

[and *Morgan*, 6 July 1858, 3 Macq. 323 (L. C. Chelmsford, p. 339); with *Househill Co.* 6 March 1843, 2 Bell's App. 1 (Lord Campbell, p. 24); *Macfarlane & Co.* 10 March 1868, 6 Macph. (H.L.) 1 (L. C. Cairns, p. 12); and the observations of Lord Pres. M'Neill, in *Kerr*, 18 Dec. 1858, 21 D. 169, and *Macgillivray*, 21 Dec. 1860, 23 D. 212.] Malice must be inserted in the issue where the defender is entitled to found on the protection of privilege, but not otherwise. [See *Defamation*.] In actions for reducing deeds, where the grounds of action infer an absolute nullity, the general issue is adopted, e.g., whether the deed in question is not the deed of the party whose deed it purports to be? But where it is voidable only on special grounds, issues specifying the particular grounds of reduction are the proper issues. It is sometimes necessary for the defender to take an issue. Where his defence is a simple avoidance, he does not require a separate issue. But where the case depends on two separate and

distinct pleas, as to which the *onus* of proof is thrown on the parties respectively, each ought to take an issue. In general, the same issue or set of issues serves, where several defenders are called in the same action about the same subject-matter. But special circumstances may render it inexpedient to adhere to this rule. [The person on whom the burden of proof lies must be pursuer in the issue, though he be defender in the action; *Brown*, 15 July 1824, 3 Mur. 445. See *Macfarlane & Cleghorn on Issues*; *Macfarlane's Jury Prac.* 63; *Mackay's Prac.* ii. 30; *Birnie's Notes on Issues*; *Jurid. Styles*, iii. 803. See *Jury Trial*.]

ITER; a Roman law rural servitude, signifying the dominant proprietor's right of a horse or foot passage for himself, his family and tenants, through the servient proprietor's lands. *Stair*, B. ii. tit. 7, § 10; *Ersk.* B. ii. tit. 9, § 12. See *Road. Actus. Via*.

ITER; according to Skene, is whatever travels. Thus, *iter camerarii*, the chamberlain aire; *iter justiciarii*, the justice aire. *Skene, h. t.* See *Justice Aire*.

J

JACTUS MERCIUM, *levandæ navis causa*; or *Jettison*. Where goods are thrown overboard for the purpose of lightening a ship during a storm, the owners, both of the ship and of the cargo saved, are liable to the owner of the goods thrown out for the common benefit, in a proportion of the loss. [See *Contribution*.]

JAIL. See *Prison*.

JEDGE AND WARRANT; is the authority given by the Dean of Guild to rebuild or repair a ruinous tenement. A petition is presented, praying the judge to visit the premises, and to grant warrant to build agreeably to a plan, and to find and declare the expense of the building to be a real and preferable debt affecting the subject; the account to be cognosed by the court after the building is completed. On this application the Dean of Guild, after a citation of all parties interested, summons a jury to examine the subject; and their verdict, on the necessity of the operation of building or repairing, authorises the Dean of Guild to grant a warrant for having it done. The accounts are afterwards produced to the court, referred to tradesman, and being approved of by those to whom they are referred, they are by the court declared to form a real burden on the property. This

form is usually resorted to by those who have a title to the area, but are doubtful of the validity of their title. It may also be resorted to by an adjudger or heritable creditor in possession; since, without such judicial authority, it is doubtful whether he would, in accounting with other creditors adjudging, have a claim for the expense laid out in repairs. But where the person having right to the reversion or property either cannot be found, or takes no charge of the property, the creditor, adjudger, or other possessor is safe to make the repairs required; the Dean of Guild pronouncing a decree, cognoscing and declaring the amount of repairs, and costs of the proceedings, with interest, to be a real and preferable debt affecting the tenement, and granting a warrant to the applicant to let or possess the tenement until the sums expended, with interest, shall be repaid. The extract of the decree is the ground and voucher of the debt and of the preference, and the recording of it in the Dean of Guild books is held legal notice of the burden. See *Search of Incumbrances*. Where the tenement is ruinous, and has been uninhabited for three years, a judicial procedure is authorised by 1663, c. 6, as to which see *Houses*. Where a tenement belonging to

several persons has been burnt, and some of the proprietors will not consent to rebuild it, any one of them may apply to have the rest decerned to give their concurrence to a plan and elevation made out, and to build their respective portions within a limited time; and on their failure, for a warrant to the petitioner to do the work at their expense. The expense of the rebuilding the storeys or subjects becomes, as in the other cases, a real burden on the property, and the petitioner may have warrant to let or possess the subjects until fully indemnified. The form of the application and of the other proceedings in the jedge and warrant will be found in *Jurid. Styles* (3d ed.), i. 622. See also *Bank. B. iv. tit. 20, § 2*; *Bell's Com. i. 784*; *Kames' Stat. Law, h. t.*; *Bell on Purchaser's Title*, 139; *Ross's Lect. ii. 505*; [*Rankine on Land-Ownership*, 567.] See *Dean of Guild. Common Interest*.

JETTISON. See *Contribution*.

JEWISH LAW. The judicial law of Moses has no binding authority as law in this country. *Ersk. B. i. tit. 1, § 26*.

[JEWS.] Several statutes have been passed during the present reign respecting the Jews. See 8 & 9 Vict. c. 52; 21 & 22 Vict. c. 48, § 5; 23 & 24 Vict. c. 63, providing declarations to be made by Jews on election to public offices; 9 & 10 Vict. c. 59, removing disabilities in regard to property, schools, &c.; 10 & 11 Vict. c. 58, and 19 & 20 Vict. c. 119, §§ 21, 22, as to their marriages; 21 & 22 Vict. c. 49, admitting them to sit in the House of Commons; and 34 Vict. c. 19, exempting young persons and females professing the Jewish religion from penalties in respect of working on Sunday. The only disabilities which still attach to the Jewish religion are these:—that they cannot fill certain high offices of state, being the same from which Roman Catholics are excluded (see *Roman Catholic*), and that they cannot present to any ecclesiastical benefice, the right to which belongs to any office in Her Majesty's gift (21 & 22 Vict. c. 49, § 4). See *Stephen's Com. ii. 742*.]

JOINT OBLIGANT. See *Co-obligant*.

JOINT ADVENTURE or JOINT TRADE. [This is a limited partnership, confined to a particular adventure, or voyage, or course of trade. To the extent to which it reaches, it differs not from proper partnership; but there is no firm, and no general responsibility beyond the limited agreement of parties; *Bell's Com. ii. 538*. *Erskine (B. iii. tit. 3, § 29)* says

[that joint trade is not a copartnership, but only a momentary contract; but his distinction is misleading, and has been generally rejected. Mr Bell says that "the great peculiarity in the doctrine of joint trade is that, unless where the joint concern is avowed, and a credit raised on the combined responsibility, the liability being the result of the discovery of a partnership which was not relied on as regulating the credit, the limits of the contract are fixed by the actual agreement between the parties; whereas in partnership there is a universal responsibility for every engagement *bona fide* relied on, and not beyond the limits of the company's line of trade." In *Withers & Co. 1790, Bell's Com. ii. 540*, Lord Pres. Campbell said that "Erskine's distinction means that, in proper copartnership, *socii* are liable for the actings of one another, even when not *in rem versum*, while joint adventurers are so liable only for furnishings actually made to the concern." See *Venables*, 8 March 1839, 1 D. 659; *White*, 12 Jan. 1841, 3 D. 334; *Pyper*, 6 Nov. 1878, 6 R. 143.] A company may be partners to a joint adventure, and this to the effect of introducing a preference in favour of the creditors of the adventure over the creditors of the proper company. Where goods are purchased for the purpose of carrying on the joint adventure, the adventurers are liable as partners for the price. But there is no such responsibility for goods purchased previously to the contract, though afterwards brought into stock. In dealings within the limits of the concern, each partner is *præpositus negotiis societatis*, but he has no implied mandate to bind the partners generally; [*Cameron*, 2 June 1871, 9 Macph. 786. Joint adventure is established by the same evidence as partnership; *Horne*, 3 July 1877, 4 R. 977. As a general rule, one of two joint adventurers is entitled to put an end to the joint adventure if it comes to be attended with greater risk than when the contract was entered into, or if there is no reasonable belief that profit will be made for either party; *Miller*, 10 Dec. 1875, 3 R. 242. In *Pyper*, *supra*, two out of five parties to a joint adventure, the purpose of which had been accomplished, were held entitled to sue one of their co-adventurers, who had acted as treasurer, for count and reckoning for his intromissions, and for payment of their shares of the balance in his hands.] See *Ersk. B. iii. tit. 3, § 29*; *Bell's Com. ii. 538*; *More's Notes on Stair*, xcvi.; [*Bell's*

[*Princ.* § 392; *Ersk. Princ.* (17th ed.) 344; *Clark on Partnership*, 40.] See *Partnership*.

JOINT STOCK COMPANIES. [Joint stock companies are associations of individuals for the carrying on of undertakings of public utility or private advantage, by means of a common stock to which the members contribute, or agree to contribute, certain sums. The rights and liabilities of the members of the association, *inter se*, are determined by the number of shares of capital of fixed amount which they respectively hold, and which cannot be subdivided, or by the amount of stock subscribed or paid, and which the holder can dispose of in such portions as he thinks proper. The two essential points in which a joint stock company differs from an ordinary partnership are (1) that the shares are transferable, and the change of the members does not operate a dissolution and reconstruction of the company; and (2) that the business is carried on by directors or officials appointed by the shareholders, and individual shareholders are not entitled to take part in the management, nor in the general case to have access to the books of the company, except so far as provided for in the contract of association. Joint stock companies are usually constituted by a written contract, by which the object of the undertaking is defined, and powers are conferred on directors or other officials for carrying on the business. The amount of capital to be contributed is fixed, and the rights and liabilities of the shareholders are detailed. Those shareholders who have not subscribed the original contract become parties to it by signing deeds of accession. The stock or shares are transferred by formal deeds of transfer duly stamped and attested, in which the transferee expressly accepts the liabilities effeiring to the shares he has acquired. It is usual for the company to issue certificates of the amount of stock or number of shares held by a member, but such certificates are not transferable. In some companies power is reserved to the directors to decline, either with or without reasons; to accept proposed transferees, and such power is frequently exercised when it is feared that impecunious shareholders are being substituted for those on the register. Joint stock companies are divided into the following classes:—

- (1) *Common Law Companies.*
- (2) *Chartered Companies.*
- (3) *Companies incorporated by Act of Parliament.*

[(4) *Companies under the former Joint Stock Companies Acts.*

(5) *Companies registered under the Companies Act, 1862, and subsequent Acts.*

(1) *Common Law Companies* are essentially partnerships with (unlike those in England) a legal *persona*, and transferable stock. The Bubble Act (6 Geo. I. c. 18) passed in 1719, declaring such companies illegal, was never enforced in Scotland, and was repealed in 1825 (6 Geo. IV. c. 91). But such companies cannot hold land except by the intervention of trustees. They cannot sue or be sued in the company name if it be a descriptive one, such as "The Carron Iron Company;" but if the company name contain that of persons only, *e.g.*, "John Smith & Company," action may be brought by and against them in that name. In the former case the company may sue and be sued, either in name of all the individual partners, or in the descriptive name, with the addition of three of the members. Under the act 7 Geo. IV. c. 67, unincorporated joint stock banking companies are allowed to sue and be sued in the name of their principal officer, provided they comply with the conditions laid down in the act. It was at one time doubted whether the liability of members of joint stock companies was not limited to the amount subscribed; *Stevenson*, 14 Dec. 1757, *Kames' Select Decs.* p. 191; but it has been long settled that there is no such restriction, and that the members of a common law company are liable individually for the whole debts of the company, just as in the case of an ordinary partnership. The liability of the shareholders may be limited by means of a special agreement with each individual creditor, that he shall only be entitled to payment out of the assets of the company and the unpaid balance on the shares subscribed. Such an agreement must be distinctly and unequivocally expressed, in order to exclude the creditor from claiming full payment from each shareholder, without regard to the amount of unpaid stock held by him, and the agreement will not be implied from any general notice, but must be embodied in each contract. A debt must be first constituted against a joint stock company before any of the shareholders can be called on to pay. Shareholders cannot contract on behalf of a joint stock company, nor incur obligations which will bind the company even within the sphere of the company's business, because they are not agents of the company, and are

[excluded from the management. Obligations are properly undertaken only by the directors and other officials duly appointed in the manner provided for in the contract of association. By the Letters Patent Act, 1837 (7 Will. IV. & 1 Vict. c. 73), many of the privileges of incorporation may be conferred on companies which comply with certain requirements of the act, but such companies in all other respects remain common law companies. The deed of partnership of companies coming under this act forms the basis of such companies, and not the letters patent, which confer the special privileges. By an act of 1834 (4 & 5 Will. IV. c. 94), the Crown was authorised, without incorporating a company, to confer certain privileges, including that of suing and being sued, and protection to individual shareholders against company debts till the creditor should establish that he could not get payment from the company. Facilities were also given by an act of 1844 (7 & 8 Vict. c. 110) for obtaining a certificate of incorporation, without charter or statute; but this did not apply to banks, which required to apply to the Crown for incorporation, to be granted without limiting the liability of the partners (7 & 8 Vict. c. 113). By the Companies Act, 1862 (25 & 26 Vict. c. 89, § 4), no joint stock company or partnership can be formed for the purpose of carrying on the business of banking if the number of members or partners be more than ten, nor for carrying on any business for the acquisition of gain if the number of members or partners be more than twenty, unless it be registered under the Companies Acts, or be formed in pursuance of some act of parliament or of letters patent. On the insolvency of joint stock companies much difficulty was formerly experienced, and great expense incurred, in making the members liable and in adjusting their relief *inter se*. To obviate these difficulties, the Winding up Acts, 1844–48, were passed, which were followed by provisions in the Joint Stock Companies Acts, 1856 and 1857, and now by the Companies Act, 1862, the eighth part of which provides for the application of that act to unregistered companies, partnerships, and associations, with the exception of railway companies incorporated by act of parliament. Such companies cannot be wound up voluntarily under the act, or subject to the supervision of the court. The winding up is by the court, which may be applied to by petition, to direct that a company be

[wound up whenever the company is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs, or is unable to pay its debts, or whenever the court is of opinion that it is just and equitable that the company shall be wound up; § 199. A common law joint stock company can, however, be made bankrupt or wound up by arrangement, as in the case of an ordinary partnership, but no advantage can then be taken of the provisions of the Companies Acts. In addition to the provisions relating to the winding up of unregistered companies, the Companies Act, 1862, provides that the court may, after the presentation of the petition for winding up, and before making an order therefor, restrain further proceedings in any action against the company, or any contributory, *i.e.*, any person liable to pay or contribute to the payment of any debt or liability of the company, or of any sum for the adjustment of the rights of the members among themselves; §§ 200, 201. The act also provides that after an order has been made, no action shall proceed against a contributory, except with the leave of the court; and also where a company has no power to sue or be sued in a common name, the court may direct that all the property which belongs to the company shall vest in the official liquidator, who shall have power in his own name to bring and defend actions; § 203. The other provisions relating to a winding up are narrated under the heading, "Companies Registered under Companies Acts." Joint stock companies may also register under the Companies Acts, merely with a view to being wound up; § 180.

(2.) *Chartered Companies*.—The Crown, in virtue of its prerogative, is entitled to create, and has created, mercantile corporations, which possess the privileges which are necessary to the existence of a corporation. These are, in the first place, the possession of a proper separate *persona*, not the *quasi persona* of an ordinary partnership, but a defined individuality, distinct from the persons of its members, and capable of maintaining an independent existence. A corporation has endurance in perpetual succession, and a name of its own, in which it sues and is sued, and does not require, either in legal proceedings or in the ordinary administration of its affairs, to conjoin the name of directors, managers, or officials with its own, in order to give validity to its proceedings or contracts,

[but the charter of constitution may provide that proceedings are to be taken in name of an official. The Charter of Incorporation generally provides for the mode in which the powers of the corporation are to be exercised, but if the charter be silent, it is competent for the members of the corporation to frame bye-laws, and to appoint officials for carrying out the objects of the corporation. They cannot, however, change the objects of the corporation as expressed in the charter, nor can they add to the liabilities of the members without the consent of each individual; with these exceptions the will of the majority is binding on the minority. The royal charter, and not the prior articles of association, or contract of copartnery, is the ruling instrument in regard to chartered companies. A corporation is entitled to possess a seal by which its deeds, conveyances, and other important documents are authenticated. A corporation is entitled to hold lands as well as moveables in its own name without the intervention of trustees. The corporation being a separate person has its own estate and its own liabilities, and the corporators are not liable for the corporation, but only to the corporation, within the limit of the obligation they have undertaken to subscribe to the corporate funds. *Si quid universitati debetur, singulis non debetur; nec quod universitas debet, singuli debent*; *Muir v. City of Glasgow Bank*, *infra*, 6 R. 392, 401. It has, indeed, been doubted whether it is within the prerogative of the Crown to create corporations, the members of which shall be subject to an unlimited liability for the debts and obligations of the corporation. It was thought that the Crown was not entitled to place any restrictions upon the privileges of legal beings whom it called into existence, and that in whatever terms the charter might be expressed, the creation of the corporation involved the conferring of all the *naturalia* of a corporation. Several acts of parliament were passed for the purpose of conferring additional powers upon the Crown with respect to the granting of charters of incorporation, to trading and other companies, and by 6 Geo. IV. c. 91 (the act which repealed the Bubble Act), power was conferred on the Crown to provide, in any charter of incorporation, that the members of such corporation should be subject to unlimited liability for the debts of the corporation. This provision of the act was abrogated by the Letters Patent Act of 1837 (7 Will. IV. & 1 Vict. c. 73),

[which made it lawful for the Crown to grant charters for a limited number of years, subject to the same regulations as to returns, &c., which were required in regard to unincorporated companies, to which letters patent had been granted under that act.

There exist then two classes of chartered companies, viz., those with limited liability on the part of their members, and those the charters of which expressly impose unlimited liability on the members of the corporation, or, as it is expressed in charters granted in virtue of the powers conferred by act of parliament, provide that "nothing contained in the charter shall be construed as intended to limit the responsibility and liability of the individual partners of the said corporation for the debts and engagements lawfully contracted by the said corporation, which responsibility or liability is to remain as valid and effectual as if these presents had not been granted, any law or practice to the contrary notwithstanding." The Letters Patent Act has been little taken advantage of. It should be remembered that charters are only of value when the rights and privileges conferred are within the prerogative of the Crown, and that, however formal, they are liable to reduction, if they have been obtained by misrepresentation, and also that chartered companies cannot, like ordinary partnerships, be dissolved at the will of the members. A charter may, however, be surrendered to the Crown, and the corporation is dissolved by the acceptance of the surrender. A chartered mercantile company also comes to an end by insolvency, or through inability to carry out the purposes for which it was created, and its privileges become liable to forfeiture if it abuse its powers or commit a breach of the conditions of its existence. Its dissolution, however, merely confers the right upon its creditors to insist for the sale and distribution of its property in payment of the debts due them, and does not render the members liable beyond the unpaid amount of their stock. By royal charter, power was conferred on burghs, &c., to grant charters. This power, which was exercised by an instrument called a seal of cause, equivalent to a royal charter, has now fallen into desuetude, but in some burghs there still exist corporations, which derive their powers from a seal of cause, and which are consequently in the same legal position as chartered companies, except that a surrender falls to be made to the burgh, and not to the Crown. The

[validity of charters granted by seals of cause depends on strict compliance with the power of granting such charters conferred by the royal charter on the burgh.

(3.) *Companies incorporated by Act of Parliament.*—These companies are proper corporations, and possess all the privileges which have been enumerated as the *naturalia* of a corporation, but they may, and generally do, possess other powers, which can only be conferred by the legislature, *e.g.*, monopolies and exclusive privileges, power to acquire lands, &c., compulsorily, and powers to levy tolls or other charges upon the community. Companies incorporated by the legislature prior to 8th May 1845 are governed solely by their special act, into which parliament might introduce such provisions and impose such qualifications upon the privileges of a corporation as it might think proper. In the case of a company incorporated by act of parliament, no court can declare, as in the case of a royal charter, that the act was beyond the power of parliament to pass, and if the act have been obtained by misrepresentation, or be to the injury of other subjects, the wrong can only be redressed by means of a repealing act. In order to obtain an act there must be executed an instrument termed a parliamentary contract, the subscribers to which undertake to pay three-fourths of the estimated cost of the undertaking to carry out which the company is being formed. The rules and formalities, prescribed by the standing orders of the houses of parliament, must also be complied with. These rules are frequently varied, and those for the year must therefore be referred to. The act of parliament, when obtained, and not the parliamentary agreement, nor any agreement between the promoters and the intending shareholders, settles the objects of the company and the rights and liabilities of the shareholders. There is no proper partnership relation between the subscribers to the proposed undertaking until the special act has been obtained. By the Companies Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 17), and the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), and the amending act of 1869 (32 & 33 Vict. c. 48), certain provisions are made, which are incorporated either in whole or in part into the special act, and upon the special act being passed, and the company being incorporated, the special act, taken along with the general acts, regulates the powers and liabilities of

[the company. All the provisions of the general act apply to any company incorporated by special act after the passing of the general acts, except so far as they are varied or excepted by the special act; and the provisions of the general acts relative to the issue of new capital, or the creation of bonds, debentures or debenture stock, or to the change of name of the company, apply to all companies, whether incorporated before or after the passing of these acts, which apply to parliament for a special act with reference to any of these objects. The principal provisions of these acts are as follows:—The capital of the company must be divided into shares of prescribed number and amount, and numbered (the act 1845, § 6); but the company, by a majority of three-fifths, may convert the shares into stock, which is then entered in a register of consolidated stock, (§§ 64–67), and the provisions in regard to shares cease to be applicable. The shares are declared to be personal estate, and transmissible as such (§ 7). A register of shareholders must be kept (§ 9); also a shareholders' address-book (§ 10). A shareholder is to be entitled to a certificate of proprietorship of the shares held by him (§ 10), which is *prima facie* evidence of his title to the shares (§ 11). A form of transfer of shares is provided, and § 15 declares that the transfer shall be valid and effectual if executed according to the usual mode of executing such instruments either in England or Scotland, or partly according to the one and partly according to the other. A register of transfers is to be kept (§ 16). The act also provides for the transmission of shares by death or marriage (§§ 19 and 20). The company is not bound by any notice of trust as regards the shares (§ 21). Sections 22 to 39 provide for the payment of calls. Sections 40 to 58 of the act of 1845, and §§ 22 to 35 of the act of 1863 provide for the mode in which money is to be borrowed, if borrowing be authorised by the special act. The act of 1845 also prescribes the holding of meetings (§§ 69–83), the appointment and rotation of directors (§§ 84–92), the powers and proceedings of directors (§§ 93–111). The directors exercise all the powers of the company except (1) the choice and removal of directors; (2) the increasing or reducing their number; (3) the choice of auditors; (4) the determination as to remuneration of directors, auditors, treasurer, and secretary, as to the amount of money to be borrowed

[on mortgage, and as to the augmentation of capital; and (5) the declaration of dividends. But all or any of these powers may be conferred on the directors by the special act. There are also provisions for the keeping of books and for rendering officials accountable by summary proceedings (§§ 112–122). The directors of joint stock incorporated companies undertake no personal responsibility, by reason merely of their executing any contract or other instrument on behalf of the company (§ 103), but they may of course interpose their individual liability, and in that case the company is bound to indemnify them. The act of 1863 contains provisions which come into operation where the name of the company is changed by a special act. The special act, in addition to incorporating the provisions of these acts in whole or in part, defines the objects of the company, and may give special or aggressive powers, or may incorporate the clauses of certain general statutes which give these powers, viz., the Lands Clauses Acts (8 & 9 Vict. c. 19, and 23 & 24 Vict. c. 106); the Railways Clauses Acts (8 & 9 Vict. c. 33, and 26 & 27 Vict. c. 92); the Tramways Act (33 & 34 Vict. c. 78); Water Works Clauses Acts (10 & 11 Vict. c. 17, and 26 & 27 Vict. c. 92); Gas Works Clauses Acts (10 & 11 Vict. c. 15, and 34 & 35 Vict. c. 41); Harbours, Docks and Piers Clauses Act (10 & 11 Vict. c. 27). Companies incorporated by act of parliament, with the exception of railway companies, may be wound up under the eighth part of the Companies Act, 1862, *vide* § 199.

(4.) *Companies under the former Joint Stock Companies Acts.*—In 1855 the first of the acts known as the Limited Liability Acts, was passed, viz., 18 & 19 Vict. c. 133. It did not apply to Scotland, and was repealed in the following year. Its provisions were, however, re-enacted in an improved form in the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), and extended to the whole of the United Kingdom. Amendments and improvements on this act were made by the Joint Stock Companies Acts, 1857 (20 & 21 Vict. c. 14 and c. 80); and the Joint Stock Banking Companies Acts of 1857 and 1858, viz., 20 & 21 Vict. c. 49, 21 & 22 Vict. c. 60, and 21 & 22 Vict. c. 91; the last being the act which for the first time enabled Joint Stock Banking Companies to be formed on the principle of limited liability. These acts were repealed by the Companies Act, 1862, which by § 206 pro-

vided that no repeal thereby enacted should affect anything done under these acts, or the incorporation of any company registered under them, or any right, privilege, or liability arising under these acts, or penalty, forfeiture, or punishment, incurred in respect of any offence against these acts. It also provided that table B in the schedules annexed to the act of 1856 should remain in force so far as it applied to any company existing at the commencement of the act of 1862. In other respects the Companies Act, 1862, applies to companies formed and registered under the repealed acts, and also to companies registered though not formed under these acts. These companies do not require to register anew under the Companies Act, but are registered companies in virtue of their registration under the prior acts. Any company registered under these acts may, however, cause its shares to be transferred in the manner hitherto in use, or in such other manner as the company may direct.

(5.) *Companies Registered under the Companies Act, 1862, and subsequent Acts.*

—These acts are: The Companies Act, 1862 (25 & 26 Vict. c. 89); The Companies Act, 1867 (30 & 31 Vict. c. 131); The Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104); The Companies Act, 1877 (40 & 41 Vict. c. 26); The Companies Act, 1879 (42 & 43 Vict. c. 76); The Companies Act, 1880 (43 Vict. c. 19); The Companies Act, 1883 (46 & 47 Vict. c. 28), repealed by act of 1888; The Companies Act, 1886 (49 Vict. c. 23); and in terms of the last act, § 2, these may be referred to as The Companies Acts, 1862–1886; and The Preferential Payment in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62).

I. *Constitution of Companies.*—Part I. of Act 1862.—The act provides negatively that no company consisting of more than 20 persons shall be formed after 2 Nov. 1862, for the purpose of carrying on any business for gain (in the case of banks the number is 10), unless it be registered under the act (§ 4). After that date any seven or more persons associated for any lawful purpose, whether for gain or not, may, by subscribing their names to a memorandum of association and delivering the same to the Registrar of Joint Stock Companies (there is a register in each of the three countries, § 174), and paying him certain fees, form an incorporated company with or without limited liability; §§ 6 and 17. The registrar is bound to give a certificate of registration

[stating that the company is incorporated, and in the case of a limited company that it is limited. This certificate is conclusive evidence that all the requisitions of the act as to registration have been complied with; § 18; *Oakes v. Turquand*, L.R. 2 H.L. 325, 354. Companies registered under these acts may be (1) unlimited companies; (2) companies limited by shares; (3) companies limited by guarantee; (4) banking companies with limited liability as to their general debts, but with unlimited liability as to the notes issued by them; (5) companies with reserve liability; (6) insurance companies. In order to entitle a company desirous of being incorporated to registration, the memorandum of association must set forth certain particulars. In the case of an unlimited company, the memorandum must contain (1) the name of the proposed company; (2) the part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate; (3) the objects for which the proposed company is to be established; § 10. In the case of a company limited by shares, the word "Limited" must be added to the proposed name, and in addition to the requirements (2) and (3), the memorandum must contain a declaration that the liability of the members is limited, and also state the amount of capital with which the company is proposed to be registered, divided into shares of a certain fixed amount. It is also provided that no subscriber shall take less than one share, and that each subscriber shall write opposite to his name the number of shares he takes; § 8. Under the act 1867, § 23, a company formed for purposes not of gain may register by licence of the Board of Trade, with limited liability, without the addition of the word "Limited" to its name, and under the same act (§§ 4-8), the liability of the directors of a limited company may in the memorandum be declared to be unlimited. The first, second, and third articles of the memorandum of a company limited by guarantee are the same as in that of a company limited by shares, and the only other article is one containing a declaration that each member undertakes to contribute to the assets of the company, in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs,

[charges, and expenses of the winding up of the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required not exceeding a specified amount; § 9.

Banking companies existing at the date of the act 1862 can only register as limited companies after giving thirty days' notice of their intention to every person having an account, and failure to do so leaves the shareholders' liability as it was before in respect to the customers who have not received notice; § 188. The shareholders also remain liable for the note issue; § 182, and the act 1879, § 6. Companies registering under this last-mentioned act as limited companies, and limited companies, may adopt a provision for a reserve of capital, which cannot be called up, except in a winding up; act 1879, § 5; and must register anew; § 9. The Scotch banks, other than the three chartered ones (the Bank of Scotland, the Royal Bank, and the British Linen Bank), have availed themselves of this act by registering as limited companies under it, and fixing a reserve of capital for winding up at four times the amount of their other capital.

Insurance companies were not authorised to be registered with limited liability (act 1856, § 2). This restriction was removed by the repeal of that statute (act 1862, § 205), and their registration under the latter act, § 209. There are special statutes affecting *life insurance companies* passed in 1870, 1871, and 1872 (33 & 34 Vict. c. 61, 34 & 35 Vict. c. 58, and 35 & 36 Vict. c. 41), which provide that all new life insurance companies shall make a deposit of £20,000 with the Accountant General of the Court of Chancery before beginning business, to be returned when the life assurance fund accumulated from premiums has reached £40,000. These acts also provide for the publication of annual accounts, for periodical investigations, and for an actuarial report being made and furnished to shareholders and policyholders. See *Insurance*, p. 571.

Along with the memorandum of association, there may, in the case of a company limited by shares, and there must, in the case of other companies, be lodged with the registrar articles of association either adopting the regulations set forth in Table A of schedule I. of act 1862, in whole or in part, or containing such regulations as the subscribers may prescribe. When registered they form the contract between the members, but may be altered from time to time by special resolution of the company; § 50. A special resolution is

[defined by § 51 as a resolution passed by a three-fourths majority of votes of those present in person or by proxy; confirmed after an interval of 14 days, by a simple majority. If no articles are lodged, the articles of association in table A are deemed to be the articles of the company limited by shares. The objects of a company as defined in the memorandum of association cannot be altered. It is *ultra vires*, not only of the directors but of the company, to go beyond them. Such an act is null and cannot be ratified. It is different with the articles of association, which play a subsidiary part, and may be altered in conformity with the statutes; and unauthorised proceedings may be ratified; *Ashbury Ry. Car. Co. L.R. 7 H.L. 653*; *Klenck*, 21 Dec. 1888, 16 R. 271. The effect of registration is to incorporate the company, but it does not thereby receive all the privileges of a corporation, but only such as are conferred on it by the act according to the class in which it stands. In all cases the subscribers to the memorandum, together with such persons as may from time to time become members of the company, are formed into a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the *functions* of an incorporated company, and having perpetual succession, and a common seal, with power to hold lands, but with such *liability* on the part of the members to contribute in the event of the same being wound up (§ 18), as is provided in § 38. That section defines the liability of members by providing that every present and past member shall be liable to contribute to the assets of the company, to pay its debts and the costs of winding up and for the adjustment of the rights of the contributories *inter se*, with the following qualifications: (1) A past member is freed from liability if he has ceased to be a member for one year before the winding up commences; (2) is never liable for debts contracted after he ceases to be a member; (3) is not liable if the existing members are able to satisfy the contributions which they are bound to make. (4) In the case of a company limited by shares, the liability of a member is limited to the amount unpaid, if any, upon the shares, in respect of which he is liable as a present or past member. (5) In the case of a company limited by guarantee, the contribution is limited to the amount undertaken by the member. (6) It is lawful in any contract to limit the liability of members in respect

[of that contract. And (7) no sum due to a member in his character of member is deemed a debt due to him in competition with the creditors of the company, but only in a question with other shareholders. (As to compensation in winding up, see *infra*.) It thus appears that, under the Companies Acts, the rule is that the liability of the shareholders is unlimited, unless they can bring themselves under some of the clauses in the act conferring an exemption from unlimited liability. A company limited by shares may alter the memorandum to the effect of (a) increasing its capital, (b) dividing its capital into shares of larger or smaller amount than its existing shares, or (c) converting its paid up shares into stock (§ 12, and act 1867, § 21); with the approval of the Board of Trade may alter its name (§§ 13, 20); may render the liability of its directors unlimited (act 1867, § 8); may issue warrants for shares payable to bearer (act 1867, §§ 27–36); and may reduce its capital, subject to confirmation by the court (act 1867, §§ 9–20). To make these alterations, the company must be authorised by its regulations as originally framed or as altered by a special resolution of the shareholders as defined by § 51.

Preference Shares.—Such shares may be created if authority be given by the company's charter, or in a registered company by its memorandum of association, or by its articles of association as originally framed; *Lindley on Companies*, p. 396. The nature of the preference depends on the terms on which the shares are created and issued. It usually applies to payment of dividend; but may apply to distribution of capital if so expressed. Preference in regard to dividend entitles the preference shareholder to have arrears paid before ordinary shareholders, *i.e.*, the preference dividend is cumulative; *Henry*, 1 De G. & J. 606; *Partick Gas Co.* 5 June 1888, 15 R. 711. But by the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), § 14, the preference shares of companies under these acts issued after July 1863 have no preference for deficiency of dividend out of profits of subsequent years. They are contingent on the profits of the year. This does not apply to companies registered under the Companies Acts.

Reduction of Capital is regulated by the acts 1867, §§ 9–20; 1877, §§ 3, 4, and 5; and 1880, §§ 3, 4, and 5; and includes not merely nominal but paid up capital, and power to cancel lost capital or capital unrepresented by available assets, and to pay off capital which may be in excess of the wants of the

[company. After the reduction has been made by special resolution of the company, the words "and reduced" must be added to the name of the company till a confirmation order is obtained from the court. Before such order is obtained, and where the interests of creditors are concerned, their consent must be got or the debt discharged or secured. Where the reduction of capital does not involve either the diminution of liability in respect of unpaid capital or the repayment to any shareholder of paid up capital, the consent of creditors is not required, nor the addition of the words "and reduced."

II. *Distribution of Capital, &c.—Part II. of Act 1862.*—"Members" are persons who have agreed to become such, and whose names have been entered on the register of members. This of course includes subscribers of the memorandum of association. Proof of agreement to become a member may be by parole; *Goldie*, 16 Nov. 1882, 10 R. 174; but the agreement must be with the company, or those acting with its authority, not merely with promoters; *Molleson*, 17 March 1881, 8 R. 630. The ordinary form of agreement is application and allotment (offer and acceptance), and the allotment must be intimated to the allottee; *Hebb's case*, L.R. 4 Eq. 9. Posting a letter of allotment is enough; *Household Accident Co.* L.R. 4 Ex. Div. 216. If the application be conditional and the allotment unconditional there is no contract. But it must be clear both that the stipulation in question is an inherent condition and not a collateral stipulation, and that it has not been waived by subsequent conduct; *Pellatt's* and *Elkington's cases*, L.R. 2 Ch. 527, 511; *Simpson's case*, L.R. 4 Ch. 184; *Miln*, 15 Nov. 1887, 15 R. 21. Further, a director's acceptance of office does not imply *ipso facto* his acceptance of the qualifying shares from the company, but only that he will, within a reasonable time, acquire the necessary number of shares by allotment or transfer; and he is not qualified to act till that be done; *Brown's case*, L.R. 9 Ch. 102; *Wheal Buller Consols*, L.R. 38 Ch. D. 42. The shares or other interest of any member are personal property, and are transferable in the manner prescribed in the articles of association; § 22. Persons also become members of a company by transmission of shares from a deceased member. The executor's confirmation may be registered, and the executor thereby becomes a member to all intents, but a law-agent must have special authority to put an executor on the register; *Wishart*,

[19 July 1879, 6 R. 1341. Executors may also, without going on the register, transfer shares to a transferee; § 24. The articles of association may give the directors an absolute or a qualified right to decline to register transfers. A transferee must in all cases be legally competent to take the shares. The numerous cases which have occurred, with reference to transfers made in view of the impending liquidation of a company, seem to establish the following propositions:—(1.) Even if the liquidation be imminent, the transfer will be sustained, and the directors be bound to register it, although made, for the purpose of avoiding liability, for a nominal consideration to a man of straw, provided the transfer be *bona fide* an absolute transfer with no secret trust for the transferor. (2.) The transfer is bad if the transaction be merely nominal, and there be a latent trust for the transferor. (3.) If the transfer be tainted with fraud, it is bad. (4.) Where the transfer is registered by the directors, who have a discretion to refuse transferees, upon a fraudulent misrepresentation, the transferor remains liable. See *Buckley* on §§ 22 and 35. Every shareholder remains liable until he has validly transferred his shares to a transferee, who is either registered, or who ought to have been registered and is not, through the default of the company; *vide* § 35. Where a shareholder, before the stoppage of a company, sold shares to the company for settlement on a day subsequent to that on which the company stopped payment, it was held that he was not entitled to have his name removed from the register, as after the stoppage and declared insolvency the company could do nothing to affect the *status* of the shareholders (§ 131); *Nelson Mitchell*, 20 May 1879, 6 R. (H.L.) 66; *A. Mitchell*, 6 R. (H.L.) 60. And on the other hand, where the agent of executors had sent to the company a confirmation with a request that the company should register the executors, and the company had not done so at the date of the stoppage, it was held that they could not register their names after the stoppage, as the executors, unlike a purchaser, were under no obligation to go on the register; *Macdonald*, 7 Feb. 1879, 6 R. 621; see also *Myles*, 28 Feb. 1879, 6 R. 718; and *Howe*, 4 July 1879, 6 R. 1194. Notice of trust may be received on the register in Scotland (§ 30), but trustees or executors who have registered as shareholders are personally liable for calls; *Muir*, 7 Feb. 1879, 6 R. (H.L.) 21, and prior cases there cited; and

[in the case of shares registered in names of liferenters and fiars, both are liable to be entered on the list of contributories; *Wishart*, 14 March 1879, 6 R. 823. The act of 1862, § 25, provides that a register of the members shall be kept, in which shall be entered their names, addresses, and occupations, and the dates at which they became and at which they ceased to be members. A list of the members, with a summary of the capital, number of shares taken, calls made, received, and unpaid, number of shares forfeited, and list of persons who have ceased to be members since last list was made, must be forwarded annually to the registrar; § 26. The register is *prima facie* evidence of all matters contained in it (§ 37), but it is not conclusive, and persons who have not agreed to become members may have their names removed even after the winding up has begun; *Wishart*, *supra*, 6 R. 1341. Where any person has been wrongly entered or omitted, he may apply by summary petition to the Court of Session to rectify the register (§ 35); and a shareholder is entitled to this remedy, or to bring an action of reduction, where he has been induced by fraud or misrepresentation on the part of the company or its agents to become a member, but not if the application be made after the stoppage of the company; *Tennent*, 20 May 1879, 6 R. (H.L.) 69. See *Fraud*. If, however, the contract to become a shareholder is void and not merely voidable, the entry on the register may be altered even after a winding up; *Stott*, 28 June 1879, 6 R. 1126.

Liability of Shareholders.—A shareholder is liable to pay the whole amount of his shares in cash unless the terms of payment shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint stock companies at or before the issue of the shares (act 1867, § 25). But if money be due by a company to a shareholder under an independent contract, that is equivalent to cash, and may be set against the cash due on the shares provided the company be not in liquidation; *Maynard's case*, L.R. 9 Ch. 60; compare with *White's case*, L.R. 12 Ch. D. 511. If a company issues shares and represents them as already fully paid up, though not really so, neither the shareholder nor any transferee thereof is liable for the unpaid portion; *Waterhouse*, 24 May 1870, 8 Macph. (H.L.) 88. Shares cannot be issued at a discount even though authorised in the memorandum and articles of the company; *Klenck*, *supra*, 16 R. 271;

[*Almada v. Tirrito Co.* L.R. 38 Ch.D. 415. Nor is a company entitled to acquire its own shares even though similarly authorised; *Trevor v. Whitworth*, L.R. 12 App. Ca. 409; *Matheson's Trs.*, 21 Dec. 1888, 16 R. 282. Shares held by a married woman exclusive of the *jus mariti* of her husband are her own property, and do not involve liability on his part. If shares stand in the name of a wife, the court will inquire whether they form part of her separate estate, or are truly her husband's; if the latter, he will be liable; *Biggart*, 15 Jan. 1879, 6 R. 470; *Thomas*, 31 Jan. 1879, 6 R. 607. The Married Women's Property Act, 1881 (44 & 45 Vict. c. 21), has the effect, in marriages after 18 July 1881, of making the wife holder of all shares acquired with any part of her own funds. A minor may become a shareholder, but, if without curators, may reduce the transaction on the head of minority and lesion within the *quadriennium utile*; *Hill*, 24 Oct. 1879, 7 R. 68. Trustees who are holders of shares have a right of indemnity against the trust estate, if their acquisition be within the trust powers, otherwise they are liable *in solidum* to the company, with rateable relief against co-trustees. The company is entitled to make good this right of indemnity so long as calls are unpaid; *Cunningham*, 19 July 1879, 6 R. 1333. Trustees cease to be shareholders by resignation when intimated to the company, or by death though not intimated. But in the case of the death of a last surviving trustee, his estate remains liable; *Oswald's Trs.*, 15 Jan. 1879, 6 R. 461; *Tochetti*, 7 March 1879, 6 R. 789; *Low's Exrs.*, 14 March 1879, 6 R. 830.

III. *The Management and Administration of Registered Companies.*—Part III. of Act 1862.—Every company must have a registered office (§ 39), of which notice must be given to the registrar (§ 40), and every limited company must publish its name by fixing its name outside the office, &c.; § 41.

Debentures.—Joint stock companies have power at common law to borrow money so far as necessary for the conduct of the business; but it is usually conferred by the articles, and a limit prescribed. A debenture is the usual form of obligation on which a company borrows. It is "nothing but an ordinary personal obligation for repayment of a loan;" *per* Lord Pres. Inglis, 9 R. 1023. It means "a document which either creates a debt or acknowledges it;" *per* Justice Chitty, L.R. 37 Ch. D. 264. It may or may not be accompanied with a security; if not, it ranks *pari passu* with other trade debts; *Clark v.*

[*West Calder Oil Co.*, 30 June 1882, 9 R. 1017. If security be granted, it must be effectually constituted according to law. In Scotland a floating security over the undertaking, or property or effects of a company, is ineffectual; *Clark, supra*. It is different in England; *Panama Mail Co.* L.R. 5 Ch. 318. If the subject of security be calls made or in arrear, the assignation thereof requires to be intimated to the shareholders individually. Future calls cannot be assigned in security, unless the directors be authorised to do so by the articles of association; *Phoenix Bessemer Co.* 44 L.J. Ch. 683; *Howard v. Patent Ivory Co.* L.R. 38 Ch. D. 156. - How such an assignation is to be intimated has not been decided in the law of Scotland. But it is thought that in addition to intimation to the shareholders, the assignation should be noted on the share certificate of each shareholder. This is not necessary in the case of English companies; *Phoenix Co. supra*. On failure to pay principal or interest in terms of the debenture, the holder may realise the subject of his security, if any, and at the same time apply for a winding up order; *Lanark Oil Co.* 2 Dec. 1886, 14 R. 147. A register of mortgages and charges specifically affecting the property of the company must be kept by every limited company (act 1862, § 43); but failure to register does not invalidate a mortgage in the hands of any one not a director, manager, or other officer of the company, nor in the hands of an onerous assignee from any officer of the company, if such assignee were ignorant of the defect. It has been held in England that a director, manager, or other officer taking a mortgage without seeing to its registration is barred from claiming under it, but the decision has been doubted. See *Native Iron Ore Co.* L.R. 2 Ch. D. 345; *International Pulp Co.* L.R. 6 Ch. D. 556; *Globe Patent Iron Co.* 48 L.J. Ch. 295; *South Durham Iron Co.* L.R. 11 Ch. D. 579.

Bills and Promissory Notes.—Similarly, if the nature of a company's business requires it, its directors have, without express authority, power to draw, accept, and indorse bills on behalf of the company in the ordinary course of business (*Lindley on Companies*, p. 185); but power is generally given by the articles of association. Promissory notes and bills of exchange are held as made or indorsed by the company, when made or indorsed, in name or on behalf of the company, by any person acting under the authority of the company; § 47. A person signing a bill or note will, however, incur a personal responsibility, unless it be clearly

[shown on the face of the document that he did not bind himself personally; *Brown*, 17 March 1875, 2 R. 615.

If the members of a company become fewer than seven, liability for the whole debts is imposed on every member who knew of it, if the company carries on business for six months after its numbers have been thus reduced; § 48. General meetings of the company must be held at least once a year (§ 49), at which the ordinary business is transacted; and also special resolutions on complying with certain regulations may be passed (§§ 50, 51), and a copy of such special resolution must be sent to the registrar; § 53. A special resolution must be passed by a majority of three-fourths of shareholders present at the meeting. Due notice must be given, and the resolution must be confirmed at a meeting of which notice is given, held not less than fourteen days and not more than a month from the date at which the resolution was passed; § 51. The Board of Trade in certain cases may examine into the affairs of any company; §§ 56-61. Summonses and notices are served on a company by leaving them at its registered office; § 62.

Dividends.—Dividends are payable only out of profits (act 1862, Table A, 73). Profits are the excess of a company's earnings over the expenses incurred in obtaining them (*Lindley on Companies*, p. 429). Dividends cannot be paid out of capital. Neither the articles nor memorandum of association can authorise this; *Guinness*, L.R. 22 Ch. D. 349; *Trevor v. Whitworth*, L.R. 12 App. Ca. 409. Directors may be compelled to replace dividends paid out of capital. See cases cited by *Lindley on Companies*, p. 432. In calculating profits, the directors will estimate the value of assets, and may include interest accrued on debts due to the company though not actually received, provided the parties liable, or the securities held therefor, are believed to be good for the amount; *City of Glasgow Bank*, 23 Dec. 1881, 9 R. 535; *Lees*, 17 March 1882, 9 R. 807. Dividends are payable "to the members in proportion to their shares;" act 1862, Table A (72); but this rule may be, and usually is, excluded by the articles of the company, which make dividends payable in proportion to paid up capital; *Oakbank Oil Co.* 12 Dec. 1882, 10 R. (H.L.) 11.

Directors.—Joint stock companies act through their directors, who are the agents of the company for carrying on its business, and whose powers and liabilities are deter-

[mined by the law of Principal and Agent. They are also trustees for the shareholders of the powers committed to them, and are responsible to them for the misuse of these powers. As agents, they bind the company by their acts done in its name, provided these acts are not *ultra vires*. Even where their transactions are irregularly entered into, the company is bound, if they belong to the class which is authorised by the articles of association; *Royal Brit. Bk.* 6 E. & B. 327; *Heiton*, 6 June 1877, 4 R. 830. In the case, however, of a transaction being irregularly entered into between the directors and a shareholder, the other shareholders may set it aside, but lapse of time will bar their right to do so. Acts of the directors which are not authorised by the articles of association may be adopted, so as to make them binding on the company, by the acquiescence of every shareholder; but there must be proof that the shareholders acquiesced in the knowledge that the acts were being done, and were *ultra vires*, or, at any rate, that the means of such knowledge were open to them; *Phosphate of Lime Co.* L.R. 7 C.P. 43.

Directors in the conduct of the business of a company are not liable for loss arising from errors of judgment; but they are liable for loss arising from culpable or wilful neglect or violation of duty. They are also liable where they act *ultra vires*, and loss is incurred; *Western Bank*, 22 Nov. 1872, 11 Macph. 96; *Caled. H.S. Co.* 9 June 1882, 9 R. 1115. If directors make false and fraudulent representations or concealment, the company cannot retain any benefit from a transaction, or enforce a contract, so induced, but must surrender what is taken under it. The remedy of a defrauded party is two-fold (*Lindley on Companies*, p. 73): (1) against the company, to rescind the contract, and demand restitution, tendering restitution in return. This remedy may be lost by delay or the occurrence of material changes making restitution impossible; and (2) against the directors individually for damages; but this cannot be maintained by a member against the company; *Addie*, 20 May 1867, 5 Macph. (H.L.) 80; *Oakes v. Turquand*, L.R. 2 H.L. 325; *Houldsworth*, 12 March 1880, 7 R. (H.L.) 53; *Lindley on Companies*, p. 74, note e). To found a claim on fraudulent misrepresentation, it is necessary to prove not only that the representation was false in fact, but that the person making it knew it to be false, or at least did not believe it to be true. It is not enough to prove that there were not reasonable grounds for the belief; but the

[grounds may be so flimsy as to destroy the idea of a *bona fide* belief in the representation, and thus afford evidence of fraud; *Addie*, *supra*, per Lord Cranworth; *Brownlie*, 16 July 1878, 5 R. 1076; *Weir*, L.R. 3 Ex. D. 238; *Lees*, *supra*, 9 R. 807; *Peek v. Derry*, L.R. 14 App. Ca. 337; *Glasier*, L.R. 42 Ch. D. 436. In actions based on concealment or failure to disclose, a heavier *onus* attaches to a person suing directors or promoters for damages than to a person suing the company for rescission and restitution. See *New Brunswick Co.* 1 D. & S. 363 (381), referred to in L.R. 2 H.L. 113; *Peek v. Gurney*, L.R. 6 H.L. 377 (403); *Lindley on Companies*, p. 90.

The Companies Act, 1867, § 38, requires the disclosure in any prospectus inviting subscription to shares of a company of the dates and names of parties to any contract entered into by the company, its promoters, directors, or trustees, prior to the issue of the prospectus, otherwise the prospectus shall be deemed fraudulent. This clause entitles persons induced to take shares to claim damages for any loss sustained against the promoters, directors, or other officers knowingly issuing the prospectus; *Twy-cross v. Grant*, L.R. 2 C.P.D. 469; *Gover's case*, L.R. 1 Ch. D. 182. Directors are liable to a criminal prosecution where they are guilty of fraud or falsify balance sheets for the purpose of concealing and misrepresenting the true state of the company's affairs, with intent to defraud, and using and uttering false balance sheets, knowing them to be false, with intent to defraud, and whereby shareholders and members of the public are defrauded; *City of Glasgow Bank Directors*, 21 Jan. 1879, 6 R. (J.C.) 19; *Lindley on Companies*, p. 87. And, by § 166 of the Companies Act, the falsification of books with intent to defraud is made a misdemeanour.

IV. *Winding up of Registered Companies.*—*Part IV. of Act 1862.*—Such companies may be made notour bankrupt (Bankrupt Act, 1856, §§ 4 and 8), but cannot be sequestrated (*Dumblane Hydro. Co.* 12 Dec. 1884, 12 R. 328). They may be wound up under the Companies Acts (1) by the court, (2) voluntarily, (3) under the supervision of the court. (1.) *Winding up by the Court.*—A company may be wound up by the Court of Session, (a) whenever the company has passed a special resolution requiring the company to be wound up by the court; (b) whenever the company does not commence business within a year, or suspends business for a year; (c) whenever the members are re-

[duced to fewer than seven; (d) whenever the company is unable to pay its debts; (e) whenever the court is of opinion that it is just and equitable that the company should be wound up; § 79. The act defines when a company is to be held as unable to pay its debts; § 80. The petition for winding up may be presented by the company, or a contributory, or a creditor, or by all or any of them; § 82. A shareholder not an original allottee must have been on the register for six months to entitle him to present a petition; act 1867, § 40. If the petition be presented by a contributory, *i.e.*, a shareholder, or any person representing a shareholder, *e.g.*, his executor, or any person liable to contribute to the assets under the act, the court has a discretion as to issuing a winding up order, and in the general case will not make an order against the wishes of a majority of the shareholders of a limited company. If the company be unlimited, the court will less readily refuse to issue an order. A creditor, whose debt is not *bona fide* disputed, is entitled to have an order, but the court may have regard to the wishes of the other creditors (§ 91), and is not bound to make a compulsory order if there be a voluntary liquidation in progress, or a liquidation under supervision of the court. The court may allow the petition to be sisted, at the request of shareholders, if there is a reasonable chance of an arrangement to carry on the company being made. The winding up is held to commence at the time of the presentation of the petition; § 84. Before an order is pronounced, the court may restrain actions at the instance of creditors, and appoint a provisional liquidator; § 85. The effect of the issue of an order for the compulsory winding up of a company is to restrain creditors from proceeding with action or diligence except by leave of the court; § 87. An official liquidator or liquidators are then appointed by the court, by whom they are removeable. The powers of the liquidator are, with the sanction of the court, to bring and defend actions, carry on the business of the company, so far as necessary for its beneficial winding up, sell its property, do all necessary acts on behalf of the company, claim in bankruptcies of contributories and debtors, draw bills and raise money on security of the company's assets, &c.; § 95. The court settles a list of contributories, rectifies the register, and causes the assets of the company to be collected and applied in discharge of its liabilities; § 98. The list distinguishes between contributories in their own right,

[and those who are representatives of others, *e.g.*, the executors of a deceased shareholder, or the trustee of a bankrupt shareholder; § 99. The court has the power of making calls (§ 102), and of fixing a day or days for creditors proving their debts (§ 107); adjusts the rights of contributories *inter se* (§ 109), and may order the costs of the liquidation to be paid in priority to the debts of the company (§ 110), and after the affairs of the company have been wound up makes an order for the dissolution of the company (§ 111), which is reported to the registrar (§ 112). In addition to the foregoing ordinary powers, the court has power of summoning before it persons suspected of having property of the company, or capable of giving information concerning the company's affairs (§ 115), and may examine such persons on oath (§ 117), and may arrest contributories about to abscond or conceal their property (§ 118). The powers given to the court are in addition to those which it has at common law (§ 119). (2.) *Voluntary Winding up of a Company.*—A registered company may be wound up voluntarily, (a) on expiry of the term fixed by the articles of association for dissolution; (b) whenever the company has passed a special resolution, requiring that it be wound up voluntarily; or (c) an extraordinary resolution to the effect that it has been proved to their satisfaction that the company, by reason of its liabilities, cannot continue its business, and that it is advisable to wind up the same. An extraordinary resolution does not require confirmation by a subsequent meeting, as a special resolution does; § 129. The winding up commences at date of resolution; § 130. Notice of the resolution must be given in the *Edinburgh Gazette*; § 132. The effect of a voluntary winding up is that the company ceases to carry on business from the date of the resolution, except in so far as required for the beneficial winding up thereof; that all transfers of shares, except with the sanction of the liquidators, are void, but the corporate state and powers of the company remain unaltered (§ 131), and diligence is not stopped; *Sdeuward*, 10 March 1876, 3 R. 577; but it is otherwise in England; *Black*, L.R. 8 Ch. 254. Liquidators, who have all the powers of official liquidators, but do not require the sanction of the court, must be appointed, and the assets applied, in satisfaction, *pari passu*, of the company's liabilities. The liquidators settle the list of contributories, make calls, and adjust the rights of contributories *inter se*. The directors

[cease to act, on the appointment of liquidators, unless the company otherwise directs; § 133. The company may delegate the appointment of liquidators to its creditors; § 135; and any arrangement between a company being, or about to be, wound up voluntarily, and its creditors is binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths of them in number and value, unless the court, on appeal, refuses to confirm it; §§ 136, 137. On the winding up of the affairs of the company being completed, the liquidators account to a general meeting, a return of which is made to the registrar, and, on the expiry of three months from the date of registration of the return, the company is deemed to be dissolved; §§ 142, 143. Notwithstanding the subsistence of a voluntary winding up, any creditor may apply to the court for an order for a winding up by the court; §§ 145, 146. (3.) *Winding up under Supervision of the Court.*—In the case of a voluntary winding up, proceedings at the instance of creditors are not stayed (*Sdeuward, supra*); where, therefore, there is risk of preferences being obtained, advantage should be taken of this third form. The petition may be at the instance either of the company, contributories, or creditors, and the court has full power to make an order for a winding up by the court, or to make an order that the voluntary liquidation shall continue under supervision of the court, and on such conditions as may be fixed by the court; §§ 147–150; *Benhar Co.* 6 Feb. 1883, 10 R. 558; *Gardner*, 11 July 1883, 10 R. 1138; *New Glenduffhill Co.* 16 Dec. 1882, 10 R. 372. The effect of a supervision order is that the voluntary liquidators continue to act without requiring the sanction of the court, but all suits, &c., are stayed, except with permission of the court, and the court may exercise all the powers which it has in a compulsory winding up. The court may, however, impose such restrictions as it shall think proper upon the freedom of action enjoyed by voluntary liquidators; § 151. A supervision order may be superseded by a compulsory winding up order. All dispositions and all transfers of shares between the commencement of the winding up and the order for winding up are void, unless the court shall otherwise direct; § 153. In the case of a winding up under the supervision of the court, all the advantages of a compulsory winding up are secured, while, at the same time, the liquidators and

[the company are enabled to conduct the winding up without requiring repeated applications to the court for its sanction, unless in so far as it shall seem advisable to the parties interested to solicit its intervention.

List of Contributories.—Whichever form the liquidation takes, one of the first duties of the liquidator is to prepare a list of contributories. In a judicial winding up it is settled by the court, in a voluntary winding up by the liquidator; and in a winding up under supervision it is prepared by the liquidator and sanctioned or approved by the court. The approval by the court is without prejudice to the right of any contributory to have his name removed on cause shown. The list of contributories is made up from the register of members. It is called the A List; and is divided into two parts, those who are contributories in their own right, and those who are representatives of or liable to the debts of others (act 1862, § 98). If the calls payable by the contributories on the A List are not enough to pay the debts of the company, the B List of contributories requires to be made up containing the names of shareholders who have transferred within a year prior to the beginning of the winding up shares which are liable in payment of calls. The past holder is liable for calls up to the full amount of liability, provided it be established that debt, existing at the time he held the shares, is still unpaid, and that present holders as a body cannot pay it in full. On establishing these points the list is approved, act 1862, § 38; *Kellock*, L.R. 9 Q.B. 241; *Helbert*, L.R. 5 H.L. 28; *Caled. H.S. Co.* 15 July 1882, 9 R. 1130; see also *Webb*, L.R. 5 H.L. 711.

Calls.—In regard to calls it is to be observed that they are made by the court in a judicial liquidation, by the liquidator in a voluntary liquidation, and by the liquidator, sanctioned by the court, in a liquidation under supervision. Calls in a liquidation are enforced by summary order on a 6 days' charge which can only be suspended on caution or consignment; act 1862, § 121; *Anderson*, 5 Nov. 1880, 8 R. 44; and may be enforced in England or Ireland, and *vice versa*, §§ 122 and 123. Directors' calls are enforced as debts under § 101; *Benhar Co.* 17 March 1882, 9 R. 763. Compensation or set-off between calls due by and debts due to a shareholder is competent while the company is a going concern, but not after liquidation has begun; the parties to and by whom the money is due not being the same, because the liquidator is not identical with the company, but a

[statutory trustee for the equal and rateable payment of all the creditors. This applies both to limited and unlimited companies; *Edin. Theatre Co.* 25 Jan. 1878, 5 R. 581; *Whitehouse*, L.R. 9 Ch. D. 595; *Pelly*, L.R. 21 Ch. D. 492. But compensation is admitted in liquidation after creditors have been paid; act 1862, § 101.

Equalising Diligence, and Ranking Claims in Liquidations.—The Companies Act, 1886 (49 Vict. c. 23, § 3), provides, in regard to companies being wound up by or subject to the supervision of the court, (but not as to companies in voluntary liquidation), that the winding up shall, in the case of a winding up by the court, as at the commencement thereof, and in the case of a winding up subject to the supervision of the court, as at the date of the presentation of the petition on which a supervision order is afterwards pronounced, be equivalent to completed diligence as in the case of sequestrations, and no arrestment or poinding, or poinding of the ground within 60 days of these dates shall be effectual, except in the last case for the current term's interest and a year's arrears of interest. The same act (§ 4) provides for ranking claims as in sequestrations, that is, after valuing and deducting securities. This was effected in England by the Judicature Act, 1875 (38 & 39 Vict. c. 77, § 10). The common law, both in Scotland and England, did not require such valuation and deduction; *Molleson*, 15 Jan. 1884, 11 R. 415; *Kellock*, L.R. 3 Ch. 769.

The Preferential Payment in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), repeals the Companies Act, 1883 (46 & 47 Vict. c. 28), and provides for the priority of certain debts in the winding up of companies. The debts are (1) parochial and local rates due at the commencement of the winding up, and Crown taxes up to the 5th April thereafter, not exceeding one year's assessment; (2) wages or salary of clerks or servants for four months before the commencement of the winding up, not exceeding £50; and (3) wages of labourers or workmen for two months, not exceeding £25. These debts are *inter se* to rank *pari passu*, and are to be paid in full after the costs of administration. The act also provides that if a landlord distrain within three months before the winding up order, the above debts shall be a first charge on effects distrained or their proceeds.

Jurisdiction of the Lord Ordinary on the Bills in Vacation.—Under the Companies Act, 1862, the Court of Session, in either Division thereof, was the only court

[(except under § 138) having jurisdiction, but under the Companies Act, 1886 (§ 5), the Court of Session is interpreted to mean, during session, either Division of the court or the Lord Ordinary to whom the liquidation may have been remitted under § 6; and during vacation, the Lord Ordinary on the Bills. Thus winding up and supervision orders can be pronounced during vacation, but subject to review; *Portobello Pier Co.* 24 S.L.R. 1. The act provides that certain orders or judgments pronounced by the Lord Ordinary on the Bills in vacation shall not be subject to review; that all others shall be subject to review, though certain of the latter shall receive effect till the reclaiming note is disposed of.

Arrangements and Compromises.—With the sanction of the court, where the company is being wound up by or subject to the supervision of the court, and with the sanction of an extraordinary resolution of the company where it is being wound up voluntarily, the liquidator may make arrangements or compromises (1) with creditors of the company, and (2) with debtors or contributories of the company; §§ 159 and 160. And under the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), a meeting of creditors, or of a class of creditors, may be convened and their assent to a compromise or arrangement may be given by a majority in number, representing three-fourths in value of such creditors, or class of creditors, present either in person or by proxy, which shall be binding on all such creditors or class of creditors, and also on the liquidator and contributories; *Calif. Redwood Co.* 12 Dec. 1885, 13 R. 335.

Sale or Transfer of Business to another Company.—This may be carried through under the Companies Act, 1862, §§ 161 and 162, by sanction of a special resolution of the selling company, which is being or about to be wound up voluntarily; and shares, policies, or other interest in the purchasing company may be taken for distribution among the shareholders of the selling company. Provision is made for any of such shareholders requiring that their interest should be paid to them in cash, and for the mode of determining the value of their interest.

Adjustment of Contributories' Rights, inter se.—Act 1862, §§ 109 and 133 (10). If there be no surplus after paying debts the loss will be apportioned among the shareholders according to the number of their shares; and if some shares are fully, and some partly paid up, it may be necessary to make a call upon the latter in order to equalise the loss; *Anglesea Co.* L.R. 1 Ch.

[555; *Paterson*, 2 March 1875, 2 R. 490. If there be a surplus it falls to be distributed among the shareholders according to the number of their shares; and if some shares have more paid up on them than others the excess will be paid back first; *Scinde Corporation*, L.R. 6 Ch. 53. Surplus assets are not paid back in proportion to the amount paid up on the shares when the liquidation began; *Bridgewater Navigation Co.* L.R. 14 App. Ca. 525. Preference shareholders have no priority in distribution of surplus, unless the preference attaches not merely to dividend but to capital; *Monkland Co.* 25 Jan. 1883, 10 R. 494.

In addition to the statutes already cited, reference may be made to the act 47 & 48 Vict. c. 56, conferring power on Her Majesty to extend the term for which charters endure; to the Companies Seals Act, 1864 (26 & 27 Vict. c. 19); and to the Companies (Colonial Registers) Act, 1883 (46 & 47 Vict. c. 30), conferring power on companies to keep registers of members resident in the colonies. See also *Ersk. B. iii. tit. 3, § 28*; *Bell's Com. ii. 516-520*; *Bell's Princ. §§ 399-403*; *M. Bell's Conv. i. 406*; *Mackay's Prac. ii. 398*; *Cameron on Joint Stock Companies*; *Lorimer on Joint Stock Companies*; *Clark on Partnership*; *Lindley on Law of Companies*, 5th ed. 1889; *Palmer's Company Precedents*; *Healey on Companies Acts*; *Buckley's Companies Acts*; *Thring's Joint Stock Companies*; *Grant on Corporations*; *Brice on Ultra Vires*. See *Partnership*.]

JOINTURE; is a conventional provision to a widow, consisting of an annual payment to her in money during her lifetime, or of a liferent assignment of the rents of lands, or sometimes of the liferent of lands called a locality, in which she is infeft, and whereby she takes her chance of the rise or fall in the rents of the lands. If a jointure-house be provided, it is by a liferent infeftment, or by an obligation to pay a certain rent in place of a house. In whatever way the jointure is constituted, whether by an annuity or by a locality of lands, and in whatever way it is secured, whether it rests on a personal obligation or is secured heritably, it excludes the widow's terce, unless the contrary be expressed. But if, by fault or fraud of the husband, the wife's jointure is left unsecured, she seems entitled to recur to her terce; and sometimes there is a stipulation to that effect. See *Bank. ii. 289*; *Bell's Com. i. 682*; *Bell's Princ. § 1947*; *Jurid. Styles, i. 201*. See *Contract of Marriage. Jus Relictæ. Terce. Marriage*.

JUDGES. Jurisdiction flows from the Sovereign alone, and is divided into civil

and criminal. The Court of Justiciary, consisting of the Lord Justice-General and Lord Justice-Clerk, [and eleven other Lords Commissioners of Justiciary,] is the supreme criminal judicatory in Scotland; [50 & 51 Vict. c. 35, § 44.] The Court of Session, consisting of [the same] judges, is the supreme civil court. Inferior to these, and possessing, to a certain extent, both a civil and criminal jurisdiction, are the sheriffs of the different counties and the magistrates of royal burghs; and inferior still in point of jurisdiction are the justices of the peace. The judges in these courts, with the exception of the magistrates of burghs and of justices of the peace, receive stated and regular salaries, corresponding to the rank and dignity of their stations; and they hold their offices *ad vitam aut culpam*. [By 50 & 51 Vict. c. 35, § 45, the salaries payable to the judges of the supreme court are as follows: to the Lord Justice-General £5000 a year; to the Lord Justice-Clerk £4800 a year; and to each of the other judges £3600 a year. Judges of the supreme courts are not liable in damages for what they do or say in their judicial capacity, being responsible only to Parliament or to the Queen in Council; *Haggart's Trs.* 1 April 1824, 2S. App. 125. And this exemption seems to be shared by inferior judges, provided they do not usurp a jurisdiction which does not belong to them; *Guthrie Smith on Damages*, 89; *Hamilton*, 18 June 1858, 3 Macq. 363; *Watt*, 24 May 1870, 8 Macph. (H.L.) 77; *Harvey*, 23 Dec. 1876, 4 R. 265. See *Ersk. B. i. tit. 2, § 32*; *Shand's Prac. i. 47*; *Mackay's Prac. i. 100*.] See *Courts. Session, Court of. College of Justice. [Justiciary Court. Bribery. Declinature.]*

[JUDGE ADVOCATE GENERAL; in England, is the adviser of the Crown in reference to courts martial and other matters of military law. He is generally a member of the House of Commons and of the Government for the time being. *Sweet's Law Dict.* A judge advocate is a legal assessor of a court martial, who administers the oath to members of the court and witnesses, and advises on points of law, maintaining an impartial position, and taking care that the prisoner suffers no disadvantage through ignorance or incapacity to examine witnesses or otherwise. He generally sums up the evidence and gives his opinion on the legal bearing of it, before the court deliberate upon their finding. See *Rules of Procedure*, 1881, §§ 99-101; *Manual of Military Law* (War Office, 1887), 670.]

JUDGE ORDINARY; a name applied

to all those judges, whether supreme or inferior, who, by the nature of their office, have a fixed and determinate jurisdiction in all actions of the same general nature, as contradistinguished from the old Scotch Privy Council, or from those judges to whom some special matter is committed; such as commissioners for taking proofs, messengers-at-arms, who, in poindings, &c., have a kind of judicial authority, macers of the Court of Session, who, under the old law, had jurisdiction in services, and other the like cases of special or extraordinary jurisdiction. *Ersk. B. i. tit. 2, § 15.*

JUDGMENT; the sentence of the law pronounced by a court upon the matter contained in the record. The judgments pronounced in the different courts, unless it is otherwise provided by statute, may be brought under the review of a superior judicature, with the exception of the judgments pronounced by the Court of Justiciary. Thus the judgments of the inferior courts may be brought under review of the Court of Session; and the judgments of the Court of Session are subject to the review of the House of Lords. See *Jurisdiction. Appeal. Decree. Interlocutory Judgment.*

[JUDGMENTS EXTENSION ACT.]

By the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), where judgment has been obtained in the courts at Westminster or at Dublin, a certificate thereof registered in Scotland has the effect of a decret of the Court of Session; and in like manner, where decret has been obtained in the Court of Session, a certificate of an extract thereof registered in England or Ireland has the effect of a judgment of the court in which it is so registered. But the act does not apply to a decree in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland. In *English's Coasting and Shipping Co.* 10 Dec. 1886, 14 R. 220, it was held that, to entitle a creditor who holds a judgment of the High Court of Justice in England to register the same in Scotland, and do diligence thereon, it is not necessary that the debtor should be subject to the jurisdiction of the Scottish courts. By 45 & 46 Vict. c. 31, the principle of the foresaid act was extended to the judgments of inferior courts (including, in Scotland, the sheriff courts, and the small debts and debts recovery courts). Registration of a certificate of judgment in any such court has the effect of a judgment of the court in which it is registered; provided the judgment is not for a greater amount than might have been recovered if the action had originated

[in such inferior court. This act does not apply to any judgment pronounced by an inferior court in England against any person domiciled in Scotland at the time of the commencement of the action, unless the whole cause of action has arisen, or the obligation to which the judgment relates ought to have been fulfilled, within the district of such inferior court, and the summons was served on the defendant personally within the said district. See A.S. 11 July 1871, 7 March 1883 (*Adam's Acts of Sederunt*, 62, 138); *Jurid. Styles*, iii. 386.]

JUDICATUM SOLVI. See *Caution.*

[JUDICIAL COMMITTEE.] See *Privy Council.*

JUDICIAL DECLARATION. See *Declaration.*

JUDICIAL FACTOR; is a factor or administrator appointed by the Court of Session on special application by petition, setting forth the circumstances which render the appointment necessary. The power of making such appointments is vested in the supreme court *ex nobili officio*, and as coming in place, it has been thought, of the Scotch Privy Council. [But see *Fraser on Parent and Child*, 455; and as to sheriff court appointments, see *infra*.] The cases in which such appointments are usually applied for and made are, where a father has died without a settlement, leaving his children in pupillarity, in which case the factor is called a factor *loco tutoris*; or where a party resident abroad has succeeded to an estate in Scotland, the factor in that case being called a factor *loco absentis*. So also, where, from insanity or mental incapacity, extreme age, or even severe indisposition, a party has become incapable of managing his affairs, the Court of Session will appoint a curator *bonis*; or where trustees named by a party deceased have declined to accept, or have died or have become incapable of acting, from bankruptcy or other causes; or where tutors have been removed as suspect; or where a subject, or its rents and profits, have become the subject of judicial competition, or have been placed under sequestration; and generally, in all cases where, but for such an appointment, there is risk of the property perishing, or being injured or going to waste, the court will, on the application of a party, or of the parties interested, name a curator *bonis* or judicial factor, with what are called "the usual powers." [In general, a guardian appointed to a minor in pupillarity, who has no legal tutor, is called a factor *loco tutoris*; and a

[guardian appointed over the estate of one above pupillarity is called a curator *bonis*.

[As a general rule, any person of full age, and resident in Scotland, may be appointed judicial factor. The person suggested by the petitioner for the office is usually appointed, if no objection is made. But the court exercise their discretion, having regard to economy, and the general interest of the estate to be administered; *Clark*, 17 June 1856, 18 D. 1041. They have latterly refused to appoint females; *Bethune*, 2 July 1851, 14 D. 11; *Galloway*, 1 Feb. 1855, 17 D. 321. In cases of earlier date, women have been appointed; *Hammond*, 20 Dec. 1831, 10 S. 167; and in a case where an unmarried woman was appointed, it was held (contrary to the rule in regard to tutors) that the office did not fall on her marriage; *Lambe*, 14 Dec. 1837, 16 S. 219. Ministers of the Established Church have been held ineligible; *Bisset*, 15 Nov. 1836, 15 S. 4; *Brodie*, 15 Feb. 1867, 3 S.L.R. 223; but see *Campbell*, 13 July 1849, 12 D. 913. There is no objection to dissenting ministers, nor to unbeneficed clergymen of the Established Church; *Hall*, 18 Feb. 1830, 8 S. 553; *Smith*, 3 Dec. 1858, 13 D. 951; *Forbes*, 2 Dec. 1853, 16 D. 109. An undischarged bankrupt will not be appointed; *Miller*, 20 June 1840, 2 D. 1181; and if a factor become insolvent, his appointment may be recalled; *Fraser*, 28 Feb. 1849, 11 D. 1028; *Miller*, 17 Nov. 1849, 12 D. 911. A step-father will not be appointed; *Buchanan*, 14 Feb. 1832, 10 S. 289. With regard to persons entitled to the office of tutor-at-law, the practice has fluctuated: in some cases the court have refused to appoint such persons factors *loco tutoris*; in others they have been appointed, on giving in a minute passing from all claim for remuneration; *Fraser on Parent and Child*, 462; *Thoms on Judicial Factors*, 184. When a law agent is appointed factor, he cannot act as agent for the ward, unless gratuitously; *Morison*, 26 April 1849, 6 Bell's App. 422; *Flowerdew*, 22 Dec. 1854, 17 D. 263; *Mitchell*, 20 July 1878, 5 R. 1124. In general, only one individual is appointed; and the court will not appoint one person, whom failing another; *Dow*, 8 Feb. 1847, 9 D. 616.

[The appointment is made on application by one or more of the ward's nearest of kin, by petition addressed to the Lords of Council and Session. Such petitions are brought before the Junior Lord Ordinary, and disposed of by him in the first instance; 20 & 21 Vict. c. 56, §§ 4-6. During vaca-

tion, the Lord Ordinary on the Bills has the same powers in regard to such petitions as the Junior Lord Ordinary has during session; *ib.* § 10. The petition "must explicitly state the age of the pupil, &c., and the value of the estate; and in the case of an insane person, the duration of his insanity, and the length of time his funds have been intrusted with by his friends; also, whether the party craved to be appointed has been acting as agent for the pupil or insane person;" see 1 Stu. 112, 118, 804; 14 D. 312, 486, 492, 849; *Jurid. Styles*, iii. 610; *Bell's Styles*, iii. 360; *Fraser*, 464; *Thoms*, 446, 595 *et seq.* See *Petition*. At common law, the sheriff appears to have a certain jurisdiction to appoint judicial factors, when the appointment is incidental to a matter already before him; *Johnstone*, 15 Feb. 1838, 16 S. 541; *Drysdale*, 11 March 1842, 4 D. 1061; *Rowe*, 4 June 1872, 9 S.L.R. 493. He has also a limited jurisdiction under various statutes; 19 & 20 Vict. c. 79, §§ 16, 37; 31 & 32 Vict. c. 100, § 79. But the sheriff's powers in reference to such appointments were enlarged by the Judicial Factors Act, 1880 (43 & 44 Vict. c. 4). Under this act, the sheriff may appoint judicial factors over estates which do not exceed £100 in yearly value, heritage and moveables being taken together. The procedure is regulated by the act, and by A.S. 14 Jan. 1881. See *Thoms*, 513.

[The powers, duties, and responsibilities of all kinds of judicial factors were formerly regulated by A.S. 13 Feb. 1730. But the provisions of that A.S. were to a large extent superseded by the Pupils Protection Act (12 & 13 Vict. c. 51), which regulates those classes of judicial factors which come under its operation, viz., factors *loco tutoris*, factors *loco absentis*, and curators *bonis*. Factors on trust estates are not affected by the Pupils Protection Act, and continue to be regulated by the A.S. 13 Feb. 1730; *Morison*, 21 Feb. 1857, 19 D. 504. The ordinary powers, duties, and liabilities of a factor under the A.S. 1730 have been thus summarised:—
 "1. To recover all rents, profits, and debts, by every necessary means, and, if necessary, to expedite confirmation in his character of factor as executor-dative. 2. To dispose of the personal and moveable property belonging to the estate for an adequate price or value, 'according to the rules of law, and as prudence requires.' 3. To apply and manage the capital and income of the estate. 4. To grant tacks or leases for the period of the judicial management,

[and for one year further. 5. To lodge with the clerk of court the following rental, inventories, accounts and papers, viz.: (1) A rental of the estate within six months after extracting the factory, and periodically to lodge information of the alterations thereon. (2) An inventory of the personal obligations and moveable property within the said six months, and periodically to lodge information of the alterations thereon. (3) Copy of the confirmed testament that may be expedite, and of all eiks thereto. And (4) annual accounts of the management, and in accounting therefor,—(a) Eases and profits must be communicated. (b) All debts or claims against the estate, bought up directly or indirectly by the factor, must be held and entered as discharged and extinguished. (c) Interest must be allowed on moneys recovered and not invested. And (d) a sum by way of commission (but nothing else) may be charged, along with outlays. 6. To be liable to the penalties following, viz.: (1) Removal on failure 'in any part of the premises.' (2) Payment of double the amount of any deficiency in the rental lodged as aforesaid, and of any increase thereon omitted to be noticed afterwards. (3) A mulct for failure to lodge full copies of the confirmed testament and eiks. And (4) a mulct, not being under half-a-year's commission, for failure to render accounts annually;"] *Thoms*, 70. Besides these ordinary powers,] if, in the course of the management, any emergency occurs, the court, although with hesitation, will confer special powers on special application, but only in cases of absolute necessity. [In applications, however, for special powers under the Pupils Protection Act (the provisions of which are noted *infra*), the factor does not require to prove absolute necessity, but only strong expediency.] Thus, in special circumstances, powers to grant leases to endure for various periods have been conferred. Such powers, however, when granted, must always be exercised *periculo petentis*, and subject to challenge by the parties interested. The great object which, in all such cases, the court has in view, is to preserve the property for the parties to whom it belongs as entire and as much unchanged as circumstances will possibly permit; and power to raise an action of reduction, to carry on a particular manufactory, and the like, has been expressly refused, leaving it to the factor to act in such matters on his own

responsibility. This judicial management being in its nature temporary, expires when the cause which gave rise to it ceases, or when a more permanent judicial manager or guardian is appointed. Where the factory is important, and the intromissions large and numerous, it sometimes happens that the factor applies at certain stated intervals to the court, to have his accounts audited to a particular date, and to have a balance struck; which avoids the inconvenience of having old accounts and vouchers investigated when the circumstances connected with them are out of mind.

[Under the Pupils Protection Act, the term *judicial factor* comprehends only factors *loco tutoris*, factors *loco absentis*, and curators *bonis*; § 1. At common law, these officers have the same powers over the ward's estate, as those of tutors and curators, in place of whom they are appointed. They have no power over the person of the ward; *Robertson*, 28 May 1814, F.C. The statute does not repeal, though practically it has superseded, the provisions of the A.S. 1730, which formerly regulated the powers and duties of these officers. By § 9 of the act, a new officer was created, called the Accountant of Court, whose duty is, under § 10, to superintend generally the conduct of all judicial factors and tutors and curators coming under the provisions of the act, and to see that they duly observe all rules and regulations affecting them for the time. See *Accountant of Court*. By § 2 of the act, every judicial factor shall, within such a time after his appointment as the court shall direct, find caution for his duly accounting for his intromissions and management, and observing and performing the duties incumbent on him as factor, and in case of his failure to do so, his appointment shall fall; and no factor shall enter upon the duties of his office, nor shall an extract of his appointment be issued, until after such caution is found and received as sufficient; and the factor shall extract his appointment without delay. By A.S. 11 Dec. 1849, § 2, the time for finding caution, when not otherwise expressed, is one month from the date of appointment. By § 11 of the act, on the death or insolvency of a cautioner, the factor shall forthwith give notice thereof in writing to the accountant, who shall require new caution to be found. By § 27, the court may, upon cause shown, limit the caution to a specified amount, and may authorise bonds or

[policies of guarantee associations to be accepted instead of bonds of caution by private individuals; *Burnett*, 8 July 1859, 21 D. 1197; *Sim*, 5 Dec. 1863, 2 Macph. 205; *M'Kinnon*, 8 March 1884, 11 R. 676. At common law also, the court has power to fix the kind and amount of caution to be found by a judicial factor; *M'Kinnon*, 26 Nov. 1884, 12 R. 184. By § 3, every judicial factor shall, within six months after receipt of his bond of caution, lodge with the Accountant of Court a distinct rental of the lands under his charge, a list of the funds, and an inventory of the moveables; and shall without delay recover all writs and documents of importance belonging to the estate, and collect all monies due to the same not securely invested, using all reasonable diligence; all documents and information so obtained to be produced to the Accountant, and new claims or property subsequently discovered to be reported to him. By § 4, the factor shall close his accounts once in every year, and lodge them with the Accountant. By § 5, the factor shall lodge the money in his hands in one of the banks in Scotland established by act of parliament or royal charter, in a separate account, or on deposit, in his own name as judicial factor; and if he shall keep in his hands more than £50 of money belonging to the estate for more than ten days, he shall be charged at the rate of 20 per cent. on the excess for any time beyond the ten days; and, unless the money has been so kept from innocent causes, he shall be dismissed from office, and have no claim for commission. This enactment is imperative, and leaves no discretion to the court; but the penalty is not exigible after the factor's death; *Ballingall*, 3 June 1853, 15 D. 711; *Macdonald*, 8 July 1854, 16 D. 1023; *Maxwell's Trs.* 27 June 1862, 24 D. 1181. By § 6, in case of the factor's misconduct, or failure in duty, he is liable to fine, forfeiture of commission, suspension or removal from office, and payment of expenses, as the court in its discretion shall decide. See *Hutton*, 15 Jan. 1852, 14 D. 330 (where a factor was merely reprimanded); *Macalister*, 22 Dec. 1853, 16 D. 301; *Wilkie*, 8 March 1856, 18 D. 793. By § 7, "if at any time it shall appear to the factor that there is a strong expediency for granting abatement of rent, either temporarily or permanently, or for renewing or granting a lease for a period of years, or for draining, or for erecting buildings or fences, or

[for otherwise improving the estate in a manner not coming within the ordinary course of factorial management, he shall report the same to the Accountant, who may order any necessary inquiry, and shall state his opinion thereon in writing; and such report and opinion may be submitted by the factor to the Lord Ordinary, with a note praying for the sanction of the court to the measure proposed." Such note is disposed of by the Junior Lord Ordinary, after such intimation as may be deemed proper; § 8, and 20 & 21 Vict. c. 56, § 4. Similar procedure is prescribed, by § 7 of the Pupils Protection Act, in the case of a factor on the estate of a lunatic or other incapable deeming it proper for the comfort or welfare of the ward that the whole or part of his estate should be sunk on annuity; as well as in all other matters in which special powers are in use to be granted by the court. The duties of the Accountant of Court are more particularly described by §§ 12 *et seq.* He adjusts the rentals, lists, and inventories, and audits the factor's accounts. He has power to dispense with the rules of exact diligence; the approval of the Lord Ordinary, however, being necessary, where the sum involved exceeds £20. The Accountant's audit and report are conclusive against the factor and his cautioner, unless objected to within twenty days. Objections are disposed of by the Lord Ordinary, whose judgment may be brought under review of the court, by the factor, but not by the Accountant. The Accountant is required to make an annual report of all judicial factories, which is printed. The Accountant makes such requisitions and orders on the factor as he considers necessary, and reports to the Lord Ordinary or the court any misconduct or failure in duty. If he has reason to suspect malversation, he may lay a case before the Lord Advocate. He has power to require information from banks with regard to factorial accounts, and is made the custodian of bank receipts, bonds of caution, &c. By § 34, a factor may, on the termination of his office, present a petition to the court for his discharge. The petition is disposed of by the Junior Lord Ordinary, after proper intimation and service. Where the factor is content with an extrajudicial discharge from the parties interested, he produces the discharge, and craves only an order upon the Accountant to deliver up his bond of caution. A judicial discharge is not granted without a remit to the Accountant. The factor is

[entitled to a commission for his services, which is generally five per cent.; but the amount may vary according to the business performed. It is fixed every year by the Accountant, under § 13, according to his opinion of what is just. The factor is entitled to no other remuneration; *Rennie*, 26 April 1849, 6 Bell's App. 422; *L. Gray*, 12 Nov. 1856, 19 D. 1. See A.S. 11 Dec. 1849, 1 Feb. 1850, 11 March 1851, 8 Dec. 1870, 14 Jan. 1881; and, with regard to judicial factors in bankruptcy proceedings, A.S. 25 Nov. 1857 (*Adam's Acts of Sederunt*, 8, 199). See *Bell's Princ.* § 2114; *Brodie's Supp. to Stair*, 879; [*Ersk. B. i. tit. 7, § 10*; *Fraser on Parent and Child*, 455; *Thoms on Judicial Factors* (2d. edit. by H. J. E. Fraser, advocate); *Goudy on Bankruptcy*, 490.

[The law as to judicial factors was altered (while this work was passing through the press) by the Judicial Factors Act, 1889, which, among other provisions, unites the offices of Accountant of Court and Accountant in Bankruptcy, and brings all judicial factors under the supervision of the Accountant of Court. The act will be printed *in extenso* in the Appendix.]

JUDICIAL PROCEDURE. This term is applied to all proceedings in a court of law falling under the cognisance of the judge. The particular rules, according to which the proceedings in the several courts in Scotland are conducted, will be more minutely treated of under distinct titles; but some general principles applicable to judicial process may here be taken notice of. 1. Although the general rule of law is, that no judicial step can have any effect except against those who have been regularly called as parties, yet there are certain proceedings which affect the whole community, upon the principle that they are parties. Thus the judgments pronounced in any suit are binding upon those only who are proper parties to it; and therefore, although such judgments may be regarded as precedents for the determination of similar questions, they do not amount to *res judicate*, nor preclude the trial of the same points in a question between other parties. On the other hand, the existence of certain judicial proceedings infers litigiosity, which may have important effects even against third parties, who contract or enter into transactions with the party against whom litigiosity strikes. See *Litigiosity*. 2. The courts of law are of course open to every individual, whether a subject of this country or a foreigner.

But with regard to the latter, he must have a mandatory resident in Scotland, personally liable for the expenses or costs of suit, in case they should be awarded against his constituent. See *Defender. Mandatory*. 3. In order to secure a more strict attention to the forms of judicial process, it has been deemed expedient, generally speaking, to commit the conduct of all lawsuits in the inferior and supreme courts exclusively to certain licensed practitioners, who have undergone a course of study to qualify them for that duty, and who are subjected to certain probationary trials. In the Court of Session, although a party may be heard *viva voce* upon the merits of his case, he must devolve the general management of the process upon a counsel and agent. The same rule prevails in the sheriff courts, and in the other inferior courts, in all of which (with certain exceptions introduced by special statutes intended to facilitate the recovery of small debts) the business is conducted by procurators duly admitted. [See *Counsel. Law Agent*.] 4. In judicial proceedings a party is entitled to aver any fact pertinent to the cause, however much it may militate against the character of his adversary, or of any witness offered against him; and action will not be sustained on account of pertinent, although calumnious, expressions thus used judicially. But any libellous matter irrelevantly introduced is not entitled to this protection—a distinction which has been recognised and repeatedly acted upon. See *Process. Courts. Defamation. Damages. Expenses*.

JUDICIAL REFERENCE. A judicial reference is a submission of a matter in dispute to an arbiter, with consent of parties, and under authority of the court. The powers and duties of the arbiter are in general the same as in an ordinary submission, and his award is subject to the same grounds of challenge. See *Rogerson*, 31 Jan. 1885, 12 R. 583. But the award has no effect until the authority of the court is interposed. See *Gillon*, 14 Jan. 1859, 21 D. 243. See *Ersk. B. iv. tit. 3, § 36*; *Bell on Arbitration*, 267; *Mackay's Prac. i. 533*. See *Arbitration*.]

JUDICIAL SALE; a term applied, in a general sense, to any sale which takes place under judicial authority. The circumstances in which, in the practice of the law of Scotland, such a sale may be made, are various. Thus, in the process of sett, one of the alternative conclusions of the action is, that the ship shall be sold by judicial authority, and the proceeds divided

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among the shareholders. See *Sett*. So in the case of an indivisible heritable subject, any one of the common proprietors is entitled to call upon the co-proprietors either to purchase his share at a certain price, or to sell him their shares at the same rate, or to concur in exposing the subject to sale by public roup. See *Common Property*. Other instances of judicial sale are, the sale under a sequestration for rent, the sale of poided effects, the sale of a minor's estate in a process of cognition and sale, and the sale of a perishable subject, pending a litigation respecting the right of ownership, or the like. By much the most important judicial sale, however, is that of the heritable property of an insolvent person, for the purpose of dividing the price among his creditors. [See *Sequestration*.] *Ranking and Sale*.

JUDICIO SISTI. See *Caution*.

JUDICIUM DEI; the term anciently applied to all extraordinary trials of secret crimes, as those by single combat, the ordeal of fire, &c. See *Combat*.

JUDICIUM PARIUM; a trial by one's peers. *Tomlins' Dict. h. t.*

JUGGLERS; are included amongst vagabonds and Egyptians, and other descriptions of idle and disorderly persons, against whom many penal laws were enacted by the Scotch Parliaments. *Ersk. B. iv. tit. 4, § 39; Hume, i. 474.* See *Egyptians. Vagabonds*.

JURAT; [the clause written at the foot of an English affidavit, stating when, where, and before whom such affidavit was sworn; *Brown's Dict.*] See *Affidavit*.

JURATORY CAUTION; is a description of caution, sometimes offered in suspensions, and [formerly] also in advocations, where the complainer is not in circumstances to offer any better. [A suspender offering juratory caution must show, to the satisfaction of the Lord Ordinary on the Bills, that he has a *probabilis causa litigandi*; *M'Gregor*, 27 May 1862, 24 D. 1006. Before the note of suspension is passed,] the complainer is required to depone, [before a commissioner named by the Lord Ordinary,] at a time and place previously intimated to the opposite party or his agent, in order that an opportunity may be offered of cross-interrogating him, as to whether he has any lands in property or liferent, or bonds, bills, or contracts containing sums of money. Should he acknowledge that he has, he must condescend upon them, and depone that he has no other lands, bonds, bills, or

contracts containing sums of money belonging to him. The complainer must also lodge with the [clerk of the bills] the bond of caution; a full inventory of his subjects and effects of every kind; and an enactment subjoined to the inventory, bearing that he will not dilapidate any of his property, and that he will not dispose of the same, or uplift any of the debts due to him, without consent of the respondent or his agent, or the authority of the judge (under pain of imprisonment, or being otherwise punished as guilty of fraud), till the [reasons of suspension] be discussed, and till there be an opportunity of doing diligence for any expenses that may ultimately be found due by him. Farther, the complainer must lodge in the hands of the clerk the vouchers of any debts due to him, and the title-deeds of any heritable subject belonging to him, so far as in his possession or within his power. And juratory caution has been refused, in respect of the non-delivery of the title-deeds, although they were not in the suspender's possession, but in that of his agents, subject to a right of hypothec, which they refused to waive. The complainer, if required, must grant a special disposition to the respondent of any heritable subject he may be possessed of, and an assignation of all debts or other rights due to him, for the respondent's further security. The disposition and assignation are made out at the expense of the respondent, and by his agent, and remain with the vouchers and title-deeds, if so deposited, in the hands of the clerk, subject to the directions of the court, till the [reasons of suspension] be discussed. Until the lodgment of the bond of caution, inventory, &c., is made with the clerk of the bills, it is not necessary for the opposite party to give in his answers in the Bill-Chamber; A.S. 11 July 1828, § 3. See *Stair*, B. iv. tit. 52, §§ 9-24; *Ersk. B. iv. tit. 3, § 19; Bank. iii. 9; Ross's Lect. i. 369, 382; Ivory's Form of Process, i. 127; [Shand's Prac. i. 416, 447, 462; Mackay's Prac. ii. 184.]* See *Caution. Suspension*.

JURI PRO SE INTRODUCTO CUIQUE LICET RENUNCIARE;

a Roman law maxim, importing that any one may at his pleasure renounce the benefit of a stipulation or other right introduced entirely in his own favour. Thus, in the ordinary case, if a mandate bear a definite term, this is understood to be in the mandant's favour, and he may recall the mandate at any time. But the rule is altered when the mandate is partly for

behoof of the mandatory, who then has an interest that the term agreed upon should not be altered. *Stair*, B. i. tit. 12, § 8; tit. 13, § 8; B. ii. tit. 9, § 38; tit. 11, § 6.

JURI SANGUINIS NUNQUAM PRÆSCRIBITUR; a Roman law maxim, importing that the right of relationship, being a personal right, is not lost *non utendo*. It is not to be understood, however, that one cannot, by prescription, establish his right to a subject which another claims in virtue of his right of relationship. Thus, after the lapse of the vicennial prescription of retours, the party served, although not the true heir, may exclude him. All that is meant is, that, if no other heir has been entered, the right of blood is not lost by the negative prescription, but that a person may enter heir to his predecessor, although he died centuries ago. [See *Officers of State*, 25 May 1866, 4 Macph. 741.] See *Stair*, B. ii. tit. 12, § 15; *Ersk.* B. iii. tit. 7, § 12; *Bank.* ii. 352; iii. 49. See *Prescription*.

JURISDICTION; is either civil or criminal. By the one, questions of private right are determined; by the other, crimes are tried and punished. Jurisdiction may be also divided into superior, inferior, and mixed. In this sense, the jurisdiction of the Courts of Session and Justiciary is superior, since the sentences of all the inferior courts of Scotland are subject to the review of one or other of them; while their sentences, though subject (with the exception of the Court of Justiciary) to review in the House of Lords, are not subject to the review of any court in Scotland. Inferior judges are those whose sentences are subject to the review of our supreme courts, and whose jurisdiction is confined to a county, burgh, or other special territory. Mixed jurisdiction partakes of the nature both of superior and inferior jurisdiction. Thus, before they were abolished, the High Court of Admiralty and the Commissary Court of Edinburgh had a universal jurisdiction over all Scotland, and might review the sentences of inferior admirals and commissaries—in so far they possessed a superior jurisdiction; but, on the other hand, their own judgments were subject to the review of the Court of Session or of Justiciary, and in so far they were inferior courts. See *Delegated Jurisdiction. Appeal*. [As to jurisdiction in ecclesiastical matters, see *Church Judicatories*. The jurisdiction of a particular court is said to be either privative or cumulative, according as it is exclusive

[of, or concurrent with, the jurisdiction of any other court. Jurisdiction is generally founded either *ratione domicilii* or *ratione rei sitæ*. For an account of the kind of domicile which will give jurisdiction, see *Domicile*. Jurisdiction founded on domicile does not apply to actions relating to heritage. The existence of heritable estate in Scotland gives jurisdiction to the Scotch courts in all actions, whether relating to such estate or not, in which decree can be enforced against the estate. See *Fraser*, 14 Jan. 1870, 8 Macph. 400. But jurisdiction founded on ownership of heritage ceases when the owner grants an absolute conveyance thereof, even though he be not feudally divested; *Bowman*, 24 Jan. 1877, 4 R. 322. The possession of moveables in Scotland may also found jurisdiction in the Scotch courts, on arrestment being used; see *Arrestment jurisdictionis fundandæ causa*. Another ground of jurisdiction arises, if this country be the *locus contractus*, or the *locus solutionis*, provided the defender be personally cited in Scotland; and this rule “extends to cases not laid upon contract, but where the cause of action, be it contract or delict, clearly arises and occurs within the territory;” *per* Lord J. C. Inglis in *Johnston*, 19 March 1861, 23 D. 758; see *Wylie*, 11 July 1834, 12 S. 927 (declarator of marriage); *Sinclair*, 17 July 1860, 22 D. 1475 (breach of promise); *Kermick*, 7 July 1871, 9 Macph. 984 (defamation); and as to the necessity of personal citation, see *Longworth*, 5 Nov. 1868, 7 Macph. 70. Another ground of jurisdiction is the apprehension of a debtor *in meditatione fugæ*; see *Meditatio Fugæ. Border Warrant*. “Where trustees are liable jointly to account for their intromissions, the proper *forum* to try the question is the *forum* of the country where the trust is said to subsist and where it comes to be executed. The liability to account is indivisible, and the accounting must be carried on in a process in which all the trustees must be summoned. In a case of this kind the jurisdiction of the court is founded not upon domicile, but upon the situation of the funds of the trust;” *per* Lord Pres. Inglis, in *Robertson’s Tr.* 13 July 1888, 15 R. 914. In regard to the conflict of jurisdiction, when trust funds are partly in England, and partly in Scotland, see *Orr Ewing’s Trs.* 24 July 1885, 13 R. (H.L.) 1. The only proper court of criminal jurisdiction is the *forum delicti*; *Hume*, ii. 50; *Alison’s Prac.* 81; *Macdonald*, 242. With regard to crimes

[committed on seas adjacent to the British coasts, see the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73); also *Keyn* (Franconia), 2 Ex. Div. 63. See the Foreign Jurisdiction Acts, 6 & 7 Vict. c. 94; 28 & 29 Vict. c. 116; 29 & 30 Vict. c. 87; 37 & 38 Vict. c. 27; 38 & 39 Vict. c. 85; 41 & 42 Vict. c. 67; 44 & 45 Vict. c. 69, §§ 23, 36.] Where a new civil jurisdiction is created by statute, with a power of judging in special matters, this jurisdiction is not exclusive of the judge formerly competent to that species of causes, unless the statute shall expressly give an exclusive right to the new court. It follows, also, that such new jurisdiction (unless the contrary be expressed) will be accounted subordinate, and subject to the review of the supreme civil court. It is not sufficient to give a supreme and sole jurisdiction, that a new court is declared to have the right of determining *finally*; to confer such a power, the judgments of the court must be declared final, and not subject to review or appeal. See *Ersk. B. i. tit. 2*; *Stair, B. ii. tit. 3, § 62*; *Swint. Abridg. h. t.*; *Ross's Lect. i. 279*; *Kames' Hist. Law Tracts, art. Courts*; *Mackay's Prac. i. 165*; *Fraser on Husb. and Wife, ii. 1271*; *Dove Wilson's Sher. Court Prac. 71*; *Story's Conflict of Laws*; *Wharton's Conflict of Laws*; *Savigny's Priv. Internat. Law* (transl. Guthrie); *Bar's Internat. Law* (transl. Gillespie); *Westlake's Priv. Internat. Law.*] See *Domicile. Citation. Edictal Citation. [Foreign. Abroad. Forum Competens. Prorogation of Jurisdiction. Incidental Jurisdiction. Reconvention. Extradition. Judgments Extension Act.]*

JURISPRUDENCE; is that science the object of which is to show in what manner the rights of individuals may best be protected. It points out the true nature of a right; it anticipates the dangers to which the enjoyment of rights is exposed, from crime, from injustice, or from uncertainty; and it directs the enactment of laws which may furnish incentives to virtue and discourage crime; which may protect the rightful owner from the force or fraud of aggressors; and which may establish rules for defining and rendering certain the rights of individuals, and prescribing the manner in which such rights are to be acquired, transmitted, and extinguished. See *Law. International Law.*

JURY; a certain number of men sworn to inquire into and try a matter of fact, and to declare the truth according to the evidence legally adduced. They are called

jurors from *juratores*, as being sworn to return their verdict faithfully; and in order that the evidence may be properly laid before them, and no illegal evidence admitted, the trial proceeds under judicial superintendence and direction, and in presence of the parties or their counsel. In criminal cases, the number of the jury is fifteen; and the majority of that number determine what the verdict shall be. In civil causes, the number of the jury is twelve; [and they may return a verdict by a majority, after being enclosed for three hours; 31 & 32 Vict. c. 100, § 48. See following article.] The English and Scotch laws relating to high treason having been assimilated at the Union of the kingdoms, the jury, in all cases of high treason, also consists of twelve; and their verdict must be unanimous. See *Treason*. The act 6 Geo. IV. c. 22, for regulating the qualifications and manner of enrolling of jurors in Scotland, and choosing of jurors on criminal trials, made many important alterations on the former practice. 1st, As to the qualification. Every man between the ages of 21 and 60 years is qualified to serve, if he be infert in his own right, or in right of his wife, in heritage, in fee, or in liferent, to the yearly value of £5 at least, in the county or city from whence the jury is to be taken; or if he have moveable property worth £200 at least. But peers, judges of the supreme courts, sheriffs, stewards, magistrates of royal burghs, ministers of the Established Church, and all other ministers of religion who have taken the oaths, and whose place of meeting has been duly registered, parochial schoolmasters, practising advocates, practising writers to the signet, solicitors before the supreme and inferior courts who have taken out their annual certificates, all acting clerks or other officers of any court of justice; all gaolers or keepers of houses of correction; all professors in universities, physicians and surgeons duly qualified and practising as such; all officers of the army or navy on full pay; all officers of customs or excise; messengers-at-arms and other officers of the law—are exempted from being returned or from serving. [All exemptions created by subsequent acts were abolished by 31 & 32 Vict. c. 100, § 43; but the exemption of lighthouse-keepers and their assistants, which had been enacted by 1 & 2 Vict. c. 119, § 27, was renewed by 32 & 33 Vict. c. 36.] 2d, The sheriffs or stewards of each county or stewartry were directed to make up a roll of all the qualified persons

within their territory, to be entered in a book called *The General Jury Book*, to be kept in the sheriff or steward-clerk's office of each county or stewartry, and to be open to public inspection on payment of a fee of one shilling. 3d, The sheriff or steward must select from the list in the general jury book the names of all persons qualified to be special jurors under the Jury Court Act, 55 Geo. III. c. 42 (*i.e.*, paying cess upon £100 of valued rent or upwards, or assessed taxes on a house rented at £30 yearly or upwards), the names so selected to be entered in a *Special Jury Book*, to be kept in like manner in the sheriff-clerk's office, open to the public on the same terms; the persons whose names are inserted in the special jury book being liable to serve as special jurors in all cases, civil or criminal, where special juries are required; and the names of the persons qualified to be special jurors at the same time remaining in the list in the general jury book. The qualifications required by the act of Geo. III. having been found to be in many counties such as not to furnish an adequate number for the discharge of their duties, an act was passed extending the qualification; 7 Geo. IV. c. 8. Under this act, every person, residing within any county or stewartry in Scotland, who is infertile in, and possessed of, lands and heritages in any part of Scotland, yielding the sum of £100 sterling of real yearly rent or upwards, at the time, or who is possessed of personal property to the amount of £1000 sterling or upwards, is qualified to serve as a special juror in Scotland, exclusive of, and in addition to, those qualified to serve as special jurors, in terms of 55 Geo. III. 4th, The counties of Edinburgh and Lanark respectively are divided into separate districts, and have separate lists of the jurors for each district made up; and the sheriffs of Haddington and Linlithgow are directed to transmit from their counties certified copies of the lists, both general and special, to the sheriff of Edinburgh, from which lists, as well as from the Edinburgh lists, the names of jurors required for trials in Edinburgh are taken in certain proportions, stated in § 7 of the statute, *viz.*, 24 for the city of Edinburgh, 6 for the town of Leith, 6 for the remainder of the county of Edinburgh, 5 for Haddington, and 4 for Linlithgow; and in the same proportions where fewer than 45 jurors are required to be returned. And in all criminal trials, one-third of those returned must be special jurors. 5th, Where the attendance of jurors at the circuits is required, the clerk of court

must give notice to the sheriffs of the counties within the circuit of the number of jurors required; and the sheriff or steward must return the number required from the different counties in certain proportions, as directed in § 8 of the statute; taking the names from the special and general jury books. 6th, In criminal trials in inferior courts, the clerk of the inferior court will be in like manner furnished with names to the number required from the jury books of the county in which the court is held, one-third of the whole number returned being persons qualified as special jurors. 7th, In all returns made by sheriffs, the names must be returned in regular order, beginning at the top of the lists in the jury books; commencing every new return with the name immediately after that of the last juror in the preceding return; provision is then made for correcting the lists as occasion may require, and for going through the lists in regular rotation. 8th, Where the person to be tried is entitled to a jury of landed men, the sheriff, when required, must make a return of the names of landed men as they stand in the jury books, a majority of the jurors in such return being landed men. 9th, Any wilful or unwarrantable departure, on the part of the sheriff, from the provisions of the statute, will subject him in a penalty of £50, to be recovered on summary complaint before the High Court of Justiciary, or the Circuit Court of Justiciary; half the penalty going to the Crown, the other half to the party suing for the same. But no irregularity in making up or transmitting the lists, or in the warrant of citation, or in summoning jurors, or in returning any execution of citation, will constitute a good objection to jurors whose names have been served on any person accused of a crime, reserving it to the court to judge of the effect of a felonious return. This provision is further strengthened by 9 Geo. IV. c. 29, § 7, which puts an end to all such objections by the general enactment that it shall not be competent, in any criminal cause or prosecution whatsoever, for any prosecutor or person accused to state any objection to any juror, or to any witness, on the ground of such juror or witness appearing without citation, or without having been duly cited to attend. 10th, The Lord Justice-Clerk, or any one of the Commissioners of Justiciary, may direct such number of persons, exceeding forty-five, as may be deemed necessary, to be summoned on any criminal trial in the High Court of Justiciary or in the Circuit Court;

the warrant for summoning jurors requiring the signature of one of the said judges only, and it being unnecessary to annex a copy of the signature of the judge to the list of assize served on the accused; [but see *infra*.] 11th, Peremptory challenges, without cause assigned, may be made of five jurors by each party in a criminal trial; the challenge to be made when the name of the juror challenged is drawn from the ballot-box. But of the five special jurors to be chosen, not more than two can be challenged peremptorily by each person accused, or by the prosecutor. Challenges, on causes shown, are unlimited; but where the ground of objection is that the juror has not the legal qualification, that can only be proved by the oath of the juror objected to; and no objection whatever to a juror can be competently made after he is sworn to serve. 12th, In all criminal trials, the number of jurors returned, unless the contrary be directed, is forty-five; [but see *infra*.] and the fifteen jurymen to be taken from that number for the particular trial must be chosen in open court by ballot, in the manner pointed out in § 17 of the statute. And the jurors once so chosen may continue to serve on the trials of other persons accused, provided such persons and the prosecutor consent, and provided that the names of the jury so continuing to serve are contained in the list of assize served on the accused, and that such jurors are duly sworn to serve on each successive trial. 13th, The several courts mentioned in this act have power to excuse one or more jurors from serving, the grounds of excuse being stated in open court. 14th, All verdicts, whether unanimous or not, must be returned *viva voce* by the chancellor of the jury, unless the court direct a written verdict to be returned; the chancellor to mention whether the jury are unanimous or not, and that fact to be recorded with the verdict. This statute, § 21, also provides for the union of several counties in Scotland into districts, or larger counties, in cases of high treason, in order to obviate the inconveniences arising from the want of proper court-houses, and from the difficulty of getting a sufficient number of jurors for the grand and petty juries within the present limits of a county.

[Under the Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35), it is not necessary to serve any list of jurors on the accused; but on and after the date of service of an indictment, a list of jurors is kept in the office of the sheriff-clerk of the district in which the court of the second diet is situated, and the

[accused is entitled to have a copy thereof on application; § 38. This list is prepared under direction of the Clerk of Justiciary in High Court cases, and by the sheriff-clerk of the district of the second diet in sheriff court cases; and it consists of not less than thirty names, in the proportion of one special to two common jurors; *ib*. All the jurors in the list need not be summoned, but only a sufficient number (as the clerk of court may determine) for the cases to be tried, commencing from the top of the list; and those not summoned are placed upon the next list issued; § 39. As to list of jurors to be provided in the event of postponement of trial or desertion of diet in consequence of withdrawal of a plea of guilty, see §§ 41, 42. When the High Court sits in a circuit town to try a crime committed in the locality, the jurors are summoned from the counties of that circuit (see *Circuit Courts*); when it sits in a town which is not a circuit town, the jurors are summoned from the general jury roll of the county; § 47. One list of assize is sufficient for all trials at the same diet in the High Court of Justiciary; and one list, signed by one of the judges, is sufficient for each Circuit Court; 11 & 12 Vict. c. 79, §§ 4, 5. Jurors are cited, both in criminal and in civil cases, by registered post letter; and a certificate of citation by the sheriff-clerk or his depute is equivalent to an execution of citation; 31 & 32 Vict. c. 95, § 10; 31 & 32 Vict. c. 100, § 47. See *Citation*. The fine for non-attendance in criminal cases is 100 merks (£5, 11s. 1½d.). As to whether an alien is liable or qualified to serve on a jury, see *Bartlett*, 22 Dec. 1876, 14 S.L.R. 180. In Scotland, an alien cannot insist on being tried by a jury composed partly of aliens; *Itansen*, 13 Feb. 1858, 3 Irv. 3. This right to a jury *de medietate lingue* was formerly recognised in England, but was abolished by 33 Vict. c. 14, § 5. When a trial is adjourned, the jury need not be seclused, except in capital cases, or where the court sees fit to order seclusion; act of 1887, § 55.]

It is often difficult to determine whether a particular offence should be prosecuted before an inferior court with or without the assistance of a jury. And the court, in cases where they think that a jury has been improperly omitted, are in use, not only to suspend the sentence *simpliciter*, but to find the prosecutor liable in expenses. The principle, as laid down by Hume, is that an inferior judge may try without a jury on a libel concluding for

fine and damages, or imprisonment only, or banishment forth of the burgh or county; *Hume*, ii. 147. This principle was confirmed by a former course of decisions. But more recently the supreme court adopted a different principle, and held that the proper criterion is the nature of the crime charged, not the conclusion of the libel. What the nature of the crime must be to require a jury has never been determined as a general rule, the court having usually confined their judgment to the special case brought before them. In each individual case, therefore, it is left to the prosecutor to judge whether the offence is one of that grave and serious nature which requires a jury, whatever the punishment may turn out to be. It has been recommended that where the charge is of such a kind as to warrant, if proved, six months' imprisonment, and caution to the amount of £50, the case should not be tried without a jury; *Alison's Prac.* 53. [Trials without a jury, on a criminal libel, have long been in disuse; the less serious offences being now prosecuted summarily under 9 Geo. IV. c. 29, § 19, or under the Summary Procedure Act (27 & 28 Vict. c. 53). See *Summary Prosecution*.

[See, on this subject, *Ersk.* B. iv. tit. 4, § 92; *Hume*, ii. 308; *Alison's Prac.* 376; *Macdonald*, 467; *Moncreiff's Review in Crim. Causes*, 25; *Barclay's Digest*.] See *Criminal Prosecution*.

JURY TRIAL in *Civil Causes*. Jury trial was at one time the prevailing form of trial in all civil causes in Scotland. [It was gradually superseded, however, by the extension of the jurisdiction of the ecclesiastical courts, and by the institution of the Session of James I., and of the Daily Council of James IV. After the institution of the Court of Session, jury trial in civil causes fell wholly into disuse, except in certain matters,] *e.g.*, services of heirs, cognition of idiots, ascertaining the extent of the widow's terce, dividing property amongst heirs-portioners, &c., [in which briefs were directed from Chancery to the sheriff, to be tried by an inquest.] See *Bell's Styles*, vi. 1; *Ivory's Form of Process*, ii. 259; [*Mackay's Prac.* i. 33.] It was not until the year 1815 that jury trial was re-introduced into the form of process in civil causes. The statute by which this form of trial was introduced was 55 Geo. III. c. 42, by which an institution called the *Jury Court* was established. This court was composed of a Lord Chief-Commissioner, who required to

be legally qualified to hold the office of a Senator of the College of Justice, and of two other judges or commissioners, who were at the same time judges of the Court of Session. The court had, besides, a suitable establishment of clerks and other officers, who, after the union of the two courts, continued to discharge their duties in the Court of Session, both at Edinburgh and on the circuits. The Jury Court was further regulated by 59 Geo. III. c. 35, and 6 Geo. IV. c. 120; and the experiment having been thus made, it was considered to have been so far successful as to justify the incorporation of jury trial with the ordinary jurisdiction of the Court of Session. This was effected by 1 Will. IV. c. 69, [which abolished the Jury Court as a separate tribunal.] As originally established, this court had no independent jurisdiction, and was of the nature of a judicial commission, for the ascertainment, by means of a jury, of certain facts deemed pertinent to a cause, by the judges of the court by whom the issues were remitted to the Jury Court to be tried; and those facts having been so ascertained, the verdict of the jury was returned to the court from which the remit came, to be applied according to law. [No action originated in the Jury Court, and it was not made imperative to send any action to be tried by jury. But by 59 Geo. III. c. 25, § 1, certain classes of cases were appropriated to jury trial; and by 6 Geo. IV. c. 120, § 28, a new enumeration of appropriated causes was made, which superseded the former.] The actions enumerated by 6 Geo. IV. c. 120, are:—"All actions on account of injury to the person, whether real or verbal, as assault and battery, libel or defamation; all actions on account of any injury to moveables or to land, when in this last case the title is not in question; all actions for damages on account of breach of promise of marriage, or on account of seduction or adultery; all actions founded on delinquency or quasi-delinquency of any kind, where the conclusion shall be for damages only and for expenses; all actions on the responsibility of shipmasters and owners, carriers by land or water, innkeepers or stablers, for the safe custody and care of goods and commodities, horses, money, clothes, jewels and other articles, and, in general, all actions grounded on the principle of the edict *Naute cautiones stabularii*; all actions brought for nuisance; all actions of reduction on the head of furiosity and idiocy, or of facility and lesion, or of force

and fear; all actions on policies of insurance, whether for maritime, or fire, or life insurance; all actions on charter-parties and bills of lading; all actions for freight; all actions on contracts for carriage of goods by land or water; and actions for the wages of masters and mariners of ships or vessels." Power is also given to the Court of Session, in reviewing the sentences of inferior judges, to send such issue or issues to be tried by a jury, as seem necessary for ascertaining facts not proved to their satisfaction by the evidence already taken, or which may have been omitted in the cause; the verdict to be returned to the Court of Session, to assist that court in the determination of the cause; [6 Geo. IV. c. 120, § 40.] It is also competent to the court to remit the whole cause for trial by jury, with such directions as to the proof already taken as to them may seem proper. And in all cases originating in the inferior courts, in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior courts (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it is competent to either of the parties, who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session [by appeal; *ib.* See *Appeal to Court of Session*. On the abolition of the Jury Court, it still continued to be imperative to try by jury the cases enumerated, as above, by 6 Geo. IV. c. 120. But by § 49 of the Court of Session Act, 1850, it was made "competent for the court to allow proof on commission in any of such enumerated causes, where the action is not an action for libel, or for nuisance, or properly and in substance an action of damages." And by § 4 of the Evidence Act, 1866, proof may be taken before the Lord Ordinary, without jury, in any cause, "if both parties consent thereto, or if special cause be shown." It is incompetent to allow proof by commission, even when both parties consent, in any of the causes enumerated by § 49 of the Court of Session Act of 1850; *Nicol*, 19 Jan. 1872, 10 Macph. 351. In *Hume*, 19 Jan. 1875, 2 R. 338, an action of declarator and interdict, in respect of pollution of a river, being an action of nuisance, was sent to a jury, in terms of § 49 of the act of 1850, there being no consent, nor special cause shown to the contrary. The same course was followed in *Trotter*, 24 Nov. 1888, 16

[R. 141; which was an action of damages for seduction, and for payment of aliment. And in *M'Avoy*, 5 Nov. 1881, 9 R. 100, it was held that the fact of an action of damages being brought under the Employers' Liability Act is not in itself sufficient cause for allowing proof instead of jury trial. But if a legal question of novelty or of delicacy is involved in the issue, and must be applied to the evidence, proof is generally taken before the Lord Ordinary, or other judge, without a jury. See *Life Association*, 31 Jan. 1873, 11 Macph. 351; *Scottish Widows' Fund*, 14 July 1876, 3 R. 1078 (reduction of insurance policies); *White*, 7 July 1875, 2 R. 904 (pollution of river); *Cadzow*, 10 July 1875, 2 R. 928 (damages for injury done by rabbits); *Macfie*, 24 Jan. 1872, 10 Macph. 410 (right of way, with alternative conclusion for declarator of servitude). On the other hand, a declarator of right to a servitude road was sent to a jury, in *Malcolm*, 17 March 1885, 12 R. 843. But in *Blair*, 2 Feb. 1884, 11 R. 515, and *Scottish Rights of Way Society*, 23 Oct. 1886, 14 R. 7, declarators of right of way were remitted for proof before the Lord Ordinary, mainly on the ground that prejudice had been created in the minds of the public by correspondence and discussion in the newspapers. See also *Mackay's Prac.* ii. 9. A provision of the Court of Session Act, 1850 (§ 50), allowing any one arbiter, or any three, five, or seven arbiters, chosen by the parties, to sit as a jury for the trial of an issue, is never taken advantage of.

[*Procedure before the Trial*.—In general, the question whether proof is to be by jury trial or otherwise, is decided by the Lord Ordinary, when the record is closed, if parties are agreed, or after debate in the procedure roll, if parties are at variance as to the mode of proof, or if any preliminary plea has to be disposed of before determining as to proof; A.S. 10 March 1870, § 1; see also 31 & 32 Vict. c. 100, § 27. See *Record*. If the case is to be tried by jury, issues are usually adjusted and approved of, as explained under *Issue*. But a case may be tried by jury upon the record, without issues, if the Lord Ordinary deems this expedient; A.S. 10 March 1870, § 1 (5); in which case the jury should not be furnished with copies of the record; *Brannan*, 4 Nov. 1884, 12 R. 61. When issues are approved, the Lord Ordinary may, "on the motion of either of the parties, appoint a time and place for the trial of such issue or issues, such time being as

[soon after the date of such approval as with reference to the proper trial of such issue or issues conveniently may be, and, except upon special cause shown, not later than three weeks from the date of such motion; and such trial shall proceed at the time and place so appointed, unless at the time of such appointment one or other of the parties shall intimate to the Lord Ordinary that he objects thereto, in which case the Lord Ordinary shall report the matter to the court, by whom it shall be fixed when and where the trial shall proceed;"] 13 & 14 Vict. c. 36, § 40. See *Campbell*, 6 Dec. 1881, 9 R. 251; *M'William*, 20 Dec. 1881, 9 R. 368; *M'Gregor*, 23 Feb. 1882, 9 R. 659. When the trial takes place during the sitting of the court, the Lord Ordinary presides, unless some different arrangement is made; *ib.* § 41. When the trial takes place at special sittings held during vacation, one of the judges of the Division usually presides. A case may also be tried at the circuit court of the district to which the subject matter of the action belongs; and "where a cause is appointed to be tried at any circuit town in any period of vacation or recess, and no special diet is fixed for such trial, it shall be lawful for either of the judges presiding at the sittings of the circuit court of justiciary in such circuit town to try the same, and such trial may proceed either at the same time with the sittings of the said circuit court of justiciary, or at the termination thereof;" but it is "competent for any judge of the Court of Session to preside at the trial" of such cause; 31 & 32 Vict. c. 100, § 46. See *Circuit Courts*. With regard to notice of trial, it is provided by A.S. 24 Feb. 1846 (altering A.S. 16 Feb. 1841, §§ 10, 11), that "as soon as the issue or issues in the cause are finally engrossed and lodged" (now adjusted and approved of), "it shall be competent to the pursuer in the issue or issues to give notice of trial; and if the pursuer does not give notice of trial within ten days from the time the said issue or issues are so lodged, or after giving notice of trial countermands the same, and does not renew the notice of trial within ten days after such countermand, it shall thereafter be competent to the defender to give notice of trial to the pursuer, and also to countermand such notice of trial in like manner as is competent to the pursuer. But if the defender countermands, then the pursuer's right to take the lead shall revive for other ten days from the date of such counter-

[mand: provided always, that in case either party countermands the notice of trial given by him, it shall be competent for the court, if then sitting, or to the judge at the sittings, or on the circuit, for which such notice of trial has been given, to fix the time and place of trial, on cause shown by the opposite party. And the party who shall be served with a countermand shall be entitled to such expenses as may have been incurred in consequence of such notice of trial, and which may not be available for the trial of the cause when it afterwards takes place." In a case in which issues were adjusted on the 14th January, and on 23rd January notice of trial at the March sittings was given by the pursuer, it was held (1) that it was still competent for the defender to move the Lord Ordinary that the trial should take place during session before himself, in terms of § 40 of 13 & 14 Vict. c. 36; and (2) that the motion being opposed, it was the duty of the Lord Ordinary to report the matter to the Division. On the case being reported, it was held that the pursuer could not be deprived of his lead, except on special cause shown; and that no cause had been shown for disturbing the pursuer's notice; *Bell*, 25 Feb. 1862, 24 D. 603, and cases there cited; also *M'Gowan*, 17 July 1852, 24 Scot. Jur. 652; *M'Neill*, 22 March 1853, 15 D. 582; *N.B. Railway Co.* 12 Jan 1865, 3 Macph. 340. It is no reason for withdrawing a case from the Lord Ordinary, that the trial will last more than one day; *Musket*, 2 Feb. 1856, 18 D. 486; nor that the expense of citing a jury would make the cost greater than if the case were tried at the sittings; *Lauder*, 21 Nov. 1857, 20 D. 71. Notice of trial must be given fifteen days previous to the trial, if it is to be in Edinburgh; and if the trial is to be on circuit, on or before the second last day of the session preceding the circuit; A.S. 16 Feb. 1841, § 12. If the opposite party wishes to have the place of trial changed, he must, within four days after receiving notice of trial, make a motion to the Division for that purpose; *ib.* § 13. When a notice of trial has been given by either party for any vacation sittings, "it shall not be competent to countermand such notice after the expiry of the time within which notices of trial require to be given for such sittings: provided always, that it shall be competent to either party, after the expiry of such time, to apply to the court to postpone the trial, for any cause which could have not been foreseen

[previous to the expiry of such time: And it shall also be competent to make such application, after the termination of the session, to the judge who is to preside at the trial, or in his absence to the Lord Ordinary on the Bills, it being shown to the satisfaction of such judge or Lord Ordinary that the application could not have been made to the court during session;" A.S. 22 June 1859. "In all cases where notices of motion, or notices of trial, or countermand of such notice, are directed to be given," under A.S. 16 Feb. 1841, "the principal notice, signed by the agent, shall be lodged in the jury office" (now the office of the clerk to the process) "and a copy served at the same time upon the agent for the opposite party; and where the motion is to be made before the Division, a copy of the notice must also be lodged with the keeper of the Inner House rolls; and in all cases in which any number of days' notice is required to be given for business to be done, the days are to be computed by excluding the day on which the notice is given, and including the day on which the business is to be done;" § 44. In *Gordon*, 3 March 1865, 3 Macph. 595, a notice of trial was held to have been well countermanded, though the countermand was timeously served only on the opposite party. At any time before the jury is sworn, it is "competent to apply to put off the trial on account of the unavoidable absence or sickness of a material witness, or for other sufficient cause, to the satisfaction of the court, and supported by oath or affidavit, if the court shall so require, and upon payment of such expenses as shall have been incurred by the opposite party in consequence of the delay of the trial;" A.S. 16 Feb. 1841, § 25. Such application may be made in vacation to the judge who is to try the cause, or in his absence to the Lord Ordinary on the Bills; but only if the cause for postponement was not known to the party during the session; *ib.* §§ 21, 25. A jury cause does not fall asleep, after issues have been finally adjusted, though no step be taken for {a year and day; *ib.* § 47. But "if it shall be made to appear to the court that a party has abandoned his suit, or if the pursuer, or the party appointed to stand as pursuer, shall not proceed to trial within twelve months after issues have been finally engrossed and signed" (now adjusted and approved of), "the court shall proceed therein as in cases in which parties are held as confessed, unless sufficient cause

[be shown for the delay to the satisfaction of the court;" *ib.* § 46. This power belongs only to the Inner House; *Ferguson*, 13 July 1861, 23 D. 1290. See also *Baird*, 16 July 1881, 8 R. 982; *Hampton*, 26 May 1885, 12 R. 969; *Mackay's Prac.* ii. 33. All maps, plans, or other productions to be used at the trial, and all writings to be put in evidence, must be lodged eight days before the trial; A.S. 16 Feb. 1841, §§ 18, 19. See *Productions*. A motion for diligence to recover documents requires thirty-six hours' notice; *ib.* § 9. See *Diligence*. It is competent to either party to move the court to direct that the issue be tried by a special jury; 55 Geo. III. c. 42, § 24; 13 & 14 Vict. c. 36, § 42. Notice must be given of such motion within four days after giving or receiving notice of trial; and when it is granted, the order for special jury is transmitted to the sheriffs of the districts from which the jury are to come, who forthwith return the names of thirty-six persons qualified to be special jurymen; A.S. 16 Feb. 1841, § 14. See preceding article. The list is then reduced to twenty names by each party, in presence of the clerk, striking off one alternately; and these twenty being summoned to the trial, twelve of them are balloted for in the usual manner; *ib.* § 15. A motion for special jury is usually granted, when a new trial is appointed in consequence of the first jury having failed to give a satisfactory verdict; *Jenkins*, 17 Nov. 1866, 5 Macph. 39; *Lindsay*, 29 May 1868, 6 Macph. 889. In the ordinary case, the mode of returning jurors is regulated by 31 & 32 Vict. c. 100, § 45, which provides that "the number of jurors to be cited for the trial of any cause or causes appointed to be tried at Edinburgh, or at any circuit town (where a special diet shall be fixed for such trial), shall be such as is specified in the act 55 Geo. III. c. 42," § 20 (viz., not less than thirty-six or more than fifty), "and a list of such jurors shall be returned by the sheriff of Edinburgh, or any other county or counties, as provided by the act 6 Geo. IV. c. 22" (see §§ 7, 8); "but so that one-third of the number of jurors required, or, if the number required cannot be divided equally into thirds, a number as near as may be, more or less, at the discretion of the sheriff, shall be persons qualified as special jurors, and shall be distinguished in the return accordingly." When the trial is at circuit, the jury are chosen from the list summoned to attend the Court of Justiciary; *ib.* § 46. The

[jury are cited by registered post letter; § 47. With regard to the balloting of the jury, it is directed by § 44 of the same act, that "in all civil causes appointed to be tried by jury, the jurors for the trial of any cause shall be chosen in open court by ballot from the list of persons summoned; and for that purpose the clerk of court shall cause the name and designation of each juror to be written on a separate piece of paper or parchment, all the pieces being of the same size, and shall cause the pieces to be rolled up as nearly as may be in the same shape, and the names of the special jurors shall be put together into one box or glass, and the remainder into another, and being respectively mixed, the clerk shall draw out the said pieces of paper or parchment one by one from both boxes or glasses in the proportion of one from the box containing the names of the special jurors, and two from the other box; and if any of the persons whose names shall be so drawn shall not appear, or shall be challenged with or without cause assigned, and be set aside, then such further number shall be drawn until the number required for the trial shall be made out; and the persons so drawn and appearing, and being sworn, shall be the jury to try the cause, and their names shall be taken down and recorded according to the present law and practice; but providing that when challenges are made, and jurors set aside, their places shall be filled up with other names, by drawing by ballot as aforesaid from the box or glass containing the description of jurors challenged respectively." In challenging the jurors, each party is allowed four challenges without assigning any cause, the challenges for cause assigned (if any) being made first; 55 Geo. III. c. 42, § 21. Two or more defenders have, together, only four peremptory challenges; *Dobbie*, 19 June 1861, 23 D. 1139. The oath administered to the jury is prescribed by 55 Geo. III. c. 42, § 31; but affirmation may be made instead of oath, by persons who state conscientious objections to be sworn; 51 & 52 Vict. c. 46. See *Affirmation*. The remuneration of jurors is at the rate of ten shillings for each day, or part of a day, during which they have been empanelled; 31 & 32 Vict. c. 100, § 49. As to motion for a view, when personal inspection of the subjects in question is deemed necessary, see *Viewers*.

[*Procedure at the Trial*.—After the jury has been empanelled and sworn, the clerk reads the issues (where there are issues) to the jury; after which one of the counsel

[for the pursuer in the issues opens the case. The evidence for the pursuer, whether parole or documentary, is then produced. When the evidence for the pursuer is closed, one of the counsel for the defender in the issues opens his case, making observations on the case for the pursuer, and then proceeds to lead his own evidence; A.S. 16 Feb. 1841, § 27. Proof in replication of the defender's proof is only allowed on special grounds, and in the discretion of the presiding judge; *Rankine*, 26 Nov. 1873, 1 R. 225. "In examining the witnesses, the counsel of the parties shall take the examination of the witnesses in such order as they shall arrange; but the counsel who begins the examination of a witness shall continue that examination throughout, without interruption from any quarter (unless when an objection is taken to the legality of the question) until he exhaust the examination. After this a counsel on the opposite side may cross-examine without interruption until he exhaust his cross-examination. Then the counsel who first examined in chief may re-examine, confining his re-examination strictly to such new matter as may have arisen in cross-examination, unless with permission of the court;" A.S. 16 Feb. 1841, § 28. In questions as to admissibility of evidence, the general rule is that only one counsel on each side is heard, the objector having a reply; but in cases of difficulty and moment, the court may hear more than one; § 29. In cross-examination all pertinent facts and circumstances may be elicited; and the questions need not be cross to those put on the original examination; § 30. See *Evidence*. "When parties are disposed to make admissions in regard to matters of fact, or to admit the authenticity of writings, a note of the admissions is to be made in writing, signed by the party's counsel or agent, and lodged in process, and certified by the clerk; and all admissions so made may be used and read in evidence at the trial, if otherwise competent;" § 22. See *Admissions*. Provision is made for stamping documents tendered in evidence, by 31 & 32 Vict. c. 100, §§ 41, 42; see also 33 & 34 Vict. c. 97, § 16. The judge's notes were formerly the only competent record of the evidence; but now, "where the parties agree, the evidence at a jury trial taken in shorthand, and extended by the shorthand writer, may, with the consent of the judge, be substituted for the judge's notes of the evidence for all purposes; and in such cases it shall not be

[competent to ask for the judge's notes of evidence;" 31 & 32 Vict. c. 100, § 37. After the whole evidence is closed, one counsel for the pursuer, and one counsel for the defender, are heard; 13 & 14 Vict. c. 36, § 44. But if the defender neither calls any witnesses, nor produces any written evidence, the pursuer has no reply; A.S. 16 Feb. 1841, § 27. See *Macfarlane's Jury Prac.* 125. The judge then charges the jury, directing them fully on any legal questions involved in the issue, and suggesting views on the evidence; the jury, however, being the sole judges in questions of fact. The jury, if unanimous, may at once return a verdict; and they may do so by a majority, at any time not less than three hours after they have been enclosed; 31 & 32 Vict. c. 100, § 48. If, after six hours, the jury are still equally divided, they may be discharged without a verdict; 22 & 23 Vict. c. 7, § 2; in which case the Division, on the procedure being reported to them, may summon another jury to try the case, or otherwise dispose thereof; 55 Geo. III. c. 42, § 35. But if the whole jury agree to apply to the court for further time to consider their verdict, the court is required to grant such further time as they desire; *ib.* The verdict is returned by the chancellor or foreman, chosen by the jury; *ib.* § 33. Where there are more than one issue, the verdict should contain a separate finding on each of them, for the pursuer or the defender; *M'Kellar*, 6 Dec. 1861, 24 D. 143; *Morrison*, 27 Feb. 1862, 24 D. 625. Instead of an ordinary verdict, where the parties agree, the case may be disposed of by a special verdict, which the jury return by consent; see *Special Verdict*; or by a special case, without a verdict; see *Special Case*; or by the parties "withdrawing a juror," in which case the terms of settlement are fixed by minute signed by the parties and the judge; A.S. 16 Feb. 1841, § 33. And when it turns out that the question at issue is really one of law, there being substantial agreement as to the facts, the judge may direct the jury what verdict to return, subject to the opinion of the court on the question of law, which is reserved; 31 & 32 Vict. c. 100, § 36 (quoted *infra*). With regard to trial in absence, it is provided by § 46 of the same A.S. that "in case either party shall not appear at the trial of a cause, after due notice of trial has been given by the opposite party, the party appearing, if pursuer in the issue, shall be entitled to

[lead his evidence, and go to the jury for a verdict; and if the party appearing be the defender in the issue, he shall be entitled to obtain a verdict in his favour without leading evidence; but if the party appearing shall decline to proceed in this manner, then the judge presiding at the trial shall certify to the Division the fact of the other party not appearing, and the Division shall thereupon proceed as in cases in which parties are held as confessed, unless it shall be shown to the satisfaction of the court that the failure of the party to appear at the trial was occasioned by some sufficient cause." During the trial, the pursuer may abandon his action, with leave of the judge, at any time before the judge has commenced to charge the jury; see *Abandoning an Action*.

[*Procedure after the Trial*.—After a verdict has been returned by the jury, it is engrossed on the issue and signed by the clerk. It does not take effect, however, until it is applied by the court, upon a motion made by the party for whom it is found. "Such motion in causes which have been tried at the sittings after the end of the session, or during the Christmas recess, or upon the circuits, may be made at any time after the expiration of six days after the commencement of the next session after the trial; and in causes which have been tried during the session, or immediately before the sitting down of the session, such motion may be made at any time after the expiration of ten days after the trial;" A.S. 16 Feb. 1841, § 34. The motion must be made before the Division; 1 Will. IV. c. 69, § 7. As to application of ambiguous verdicts, see *Morgan*, 6 July 1858, 3 Macq. 323; *M'Whinnie*, 20 Feb. 1864, 2 Macph. 668; *Macfarlane's Jury Prac.* 252. The application of a verdict given under the direction of the judge, subject to the opinion of the court on a reserved question of law, is regulated by 31 & 32 Vict. c. 100, § 36, which is in the following terms:—"The judge at the trial may direct the jury upon any matter of law (subject to the opinion of the court upon such direction), and with liberty to either party to move the court to enter the verdict for such party, although returned against him, if the court should be of opinion that such direction was erroneous, and that such party was truly entitled to a verdict. The opinion of the court upon any direction so given may be obtained upon motion to enter the verdict for the party moving; and if the court shall be of opinion that the direction was erroneous,

[and that the party moving is truly entitled to the verdict in whole or in part, they shall direct the verdict to be entered for him in whole or part, either absolutely, or on such terms as they may think fit; otherwise they shall refuse the motion, or they may, if necessary, set aside the verdict and order a new trial: provided also, that in such applications, as well as in motions for a new trial, it shall not be necessary to print the notes of the evidence for the use of the court, but the judge's notes may be produced at any time if required." The only mode of review in jury trial is by motion for a new trial, by bill of exceptions, or without such bill; 55 Geo. III. c. 42, §§ 6, 7. "There is no other way in which a party can interpose between the returning of a verdict by the jury and its being entered up and applied by the court. Wherever the complaint of the party against the verdict is directed against the opinion or direction of the presiding judge, as to competency of evidence or other matter of law arising at the trial, it may be brought, under the authority of § 7, in the form of a bill of exceptions, and the judgment of the court on the exceptions is subject to appeal to the House of Lords. Every other complaint, as well as objection to the directions of the judge, having for its object the setting aside of the verdict and ordering a new trial, must be in the form of a motion for a new trial, in the manner, and subject to the conditions prescribed by § 6; and the judgment of the court on this application is not subject to review by appeal to the House of Lords;" *per* Lord J. C. Inglis in *D. Buccleuch*, 21 Dec. 1866, 5 Macph. 214. See *New Trial. Exceptions, Bill of*. As to expenses in jury trials, see *Expenses*. See on this subject, *Ersk. B. iv. tit. 2, § 33; Adam's Jury Trial; Macfarlane's Jury Prac.; Ivory's Form of Process*, ii. 259; *Mackay's Prac.* ii. 30; *Coldstream's Procedure*, 37; *Jurid. Styles*, iii. 831.]

JUS ACCRESCENDI. See *Accretion*.

JUS CREDITI; signifies the right vested in the creditor in a debt or obligation; and in legal phraseology the term is frequently used in contradistinction to a mere *spes*, or defeasible expectancy. This *jus crediti* is often of great importance; for although a person may not be entitled to be put in immediate possession of a subject, yet the obligation to deliver it to him at some future time creates in him a vested right, which forms part of his estate. Thus, when heritage has been conveyed by a trust-disposition, the completion of the title

in the person of the trustee, although it vests the fee in him, yet leaves to the person for whose behoof it is intended a *jus crediti*, as a real burden on the trust-estate. The consequence of this right is, that the creditors of the trustee are not entitled to attach the trust estate for the trustee's debts. And while the maxim of the law, that a fee cannot be *in pendente*, is satisfied, an effectual right is constituted for persons yet unborn, or otherwise incapable of holding the fee. When heritable subjects are vested in trustees, with directions to convey specific portions of the heritage to the parties beneficially interested, the *jus crediti* thus created is heritable. If, on the other hand, the trustees are directed merely to pay over to the parties interested a sum or share of the general trust fund, or of the proceeds of the trust estate, the *jus crediti* is moveable. Under a marriage contract, provisions to the heirs of the marriage constitute in them a *jus crediti*, which vests in themselves, and transmits to their representatives, without service or confirmation, so that although, in some respects, they are heirs in questions with creditors, yet they are creditors in questions with heirs. As a consequence of this *jus crediti*, it has been held that the heir entitled to claim the benefit of the contract may discharge his claim under it, even before he could demand the fulfilment of its terms. And where the father is bound not merely to provide the heir or children of the marriage in a sum, but to make payment of it to them at a term which may happen to exist before the father's death, they are, in virtue of their *jus crediti*, entitled to come into competition with the father's onerous creditors; and the preference will be determined according to the nature of their rights, and the priority of the diligence used upon them. [The distinction between a *jus crediti* and a mere *spes successionis* was thus explained by Lord Moncreiff in *Godard*, 9 March 1844, 6 D. 1018:—"1. I understand the rule of law to be that under antenuptial marriage-contracts the children have a *jus crediti*, giving them such a right against the creditors of their father, if the provision is so conceived as that there was or might be a direct interest accruing to them in the lifetime of their father. As, for example, if the provision is made payable on the marriage or majority of the child, though such an event should happen in the lifetime of the father; or if the provision is declared to bear interest from any

[such term which might be in his lifetime ; or if it is declared to be payable at the dissolution of the marriage, or to bear interest from and after that event, which may happen by the wife's predecease. 2. But, on the other hand, if the provision is so conceived that the principal is not payable till after the father's death, and does not bear interest from any earlier term, and where no actual benefit or interest can be claimed or taken in his lifetime, there is no *jus crediti* vested in the children as against onerous creditors. In respect of the father and his heirs, they are no doubt creditors ; but in respect of his creditors, they are merely heirs, having no more than a *spes successionis*. 3. I understand it also to be a fixed rule, that it has no effect in conferring a *jus crediti* on the children, that, instead of the husband being simply bound to pay a sum to the children, he engages to provide and secure a sum so payable. 4. But if he actually lends out the money, or constitutes a trust, or grants heritable security to the wife or any other person in name of the children, with absolute warranty, it constitutes a fee in the children, which will prevail against onerous creditors." See also *Herries, Farquhar & Co.* 9 March 1838, 16 S. 948 ; *Wilson's Trs.* 2 July 1856, 18 D. 1096. As to the distinction between *jus crediti* and *jus ad rem*, see *Edmond*, 26 Feb. 1858, 3 Macq. 116.] See *More's Notes on Stair*, excviii. ; *Ersk.* B. iii. tit. 8, § 40 ; *Bell's Com.* i. 33, 682 ; ii. 4 ; *Bell's Princ.* §§ 1482, 1966, 1981, 1985 *et seq.*, 1996, 2017 ; *Sandford on Heritable Succession*, i. 239, 243, 256 ; ii. 50 ; [*Menzies' Conv.* 711, 793 ; *M. Bell's Conv.* ii. 771, 893, 999 ; *M'Laren on Wills*, i. § 809 ; *Fraser on Husband and Wife*, ii. 1356, 1420. See *Contract of Marriage*.]

JUS DELIBERANDI. The right of deliberating for one year [now six months] after his predecessor's death, as to the propriety of taking up the defunct's succession, is one of the privileges of an apparent heir. See *Annus Deliberandi*.

JUS DEVOLUTUM. [In the Established Church of Scotland,] that a cure may not remain too long vacant, a fit person must be presented to the presbytery, to supply the cure, within six months after a vacancy has occurred by the death of the last incumbent, or otherwise. [Formerly, while the right of private patronage existed,] if the patron failed to make such a presentation within the six months, the right of presentation devolved upon the presbytery. [And now, since, by 37 & 38 Vict. c. 82, patronage was

[abolished, and the right of electing and appointing ministers was vested (subject to regulations) in the congregations, if no appointment is made within six months of a vacancy, the right of appointment devolves, in like manner, on the presbytery.] The right of presentation, thus accruing to the presbytery, is called the *jus devolutum*. It was sufficient to bar the exercise of the right of the presbytery, if the patron's presentation to a new incumbent was executed within six months after the vacancy occurred, although, from accidents not imputable to the patron, the presentation should not have reached the presbytery until after the expiration of the six months ; *L. Dundas*, 1795, M. 9972 ; 1567, c. 7. See 1592, c. 115 ; 1712, c. 12 ; *Ersk.* B. i. tit. 5, § 17 ; *Hill's Church Prac.* 58 ; *More's Notes on Stair*, ccxliii. ; *Connell on Parishes*, 494 ; [*Bell's Princ.* § 836 ; *Cook's Styles*, 102 ; *Duncan's Par. Eccl. Law*, 136 ; *Mair's Church Laws*, 178. See *Patronage*.]

JUS IN RE—JUS AD REM. These two expressions are derived from the Roman law, and serve to mark the distinction between the right in a subject enjoyed by the proprietor, and that enjoyed by a mere creditor for its delivery. The proprietor of a subject, he who has the *jus in re*, is entitled to claim the subject, or to defend it against all the world. The mere creditor, or he who has the *jus ad rem*, possesses no real right, and can claim the subject only from the debtor in the obligation. This distinction is well illustrated by the contract of sale. The completion of the contract of sale does not of itself transfer the property of the subject. The buyer is, before delivery, merely a personal creditor of the seller ; and if the subject were to pass out of the seller's hands, the buyer would have no claim against the new possessor for the subject itself, but only an action of damages against the seller for not implementing his contract. The difference between *jus in re* and *jus ad rem* is also clearly marked in cases of bankruptcy. If one person has a right of property in a subject possessed by another when he becomes bankrupt, that subject cannot be seized by the bankrupt's creditors, but must be restored to its owner. If, however, all the right possessed be a *jus ad rem*, the other personal creditors of the bankrupt are not excluded. See *Stair*, B. i. tit. 1, § 22 ; tit. 7, § 2 ; *Ersk.* B. iii. tit. 1, § 2, *Bell's Com.* i. 298 ; *Bell's Princ.* §§ 3, 86 ; *Bank.* i. 89 ; *Brown on Sale, Introduct.* p. 3 *et seq.* See *Sale. Property. Personal Rights. Obligation*.

JUS MARITI. [The *jus mariti* is described in previous editions of this work, following the institutional writers, as] the uncontrolled power of administration of the goods in communion, vested by law in the husband. [It is more correctly described by Lord Fraser as "the right by which the husband acquires to himself absolutely the personal property of his wife;" *Husband and Wife*, i. 676. It is quite distinct from the husband's right of administration. See this more fully under *Marriage*, p. 695.] In virtue of the *jus mariti*, the husband is entitled to sue for, recover, and in his own name discharge, all sums due to his wife; and his creditors may also attach them for payment of the husband's debts; insomuch that, where the rents of the wife's heritable estate, or the interest of heritable bonds in which she is creditor, have been so attached, as falling under the *jus mariti*, she is not entitled to claim from the creditors an aliment out of the profits of her own property. Hence, the marriage may be said to be in effect a legal assignation by the wife of her whole moveable estate in favour of the husband; in virtue of which, even after the dissolution of the marriage, the husband or his heirs may recover subjects falling under the *jus mariti*, but not recovered during the subsistence of the marriage. This right includes all moveable subjects, the rents of the wife's heritage, the interest of heritable or of personal bonds. For, although personal bonds, bearing interest, are declared by statute to be moveable as to succession, yet the same statute expressly excepts from the *jus mariti* the principal sums in such bonds; 1661, c. 32. The *jus mariti* may be renounced by the husband in an antenuptial contract of marriage; or an estate may be given to the wife by a stranger, exclusive of the *jus mariti*. [It was formerly held that the *jus mariti* could not be renounced or excluded *per aversionem*; but the contrary was decided in *M'Dougall*, 20 June 1879, 6 R. 1089. See *Marriage*.] See *Ersk.* B. i. tit. 6, § 13; *Stair*, B. i. tit. 4, § 9; *More's Notes*, xix.; *Bank.* i. 128; *Bell's Com.* i. 59, 678-685; *Bell's Princ.* § 1561; *Ross's Lect.* ii. 484; [*Fraser*, i. 679.]

JUS PRÆVENTIONIS; the preferable right of jurisdiction acquired by a court, in any cause to which other courts are equally competent, by having exercised the first act of jurisdiction. *Ersk.* B. i. tit. 2, § 9. See *Jurisdiction*.

JUS QUÆSITUM TERTIO. Where,

in a contract between two parties, a stipulation is introduced in favour of a third, who is not a contracting party, the right thus created is said to be *jus quæsitum tertio*. Such a right, generally speaking, cannot be recalled by the contracting parties, and the third party, so far as he is concerned, may require exhibition and implement of the contract. In one case, where a promise, though gratuitous, had been made in favour of a third party, that party, although neither present nor accepting, was found to have right thereby. But provisions or destinations in contracts of marriage, in favour of other parties, are regarded, not as *jura quæsitum tertio*, but as destinations of succession, which may be altered by the spouses at pleasure. On this point, however, the decisions have not been uniform. The maker of an entail, although he has delivered it to a third party, may demand it back for the purpose of cancelling it; and the substitutes cannot claim any *jus quæsitum* under it; but where the entail has been recorded, and an investiture expedite upon it, it cannot be altered or revoked, unless express power to that effect has been reserved in the deed. A right taken in favour of children by a father or other relation, and intimated to the children, cannot be recalled, either by the father himself or his creditors. When the purchaser of lands has been taken bound to pay the price, or a part of it, to the creditors of the seller, a right is thereby vested in the creditors, upon which they may use inhibition against the purchaser. And in such cases, the purchaser is not at liberty to prefer such creditors as he thinks proper, but, having received a list of the creditors, is bound to pay each creditor in this list proportionally. But the delivery of money by a person, with orders to apply it to a particular destination, vests no right in those for whom it is destined till it be paid to them, or until they are informed that it is held for their behoof. In the meantime, the money may be reclaimed by the person who delivered it, or it may be arrested by his creditors. There are one or two decisions inferring that where a person takes a right in the name of a third party, which he never intimates or delivers to him, the insertion of the third party's name is regarded as a mere trust created in him for the benefit of the person who directed his name to be inserted. But some authors are inclined to think these cases inconsistent with the general doctrine of *jus quæsitum tertio*.

A trust settlement partakes of the nature of *jus quæsitum tertio*, since the object in view is, not the beneficial interest of the trustee, but some purpose to be accomplished in which a third party is interested. But in one case it was held that a trust disposition, which had been granted for the behoof of creditors, and which had been followed by infestment, was not effectual to the creditors, and vested no interest in them, in respect they had not acceded to it. [The cases referred to are all cited in *More's Notes*, lxii. See this head in the *Digests*; also *Peddie*, 9 June 1857, 3 Macq. 65; *Finnie*, 13 Aug. 1857, 3 Macq. 75; *Blumer & Co.* 16 Jan. 1874, 1 R. 379; *Hislop v. M'Ritchie's Trs.* 23 June 1881, 8 R. (H.L.) 95; *Calder*, 26 Feb. 1886, 13 R. 623; *Gordon*, 11 June 1886, 13 R. 934. In the leading case of *Hislop*, which related to building restrictions in a feu-contract, Lord Chanc. Selborne observed:—"The fact of several feuars of neighbouring plots of building land in the same street holding from a common superior, does not, by itself, entitle one of those feuars to claim the benefit of restrictions contained in the feu-contract of another, unless some mutuality and community of rights and obligations is otherwise established between them; which can only be done by express stipulation in their respective contracts with the superior, or by reasonable implication from some reference in both contracts to a common plan or scheme of building, or by mutual agreement between the feuars themselves." See *Stair*, B. i. tit. 10, § 5; *Bell's Com.* i. 31; *Kames' Equity*, 321-7. [See *Jus Tertii. Conditions in Feudal Grants*.]

JUS RELICTÆ; is the share of the goods in communion to which a wife is entitled on the dissolution of her marriage by death. Where the marriage is dissolved by the predecease of the husband, the moveables or goods in communion, after deduction of debts, suffer a division. When the husband has left children, either by his last or by any former marriage, the division is tripartite—one-third goes to the children as legitim—one-third is the dead's part, which is at the husband's disposal, and, failing his destination of it, it will go to the children as his executors—and the remaining third goes to the widow as *jus relictæ*. Where there are no children, the goods in communion are divided into two equal parts—one-half

is dead's part of the husband, and the other *jus relictæ*. The wife has right to the *jus relictæ*, although she should also have a conventional provision from her husband, unless, in accepting such provision, she has bound herself to renounce her *jus relictæ*. [But a discharge of *jus relictæ* is not effected by implication; *Keith's Trs.* 17 July 1857, 19 D. 1040; unless under a settlement disposing of the whole fund from which *jus relictæ* could be claimed; *Thomson*, 8 Dec. 1849, 12 D. 276. In *Edward*, 12 March 1888, 15 R. (H.L.) 33, a wife was held to have waived her *jus relictæ* by signing the settlement of her husband; such signature implying, in the circumstances of the case, acceptance of a provision in lieu of legal rights. Before a discharge is effectual, it must be shown that the wife knew the extent of her legal rights; *Ross*, 3 Feb. 1843, 5 D. 483; *Stewart*, 3 June 1839, M'L. & Rob. 401. Mere delay in asserting the claim does not bar the right to *jus relictæ*; but the widow's claim may be excluded, within the forty years' prescription, if facts and circumstances are proved sufficient to support a presumption of payment; *Seath*, 21 Jan. 1848, 10 D. 377; *Pringle*, 2 March 1870, 8 Macph. 622; *Robson*, 19 March 1870, 8 Macph. 757; *Mackenzie*, 12 June 1873, 11 Macph. 681.] The husband cannot affect the *jus relictæ* by any testamentary, or revocable, or other *mortis causa* deed, although he may diminish its amount indirectly during the subsistence of the marriage by his manner of administering the goods in communion. Personal bonds bearing interest are declared, by 1661, c. 32, to be moveable and descendible to executors; but that statute makes an exception of the rights of husband and wife, and, consequently, such bonds do not fall under the *jus relictæ*. As the *jus relictæ* is a share of the *free* goods in communion only, it follows that, if the husband is insolvent at the dissolution of the marriage, the wife cannot, in virtue of this right, compete with his creditors; nor does it create any *jus crediti* in the wife, entitling her to rank on the bankrupt estate. See *Divorce*. The *jus relictæ* being a legal right, vested in the wife, to a certain proportion of the goods in communion, is not to be regarded as a succession. Hence it vests in the wife without confirmation. [Like legitim, it is a claim of debt against the husband's estate, and is made effectual by action against his executor; see *Legitim*. See

[also *Tait's Trs.* 8 July 1886, 13 R. 1104. By the Married Women's Property Act, 1881 (§ 6), a surviving husband has the same interest in his deceased wife's moveable estate, as a widow has in that of her deceased husband; see *Marriage*, p. 699a; and case of *Poë* there cited.] See *Stair*, B. i. tit. 4, § 23; *More's Notes*, cv., cxv.; *Ersk.* B. iii. tit. 9, § 15; *Bank.* i. 135; *Bell's Com.* i. 137, 678; *Bell's Princ.* §§ 1591, 1946; [*Fraser on Husb. and Wife*, ii. 973, 1058. See *Marriage*.]

JUS REPRESENTATIONIS. In heritable succession, this expression is usually applied to the rule of law, whereby the son or other issue of an elder son deceased, as coming in place of or representing their father, succeed to the grandfather's heritage, preferably to the grandfather's surviving younger sons, or other immediate children. This right of representation takes place in collateral succession to heritage, as well as in that of descendants in the direct line. [It had no place in moveables, until the Intestate Moveable Succession Act, 1855 (18 Vict. c. 23), which allowed the issue of pre-deceasing next of kin to come in place of their parent in intestate succession. But this is not extended to collaterals beyond the descendants of brothers and sisters.] See *Ersk.* B. iii. tit. 8, § 11; [tit. 9, § 2.] See *Succession*. [*Representation*.]

JUS SUPERVENIENS AUCTORI ACCRESCIT SUCCESSORI. The supervening right of the seller or granter of a right accresces to the right of his disponee or successor. This is the Roman law maxim, on which the Scotch law doctrine of accretion rests. See *Accretion*.

JUS TERTII. When a party in an action maintains a plea which he has neither title nor interest to maintain, he may be met by the reply, that if it is *jus tertii* in him to maintain such a plea. It does not necessarily follow that the party so met would not be benefited by pleading another person's right; for there are frequently instances where, if he were allowed to do so, he would gain his own cause. All that is meant is, that although an objection may be pleaded against the title or claim of one party, it is the right of another than the opposite party to plead that objection, since, *quoad* him or his rights, the title or claim may be perfectly good. This will best be understood by examples. The cases in which the plea of *jus tertii* is most frequently urged are those where the rights of the pursuer and

of the defender are both derived from the same author, and where the one cannot plead a defect in the other's title without admitting a defect in his own. In such a case, it is held to be the right of a third person to plead the objection against both. Thus, in a reduction of a sale, the defender objected that the title of the pursuer's author was defective. The pursuer's author being the common author of both parties, it was found to be *jus tertii* in the defender to object to that author's title; *Livingston*, 1768, M. 7847; *Fraser*, 1794, M. 7849. It is usual, in granting leases, to insert a clause excluding assignees and subtenants. But when the tenant sublets the property, or, passing over his own heir, assigns the lease to a second son, or other person not his heir, it is *jus tertii* in his creditors or heirs to plead that the clause has not been complied with, since the limiting clause is held to have been introduced for the benefit of the landlord alone; *Hay*, 1801, M. 15,297. In like manner, where a creditor had obtained decree of adjudication on his debt, and charter and infeftment thereon, the debtor being alive and abroad, it was found to be *jus tertii* to the daughters of the debtor to offer payment of the debt, and that the creditor was not bound to accept of it, and disencumber the subject; *Gowans*, 22 June 1810, F.C. For a series of cases illustrative of this subject, see *Mor. Dict. h. t.*; *Brown's Synop. h. t.*; *Bell on Leases*, i. 168, 200. [See also *Monteith*, 6 Feb. 1869, 7 Macph. 523.]

JUSTICE, COLLEGE OF. See *College of Justice*.

JUSTICE. In a legal acceptation, justice may be said to be the impartial administration of the law, according to the principle of giving to every man that which is his due. As applied to the conduct of individuals, justice consists in the conformity of their actions to the law as established. Thus, a man is said to be just, who, whatever his motives may be, acts conformably to the principles of justice, by implementing his legal obligations and engagements. *Ersk.* B. i. tit. 1, § 4; *Stair*, B. i. tit. 1, § 2; *Bank.* i. 2. See *Equity*.

JUSTICES; officers deputed by the Sovereign to administer justice, and do right by way of judgment. In England, [with the exception of the Lord Chancellor and the Master of the Rolls, all the judges of the High Court of Justice are called Justices, the President of the Queen's Bench Division being the Lord Chief

JUSTICE OF THE PEACE

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[Justice. The ordinary judges of the Court of Appeal are called Lords Justices.]

JUSTICE OF THE PEACE. Justices of the peace are persons appointed by royal commission to keep the peace within a certain district. Their commission is in the following terms: "VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, To our most dear and faithful counsellors (*the princes of the blood*), the most reverend father in God, and our faithful counsellor, Archbishop of Canterbury, primate and metropolitan of all England, our well beloved and faithful counsellor, our Chancellor of that part of our United Kingdom of Great Britain and Ireland called Great Britain." *Then are named the Archbishop of York, the Archbishop of Armagh, certain of the members of the Privy Council, the Lord Justice-General, Justice-Clerk, and Commissioners of Justiciary for Scotland for the time being, the Lord President and Judges of the Court of Session for the time being, the Lord Advocate and Solicitor General for Scotland. These are followed by the names of the Gentlemen of the county.*—"GREETING:—Know ye, that we have assigned you, jointly and severally, and every one of you, our justices, to keep our peace, in our county of _____, and to keep, and cause to be kept, all the ordinances and statutes for the good of our peace, and for the preservation of the same, and for the quiet rule and government of our people, made in all and singular their articles in our said county (as well within liberties as without), according to the force, form, and effect of the same; and to chastise and punish all persons that offend against the form of those ordinances or statutes, or any one of them, in the aforesaid county, as it ought to be done, according to the form of those ordinances and statutes; and to cause to come before you, or any one of you, all those who, to any one or more of our people concerning their bodies, or the firing of their houses, have used threats, to find sufficient security for the peace or their good behaviour towards us and our people; and if they shall refuse to find such security, then them in our prisons, until they find such security, to cause to be safely kept. We have also assigned you, and every two or more of you, of whom any one of you, the aforesaid (here the justices before named are again mentioned), we will shall be one, our justices, to inquire the truth more fully,

according to the law and custom of the land, of all and all manner of felonies or capital crimes, poisonings, enchantments, sorceries, arts, magic, trespasses, forestallings, regratings, ingrossings and extortions whatsoever, and of all and singular other crimes and offences, of which the justices of our peace may or ought lawfully to inquire, by whomsoever, and after what manner soever, in the said county, done or perpetrated, or which shall happen to be there done or attempted. And also of all those who, in the aforesaid county, in companies against our peace, in disturbance of our people, with armed force, have gone or rode, or hereafter shall presume to go or ride; and also of all those who have there lain in wait, or hereafter shall presume to lie in wait, to maim, or cut or kill our people, and also of all victuallers, and all and singular other persons who, in the abuse of weights or measures, or in selling victuals, against the form of the ordinances and statutes, or any one of them, therefor made, for the common benefit of our people, have offended, or attempted, or hereafter shall presume to offend or attempt; and also of all sheriffs, bailiffs, stewards, constables, keepers of gaols and other officers, who, in the execution of their offices about the premises, or any of them, have unduly behaved themselves, or hereafter shall presume to behave themselves unduly, or have been, or shall happen hereafter to be, careless, remiss, or negligent in our aforesaid county; and of all and singular articles and circumstances, and all other things whatsoever that concern the premises, or any of them, by whomsoever, and after what manner soever, in our aforesaid county, done, or perpetrated, or which hereafter shall there happen to be done or attempted in what manner soever; and to inspect all indictments or libels whatsoever so before you, or any of you, taken or to be taken, or before others late our justices of the peace in the aforesaid county, made or taken, and not yet determined; and to make and continue processes thereupon against all and singular the persons so indicted or accused, or who before you hereafter shall happen to be indicted or accused, until they can be taken, surrender themselves, or be outlawed, or declared rebels; and to hear and determine all and singular the felonies, capital crimes, poisonings, enchantments, sorceries, arts, magic, trespasses, forestallings, regratings, ingrossings, extortions, unlawful assemblies, indictments aforesaid, and all and singular other the premises, according

to the laws and statutes of the kingdom, as in the like cases it has been accustomed or ought to be done; and the same offenders, and every of them, for their offences, by fines, ransoms, amerciaments, forfeitures and other means, as according to the law and custom of the land, or form of the ordinances or statutes aforesaid, it has been accustomed, or ought to be done, to chastise and punish. Provided always, that if a case of difficulty, upon the determination of any of the premises before you, or any two or more of you, shall happen to arise, then let judgment in nowise be given thereon before you, or any two or more of you, unless in the presence of one of our justices, or of one of our justices appointed to hold courts of circuit, in the aforesaid county. And, therefore, we command you, and every one of you, that to keeping the peace, ordinances, statutes, and all and singular other the premises, you diligently apply yourselves; and that at certain days and places which you, or any such two or more of you (as is aforesaid) shall appoint for these purposes, into the premises you make inquiries, and all and singular the premises hear and determine, and perform and fulfil them in the aforesaid form, doing therein what to justice appertains, according to the law and custom of the land, saving to us the amerciaments, and other things to us therefrom belonging. And we command, by the tenor of these presents, our sheriff of the said county of _____, that at certain days and places which you, or any such two or more of you (as is aforesaid) shall make known to him, he cause to come before you, or such two or more of you, as aforesaid, so many, and such good and lawful men of his bailiwick (as well within liberties as without), by whom the truth of the matter in the premises shall be the better known and determined. We also command the keepers of the rolls of our peace in our county aforesaid to bring before you, at the days and places aforesaid, the writs, precepts, processes, and indictments aforesaid, that they may be inspected, and by a due course determined, as is aforesaid. In witness whereof, we have caused these our letters to be made patent. Witness ourself, at Westminster, the _____ day of _____ in the _____ year of our reign.

(Signed by the Secretary of State for the time.)"

Annexed to the commission there is an oath of office, which is now taken by justices of the peace in Scotland, before

entering on their office, instead of the oath contained in the Scotch acts. The oath is in these terms: "Ye shall swear, that as justice of the peace in the county of _____, in all articles in the Queen's commission to you directed, you shall do equal right to the poor and to the rich, after your cunning, wit, and power, and after the laws and customs of this realm and statutes thereof made: And ye shall not be of counsel with any person in any quarrel hanging before you: And that ye hold your sessions after the form of the statutes thereof made: And the issues, fines, and amerciaments which shall happen to be made, and all forfeitures which shall fall before you, you shall truly cause to be entered without any concealment or embezzling, and truly send them to the Queen's Exchequer: Ye shall not let for gift or other cause, but well and truly ye shall do your office of justice of the peace in that behalf: And that you take nothing for your office of justice of the peace to be done, but of the Queen, and fees accustomed, and costs limited by statute: And ye shall not direct, nor cause to be directed, any warrant by you to be made to the parties, but you shall direct them to the bailiffs of the said county, or other the Queen's officers or ministers, or other indifferent persons, to do execution thereof. So help you God."

The office of justice of the peace was attempted to be introduced into the practice of Scotland by 1587, c. 82; but the state of manners, as exhibited in that statute, was not such as to promise success to a regulation of this kind, and it required repeated legislative enactments to lay the foundation of this valuable system. Nor does this appear to have been fully done until the time of the Usurpation, after which, the act 1661, c. 38, prescribed those rules which have ever since, in a great measure, regulated this important branch of public police. By the Articles of Union, the laws for regulating the trade, customs and excise, are declared to be the same in Scotland as in England; and, accordingly, justices of the peace in Scotland are vested with the same powers with those in England in matters touching the customs and excise; and, by 6 Anne, c. 6, § 2, the same powers were given to justices of the peace in Scotland which had formerly been enjoyed by justices of the peace in England in relation to, and for the preservation of, the peace; leaving the trials and judgments to be regulated by Scotch forms

and customs. This act had the effect of doing away certain restrictions in regard to the persons subject to the jurisdiction of justices of the peace, and in regard to the time within which they were at liberty to act, and placed them on the same footing in those respects with the English justices of the peace. In Scotland, no particular qualification in rank or property is required to entitle a person to act as a justice of the peace. Whoever is named in the commission may accept and act. Neither is there any general disqualification preventing justices from acting, except that introduced by 6 Geo. IV. c. 48, § 27, which declares, that no solicitor or procurator before any inferior court in Scotland, or the partner of such person, shall be entitled to act as a justice of peace while he or his partner shall continue to practice in a court of the above description. Even this restriction seems not to affect the nomination of such an individual, but merely to suspend his power of acting under the commission of the peace. [And, by 19 & 20 Vict. c. 48, § 4, the disqualification does not extend to writers or procurators who may be elected magistrates or deans of guild in any burgh.] No one named in a commission of the peace, is by law bound to accept the appointment. If he wish to abstain from being a justice, he may omit to qualify himself by taking the usual oaths; and there is no reason for supposing that a justice of the peace, who wishes to be relieved of his office, may not resign as freely as any other public servant. Before acting, it is necessary to take the oath *de fidei administratione* in the above terms, and the oath of allegiance.

The general jurisdiction of justices of the peace relates only to the preservation of the peace. They are specially intrusted with the execution of several penal statutes concerning rural economy, such as the statutes relating to planting and inclosing, and the like; and various ministerial duties connected with the regulation of the highways are in like manner committed to them. They also judge in many important questions connected with the revenue of customs and excise, and other branches of the revenue, as to which the special statute imposing the duty gives justices of the peace certain powers; and, by special enactments in several statutes, certain ministerial or judicial powers are conferred on justices. Without enumerating those statutes, it may be stated as a general proposition, that no justice can safely act in

virtue of statutory powers without having before him the particular statute conferring those powers. The civil jurisdiction of justices of the peace has been greatly enlarged by the small debt acts. See *Small Debts*. But, independently of those acts, justices of the peace judge in questions as to the aliment of natural children, as being in some degree connected with the public peace (see *Aliment*); and also, by usage, resting partly on statute, they judge in questions concerning servants' wages. With these exceptions, however, they seem to have no civil jurisdiction except under special statutes. They have a statutory jurisdiction with regard to the expense of march fences and the straightening of marches, and also (although that is not so clear) with regard to the damage done by cattle who have trespassed, and have been poinded *brevi manu* on the grounds of another person. It is still more doubtful whether justices can competently judge in an action embracing a civil claim of damages for injury done by the offender, as well as a conclusion for fine or imprisonment *ad vindictam publicam*, e.g., in a libel at the instance of the public prosecutor and the private party for an assault. Under the small debt acts, a person who has been injured by assault or otherwise, may, no doubt, sue before the justices for reparation or damages from the person who has injured him, as a mere civil debt, provided he limits his claim of debt on that account to £5. But there is an obvious and broad distinction between such a claim of debt under those statutes, and an action concluding for fine or imprisonment against the offender, on account of his offence against the public peace, and at the same time for civil reparation to the injured party. The jurisdiction of justices of the peace, in such mixed actions, may be warranted in some instances by custom, but it seems hardly reconcileable with sound legal principle. See *Damages*. [In regard to the quarterly meetings of justices, and the appeal to quarter sessions, see *Quarter Sessions*.]

Although, generally speaking, justices cannot act in causes in which they are personally interested, they may act in all questions about the poor, vagrants, highways, or other laws concerning parochial rates, though themselves liable in the burdens imposed for those objects. But they cannot act in the determination of any appeal to the quarter sessions, from anything relating to the parish or place in which they are subject to those rates; 16

Geo. II. c. 18, §§ 1, 3. By special enactments, commissioners of excise and customs, and others connected with those branches of the revenue, cannot act as justices in revenue questions cognisable by justices of the peace; and similar exceptions apply to officers of the army and to coal-masters, in questions relating to soldiers and colliers. See *Colliers. Enlistment*. [Proprietors of salmon or trout fishings may act as justices in the execution of the fishery acts, unless they are parties to, or directly interested in, the prosecution or case to be determined; 9 Geo. IV. c. 39, § 12; 8 & 9 Vict. c. 26, § 5.] Unless authorised by special statute, justices cannot exercise any judicial or coercive power as justices beyond the county to which they belong; but they may perform ministerial acts, such as receiving the statements of a person who has been robbed or assaulted; and they may also exercise voluntary jurisdiction beyond their territory, such as taking affidavits in general, taking the judicial ratifications of married women, and the like. [See *Kerr*, 12 June 1854, 1 Macq. 736.] A justice of the peace may commit a person who assaults or violently interrupts him in the execution of his office, until the offender find security to keep the peace. [But he has no power to enforce his decisions in ordinary civil cases by imprisonment; *Blaw*, 1754, M. 7610. As to the procedure in prosecutions before justices of the peace, see the Summary Procedure Act, 1864 (27 & 28 Vict. c. 53); also 38 & 39 Vict. c. 62; and *Moncreiff's Review in Crim. Cases*, 49.] Justices are liable to criminal prosecution before the Court of Justiciary; and in like manner to civil actions of damages before the civil court, on account of oppression or injustice, or other illegal proceedings in their official capacity. But in such cases they are leniently dealt with, and large allowances are made for errors and defects in judgment and capacity, where it appears that they were acting *bona fide* for the public good. And, by special statute, in actions against any justice of the peace in Great Britain or Ireland (which statute is held to extend to Scotland), for any summary conviction under any act of parliament, or for anything done by him towards carrying such conviction into effect, if the conviction shall be quashed, the plaintiff (besides any penalty levied) shall recover only twopence without costs, unless malice and want of probable cause be expressly alleged; and that the penalty, damages, or costs, shall

not be recovered if the plaintiff be proved guilty of the offence, and the punishment undergone did not exceed that assigned by law; 43 Geo. III. c. 141. [See *M'Kellar*, 18 Dec. 1841, 4 D. 287.] Justices of the peace, however, ought to act with exceeding caution in everything relating to the personal liberty of the subject; for, in such cases, the plea of good intention will be no justification of an illegal act. This is particularly the case under the Liberation Statute, 1701, c. 6, whereby justices and other judges are subjected to penalties for error, whatever their intentions may have been. See *Bail. Commitment for Trial. Backing a Warrant. Wrongous Imprisonment*.

A justice of the peace receives no pecuniary recompense; but he will be reimbursed by the sheriff of the county for any pecuniary advances properly made for the public, in the execution of his office. A commission of the peace may be recalled at any time by the Sovereign, and it falls by the demise of the Crown; though, by 1 Anne, st. 1, c. 8, § 2, it is continued for six months longer, unless it shall be recalled by the successor. The clerk of the justices, or of the quarter sessions, is named by the Secretary of State. It is by the clerk that the books in which their proceedings are recorded are kept. See *Clerk of the Peace*. The fiscal is an officer who gives his instance or concurrence to the steps necessary to be taken for the apprehension and prosecution of delinquents; and this officer is also appointed collector of the fines and penalties which the justices of the peace have the power to impose. The procurators of the sheriff court practise before the justices (except under the small debt acts), and the warrants of the justices are executed by constables, who are officers appointed by the justices of peace. See *Constables*. There is not in the Scotch commission a *custos rotulorum*, as in England (see *Custos Rotulorum*); and the *quorum*, or a certain number of justices with superior powers, on account of their superior knowledge, formerly named by the English commissions, has never been introduced into the Scotch ones. See *Ersk. B. i. tit. 4, § 13; Bank. ii. 568; [Hutcheson's, Tait's, and Blair's Treatises on Justices of the Peace; Barclay's Digest, h. t.; Tomlins' Dict. h. t.]*

JUSTICE AYRES; means the circuits through the kingdom made for the distribution of justice. See *Justiciary Court. Ersk. B. i. tit. 3, § 25*.

JUSTICE-CLERK. The Lord Justice-

Clerk, in absence of the Lord Justice-General, is the presiding judge in the Court of Justiciary. He is also one of the Officers of State for Scotland, and one of the commissioners for keeping the Scottish *regalia*. The Lord Justice-Clerk is always one of the Senators of the College of Justice. It appears that, prior to 1671, the Justice-Clerk was not one of the judges of the Court of Justiciary, but merely the clerk and assessor of court; *Hume*, ii. 17. [Nor had he, as judge in the Court of Session, any precedence before the ordinary judges, until 1808, when he was made Lord President of the Second Division; 48 Geo. III. c. 151, § 2.] The office of Lord Justice-Clerk is now, in point of rank, the second judicial appointment in Scotland. See *Justiciary Court. Session, Court of.* [*Judges.*]

JUSTICE-GENERAL. The Lord Justice-General, as the President or head of the Court of Justiciary, was formerly an officer of high rank and consideration. For a long course of years, however, the office had been a sinecure, usually held by one of the Scotch nobility, while the duties of President of the Court of Justiciary were almost invariably discharged by the Lord Justice-Clerk. By 1 Will. IV. c. 69, §§ 18, 19, it was enacted that, on the termination of the then existing interest, the office should devolve upon, and remain united with, that of Lord President of the Court of Session, who should perform the duties of presiding judge in the Court of Justiciary, without salary. In this capacity the Lord President may also be present at any circuit court, and may dispatch the business there, whether any other judge or judges of the Court of Justiciary be present or not. See *Justiciary Court.* [*Judges.*]

JUSTICIARY COURT. The High Court of Justiciary, [as constituted under the act 1672, c. 16,] was composed of five of the Lords of Session, added to the Lords Justice-General and Justice-Clerk. [But by the Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35, § 44), all the Senators of the College of Justice are Lords Commissioners of Justiciary.] At first, the judges were named for life, and thereafter they seem to have been removeable at the pleasure of the Crown; but, at the Revolution, it was made an article of the claim of right, "that the changing the nature of the judges' gifts, *ad vitam aut culpam*, into commissions *durante bene placito*, is contrary to law;" and, by the commission in 1690, no such power is

reserved by the Crown. The quorum of this court consists of three judges; 1681, c. 22; 23 Geo. III. c. 45. [But any one judge may preside alone at the trial of any panel before the High Court, and when so presiding shall constitute a quorum of the court; 31 & 32 Vict. c. 95, § 1. When points of delicacy arise, it is usual for the judge or judges presiding to certify the case for the opinion of the whole court. As to whether there can be certification on a question as to admissibility of evidence, see *Davie*, 22 April 1881, 4 Coup. 450. The presiding judge in the High Court, sitting in judgment on a case certified, or as a court of review, has no vote, except where the other members of the court are equally divided; see Lord Neaves in *Stewart*, 11 Sept. 1866, 5 Irv. 310; also *Ross*, 8 June 1886, 13 R. (J.C.) 73, 83.] The Court of Justiciary had anciently justice ayres or circuits for distributing justice in the different parts of the kingdom. These, however, notwithstanding the regulations which were made for them, having fallen into disuse, it was directed, by 20 Geo. II. c. 43, that circuit courts should be held regularly twice a-year; [and the number has been increased by subsequent regulations; see *Circuit Court*. Under the recent act of 1887, the Lords Commissioners of Justiciary are directed to hold such sittings for the trial of criminal causes as may be necessary, on the requisition of the Lord Advocate, subject to such orders as Her Majesty in Council may issue ordaining courts to be held; and every sitting of the Lords Commissioners is a sitting of the High Court of Justiciary; § 46. The ceremonies of fencing and closing courts by proclamation of a macer, which were formerly customary, are discontinued; and the judges need not remain in any town longer than is required for the disposal of the business, civil and criminal; *ib.* The court need not sit in any town, when there are no cases indicted for the sitting of the court at that town, nor when so many of the persons indicted thereto have pleaded guilty before the sheriff at the first diet (see *Criminal Prosecution*) as to make the holding of a special court inexpedient; § 48.]

The jurisdiction of the Court of Justiciary, which is the supreme criminal tribunal of Scotland, extends to all crimes, and includes the whole of Scotland; and it is superior to that of all criminal judges, whose sentences it is entitled to advocate or suspend. A libel may be brought before

the Justiciary Court, concluding, not only for the pains of law, but for damages to the suffering party, if it arises out of an act of criminal delinquency; but the patrimonial conclusions alone cannot be brought, though the loss had arisen from a criminal act. The circuit court, however, has a civil jurisdiction by way of appeal, as to which, see *Appeal to Circuit Court*. All persons, whether native or foreigners, are amenable to the Court of Justiciary, if the offence committed be one against the public laws of the realm; and this rule comprehends even peers, in regard to assaults and inferior crimes; although, for treason or any other felony, they can only be tried by a court of their own order, assembled by the Lord High Steward of Great Britain. See *Peer. Member of Parliament*. This court cannot try crimes of a military nature, such as crimes against the Mutiny Act, nor offences of soldiers against the regulations or discipline of the royal navy, nor of ecclesiastics against the rules and discipline of their body. But in offences, not included in the above restriction, committed in the Scotch or high seas, on board a British vessel, belonging to a Scotch port, they have a privative jurisdiction, [as coming in place of the High Court of Admiralty; 11 Geo. IV. & 1 Will. IV. c. 99;] and in inferior maritime crimes, a jurisdiction cumulative with that of the sheriffs, [who are now the inferior or local admirals, under the same statute.] Although a statutory court may have been appointed for the trial of special offences, the Court of Justiciary, in virtue of their original and inherent jurisdiction over all offences, have a cumulative jurisdiction in such cases, unless the jurisdiction of the court is expressly taken away. And on the same principle, where new offences are created by statute, it requires the clearest expressions to limit the cognisance of such offences to any other court, and exclude the jurisdiction of the Justiciary Court. This court has a privative jurisdiction in falsehood and forgery, when remitted from the Court of Session; and in offences directed against the state, or the administration of justice, or the execution of their duty by its own officers. There are also certain statutes creating offences, and limiting their cognisance to this court; but these are almost all in desuetude. [It had formerly exclusive jurisdiction in the four pleas of the Crown, and still has in regard to murder and rape; but robbery and wilful fire-raising were brought under the

[cognisance of the sheriff court by § 56 of the act 1887; as were also the crimes of uttering a forged document, and of aggravated night poaching (9 Geo. IV. c. 69, § 11).] The Court of Justiciary has the exclusive power of providing a remedy for all extraordinary or unforeseen occurrences in the course of criminal business, whether before themselves or any inferior court. [In *Sandys*, 26 Nov. 1874, 2 R. (J.C.) 7, the High Court sustained an appeal from the sheriff court in a civil matter, on the ground that the sheriff had erred in dismissing as incompetent an action brought under the Debts Recovery Act, for a debt which the sheriff held did not fall under that act. But see *Traill*, 14 March 1883, 10 R. (J.C.) 44.] The Court of Justiciary has also the power of reviewing the sentences of all inferior criminal courts in Scotland; the method of review being either by advocacy, suspension, or appeal. [But in prosecutions under the Revenue Acts, the appeal is not to the Court of Justiciary, but to the Quarter Sessions and the Court of Exchequer; *Downie*, 2 Feb. 1886, 13 R. (J.C.) 24.] No appeal lies from the decisions of the High Court of Justiciary, whether interlocutory or final, to the House of Lords, or to any other court; [*Mackintosh*, 23 March 1876, 2 App. Ca. 41; act of 1887, § 72.] See *Hume*, ii. 1; *Ersk. B. i. tit. 3, § 24*; *Alison's Prac. 1*; *Bank. ii. 522*; [*Macdonald*, 246; *Moncreiff on Review in Criminal Cases*, 150. As to procedure,] see *Criminal Prosecution*; also *Jury. Suspension. Advocacy. [Summary Prosecutions.]*

JUSTIFIABLE HOMICIDE; is homicide which the killer is bound or entitled to commit, on grounds of public or private duty. Public duty will excuse—lawful sentence of death; slaughter, necessary in the suppression of a riot; slaughter of a criminal by an officer, rendered indispensable by his violent resistance; homicide, on resistance of a civil warrant, when the resistance is such that the officer's life would be in danger if he were to persist in executing his duty; homicide by a sailor or soldier on duty, if violently invaded; homicide by a revenue officer on seizing run goods, when the resistance would put his life in danger were he to persist in making the seizure. Private duty will excuse—homicide in defence against an attempt to commit a felony (for an enumeration of cases, see *Hume*, i. 217; *Steele*, 72); homicide in defence of life on a sudden quarrel, the motive being nothing else than that of saving life. The

accused party, in order to justify the act, must show that he confined himself to the just measure of resistance, and that he entertained a reasonable apprehension of danger; and he must not have been in any degree the cause of the fatal strife. *Hume*, i. 195; *Alison's Princ.* 105, 127; [*Mac-*

donald, 140.] See *Homicide. Moderamen inculpatæ tutelæ.*

JUSTIFICATION; according to the English law definition, is a maintaining or showing good reason in court why one did the act or deed for which he is called to answer. *Tomlins' Dict. h. t.*

K

KAIN; derived from *canum*, a word used in ancient grants to signify the fowls or animals deliverable by the vassal to the superior, as part of the *reddendo*. In modern practice, the term is applied to the poultry, eggs, &c., deliverable by a tenant to his landlord in terms of his lease. Where kain forms part of the rent, the court, in estimating the value of property, sold according to a rental, allow such as is convertible into money at the option of the lessor, but disallow such as is not convertible. There is no such distinction, however, as between the lessee and a singular successor. *Ersk. B. ii. tit. 10, § 32*; *Hunter's Landlord and Tenant*, i. 386; ii. 297; *Bell on Leases*, i. 226; ii. 40; *Ross's Lect.* ii. 236, 405; [*Bell's Princ.* § 696.]

KELP. The introduction of the use of this article in the manufacture of glass gave rise to several questions as to the right to make it. These questions are either as between the neighbouring proprietors and the Crown, or as between landlord and tenant. It has been found that the taking of kelp is not one of the uses for which the shore is held by the Crown in trust for the public, and consequently the right is not inalienable by the Crown, but is transferred to the grantee, where land is granted bounded by the sea or sea-shore. In *E. Morton*, 1760, M. 13,528, the defender's lands lay in a continued stretch along the sea-shore of Orkney, and the pursuer's were behind them, a little farther from the sea, except a small part which touched the shore. On the introduction of kelp as a manufacture, the pursuer claimed right to the ware of the whole coast, as *inter regalia*, and under his charter of the earldom of Orkney. But it was held that he had no right to the ware on the shore of the defender's lands. The designation of a glebe is a bounding charter; and where shores are not mentioned, although the glebe may be contiguous to the shore, the minister has no right to kelp; [*L. Reay*, 1781, M. 5151.] The right of kelp-ware is not a pertinent of

an agricultural or pastoral farm, but may be let independently of, or along with, the lands upon the shores of which the kelp grows, under the denomination of the kelp-shores. In the Highlands and Islands, it is the practice for the proprietor to retain the shores in his own possession, and employ the tenants and cottars in manufacturing the kelp. See *More's Notes on Stair*, clxxii; *Bell's Princ.* §§ 647, 1226; *Bell on Leases*, i. 357; *Hunter's Landlord and Tenant*, i. 284; ii. 210; [*Rankine on Land-Ownership*, 219, 349.] See *Sea*. [*Ware*.]

KENNING TO A TERCE. The kenning of a widow to her terce is the judicial act of the sheriff of the shire within which the lands lie. The widow is first served to her terce by the verdict of a jury, proceeding on a brieve from Chancery. By this verdict it is ascertained that the claimant is the widow of the deceased, and that certain lands are the lands in which her husband died infert. The next step is for the sheriff to ascertain the just proportion of the husband's lands which belong to the widow in virtue of her terce, and this is what is termed kenning her to her terce. It is done by the sheriff setting off two acres for the heir, and one for the widow alternately, through the whole property, beginning on the east or west of the property by lot. But as the object of kenning the widow to her terce is to separate the interests of the heir and of the widow, in order that each may possess independently of the other, an object not likely to be attained by this mode of division, it often happens that, in place of it, the parties agree to divide the estate into farms, or larger portions of the property, which division is then judicially authorised by the sheriff, and made the rule of his division. After the division is made by the sheriff, a procurator appears for the widow, sasine is given by delivery of earth and stone, and instruments are taken in the hands of a notary-public, on which an instrument is made out. ["But both these modes of