testator's debtor, as the title is in the executor; and, on the other hand, an executor cannot sue for a special legacy, for the title is in the legatee." See *Mackay's Prac.* i. 280 *et seq.*, where the decisions are digested, and the title necessary in special classes of persons, such as agents, factors, executors, &c., is considered. The pursuer's title must be correctly set forth in the record. A plea of no title must be specially stated, before the record is closed; *Lade*, 6 Nov. 1864, 2 Macph. 17. Defect of title in the principal party to a suit cannot be cured by the consent and concurrence of the person to whom the right of action truly belongs; *Hislop*, 23 June 1881, 8 R. (H.L.) 95. When the objections to a pursuer's title to sue cannot be disposed of without entering into the merits of the action, and are ultimately sustained, the defender may be entitled to absolvitor, not merely to dismissal of the action; *Baird & Co.* 1 Nov. 1878, 6 R. 116.] See *Stair*, B. iv. tit. 38, § 18; B. iv. tit. 39, §§ 17, 18; *Bank.* B. iv. tit. 23, § 20; [*Shand's Prac.* i. 139; *Mackay's Prac.* i. 278; *Kames' Elucidations*, 127.] See *Interest.* [*Pursuer.*] And as to the distinction between title to pursue and *persona standi in judicio*, see *Persona Standi.*

TITLES OF HONOUR; go to the heir where there is no destination, and may be taken up without inferring representation under the passive titles. [They vest *jure sanguinis*, without service or possession.] The eldest of heirs-portioners, where the title is not otherwise limited, takes a title of honour. *Ersk.* B. ii. tit. 2, § 6; B. iii. tit. 8, §§ 77, 86; *Stair*, B. iii. tit. 5, § 11; *Bank.* B. i. tit. 2, § 32; B. iii. tit. 5, § 83; *Bell's Princ.* §§ 1659, 1679, 1825. See *Dignities.*

[**TITLES TO LAND.** See *Conveyancing. Disposition. Charter. Infeftment. Progress of Titles. Search of Incumbrances. Passive Titles.*]

TITULAR. See *Teinds.*

TOCHER; is the marriage portion, or *dos*, which a wife brings to her husband, *intuitu matrimonii*, as provided in her marriage settlement; not what she otherwise acquires or succeeds to during the subsistence of the marriage. The tocher is presumed to be given in satisfaction of all other provisions by, or claim against, her father; and [formerly] on the dissolution of the marriage within year and day, without a living child, the tocher returned to the contractor, not to the wife or her representatives. See *Bank.* B. i. tit. 5, § 121; tit. 6, § 5; tit. 10, § 77; *Stair*, B. i. tit. 3, § 19; tit. 8, § 2; *Ersk.* B. i. tit. 6, §§ 38, 46, 47, 48; *Bell's Com.* i. 679; [*Fraser on Husb. and Wife*, ii. 1394.] See *Marriage. Liferent. Contract of Marriage.*

TOLBOOTH; the old word for a burgh jail, so called from that being the name of a temporary hut of boards erected in fairs and markets, in which the customs or duties were collected, and where such as did not pay were confined. *Ross's Lect.* i. 319.

TOLERATION ACT. The act 10 Anne, c. 6, allowed all sectarians in Scotland to meet for religious service, in any place but a parish church or chapel, as they thought fit. It imposed a fine of £100 on those who disturbed them; and allowed the episcopal clergy in Scotland to perform the ceremony of marriage, and to administer the sacraments. [The Toleration Act was repealed by 34 & 35 Vict. c. 48.]

TOLLS. [Under the former road system of Scotland, tolls were] placed at turnpikes by road trustees acting with discretionary powers under authority of Parliament. [But by the Roads and Bridges Act, 1878 (41 & 42 Vict. c. 51), which came into force (where not previously adopted) on 1st June 1883, tolls were abolished throughout Scotland. See *Road, Public.*] It would appear that toll was formerly used for custom of any kind. *Skene, h. t.*

[**TONTINE**; a life annuity, or a loan raised on life annuities, with benefit of survivorship. The term originated from the circumstance that Lorenzo Tonti, an Italian, invented this kind of security in the 17th century, when the governments of Europe had some difficulty in raising money in consequence of the wars of Louis XIV.,

[who first adopted the plan in France. A loan was obtained from several individuals on the grant of annuity to each of them, on the understanding that, as deaths occurred, the annuities should continue payable to the survivors, and that the last survivor should take the whole. This mode of raising money has more than once been adopted by the English government (see, *e.g.*, 29 Geo. III. c. 41, amended by 30 Geo. III. c. 45), and also for the purpose of private speculations, but it has almost entirely fallen into disuse, and it may be doubted whether it is not prohibited by the Lottery Acts. *Wharton's Lex. h. t.*]

TOP ANNUAL; mentioned along with *ground* and *feu* annuals in 1551, c. 10, as a real burden on houses within burgh; connected in that act with the burnings of houses within burgh, effected at different times, by the English. *Skene, de Verb. Sig.* voce *Annual; Craig*, lib. i. dieg. 10, § 38; *Stair*, B. ii. tit. 5, § 7; *Ersk.* B. ii. tit. 3, § 52; *Kames' Stat. Law, h. t.; Ross's Lect.* ii. 326. See *Ground-Annual.*

TORRALIUM; a kiln. *Skene, h. t.* See *Kiln.*

TORT; injury, "non-reason, unreason, wrang or unlaw." *Skene, h. t.* [In England, the word is specially used to signify a civil wrong independent of contract. See *Addison on Torts; Pollock on Torts.*] See *Injury.*

TORTURE. The application of torture for the discovery of crime was declared contrary to law by the Claim of Right in 1689; and by 7 Anne, c. 21, § 5. *Ersk.* B. iv. tit. 4, § 96; *Bank.* ii. 660; *Kames' Stat. Law. h. t.;* [*Hume*, i. 542; ii. 323.]

TOSCHEODERACHE; an office or jurisdiction, formerly common in the Highlands and Islands, "not unlike to a baillierie." *Skene, h. t.*

TOWN-CLERK; the clerk to a corporation or burgh court in Scotland. The town-clerk [formerly] acted as notary in all infeftments granted of burgage property. It is illegal to elect a town-clerk removeable at pleasure; and even when he is so elected, he cannot be removed but on just cause; *Simpson*, 17 June 1824, 3 S. 150. A town-clerk having been appointed for five years, and the council at the end of that period having elected another person, it was found that he was not summarily removeable, and the council was interdicted from carrying the new appointment into effect; without prejudice to any declarator the council might be advised to institute for having it found that the office came to an end at the lapse of the stipulated period; *Farish*, [14 July 1837, 2 S. & M'L. 930.] A town-clerk is not a magistrate; and, accordingly, a charge, in which he, along with the magistrates, was charged to perform the town's obligations, was found null; *Drumlanrig*, 1624, M. 13089 and 2509. The town-clerk of a royal burgh is the proper custodier of the burgh records, and is entitled and bound to give extracts therefrom, without being subject to interference on the part of the town council; *Spence*, 6 July 1830, 8 S. 1015; [*Finnie*, 15 July 1868, 6 Macph. 1066.] And a town-clerk who declined to give extracts from the records, to enable a party to complain against an election of magistrates, was found liable in expenses, although he furnished them on being served with a complaint; *Tod*, 17 June 1824, 3 S. 153. See also *Gardiner*, 11 Dec. 1823, 2 S. 571; [*Forbes*, 23 Feb. 1856, 18 D. 645, 1210; *Downie*, 7 Jan. 1879, 6 R. 457; *Cowper*, 8 Jan. 1885, 12 R. 415. See *Marwick on Municipal Elections*, 346, 400, 410.] See *Burgh, Royal. Burgage.*

TOWN COUNCIL; as to the functions and election of the town council of royal burghs, see *Burgh, Royal. Magistrate.* [See also *Marwick on Municipal Elections.*]

TOWN HALL. The town hall of a burgh is not subject to the diligence of the creditors of the burgh; *Phin*, 22 May 1827, 5 S. 690. See *Burgh. Community.*

TRACTUS FUTURI TEMPORIS. See *Heritable and Moveable.*

[**TRADE, USAGE OF.** See *Usage of Trade.*]

[**TRADE MARKS.** A trade mark is a distinctive mark or device used by a manufacturer to indicate that goods to which it is affixed were made by him. When such a mark comes to be recognised as belonging to a particular trader, he acquires right at common law to be protected in the use of it. See *Seixo*, L.R. 1 Ch. App. 192; *Dixon*, 29 Jan. 1867, 5 Macph. 326; *Orr Ewing*, 7 App. Ca. 219; *Singer Co.* 8 App. Ca. 15. But in 1875 a register of trade marks was established by 38 & 39 Vict. c. 91; and since then the acquisition and protection of trade marks have been regulated by statute. The existing rules are contained in the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), as amended by the Patents, Designs, and Trade Marks Amendment Act, 1888 (51 & 52 Vict. c. 50). See also Trades Marks Rules, 1883 and 1888. Application for registration must be made, in prescribed form, to the Comptroller General of Patents, &c.; and must be accompanied

[by representations of the trade mark, and statement of the particular goods or classes of goods in connection with which the applicant desires the trade mark to be registered; act 1883, § 62; 1888, § 8. For the purposes of the acts, a trade mark must consist of or contain at least one of the following essential particulars: (*a*) a name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or (*b*) a written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or (*c*) a distinctive device, mark, brand, heading, label, or ticket; or (*d*) an invented word or invented words; or (*e*) a word or words having no reference to the character or quality of the goods, and not being a geographical name. "There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or of any of them, but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register. Provided as follows: (1) a person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business, but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof: (2) any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures used as a trade mark before 13 Aug. 1875, may be registered as a trade mark under this part of this act;" 1883, § 64; 1888, § 10. Where it is desired to register several trade marks, which, while resembling each other in the material particulars thereof, yet differ in respect of statements of the goods for which they are to be used, or of numbers, or of price, or of quality, or of names of places, they may be registered as a series in one registration. A series of trade marks is assignable and transmissible only as a whole, but for all other purposes each of the trade marks composing a series is deemed and treated as registered separately; 1883, § 66. A trade mark may be registered in any colour or colours; 1883, § 7; 1888, § 11. The comptroller may, if he thinks fit, refuse to register a trade [mark; but there is appeal to the Board of Trade, who may either determine the matter or refer it to the court; 1883, § 62. If registration is not completed within 12 months after application, the comptroller shall give notice to the applicant's agent, and if within 14 days thereafter, or such further time as the comptroller may allow, the registration is not completed, the application is deemed to be abandoned; 1883, § 63; 1888, § 9. Every application for registration shall be advertised by the comptroller, and provision is made concerning opposition to such application, and its determination by the court; 1883, §§ 68–9; 1888, §§ 12–13. A trade mark, when registered, shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill; 1883, § 70. Except where the court has decided that two or more persons are entitled to be registered as proprietors of the same trade mark, the comptroller shall not register in respect of the same goods or description of goods a trade mark identical with one already on the register with respect to such goods or description of goods; and the comptroller shall not register with respect to the same goods or description of goods a trade mark having such resemblance to a trade mark already on the register with respect to such goods or description of goods as to be calculated to deceive; 1883, § 72; 1888, § 14. It is not lawful to register as part of or in combination with a trade mark any words the use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a court of justice, or any scandalous design; 1883, § 73; 1888, § 15. Common marks may be entered on the register, in addition to any trade mark, provided the applicant state the essential particulars of the trade mark, and disclaim right to exclusive use of the added matter; 1883, § 74; 1888, § 16. Application for registration of a trade mark is equivalent to public use of the trade mark; and the date of the application is the date of registration; 1883, § 75; 1888, § 17. Registration as proprietor of a trade mark is *prima facie* evidence of right to its exclusive use, and after five years is conclusive evidence thereof; 1883, § 76. Interdict or damages for infringement of a trade mark cannot be sued for unless it has been registered, if capable of being regis-

[tered, or, in the case of any other trade mark in use before 13 Aug. 1875, unless registration has been refused; 1883, § 77. The Register of Trade Marks is kept at the Patent Office, and the names and addresses of proprietors of trade marks, assignments, transmissions, &c., are entered therein; 1883, § 78. It is open to the inspection of the public; § 88. Trade marks may be removed from the register after 14 years unless a prescribed fee is paid; 1883, § 79; 1888, § 19. Special regulations are made in reference to the Cutlers' Company of Sheffield; 1883, § 81; 1888, § 20. Some other provisions of the acts, which apply equally to patents and to trade marks, are set forth under *Patents*. The law relating to fraudulent marks on merchandise is contained in the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28).

Trade Name.—A name, either personal or descriptive, may be used and registered as a trade mark. But even when there is no trade mark in the sense of the acts, if the goods of a particular trader have become known in the market under his name or the name of the place of manufacture, he is entitled to be protected against any other person using that name in a manner calculated to mislead the public. See *Singer Co.* 14 Jan. 1873, 11 Macph. 267; *Singer Co.* 3 App. Ca. 376, 8 App. Ca. 15; *Lochgelly Co.* 15 Jan. 1879, 6 R. 482; *Charleson*, 17 Nov. 1876, 4 R. 149 (name of hotel); *Dunnachie*, 22 May 1883, 10 R. 874; *Montgomerie*, 1 Feb. 1884, 11 R. 506; *Stuart & Co.* 16 Oct. 1885, 13 R. 1; *Bass, Ratcliff, & Gretton*, 22 May 1886, 13 R. 898; *Thomson & Co.* 12 July 1888, 15 R. 880; *Thorley's Cattle Food Co.* 14 Ch. D. 748; *Wotherspoon*, L.R. 5 H.L. 508.

See on this subject, *Sebastian on Trade Marks; Sebastian's Digest of Trade Mark Cases; Reports of Patent, Design, and Trade Mark Cases*, under authority of Board of Trade, 1884–9; *Upton on Trade Marks; Lawson's Patents, Designs, and Trade Marks Acts; Guthrie's Bell's Princ.* § 1361 C; *Guthrie Smith on Damages*, 318; *Williams on Personal Property*, 328.]

[**TRADE UNIONS.** Trade unions are mainly regulated by the Trade Union Act of 1871 (34 & 35 Vict. c. 31), and the Amendment Act of 1876 (39 & 40 Vict. c. 22). As defined by § 16 of the latter act, the term trade union means "any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and [workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade." The purposes of a trade union are not, by reason merely that they are in restraint of trade, to be deemed unlawful, so as to render any member liable to criminal prosecution for conspiracy or otherwise; nor so as to render void or voidable any agreement or trust; 1876, §§ 2, 3. But nothing in the act is to enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, viz:—(1) Any agreement between members of a trade union as such, concerning the conditions on which they shall or shall not sell their goods, transact business, employ, or be employed: (2) Any agreement for the payment by any person of any subscription or penalty to a trade union: (3) Any agreement for the application of the funds of a trade union—(*a*) to provide benefits to members; or (*b*) to furnish contributions to any employer or workman not a member of the union, in consideration of his acting in conformity with its rules or resolutions; or (*c*) to discharge any fine imposed upon any person by sentence of a court of justice: (4) Any agreement made between one trade union and another: or (5) Any bond to secure performance of any of the above agreements. Nothing in this section, however, is to constitute any of the above agreements unlawful; § 4. The question whether a particular agreement is enforceable is therefore to be determined according to the common law, apart from the statute. See *M'Kernan*, 6 Feb. 1874, 1 R. 453; *Shanks*, 11 March 1874, 1 R. 823; and *Aitken*, 4 July 1885, 12 R. 1206; in which it was held that claims against trade unions by individual members for benefit money could not be enforced; also *Rigby*, 14 Ch. D. 482; and *Strick*, 36 Ch. D. 558; in which the court refused to restrain a trade union from expelling a member. Where a central society sought interdict against a branch society, to prevent misapplication of funds, the court granted interdict until the rights of parties should be cleared up; the object being merely to preserve the *status quo; Amalgamated Society of Railway Servants*, 4 June 1880, 7 R. 867.

[See also *Duke*, 49 L.J. Ch. 802; *Wolfe*, 21 Ch. D. 194. The Friendly Societies Acts, the Industrial and Provident Societies Acts, and the Companies Acts, 1862 and 1867, are not to apply to any trade union, and the registration of any trade union under any of these acts is void; 1871, § 5. But a trade union, whether registered or unregistered, which insures or pays money on the death of a child under ten years of age is deemed to be within the provisions of § 28 of the Friendly Societies Act, 1875; 1876, § 2. See *Friendly Societies.* The Life Assurance Companies Act, 1870, is not to apply to registered trade unions; *ib.* § 7. Any seven or more members of a trade union may, by signing the rules of the union, and otherwise complying with the provisions of the act as to registry, register the union under the act; but if any one of the purposes of the union is unlawful, the registration is void; 1871, § 6. The acts make further regulations as to registry, appointment of trustees in whom the property of each union is to be vested, offences and penalties, matters to be provided for by the rules of each union, &c. Offences are prosecuted summarily before the sheriff, and there is an appeal to the Court of Justiciary in the manner prescribed by 20 Geo. II. c. 43; see *Appeal to Circuit Court.* See also Provident Nominations Act, 1883 (46 & 47 Vict. c. 47). See *Guthrie on Trade Unions; Erle on Trade Unions; Davis on Friendly Societies and Trade Unions; Fraser on Master and Servant*, 404. See *Workmen. Conspiracy.*]

TRADITION; is necessary to every conveyance of property where the acquirer has not already the custody or possession. Tradition is either actual, or, where actual is impracticable, symbolical; *Ersk.* B. ii. tit. 1, §§ 18 *et seq.*; although, in some cases, the want of symbolical cannot be supplied even by actual possession. *Stair*, B. iii. tit. 2, §§ 5, 6. See *Delivery. Symbols. Possession. Sasine.*

TRAISTIS; in old law language, a roll or catalogue, containing the particular dittay taken up upon malefactors, which, with the "portuous," was delivered by the Justice-Clerk to the "Crowner," that the persons enumerated in the portuous might be attached, conform to the dittay contained in the traistis, so called because committed to the "traist," faith, and credit of the clerks and crowner. *Skene, h. t.*

[**TRAMWAYS.** See 24 & 25 Vict. c. 69; 33 & 34 Vict. c. 78; *Guthrie Smith on Damages*, 151. See *Road, Rule of.*]

TRANSACTION; is any agreement between two parties tending to the settlement of doubtful and controverted claims. It does not apply, in strictness, to mere contingencies. The sentence of a court, if subject to review, does not exclude it. It may be entered into by any one who can lawfully administer his own affairs, or those of others. It has been observed, that of all agreements, the transaction or arrangement of doubtful rights is the most difficult to set aside; *Stewart*, 22 Nov. 1836, 15 S. 112. [It cannot be reduced on the ground of error as to legal rights; *Kippen*, 10 July 1874, 1 R. 1171. See *Error.* But it is reducible if procured by fraudulent misrepresentation or concealment; *Dempster*, 1 July 1873, 11 Macph. 843. Transaction with regard to moveables cannot be proved by witnesses; but acquiescence in an alleged transaction may be inferred from the subsequent conduct of the party, and the facts and circumstances establishing it may be proved by witnesses. [Compromise of an action may be proved *prout de jure; Thomson*, 30 Oct. 1868, 7 Macph. 39; *Love*, 12 June 1872, 10 Macph. 795. A trustee in sequestration has power, with consent of the commissioners, to transact doubtful claims; 19 & 20 Vict. c. 79, § 176; *Dalzell*, 12 Dec. 1876, 4 R. 222. See *Sequestration.* As to power of liquidators to transact, see *City of Glasgow Bank*, 19 March 1880, 7 R. 731.] See *Stair*, B. i. tit. 17, § 2; *Bank.* B. i. tit. 23, § 1; *Kames' Equity*, 181, 365; [*Bell's Princ.* § 535; *Dickson on Evidence*, §§ 305, 564; *Mackay's Prac.* ii. 144, 377, 545. See *Counsel. Agent and Client. Compromise.*]

TRANSFERENCE; is that step whereby a depending action is transferred from a person deceased to his representative. An action of transference *activè* is rendered unnecessary by 1693, c. 15, the pursuer's representative producing merely his titles, viz., retour, confirmed testament, or special assignation. [Assignation of the right on which the action depends, without assignation of the cause, is sufficient to entitle the assignee to appear; *Kyle*, 30 Nov. 1821, 1 S. 180. In the case of a defender, or a pursuer who would not sist himself, an action of transference was formerly necessary; but by § 96 of the Court of Session Act, 1868, "where, according to the existing practice, a cause may be transferred against any party or parties, it shall be competent to any party who might have instituted a summons of transference to enrol the cause before the Lord Ordinary, and to lodge a

[minute craving a transference of the cause against such party or parties; and the Lord Ordinary may thereupon grant warrant for serving a copy of the summons or other original pleading upon the party or parties against whom such cause is sought to be transferred, and at the same time shall allow such party or parties to give in a minute of objections to such transference within a time to be specified in the interlocutor; and such interlocutor shall also be intimated in common form to the agents of the other parties in the cause; and such and the like procedure may be had in virtue of the service of such summons or pleading under the Lord Ordinary's warrant as might have been had in virtue of the execution of a summons of transference; and if the Lord Ordinary shall think fit to transfer the cause in terms of the said minute (which the Lord Ordinary is hereby authorised to amend if necessary), he shall pronounce an interlocutor holding the cause as transferred against the party or parties named in such minute or amended minute, and the cause shall be taken to be transferred accordingly." Transference of a cause in the Inner House is regulated in a similar way by § 98. As to combined wakening and transference, see *Wakening*. An action may be transferred so long as it is in dependence, *i.e.*, at any time between the execution of the summons and the final decree; *Cameron*, 9 March 1838, 16 S. 907; *Forbes*, 13 Feb. 1872, 10 Macph. 448. The party against whom transference is sought, must be a representative, in some capacity, of the original party; *Clelland*, 18 Feb. 1845, 7 D. 461; *Parks*, 15 July 1854, 16 D. 1105.] See *Stair*, B. iv. tit. 34; *Ersk.* B. iv. tit. 1, §§ 60–1; *Ivory's Form of Process*, ii. 26; [*Shand's Prac.* ii. 537; *Mackay's Prac.* i. 492.]

TRANSITUS. See *Stoppage in Transitu*.

[**TRANSLATION.** A deed whereby the assignee of a debt makes over his right to a third party is called a translation. The short forms authorised by the Transmission of Moveable Property Act, 1862, are available for translations. See *M. Bell's Conv.* i. 334; *Jurid. Styles.* ii. 718. See *Assignation.*]

TRANSMISSION OF PENAL ACTION. A penal action transmits against the heir only *in quantum lucratus*, and that not unless there has been, in the common case, litiscontestation, and, in public crimes, sentence. The heir is liable in restitution or damages for all delinquencies proved during the deceased's life, and in penalties incurred by the deceased's breach of contract, even without any previous action for them. *Bank.* B. iv. tit. 45, § 70. See *Penal Action.*

TRANSMISSION OF RIGHTS. Some rights are intransmissible, such as those of parent and child; others transmissible, but only with the consent of him on whom lies the corresponding obligation; while, in other cases, either the law or the individual possessor may transmit, either directly without consent, or indirectly without requiring consent. Where transmission is practicable, it is that either of a moveable or an heritable right. If of a moveable right, it is either voluntary, as by assignation, or involuntary (*i.e.*, by legal diligence), as by arrestment or poinding. If of an heritable right, it is also either voluntary, as by disposition, or involuntary, as by adjudication. *Ersk.* B. ii. tit. 7.

TRANSPORTATION OF CHURCHES. To transport a church means to authorise the erection of the parish church in a different part of the parish from that in which it has formerly stood. The act 1707, c. 9, gives the power of determining as to the transportation of churches, to the Court of Session, as the Commission of Teinds. The consent of three-fourths of the heritors, in point of valuation, was [formerly] necessary to the removal; [that of a simple majority was made sufficient by 7 & 8 Vict. c. 44, § 1.] But any party having interest is entitled to oppose it. In sanctioning the transportation, the court is in use to give decree against the heritors for the erection of the new church, and to order the materials of the old building to be sold, and the price applied in defraying the expense of the new. The form of applying for transportation is by a summons raised before the Teind Court, concluding for authority to transport, and to have the new church declared the regular parish church, &c. The heritors who are not parties to this summons as pursuers should be cited as defenders, as also the minister and presbytery, who have an interest to appear and object if they see cause. See *Ersk.* B. i. tit. 5, § 21; *Bank.* B. ii. tit. 8, § 49; *Dunlop's Parochial Law*, 26. See *Church. Teind Court.*

TRANSPORTATION OF FELONS; is the banishing or sending away of convicts out of Great Britain as a punishment. [By 20 & 21 Vict. c. 3, § 2, sentence of transportation was abolished, and sentence of penal servitude was substituted. See *Penal Servitude.*]

TRANSUMPTS. An action of transumpt is an action competent to any one having a partial interest in a writing, or immediate use for it, to support his titles or defences, in other actions; directed against the custodier of the writing, calling upon him to exhibit it, in order that a transumpt thereof may be judicially made and delivered to the pursuer. This action may be competently pursued before the judge ordinary. Although, in the ordinary case, the title of the pursuer of an action of transumpt consists of an obligation by the defender to grant transumpts, it is, nevertheless, a sufficient title to insist, if the pursuer can show that he has an interest in the writings; but, in that case, he must be at the expense of the transumpt. After the writings to be transumed are judicially exhibited, duplicates are made out, collated, and signed by one of the clerks of court. Such duplicates are called transumpts, and have a decree of the judge interponed, declaring that they are to bear as full faith or credit as an extract from the record of that court. Hence, a decree of transumpt cannot be challenged except by an action of improbation; and in that case, the user of the transumpt sought to be reduced must support it by the production of the principal writing, for the recovery of which a diligence will be granted to him against havers; and if it be not produced, certification will be granted against it. The parties chiefly interested in the deeds to be transumed, both granters and grantees, or their representatives, must either be made parties to the action, or consent expressly to the transuming of the deeds. All others pretending interest may be cited edictally. [This action is now of very rare occurrence; but see *Webster*, 24 Nov. 1857, 20 D. 83. When a trustee in a sequestration desires to compel production of documents, an action of transumpt is unnecessary: he has sufficient powers under the Bankruptcy Act, 1856, §§ 90, 91, 93; *Selkirk*, 22 Oct. 1880, 8 R. 29.] See *Stair*, B. iv. tit. 31; *More's Notes*, ccclxxxiii.; *Ersk.* B. iv. tit. 1, § 53; *Bank.* ii. 622; *Jurid. Styles*, iii. 22; [*Dickson on Evidence*, § 1324; *Mackay's Prac.* i. 366.] See *Evidence. Privileged Summons.*

TRAVELLER. The powers of a mercantile traveller, or rider, are regulated by the terms of his commission; but he has also, by custom, an implied power to receive payment for his principal, and to take orders for him, which the principal is bound to perform. *Bell's Princ.* §§ 219, 231.

TRAVERSE; in English law, the denial of a matter of fact alleged in the declaration, or pleadings. *Tomlins' Dict. h. t.*

TREASON. By the older law of Scotland, treason was either proper or statutory —the first comprehending all facts which were, by common law or by statute, held to be high treason itself, committed against the state or its head (see 1424, cc. 3, 4; 1449, c. 25; 1455, c. 54; 1584, c. 129; 1661, c. 5; 1662, c. 2; 1689, cc. 1, 2; 1703, cc. 1, 3); the second comprehending all facts which, though in themselves bearing none of the characters of treason, were from their mischief and enormity punished as such (see 1587, cc. 50, 51; 1592, c. 146; 1528, c. 8; and 1681, c. 15); the punishment of both being death, forfeiture of real and personal estate, and loss of honour and privilege. But by 7 Anne, c. 21, §§ 1, 23, the law of England as to treason was adopted as the law of Scotland. The great basis of the English treason law is 25 Edw. III. stat. 5, c. 2, which declares that it is treason—1. To compass or imagine the death of the King, meaning also the Queen Regnant (though not her husband), the Queen, or their eldest son; which includes the mere designing even of such a deed, if evinced by overt act, affording evidence of means, even remotely employed to accomplish it. Such overt acts are—lying in wait in order to attempt the life of the King; providing arms; preparing poison; sending letters; assembling and consulting; presence at consultation, with subsequent concealment of the scheme, and previous knowledge of the purpose of assembling; offering money, whether accepted or not; or in any other way instigating or abetting to kill the King. As also, every act of which danger to the King is the natural consequence: as marching in array against him; fortifying in resistance to his authority; enlisting men to depose him; taking measures, by subscribing bonds, associating, writing letters or otherwise, to imprison, or get forcible or fraudulent possession of his person; conspiring, or taking measures to levy war, or raise insurrection against his person or government, or constrain any of his sovereign acts; soliciting or concerting measures with a foreign power to invade the country, or going, or even displaying a purpose of going, abroad with that view. The same observations hold, though not so rigorously, as to the Queen-consort and the eldest son, in so far as their different *status* allow the application. The act 36 Geo. III. c. 7, [made perpetual by 57 Geo. III. c. 6,]

makes it treason to compass, devise, or intend, the death, or bodily harm tending to the death, maiming, wounding, or restraint of the King; provided that such compassing, &c., be published by writing, printing, or other overt act. No writing unpublished, or purely speculative (as without a definitive reference to purpose), is treasonable. But all writings, even unpublished, which refer to any treasonable scheme set on foot, or to be set on foot, and all words and opinions written and published expressing a general hostility to the King's life, are treasonable. Words merely spoken do not amount to treason, except as expounding acts into treason, *e.g.*, in consultations or advices to kill, &c. *The King* means generally that person who is, as head of the State, in possession of the Crown, whether rightfully or not, as none can be punished for obeying the powers that be at the time; 11 Henry VII. c. 1.; except perhaps, in the case of voluntarily and ultroneously acting against a rightful King dispossessed by a usurper, which is certainly treason. 2. It is treason to violate, whether with or without consent, the Queen, regnant or not, or the wife of the eldest son (while in these characters), or the King's eldest daughter, while unmarried. 3. To levy war against the King within his realm. This includes every act deliberately and directly defying, and forcibly opposing or instantly threatening, or beginning so to oppose, the authority of the State, as a whole, and as represented by the King as its head, whether that defiance is intended as the means or as the end of action, or whether the King himself or the organs of Government are so opposed. The narrow seas are held within the realm; so that to assail King's ships on them is treason. 4. Adhering to, or assisting or corresponding with, the King's enemies, anywhere, whether rebels or foreign foes, without the excuse of compulsion, *i.e.*, reasonable fear for life or person. Where rebels are assisted, it becomes a levying of war. Enemies need not be acting under authority of their respective governments, or of any government; and the King's allies or stipendiaries are identified with himself. 5. To counterfeit the King's Great or Privy Seal; and (by 7 Anne, c. 21) to counterfeit the seals used in Scotland. 6. To kill the Chancellor, Treasurer, or any of the King's Justices, or (by 7 Anne) the supreme judges in Scotland, provided they be in their places, and in the execution of their official duty. By 1 Anne, stat. 2, c. 17, an endeavour, by any direct and overt act, to hinder the succession to the Crown of the person nearest, according to the limitations of the Act of Settlement, is treason; and by 6 Anne, c. 7, it is treason to maintain and affirm, advisedly and directly, by writing or printing, that any person has right to the Crown of these realms, otherwise than by the Act of Settlement, or that the King and Parliament cannot make laws to bind the Crown and descent thereof. But to do the same by teaching, preaching, or advised speaking, does not amount to treason.

All accessories, whether before or after the fact, are principals in treason. Treason may be committed by all who owe allegiance. Allegiance is either *natural*, viz., that of a born subject, which he cannot by his own act shake off during life; or *local*, which is as binding, while it lasts, as the natural, and is owed by every foreigner, while he resides in Britain, even though his Government should, during that period, go to war with Britain; and even though, on such a war occurring, he quits Britain himself, but leaves his family and effects here voluntarily. Foreign ambassadors are guilty of treason when they attempt the King's life. In other cases of offence as ambassadors, they become merely enemies.

Trial in Scotland for treason is competent to the Court of Justiciary, and to any commission of *Oyer and Terminer* appointed by the Crown, and containing at least three Lords of Justiciary (see 7 Anne), of whom one to be of the quorum. At the desire of the Lord Advocate, any trial for treason pending before the commission may, by a *certiorari* under the Great Seal, be transferred to the Justiciary Court; but a prosecution takes place now, not at the discretion of the Lord Advocate, but on a bill found by a grand jury, as in England. The petty jury consists, not of fifteen, but of twelve men taken from the county within which the treason is alleged to have taken place, or within which the court sits, if on the trial of treason committed abroad; which jury must be unanimous, or agreed in their verdict. See *Jury*. Trial in absence for treason, and trial after death, which last was allowed by Parliament, 10 Dec. 1540, are abolished by 7 Anne. Two concurring witnesses to each overt act libelled, or one witness to each of two or more overt acts of the same species of treason, are required; 1 Edw. VI. c. 12; 5 & 6 Edw. VI. c. 11; 1 & 2 Philip & Mary, c. 10; and 7 Will. III. c. 3; but one witness will

suffice to establish any other and extrinsic circumstance, such as a former confession. Judicial confession at the bar convicts. The grand jury's bill must (except in trial for an attempt at assassinating the King) be found within three years from the date of the offence. The panel may see his indictment and lists of witnesses and jurors ten free days before trial (7 Anne, c. 21), and may challenge thirty-five jurors. He may compel the appearance of his witnesses, and employ counsel in his defence; *Foster*, ii. 230. [The Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35) does not apply to treason, nor affect the procedure in any prosecution or trial therefor (§ 75).]

The punishment of high treason, by 54 Geo. III. c. 146, is that the offender shall be drawn on a hurdle to the place of execution, and there be hanged by the neck until he be dead, and that afterwards his head shall be severed from his body, and his body divided into four quarters, and disposed of as the King shall think fit; with power to the King to direct that the offender shall not be drawn to the place of execution, and that he may not be hanged but beheaded, and also to direct as to the disposal of the body, &c. From the date of the treason the traitor's moveables are confiscated, and his heritage and honours are forfeited for ever by himself and his heirs, though, on the failure of heirs, an entailed estate returns to the next substitute. Debts heritably secured are not forfeited; but personal debts are, at common law, although, on the Rebellions 1715 and 1745, personal debts were, by statute, allowed to be claimed. Forfeiture extends to the estate even of an apparent heir. By corruption of blood in consequence of sentence for treason (a stain which nothing short of an act of Parliament, not even a pardon, can remove), neither the offender, nor any one who traces connection through him, can succeed. [In England the punishment has been made simply hanging, and the consequences of forfeiture and attainder have been abolished by 33 & 34 Vict. c. 23; but the act does not apply to Scotland.] See *Hume*, i. 512; *Ersk.* B. iv. tit. 4, § 20; tit. 4, § 110; B. ii. tit. 5, § 9; *Bank.* B. ii. tit. 3, § 46; tit. 19, §§ 26–8; *Tomlins' Dict. h. t.*; *Stair*, B. ii. tit. 3, § 66; B. iii. tit. 3, § 28; *More's Notes*, cxci.; [*Alison's Princ.* 596; *Macdonald*, 220; *Stephen's Com.* iv. 167; *Stephen's Digest of Crim. Law*, art. 51; *Foster's Report and Discourses*, 181.]

[**TREASON-FELONY.** In order that treasonable practices of less political [moment might be punished without the necessity of dealing with them as high treason, the act 11 Vict. c. 12, § 3, provides that, "if any person whatsoever shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most gracious lady the Queen, her heirs or successors, from the style, honour, or royal name, of the imperial crown of the United Kingdom, or of any other of Her Majesty's dominions and countries, or to levy war against Her Majesty, her heirs or successors within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or to put any force or constraint upon, or in order to intimidate or overawe both Houses, or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other of Her Majesty's dominions or countries under the obeisance of Her Majesty, her heirs and successors; and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed;" he shall be guilty of felony, and liable to penal servitude for life, or any period not less than seven years, or imprisonment not exceeding two years, with or without hard labour. See *Cumming*, 7 Nov. 1848, J. Shaw, 17; *Macdonald*, 226; *Stephen's Com.* iv. 185.]

TREASON, MISPRISION OF. See *Misprision of Treason.*

TREASURER, LORD, *of Scotland.* The duty of the Lord Treasurer was to examine and pass the accounts of the sheriffs and others concerned in levying the revenues of the kingdom, to receive resignations of lands and other subjects, and to revise, compound, and pass signatures, gifts of tutory, &c. In 1663, he was declared President of the Court of Exchequer. *Ersk.* B. i. tit. 3, § 30.

TREASURES. Treasure-trove, *i.e.*, treasures dug out of the ground or out of buildings, or found in the sea, and the owner of which is unknown, fall to the Crown, according to the maxim, *Quod nullius est, fit domini regis.* See *Ersk.* B. ii. tit. 1, §§ 6, 12; *Stair*, B. ii. tit. 1, § 5; tit. 3, § 60; B. iii. tit. 3, § 27; *More's Notes*, cxlvi.; *Bank.* i. 85, 211; *Bell's Princ.* § 1293; [*Rankine on Land-Ownership*, 212.]

[**TREASURY BILLS.** See *Unfunded Debt.*]

TREES. See *Timber. Planting.*

TRESPASS. ["The word 'trespass' was unknown in our early law, and was introduced from England, where it was used in a very wide sense to denote all the wrongs to which the common law remedy, which went by the same name, was applicable. In Scotland it is popularly used to denote any temporary intrusion, or entering, or being upon the lands or heritages of another without his permission;" *Rankine on Land-Ownership*, 122.] It follows, from the exclusive right of property, that a proprietor is entitled to prohibit all trespass within his grounds. [See *E. Breadalbane*, 1791, 3 Pat. 221. But this exclusive right yields wherever public interest or necessity requires that access be allowed, *e.g.*, for extinguishing a fire, pursuing a criminal, or destroying dangerous or noxious animals; *Bell's Princ.* § 956. Trespassers may be restrained by interdict, but that is the proprietor's only remedy; and the only penalty to which a trespasser is liable (apart from destruction of property or other malicious mischief) is the expense of the application for interdict, decree for which will be granted against him, in the case of a well-grounded application. If the trespass is repeated after interdict has issued, the trespasser is, of course, liable in the penalties for breach of interdict. See *Interdict. Breach of Interdict.* Interdict can be obtained only when there is reasonable apprehension that the trespass will be repeated, and when there is evidence of intention to commit trespass or give offence to the proprietor. See *Hay's Trs.* 31 Jan. 1877, 4 R. 398; *Winans*, 3 June 1885, 12 R. 1051. The use of violence against a trespasser would found a claim of damages at his instance. See also *Spring-Guns.* As to trespass in pursuit of game, see *Poaching.* By the Trespass Act, 1865 (28 & 29 Vict. c. 56), every person who lodges in any premises, or occupies or encamps on any land being private property, without consent of the owner or occupier, and every person who encamps or lights a fire on or near any private road or enclosed or cultivated land, without consent of the owner or occupier, or on or near any public road or other highway, is liable to a fine of 20s. or imprisonment for fourteen days for a first offence, and to a fine of 40s. or imprisonment for twenty-one days for a subsequent offence. See *Bell's Princ.* § 961; *Hume*, i. 62, 73, 219; *Rankine, supra cit.; Guthrie Smith on Damages*, 120, 214; *Pollock on Torts*, 178. See [*Property. Fences. Ejection and Intrusion. Winter Herding. Planting and Inclosing.*]

TRIAL. See *Criminal Prosecution.*

TRIBULA; a flail for thrashing out corn. *Skene, h. t.*

TROUT-FISHING. The right of trout-fishing is conveyed, along with lands, as part and pertinent. The right, however, may be reserved or transferred to a stranger. Where one person has right to the salmon-fishing, and another to the trout-fishing, the right of fishing trout must be exercised in such a way as not to prejudice the salmon-fishing; *Carmichael*, 1787, M. 9645, [Hailes, ii. 1033.] The doctrine that trout-fishing is an accessory of the adjacent land, was confirmed in *Mackenzie*, 14 May 1832, 6 W. & S. 31; and in *Macdonald*, 4 Dec. 1836, 15 S. 259. See also *Forbes*, 31 May 1826, 4 S. 650. [A right of trout-fishing cannot be acquired as a servitude; *Patrick*, 28 March 1867, 5 Macph. 683. The public have no right to fish in private streams or lochs, even though they have a right of way along the banks; *Fergusson*, 18 July 1844, 6 D. 1363; *Montgomery*, 28 Feb. 1861, 23 D. 635. An ordinary agricultural lease gives the tenant no right of trout-fishing; *Maxwell*, 28 Feb. 1871, 9 Macph. (H.L.) 1; *D. Richmond*, 14 Jan. 1861, 4 Irv. 10; *Hunter on Landlord and Tenant*, ii. 210. As to the right of a fishery proprietor on one bank of a river to interdict a trout-fisher trespassing on the opposite bank, see *L. Somerville*, 22 Dec. 1859, 22 D. 279; also *Stuart*, 23 Nov. 1866, 5 Macph. 753, 6 Macph. (H.L.) 123.

[By 23 & 24 Vict. c. 45 (which extends, and for the most part supersedes, the provisions of 8 & 9 Vict. c. 26), the following offences are punishable by a fine of £5 (besides forfeitures):—Fishing for trout or other fresh-water fish in any river, water, or loch in Scotland, with any net of any kind, or by double rod fishing, or cross line fishing, or set lines, or otter fishing, or burning the water, or by striking the fish with any instrument, or by pointing, or putting into the water lime or any other destructive substance with intent to destroy the fish, or trespassing on any ground, or in or upon any water, with intent to commit any of these offences. But the act does not prevent any person having the right to fish in any river, &c., or any one having permission from such person, from fishing in any mode not prohibited before the passing of the act. See *Bell's Princ.* § 747; *Stair*, B. ii. tit. 1, § 5; tit. 3, §§ 69,

[76; *Ersk.* B. ii. tit. 6, § 6; *Bank.* B. i. tit. 2, § 3; *Rankine on Land-Ownership*, 482, 875; *Stewart on Fishing*, 246; *Paterson on Fishery Laws*, 211. See *Salmon-Fishing. River. Lakes.*]

TROVER, *in English law.* [The action of trover (or trover and conversion) was a species of action on the case, and originally lay for the recovery of damages against a person who had found another's goods and wrongfully converted them to his own use. Subsequently, the allegation of loss by the plaintiff and finding by the defendant was merely fictitious, and the action became the remedy for any wrongful interference with or detention of the goods of another. The name trover is sometimes applied to an action brought for the same purpose under the present Judicature Act, though it is more usual in such a case to bring an action claiming delivery of the goods and damages for the wrongful detention. In an action of trover, the plaintiff could only recover the value of the goods, not the goods themselves. *Sweet's Law Dict.*] See *Detinue.*

[**TRUCK ACTS**; 1 & 2 Will. IV. c. 37, and 50 & 51 Vict. c. 46. These acts strike against the system of paying wages in goods instead of money. It was a common practice with masters to establish warehouses or shops, and the workmen in their employ either had their wages accounted for to them by supplies of goods from such depots, without receiving any money, or they had the money given them with an express understanding that they should resort to the warehouses or shops of their masters for the articles of which they stood in need. By 1 & 2 Will. IV. c. 37, wages were made payable in current coin only, and all payments, or contracts for payment, in any other manner, were declared illegal and void; as were also all stipulations as to the manner in which wages should be expended; §§ 1–3. See *Finlayson*, 1 July 1864, 2 Macph. 1297; *M'Farlane*, 7 Dec. 1888, 16 R. (J.C.) 28. In an action for wages, no set-off is allowed for goods supplied by the employer, or by any shop in which he is interested; § 5. If any workman, or his wife or children, become chargeable to the parish, the inspector of poor may recover any wages earned by him within the three preceding months, and not paid in cash; § 7; 50 & 51 Vict. c. 46, § 16. The act does not prevent any employer or his agent from supplying or contracting to supply to a workman any medicine or medical attendance, or fuel, or materials, tools or implements, or hay, corn, or other provender, or victuals dressed or prepared under the roof of the employer, and there consumed by the workman; nor from demising to a workman a tenement or part thereof at any rent to be thereon reserved (see *M'Farlane, supra*); nor from making or contracting to make any stoppage or deduction from wages in respect of the above, or in respect of money advanced for any such purpose as aforesaid, provided that such stoppage or deduction do not exceed the real and true value of the things supplied, and be not in any case made from the wages of such workman, unless the agreement or contract for such stoppage or deduction is in writing, and signed by such workman; § 23 of earlier act. Nor does the act prevent advances by employers to workmen for contributions to friendly societies or savings banks, or for relief in sickness, or education of children; § 24. By §§ 19, 20, these provisions were restricted to certain classes of artificers, domestic servants and servants in husbandry being expressly excluded from their operation. But by 50 & 51 Vict. c. 46, the provisions of the earlier act were extended to all "workmen," as defined by the Employers and Workmen Act, 1875 (see *Workmen*); § 2; and the following additional provisions were enacted:—Whenever by agreement, custom, or otherwise, a workman is entitled to receive in anticipation of his wages an advance as part or on account thereof, the employer may not withhold such advance, or make any deduction in respect thereof, on account of poundage, discount, or interest, or any similar charge; § 3. Nothing in either act renders illegal a contract with a servant in husbandry for giving him food, drink (not being intoxicating), a cottage, or other allowances or privileges in addition to money wages as a remuneration for his services; § 4. In an action for wages, the employer is not entitled to any set-off or counterclaim in respect of any goods supplied to the workman by any person under any direction or order of the employer, or any agent of the employer; and an employer or his agent, or any person supplying goods by his order or direction to the workman, may not sue the latter in respect thereof; § 5. But this section does not apply to anything excepted by § 23 of the earlier act (*supra*). No employer shall, directly or indirectly, by himself or his agent, impose as a condition, express or implied, in or for the employment of any workman, any terms as to the place at which, or the manner in which, or the

[person with whom, any wages or portion of wages paid to the workman are or is to be expended; and no employer shall by himself or his agent dismiss any workman from his employment for or on account of the place at which, or the manner in which, or the person with whom, any wages or portion of wages paid by the employer to such workman are or is expended, or fail to be expended; § 6. No deduction may be made from wages for sharpening or repairing tools, except by agreement not forming part of the condition of hiring; § 8. Where deductions are made from wages for education of children, or in respect of medicine, medical attendance or tools, once at least in every year the employer or his agent shall make out a correct account of receipts and expenditure in respect of such deductions, and submit the same to be audited by two auditors appointed by the workmen, producing vouchers, &c., and affording all requisite facilities; § 9. Where articles are made by a person at his own house, or otherwise, without the employment of any person under him except a member of his own family, the acts apply as if he were a workman, and as if the price of an article were wages earned during the seven days next preceding receipt of the article by the employer from the workman. This section only applies to articles under the value of £5, knitted or otherwise manufactured of wool, worsted, yarn, stuff, jersey, linen, fustian, cloth, serge, cotton, leather, fur, hemp, flax, mohair, or silk, or of any combination thereof, or made or prepared of bone, thread, silk, or cotton lace, or of lace made of any mixed materials. The Queen has power, by Order in Council, to suspend the operation of this section, in whole or in part, in any county or place, if expedient in the interest of persons making such articles; § 10. Both the acts contain further provisions in regard to offences and penalties. See also 37 & 38 Vict. c. 48, which prohibits the letting of frames and machinery, and the stoppage of wages for frame rents and charges in the hosiery manufacturer. See *Fraser on Master and Servant*, 442; *Bell's Princ.* § 192; *Manley Smith on Master and Servant*, 603; *Macdonell on Master and Servant*, 366.]

TRUST. A subject is conveyed in trust when the person to whom it is conveyed, and who is called the trustee, does not acquire an unlimited right of property, but holds the subject for the purpose of applying it to certain uses, expressed or implied. Trust is either voluntary, constituted by a disposition of the truster, or judicial. A conveyance in trust is completed by delivery of the moveables and by sasine in the heritage. The completion of the conveyance denudes the truster, and prevents his creditors, or others coming in his place, from attaching anything but the reversionary interest after the purposes of the trust are fulfilled. The conveyance may be either absolute, with a back-bond or other acknowledgment granted by the trustee that he holds the subject for the purposes of the trust; or it may be *ex facie* a trust-conveyance. In our earlier law, it was customary to grant absolute dispositions without receiving any back-bond; and presumptions and parole evidence were admitted to establish the trust against the trustee or his representatives, although not against his singular successor. But it was afterwards enacted, that no action for declaring a trust shall be sustained, unless the trust be proved by oath of party, or by a written acknowledgment of trust from the trustee; 1696, c. 25. [See *Laird & Co.* 9 Dec. 1884, 12 R. 294; *Wallace*, 24 Feb. 1885, 12 R. 687.] A formal back-bond of trust, however, is not indispensable; it is competent to prove the trust by writings under the hand of the trustees importing an acknowledgment or admission of trust; *Macfarlane*, 23 May 1837, 15 S. 978. [In *Seth*, 14 July 1855, 17 D. 1117, entries in the trustee's business books, being clearly referable to the existence of a trust, were held sufficient under the act. See also *Walker*, 11 Dec. 1857, 20 D. 259; *Marshall*, 18 Feb. 1859, 21 D. 514; *Thomson*, 28 Oct. 1873, 1 R. 65. Where the writ founded on is ambiguous, proof is allowed of the circumstances in which it was executed and delivered; *Evans*, 6 June 1871, 9 Macph. 801.] It is competent to prove the existence of a trust as between two third parties, *prout de jure;* and the act 1696, c. 25, only applies to the case of proper declarators of trust by the truster, or those in his right, against the trustee; *L. Elibank*, 16 Nov. 1827, 6 S. 69; [*Scott*, 16 Nov. 1832, 11 S. 26; *Middleton*, 8 Feb. 1861, 23 D. 526; *Hastie*, 19 March 1886, 13 R. 843. The act does not apply so as to restrict proof of a relevant averment of fraud; *Wink*, 3 Dec. 1867, 6 Macph. 77; *Tennent*, 15 March 1870, 8 Macph. (H.L.) 10. Nor does it apply where the allegation is not trust, but partnership or mandate; *Forrester*, 5 June 1875, 2 R. 755; *Horne*, 3 July

[1877, 4 R. 977; nor when an agent, having been authorised to take a deed in one capacity, takes it in another, without preserving evidence of the trust; *Pont Mawr Quarry Co.* 16 Jan. 1883, 10 R. 457. In order to exclude proof *prout de jure*, it is indispensable that the true owner of the property should have consented to an absolute title being taken in the trustee's name (*per* Lord Pres. Inglis in last case).] An acknowledgment of trust by the representatives of the trustee, combined with other circumstances, was found sufficient to establish trust; *Montgomery*, 7 Feb. 1811, F.C. The persons having the beneficial interest under a trust are properly creditors having a preference over the private creditors of the trustee. Persons not yet born may be the creditors under a trust. The beneficial interest is heritable or moveable according to the nature of the prestations directed to be made. See *Jus Crediti*.

A voluntary trust-disposition is often had recourse to for securing property, which might otherwise be exposed to the acts and deeds of the person in possession; as in marriage-contracts, in family settlements, and in the constitution of liferents, where it is proper that the fee should not be *in pendente*. It is also employed by debtors, whether companies or individuals, who may desire extrajudicially to wind up their affairs, and to settle with their creditors. And where the conveyance is not struck at by the act 1696, c. 5, or 1621, c. 18, a voluntary trust may be granted for the purposes of sale and distribution. [See *Insolvency*, p. 548. *Accession, Deed of.*] The import of the trust-deed is interpreted according to the plain meaning of the terms used; and whatever is necessary to the rational interpretation, and for carrying into effect the purposes of the trust, is implied. Upon the principle that the reversion remains radically in the person of the granter, it has been decided that it may be adjudged by his creditors; *Campbell*, 1801, M. App. Adjud. No. 11. [But see *Absolute Disposition*. Where lands are conveyed by a trust-disposition valid by the law of Scotland, subject to uses either already declared, or afterwards to be declared, the trust uses may be declared by any writing valid by the law of the place where it is executed. See *Willoch*, 1769, M. 5539; *Cameron*, 29 Aug. 1833, 7 W. & S. 106; *Ross's L.C.* i. 401.] After the purposes of the trust are fulfilled, the trustees must pay over the residue to the heir-at-law, or to the executors, according to the nature of the subjects of which it consists; and if the subjects be heritable, the heir-at-law will be entitled to them, although the trustees may have had a power of sale, which they have not found it necessary to exercise; *Cathcart*, 26 May 1830, 8 S. 803; *Burrell*, 14 Dec. 1825, 4 S. 314; [*Ross's L.C.* i. 524.] The court allowed a party to receive the rents of a trust property, the destination to which carried it to him, failing issue of his own body, there being no issue at present in existence, on caution to repeat in the event of issue; *Blackwood*, 11 June 1833, 11 S. 699.

When the trustees appointed in a trust-deed, *inter vivos*, are [in express words] named jointly, the nomination falls by the failure of any one of them; [but the general rule is now settled that "in a testamentary deed in which trustees are appointed, the condition of survivorship is implied, on the principle that the truster prefers that any one of the trustees nominated should manage the estate rather than a judicial factor;" *per* Lord Pres. M'Neill, in *Findlay*, 30 June 1855, 17 D. 1014. See also *Gordon's Trs.* 17 July 1851, 13 D. 1381; *Oswald's Trs.* 15 Jan. 1879, 6 R. 461; *Dalgleish*, 20 Nov. 1885, 13 R. 223.] When the nomination is to the acceptors or survivors, the trust subsists if any of them accept and survive. But when a quorum is named, it is necessary that the number of which the quorum consists should accept, survive, and act. See *Quorum*. [By 24 & 25 Vict. c. 84, § 1, amended by 26 & 27 Vict. c. 115, all trusts (defined as *infra*), under which gratuitous trustees, including trustees *ex officio*, are nominated, are held to include, unless the contrary is expressed, a provision that the majority of the trustees accepting and surviving shall be a quorum.] A trustee named a *sine quo non* must concur in all acts, and on his death the nomination falls. [But see *Sine Quo Non.*] No person named trustee can be compelled to act, unless he accept. But if infeftment should be taken in his name without his knowledge, he may be compelled either to act or denude. Trustees who have once accepted are not [at common law] entitled to throw up the office before they have executed the purposes of the trust; [but power to resign has been conferred by statute on gratuitous trustees; see *infra*.] A trustee whose concurrence is necessary, may be compelled to concur in a reasonable act of management; and if he refuse, he will be liable for the damage

thereby incurred by the trust-estate; *L. Lynedoch*, 7 July 1830, 4 W. & S. 148; 20 Nov. 1832, 11 S. 60. A trustee is understood to act gratuitously, unless the trust-deed provides a remuneration for him.

[*Statutory Powers of Trustees.*—In the construction of the Trusts Acts, 1861 to 1884, the word "trust" means and includes any trust constituted by any deed or other writing, or by private or local act of parliament, or by resolution of any corporation or public or ecclesiastical body, and the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise; and "trustee" includes tutor, curator, and judicial factor; 47 & 48 Vict. c. 63, § 2. By the act of 1861 (24 & 25 Vict. c. 84), amended by 26 & 27 Vict. c. 115, all trusts under which gratuitous trustees, including trustees acting *ex officio*, are nominated, are held to include, unless the contrary be expressed, power to resign (see *Maxwell's Trs.* 4 Nov. 1874, 2 R. 71), and power to assume new trustees (see *Allan's Trs.* 23 Jan. 1878, 5 R. 576; *Wyse*, 19 July 1881, 8 R. 983; *Ainslie*, 8 Dec. 1886, 14 R. 209; *Munro's Trs.* 9 March 1887, 14 R. 574). The court will not interfere with the exercise by trustees of their power of assumption, unless upon such grounds as corruption or impropriety; *Neilson*, 19 Feb. 1885, 12 R. 670. By the act of 1867 (30 & 31 Vict. c. 97), § 2, power is conferred on trustees to do the following acts, where not at variance with the terms or purposes of the trust, and such acts when done are declared to be as effectual as if such powers had been contained in the trust-deed, viz.:—(1) To appoint factors and law-agents, and to pay them a suitable remuneration; (2) to discharge trustees who have resigned, and the representatives of trustees who have died; (3) to grant leases of heritable estate of a duration not exceeding twenty-one years for agricultural lands, and thirty-one years for minerals, and to remove tenants (see *Campbell*, 6 July 1883, 10 R. (H.L.) 65); (4) to uplift, discharge, or assign debts due to the trust-estate; (5) to compromise, or to submit and refer all claims connected with the trust-estate; (6) to grant all deeds necessary for carrying into effect the powers vested in the trustees; (7) to pay debts due by the truster or by the trust-estate without requiring the creditors to constitute such debts where the trustees are satisfied that the debts are proper debts of the trust. Additional powers were conferred by 50 & 51 Vict. c. 18, viz., to make abatement or [reduction, either temporary or permanent, of the rent stipulated in any lease of lands let for agricultural or pastoral occupation, or for both purposes, and to accept renunciations of leases of any such subjects. And the extensive construction given to the words "trust" and "trustee" by § 2 of the act of 1884 (*supra*) is applied to this last-mentioned provision by 52 & 53 Vict. c. 39, § 19. By § 3 of the act of 1867, the court may grant authority to trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof, viz.:—(1) To sell the trust-estate or any part of it (see *Weir's Trs.* 13 June 1877, 4 R. 876; *Downie*, 10 June 1879, 6 R. 1013; *Molleson*, 26 May 1888, 15 R. 665); (2) to grant feus or long leases of the heritable estate or any part of it (see *Birkmyre*, 5 Feb. 1881, 8 R. 477); (3) to borrow money on the security of the trust-estate or any part of it; (4) to excamb any part of the trust-estate which is heritable. When all the beneficiaries in existence under a trust are of full age and capable of acting, they may also, by deed of consent, grant valid authority to the trustees to do any of the acts above-mentioned, not being inconsistent with the intention of the trust. The trustees of a charitable mortification have power to feu at common law; *Merchant Co. of Edinr.* 1767, M. 5750; hence a petition by such trustees for power to feu under this section was refused; *Mags. of Elgin*, 9 Dec. 1882, 10 R. 342. By § 4, all powers of sale conferred on trustees by the trust-deed, or by virtue of this act, may be exercised either by public roup or private bargain, unless otherwise directed; and when the estate is heritable, it shall be lawful in such sales to sell, subject to or under reservation of a feu-duty or ground-annual, at such rate and on such conditions as may be agreed upon; and in all sales and feus it shall be lawful to reserve the mines and minerals if so wished. The powers of investment are regulated by the act of 1884 (47 & 48 Vict. c. 63), § 3, which repeals § 5 of the act of 1867, and provides as follows:—Trustees under any trust may, unless specially prohibited by the constitution or terms of the trust, invest the trust funds—(A.) in the purchase of (1) any of the Government stocks, public funds, or securities of the United Kingdom; (2) stock of the Bank of England; (3) any securities the interest of which is or shall be guaranteed by parliament; (4) debenture

[stock of railway companies in Great Britain incorporated by act of parliament; (5) preference, guaranteed, lien, annuity, or rent-charge stock, the dividend on which is not contingent on the profits of the year, of such railway companies in Great Britain as have paid a dividend on their ordinary stock for ten years immediately preceding the date of investment; (6) stock or annuities issued by any municipal corporation in Great Britain, which annuities, or the interest or dividend upon which stock are secured upon rates or taxes levied by such municipal corporation under the authority of any act of parliament; (7) East India stock, stocks or other public funds of the government of any colony of the United Kingdom approved by the Court of Session, and also bonds or documents of debt of any such government approved as aforesaid, provided such stock, bonds, or others are not payable to the bearer (see *Accountant of Court*, 12 Nov. 1886, 14 R. 55); (8) feu-duties or ground-annuals; (B.) in loans—(9) on the security of any of the stocks, funds, or other property aforesaid; (10) on real or heritable security in Great Britain; (11) on debentures or mortgages of railway companies in Great Britain incorporated by act of parliament; (12) on bonds, debentures, or mortgages, secured on rates or taxes levied under the authority of any act of parliament, by municipal corporations in Great Britain authorised to borrow money on such security; (13) on Indian railway stock, debentures, bonds, or mortgages on which the interest is permanently guaranteed by the Indian Government and payable in sterling money in Great Britain; provided that the trustees shall not be held to be subject as defendants or respondents to the jurisdiction of any of Her Majesty's courts of law or equity in England or Ireland, either as trustees or personally, in any suit for administration of the trust by reason of their having invested or lent trust funds as aforesaid. By 34 & 35 Vict. c. 27, power to invest trust funds in mortgages or bonds of a railway or other company includes power to invest in debenture stock. Under § 7 of the act of 1867, the court may authorise the advance of part of the capital of a trust fund, if needful, for the maintenance or education of minor descendants of the truster, being beneficiaries having a vested interest in such fund. See *Pattison*, 19 Feb. 1870, 8 Macph. 575; *Weir's Trs. supra; Thomson*, 22 Dec. 1883, 11 R. 401; *Webster*, 26 Feb. 1887, 14 R. 501. By § 9, when a trustee who resigns, or the [representatives of a trustee who has died or resigned, are unable otherwise to obtain discharge, it may be granted by the court. No trustee to whom any bequest is expressly given on condition of his accepting the trust, is entitled to resign by virtue of this or the other acts above-mentioned; § 1. In regard to the form of resignation, it is provided by § 10 that any trustee entitled to resign his office may do so by minute of the trust entered in the sederunt book of the trust, and signed in such sederunt book by such trustee and by the other trustee or trustees acting at the time, or he may do so by signing a minute of resignation in the form of sched. (A) annexed to the act, or to the like effect, and may register the same in the books of Council and Session, and in such case he shall be bound to intimate the same to his co-trustee or trustees, and the resignation shall be held to take effect from and after the expiry of one calendar month after the date of such intimation, or the last date thereof if more than one, if the trustee or trustees to whom such intimation was given is within Scotland, or otherwise, within three months from and after that date; and in case, after inquiry, the residence of any trustee to whom intimation should be given under this provision cannot be found, such intimation shall be given edictally in usual form, and the resignation in that case shall be held to take effect from and after the expiry of six months; and if any trustee entitled to resign his office is at the time sole trustee, he shall not be entitled to resign until, with the consent of the beneficiaries under the trust of full age, and capable of acting at the time, he shall have assumed new trustees, who shall have declared their acceptance of office, or he may apply to the court stating his wish to resign, and praying for the appointment of new trustees, or of a judicial factor to administer the trust; and the court, after intimation to the beneficiaries under the trust, or such of them as the court may direct, shall thereafter either appoint a judicial factor, or, on the application of the beneficiaries or any of them, may appoint trustees in the same manner as is provided under § 12 of the act; and after such appointment, either of judicial factor or of trustees, the petitioning trustee will be entitled to resign; and any retiring trustee or trustees who may have already retired shall be bound, when required, and at the expense of the trust, to execute all deeds necessary for divesting them of trust-property, conveying the same to the trustees, or trustee,

[or judicial factor acting in the execution of the trust. The right to resign given by the act of 1861 is not restricted by these provisions, except in the case of a sole trustee; *Maxwell's Trs.* 4 Nov. 1874, 2 R. 71. In that case a whole body of trustees resigned, and the court appointed a judicial factor. But if the forms provided by this act are used, the conditions as to intimation, &c., must be carefully observed; see *Sinclair*, 23 Jan. 1879, 6 R. 571; *Tochetti*, 7 March 1879, 6 R. 789; see also *Dalgleish*, *supra*, 13 R. 223. Resignation of a trustee who is also executor infers resignation as executor; § 18. In regard to assumption, it is provided by § 11 that, when trustees have the power of assuming new trustees, such new trustees may be assumed by a deed of assumption executed by the trustee or trustees acting under such trust-deed, or by a quorum of such trustees, if more than two, in the form of sched. (B) annexed to the act, or to the like effect; and a deed of assumption so executed, in addition to a general conveyance of the trust-estate, may contain a special conveyance of heritable property, and in such case may, with the necessary warrant of registration thereon, be recorded in the register of sasines, and when so recorded shall be effectual as a conveyance of the heritable property belonging to the trust-estate, so far as specially conveyed, in favour of the existing trustees and the trustees so to be assumed, and such deed of assumption shall also be effectual as an assignation in favour of such existing and assumed trustees of the whole personal property belonging to the trust-estate; and in the event of any trustee acting under any trust-deed being insane, or incapable of acting by reason of physical or mental disability, or by continuous absence from the United Kingdom for a period of six months or upwards, such deed of assumption may be executed by the remaining trustee or trustees acting under such trust-deed: provided that when the signatures of a quorum of trustees cannot be obtained, it shall be necessary to obtain the consent of the court to such deed of assumption, on application either by the acting trustee or trustees, or by any one or more of the beneficiaries under the trust-deed. By § 12, when trustees cannot be assumed under any trust-deed, or when any person who is the sole trustee acting under any such trust-deed has become insane, or incapable of acting by reason of physical or mental disability, the court may, upon the application of any party having interest in the trust-estate, [after such intimation and inquiry as may be thought necessary, appoint a trustee or trustees under such trust-deed, with all the powers incident to that office; and the court may at the same time grant warrant for completion of title. This provision applies to the case of lapsed trusts; *Zoller*, 11 March 1868, 6 Macph. 577; *Graham*, 26 June 1868, 6 Macph. 958. But the court will not, under this section, appoint new trustees in trusts for behoof of creditors; *Mackenzie*, 28 May 1872, 10 Macph. 749. In *Aikman*, 2 Dec. 1881, 9 R. 213, where a marriage-contract trust had become unworkable, the court, in virtue of its *nobile officium*, and not under the statute, appointed new trustees. Trustees appointed by the court have no power of assumption unless specially conferred; § 13. Completion of title by a beneficiary under a lapsed trust is provided for by § 14. This section has been held not to apply to the assignee of a beneficiary; *Macknight*, 20 March 1875, 2 R. 667. Petitions under the act are presented to the Junior Lord Ordinary; but when there is occasion to settle a scheme for the administration of a charitable or other permanent endowment, the Lord Ordinary is directed, after preparing such scheme, to report to the Inner House, intimation being made to the Lord Advocate; § 16. See *Mackay's Prac.* ii. 379. The act does not restrict or affect any express powers or directions given to trustees under any trust-deed; and the powers conferred by the act may be negatived by express declaration, or modified by variations or limitations of such powers, contained in the deed; § 19. But this section applies only to powers conferred by the act of 1867, not to those conferred by the act of 1861; *Maxwell's Trs. supra.* The act of 1867 is not expressly confined to gratuitous trusts; but it has been decided that it applies only to such trusts; *Mackenzie*, *supra.* "Gratuitous trustees," as defined by § 1, "shall mean and include all trustees who are not entitled as such to remuneration for their services in addition to any benefit they may be entitled to under the trust, or who hold the office *ex officio*, and shall extend to and include all trustees, whether original or assumed, who are entitled to receive any legacy or annuity or bequest under the trust." By the Conveyancing Act of 1874, §§ 43–46, provision is made for completion of title by the heir of a last trustee, by persons appointed by the court to administer a trust, by persons succeeding as trustees *ex officio*, and by

[trustees or executors where the deed does not contain words of direct conveyance to them. See also §§ 24–26 of the Consolidation Act of 1868.

[*Responsibility of Trustees.*]—Trustees are liable for obligations incurred *qua* trustees, to the extent of the trust-estate; and they may become personally liable beyond the amount of the trust-estate, as where they exceed their powers. They are answerable for their intromissions, and are personally liable in so far as they cannot account for them according to the principles of a trustee's accounting; as, *e.g.*, where they have paid to one not entitled to receive payment. Gratuitous family trustees were found personally liable in payment of a bill, granted by them to a third party, for a debt due by the truster; the *ratio decidendi* being that when they grant such a liquid obligation, they give assurance of funds, and pledge themselves to retain sufficient to answer the debt; *Thomson*, 24 June 1829, 7 S. 777. [By 24 & 25 Vict. c. 84, § 1, amended by 26 & 27 Vict. c. 115, all trusts under which gratuitous trustees, including trustees *ex officio*, are nominated, are held to include, unless the contrary be expressed, a provision that each shall be liable only for his own acts and intromissions. But this provision must be construed in the same sense in which similar clauses of protection occurring in deeds have been interpreted by the courts. "(1) Where trustees expressly authorise money to be drawn or received, and disposed of in such a way as to incur loss, this is held not a mere omission, but a positive act. (2) Where there is a mere negligence of superintendence, the exemption will free the trustess. (3) Where neglect of superintendence amounts to *culpa lata*, the exempting clause will be no protection. (4) Where the neglect is a positive breach of the truster's order, the clause will not protect. (5) A trustee ratifying the assumption of a new trustee, is exempt by the clause from liability for his acts; and trustees electing a factor reputed responsible and fit for the office under the express or implied powers in the trust, are exempt from liability for that factor's acts or deficiencies, if merely negligent in superintending his proceedings;" *Bell's Princ.* § 2000. See *Blain*, 28 Jan. 1836, 14 S. 361; *Seton*, 18 Dec. 1841, 4 D. 328; *Knox*, 7 Aug. 1888, 15 R. (H.L.) 83.] Trustees must keep exact accounts; they must take credit only for actual payments, and communicate for the benefit of the trust whatever eases they may have had in paying. They must give up to those interested all acquisitions made by them in the course of their administration. ["A trustee cannot justifiably embark the trust-funds in trade, even though he be not expressly prohibited by the trust-deed, and though he may intend the benefit to accrue to the beneficiaries. If, therefore, he does so—if he does what by law he was not entitled to do, and the funds are in consequence lost—he must bear the loss; but if there is any gain, the gain will belong, not to the trustee, but to the beneficiary whose funds were so employed;" *per* Lord Pres. M'Neill, in *Laird*, 28 May 1858, 20 D. 972. See also *Laird*, 26 June 1855, 17 D. 984; *Cochrane*, 1 Feb. 1855, 17 D. 321; *Mackie's Trs.* 15 Jan. 1875, 2 R. 312. On the same principle—viz., that he cannot be *auctor in rem suam*—a trustee cannot purchase property belonging to the trust; *York Buildings Co.* 1795, 3 Pat. 378, 579. But see *Fleming*, 11 Feb. 1868, 6 Macph. 363. And a trustee who acts as agent in the trust is not entitled to his professional charges, without express authority in the trust-deed; *Home*, 22 June 1841, 2 Rob. 384; *Aitken*, 24 May 1871, 9 Macph. 756. But the beneficiaries may be barred by acquiescence from objecting to such charges; *Ommaney*, 3 March 1854, 16 D. 721; *Scott*, 30 Jan. 1868, 6 Macph. 753. Trustees investing without special authority on personal security, or on insufficient security, whether personal or heritable, are liable, in the event of loss, to indemnify the beneficiaries; *Forsyth*, 28 Jan. 1853, 15 D. 345; *Thomson*, 16 June 1852, 1 Macq. 238; *Maclean*, 19 July 1888, 15 R. 966. The diligence required of a trustee is that of a man of ordinary prudence in the management of his own affairs; *Knox*, *supra*, 15 R. (H.L.) 83; *Rae*, 8 Aug. 1889, 16 R. (H.L.) 31. "As a general rule, the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character, but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended

[with hazard. So long as he acts in the honest observance of these limitations, the general rule already stated will apply;" *per* Lord Watson, in *Learoyd*, 12 App. Ca. 727, 733. In *Maclean*, *supra*, it was observed that where trust moneys are lent on the security of heritable subjects, if any part thereof is in the occupation of the owner, the trustee ought to take that fact into consideration in estimating the amount of the rental available for paying the interest on the loan; also that where the primary purpose of a trust is to secure an alimentary provision, the trustee is bound to be specially careful that the security is sufficient to ensure payment of the interest. The fact that trustees, in the exercise of an express or implied power, have borrowed money on the security of the trust-estate does not necessarily involve personal liability in the event of loss resulting from the transaction; their liability depending on whether the transaction was a prudent one in the circumstances; *Binnie*, 8 Aug. 1889, 16 R. (H.L.) 23. As to personal liability of a trustee under a clause of warrandice, see *Horsburgh's Trs.* 12 Nov. 1886, 14 R. 67. It is illegal for trustees to lend trust-funds to one of their number, even on heritable security; *Perston*, 9 Jan. 1863, 1 Macph. 245. Trustees becoming members of a joint stock company, though entered in the register as trustees, incur individual liability as partners of the company, unless the contrary is expressly stipulated; *Lumsden*, 22 June 1865, 3 Macph. (H.L.) 89, 4 Macq. 950; *Muir*, 7 April 1879, 6 R. (H.L.) 21. But the representatives of a trustee who has thus become member of a company, and dies prior to liquidation, though his name still stands on the register, are not liable as contributories; *Oswald's Trs. supra*, 6 R. 461; unless he was the last surviving trustee, in which case his representatives are so liable; *Low's Exrs.* 14 March 1879, 6 R. 830. Trustees having continued an investment in stock of a banking company with unlimited liability, for thirteen years after the death of the truster, and the bank having failed, it was held that the trustees ought to have sold the stock within a reasonable time after the truster's death, and that they were not entitled to apply the trust-funds in payment of calls; *Brownlie*, 11 July 1879, 6 R. 1233. See also *Robinson*, 3 Aug. 1881, 8 R. (H.L.) 127. Power given to trustees to continue investments does not authorise them, on the reconstruction of an undertaking by the [winding up of an old company (in which the truster had shares) and the formation of a new one, to take shares in the new company; *Thomson's Trs.* 22 Feb. 1889, 16 R. 517. The law agent in a trust is not bound to volunteer advice to the trustees as to retaining investments, and is not liable for loss resulting from their doing so imprudently, without consulting him; *Currors*, 25 Jan. 1889, 16 R. 355. When a trustee improperly invests trust-funds in a trading company, subsequent approval by the beneficiaries does not imply an obligation to relieve him of loss; *City of Glasgow Bank*, 20 March 1880, 7 R. 749. See also *Curror*, 28 Nov. 1879, 7 R. 289. Trust-funds may be applied only to the existing purposes of the trust. Hence statutory trustees were interdicted from paying out of trust-funds the expenses incurred in an application to parliament for additional powers; *Cowan*, 8 March 1872, 10 Macph. 578; *Perth Water Commrs.* 17 June 1879, 6 R. 1050.]

See generally, *Bell's Com.* i. 29; ii. 382, 496; *Ersk.* B. iii. tit. 1, § 32; B. iv. tit. 1, § 45; *Stair*, B. iv. tit. 6; tit. 45, § 21; *More's Notes*, lxxi., cxliv., clxix.; *Bank.* i. 272, 395, 262; *Bell's Princ.* § 1991; *Kames' Equity* (1825), 286, 325; *Bell on Purchaser's Title*, 5; *Sandford on Heritable Succession*, ii. 30–32; [*M'Laren on Wills*, vol. ii.; *M'Laren on Trusts; Forsyth on Trusts; Dickson on Evidence*, § 575; *Ersk. Princ.* (17th ed.), 556; *Duff's Feudal Conv.* 548; *Menzies' Conv.* 55, 703; *M. Bell's Conv.* ii. 801, 942, 1001; *Craigie's Digest* (Herit.), 91; *Wood's Trusts Acts*, 1861–1884; *Jurid. Styles*, i. 286; ii. 580; *Lewin on Trusts.* See *Thellusson Act.*]

[**TRUST, BREACH OF.** See *Breach of Trust.*]

TUERNAY; an old word of doubtful signification. Skene thinks that in one passage, "*implacitis burgorum utitur Tuernay*," it means the title to sue or "do richt." He seems afterwards to think it synonymous with *twentynay*, a word by using which an accused person approved his judge, so that he could not afterwards decline his jurisdiction. *Skene, h. t.*

TURNPIKES. [See *Road, Public.*]

TURPIS CAUSA. An obligation to pay money, *ob turpem causam*, cannot found an action in law. Where a gift proceeds *ex turpi causa*, if the unlawfulness lie with the giver, restoration can in no case be competently required; if it lie with the receiver, it is otherwise; if it lie with both parties, then, *in pari causa, potior est conditio possidentis; Bank.* B. i. tit. 8, § 22; *Stair*,

B. i. tit. 7, § 8; tit. 18, § 1; *Ersk.* B. iii. tit. 1, § 10; *Kames' Equity*, 170, 305; *Brown's Synop.* 436; *Johnston*, 4 Dec. 1835, 14 S. 106. See *Pactum Illicitum.*

"**TUTOR**; is the legal representative and guardian of the person, and the administrator of the estate, of a pupil, failing the father, who during his life, as administrator-in-law, is legally vested with the powers both of a tutor and of a curator for his children during their minority, [and failing also the mother, who, under the Guardianship of Infants Act (49 & 50 Vict. c. 27), becomes, on the death of the father, the guardian of their pupil children, either alone or jointly with any guardian appointed by the father." See *Parent and Child*, where the leading provisions of this act are set forth.] The tutor is either a *tutor-nominate*, or a *tutor-at-law*, or a *tutor-dative* —a division borrowed from the Roman law.

A *tutor-nominate* or testamentary is he whom the father, who alone [at common law] has the power of naming a tutor, has nominated, either in a testament or in some other writing, sufficiently indicative of his intention. A tutor so appointed has the precedence of every other tutor. A father may nominate any number of tutors; and if some of those named refuse, or are unable to act, they are merely held *pro non adjectis;* and the nomination holds good as to the rest, unless one of them who cannot, or will not act, is named *sine quo non;* in which case, failing the *sine quo non*, the nomination falls. [A father cannot delegate his power of nomination; *Walker*, 21 Nov. 1874, 2 R. 120. By § 3 of the Guardianship of Infants Act, power was conferred on a mother to nominate guardians; see *Parent and Child.*] A tutor-nominate must be major before he can act; but he is exempted from the oath *de fideli administratione;* and although in peculiar cases, as of one who is *vergens ad inopiam*, or of dubious character, the court may, *ex nobili officio*, ordain him to find security, he is not, generally speaking, bound in security *rem pupilli salvam fore.* The devising of an estate to the pupil, with provision of an individual to manage it during the donee's pupillarity, does not supersede the nomination of a tutor by the father; for such a manager, although he will have the management of the special estate so devised, has no control over the person of the pupil, and is in no sense of the term a tutor, although sometimes erroneously so called.

A *tutor-at-law*, or *tutor-legitim*, has place only where there is no tutor-nominate, or where the tutor-nominate is dead, or cannot act, or where he has not accepted. A tutor-at-law acquires his right by the mere disposition of law, and cannot be supplanted by a tutor-nominate who has once distinctly renounced, whether when called at the instance of the tutor-at-law or otherwise. No *cognate* (*i.e.*, no relation by the mother's side) can be a tutor-at-law; and no *agnate* (*i.e.*, no person related through the father) can be so either, unless a male. The nearest male agnate, of common understanding and prudence, and twenty-five years of age (1474, c. 52), who can give security *rem pupilli salvam fore*, is the tutor-at-law. Where more than one are alike near, it is he who would be the pupil's heir-at-law in a general service; omitting those not of the proper age. The tutor-at-law desiring the office obtains a brieve from Chancery directed to any judge having jurisdiction, requiring him to call a jury to ascertain, 1. Who is the nearest male agnate, heir-general, and twenty-five years of age? 2. Is he attentive to his own affairs? 3. Can he give security? 4. Who is the nearest cognate entitled to be custodier of the person of the pupil? Of these, the first alone is really examined into,—the second is presumed,—the third the clerk looks to,—and the last is left to the courts of law, and arises from this, that where there is a tutor-legitim, the custody of the person is taken from him, as being the successor of the pupil, and given to the mother till the pupil be seven years of age; at which time, or on her second marriage, if she married again before that time, [it was, prior to the Guardianship of Infants Act,] transferred from her to the tutor, if he were not of law; and if he were, then to the next nearest cognate not at the time (if female) *vestita vero;* to whom also, if capable, the custody went from the first, if the mother were then either dead, or married, or incapable. The tutor-at-law, however, retained every right but that over the pupil's person. After the brieve is taken out of Chancery, it is executed, upon fifteen days' warning, at the market-cross of the head burgh of the judge's jurisdiction to whom it is directed, against all and sundry. After the service is returned, a letter of tutory is expede under the quarter seal in favour of the tutor, and is his title to act. The tutor's caution is recorded in the judge's books, and he takes the oath *de fideli.* [The deliverance on the brieve may be appealed to the Court of Session, and any person

[interested may bring forward contradictory evidence on every head of the brieve; *Godwin*, 24 June 1842, 4 D. 1451. But the procedure above described is now for the most part superseded by the practice of applying for appointment of a factor *loco tutoris* under the provisions of the Pupils Protection Act (12 & 13 Vict. c. 51). As to the custody of pupil children, see *Parent and Child;* also *Stuart*, 17 May 1861, 4 Macq. 1; 25 May 1861, 23 D. 902; and previous stages of same case (as to custody of the Marquis of Bute). By § 26 of the Pupils Protection Act, in every service as tutor-of-law, there must be inserted in the bond of caution an obligation to observe and perform every duty incumbent on the tutor, in terms of the rules prescribed, together with a consent to registration for execution; and no extract of the retour, nor letters of tutory, may be issued by the Director of Chancery, until the bond of caution have been lodged. But by § 12 of the Guardianship of Infants Act, tutors being administrators-in-law, tutors-nominate, and guardians appointed or acting in terms of that act who shall, by virtue of their office, administer the estate of any pupil, are deemed to be tutors within the meaning of the Pupils Protection Act, and subject to the provisions thereof; provided always that such tutors, being administrators-in-law, tutors-nominate, and guardians aforesaid, shall not be bound to find caution in terms of §§ 26, 27 of the last-mentioned act, unless the court, upon the application of any party having interest, shall so direct.]

A *tutor-dative* is named by the sovereign as *pater patriæ*, on the failure both of tutors-nominate and of tutors-at-law, but never till a year after the tutor-of-law might have served; [unless he expressly renounce; *Martin*, 26 Nov. 1859, 22 D. 45;] and great allowance, in point of form, would be made to a tutor-at-law desiring to precede a tutor-dative. A tutor-dative is appointed on his presenting a signature in Exchequer, [now a petition to either Division of the Court of Session,] with the consent of the next of kin on both father's and mother's side, or at least after those parties have been regularly cited. See 1672, c. 2; [19 & 20 Vict. c 56, § 19. The petition must be intimated to the Lord Advocate; *Wilson*, 22 Jan. 1857, 19 D. 286. An appointment of several tutors-dative, without clause of survivorship, is presumed to be joint, and falls on the death of one; *Scott*, 7 April 1834, 7 W. & S. 211.] Where a pupil has no tutor at all, the Court of Session will, at the suit of any kinsman of the pupil, and after due intimation to the nearest of kin, appoint a factor *loco tutoris*, whose office expires with the pupillarity, and who must conform to A.S. 13 Feb. 1730. The powers of a factor *loco tutoris* are similar to those of a tutor; but the factor may be superseded *quandocunque* by the service of a tutor-at-law.

As no one can be a tutor who is not in the uncontrolled management of his or her own affairs, a female is excluded, even when tutor-nominate, from the office, while she is *vestita viro*. [But the mother's right to be guardian under the Guardianship of Infants Act is not affected by her marrying again; see *Parent and Child*.] Professed Papists, and all suspected of Popery, were, by 1661, c. 8, and 1700, c. 3, excluded from this office; but that disability was removed by 33 Geo. III. c. 44. [See *Roman Catholics*.] A tutor is vested with the management of both the person and the estate of his pupil, while a curator's sole concern is with the estate. Hence the maxim, *Tutor datur personæ, curator rei*. The tutor acts alone, the pupil having no person in law; while the minor, on the other hand, acts, but with the advice and consent of his curator. A deed signed by a pupil is null, *ope exceptionis*. A tutor is allowed no remuneration for his trouble; and when the father, in his nomination, has provided a remuneration for him, it is understood to cover all incidental outlays which otherwise he might have charged. The concurrence of a fixed *quorum*, or of a *sine quo non*, where one is named, is indispensable, as is that also of every one of a number of joint nominees. See *Quorum*. *Sine Quo Non*. A tutor can sue for, receive and discharge all debts due to the pupil, rents, interests, or even principal sums when required, and must use regular diligence. He may remove tenants, and may grant leases to endure for the period of his office; but he cannot sell or feu the heritage without the authority of the Court of Session; although the tutor may implement any commenced transaction, and must go on with any procedure of the law in regard to his pupil's heritage. See *Cognition and Sale*. [Under §§ 7 and 25 of the Pupils Protection Act, tutors-at-law and tutors-dative may apply to the court for special powers to grant leases for a term beyond their period of office. Similar powers are granted to tutors-nominate; *Brown's Tutors*, 16 July 1867, 5 Macph. 1046; *Morison's Tutors*, 19 July 1861, 23 D. 1313. By the Trusts Act,

[1884 (47 & 48 Vict. c. 63), § 2, in the construction of that and previous Trusts Acts, the word "trustee" includes tutor; so that the statutory powers of trustees are also enjoyed by tutors. See *Trust.* Authority to sell or feu is granted only on proof of necessity. "The court may, with propriety, sanction an alienation of a pupil's heritage when the sale is necessary for payment of debts for the minor's aliment, and in case of urgency to avoid loss. But the court ought not to interfere merely from views of procuring future advantage to the minor;" *Colt*, 1801, M. App. Tutor, No. 1. See *L. Clinton*, 30 Oct. 1875, 3 R. 62; *Campbell*, 26 Feb. 1881, 8 R. 543.] The tutor may, if necessary, appoint factors under him, with reasonable salaries, and giving security. He may sell the moveables of his pupil, and may validly submit to arbitration all doubtful claims as to them. He may do anything whereby the better to secure debts to the pupil; but any change in the nature of the debt (as from heritable to moveable), produced in doing so, is not good unless afterwards approved by the pupil when major; and, generally speaking, the tutor cannot, without very weighty considerations, change the nature of any part of the pupil's property so as to invert the course of the pupil's succession. Neither can a tutor be *auctor in rem suam;* he cannot buy from (unless at public sale) or lend to his pupil; he ought not to assign any debt due to the pupil, except in the case of a cautioner paying to him the debt of another; and he must communicate the advantage of any bargain which he may have got in buying a debt affecting the pupil's property. A tutor may accept or decline his office; and acceptance is not to be inferred by implication. It is fixed on tutors-nominate by writing to that effect, or by acts of administration as tutors; and on tutors-of-law and dative by their applying for the office, ordering anything which a tutor alone has right to do, and clearly evincing their intention to accept, even although they have omitted to give security. By 1672, c. 2, a tutor on entering to his office is bound to make up a tutorial inventory; and, failing his doing so, he is not entitled to any disbursements made by him for the pupil in litigation or diligence; he is accountable for omissions, and may be removed even without cause assigned, at least *ex culpa levissima.* See *Inventory.* [But in so far as regards tutors-at-law, tutors-dative, and factors *loco tutoris*, the procedure under the act 1672 was superseded by the Pupils Protection Act, which directs (§§ 3, 25, 30) that a rental, list and inventory of the ward's estate be lodged with the Accountant of Court within six months after lodging the bond of caution. Such tutors are placed under the superintendence of the Accountant of Court, and their accounts are audited annually according to the provisions of the act. See *Judicial Factor.*] A tutor should, in his care of the pupil's person and education, allow him yearly a decent aliment, not, however, exceeding the annual income of his estate. He should pay off the debts, and discharge all other obligations, *quam primum;* and must do everything to continue the estate at least as it was. [In *Stuart*, 10 Feb. 1855, 17 D. 378, permanent improvements made by a tutor-at-law were allowed to be charged on an entailed estate. As to investment of funds, see *Fraser on Parent and Child*, 235; *Nicolson's Ersk.* B. i. tit. 7, § 25 (note *b*).] Tutors are accountable from the time of their acceptance, whether intromitting or not. As to the required degree of diligence, fathers and honorary tutors are liable merely for intromissions; and testamentary tutors are liable in the diligence which a prudent man would give to his own affairs; while tutors-of-law and dative, and protutors (*i.e.*, persons who, without legal authority, act as tutors), are all liable in exact diligence; [but in certain circumstances the rules of exact diligence may be dispensed with by the Accountant of Court; § 14 of Pupils Protection Act.] Tutors are liable *singuli in solidum*, except, 1*st*, Where a father has divided the management into parts. 2*d*, Where the father has in *liege poustie*, and in regard to that estate alone which comes from himself, expressly exempted the tutors-nominate from omissions, and liability *in solidum;* 1696, c. 8. Tutory expires by the death of either tutor or pupil—by the death of a *sine quo non*, or the deficiency of a *quorum*, where a *quorum* is fixed in the nomination—by the pupil's attaining to puberty—by the marriage of a female tutor (though it may revive on her widowhood)—by supervening incapacity, natural or legal—or by gross misconduct in the tutor, cognisable by the Court of Session alone. The tutory may also expire by the tutor's renunciation made on reasonable cause, and admitted by the judge; for although one cannot be compelled to accept the office, yet, having once accepted, he cannot renounce at his pleasure, since *id quod prius fuit voluntatis postea fit*

necessitatis; 1555, c. 35. [By the Pupils Protection Act, § 31, the court has power, on cause shown, to remove or accept the resignation of any tutor-at-law or tutor-dative, and appoint a factor *loco tutoris* in his room. Under § 34, any such tutor may present a petition for discharge. See also § 6 of the Guardianship of Infants Act, narrated under *Parent and Child*.] On the expiration of the office, mutual actions (the *directa et contraria tutelæ*) are competent for the adjustment of the claims of each—the tutor accounting for the rents and for the other profits of the heritage, and for such debts as he has or ought to have known of, and to have recovered; and claiming, though no remuneration, yet relief from all rational engagements, and payment of all reasonable expenses or purchases on the pupil's behalf, of which, however, evidence must be brought, in order to elide a contrary presumption. The latter action is of course uncalled for where the former has been instituted. All claims against a tutor by a minor prescribe in ten years; [see *Prescription*, p. 840.] See *Ersk.* B. i. tit. 7, § 1; *Bank.* B. i. tit. 7, § 1; *Stair*, B. i. tit. 6, § 1; *More's Notes*, xxxv., lv., cccxliv.; *Bell's Com.* i. 128; *Bell's Princ.* § 2067; *Kames' Equity* (1825), 108, 334, 353, 467; *Kames' Stat. Law Abridg. h. t.*; [*Ross's Lect.* ii. 559; *Fraser on Parent and Child*, &c., 145.] See *Minor. Curatory.*

[**TWOPENNY ACT.** See *Justice of Peace*, p. 628.]

U

UDAL RIGHT; is that right in land, which, though dependent on the Crown as superior for payment of a tribute called Skat, is completed without charter or sasine, by undisturbed possession, provable by witnesses before an inquest, and founding petitory actions and rights of prescription just as infeftment does. This right is said to have prevailed in Britain before the introduction of the strictly feudal system, and is still to be met with in Orkney and Shetland. See 1669, c. 13. Udal lands are not exempted from land-tax; and are now very commonly converted into feus, by the giving out of Crown charters, a practice introduced into Orkney and Shetland by the annexation of the church lands. [See *Rendall*, 15 Dec. 1836, 15 S. 265.] See *Bank.* B. ii. tit. 3, §§ 10, 18; *Stair*, B. ii. tit. 3, § 11; B. iv. tit. 22, § 2; *More's Notes*, xxxiii.; *Ersk.* B. ii. tit. 3, § 18; *Bell's Princ.* § 932; *Kames' Stat. Law, h. t.; Brown's Synop. h. t.*; [*Menzies' Conv.* 517. See *Allodial.*]

ULTIMUS HÆRES. See *Last Heir.*

UMPIRE. See *Arbitration. Oversman.*

UNCTUM PORCORUM; "swine's seame or fat." *Skene, h. t.*

[**UNDEFENDED CAUSES.** A roll of undefended causes is taken up daily during session, by the clerk of each Lord Ordinary, and printed in the daily rolls; A.S. 14 Oct. 1868, § 13. When a defender does not enter appearance on or before the second day after the summons has been called, the cause may be enrolled either in the roll of undefended causes, or in the Lord [Ordinary's motion roll, as an undefended cause, for decree in absence; and decree in absence is then granted by the Lord Ordinary, without attendance of counsel or agent; 31 & 32 Vict. c. 100, §§ 22, 23. See *Mackay's Prac.* i. 409, 417. See *Absence.*]

UNDERWRITER; the person who undertakes to insure or indemnify another against losses by sea or by fire. He is called underwriter from writing his name *under*, or at the foot of the policy or instrument by which the insurance is effected. See *Insurance.*

[**UNDUE INFLUENCE**; as a ground for setting aside a deed or agreement. See *Fraud*; also *Guthrie's Bell's Princ.* § 14; *Pollock on Contract*, 579; *Anson on Contract*, 172. As to undue influence as an offence at elections, see *Election Law*, p. 381.]

UNFEUDALISED HERITAGE. Rights which are heritable, but not feudal, may be attached by adjudication duly recorded without sasine or charge. *Bell's Com.* i. 789, 794; ii. 405. See *Adjudication. Bankruptcy. Personal Rights.*

UNFUNDED DEBT; is that part of Government stock for the payment of the interest on which no certain funds are set apart. The chief documents of this debt are Exchequer and navy bills, [Treasury bills, and Exchequer bonds,] which bear interest from their dates, or from six months after they are issued. [See 17 & 18 Vict. c. 23; 29 & 30 Vict. c. 35; 40 & 41 Vict. c. 2.] These funds are held in law to be moveable, and the right passes with the possession of the document. *Bell's Com.*

i. 101; *Bell's Princ.* § 1343. See *Exchequer Bills.*

UNILATERAL OBLIGATIONS; are those obligations in which one party alone is bound. Unilateral trusts are those which a debtor voluntarily and extrajudicially executes, for the better and more equal settlement of the claims against him, in favour of a trustee for behoof of all his creditors. *Bell's Com.* i. 351; ii. 381. See *Trust. Bankruptcy.*

UNION. The acts of the Scotch Parliament, 1707, c. 7 and c. 8, contain the articles of union between the kingdoms of Scotland and England, including an exemplification, under the Great Seal of England, of the corresponding act of the English Parliament. By the Union the two kingdoms of Scotland and England were, from and after the 1st May 1707, united, under the title Great Britain, with one King, Court, and Parliament, and one Privy Council. For the Parliamentary representation of Scotland, see *Election Law.* The Scotch courts of justice remain unaltered, except by the abolition of the Privy Council. The English law of treason has been substituted for the Scotch, and the revenue laws are also assimilated; but, with those exceptions, all our other laws, so far as consistent with the object of the Union, remain unaltered. *Bank.* B. iv. tit. 1, § 14; *Swint. Abridg. h. t.; Kames' Stat. Law, h. t.; Brown's Synop.* 5303. See *Exchequer. Treason.*

[**UNION.** In the English poor law, a union consists of two or more parishes which have been consolidated for the better administration of the poor law therein. *Sweet's Law Dict.*]

UNION, CHARTER OF. Where lands lie discontiguous, although all the separate tenements or parcels should be of the same kind, and held by the same tenure, under the same superior, and derived from the same author, there must be a special infeftment given in each tenement, unless the Sovereign, by a Crown charter, has united them into one tenantry. That is, failing such union, there must be a separate act of symbolical delivery in each of the discontiguous tenements; and the instrument of sasine accordingly must bear that infeftment was so given in each parcel or tenement. The object of a charter, or clause of union, is to dispense with the necessity of taking separate infeftments, and to declare that one sasine shall be sufficient to carry the whole discontiguous subjects. If the clause of union mentions the particular place at which the sasine is to be taken, it must be taken at that place, otherwise it will reach only to the tenement in which it is taken. But if no place be fixed, sasine taken on any part of the united lands serves for the whole. It is to be observed, however, that the only effect of a clause of union is to unite lands locally discontiguous; for where lands are derived from different authors, or held of different superiors, or of the same superior, but by different tenures, they cannot legally be the subjects of union. Where a part of the united lands is disponed, and thus separated from the rest, some lawyers have held that the union is thereby dissolved; but the more correct opinion appears to be, that a grant of part of the united lands does not dissolve the union as to the part which remains; and it seems to be equally well settled, that the quality of union remains in the part conveyed; in so much that a valid sasine may be taken in favour of the disponee, although taken on a portion of the united lands not conveyed to him. [See *Montgomery*, 2 March 1813, F.C.; *Heron*, 1771, M. 8684.] The erection of lands into a barony confers a higher right on the grantee than that resulting from a mere clause of union; for such an erection has the effect not only of uniting land naturally discontiguous, but it makes one sasine serve for all, although the subjects erected should be perfectly distinct, as lands, patronages, mills, &c. [The act 8 & 9 Vict. c. 35, besides declaring infeftment on the lands to be unnecessary, provides a short form of sasine, which is effectual, whether the lands be contiguous or not, or are held by the same or different titles, or of one or more superiors; § 1. The recording of a conveyance under the modern system has the same effect; 31 & 32 Vict. c. 101, § 15.] See *Ersk.* B. ii. tit. 3, § 44; *Stair*, B. ii. tit. 3, § 18; B. ii. tit. 3, § 44; *More's Notes*, excii.; *Bank.* B. ii. tit. 3, § 88; *Bell's Princ.* § 874; *Bell on Purchaser's Title*, 200, 302; *Jurid. Styles*, 2d edit. i. 441, 468; [*Ross's Lect.* ii. 199; *Menzies' Conv.* 576, 591; *M. Bell's Conv.* i. 589, 660.] See *Barony. Infeftment. Dispensation, Clause of.*

UNIVERSITIES. [The Scottish universities are regulated by the acts 21 & 22 Vict. c. 83, and 52 & 53 Vict. c. 55. As to the election of parliamentary representatives for the universities, see *Election Law.*]

UNLAW. A witness was formerly inadmissible who was not worth the King's unlaw, *i.e.*, the sum of £10 Scots, then the common fine for absence from courts,

or for small delinquencies. *Bank.* B. iv. tit. 30, § 21; *Stair*, B. iv. tit. 43, § 9. See *Evidence. Amerciamentum. Tort.*

USAGE OF TRADE; [is an implied condition in sale, and in every mercantile contract; and as such is held to be incorporated in the agreement. But it must be consistent with the law; and either general or, if local, known and relied on by both parties; *Armstrong*, 19 Jan. 1875, 2 R. 339; *Anderson*, 1 June 1866, 4 Macph. 765; *Holman*, 8 Feb. 1878, 5 R. 656 (Lord Pres. Inglis).] Usage may constitute a general *lien*, *e.g.*, in different branches of manufacture for work done. See *Bell's Com.* i. 70, 456, 465, 516; ii. 102; *Bell's Princ.* §§ 83, 101, 173, 176, 285, 524, 1434, 2235; *More's Notes to Stair*, cvi.; [*Ersk.* B. ii. tit. 6, § 29; *Dickson on Evidence*, §§ 42, 1087, 1090; *Pollock on Contract*, 220, 242; *Anson on Contract*, 256.] See *Prescription. Servitude.* [*Retention. Custom. Desuetude.*]

USANCE; is the customary time at which bills are made payable in a particular country. [For the existing usance between London and various foreign countries, see *Chitty on Bills*, 260; *Byles on Bills*, 279.] Double, treble, and half usance, are terms implying corresponding alterations on the usual period. [When the usance is one calendar month, half usance is always 15 days, whatever the number of days in the month.] See *Bell's Com.* i. 434; *Stair*, B. i. tit. 11, § 7; *Bank.* i. 360; [*Bell's Princ.* § 326; *Thomson on Bills*, 250, 653.] See *Bill of Exchange.*

USE, SERVITUDE OF; a personal servitude, whereby the whole fruits of a subject are enjoyed, *salva rei substantia* —an important servitude with the Romans, but with us little known. See *Servitude.* The *usuarius* could not, by the Roman law, dispose of anything from the servient subject, so that his use was confined to what he and his family could consume. *Ersk.* B. ii. tit. 9, § 39. See *Liferent.*

USUCAPIO; the right which, by the Roman law, long, uninterrupted, and *bona fide* possession, founded on a colourable title, gave to property. The analogous provision of the law of Scotland is the long prescription of forty years. *Stair*, B. ii. tit. 12, § 2; *Bank.* B. ii. tit. 12, § 1; *Ersk.* B. iii. tit. 7, § 2. See *Prescription.*

USUFRUCT; was one of the three personal servitudes of the Roman law, *use*, *usufruct*, and *habitation*, and is essentially the same as liferent, being that right by which, during the life of the usufructuary, the whole benefit of the subject, *salva rei substantia*, is enjoyed. *Stair*, B. ii. tit. 6, §§ 1 *et seq.*; *Bank.* B. ii. tit. 6, § 4; *Ersk.* B. ii. tit. 9, § 39; *Bell's Princ.* § 1037. See *Liferent.*

USURY *or* **OKER**; is the taking, or agreeing to take, in return for the loan of money, more than the legal interest in the place where the loan is contracted. [The act 12 Anne, sess. 2, c. 16, which superseded earlier statutes, made five per cent. the legal rate of interest, and described the crime of usury. But all acts against usury were repealed by 17 & 18 Vict. c. 90; and it is now lawful to stipulate for any rate of interest, except in pawnbroking transactions. See *Ersk.* B. iv. tit. 4, § 76; *Stair*, B. i. tit. 15, § 7; *More's Notes*, xcvi.; *Ross's Lect.* i. 5; *Bell's Princ.* § 36; *Hume*, i. 498. See *Interest. Pawnbrokers.*]

UTERINE BROTHER; a brother by the same mother, but by a different father. [From the nature of his connection, he cannot succeed, in heritage, to his step-father or half-brother, as there is no heritable succession through the mother. He was also unable to succeed in moveables, until the passing of the Moveable Succession Act, 1855 (18 Vict. c. 23); by § 5 of which it was enacted that, failing brothers and sisters german or consanguinean, and their descendants, the collateral relatives uterine should have right to one-half of the succession of an intestate dying without issue, and predeceased by his parents.] See *Stair*, B. iii. tit. 8, § 43; *Ersk.* B. iii. tit. 8, § 8; [tit. 9, § 2;] *Bank.* ii. 296; *Bell's Princ.* §§ 1654, 1665; [*M'Laren on Wills*, i. §§ 123, 236.] See *Succession. Half-Blood.*

UTI POSSIDETIS; an interdict of the Roman law as to heritage, ultimately assimilated to the interdict *utrubi*, as to moveables, whereby the colourable possession of a *bona fide* possessor is continued until the final settlement of a contested right. *Stair*, B. iv. tit. 26, § 1; *Bank.* B. iv. tit. 24, § 53. See *Possessory Judgment.*

UTLAGIUM; or *utlagatium*, "outlawry, rebellion, disobedience to the laws, banishment, or forfaultor." *Skene*, *h. t.*

UTTERING. In reference to forgery and counterfeit coining, the word *uttering* signifies the putting to use the false deed, or the passing as true the base coin. The crime of forgery is not completed without the uttering; [but felonious uttering is of itself a crime, even though the origin of the forgery be unknown.] See *Forgery. Coining.*

V

VACANT STIPENDS. The stipend due during a vacancy was formerly at the disposal of the patron for pious uses. But it has been given, by statute, to the Widows' Fund; [54 Geo. III. c. clxix. The act applies to all pastoral charges of a permanent nature. See *Mags. of Stirling*, 24 Feb. 1837, 15 S. 657; *Mags. of Dundee*, 18 Nov. 1829, 8 S. 66. It applies to *quoad sacra* churches under 7 & 8 Vict. c. 44; *Cheyne*, 20 June 1863, 1 Macph. 693; but not to parliamentary churches under 5 Geo. IV. c. 90; *Irvine*, 24 May 1838, 16 S. 1024. See also 29 & 30 Vict. c. 71, § 15. It is only the amount of stipend actually paid to the last minister, irrespective of possible augmentation, that can be claimed by the Widows' Fund; *Cheyne*, 27 June 1866, 4 Macph. 1002. In *Kinnoull*, 17 April 1845, 4 Bell's App. 126, the Widows' Fund was found entitled to the stipend accruing during a vacancy, occasioned by the refusal of the church courts to put the patron's presentee upon his trials. See *Ersk.* B. i. tit. 5, § 13; *Bank.* B. ii. tit. 8, § 77; *Stair*, B. ii. tit. 8, § 35; *Bell's Princ.* § 836; *Connell on Parishes*, 169, 334, 546; *Duncan's Par. Eccl. Law*, 324. See *Stipend. Widows' Fund.*]

[**VACCINATION.** The father of every child born in Scotland must within six months after its birth cause it to be vaccinated by a medical practitioner. Failing the father, through death, illness, absence, or inability, this obligation lies on the mother; and failing the mother also, then on the person who has the care, nurture, or custody of the child. Immediately after successful vaccination of the child, the medical practitioner who has performed the operation must deliver to the parent or guardian a certificate, in form prescribed, that the child has been successfully vaccinated; and this certificate must within three days of its date be transmitted to the registrar for the district by the parent or guardian; 26 & 27 Vict. c. 108, § 8. If the child be not in a fit state for vaccination, a certificate to that effect, in form prescribed, is given to the parent or guardian, and remains in force for two months; after which the child must be vaccinated, or if still unfit, a certificate to that effect must again be given; § 9. If [the medical practitioner is of opinion, after three successive vaccinations, that the child is insusceptible of vaccine disease, he gives a certificate to that effect; § 10. Failing transmission to the registrar of one or other of these certificates within the prescribed time, the registrar shall intimate such failure by post to the parent or guardian; and if a certificate is not exhibited by the parent or guardian to the registrar within ten days from the despatch of such notice, the parent or guardian so failing shall forfeit a sum not exceeding 20s., besides 1s. to the registrar in respect of such notice, and failing payment is liable to imprisonment for ten days; § 17. The registrar of each district is directed, once in every six months, to transmit to the inspector of poor a list of the names and addresses of such persons as have failed to transmit certificates as above; such list shall be laid before the parochial board, who shall thereupon issue an order to the vaccinator appointed by them to vaccinate the persons named in such list, and notice thereof shall be given to such persons, or, if children, to their parents or guardians; and if any such person, or his parent or guardian, shall refuse to allow vaccination to be performed, at any time not less than ten nor more than twenty days from the date of such notice, he shall, for every such offence, be liable to a penalty of 20s. or imprisonment for ten days; § 18. Such order may be pronounced every six months; and the offence is committed every time the order is disobeyed; *Skene*, 4 March 1889, 16 R. (J.C.) 72. These provisions may be modified by the Board of Supervision, with approval of Lord Advocate, in the case of certain districts in the Highlands and Islands; § 12. Under the Public Health Act (30 & 31 Vict. c. 101), § 57, the local authority (*i.e.*, in counties the county council, 52 & 53 Vict. c. 50, § 11) may defray the cost of vaccinating such persons as to them may seem expedient, not being paupers, or the children of paupers, or persons ordered to be vaccinated under § 18 of the Vaccination Act (*supra*).]

VADIARE DUELLUM; a phrase peculiar to the trial by single combat. The pursuer and defender were said *vadiare duellum*, when they gave pledges to fight,

the one to prove what he asserted, the other to disprove what he denied. *Skene, h. t.* See *Single Combat.*

VADIUM; a wad, wedde or pledge. *Skene, h. t.* See *Wadset.*

VAGABOND *or* **VAGRANT**. Vagrants and sturdy beggars were at one period classed as necessary, *i.e.*, involuntary servants, such as indigent children, colliers, salters, and workmen who refused to serve at the legal rates; see 1663, c. 16. Various severe enactments were passed against them under the descriptions of beggars, fortune-tellers, jugglers, minstrels, &c., providing sometimes even capital punishments; 1424, c. 42; 1535, c. 22; 1579, c. 74; 1597, c. 272; 1617, c. 10; 1663, c. 16; and 9 Geo. II. c. 5. The act 1698, c. 21, ratified all but the last. Yet now vagrants are seldom taken up or punished, unless where police regulations are enforced; or where they are entering a parish in the face of an advertised prohibition; or where they are committing, or in the notour habit of committing, petty delinquencies. [By 5 Geo. IV. c. 83, § 4, as amended and made applicable to Scotland by 34 & 35 Vict. c. 112, § 15, the following persons, among others, are deemed rogues and vagabonds, and may be apprehended and imprisoned with hard labour for three months:—Any person pretending to tell fortunes or to deceive by palmistry; wandering abroad, and lodging in any barn or outhouse or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself; wilfully exposing in a public place any obscene print, picture, or other indecent exhibition; going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any kind under any false pretence; running away and leaving wife or children chargeable to any parish; playing or betting in any street or public place, with any table or instrument of gaming, at any game of chance; having in his possession any picklock or other implement, with intent feloniously to break into any house or building, or being armed with any gun, bludgeon, or other weapon, or having upon him any instrument, with intent to commit any felonious act; being found in or upon any house, stable, or outhouse, or any enclosed yard, garden, or area, for any unlawful purpose; any suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse [near or adjoining thereto, or any street, highway or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street or any highway or any place adjacent to a street or highway, with intent to commit felony. Intent to commit felony may be proved from circumstances and character, without any particular act tending to show such intent. Felony includes any of the pleas of the Crown, theft punishable with penal servitude, forgery or uttering. See as to this enactment, *M'Lean*, 23 Dec. 1882, 10 R. (J.C.) 34. The General Police and Improvement Act provides for the apprehension and imprisonment of vagrants and beggars in burghs which have adopted that act; 25 & 26 Vict. c. 101, §§ 331 *et seq.* See also 28 & 29 Vict. c. 56; 42 & 43 Vict. c. cxxxii. §§ 270 *et seq.*] See *Ersk.* B. i. tit. 7, § 61; [B. iv. tit. 4, § 39;] *Hume*, i. 477; *Bank.* i. 59; *Kames' Stat. Law Abridg.* voce *Vagrant; Dunlop's Parish Law*, 252; [*Irons' Police Law*, 165, 251.] See *Poor. Egyptians.*

VALENT CLAUSE. The *valent* clause in a retour of a special service is that clause in which the old and new extent of the lands are specified. *Bank.* ii. 459; *Bell's Princ.* § 1831. See *Extent.*

VALUABLE CONSIDERATION. See *Consideration. Onerous Deed. Conjunct and Confident. Gratuitous Deed.*

[**VALUATION OF LANDS**. By the Valuation of Lands Act, 1854 (17 & 18 Vict. c. 91), provision was made for a uniform valuation of lands and heritages in Scotland, according to which all public assessments leviable according to the real rent of such lands and heritages are assessed and collected, and for the annual revision of such valuation. The commissioners of supply of every county and the magistrates of every burgh shall annually cause to be made up a valuation roll, showing the yearly rent or value for the time of the whole lands and heritages within the county or burgh, distinguishing the parishes and specifying the nature of the lands or heritages, and the names of the proprietors and of the tenants or occupiers (if any); § 1. The valuation roll is to be made up by assessors appointed under the act, on or before 15th August in each year; and every proprietor, tenant or occupier must receive notice, between 15th July and 25th August, of the entry affecting his lands, unless it be a mere repetition of the entry of the preceding year; §§ 3–5. The expression, "lands and heritages," includes

[all lands, houses, shootings and deer forests, fishings, woods, copse and underwood from which revenue is actually derived, ferries, piers, harbours, quays, wharfs, docks, canals, railways, mines, minerals, quarries, coalworks, waterworks, limeworks, brickworks, ironworks, gasworks, factories, and all buildings, and pertinents thereof, and all machinery fixed or attached to any lands or heritages; but no mine or quarry shall be assessed unless it has been worked during some part of the year to which the assessment applies; § 42; 49 Vict. c. 15, § 4. By § 6 of the last act, in order to ascertain and assess the yearly value of shootings and deer forests, the assessor shall enter separately for each parish, and in respect of each proprietor therein, the yearly value of the shootings over the lands, and of the deer forests belonging to him in so far as situated within such parish. As to valuation of railways, waterworks, gasworks, and other undertakings, see 30 & 31 Vict. c. 80; 50 & 51 Vict. c. 51. In estimating the yearly value of lands and heritages, the same shall be taken to be the rent at which, one year with another, they might in their actual state be reasonably expected to let from year to year. Where they consist of woods, copse, or underwood, the yearly value shall be taken to be the rent at which they might in their natural state be reasonably expected to let from year to year, as pasture or grazing lands. Where lands and heritages are *bona fide* let for a yearly rent conditioned as their fair annual value, without grassum or consideration other than the rent, such rent is taken to be the yearly rent or value under the act. But if the lands are let upon a lease of more than twenty-one years, or in the case of minerals of more than thirty-one years, the yearly rent or value shall be ascertained irrespective of the rent payable under the lease, and the lessee shall be deemed to be also the proprietor in the sense of the act, but shall be entitled to relief from the proprietor, and to deduction from his rent of such proportion of all assessments laid on upon the valuations of such lands and heritages made under the act, and payable by him as proprietor in the sense of the act, as shall correspond to the rent payable by him to the actual proprietor as compared with the amount of such valuation; Valuation Act, § 6. On demand by the assessor, the proprietor, tenant, or occupier must furnish, within fourteen days, a written statement of the particulars [required by the act, under a penalty of £20 for failure, or £50 for false statement; § 7. The assessor's valuation may be appealed from not later than 10th September, and every appeal must be disposed of not later than 30th September; 30 & 31 Vict. c. 80, § 7. Notice must be given by the appellant to the assessor at least six days before the appeal is heard; Valuation Act, § 9. Appeals are heard by the magistrates in burghs, and in counties by a county valuation committee appointed annually by the commissioners, under 42 & 43 Vict. c. 42. If either the assessor or the party appealing is dissatisfied with the decision of the commissioners or magistrates, he may require them to state a case to be submitted to a court consisting of two judges of the Court of Session, to be named from time to time by Act of Sederunt; 20 & 21 Vict. c. 58, § 2, amended by 30 & 31 Vict. c. 80, § 8. See also 42 & 43 Vict. c. 42, §§ 7–9. These judges form an independent court, and their decisions are not subject to review, even on the ground of alleged excess of jurisdiction; *Stirling*, 28 Feb. 1873, 11 Macph. 480. See *Mackay's Prac.* ii. 465. After 8th September, the valuation roll is open to inspection by any one interested as proprietor, tenant, or occupier; Valuation Act, § 11. The valuation roll is available only for purposes of local rating, not of imperial taxation, except where the officer of Inland Revenue acts as assessor for the valuation roll, in terms of 20 & 21 Vict. c. 58; *Menzies*, 18 Jan. 1878, 5 R. 531. See the new form of valuation roll (which may be varied by Order in Council) provided by the Registration Act, 1885 (48 Vict. c. 16). The decisions on the construction of the Valuation Act are too numerous for citation here. See *Reports of Valuation Appeal Cases* (Inland Revenue); also Digests. See *Rankine on Land-Ownership*, 190; *Guthrie's Bell's Princ.* § 1136 B. See *Extent. Election Law.*]

VALUATION OF TEINDS. See *Teinds.*

VALUE, *or* AVAIL OF MARRIAGE. See *Avail of Marriage.*

VALUED POLICY. In marine insurance, a valued policy is a policy in which a specified value is put on the ship, goods or effects insured. This value is held to be of the nature of liquidated damages, to save the necessity of proof in the event of a total loss; and the value is, or ought to be, the value of the ship, or the prime cost of the goods at the date of effecting the policy.

Such policies are said to have originated in the difficulty occasionally found, of proving the exact amount of the value of the interest insured; and if the insured be able to prove *some* interest, he need not prove interest to the full amount of value specified. See *Insurance*, p. 557; [*Arnould on Marine Insurance*, 296.]

VARDA; *quasi warda;* custody or keeping. *Skene, h. t.* See *Ward-Holding.* Also *Varda Curiæ. Skene, h. t.*

VARENNA; a warren. *Skene, h. t.* See *Rabbits.*

VASSAL. In feudal law, the vassal is he in whom the *dominium utile* of the feu is vested, in contradistinction to the superior, who holds the *dominium directum.* See *Superior. Feudal System. Base Rights. Feu. Disposition. Holdings. Charter.*

VASTATION; by any public calamity, as war, or by any other *damnum fatale*, does, if affecting the unseparated fruits of the ground, entitle the tenant to proportional deduction of rent for that year. *Stair*, B. i. tit. 15, § 3; *Bank.* B. i. tit. 20, § 13. See *Damnum Fatale. Sterility.*

VENDOR *and* **VENDEE.** Vendor is the person who sells anything; and vendee is he to whom the sale is made. See *Sale.*

[**VENUE.** In English criminal procedure, the venue (*vicinetum*) is a note on the margin of an indictment, giving the name of the county or district within which the court in which the indictment is preferred has jurisdiction. At common law, the venue must be laid in the county where the offence was committed, but in many cases it may by statute be laid in the county in which the offender was apprehended, or in some cases, in any county; *Sweet's Law Dict.*]

VENYSOUN; a word anciently used in infeftments, and in the English laws, signifying a licence and power to hunt, take and slay of the King's venison within his parks and forests. *Skene, h. t.*

VERBAL OBLIGATIONS; are such as have no proper appellation; as, 1*st*, Promises on one part alone; therefore gratuitous. 2*d*, Verbal and mutual agreements. But verbal agreements regarding heritage are invalid (except where they regard a lease, which can be thus constituted for one year); and are not provable by reference to oath of party. In obligations, in the constitution of which writing is usually employed, a verbal obligation even as to moveables is invalid; but a verbal obligation founded on or referable to any known contract, and in all cases where the value of the subject of the obligation is under £100 Scots, may be proved by witnesses. *Ersk.* B. iii. tit. 2, § 1; *Bell's Com.* i. 347; *Kames' Equity*, 143. See *Evidence. Pacta Liberatoria.*

VERBORUM OBLIGATIO; in the Roman law, was completed by certain *verba solennia* unknown in Scotland.

VERD, *vert;* according to Skene, from the Latin *viride;* a word anciently used in charters and infeftments, and also in the English laws, where it is called "granehue," signifying power to cut green trees or wood. Also a power and licence of pasturage within the King's forest. *Skene, h. t.*

VERDICT; the judgment or deliverance of a jury. In criminal trials, the verdict is according to the votes of the majority of the jury. All verdicts returned before the adjournment of the court must be *viva voce;* and if the jury are not unanimous, this circumstance must be stated by the chancellor in announcing the verdict. On the jury being asked what is their verdict, their chancellor proclaims it aloud; and if it is special or detailed, the clerk takes it down in the words of the chancellor on a slip of paper. It is then transferred to the record and read aloud to the jury, who are asked, "Is this your verdict?" After this, the verdict acquires the nature of a written verdict, and cannot be explained or modified by the declarations of the jury. Written verdicts are only competent where the court adjourns before the verdict is returned. [They are now, since 9 Geo. IV. c. 29, § 15, unknown in practice. See also 54 Geo. III. c. 67; 6 Geo. IV. c. 22, § 20.] The finding may be either, generally, *guilty, not guilty*, or *not proven;* or it may find certain things proven, from which the court are left to draw the inference; [but such special verdicts are now almost obsolete.] See *Hume*, ii. 425; *Alison's Prac.* 631; [*Ersk.* B. iv. tit. 4, § 101; *Macdonald*, 519. See *Criminal Prosecution.* As to verdicts in civil causes, see *Jury Trial. Special Verdict.*]

VERGELT; a compensation for a wrong. *Skene, h. t.*

VERGENS AD INOPIAM. When a man is clearly *vergens ad inopiam*, his creditors may legally resort to various measures calculated to secure their claims, which would be otherwise regarded as inadmissible or nimious. See *Bell's Com.* i. 242; ii. 65, 136; *Bell's Princ.* §§ 46, 69, 71, 100; *Ersk.* B. ii. tit. 12, § 42; B. iii.

tit. 3, § 65; tit. 6, § 10; *Kames' Equity*, 284.

VERITAS CONVICII. See *Defamation.*

VERITY, OATH OF. See *Oath. Evidence. Sequestration.*

VERSO; *actio de in rem verso;* an action borrowed from the Roman law, whereby whatever is done by one party for the direct benefit of another, lays the party benefited under an obligation for recompense, to the extent of the benefit conferred at the other's expense; *Stair*, B. i. tit. 8, § 7. See *Recompense.*

VESTING. [A legacy or other interest vests in a person, when he acquires the right to it in such sense that it becomes transmissible to his heirs or assignees. The primary consideration, in judging whether an interest has vested or not, is the intention of the maker of the will or deed under which the interest arises; and every case depends upon its own distinctive features. Hence there is no department of the law in which the decisions are so multifarious, and so little capable of being systematised. The opinion of Lord Colonsay, in *Carleton*, 30 July 1867, 5 Macph. (H.L.) 151, contains the following exposition of the general principles of vesting:—"The general rule of law as to bequests is, that the right of fee given vests *a morte testatoris*. That rule holds although a right of liferent is at the same time given to another, and although that is done through the instrumentality of a trust, and whether the fee be given to an individual *nominatim* or to a class. The postponement of the period of payment till the death of a liferentrix does not suspend the vesting, nor does the interposition of the machinery of a trust for carrying into effect the intentions of the testator. Indeed, the creation of a trust is a very usual mode of securing the interest of a liferenter, where the right to the fee is nevertheless intended to vest in the person or class of persons for whom it is destined. Although the *jus dominii* may be in trustees, the *jus crediti* is in the beneficiaries as a vested right. At one time doubts were entertained as to the case where the settlement was by a trust-deed, to hold for a liferenter and successive persons as fiars, but the tendency of recent decisions in that class of cases, and indeed in almost all cases, has been in favour of the vesting of the fee *a morte testatoris*, unless the terms of the deed are such as to exclude that construction. The circumstance that some of the members [of the favoured class were unborn at the testator's death is no obstacle to the right vesting in each of them as soon as they respectively come into existence, although the amount of the benefit to accrue to each may not be then ascertainable. There may, however, be cases in which vesting is suspended. Thus, where the right is made conditional on a contingency personal to the legatee, such as marriage or arrival at majority, events or dates uncertain, which may never have taken place, there is a presumption, though not insuperable, that vesting or right to take was intended to be suspended until the occurrence of the contingency should be ascertained. So also, an inference to that effect may be deduced from an express clause of substitution or survivorship applicable to the members *inter se* of a class to whom the fee is destined. These are the most usual indications of an intention to suspend vesting. It has been contended that where, in addition to postponement of the period of payment during the life of a liferenter, there is a substitution, or, as it is sometimes called a destination over, in favour of parties other than the fiars first named, there is a presumption that the vesting also was intended to be postponed till the death of the liferenter. There are cases in which that circumstance has, in connection with other circumstances, been taken into account, but it is by no means a conclusive circumstance." See also *Jackson*, 18 March 1876, 3 R. 627 (Lord J. C. Moncreiff). As above explained, conditions personal to a legatee, such as his marriage or reaching majority, suspend vesting until they are purified. But contingencies attaching to bequests have not always that effect; and the doctrine of vesting subject to defeasance has been illustrated and developed in several recent decisions. In the familiar case of a liferent of a sum of money being given to A., and the fee to his issue, and failing issue of A., then to B., not only is B.'s beneficial enjoyment postponed till the expiry of A.'s liferent, but so long as A. lives, B.'s interest is liable to be defeated by issue being born to A. Nevertheless, the fee is held to vest in B. at the death of the testator, unless there are other indications in the deed of a different intention. "It is in general for the benefit of the objects of the testator's bounty that they should be able to deal with their expectant interests at once, which they can do if their interest is vested, though subject to be divested by the happening of a subsequent event, but

[which they cannot do if their interests are kept in suspense and contingency until that event has happened. And therefore it is to be presumed that the testator intends the gift he gives to be vested subject to being divested, rather than to remain in suspense. As there is no more than a presumption of his intention, it must yield to anything in the testamentary deed which shews a contrary intention;" *per* Lord Blackburn, in *Gilbert's Trs.* 12 July 1878, 5 R. (H.L.) 217. A decision to the opposite effect was pronounced by a majority of seven judges, in *Haldane's Trs.* 15 Dec. 1881, 9 R. 269. But that decision has been overruled, and the doctrine of defeasible vesting finally established, by the House of Lords in *Gregory's Trs.* 8 April 1889, 16 R. (H.L.) 10. See also *E. Dalhousie's Trs.* 24 May 1889, 16 R. 681. In *Steel's Trs.* 12 Dec. 1888, 16 R. 204, Lord Pres. Inglis observed:—"Where a fund is settled on daughters of the testator for their liferent use allenarly, and their children, if any, in fee, whom failing, to another person or other persons in absolute property, with no further destination, the vesting of the fee in the last-named person or persons will depend on these considerations,—whether the person so called to the succession, if only one, was a known and existing individual at the death of the testator, or, if more than one, whether the persons so called were all of them known and existing at that date; or if the destination is to a class called by description, whether the individuals who constitute the class are ascertained at that date, or whether he or they cannot be known or ascertained till the death of the liferenters or the occurrence of some other event. If the person or persons are not known, or the individuals who are to constitute the class are not ascertained at that date, the fee will not vest until the occurrence of the event which will determine who are the persons called or the individuals composing the class are ascertained. But, when the person or persons called are known, or the individuals composing the class are ascertained at the death of the testator, then the fee will vest in them *a morte testatoris*, subject to defeasance in whole or in part in the event of the liferenters, or any of them, leaving issue." A clause of survivorship has generally a suspensive effect, being referable to the period of distribution; *Young*, 14 Feb. 1862, 4 Macq. 314; *Marshall*, 30 Oct. 1888, 16 R. 40; contrast *M'Alpine*, 20 March 1883, 10 R. 837. See *Survivorship.* [A destination over also generally suspends vesting; *Bryson's Trs.* 26 Nov. 1880, 8 R. 142; *Steel's Trs. supra.* "When nothing is expressed in favour of a beneficiary except a direction to trustees to convey to him on the occurrence of a certain event, and not sooner, and failing him, to certain other persons as substitutes or conditional institutes to him, then, if he does not survive the period, he takes no right under the settlement;" *per* Lord Pres. Inglis, in *Bryson's Trs.* When trustees are directed to realise and divide an estate, delay on their part does not hinder the vesting of the shares in the beneficiaries; *Scott's Trs.* 27 Jan. 1877, 4 R. 384; *Love's Tr.* 15 Dec. 1879, 7 R. 410; and contrast *Howat's Trs.* 17 Dec. 1869, 8 Macph. 337. See *Ersk.* B. iii. tit. 9, § 9 (Mr Nicolson's note); *Bell's Princ.* §§ 1879, 1883; *Menzies' Conv.* 495; *M. Bell's Conv.* ii. 990; *M'Laren on Wills*, ii. § 1391; *Fraser on Husb. and Wife*, i. 744; ii. 1370; *Craigie's Digest* (Mov.), 270.] See *Legacy. Jus Crediti. Succession. Contract of Marriage. Dies Cedit.*

VIA; a Roman law rural servitude, including the two minor servitudes of the same class of *iter* and *actus*, and in addition conferring on the dominant proprietor the right to use the road for carriages drawn by horses and other beasts of draught. *Ersk.* B. ii. tit. 9, § 12. See *Actus. Iter. Road.*

VICAR, VICARAGE. See *Teinds.*

VICE, SUCCEEDING IN THE. Succeeding in the vice is an intrusion whereby one enters into possession, in the place of a tenant bound to remove; such entry being made collusively with the outgoing tenant, and without the landlord's consent. In this case, both the tenant and he who thus collusively takes his place, are liable as violent possessors; because it was legally incumbent on the tenant to have left the possession void for the landlord's entry. The person succeeding in the vice, therefore, will be subjected as an intruder, unless he have a colourable title of possession to protect him. *Bank.* B. i. tit. 10, § 149; *Stair*, B. ii. tit. 9, § 45; *Hunter's Landlord and Tenant*, ii. 35. See *Ejection and Intrusion. Violent Profits.*

[**VICE-CHANCELLOR.** The judges of first instance in the English Court of Chancery were formerly so styled. On the formation of the Supreme Court of Judicature, the Vice-Chancellors (three in number) were transferred to the Chancery Division of the High Court of Justice, and

[the title is no longer in use. See *High Court of Justice.*]

VICECOMES; the ancient name of the sheriff. See *Sheriff. Comes.*

VICENNIAL PRESCRIPTION; pleadable against holograph bonds not attested by witnesses. See *Prescription.*

VICTUAL; is the name given, in our law, to any sort of grain or corn. *Ersk.* B. ii. tit. 10, § 46.

VIEW, PROOF ON; an extraordinary mode of proof, by inspection judicially authorised. In jury cases, it is sometimes thought expedient that the jurors, or some of them, should have an opportunity of inspecting premises in dispute previously to the trial. When this is proposed, the course is, for the party wishing the view to apply to the court for a view, giving notice to the agent of the opposite party. [Such notice must be given at least ten days before the trial, and must be lodged and served thirty-six hours before the motion is moved in court; A.S. 16 Feb. 1841, § 16.] Where the application is granted, six jurors are selected for the purpose, called *viewers*, who must be summoned by the sheriff to attend at the place in question some convenient time before the trial, where the premises are pointed out to them by two persons, named by the court, usually on the joint suggestion of the parties, and technically called shewers. The expense of such views is borne in the first instance by the parties equally, and no evidence can be adduced at the time of taking the view. The object of the view is, to render the ground of dispute more intelligible to the jury; but it will only be granted where the necessity of it is made very apparent. The attendance of agents at the view is disapproved of, and all discussion on that occasion is inadmissible. The shewers are the only parties properly entitled to interfere or communicate with the viewers. [See 55 Geo. III. c. 42, § 29. By 59 Geo. III. c. 35, § 35, special regulations are made as to Sutherland, Caithness, and Orkney.] See *Bank.* B. iv. tit. 26, § 4; [*Macfarlane's Jury Prac.* 97; *Mackay's Prac.* ii. 44.] See *Evidence. Jury Trial.*

VIGILANTIBUS, *non dormientibus, jura subveniunt.* See *Stair*, B. iii. tit. 2, § 42; *Kames' Equity*, 408; [*Broom's Legal Maxims*, 844.]

VILLENAGIUM; slavery or servitude. *Skene, h. t.*

VINDICATIO REI; a Roman law real action, founded on the right of property, little known now in that form. *Stair*, B. iv. tit. 3, § 43; *Bank.* B. iv. tit. 24, § 36. See *Action.*

VINTNERS. The edict *Nautæ, Caupones, Stabularii*, is extended, by the law, to vintners. See *Nautæ, Caupones, &c. Innkeepers.*

VIOLATING SEPULCHRES. See *Dead Body.*

VIOLENCE; may be established by parole evidence to the effect of reducing a deed impetrated thereby; and the amount of damage sustained by violence may be judicially ascertained by an oath *in litem; Ersk.* B. iv. tit. 2, §§ 18, 21. See *Extortion.* [*Force and Fear.*] Violent or clandestine possessors, if not explicitly or tacitly acknowledged, may be removed without warning, but not without order of law. *Bank.* B. ii. tit. 9, § 57; *Stair*, B. iv. tit. 26, § 14; tit. 28, §§ 1 *et seq.* See *Ejection.*

VIOLENT PROFITS. "Violent profits are so called because they became due on the tenant's forcible or unwarrantable detaining the possession after he ought to have removed;" *Ersk.* B. ii. tit. 6, § 54. In an action of removing, the defender must, in most cases, find caution for the violent profits; 1555, c. 39. He must be prepared with a cautioner for violent profits at giving in his defences, unless he instantly verify a defence excluding the action; [A.S. 11 July 1839, § 34. See *Cossar*, 8 Feb. 1847, 9 D. 617; *Robb*, 20 Jan. 1859, 21 D. 277. But it has been held that an action brought by a landlord under § 5 of the A.S. 1756, upon the allegation that the tenant deserted his farm and left it unlaboured, and concluding for caution for five years' rent, and failing such caution, for removal, is not, at all events in its first stage, an action of removing to which the above provision applies; *Oliver*, 21 May 1870, 8 Macph. 786. See also *Mackenzie*, 23 May 1848, 10 D. 1008, where there was a *bona fide* dispute as to the existence of arrears, and caution for violent profits was dispensed with.] In rural tenements, the violent profits are held to be the full profits which the landlord could have made either by possessing the lands himself, or by letting them to others. In urban tenements, the violent profits are generally estimated at double the stipulated rent. See *Watt*, 10 July 1822, 1 S. 556; [*Gardner*, 17 July 1877, 4 R. 1091 (Lord Pres. Inglis).] If the tenant, in resisting the removing, have a *probabilis causa litigandi*, the rent decerned for will be limited to the rent stipulated in the lease; *Ersk. ib.* As to the effect

of the tenant's *bona fides* where his lease is under reduction, and as to the period at which, in the course of such an action of reduction, his *bona fides* will be held to cease, to the effect of entitling the landlord to claim violent profits, see *D. Buccleuch*, 10 March 1824, 2 S. App. 54; *E. Wemyss*, 13 Jan. 1823, 2 S. 107, 2 S. App. 70; [*Houldsworth*, 8 Jan. 1876, 3 R. 304.] Violent profits are also due by any other unlawful possessor *in mala fide; Ersk.* B. ii. tit. 6, § 54; *Bank.* B. i. tit. 10, §§ 133–47. It is the opinion of Stair, that, *in dubio*, the pursuer's oath *in litem* should be admitted; *Stair*, B. iv. tit. 29; B. i. tit. 9, §§ 16, 26; B. ii. tit. 9, § 44. See also *More's Notes*, lxi.; *Bell on Leases*, ii. 83–5, 347; *Hunter's Landlord and Tenant*, ii. 43, 64, 524; *Ross's Lect.* ii. 519; [*Ersk.* B. ii. tit. 6, § 48; B. iii. tit. 7, § 16; *Rankine on Land-Ownership*, 21; *Rankine on Leases*, 487.] See *Removing. Spuilzie. Warning. Bona Fides. Ejection. Prescription.*

VIS ET METUS. [See *Force and Fear.*]

VISNETUM; neighbourhood. *Skene, h. t.*

VITIATION. Vitiation or alteration in a material part of any deed, *e.g.*, the date of a bill, without consent of parties, is fatal to the document; independently of the objection of the stamp laws, unless the alteration be made evidently to correct a mistake, and in furtherance of the original intention. A vitiation affecting a distinct part only of a deed, generally speaking, goes merely to cause that part to be held *pro non scripto. More's Notes to Stair*, ccccvii.; *Ersk.* B. iii. tit. 2, §§ 20, 26; *Thomson on Bills*, 109; [*Dickson on Evidence*, § 867;] *Ross's Lect.* i. 145. See *Deed. Bill.* [*Erasure.*]

VITIOUS INTROMISSION. See *Intromission.*

VITIUM REALE. See *Vitiation. Labes Realis.*

VITRIOL, THROWING ON THE PERSON. See *Attempt at Murder.*

[**VOLENTI NON FIT INJURIA**; see illustrations in *Guthrie Smith on Damages*, [363; *Beven on Negligence*, 336; *Broom's Legal Maxims*, 262. See also *Master and Servant*, p. 707; and *Membury*, 14 App. Ca. 179.]

VOLUNTARY JURISDICTION; is that exercised in matters admitting of no opposition or question, and, therefore, cognisable by any judge, in any place, and on any lawful day; such as the judicial ratification of a married woman, brieves of tutory, general service, &c. *Ersk.* B. i. tit. 2, § 4; [*Kerr*, 12 June 1854, 1 Macq. 736.] See *Jurisdiction. Ratification.*

[**VOLUNTEERS.** See 26 & 27 Vict. c. 65; 32 & 33 Vict. c. 81; 44 & 45 Vict. c. 57, § 9. See *Militia. Army.*]

VOTE, CASTING. The privilege of giving a casting vote is sometimes conferred on the preses or chairman, or on some particular member of a meeting, or nomination of persons entitled to vote; that is, the person having this privilege is entitled not only to his deliberative vote as a member of the meeting, but also to a second vote in cases of equality. This right does not exist at common law; and must therefore be vested in the party exercising it, either by statute, or by special deed or agreement, binding on all the voters. See *Election Law. Preses.*

VOTH; outlawry. (See *Utlagium.*) *Vouth*, calling or accusation; *Skene, voce Voth.*

VOUCHER; is the technical name for the written evidence of payment. See *Discharge.*

VOW; refers chiefly to pious dedication in times of popery. *Bank.* B. i. tit. 23, § 53.

VOYAGE; the master and owners of a vessel are liable for the consequences of all misconduct on the voyage, such as sailing too late (unless the delay be involuntary, as from adverse or boisterous winds)—sailing without convoy in time of war—going unnecessarily out of the usual course—navigating carelessly—failing to deliver the cargo to the proper persons in safety, according to the local customs, &c., &c. See *Charter-Party. Demurrage. Shipping Law. Insurance.* [*Carriers. Deviation.*]

W

WADSET; is the conveyance of land in pledge for, or in satisfaction of a debt or obligation, with a reserved power to the debtor to recover his lands, on payment or performance. The lender is called the wadsetter, and the borrower the reverser. Formerly the reverser never parted with more than the bare possession of his lands, regularly pledged, until payment; but aferwards a wadset assumed the form of

an absolute conveyance, and the debtor got separate letters of reversion from the creditor, which, as conveying a right merely personal at common law, were, by 1469, c. 27, made effectual against the singular successors of the wadsetter. [The right of purchasers was thus rendered insecure, until the act 1617, c. 16, required reversions to be registered within sixty days, under pain of nullity. After that act, it was the practice to prepare wadsets in the form of a mutual contract, the debtor, on the one hand, conveying the lands, and the creditor, on the other, granting the right of reversion. The loan might at any time be increased, and the additional sum secured by an eik to the reversion.] Wadset is *proper* or *improper*. Under a proper wadset, the wadsetter enjoys the yearly profits of the wadset lands, in satisfaction of his interest, during the non-redemption; while, by the improper wadset, which is in fact nothing more than a *pignus* or right in security, the wadsetter is accountable to the reverser for the excess of the rents over the interest, and can claim from him the deficit from the interest of his money; thus undertaking no part of the hazard of the rents, and being obliged to account for any excess of rent, as payment *pro tanto* of the capital. [This form of heritable security may now be regarded as obsolete; but the nature of wadset rights was considered in *Chisholm*, 9 Dec. 1864, 3 Macph. 202, and *Mackintosh*, 20 May 1870, 8 Macph. 772.] See *Ersk.* B. ii. tit. 8, § 3; *Stair*, B. ii. tit. 10, § 1; B. iv. tit. 5; B. ii. tit. 6, § 17; B. i. tit. 13, § 14; *Bank.* B. ii. tit. 10, § 2; *More's Notes*, cclxi., ccccxxvi.; *Bell's Com.* i. 712; *Bell's Princ.* § 901; *Kames' Princ. of Equity*, 45, 49 (1825); *Ross's Lect.* ii. 329; *Menzies' Conv.* 847; *Duff's Feudal Conv.* 257. See *Heritable Securities. Redeemable Rights. Regress. Eik.*]

WAGER. Wagers and gaming debts are regarded in the law of Scotland as *pacta illicita*, as not partaking of the nature of serious business, but as mere pastime and amusement. Hence, no action is competent for the recovery of any sum gained by betting or wagering in any form. The view taken in Scotland is, that courts are instituted to enforce the rights of parties arising from serious transactions, and can pay no regard to *sponsiones ludicræ*. For the same reason, if the money lost has been actually paid, the loser cannot recover it in an action; for, in such a case, the maxim *melior est conditio possidentis* applies; *Wordsworth*, 1799, M. 9524. In England the law was [formerly] different; [but by 8 & 9 Vict. c. 109, § 18, all contracts by way of gaming and wagering are declared null and void. See *Gaming*, and authorities there cited.]

WAGER POLICY; has been defined, a pretended insurance founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss by the happening of any of the misfortunes insured against. Such insurances are usually expressed by the words, "*interest or no interest*,"—or "*without farther proof of the interest than the policy*,"—or "*without benefit of salvage to the insurer*." Notwithstanding the general principle that insurance is a contract of indemnity, such policies came in England, after some fluctuation in judicial opinion, to be held as legal contracts at common law; and the gambling thus legalised became so prevalent and injurious, that wager policies, as above defined, were prohibited by the statute 19 Geo. II. c. 37, [in regard to maritime insurance, and by 14 Geo. III. c. 48, in regard to insurance on lives or on any other events.] Valued policies have sometimes been made the cover for wager policies; as to which the general rule seems to be that where, in a valued policy, the interest is so small as to be a mere cover for a wager, the contract will be void; but, on the other hand, when it appears that the contract is fairly meant as an indemnity, a valued policy is not held to fall under the statutory prohibition; nor will courts of law inquire minutely whether the valuation specified in the policy is or is not very near the true interest of the insured. See *Marshall on Marine Insurance*, 87, 229; [*Arnould on Marine Insurance*, i. 4, 123, 229; *Bunyon on Life Insurance*, 3.] See *Insurance. Valued Policy.*

WAGES. [A master's obligation to pay wages as the hire for service is explained in the article *Master and Servant.*] Servants' wages are privileged debts for the current term, both on the death and on the bankruptcy of the master. [This privilege has been found to prevail over the landlord's hypothec; *M'Glashan*, 29 June 1819, F.C. At common law, the privilege is confined to domestic and farm servants. But by 38 & 39 Vict. c. 26, "the wages of clerks, shopmen, and servants employed by the bankrupt, shall be entitled to the same privilege as the wages of domestic servants, to an extent not exceeding four months'

[wages prior to the date of sequestration being awarded, or where sequestration is not awarded prior to the concourse of diligence for distribution of the estate of a party being notour bankrupt, and not exceeding the sum of £50; and the wages of workmen employed by the bankrupt shall be similarly entitled, to an extent not exceeding two months' wages prior to the same respective dates."] See *Bell's Com.* ii. 149; *Ersk*, B. iii. tit. 9, § 43; [*Fraser on Master and Servant*, 144; *Goudy on Bankruptcy*, 504.] See *Privileged Debts. Executor.* [As to a workman's right of retention for his wages, see *Fraser*, 151.] Claims for servants' wages fall under the triennial prescription of 1579, c. 83; [each term's wages running a separate prescription from the day when they became due; *Fraser*, 155. See *Prescription.*] Servants' wages are alimentary, and cannot be arrested in so far as they [do not] exceed what is required for subsistence; arrears of them, however, may be arrested. [As to what is considered a suitable aliment, see *Shanks*, 10 July 1838, 16 S. 1353.] By 1 Vict. c. 41, § 7, wages of labourers and manufacturers, so far as necessary for their subsistence, are deemed alimentary, and not liable to arrestment. [By 33 & 34 Vict. c. 63, "the wages of all labourers, farm servants, manufacturers, artificers, and work people," are exempted from arrestment except in so far as they exceed twenty shillings per week; the expense of the arrestment not being chargeable against the debtor unless the sum recovered exceeds such expense. But the act does not affect arrestments in virtue of decrees for alimentary allowances or payments, or for rates and taxes imposed by law. By 8 & 9 Vict. c. 39, it is made incompetent to arrest wages upon the dependence of any action raised by virtue of the Small Debt Acts (6 Geo. IV. 48, and 1 Vict. c. 41). See *Fraser*, 158; also *Arrestment.* The payment of wages to workmen in public-houses is prohibited by 46 & 47 Vict. c. 31, under a penalty of £10. As to seamen's wages, see 17 & 18 Vict. c. 104, §§ 168–204; *Maclachlan on Shipping*, 220.] See generally, *Bell's Com.* i. 126, 348; ii. 148; *More's Notes to Stair*, lxxxv.; *Brodie's Supp.* 955, 976; *Bank.* i. 58; *Bell's Princ.* §§ 184, 629, 1404. [See also *Workmen. Truck Acts.*]

WAIFE BEAST; "an animal which wanders and wavers without any known master, which, when any one finds it within his own bounds, he ought to cause to be proclaimed diverse and sundry times upon market days, at the parish kirk, and within the sheriffdom; otherwise, if he detain the same, he may be accused for theft therefor." It is "leasum to the owner of the beast to repeat and challenge the same within year and day;" *Skene, h. t.* See *Strays.*

[**WAITH** *or* **WAIF.** See *Strays.*]

[**WAIVER.** A person is said to waive a benefit when he renounces or disclaims it, and he is said to waive a tort or injury when he abandons the remedy which the law gives him for it. A waiver may be either express or implied. Thus, if a tenant commits a breach of covenant, and thereby makes the lease liable to forfeiture, the lessor may waive the breach either by promising not to take advantage of it, or by receiving rent after knowing of the breach: the former is an express, the latter an implied, waiver. *Sweet's Law Dict.*]

WAKENING. Where a summons is not called within year and day after its execution, the instance falls, and a new action must be raised. But where, at any time after calling, no judicial proceeding takes place in the action for a year and day, the depending process merely falls asleep, and may then be wakened at any time within the period of the long prescription. [For this purpose an action of wakening was formerly necessary; but the necessity for a separate action was done away with by 13 & 14 Vict. c. 36, § 50. The present procedure is regulated by § 95 of the Court of Session Act, 1868, which is in these terms:—"Where, according to the existing practice, a cause would require to be awakened in order to its being proceeded with, it shall be competent for any of the parties to enrol such cause before the Lord Ordinary, and to lodge a minute craving a wakening of the cause; and the Lord Ordinary may thereupon direct intimation of such minute to be made to the known agents of the other parties in the cause, or to such parties themselves, and shall direct intimation to be made in the minute-book of the Court of Session; and where said parties have no known agents, or are themselves furth of Scotland, the Lord Ordinary shall also appoint edictal intimation thereof to be made by publication in the record of edictal citations; and on the expiration of eight days from the date of such intimation, or from the latest date thereof, and on a certificate being lodged in process under the hand of the agent of the party applying for the waken

[ing, certifying that he has duly intimated the minute in terms of the Lord Ordinary's interlocutor, the Lord Ordinary may pronounce an interlocutor holding the cause as wakened, and the same may thereafter be proceeded with as wakened accordingly." When a cause requires to be transferred as well as wakened, a combined minute of wakening and transference may be lodged, in accordance with § 97 of the same act, which provides as follows:—"Where, according to the existing practice, a cause would require to be wakened in order to its being proceeded with, and also to be transferred against any party or parties, it shall be competent to any party who might have instituted a summons of wakening and transference to enrol the cause before the Lord Ordinary, and to lodge a minute craving a wakening of the cause, and a transference thereof against such party or parties; and after such procedure by intimation and service as is hereinbefore directed with respect to motions for wakening and transference respectively, the Lord Ordinary may pronounce an interlocutor holding the cause as wakened, and may either in the same interlocutor or in an interlocutor to be subsequently pronounced, as justice may require, also transfer the cause against the parties named in such minute." See *Transference.*] Actions on the proper Inner House roll, and those in which decree has been pronounced, never sleep; [see *Wemyss*, 24 Jan. 1860, 22 D. 556.] See *Ersk.* B. iv. tit. 1, § 62; *Ivory's Form of Process*, ii. p. 53; *Stair*, B. iv. tit. 2, § 3; tit. 34; *Bank.* ii. 624; [*Shand's Prac.* ii. 545; *Mackay's Prac.* i. 489.]

WAND; the baton which, along with the blazon, forms a messenger's *insignia*, must be exhibited by him in executing a caption. *Stair*, B. iv. tit. 47, § 14. See *Imprisonment.*

WARD, CASUALTY OF; [one of the casualties proper to ward-holding. By this casualty the superior was entitled to the full rent of the ward-lands after the vassal's death, during the heir's minority, because the heir, in that period, was incapable of performing military service. Ward was burdened with the charge of upholding the houses, inclosures, &c., in good condition during the heir's minority, and with an alimony to the heir if he had no separate means of subsistence. It was also burdened with the terce due to the widow of the last vassal, or might be wholly excluded by the courtesy belonging to the surviving husband [of the last female vassal. Ward was sometimes taxed or restricted to a fixed sum to be paid annually by the minor heir. Ward expired when the heir, if male, reached majority. In females, it lasted only till fourteen, at which age women became marriageable by the old law. This casualty was abolished in 1747, by 20 Geo. II. c. 50. See *Ersk.* B. ii. tit. 5, § 5. See *Casualties. Holdings.*]

WARD-HOLDING. *Skene, voce Varda.* See *Holdings.*

WARDING AND WATCHING; services in burgage tenure, constituting the *reddendo* of burgage holding. See *Burgage.*

WARDING, ACT OF. See *Act of Warding.*

WARE *of the Sea* (*alga maris*). According to Skene, he who was infeft with ware, might stop and make impediment to all other persons, both within and without flood-mark, to gather ware, for "mucking and guding of their lands;" or to gather "wilkes, cockles, lempers, mussels, sandeiles, small fish, or baite, upon the sand or craiges foreanent his lands." But if any person were not infeft with this privilege, he could not prevent the king, or any of his lieges from doing so, or from "winning stanes, or exercising onie uther industrie, to their profit, within floud-marke;" *Skene, h. t.* [See *Rankine on Land-Ownership*, 219, 231, 349. See also *Sea and Seashore*, and cases there cited.]

WAREHOUSING. The warehousing system is that by which merchants are enabled to deposit goods imported from abroad, in warehouses belonging to the Crown, without paying the duty for importation. The goods are kept in bond, as it is called, until the merchant pays the duty and removes them from the warehouse. The warehousing system has been the subject of various legislative enactments, [the subsisting provisions being contained in the Customs Laws Consolidation Act (39 & 40 Vict. c. 35, §§ 12, 13, 19, 39, 57–62, 73–100). The transference to a purchaser of goods deposited in a warehouse is completed by notice being given to the keeper of the warehouse; but when the seller is himself the occupier of the warehouse, there must be delivery, actual or constructive. See *Melrose*, 4 Feb. 1850, 12 D. 665; 7 March 1851, 13 D. 880; *Smith*, 14 Dec. 1859, 22 D. 208.] See *Bell's Com.* i. 194, 199; *Bell's Princ.* § 1368; *Ersk.* B. iii. tit. 3, § 8; *Brodie's Supp. to Stair*, 872. See *Delivery. Hypothec. Stoppage in Transitu.* [*Dock Warrant.*]

[**WARING, EX PARTE.** The rule of *Ex parte Waring* is a rule of English bankruptcy, which was first laid down by Lord Eldon in 1815, in the case of that name (reported 19 Ves. 345), and has since been applied in many cases as an established principle in equity. The rule is to the following effect:—Where, as between the drawer and the acceptor of a bill of exchange, a security has, by virtue of a contract between them, been specifically appropriated to meet that bill at maturity, and has been lodged for that purpose by the drawer with the acceptor; then, if both drawer and acceptor become insolvent, and their estates are brought under a forced administration, the bill-holder, though neither party nor privy to the contract, is entitled to have the specifically appropriated security applied in or towards payment of the bill; *Eddis on the Rule of Ex parte Waring*, 5. The rule has no force in this country, being inconsistent with the principles of the Scotch bankruptcy system; *Royal Bank*, 10 July 1882,-9 R. (H.L.) 67. See *Goudy on Bankruptcy*, 556.]

WARNING OF SERVANTS. See *Master and Servant*, p. 702.

WARNING OF TENANTS. See *Removing. Chalking of Doors.*

WARRANDICE; is the obligation whereby a party conveying a subject or right, is bound to indemnify the grantee, disponee, or receiver of the right, in case of eviction, or of real claims or burdens being made effectual against the subject, arising out of obligations or transactions antecedent to the date of the conveyance. Warrandice is either personal or real. Personal warrandice, by which the granter and his heirs are bound personally, is *general* or *special*, of which the former is interpreted by the rules of implied warrandice, while the latter is either, 1*st*, *Simple*, viz., that the granter shall do nothing inconsistent with the grant, which is that implied in donations; 2*d*, *From fact and deed*, *i.e.*, that he neither has done, nor shall do, any contrary deed, which is that implied in transactions; or 3*d*, *Absolute*, *contra omnes mortales*, against all deadly, whereby the granter is liable for every defect in the right which he has granted. This liability is sometimes expressly limited to the extent of the price or equivalent received; but where it is not, it extends to the full value of the subject at the date of eviction, and to all damage whatever consequent upon eviction. As to *implied* warrandice, it does not, in assignations, reach to the solvency of the debtor; and even absolute warrandice in such a case, however anxiously expressed, imports merely that the bond or other voucher is a valid deed; [*Barclay*, 1671, M. 16593; *Riddel*, 1707, M. 16616. But warrandice *debitum subesse* is always implied in the voluntary assignation of a debt for onerous causes; *Ferrier*, 16 May 1828, 6 S. 818; *Russell*, 28 Nov. 1857, 20 D. 125; *Reid*, 6 June 1879, 6 R. 1007.] In donations, warrandice against the voluntary deeds of the donor is implied, and in all onerous deeds absolute warrandice (restricted, however, to the mere value in redeemable and personal rights) is implied; but no warrandice is implied against a bare consenter to a conveyance. Express warrandice supersedes implied; and parties may provide, or tacitly consent to any kind of warrandice, or even that there shall be none at all. A granter expressly exempted from warrandice is not, however, secured, if he grant a subsequent inconsistent deed. [The statutory form of the clause of warrandice in dispositions ("And I grant warrandice") implies, unless specially qualified, absolute warrandice as regards the lands and writs and evidents, and warrandice from fact and deed as regards the rents; 31 & 32 Vict. c. 101, § 8. It warrants that a legal and valid right to the lands exists, and has been conveyed by the deed; but it does not imply that the lands hold of any particular superior. No relief can be claimed on the warrandice, if there has been no eviction of anything contained in the dispositive clause; *Brownlie*, 10 June 1880, 7 R. (H.L.) 66. See also *Leith Heritages Co.* 7 June 1876, 3 R. 789; *Horsbrugh's Trs.* 12 Nov. 1886, 14 R. 67.] The Sovereign, though liable in no warrandice when granting rights *jure coronæ*, is liable, as a subject, when acting *tanquam quilibet*, and thus burdens himself and the heirs to his private patrimony. Churchmen, having feued or leased lands annexed to the Crown by 1587, c. 29, were obliged in warrandice from fact and deed merely, however their former express warrandice ran. *Real* warrandice is that whereby certain lands, called warrandice lands, are made over eventually in security of the lands conveyed. In excambion, real warrandice is implied. See *Excambion.* Warrandice, moreover, though from fact and deed merely, may be incurred simply from the nature of the obligation; as where a liferent out of lands to a widow is warranted to a certain amount, in which case the granter is liable for every accident by which the lands may be prevented from

yielding so much. No contravention, however, of warrandice is inferred from events not anterior to the conveyance, or from the operation of a supervenient public law, or arising from the legal effects of ownership, unless the grantee has obtained special warrandice against such grounds of eviction. Warrandice, it ought to be borne in mind, is not an obligation to defend the right warranted, but to indemnify in case of eviction. Hence, warrandice is not incurred until judicial eviction, unless it can be shown that the ground of eviction is undeniable, and that it proceeds from the fault of the seller, in which case the purchaser may sue at once, and before eviction, to have the ground of eviction purged, or for indemnification. Where the eviction is partial, a corresponding indemnification is due under the warrandice. A real burden must be discharged, if covered by the warrandice; although warrandice being *stricti juris*, small matters, or trifling servitudes, will not infer warrandice. Neither will the purchaser have any claim under the warrandice, if the purpose of his purchase is defeated as a nuisance. Where eviction has taken place, the claim of indemnification extends to the value of the subject as at the date of eviction, and not merely to the price paid. But the person bound in warrandice is entitled to have notice of the claim, or attempt to evict; and although the purchaser is not bound to defend the right, yet, if he undertake the defence without notice, and omit a good plea, the seller will be free. On the other hand, the seller is not bound to defend against the claim, and if the purchaser do so while the seller declines, and if such defence fails, the purchaser will not be entitled to the expense of the litigation. A conveyance in real warrandice does not fall under the act 1696, c. 5, as a security for future debt; [*Smith Sligo*, 17 March 1885, 12 R. 907;] but it must be completed by sasine duly recorded, although lands disponed in this way may be effectually bound after forty years in case of eviction. [An obligation to free lands from debt arising under the warrandice clause of a disposition falls to be satisfied by the executor of the granter of the disposition, in a question between him and the heir; *Stirling Crawfurd's Trs.* 15 Nov. 1887, 15 R. (H.L.) 19.] See *Ersk.* B. ii. tit. 3, § 25; *Stair*, B. ii. tit. 3, § 46; B. iv. tit. 35, § 24; *Bell's Com.* i. 689, 733; ii. 219, 260; *Bell's Princ.* §§ 121, 894, 1469; *Bank.* i. 576; *Kames' Princ. of Equity* (1825), 116, 185, 190; *Hunter's Landlord and Tenant*, ii. 265; *Brown on Sale*, 208, 240; *Bell on Purchaser's Title*, 42; *Ross's Lect.* i. 193; ii. 143 *et seq.*, 235, 299; [*Menzies' Conv.* 153, 553; *M. Bell's Conv.* i. 214, 642, 690; ii. 718.] See *Eviction. Judicial Sale. Sale.* [See also next article.]

WARRANTIES, *in insurance;* are absolute conditions, non-compliance with which voids the insurance. They are either express or implied. See *Insurance*, pp. 558, 568. [And as to warranty in sale, see *Sale*, p. 940. *Actio Redhibitoria.*]

[**WARRANT OF ATTORNEY**, *in English law;* originally meant the same thing as a power or letter of attorney, but at the present day the term is used only to denote a written authority from a person, enabling the person to whom it is given (the attorney) to enter an appearance for him in action, and to allow judgment to be entered for the plaintiff, or to suffer judgment to go by default. Such a warrant is usually given to secure the payment of a sum of money, and is therefore qualified by a condition that it shall not be put in force if the debt is not paid by a certain day; this condition is expressed in a document called the defeasance, which also usually contains various stipulations designed to facilitate the execution of the judgment when obtained; *Sweet's Law Dict.* See *Registration.*]

WARRANT OF COMMITMENT. See *Criminal Prosecution. Bail. Commitment for Trial. Backing a Warrant.*

[**WARRANT OF REGISTRATION.** See *Registration for Publication.*]

[**WASTE**, *in English law;* any spoil or destruction in houses, gardens, trees, &c., by a tenant, to the prejudice of the expectant in fee. It is either (1) legal, subdivided into (*a*) voluntary or commissive, as where the tenant pulls down a house or part thereof, or ploughs up ancient meadow, and (*b*) permissive or omissive, as where a tenant suffers a house to fall out of repair; or (2) equitable, which comprehends acts not deemed waste at the common law. An estate for life is frequently granted "without impeachment for waste;" but this confers no right to commit "equitable" waste, such as involves manifest injury to the inheritance. *Wharton's Lex.*]

WATER. [See *River. Lake. Stagnum.*] *Aquæductus. Aquæhaustus.*

WAY. See *Servitude. Road.*

WAYGOING CROP. The usual terms

of removal, under an agricultural lease, are Whitsunday, as to the houses and grass, and Martinmas, or the separation of that year's crop, as to the arable land; and the crop sown by the tenant, in the spring of the year of removal, is called his *awaygoing*, or *waygoing* crop. The general rule is, that the tenant is entitled to reap the crop which has been sown before the term of removal; as having had the right of exclusive possession during seed-time. But there have been conflicting decisions upon the point, and cases where, from special circumstances, the tenant's right to the waygoing crop would have given him one year's rent more than he had paid rent for, and where therefore it was disallowed. In absence of express provision, it has been held that the outgoing tenant has no right to keep possession of the barns and similar offices, for thrashing out and disposing of the last crop, longer than the Martinmas succeeding the Whitsunday of his removal. But local usage sometimes establishes a different rule. [See *M'Ewan*, 1803, M. 13891, Hume's Dec. 571; *Gatherer*, 11 Jan. 1870, 8 Macph. 379.] See *Bell on Leases*, i. 330; ii. 97; *Bell's Princ.* § 1270; *Hunter's Landlord and Tenant*, ii. 480; [*Rankine on Leases*, 369, 376.] See *Grass. Straw. Fallow.* [*Lease.*]

WEIGHTS AND MEASURES. Weights and measures have been the subject of many statutory enactments; see 1491, c. 33; 1540, c. 114; 1607, c. 2; 1621, c. 17. After many ineffectual attempts to equalise the weights and measures throughout the kingdom, that object was effected by the act 5 Geo. IV. c. 74. [But that act, as well as several subsequent enactments, has been repealed; and the Weights and Measures Acts, 1878 (41 & 42 Vict. c. 49) and 1889 (52 & 53 Vict. c. 21), constitute the existing law on the subject. By 1878, § 3, the same weights and measures are to be used throughout the United Kingdom. By § 4, the bronze bar and platinum weight, more particularly described in a schedule, and deposited in the Standards department of the Board of Trade, in the custody of the Warden of the Standards, are declared to be the imperial standards of measure and weight; the bronze bar being the imperial standard for determining the imperial standard yard for the United Kingdom, and the platinum weight being the imperial standard for determining the imperial standard pound. These standards were constructed, under direction of the Treasury, after the destruction of the former imperial standards in the [fire at the Houses of Parliament. By § 5, certain copies of the imperial standards, described in a schedule, are denominated parliamentary copies thereof. Provision is made by §§ 6, 7, for the restoration of these imperial standards, or parliamentary copies, in the event of their being lost or injured. By § 8, secondary standards are approved of, which are derived from the imperial standards, and are called Board of Trade standards. Imperial measures of length are dealt with more particularly by §§ 10–12; and of these the yard is declared to be the only unit or standard measure, from which all other measures of extension, whether linear, superficial, or solid, are to be ascertained. Imperial measures of weight and capacity are dealt with by §§ 13–15, and 17; the pound being the unit of weight, and the gallon the unit of capacity. By § 18, the metric equivalents of imperial weights and measures, as set forth in a schedule, may be lawfully used. By § 19, all trade contracts, sales, dealings, &c., are deemed to be made according to one of the imperial weights or measures ascertained by the act, or to some multiple or part thereof, and if not so made are void. No local or customary measures, nor the use of the heaped measure, are lawful. See *Ross*, 8 June 1886, 13 R. (J.C.) 73. By § 20, all articles sold by weight are to be sold by avoirdupois weight; except that (1) gold and silver, and articles made thereof, also platinum, diamonds, and other precious metals or stones, may be sold by the ounce troy, or by any decimal parts of such ounce; and (2) drugs, when sold by retail, may be sold by apothecaries weight. Another exception is made by § 21, in favour of the metric system; and the provisions of § 19 are declared not to apply to the sale of any article in a vessel not represented as a measure; § 22. By 1878, §§ 25–27, and 1889, § 3, penalties are imposed for the use or possession of unjust measures, weights, balances, or weighing machines, and for fraud in the use of any weight, measure, &c. Provision is made by 1878, §§ 28–32, and 1889, § 2, for the stamping and verification of weights and measures. The central administration by the Board of Trade, and the powers and duties of the Board, particularly in regard to the custody and verification of standards and copies, are dealt with by 1878, §§ 33–39, and 1889, § 8. The administration by local authorities, including the verification and inspection of weights and measures, the prosecution of offences and recovery of fines, &c., is dealt with by 1878, §§ 40–61, and 1889, § 9.

[See *Hood*, 3 Nov. 1887, 15 R. (J.C.) 4. Every weighing instrument used for trade shall be verified and stamped by an inspector of weights and measures; and every person who uses, or has in his possession for use, for trade any instrument not so stamped, is liable to a fine of £2, or £5 for a second offence; 1889, § 1. If the court by which a person is convicted of a second or subsequent offence under the acts, is of opinion that there was intent to defraud, he is liable to imprisonment for two months; § 4. Conviction of any offence under the acts may be published by the court in such manner as it thinks desirable; § 14. The Board of Trade may from time to time cause new denominations of standards to be made and verified; § 6; and working standards may be provided by local authorities for their officers, with approval of the Board of Trade; § 7. The Board of Trade may hold local inquiries in regard to the administration of the law on this subject; § 10. The qualifications of inspectors are dealt with by §§ 11–12. The act of 1889 deals also with the sale of coal (§§ 20–31), and of bread (§ 32). See *Stephen's Com.* ii. 545; *Ersk.* B. iv. tit. 4, § 66; *Bell's Princ.* § 91; *Irons' Police Law*, 433; *Barclay's Digest.* For the old Scotch computation of weights and measures, see *Serplath.* [See also *Sale*, p. 939 *a*.]

[**WELL.** See *Aquæhaustus.*]

WEREGILD; *or* **CRO**; was the assythment due by an offender to the friends of one killed by him. It did not infer representation, and was not discharged by the remission of the punishment. *Bank.* B. i. tit. 10, §§ 15 *et seq.*; *Kames' Stat. Law*, voce *Vergelt.* See 1426, c. 93; 1457, c. 74; 1503, c. 63; 1528, c. 7; 1592, c. 157.

WHALES. By the *leges forestarum*, § 17, all whales thrown ashore, of above six power draught, belong to the Queen; but in practice they require to be of much greater size before they become Her Majesty's property, or that of the admiral, her donatory. With regard to the smaller whales cast on shore, it has been a question whether they belong to the landlord or the tenant. The rule seems to be that they belong to the catcher, without regard to the rights of landlord and tenant. But in the Shetland islands, by usage, such whales belong half to the proprietor on whose lands they are driven, and half to those concerned in catching them; *Stove*, 26 May 1831, 9 S. 633. [With regard to the ownership of whales captured in the whale-fisheries, the general principle of the law of Scotland is that the person first engaged in the pursuit, so long as he continues it with a reasonable prospect of success, excludes the interference of any other. See *Occupancy.* But, in order to save disputes among whalefishers of different nationalities, certain conventional rules have been established in particular localities, which are recognised by the courts as superseding the rule of common law. Of these conventional rules, the most important is the rule of "fast and loose," which prevails in all the northern seas. "The rule is," as stated by Lord Chanc. Westbury, "that the person who first harpoons a fish, and retains his hold of that fish until it is finally captured, is to be regarded as the proprietor of the fish, although the actual capture and killing of the whale may be accomplished by the assistance of other persons. But the rule also involves this condition that, if the fish, after it has been harpooned, breaks away from the person who first harpoons it, or if the fish is subsequently abandoned, that fish, though dying in consequence of the wound originally inflicted by the harpoon, is a loose fish, and becomes the property of the person who first finds it and takes possession of it;" *Sutter*, 3 April 1862, 4 Macq. 355.] See 17 Edw. II. c. 11; *Ersk.* B. ii. tit. 1, § 10; *Stair*, B. ii. tit. 1, § 5; *Bell's Princ.* § 1289.

WHARFAGE DUES; are a burden, operating lien, not on the goods, but on the ship. *Bell's Com.* ii. 97.

WHARFINGER. Delivery of goods sold, while in wharf, is completed by transfer in the wharfinger's books from the seller's name to the buyer's, the wharfinger then becoming custodier for the buyer; or simply by notice to the wharfinger, or other custodier, which may be proved by the transfer itself, by post-mark or acceptance of written order, or by evidence of party or other witnesses. Wharfingers are liable for goods lodged with them, and for the negligence of those whom they may employ to unload vessels. They have a lien on the goods for their balance, by usage, which usage forms matter of evidence. See *Bell's Com.* i. 194, 216, 605; ii. 103; *Bell's Princ.* §§ 155, 156, 236, 1434; *Brodie's Sup.* 872, 881, 920. See *Delivery.* [*Retention. Sale.*]

[**WHIPPING.** By 23 & 24 Vict. c. 105, § 74, in every case where it is competent for a judge or magistrate to award sentence of imprisonment, or of fine with the alternative of imprisonment, he may, in the

[case of a male juvenile offender whose age does not in his opinion exceed 14 years, adjudge him, instead of or in addition to imprisonment or imprisonment and hard labour, to be punished by private whipping. By 25 Vict. c. 18, the order or sentence awarding such punishment must specify the number of strokes to be inflicted and the instrument to be used, and in the case of an offender whose age does not exceed 14 years, the number of strokes must not exceed 12, and the instrument must be a birch rod; § 1. No offender may be whipped more than once for the same offence, and in Scotland no offender above 16 may be whipped for theft, or for crime committed against person or property; § 2. See *Stevenson*, 7 Sept. 1878, 4 Coup. 76. See also *Criminal Law Amendment Act.* See *Irons' Police Law*, 529; *Barclay's Digest.*]

WHITEBONNET. A whitebonnet or puffer is a person who, in collusion with the exposer, or other party interested in a sale by auction, attends the sale, to raise the price by making offers, so as to lead on to other offerers; while the whitebonnet himself holds either an express or an implied obligation, from the party for whom he interferes, to relieve him of the consequences of his offer, in case the subject should fall into his hands. The intervention of a whitebonnet is held in law to be a fraud upon the other bidders, and either the next highest offerer will be preferred to the purchase, or the sale effected by such means may be entirely set aside; *Gray*, 1753, M. 9560; *Anderson*, 16 Dec. 1814, F.C. [See *Ersk.* B. iii. tit. 3, § 2;] *More's Notes on Stair*, lx. See also *Auction. Pactum Illicitum.*

WHITSONDAYES STYLES; according to Skene, were certain constitutions and statutes which freeholders, both spiritual and temporal, especially convents of abbeys, and religious places, made betwixt them and their tenants before Whitsunday, for service to be done to them, and better labouring of their lands, and payment of their duty. *Skene, h. t.*

WHITSUNDAY; was formerly a moveable term, often reaching far into summer; but the legal term of removing, both in burgh and in rural tenements, was fixed, by 1690, c. 39, to be the 15th May, a provision extended, by 1693, c. 24, to every other civil question. [See *Hunter*, 13 May 1886, 13 R. 883.] See *Ersk.* B. ii. tit. 6, § 46; *Stair*, B. iv. tit. 26, § 7; *Bell on Leases*, ii. 63, 363; *Hunter's Landlord and Tenant*, i. 384; ii. 42. See *Removing. Terms, Legal and Conventional.*

WIDOW. See *Relict.*

WIDOWS' FUNDS. The funds provided for the widows of members of various societies have been the subject of statutory enactments. Thus, the Advocates' Widows' Fund is regulated by 11 Geo. IV. & 1 Will. IV. c. cxli., and that of the Society of Writers to the Signet by several statutes. [The Ministers' Widows' Fund of the Established Church is regulated by 19 Geo. III. c. 20, as amended by 54 Geo. III. c. clxix.; as to which see earlier editions (1838 or 1861) of this Dictionary. See also *Ersk.* B. ii. tit. 10, § 68; B. iii. tit. 6, § 7; B. iv. tit. 3, §§ 10, 19; *Bell's Com.* i. 126; ii. 150; *Duncan's Par. Eccl. Law*, 330.]

WIFE. See *Marriage.* [*Husband.*] *Jus Mariti. Jus Relictæ.*

[**WILD BIRDS.** By the Wild Birds Protection Act, 1880 (43 & 44 Vict. c. 35), as amended by 44 & 45 Vict. c. 51, a close time, from 1st March to 1st August, was established for all wild birds. Any person who, during such close time, shall wilfully shoot or attempt to shoot, or use any boat for the purpose of shooting, or use any snare for the purpose of taking, any wild bird, or shall sell or have in his possession after 15th March any wild bird recently killed or taken, may be prosecuted before the sheriff. On conviction, in the case of any wild bird included in a schedule (which enumerates eighty-six different species), the offender shall pay for every bird a sum not exceeding £1, and in the case of any other wild bird, shall for a first offence be reprimanded and discharged on payment of costs, and for every subsequent offence shall pay for every bird a sum not exceeding five shillings, besides costs. But this provision does not apply to the owner or occupier of any land, or any person authorised by him, killing or taking on such land any wild bird not included in the schedule. Any person may require a person offending against the act to give his name and place of abode, under a penalty. The close time in any county may be extended or varied, or the county or part thereof may be exempted from the operation of the act, by the Secretary for Scotland (48 & 49 Vict. c. 61), on application by the justices of such county assembled in quarter sessions. Sandgrouse are protected till 1st Jan. 1892, by 51 & 52 Vict. c. 55. See *Irvine on Game Laws*, 250; *Rankine on Land-Ownership*, 139; *Rankine on Leases*, 413.]

WILL. This term is not one which is used technically in our law, at least by itself, although it is sometimes so used in combination, as in the expression, *last* or *latter will*, which is synonymous with testament. In popular language, however, it is employed to signify any declaration of what a person wills with regard to the disposal of his property, heritable or moveable, after his death, and thus includes not only testaments, but all the complicated forms of deeds granted *intuitu mortis*. [" *Will* is a generic word, and is not to be confounded in meaning with *testament*, which (according to our municipal law) is applicable only to wills of moveable or personal estate ;" *M'Laren on Wills*, i. 491, note (*a*). But since the recent statutory provision (narrated *infra*), by which it was made competent to bequeath lands by testamentary writing, the distinction between will and testament is now of small significance.]

Any person has power to execute an effectual testament, who is of sound judgment at the time, although he be labouring under bodily sickness, or even be on deathbed. A wife has power to test without the consent of her husband ; a minor without the consent of his curators ; and a person interdicted without that of his interdictors. A pupil, however, has not the power to test, nor an idiot, nor a furious person in his furiosity. But even with regard to things strictly moveable, a person cannot effectually dispose by testament of more than that share of them which is termed the dead's part, as a testament which encroaches on the *jus relictæ* or *legitim*, may be reduced at the instance of the widow or children of the testator in so far as they are concerned. See *Legitim*. *Jus Relictæ*. A testament, containing the nomination of an executor, or the bequest of a legacy of greater value than £100 Scots, is not valid, unless it be executed in writing, however small may be the value of the estate to which it relates. See *Nuncupative Testament ;* [also *Thomson*, 9 Jan. 1884, 11 R. 453.] It must be properly tested and signed before witnesses ; but if it be in the testator's own handwriting, witnesses are not required. [A writ neither holograph nor tested is ineffectual ; *Rankine*, 7 Feb. 1849, 11 D. 543 ; *Maitland's Trs.* 10 Nov. 1871, 10 Macph. 79. A holograph writing unsigned, though it embody the writer's name, is ineffectual ; *Skinner*, 13 Nov. 1883, 11 R. 88 ; *Petticrew's Trs.* 6 Dec. 1884, 12 R. 249 ; *Goldie*, 4 Nov. 1885, [12 R. 138. But an improbative writing may be imported by reference into a probative deed ; *Wilsone's Trs.* 13 Dec. 1861, 24 D. 163 ; *Callander*, 17 Dec. 1863, 2 Macph. 291 ; *Russell's Trs.* 11 Dec. 1883, 11 R. 283 ; but see *M'Laren*, § 476. " The law has not made it requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property ; and if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded ;" *Jarman on Wills*. i. 13. See *Whyte*, 15 June 1882, 9 R. (H.L.) 53. A pencil writing may have testamentary effect, if it be not a mere jotting ; *Muir's Trs.* 23 Oct. 1869, 8 Macph. 53 ; *Simson*, 19 July 1883, 10 R. 1247. When a testator makes pencil alterations on a deed written in ink, the alterations are presumably merely deliberative in character ; but they will receive effect if there is evidence that they were intended to be final ; *Lamont*, 10 March 1887, 14 R. 603. In *Spiers*, 19 July 1879, 6 R. 1359, two holograph writings, enclosed in the same envelope, of which one was not signed at all, and the other was initialed, were found, in the particular circumstances of the case, to constitute together a valid testament. In *Lowson*, 20 March 1866, 4 Macph. 631, a signed list of names, with sums of money appended, was held inoperative. See also *Colvin*, 20 May 1885, 12 R. 947. Holograph testamentary writings are presumed to have been executed of the dates they bear ; 37 & 38 Vict. c. 94, § 40.] If the testator cannot write, a single notary, [or justice of the peace, or the minister of the parish,] may subscribe for him in presence of two witnesses. [But certain formalities are required in such case by § 41 of the last-mentioned act, as to which see *Deeds, Execution of*. Testamentary writings are exempt from stamp duty ; 33 & 34 Vict. c. 97, sched.] As testaments do not operate till the death of the granter, they may validly be revoked at any time ; and a clause declaring them irrevocable is ineffectual. The revocation of a testament may either be express, by the granter executing a writing for that special purpose, or implied, by his making a new testament inconsistent with the former. As it is thus always the testament

that may have been executed last which is effectual, deeds of this kind have obtained the name of last or latter wills. [See *Sibbald's Trs.* 13 Jan. 1871, 9 Macph. 399. In *Kirkpatrick's Trs.* 23 June 1874, 1 R. (H.L.) 37, it was held that an ineffectual *mortis causa* conveyance of heritage did not revoke by implication a prior conveyance thereof. Where there is no express revocation, a posterior will revokes a prior one only in so far as the two are incapable of standing together; so that the last will of a testator may consist of several writings; *Grant*, 28 June 1852, 1 Macq. 163. A mere draft or memorandum is not in itself sufficient to revoke or alter a prior deed; *Cunningham*, 15 March 1871, 9 Macph. 713; *Forsyth's Trs.* 13 March 1872, 10 Macph. 616; *Lamont*, *supra*. Where a posterior deed, which revokes a prior deed, is cancelled by the testator, the prior deed revives; *Howden*, 8 July 1815, F.C.; *Dove*, 31 May 1827, 5 S. 734. With regard to the effect of deletions, marginal additions, &c., on a will, Lord M'Laren, in *Pattison's Trs.* 11 Aug. 1888, 16 R. 73, stated the following propositions:—"(1) If a will or codicil is found with the signature cancelled, or lines drawn through the dispositive or other essential clause of the instrument, then on proof that the cancellation was done by the testator himself, or by his order, with the intention of revoking the will, the will is to be held as revoked; otherwise it is to be treated as a subsisting will. (2) If a will or codicil is found with one or more of the legacies or particular provisions scored out, that raises no case for inquiry as to the testator's intention to revoke the instrument in whole; a question is raised only as to his intention to revoke the particular provision, which will not be held to have been revoked unless upon evidence that the scoring was done by the testator himself or by his direction with the intention of revoking the clause, and the authentication of the deletion by the testator's initials is sufficient evidence of such intention. (3) Marginal or interlineal additions, apparently in the testator's handwriting, will not be held part of the instrument unless authenticated by his signature or initials, for until such authentication he cannot be supposed to have finally resolved to make the addition. (4) When a will or codicil contains words scored out and others inserted in their place, the cancellation is conditional on the substituted words taking effect, so that if the substituted words are rejected for want of authentication [the will is to be read as if there had been no deletion." General words in a will, purporting to dispose of a man's whole property, are presumed to apply only to property, the succession to which is not already regulated by special destination; *per* L. C. Selborne, in *Glendowyn*, 19 May 1873, 11 Macph. (H.L.) 33. See *General Disposition*; also *Bertram's Trs.* 10 March 1888, 15 R. 572. The question is always one of intention.] The effect of a testament is to authorise the commissary court to confirm, after the testator's death, the person who has been named executor, in preference to all others who may apply for the office; or, in other words, to empower that person to recover and administer the moveable property of the deceased, for behoof of all interested in it. With regard to the form of confirmation, and the duties and powers of executors, see *Confirmation. Executor.*

[By the former law,] a testament was effectual only with regard to the moveable estate of the testator. By such a deed, therefore, one could not settle heritage, nor even such moveables as were rendered heritable by destination, and were carried by service, as bonds secluding executors, and the like. [The owner of heritage could not settle the succession thereto otherwise than by words of *de præsenti* conveyance. But by § 20 of the Consolidation Act of 1868 (31 & 32 Vict. c. 101), "it shall be competent to any owner of lands to settle the succession to the same in the event of his death, not only by conveyances *de præsenti*, according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings; and no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands which shall have been granted by any person alive at the commencement of this act, or which shall be granted by any person after the commencement of this act, shall be held to be invalid as a settlement of the lands to which such deed or writing applies, on the ground that the grantor has not used, with reference to such lands, the word 'dispone,' or other word or words importing a conveyance *de præsenti*; and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain with reference to such lands any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the grantor,

[or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands within the meaning of § 19 hereof by the grantor of such deed or writing in favour of the grantee thereof, or of the legatee of such lands, and shall be held to create and shall create in favour of such grantee or legatee an obligation upon the successors of the grantor of such deed or writing to make up titles in their own persons to such lands and to convey the same to such grantee or legatee; and it shall be competent to such grantee or legatee to complete his title to such lands in the same manner and to the same effect as if such deed or writing had been such a general disposition of such lands in favour of such grantee or legatee, and that either by notarial instrument or in any other manner competent to a general disponee: Provided always, that nothing herein contained shall be held to confer any right to such lands on the successors of any such grantee or legatee who shall predecease the grantor, unless the deed or writing shall be so expressed as to give them such right in the event of the predecease of such grantee or legatee." The result of this enactment is to place heritage in the same position as moveable estate, with respect to the settlement of the succession thereto. "It is no longer a question of technicality, but of common construction, whether heritage was intended to be carried or not;" *per* Lord Neaves, in *Hardy's Trs.* 13 May 1871, 9 Macph. 736. "Words conveying moveables are not sufficient to convey heritable property unless the wish is clearly implied in the language. They must be words importing that heritable property is meant to be conveyed as well as moveable, or that the whole estate is to be conveyed without distinguishing between the two kinds;" *per* Lord Pres. Inglis, in *Urquhart*, 13 June 1879, 6 R. 1026. See also *Aim*, 15 Dec. 1880, 8 R. 294; *Farquharson*, 19 July 1883, 10 R. 1253; *Oag's Curator*, 26 June 1885, 12 R. 1162; *Campbell*, 30 Nov. 1887, 15 R. 103; *Forsyth*, 16 Dec. 1887, 15 R. 172; and cases in *Begg's Conv. Code*, 67. As to the word "dispone," see *Dispositive Clause*. With regard to moveable estate, a will is effectual at common law, if executed according to the forms required by the law of the country in which it is made; and the [above enactment makes such a will effectual also in regard to heritable estate in Scotland; *Connel's Trs.* 16 March 1872, 10 Macph. 627; *Studd*, 8 May 1883, 10 R. (H.L.) 53. See 24 & 25 Vict. c. 114. By 37 & 38 Vict. c. 94, § 46, trustees or executors are enabled to complete a title to a testator's heritage in cases where the will does not contain words of direct conveyance or bequest in their favour. See also § 21 of the Consolidation Act. By 37 & 38 Vict. c. 94, § 51, probate of a will is made equivalent to the will or extract thereof, for the purpose of completing title.

[Short styles are subjoined to this article (1) of a simple Last Will and Testament, and (2) of a Trust Disposition and Settlement, containing examples of some of the more ordinary provisions occurring in these deeds.]

See generally, *Stair*, B. iii. tit. 4, § 24; tit. 8, § 20; B. iv. tit. 43, § 21; *More's Notes*, cccxxxviii.; [*Ersk.* B. iii. tit. 2, § 23; tit. 8, § 20;] tit. 9, § 5; *Bank.* ii. 377; iii. 52; *Bell's Princ.* §§ 1692, 1862; *Robertson on Personal Succession; Jurid. Styles*, i. 286; ii. 565; [*M'Laren on Wills; Menzies' Conv.* 477; *M. Bell's Conv.* ii. 925; *Dickson on Evidence*, §§ 631, 776; *Craigie's Digest* (Mov.), 260; *Jarman on Wills; Williams on Executors; Theobald on Wills; Savigny's Priv. Internat. Law*, 282. See *Testament. Mutual Testament. Legacy. Vesting. Disposition and Settlement. Codicil. Revocation. Succession. Conditio si sine. Conditional Institution. Substitution. Destination. Reduction. Insanity. Deeds, Execution of. Testing Clause. Thellusson Act.*

Last Will and Testament.

I, A. (*insert full name, occupation or designation, and residence*), being desirous of settling the succession to my means and estate after my death, do hereby give, grant, and dispone, to and in favour of B., and his heirs and assignees, my whole means and estate, heritable and moveable, real and personal, wherever situated, belonging or due to me at the time of my death, with the writs, vouchers, and securities thereof, but always under burden of my just and lawful debts, deathbed and funeral expenses, and of the following specific legacies, viz., to C. my gold watch and chain, to D. my sword, &c., &c., and the following pecuniary legacies, viz., to E. the sum of £100, &c., &c.; And I nominate the said B. to be my sole executor: In witness whereof, I have subscribed these presents, written by my-

[self upon this and the two preceding pages (or as the case may be), at upon the day of 18 .

Or, In witness whereof, I have subscribed these presents written upon this and the two preceding pages (or as the case may be), by F. (*insert full name and designation of the writer*), at upon the day of 18 , before these witnesses, G. and H. (*insert full names, occupations or designations, and residences*).

Note.—Any male or female above the age of fourteen years, who is not a beneficiary under the will, may be a witness.

When the testator has property in England, it may save trouble if there is inserted in the testing clause immediately before the signatures of the witnesses, a docquet in the English style, as follows:—"Signed by the said A. and acknowledged by him as his last will and testament in the presence of us both, being present at the same time, who at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses."

Testamentary writings are exempt from stamp duty.

Trust Disposition and Settlement.

I, A. (*insert full name, occupation or designation, and residence*), in order to regulate the succession to my means and estate after my death, do hereby give, grant, assign, and dispone to and in favour of B., C., D., and E. (*insert full names, occupations or designations, and residences*), and the survivors or survivor, acceptors or acceptor of them, and to their or his assignees, my whole means and estate, heritable and moveable, real and personal, wherever situated, belonging or due to me at the time of my death, with the writs, vouchers, and securities thereof: But in trust always, for the ends, uses, and purposes after mentioned, viz., (First) For payment of all my debts, deathbed and funeral expenses, and the expense of executing this trust: (Second) My trustees shall implement the following specific legacies, viz., to &c., &c.: (Third) For payment of the sum of £ to , my wife, as soon as is convenient after my death: (Fourth) For payment to my said wife of an annuity of £ during all the days of her life, payable half-yearly in advance at the terms of Whitsunday and Martinmas, commencing the first term's payment at the first of these terms which shall happen after my decease, with a fifth [part more of liquidate penalty in case of failure in the punctual payment thereof, and interest thereon at the rate of £5 *per centum per annum* during the not payment; but I hereby declare that the said annuity shall be alimentary allenarly, and shall not be affectable by her debts or deeds or by the diligence of her creditors: (Fifth) For payment of the following provisions to my children, viz.—To my sons , and , of the sums of £ each, and to my daughters , and , of the sums of £ each, payable in the case of sons on their attaining majority, and in the case of daughters on their attaining majority or being married, but with power to my trustees to apply towards the maintenance and education of my said children so much of the income of their respective provisions as my trustees shall think fit, and also to apply towards their setting up in business or advancement in life such portions of the capital of their respective provisions as my trustees shall think proper, and also to settle my said daughters' provisions in their contracts of marriage in such way as my trustees shall deem to be most to the advantage of my said daughters: (Sixth) For payment of an annuity of £ to , payable at the terms, and with the interest and penalties as above specified with respect to the annuity provided to my wife: (Seventh) For payment of the following legacies, at the first term of Whitsunday or Martinmas which shall happen six months after my death, with interest thereon at the rate of £5 *per centum per annum* during the not payment thereof, viz., to : (Lastly), My trustees shall hold the whole rest and residue of my estate, subject to the above provisions, for payment thereof to , and , equally among them share and share alike: And I hereby declare that the foregoing provisions in favour of my said wife and children shall be in full of all claims of terce and *jus relictæ*, and of legitim, and all other claims that might be competent to them by and through my decease; and I declare also that the whole legacies and annuities hereinbefore provided shall be payable free of legacy duty: With full power to my trustees to continue the investments in which my means and estate may be placed at the time of my death, or to sell, realise, and convert into cash the whole trust-estate hereby conveyed, and to invest the funds coming into their hands on heritable security, or in the purchase of heritable property, feu-duties, or ground

[annuals, or in Government stock, or Indian or Colonial stock guaranteed by Government, or upon the debentures or mortgages of public joint stock companies or public trusts: With power also to appoint factors or law agents either of their own number or other fit persons, and to allow them suitable remuneration: And I nominate my trustees to be my sole executors: And I nominate and appoint my said wife and the said (*insert names of trustees*) to be tutors and curators to such of my children as shall be under age at the time of my death during their respective pupillarities and minorities: And I hereby declare that the said trustees, tutors and curators shall not be liable for omissions in management, but shall only be bound to act honourably, and shall nowise be liable *singuli in solidum*, but each for his own actual intromissions and wilful default only: In witness whereof (*complete the testing clause as in the preceding style*).]

WILL OF A SUMMONS, *or other Signet Letter.* The will is that part of the writ beginning, "*Our will is,*" *&c.*, and containing the will or command of the Sovereign, or of the judge in whose name the writ issues, to the messenger-at-arms or other officer of the law, requiring him to cite the party to answer in court, at the suit of his opponent. The will charges the officer to cite the party, on the *inducice* appropriate to the particular action, to appear to answer at the instance of the other party in the matter libelled. [A warrant to arrest may be inserted in the will of a Court of Session summons; 1 & 2 Vict. c. 114, § 16; and also a warrant to inhibit; 31 & 32 Vict. c. 100, § 18. See *Arrestment. Inhibition.*] The officer serves a copy of the summons on the party, along with a citation to appear in court, pursuant to the injunction in the will, but these service copies, or *doubles* as they are called, in the ordinary case, do not contain a copy of the will; hence the technical expression in the officer's execution is, that he served the party with a full double "*to the will,*" *i.e.*, as far as the will. [For forms of the wills, see A.S. 11 July 1828, § 22; *Jurid. Styles*, iii. 210; *Parker's Styles*, 96.] See *Stair*, B. iv. tit. 5, § 2; *Ersk.* B. iv. tit. 1, § 7; *Ross's Lect.* i. 290; [*Shand's Prac.* i. 227; *Mackay's Prac.* i. 375. See *Summons.*] *Doubles of Summonses. Inducice. Citation. Execution.*

WIND BILLS. See *Accommodation Bills.*

[**WINDING UP.** See *Joint Stock Companies. Partnership.*]

WINTER HERDING. Prior to 1686, c. 11, no one was bound to herd his cattle so as to prevent their trespassing, except during what was called "haining time," that is, while the corn was on the ground. Hence, although a man might drive his neighbour's cattle off his ground, he could not poind or detain them *brevi manu*, until the above statute, on the preamble that much damage to plantings and inclosures was sustained through the not herding of cattle and sheep during the winter, enacted that all heritors, liferenters, tenants, cottars, and other possessors of lands or houses, should herd their horses, nolt, sheep, swine, and goats, during the entire year, winter as well as summer; and in the night-time should keep them in houses, folds, or inclosures; certifying the contraveners that they should pay half a merk (about 1s. 3½d., sterling) for every animal found on their neighbour's ground, over and above making reparation for the damage done to the "grass or planting." It is also made lawful for the heritor or possessor of the ground to detain animals found trespassing until the half-merk is paid, together with the expense of keeping the animal. Actions under this statute may be brought before the sheriff; and it seems to have been decided (although the cases are exceedingly ill reported)—1. That so far as regards the damage done, the statute applies to damage done to corn as well as to grass or planting, although, where a herd had been kept, the statutory penalties were held not to be exigible; *Govan*, 1794, M. 10499. 2. That where there was not only a march-fence, but also herds kept, the owner of the trespassing cattle was liable both for damages and also for the statutory penalties; *Loch*, 1799, M. 10501. In *Govan*, the cattle had not been poinded *brevi manu*, and it was argued (although unsuccessfully), that in such circumstances the statute did not apply. In *Loch*, the cattle were poinded or detained, and then returned to the owner, and the action thereafter raised. [In *M'Arthur*, 18 Oct. 1878, 6 R. 41, no overt act had been done in the way of detaining the cattle until their trespass had ceased, and it was held that the right to take possession of them had been lost. See also *Grant*, 3 May 1888, 2 White, 6.] See *Stair*, B. ii. tit. 3, § 67; *Bank.* B. iv. tit. 41, § 16; *Ersk.* B. iii. tit. 6, § 28; [*Rankine on Land-Ownership*, 508.] See *Planting and Inclosing. Poinding of Stray Cattle.*

WITCHCRAFT; was formerly held to be an offence punishable with death, and cognisable even by the sheriff; 1563, c. 73. But all prosecution for this imaginary crime was prohibited by 9 Geo. II. c. 5, except that persons proved to have pretended to witchcraft, occult skill, fortune-telling, or any such art, calculated to impose on the ignorant, are to be imprisoned for a year, to stand once every three months during that period on the pillory, and to find security for their good behaviour. *Ersk.* B. i. tit. 4, § 4; B. iv. tit. 4, § 18; *Hume*, i. 588.

WITNESS. [See *Evidence. Instrumentary Witness. Citation. Diligence. Absconding.* The present article deals merely with the rate of allowance to witnesses in court.

A. *In the Court of Session*, the rate is fixed by A.S. 15 July 1876, and is as follows:—

1. *Where the witnesses reside in the town where the trial or proof takes place.*—Labourers, mechanics, servants, journeymen, &c., per day, according to circumstances, from 5s. to 7s. 6d. Tradesmen, shopkeepers, innkeepers, clerks, farmers, manufacturers, auctioneers, &c., per day, according to circumstances, from 10s. to £1, 1s. Gentlemen, merchants, bankers, clergymen, &c., per day, £1, 1s. Professional persons, such as writers or solicitors, accountants, physicians, surgeons, eminent architects, civil engineers, surveyors, &c., per day, £2, 2s. Women, according to their station in life, per day, from 5s. to £1. The above allowances are in full of all the above respective classes of persons shall be entitled to demand for their trouble and maintenance, and no separate charges shall be allowed for hotel expenses or otherwise in respect of witnesses.

2. *Where the witnesses do not reside in the town where the trial or proof takes place.*—They shall be allowed at the above rates for the time necessarily occupied by them in going to, remaining at, and returning from the place of trial or proof, besides reasonable travelling charges for going to and returning from the place of trial or proof, according to their rank and station of life, and with reference to the means of conveyance to and from their respective places of residence, such as steam-boats, railways, &c. The said allowances for travelling shall not exceed in whole the rate of sixpence per mile for going to, and the same for returning from [the place of trial or proof; and in cases where it is found necessary to employ professional or scientific persons, such as physicians, surgeons, chemists, engineers, land-surveyors, or accountants, to make investigations previous to a trial or proof, in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such persons shall be allowed as may be considered fair and reasonable, provided that the judge who tries the cause shall—on a motion made to him either at the trial or proof, or within eight days thereafter if in session, or if in vacation within the first eight days of the ensuing session—certify that it was a fit case for such additional allowance.

Receipts or vouchers for all the sums stated as paid to witnesses shall be produced to the auditor at the taxation of the account, otherwise the same shall not be allowed.

The names of the witnesses examined at the trial or proof shall be stated separately, as in a schedule annexed, from those not examined; and if the expenses of all or any of the latter class of witnesses shall be demanded, the grounds or reasons for such demand shall be stated in a note appended to the schedule, as, for example, that the witness was cited to prove a certain fact or writing which the opposite party had refused to admit before trial or proof, but which was admitted at the trial or proof, whereby the examination of the witness was rendered unnecessary; or (in the case of a defender) because the pursuer had failed to prove his case, in consequence of which the defender's witnesses were not examined; but in this latter case it ought to be shown that all the witnesses charged for were properly and necessarily cited, the general rule being that the expense of witnesses not examined shall not be allowed unless a good and valid reason shall be assigned for their non-examination. In the absence of a note in terms of this direction, the witnesses not examined shall be disallowed by the auditor. See *Mackay's Prac.* ii. 595.

B. *In Criminal Courts.*—The rates of payment to witnesses in the criminal courts, as allowed at the audit of the sheriff's accounts in Exchequer (1862), are as follows:—

1. *Ordinary witnesses*, that is to say, persons of all ranks and professions cited to give evidence as to facts or circumstances which may have come under their observation in connection with the cases in which they are called, and who travel some considerable distance, are allowed, not exceed-

[ing, per day, 4s. 6d. Besides necessary hires or fares; if by railway—third class when available. Or, including fares and all other expenses, they are allowed, not exceeding, per day, 7s. 6d. When travelling on foot, and for short distances, not exceeding, in all, per day, 4s. 6d. No allowance is made to ordinary witnesses for attendance to give evidence in the towns in which they reside, or from within a mile thereof, unless they are persons of low rank, and unable from poverty to attend without recompense, in which case they are paid not exceeding, per day, 3s.

2. *Salaried police officers, prison officers,* and the like, when required to travel to a distance, are allowed expenses only, not exceeding the rates payable to ordinary witnesses—see No. 1; but if resident in the towns where their evidence is required, they are not remunerated, with the exception of officers on night duty, who are allowed, for each day's attendance, 1s.

3. *Sheriff officers* who have no salaries, but are remunerated by fees, are allowed for attendance in town, not exceeding, per day, 3s. When from a distance, not exceeding, per day, 7s. 6d. Besides fares—third class when available.

4. *Medical men,* when cited to give professional evidence from a distance of more than one mile from the towns in which they reside, if detained above four hours, are allowed, not exceeding, per day, £2, 2s. Besides fares; but nothing additional for maintenance. If in town, they are allowed, not exceeding, per day, £1, 1s.

5. *Engineers, architects, surveyors, silversmiths, engravers,* and other professional persons, when required to give professional evidence, are paid according to rank, at various rates not exceeding, per day, when from a distance, £2, 2s. Besides fares; and if in town, not exceeding, per day, £1, 1s.

6. *Bankers* or others, from a distance, whose evidence may be considered necessary, on account of their familiarity with handwriting, for identification in cases of forgery, and the like, when not also called as ordinary witnesses to facts, are paid at various rates, not exceeding, in all, per day, £1, 1s. But they receive no allowance for attendance in the towns in which they reside.

7. *Official witnesses,* such as procurators-fiscal, sheriff-clerks, their clerks, and clergymen, when cited to give official evidence, are allowed, when from a distance, their necessary expenses, not exceeding, per day, £1, 1s. But they receive no allowance [for attendance in the towns in which they reside. The same regulation applies to registrars of births, &c., when they are cited officially, and travel a distance, to the High Court and Circuit Courts of Justiciary; but for attendance to give evidence in the sheriff courts, their allowance for expenses is limited to, not exceeding, per day, 7s. 6d. Besides fares—third class; and they receive no allowance for attendance in the towns in which they reside.

8. *Superior officers and clerks of the Post-Office and other Revenue departments* in the principal towns, required officially, and travelling to a distance, are allowed for travelling charges and expenses not exceeding, in all, per day, £1, 1s. Or for personal expenses, not exceeding, per day, 12s. With railway fares—second class. Inferior officers—same as ordinary witnesses, No. 1.

9. *Attendants on infirm or very young witnesses,* when from a distance and absolutely necessary, are allowed for expenses at the same rate as ordinary witnesses; and witnesses certified to be unable from age or infirmity to travel by the ordinary public conveyances, are allowed the expense of suitable special conveyances.

10. No allowance is made for payment of persons employed to supply the place of witnesses during their absence from home.

11. *Witnesses from England or Ireland* are allowed "reasonable and sufficient expenses," in terms of 45 Geo. III. c. 92, § 4, in accordance so far, but not in strict conformity, with the foregoing resolutions.

It is understood that witnesses at the High Court of Justiciary are paid on a slightly more liberal scale; 7s. 6d. per day being generally allowed to ordinary witnesses, and second class railway fare.]

WOMEN; are excluded from a variety of offices peculiar to men, such as that of tutor-at-law. [They may be appointed tutors, however, by a father or a magistrate. A married woman may legally be named trustee or executrix, but not tutrix or curatrix; *Stoddart,* 30 June 1812, F.C.; *Darling,* 11 May 1825, 1 W. & S. 188. See *Ersk.* B. i. tit. 7, §§ 4, 12; *Bell's Com.* i. 31; *Fraser on Husb. and Wife,* i. 507. Women cannot vote at a parliamentary election; see *Election Law.* But by 44 & 45 Vict. c. 13, women who are unmarried, or not living in family with their husbands, were admitted to the municipal franchise. They are not, however, eligible for election as town councillors. Women are not disqualified by their sex from voting at school-

[board elections, nor from being elected as members. Married women are competent candidates, but there is diversity of opinion as to their qualification to vote. See *Schools*, p. 956. In *Jex-Blake*, 28 June 1873, 11 Macph. 784, it was held that female students have no right to graduate at the University of Edinburgh.] All objection to the admissibility of women, [either as witnesses in a cause, or as instrumentary witnesses,] is now done away; *Ersk.* B. iv. tit. 2, § 22; [31 & 32 Vict. c. 101, § 139. See *Evidence.*] A woman may be made bankrupt, except where married; and even in that case, if her husband have abandoned Scotland, and if she trades for herself, [or in respect of her separate property protected by the Married Women's Property Act, 1881,] she may be rendered bankrupt; *Bell's Com.* ii. 157; [*Goudy on Bankruptcy*, 74–6. See *Marriage.*]

WOODS. Proper forests are not conveyed without a special clause; but common woods go as part and pertinent of the lands. *Ersk.* B. ii. tit. 6, § 14. [See *Timber. Sylva Cædua.*]

[**WOODS AND FORESTS, COMMISSIONERS OF.** The Board of "Commissioners of Woods, Forests, Land Revenues, Works and Buildings," for the management of the property belonging to the Crown, was established by 2 & 3 Will. IV. c. 1, and 3 & 4 Will. IV. c. 4, § 69. See *L. Dunglas*, 24 Dec. 1836, 15 S. 314. By 14 & 15 Vict. c. 42, this board was divided into a board of "Commissioners of Woods, Forests, and Land Revenues," and a board of "Commissioners of Works and Public Buildings." The Commissioners of Woods and Forests administer the Crown lands under the general regulations of 10 Geo. IV. c. 50. See also 8 & 9 Vict. c. 99; 15 & 16 Vict. c. 62; 36 & 37 Vict. c. 36; 48 & 49 Vict. c. 79. They act as trustees for the Crown, and are subject to the same rules as trustees of corporations and other public bodies. See *Bell's Princ.* § 672; *Hunter's Landlord and Tenant*, i. 132; *Rankine on Leases*, 26. See *Crown Lands.*]

WORKING DAYS. It is generally stipulated in charter-parties, that the master of the ship shall remain at the port of delivery to unload or procure cargo, or sail with convoy, for a certain number of *working* or *lay days*, with allowance of a further time, called *days of demurrage*, during which he may remain on payment of a daily hire; and, on occasion of improper detention, demurrage is given to the shipowners in name of damage also, as well as under contract. *Bell's Com.* i. 623; *Brodie's Supp. to Stair*, 988. See *Demurrage. Lay Days.*

WORKMEN. [The common law in regard to the relation between employers and workmen (as to which see *Master and Servant*) has been reinforced by several statutory enactments, having for their object mainly to protect the separate interests of these classes, and to facilitate the adjustment of disputes between them.

[The Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), authorises the ordinary sheriff court of the county, in any dispute arising out of or incidental to the relation of employer and workman, to adjust and set off against each other all subsisting claims, liquidated or not, for wages, damages, or otherwise, incidental to the relation between the parties; to rescind the contract between them, upon such terms as to payment or apportionment of wages or other claims as may seem just; and to accept security for performance of contract, if both parties consent, instead of awarding damages for breach; § 3. The same powers are, by § 4, conferred on the sheriff's small debt court, in cases where the sum in dispute does not exceed £10; an order for payment or security beyond that amount being declared incompetent in that court. By §§ 5–7, the jurisdiction of the summary or small debt court in disputes between master and apprentice is further regulated (see also § 12). The term "workman" does not include a menial or domestic servant, but means any labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or other person engaged in manual labour, whether under or above twenty-one years of age, who has entered into or works under any contract with an employer, whether the contract be express or implied, oral or written, or be a contract of service or a contract personally to execute any work or labour; § 10. By § 13, the act was declared not to apply to seamen or apprentices to the sea service; but this provision was repealed by 43 & 44 Vict. c. 16, § 11. See *Oakes*, 21 Feb. 1884, 11 R. 579. In *Wilson*, 22 June 1878, 5 R. 981, the opinion was expressed that a tramway conductor is a workman in the sense of the act. But the contrary view was taken in *Morgan*, 13 Q.B.D. 832, and *Cook*, 18 Q.B.D. 683; see also *Yarmouth*, 19 Q.B.D. 647. In the case of any child, young person, or woman, subject to the provisions of the Factory Acts, 1833 to 1874, any forfeiture on the ground of absence or leaving work

[shall not be deducted from or set off against a claim for wages or other sum due for work done before such absence or leaving work, except to the amount of the damage (if any) which the employer may have sustained by reason of such absence or leaving work; § 11. The sheriff's decrees and orders under the act may be enforced in the same way as if pronounced in his ordinary or small debt court; § 14. See A.S. 29 Jan. 1876. Imprisonment for debt having now been abolished (in the general case), payment can only be enforced against a workman by arrestment and poinding. As to whether the sheriff's power, under § 3, to rescind contracts entitles him to override arbitration clauses or awards in a contract of service, see *Wilson*, *supra*.

[By the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), it is enacted that an agreement or combination by two or more persons to do any act in furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if the same act committed by one person would not be punishable as a crime; § 3. Nothing in the section is to exempt any person punishable for conspiracy under any statute; nor to affect the law as to riot, unlawful assembly, breach of peace, sedition, or any offence against the state or the sovereign; *ib.* "The result of this section (taken in combination with § 7, *infra*) is to make it perfectly lawful for workmen, *so far as criminal consequences are concerned*, to threaten an employer that they will leave his service in a body unless he discharges a particular workman. But although protected by statute from criminal liability, workmen would expose themselves by such conduct to a civil action of damages at the instance of a fellow-workman, discharged by his employer in consequence of such threats;" *Fraser on Master and Servant*, 424. Every person who, with a view to compel any other person to abstain from doing or to do any act which he has a legal right to do or abstain from doing, wrongfully and without legal authority,—(1) uses violence to or intimidates such other person or his wife or children, or injures his property; or (2) persistently follows him about from place to place; or (3) hides any of his tools, clothes, or other property, or hinders him in the use thereof ("rattening"); or (4) watches or besets the house or other place where he resides, or works, or carries on business, or happens to be, or the approach to such house or [place ("picketing"); or (5) follows him with two or more other persons in a disorderly manner in or through any street or road,—is liable to a fine of £20, or imprisonment for three months, with or without hard labour; § 7. Attending at or near a place, in order merely to obtain or communicate information, is not a watching or besetting within the meaning of the section; *ib.* See *Bauld*, 1876, 13 Cox Cr. Ca. 282. Similar penalties are enacted with regard to breach of contract involving injury to persons or property,—in particular by persons employed in the supply of gas or water; §§ 4, 5. Where a master, being legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, whereby the health of the servant or apprentice is or is likely to be seriously or permanently injured, he is liable to a fine of £20, or to imprisonment for six months, with or without hard labour; § 6. The act does not apply to seamen; § 16. Proceedings under the act are at the instance of the Lord Advocate, or of the procurator-fiscal of the sheriff court. They may be on indictment in the Court of Justiciary or sheriff court, or may be taken summarily before the sheriff; § 19. There is appeal to the Circuit Court, as prescribed by 20 Geo. II. c. 43, § 20.

[As to arbitration between masters and workmen, see 5 Geo. IV. c. 96; 7 Will. IV. & 1 Vict. c. 67; 8 & 9 Vict. c. 77 (hosiery); 8 & 9 Vict. c. 128 (silk weavers); the Councils of Conciliation Act, 1867 (30 & 31 Vict. c. 105); and the Arbitration (Masters and Workmen) Act, 1872 (35 & 36 Vict. c. 46). Other statutes relating to workmen are the Embezzlement Acts, 22 Geo. II. c. 27, and 17 Geo. III. c. 56; the Chimney-Sweepers and Chimneys Regulation Acts, 3 & 4 Vict. c. 85, and 27 & 28 Vict. c. 37; the Children's Dangerous Performance Act, 42 & 43 Vict. c. 34; the Prevention of Cruelty to Children Act, 52 & 53 Vict. c. 44 (*infra*, pp. 1132–3); the Shop Hours Regulation Act, 1886 (49 & 50 Vict. c. 55), which restricts the hours of employment of young persons and children; and the act 46 & 47 Vict. c. 31, which prohibits the payment of wages to workmen in public-houses. The Employers Liability Act, 1880 (43 & 44 Vict. c. 42), is dealt with under *Master and Servant*. See also *Trade Unions*. *Truck Acts*. *Factories*. *Mines*. *Wages*.

[See on this subject, *Fraser on Master and Servant*, 372; *Davis's Labour Laws.*]

WRECKS; formerly fell to the king or his donatory, the admiral or the heritor, if no living thing escaped; statute Alex. II. c. 25, § 1. But foreigners can always, on application, have access to their wrecks on our coasts; 1429, c. 124; and the wrecks of natives belong to the owners, if they apply within a year, or even at a more remote period, if reasonable in the circumstances. Theft from wrecks is punished with severity; *Hume*, i. 485. Stranded goods, and such wreck goods as the owners claim and recover (but not *flotsam*, *jetsam*, and *lagan*) are liable to custom. Our law as to shipwreck is not innovated on by 12 Anne, c. 18, although it extends to Scotland. [See *Commrs. of Customs*, 2 Dec. 1812, F.C.; *M. Breadalbane*, 28 Jan. 1850, 12 D. 602; *Hebden*, 26 Feb. 1868, 6 Macph. 489. Wrecks are now under the superintendence of the Board of Trade, who appoint a receiver of wreck for each district. See the provisions of the Merchant Shipping Acts, under *Shipping Law*, p. 1015. As to removal of wrecks obstructing navigation, see 40 & 41 Vict. c. 16; 52 & 53 Vict. c. 5.] See *Stair*, B. ii. tit. 1, § 5; *Bank.* B. i. tit. 8, § 5; *More's Notes to Stair*, cxlvi.; *Bell's Com.* i. 644; *Bell's Princ.* § 1292; *Swint. Abridg. h. t.*; *Brown's Synop. h. t.*, and p. 1979; [*Rankine on Land-Ownership*, 213; *Murton on Wreck Inquiries.*] See *Dereliction. Flotsam. Jetsam.* [*Salvage.*]

WREK OF THE SEA; "a word specified in the laws and sundry infeftments, signifying power, liberty and prerogative, competent to the king, or to any person to whom the same is granted by him, by infeftment or any other disposition, to intromit and uptake such gudes and gear as are ship-broken, or fall to him by escheat of the sea. This liberty was as competent and profitable to him who was infeft with wrek as it might be to the king" himself. *Skene, h. t.* See *Wrecks.* [*Ware.*]

WRIT OF ERROR. See *Error, Writ of.*

WRITERS TO THE SIGNET. The Clerks or Writers to the Signet are said to have been anciently clerks in the office of the Secretary of State, by whom writs passing the King's Signet were prepared. These writs were summonses ordering attendance on the King's court, or charging the party to obtemper the decree pronounced against him, or authorising execution against his person or estate. When the College of Justice was established, the Writers to the Signet were in the exercise of nearly the same duties in which they are engaged at the present day; and they are recognised as members of that college; 1537, c. 59. [They are an incorporation, by immemorial custom; *Solicitors* v. *Writers*, 1802, 4 Pat. 326; *Writers* v. *Graham*, 21 June 1825, 1 W. & S. 538. At one time Writers to the Signet had the exclusive privilege of preparing such summonses as could not pass the signet without a bill, and the formal part of all other summonses passing the signet. But by 13 & 14 Vict. c. 36, § 18, it was made unnecessary that any summons before the Court of Session should proceed upon a bill. And by 31 & 32 Vict. c. 100, § 13, a summons may now be signed by any agent entitled to practise before the Court of Session, provided it be signed on the last page by a Writer to the Signet, in testimony of its being written to the signet; and any Writer to the Signet is bound, on tender of two shillings and sixpence, to sign any summons which may be presented to him; incurring thereby no responsibility. Letters of diligence passing the signet (where still used) must be signed by a Writer to the Signet; and so also must a minute craving warrant to imprison under 1 & 2 Vict. c. 114, § 6. But notes of suspension and other Bill-Chamber proceedings may be signed by any agent; *Solicitors* v. *Writers*, *supra.* All Crown writs, including charters, precepts, and writs from the Sovereign or Prince of Scotland, must be prepared by Writers to the Signet; 31 & 32 Vict. c. 101, § 64. Prior to 5 August 1873, the Writers to the Signet and the Solicitors before the Supreme Court had the exclusive right of practising as agents before the Court of Session. But now any person is entitled to practise in any court of law in Scotland, who is enrolled as Law Agent under the provisions of the act 36 & 37 Vict. c. 63. See *Law Agent.*] The society is now under the Keeper of the Signet, who usually acts by a deputy-keeper; and the affairs of the body are conducted by this deputy and certain commissioners named by the keeper, from the members, with power to them to make byelaws for the admission of members, and the regulation of their conduct. [The office of Keeper of the Signet was conjoined with that of Lord Clerk-Register by 57 Geo. III. c. 64.] By the existing rules, a person applying to be admitted to enter into indenture as an apprentice, must be at least [seventeen] years of age. The apprenticeship is for five years; [but where

[the applicant is not under nineteen, and holds a degree in law or arts of a University of Great Britain or Ireland, granted after examination, the period of indenture may be three years. Failing such degree, applicants must produce evidence—either of having attended, in three separate sessions, and of having taken part in the examinations in three separate classes of Arts (Humanity being one) in any Scottish University—or of having passed the higher examination in general knowledge for Law Agents, under A.S. 20 Dec. 1873. See *Law Agent.* The form of application for indenture is by petition to the Keeper and Commissioners to the Signet. On expiry of the apprenticeship, the indenture must be discharged, and the discharge and oath of service recorded at the Signet Office within three months after the date of the discharge. Thereafter a petition may be presented to have the applicant examined in the law, civil and criminal, of Scotland.] Every candidate for admission must have attended, [in at least two separate winter sessions, and have taken part in the examinations in,] four courses of the law classes, viz., one of the civil law, one of Scots law, and one of conveyancing, with a second course of any one of these. [But where the applicant holds the degree of LL.B. of Edinburgh University, he need not attend a second course of any of the classes. The examinations consist of private and public trials; the former being directed mainly to the theory, and the latter to the practice of the law. The public trials take place three months after the private trials. The fees on entering into indenture, including £100 apprentice fee, are £344, 14s. 2d.; and the fees payable on admission are £142, 12s. 7d. See *Shand's Prac.* i. 83; *Mackay's Prac.* i. 128; *Begg on Law Agents*, 8, 39, 69, 370. See *Agent and Client. Law Agent. College of Justice.*]

WRIT. See *Deed. Proving of Tenor. Delivery. Testing Clause.*

WRONGOUS IMPRISONMENT; is described by the act 1701, c. 6, called the Scotch *Habeas Corpus.* Under that statute, wrongous imprisonment is committed by a judge or magistrate granting warrant for commitment, in order to trial, without cause expressed, and on information not subscribed by the informer; by officers of the law receiving or detaining prisoners on such warrants—refusing to the prisoner a copy of the warrant of commitment—detaining him in close confinement above eight days after such commitment—not duly releasing him on bail, where he is committed in order to trial for a bailable offence—or transporting persons beyond seas without their own consent, or a lawful sentence. Other species of wrongous imprisonment, not falling under the statute, are punished arbitrarily at common law. The statutory punishment is a pecuniary fine, and payment of a sum of money *per diem* to the prisoner, both proportioned to his rank; and, moreover, incapacity for public trust. This act has been extended to private offenders also; and the penalties (which cannot be modified) may be sued for before the Court of Session, who have the sole cognisance of the crime. The right to prosecute under the statute prescribes in three years. But this prescription does not extend to actions founded on imprisonment for civil debt; *M'Christie*, 21 Jan. 1831, 9 S. 312. Wrongous imprisonment founds also a civil action at common law for damages, at the instance of the injured party, against the magistrate or officer of the law, or other person who has done the wrong. In an action for wrongous imprisonment, it is competent to prove, in aggravation of damages, that one of the pursuer's family was sick; *Beveridge*, 13 July 1822, 3 Mur. 108. A summons founded exclusively on the act 1701 cannot support a conclusion for damages at common law, independently of the penalties imposed by the act; *Millar*, 21 May 1831, 9 S. 625. In this case an amendment of the libel was allowed. [As to damages for wrongous imprisonment on a *fugæ* warrant, see *Meditatio Fugæ.*] See *Ersk.* B. iv. tit. 4, §§ 31, 110; *Hume*, ii. 98; *Alison's Prac.* ii. 151, 152; *Bank.* i. 64; *Bell's Princ.* § 2035; *Jurid. Styles*, 2d edit. iii. 89. See *Damages.* [*Procurator-Fiscal. Criminal Prosecution.*] *Bail. Imprisonment. Habeas Corpus.*

Y

YARE. See *Cruives.*

YBURPANANSECA. This word is by Skene supposed to mean the law of birding-sek or burdenseck, which was, "*De furto vituli, vel arietis, vel quanti cibi quis portare potest super dorsum suum, curia non est tenenda.*" *Skene, h. t.* See *Burdenseck.*

YEAR AND DAY. The lapse of a year has several important effects in the law of Scotland, the day being added *in majorem evidentiam.* Thus, an heir had [formerly] a year and a day to deliberate as to whether or not he would take up his ancestor's succession, after the lapse of which he had not the privilege of serving heir *cum beneficio inventarii.* [The period was reduced to six months by 21 & 22 Vict. c. 76, § 27, re-enacted by 31 & 32 Vict. c. 101, § 61.] See *Annus Deliberandi. Beneficium Inventarii.* So also, if a marriage did not subsist for a year and day, or until the birth of a living child, matters, *quoad* the spouses, were restored to the state in which they were before the marriage, unless otherwise provided in the contract of marriage. [But this rule was done away with by 18 Vict. c. 23, § 7.] See *Marriage. Terce.* All adjudications led within year and day of the first effectual adjudication rank *pari passu* on the debtor's estate. See *Adjudication. Effectual Adjudication.* Letters of horning must be denounced within year and day of the charge, in order to warrant the issue of a caption. See *Denunciation.* A summons must be called within year and day after its execution, otherwise it falls. See *Summons.* A depending process must be moved in by having an interlocutor pronounced within year and day after the immediately preceding interlocutor, otherwise it falls asleep. See *Wakening.* Under the Small Debt Act, [1 Vict. c. 41, § 13,] a new charge of payment must be given to the debtor if the decree is not enforced within a year from its date, or from the charge for payment. See *Computation of Time.*

Z

ZAIRS. See *Cruives.*

ZARDE; an old English land measure, the same as *virgata terræ*, containing in some places twenty, in others twenty-nine, and in others thirty acres. *Skene, h. t.*

ZELDE; a gift or donation. *Skene, h. t.*

ZEMSEL; of a castle; the custody and keeping of a castle. *Skene, h. t.*

ZETLAND. The *retractus gentilicius, i.e.*, the right of the udaller's heir to redeem from a purchaser, and the succession of all the sons or brothers by *gavelkind*, with a *præcipuum* of the house and pertinents to the eldest, formerly prevailed in Zetland. *Bank.* B. ii. tit. 3, § 30. See *Udal.*

ADDENDA ET CORRIGENDA.

ABANDONING AN ACTION. As to abandoning a jury cause, after adjustment of issues, see A.S. 16 Feb. 1841, § 46; *Ross*, 26 June 1889, 16 R. 871.

ACCESSION, DEED OF. Delete reference to *Trust Deed*, and substitute reference to *Insolvency*, p. 550.

ACCOUNTANT IN BANKRUPTCY *and* **ACCOUNTANT OF COURT.** These offices were conjoined by the Judicial Factors Act, 1889, which see *infra*, p. 1135.

AD VITAM AUT CULPAM. See *Hastie*, 4 June 1889, 16 R. 715.

AGRICULTURAL HOLDINGS ACT. See the amending act of 1889, 52 & 53 Vict. c. 20 (as to procedure by reference).

ALIMENT. As to right of widow to deduct aliment in accounting for legitim, see *Morrison*, 18 Dec. 1888, 16 R. 247.

AMENDMENT OF RECORD. P. 43 *b* (mid.). See cases cited under *Summons.*

APPARENT HEIR. With reference to the act 1661, c. 24, see *Macalpine*, 6 Feb. 1885, 12 R. 604; and with reference to the act 1695, c. 24, see *Glen*, 15 Dec. 1881, 9 R. 317, and *Fleming's Trs.* 30 June 1882, 9 R. 1013.

APPEAL TO COURT OF SESSION. (1.) *For Review*, p. 53 *b.* In *Dickson*, 14 May 1889, 16 R. 673, appeal was held incompetent, the value of the cause being less than £25.