

sometimes, although incorrectly, called a right of hypothec. It is more properly a mere right of retention, or general lien, depending upon the possession of the writs retained. This right does not entitle the agent to retain, in security of advances unconnected with the particular employment in which he has been engaged. [See *Rennie*, 8 Feb. 1847, 9 D. 619.] But, even as so limited, the right has been carried so far as, in the opinion of some lawyers, unduly to encroach on real rights constituted in favour of parties who have trusted to the records. A country agent's right of hypothec on his employer's title-deeds, covers the account of the Edinburgh agent employed by him for his client; *Walker*, 8 June 1831, 9 S. 691. In another case, the creditors of an ancestor, holding heritable bonds with powers of sale, and a law-agent holding the title-deeds hypothecated, having offered to the trustee on the bankrupt estate of the heir (who had made up no title), to give him either full inspection of the title-deeds, or actual delivery of them, on payment or caution for their debts, were found not bound to deliver them up on any other condition; *Dobie*, 19 May 1831, 9 S. 609. This right of retention does not stop prescription of the debt in security of which it is exercised. A right more properly of the nature of hypothec, is the preference which a law-agent enjoys for the costs of suit, over the costs recovered by his client

from the adverse party. This is a right which does not depend on the agent's possession of the document of debt, or of the decree. This preference does not extend over the principal debt decreed for in a decree in favour of the client, as to which the agent is in no better situation than an ordinary creditor; [*Alison's Trs.* 29 Nov. 1808, F.C.; *Cullen*, 20 Nov. 1845, 8 D. 77. Compensation cannot be pleaded against the client so as to deprive the agent of his security, except to the extent of setting off expenses previously found due to the opposite party; *Miller*, 22 June 1848, 10 D. 1384; *Warburton*, 30 May 1826, 4 S. 631. And when expenses have been found due, or must necessarily follow on the decree, the client may not defeat the agent's preferable claim for the expenses by any extrajudicial arrangement; *Sloss*, 28 May 1823, 2 S. 302. See *Ersk. B. iii. tit. 4, § 21*; *Bell's Com. ii. 348*; *Bell's Princ. § 1388*; *Begg on Law-Agents*, 190, 209; *Goudy on Bankruptcy*, 516, 535. See *Expenses. Agent. Retention.*]

#### IV. HYPOTHEC FOR FEU-DUTIES.

[A superior has also a hypothec for security and satisfaction of the last or current feu-duty over the crop, and *invecta et illata*, similar but preferable to the hypothec of a landlord; *Yuille*, 24 Jan. 1823, 2 S. 155. See *Ersk. B. ii. tit. 6, § 63*; *Bell's Com. ii. 26*; *Bell's Princ. § 698.*]

## I

**IDIOTS.** An idiot, or fatuous person, is one "entirely deprived of the faculty of reason, having a uniform stupidity and inattention in his manner, and a childishness in his speech, which distinguishes him from other men." [See *Insanity. Imbecility. Lunatic.*] In England, an idiot is one who has had no understanding from his nativity, and is by the law presumed likely never to attain any. A lunatic is one who has had understanding, but by disease, grief, or accident, has lost the use of his reason. Indeed, a lunatic is properly one who has lucid intervals. But the general term, *non compos mentis*, as contradistinguished from idiot, comprises lunatics, persons under phrenzies, those who lose their intellects by disease, and those who become deaf, dumb, and blind. The

Sovereign is guardian both of idiots and of persons *non compos*; standing, however, with regard to the latter, in the relation of a mere trustee, since their recovery is never despaired of. *Tomlins' Dict. h. t.*

**ID TANTUM POSSUMUS QUOD DE JURE POSSUMUS**; a maxim applied by Stair to conditions in contracts impossible, because illegal. *Stair, B. i. tit. 3, § 7*; *Bank. i. 63.* See *Condition.*

**IGNORAMUS.** In the criminal law of England, *ignoramus* was the word formerly written on a bill of indictment, by the grand jury, when they rejected the evidence for the prosecution as [insufficient.] The words now are, *Not a true bill*, or *Not found*, and such a deliverance stays proceedings, and the prisoner is liberated without further

answer. *Ersk. B. iv. tit. 4, § 84; Tomlins' Dict. h. t.*

**IGNORANTIA JURIS NEMINEM EXCUSAT.** No person is entitled to plead ignorance of the law, though he may plead ignorance of the fact. Thus, by law a mandate falls on the death of the mandant; but should the mandant, ignorant of the mandant's death, continue to act under the mandate, his acts will be effectual. On the other hand, should he continue to act after coming to the knowledge of his constituent's death, his acts would be invalid, though, under an error in law, he should *bona fide* believe that he was still legally entitled to act under the mandate; *Ersk. B. iii. tit. 3, § 41*. In this sense, a person may plead ignorance of the fact, but he will not be permitted to plead ignorance of the law. [See limitation of this rule in article *Error*.] See also *Condictio Indebiti*.

**ILLEGAL CONTRACTS.** See *Pactum Illicitum*.

**ILLEGIBILITY**; in a material part of a deed has often proved fatal to it. Thus a bond, in a material part of which half a line was obliterated and unintelligible, was annulled; and another was found not to be probative, the condition of which was partly scored and partly illegible. *Ross's Lect. i. 146*.

**ILLEGITIMATE CHILDREN.** See *Bastard*.

**IMBARGO.** See *Embargo*.

**IMBECILITY.** Under this title in the *Dictionary of Decisions* are classed questions as to the validity of deeds granted by persons of weak intellect, or in such a state of mind or body, from the occurrence of some accident or overwhelming event, that they cannot be considered *compotes mentis*. Natural imbecility approaches to fatuity, but has not necessarily the same effect, a distinction being taken between an absolute idiot and a person who has some sparks of reason. The latter, it is said, may, without the consent of curators, execute deeds of lesser moment. In some cases the court have, on application of the friends of the party, for the appointment of curator, remitted to the Lord Ordinary, to ascertain the state of the fact; and have granted or refused the application accordingly. This was done in one instance where there appeared in the party a singularity of behaviour, and a total neglect of his affairs; and in another, where the interposition was craved in behalf of a gentleman who, from great age and severe indisposition, had been reduced to a state of nearly total imbecility.

In a subsequent case the appointment of a curator was resisted, in the name of the party said to be imbecile; and it was argued that he could not be deprived of his right to conduct his own affairs, unless regularly cognosed by a jury. The court, however, having remitted to the sheriff to receive evidence, and being satisfied on his report, and after a hearing in presence, of the necessity of a curator, sustained their appointment. And it is now settled, that in cases of imbecility and partial incapacity, which require protection, but in which no remedy by cognition and curatory can be obtained, the power of interposing, by appointing a judicial factor or *curator bonis*, is vested in the supreme court. [See *Insanity*.] Where the imbecility of one who grants a deed amounts to little more than a weak and facile disposition, coincident fraud in the grantee is necessary to annul the deed. See *Facility*. But where the imbecility approaches more nearly to fatuity, the obligation, if of great importance, may be dissolved without the necessity of proving fraud. A man has been found to have sufficient understanding to make a testament, because that is revocable at pleasure; but he was judged incapable of signing a deed, disabling himself from making a second testament, as such a deed would strip him of all power over his effects. And the marriage of a person, not altogether void of reason, was reduced on the head of imbecility, the tie made by marriage being indissoluble. The court, however, has gone a great length in supporting the obligation except where there was some suspicion of fraud, and where the contract was obviously such a one as a person of sound judgment would not have entered into. With regard to imbecility, induced by accident or otherwise, very severe disease, or *lectus ægritudinis*, has been held a ground of reduction; it having been repeatedly found relevant to reduce a deed or discharge subscribed by a woman, that it was offered to be proved to have been presented to her in childbirth pains. *Æstus amoris* in a bridegroom may be "pretended" as a ground to reduce grants in favour of a wife or her friends, but not in favour of parties unconcerned in the treaty of marriage. *Luctus* or grief is no defence. Imbecility is not necessarily an objection proponable to a witness's testimony, except where it would be plainly indecent and unreasonable to expose such an unfortunate person to the useless test of an examination. The degree of intelligence necessary to make such a person a credible



witness, depends in a great measure on the nature and circumstances respecting which he is tendered to give evidence. *Ersk. B. i. tit. 7, § 48; Bell's Princ. §§ 14, 2113; Kames' Equity, 66. See Idiots. Insanity. Facility. Interdiction.*

**IMMEMORIAL**; beyond the memory of existing men. When a custom has been proved as far back as the memory of man, the same custom is presumed beyond memory. Thus, where the rate of the multure is not specified in the deed of thirlage, the quantity due may be established by mere possession for forty years. According to Stair,—“forty years is equivalent and always equiparate to immemorial possession.” But possession for a much shorter period may be considered immemorial. Thus, in a constitution of thirlage, possession being proved for twenty-eight years backward, and nobody being found of age to prove further back, anterior possession was presumed, to complete prescription; [*Montgomery, 1665, M. 12722.*] Immemorial practice in a burgh, of levying particular duties, upon a preceding title in writing, to tolls and customs in general, was found relevant to support the exaction; [*Oliphant, 1775, M. 1971.*] So also, where there was doubt as to the comprehensiveness of the words of the grant, immemorial possession and practice were found relevant to support the exaction, as well as the mode of levying the duties; [*E. Aboyme, 1775, M. 1972.*] See *Stair, B. ii. tit. 7, § 2; Ersk. B. ii. tit. 9, § 30; Brown's Synop. 308, 1594–5. [See Prescription.]*

**IMMORAL CONTRACTS.** See *Pactum Illicitum.*

**IMPEACHMENT**; an accusation and prosecution for treason and other high crimes and misdemeanours. The House of Lords has an original jurisdiction in criminal matters, exercised over either peers or commoners, upon impeachment by a member of the Lower House. Articles are exhibited on behalf of the Commons, who appoint managers to make good their charge. These articles are carried to the Lords; and if they find the accused guilty, no pardon under the Great Seal can be pleaded to such an impeachment. *Ersk. B. i. tit. 3, § 8; 12 Will. III. c. 2. [As to impeachment of waste in English law, see Waste.]*

**IMPIGNORATION.** See *Pledge.*

**IMPLIED CONDITION.** See *Condition. Legacy. [Lease.]*

**IMPLIED DISCHARGE AND RENUNCIATION.** The granting of a receipt for a single year's rent or feu-duty,

without any reservation of arrears, raises a presumption that no arrear is due. But the presumption rises much higher when the creditor has, for three successive years or terms, granted receipts for rents or feu-duties, without reservation of arrears; these discharges, when written, applying each to a whole term's or year's rent, and granted all by the same person, being held equivalent to a discharge of arrears. Provided they have been granted by the same person, it is of no consequence although they have been granted to different persons. The presumption may be elided by reference to the debtor's oath, or stronger presumptions that the arrears are due. With regard to implied discharge of a cautioner, see *Cautioner.* The accepting of or acquiescence in a tack, or other inferior right, has been found to imply a renunciation of any claim to a higher right. Taking a right to a second tack from a third party, does not imply a passing from the former, unless the posterior tack had a greater duty or shorter endurance, and the tacksman paid the greater duty, or declared expressly that he stood by the latter tack. But accepting a second tack from the grantor of the first, bearing a different commencement and duty, was found to import a passing from the former. An irritant clause is, in the general case, held to be purged by him who seeks declarator of irritancy, having acted subsequently to the contravention, as if the irritancy had not been incurred. The granting of a bond for a sum of money, in satisfaction of all which the grantee could ask or name, was found to annul a previous bond for a smaller sum. The question, whether conventional provisions imply a discharge of legal provisions, must depend much upon the circumstances of the case, and frequently on the presumed intention of the granter to supersede or only to increase the legal provision. *More's Notes on Stair, cxxiii.; Brown's Synop. h. t.; [Hunter on Landlord and Tenant, ii. 29, 110; Dickson on Evidence, §§ 177, 618.] See Discharge.*

**[IMPLIED GRANT.** See *Servitude.*]

**IMPLIED WARRANTICE.** [When warrantice is not expressed, its extent, *i.e.*, the degree in which the granter of a deed is bound to make up or warrant the subject conveyed, depends on the nature of the transaction. When the deed has been granted for an adequate consideration, absolute warrantice is implied; but when the transaction is gratuitous, the implied warrantice extends only to future deeds

[inconsistent with the grant. See *Warrandice*. In contracts of excambion, real warrandice is always implied. When a debt is assigned, there is implied warrandice on the part of the cedent, that the debt is due, and that the title to assign is good, but not that the debtor is solvent. Formerly,] under the implied warrandice of the contract of sale, the buyer, on discovering that the commodity purchased had a latent defect of such a nature that, had he been made acquainted with it, he would not have become a purchaser, might return the article, and bring an action against the seller for repetition of the price. This action required to be raised *de recenti*, as otherwise the presumption was that the purchaser was satisfied with his bargain. By the law of England the purchaser has not this remedy unless the seller has given express warrandice; [and, by the Mercantile Law Amendment Act (19 & 20 Vict. c. 60, § 5), the law of Scotland in this respect was assimilated to that of England.] See *Brown on Sale*, 285; *Ersk.* B. ii. tit. 3, §§ 25, 28; B. iii. tit. 3, § 9; *Bell's Com.* i. 463, 689; *Bell's Princ.* §§ 121, 1469; *Hunter's Landlord and Tenant*, ii. 265; *Ross's Lect.* i. 218; ii. 235. See *Warrandice*. [*Warranty*.]

**IMPOSITION.** See *Fraud*.

**IMPOTENCY**; is a ground on which a marriage may be declared void, as having been in truth no marriage at all. [In Lord Fraser's opinion, this ground of nullity can only be founded on by the aggrieved spouse. See *A.B. v. C.D.* 18 July 1863, 1 Macph. 1163; *C. v. M.* 24 May 1876, 3 R. 693; *A.B. v. C.B.* 5 March 1885, 12 R. (H.L.) 36.] See *Ersk.* B. i. tit. 6, § 7; *Stair*, B. i. tit. 4, § 6; [*Fraser on Husb. and Wife*, i. 80; *Bishop on Marriage and Divorce*, i. 322; *Eversley on Domestic Relations*, 78.] See *Marriage. Divorce*.

**[IMPOUND,** in English law. In its literal sense, to impound is to put distrained cattle or other goods in a pound; and as this is done to keep them as security, the term is also applied to cases where a document, money, or other property, is set apart to be kept in safety until some condition is fulfilled or some question is decided. *Sweet's Law Dict.*]

**IMPRESSMENT.** The Crown is, in compliance with long-established custom, empowered, by the annual Mutiny Act, to grant commission for the impressment of men for the sea service. [See *Barclay's Digest*; *Wharton*, h. t. See also *Mutiny Act. Seamen*.]

**IMPRISONMENT.** Imprisonment or

incarceration may proceed either in virtue of a criminal or of a civil warrant. Criminal warrants are issued for the purpose of arresting the supposed offender, when a crime has been committed; and where imprisonment is part of the punishment, the sentence of the criminal court is the warrant for the convict's detention. Any sheriff, justice of peace, or other magistrate, may grant warrants for apprehension, although he has himself no jurisdiction in the trial of the crime committed. See *Criminal Prosecution*. [As to recording and extracting sentences of imprisonment pronounced by the Court of Justiciary, see Act of Adjournal, 22 Feb. 1879.] Civil warrants are granted for the apprehension of a debtor. There are various civil warrants on which imprisonment may proceed, such as the act of warding, the *meditatio fugæ* warrant, letters of caption, [and the warrant now inserted in decrees, under the Personal Diligence Act. See *Diligence*. By 5 & 6 Will. IV. c. 70, however, imprisonment for debts under £8, 6s. 8d. was made incompetent; the enactment being declared not to apply to obligations *ad facta præstanda*, to taxes or penalties due to the revenue, to fines or forfeitures imposed by law, to poor rates or local taxes, nor to sums decerned for aliment (§ 5). See *Lawson*, 16 Feb. 1853, 15 D. 392; *Cheyne*, 19 July 1860, 22 D. 1490. And by the Debtors Act, 1880 (43 & 44 Vict. c. 34), § 4, imprisonment for civil debt was, with certain exceptions, abolished altogether. The enactment is as follows:—"With the exceptions hereinafter mentioned, no person shall, after the commencement of this act, be apprehended or imprisoned on account of any civil debt. There shall be excepted from the above enactment—(1) Taxes, fines, or penalties due to Her Majesty, and rates and assessments lawfully imposed or to be imposed: (2) Sums decerned for aliment: Provided that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than 12 months. Nothing contained in this act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatio fugæ*, or under any decree or obligation *ad factum præstandum*." See *Meditatio Fugæ. Factum Præstandum*, In *Mackenzie*, 12 July 1883, 10 R. 1147, a decree in an action of accounting, ordaining consignation of a certain sum, was held to be a decree *ad factum præstandum*, enforceable by imprisonment. The limitation of



[the period of imprisonment in the excepted cases to 12 months would not prevent a person imprisoned for non-payment of one year's taxes from being further imprisoned if he failed to pay the next year's taxes; *Walker*, 6 Dec. 1881, 9 R. 249. In regard to sums decerned for aliment, the Civil Imprisonment Act, 1882 (45 & 46 Vict. c. 42), made a further alteration by enacting (§ 3) that "no person shall, except as hereinafter provided, be apprehended or imprisoned on account of his failure to pay" any such sum. Power is, however, given to the sheriff to imprison for wilful failure to obey a decree for an alimentary debt, by § 4, which is as follows:—"Subject to the provisions hereinafter contained, any sheriff or sheriff-substitute may commit to prison for a period not exceeding six weeks, or until payment of the sum or sums of aliment, and expenses of process decerned for, or such instalments thereof as the sheriff or sheriff-substitute may appoint, or until the creditor is otherwise satisfied, any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process, for which decree has been pronounced against him by any competent court; provided (1) That the warrant to commit to prison may be applied for by the creditor in the sum or sums decerned for without any concurrence: (2) That the application shall be disposed of summarily, and without any written pleadings: (3) That the failure to pay shall be presumed to have been wilful until the contrary is proved by the debtor; but that a warrant of imprisonment shall not be granted if it is proved to the satisfaction of the sheriff or sheriff-substitute that the debtor has not, since the commencement of the action in which the decree was pronounced, possessed or been able to earn the means of paying the sum or sums in respect of which he has made default, or such instalment or instalments thereof as the sheriff or sheriff-substitute shall consider reasonable: (4) That a warrant of imprisonment may be granted of new, subject to the same provisions and conditions, at intervals of not less than six months, against the same person in respect of failure to pay the same sum or sums of aliment and expenses of process, if or in so far as still remaining due, or such instalment or instalments thereof as the sheriff or sheriff-substitute shall consider reasonable, or any sums afterwards accruing due under the decree, or such instalment or instalments thereof

[as the sheriff or sheriff-substitute shall consider reasonable: (5) That the imprisonment shall not to any extent operate as a satisfaction or extinction of the debt, or interfere with the creditor's other rights and remedies for its recovery: (6) That the creditor, upon whose application the warrant of imprisonment is granted, shall not be liable to aliment or to contribute to the aliment of the debtor while incarcerated under such warrant; but that the incarcerated debtor shall be subject to the enactments and rules as to maintenance, work, discipline, and otherwise applicable to the class of prisoners committed for contempt of court." See, as to this enactment, *Teven-dale*, 20 March 1883, 10 R. 852; in which a sum contained in a decree obtained by a parochial board against a son for previous expenditure in alimenting his father was held not to be a sum "decerned for aliment." The enactment would probably be construed as giving the power to commit only to the sheriff or sheriff-substitute to whose jurisdiction the debtor is at the time subject; *ib.* It is doubtful whether the Court of Session can interfere with the sheriff's discretion, if he does not exceed the powers conferred on him by the statute; *ib.* See also *Cook*, 7 March 1889, 16 R. 565. By § 5 of the same act no person shall, on account of failure to pay rates and assessments, be imprisoned for a longer period than six weeks in all at the instance of the rating authority or authorities of any one parish, combination, district, county, or burgh, in respect of his failure to pay the rates and assessments due for any one year, without prejudice to any other civil rights and remedies competent to the rating authority. By § 10 of the Debtors Act, at least once in every four weeks it shall be the duty of the governor or principal officer in charge of every prison in Scotland to make a report to the sheriff of the county within which such prison is situated, setting forth the name and designation of every civil prisoner detained in such prison; the ground of and the warrant for his imprisonment, and the period for which he has been so detained.]

The imprisonment for a civil debt consists in different acts, to which it is necessary to pay attention, since the Bankrupt Acts attach very important effects to imprisonment, by making it one of the equivalents of legal bankruptcy. See *Bankruptcy*. The first step regularly is, for the messenger, with his blazon displayed, to touch the shoulder of the debtor with his

wand, and to tell him that he is his prisoner. After this, should the debtor attempt to escape, or even take refuge in the sanctuary of Holyrood house, the messenger may follow him there, and take him out of the sanctuary, and convey him to prison. The act of incarceration is the next step to that of the debtor's apprehension; and this consists in the messenger's actually lodging the debtor in prison. On this occasion, the messenger either leaves the caption in the hands of the jailor, or makes a copy of it, and certifies it; at the same time he enters the prisoner's name in the books of the jail, either for the whole or a certain portion of the debt. [If the debtor pays the sum entered against him in the books, he is entitled to his freedom. If he made his escape without paying, the magistrates were formerly liable for the sum entered, but they were relieved of this responsibility by 2 & 3 Vict. c. 42, § 18; see *Lamb*, 18 July 1865, 3 Macph. 1105. See also *Booking a Prisoner. Breaking of Prison*. It commonly happens, however, that neither formal apprehension with the wand, nor actual incarceration, takes place; and it was held in *Scott*, 18 Jan. 1855, 17 D. 292, that the term "imprisonment," in the act 1696, c. 5, is open to construction, and that an insolvent debtor may be constructively imprisoned and rendered notour bankrupt, by being apprehended and taken into custody, in virtue of legal diligence, without actual incarceration. It is not essential to the validity of such constructive imprisonment, that the messenger, in executing the diligence, should make use of his wand of peace; *ib.*] See *Stair*, B. iv. tit. 47, § 16; *More's Notes*, cccxxx.; *Ersk.* B. iv. tit. 3, §§ 12 *et seq.*; [tit. 4, § 85;] *Bank.* i. 64; *Bell's Com.* ii. 160, 430; *Bell's Princ.* § 2311; [*Campbell on Citation and Diligence*, 244; *Goudy on Bankruptcy*, 573; *Jurid. Styles*, iii. 309, 338.] See *Prison*. [*Wrongous Imprisonment. Dyvours. Diligence.*]

**IMPROBATION**; means the act by which falsehood and forgery are proved. A reduction may proceed on forgery, and it is termed an action of improbation. But it may also proceed where there is no real forgery, and where forgery is alleged merely to insure the production of the deed. It is this action which obtains the name of reduction-improbation. The pursuer not only libels the grounds of reduction on which the action is to turn; but also, in order to force production of the deed, or to obtain a decree of certification, should the deed not be produced, he libels grounds of

falsehood; the effect of which is, that under the certification of an action of reduction-improbation, the deed, if not produced, will be held as false and forged. *Ersk.* B. iv. tit. 1, § 19; *Stair*, B. iv. tit. 20; *Bank.* ii. 637; *Kames' Stat. Law Abridg. h. t.*; [*Dickson on Evidence*, § 900. See *Reduction.*]

**IMPROBATORY ARTICLES.** See

*Articles Improbatory.*

**[IMPROPRIATION.** See *Appropriation.*]

**IMPROVEMENTS.** See *Meliorations.* [*Entail. Lease. Agricultural Holdings.*]

**IMPROVING LEASE.** When, from the dilapidated state of a farm, and the exhaustion of the soil, it would require much labour and outlay to prepare it for successful cultivation, it is usual, for the sake of encouraging the tenant to improvements, by the hope of reaping the benefit of them, to grant him a lease of more than ordinary duration. Such a lease is called an improving lease, and is generally double the length of an ordinary lease. A lease of ordinary endurance is a lease for nineteen or twenty-one years; and an improving lease is usually for thirty-eight or forty-two years. In improving leases, the doctrine of the landlord's "*delectus personæ*" is excluded; and in the absence of stipulation to the contrary, the tenant's assignee, or heirs, or creditors, are entitled to possess under the lease, or to demand a compensation for being deprived of it. See *Bell's Princ.* §§ 1215, 1764; *Bell on Leases*, i. 73, 129; ii. 186, 368; *Hunter's Landlord and Tenant*, i. 90, 132. See *Lease.* [*Entail.*]

**INCEST**; is defined by Erskine to be "an unnatural commixtion of the bodies of man and woman, contrary to the reverence due to blood." It applies to all who stand within the degrees of consanguinity or affinity within which marriage is by law prohibited. But it is not committed by connection with bastard relations how near soever. It is essential to the crime that the accused knew of the relationship; but the *onus* of proving ignorance lies upon him. Incest was, [until the act 50 & 51 Vict. c. 35, § 56,] a capital offence; [but penal servitude has for long been the usual sentence.] The attempt to commit incest is punishable arbitrarily; [see *M'Coll*, 20 April 1874, 1 R. (J.C.) 22. In *A.E.* 5 Dec. 1887, 15 R. (J.C.) 32, the evidence of a *particeps criminis*, being a woman of full age who had not been charged with the crime, was rejected. But see (*contra*) *Rae*, 3 July 1888, 2 White, 62.] See *Ersk.* B. iv. tit. 4, § 56; *Hume*, i. 441; *Alison's*



*Princ.* 562; [*Macdonald*, 198; *Fraser on Husb. and Wife*, ii. 1314-6, 1520.]

**INCIDENT DILIGENCE.** Letters of incident diligence in the Court of Session, are signet letters authorised by the court, to be issued incidentally in the course of a process, for the purpose of compelling the attendance of witnesses or havers, to bear evidence, or to exhibit and produce writings. [A formal extract of the diligence was formerly necessary; but now a certified copy of the interlocutor granting it is sufficient; 13 & 14 Vict. c. 36, § 25.] Such diligences seem also, at one time, to have been used for the purpose of bringing new parties into the field; as in the process of ranking and sale, where, in the event of the death of the debtor, or of any of the creditors who appeared, their heirs might be cited on a diligence, without waiting the expiration of the *tempus deliberandi*, or transferring the process *passivè* against them. In the case of parties interested, as being liable in relief or otherwise, it was also customary, by the older practice, to intimate the dependence of the action by incidental diligence. This, however, is now done by an interlocutor ordering the cause to be intimated, without a diligence or extract; a mere certificate of intimation being sufficient evidence of the notice. And when the interest of the party is more important, a supplementary summons is required; for, according to the old rule, no decree could issue against a party called by an incident diligence. Neither is this a competent mode of transferring an action against the representative of one of several defenders, or against the husband of a party who has married during the dependence of the action. In the inferior courts, incidental diligences are issued under the warrant of the inferior judge. See *Ersk.* B. iv. tit. 1, § 52; [tit. 2, § 30;] *Bank.* ii. 626; *Stair*, B. iv. tit. 20, § 9; tit. 33, § 2; tit. 41, § 4; A.S. 23 Nov. 1711; [*Campbell on Citation and Diligence*, 388; *Shand's Prac.* i. 492.] See *Haver. Proof. Evidence. Commission.* [*Diligence.*]

#### INCIDENTAL JURISDICTION.

Where, in order to enable him to pronounce a definitive judgment in an action brought before him, a judge finds it necessary to decide questions which do not fall under his original cognisance, he may determine them incidentally; his sentence having no further effect in that incidental question, than to support his judgment or explicate his jurisdiction in the original cause carried on before him. Thus, a

sheriff need not stay process for want of jurisdiction because forgery is alleged in an action to which he is confessedly competent, but may judge in the forgery *incidenter*. See *Ersk.* B. i. tit. 2, § 8.

**INCLOSURES.** The act 1661, c. 41, enables a proprietor to force a conterminous proprietor to concur with him in mutually inclosing their property. And accordingly the conterminous heritors must, under this statute, mutually bear the expense of making a march-dike or proper fence. See *Marches. Planting and Inclosing.*

**[INCOME TAX.** See *Property and Income Tax.*]

**INCOMPETENCY;** is one of the grounds on which a cause may be brought from an inferior court, by advocacy [now appeal] to the Court of Session. Under incompetency is concluded not only want of jurisdiction, but every ground of declining a jurisdiction, arising either from privilege in the party or suspicion of the judge. [This ground of appeal exists both at common law and under 50 Geo. III. c. 112, § 36. But privilege of party cannot now be pleaded, since the abolition, by 16 & 17 Vict. c. 80, § 48, of the right of members of the College of Justice to be sued before the Court of Session. Appeal on this ground, not being for review on the merits, is not excluded by the value of the cause being under £25, nor by the provisions of 16 & 17 Vict. c. 80, § 24, which limit the right of appeal to certain kinds of interlocutors; *Harrington*, 20 Jan. 1854, 16 D. 368.] See *Stair*, B. iv. tit. 37, § 12; [*Ersk.* B. iv. tit. 2, § 40; *Shand's Prac.* i. 441; *Mackay's Prac.* ii. 456. See *Appeal to Court of Session. Declinature.*]

**INCORPORATION;** is an association for the purpose of trade or manufactures, established by grant from the Crown. Incorporations are perpetual, if their duration be not limited by the grant or charter. The majority of the members of the incorporation may make bye-laws. [See *Gray*, 30 June 1836, 14 S. 1062; *Morris*, 16 Feb. 1866, 4 Macph. 457.] The share of the individual partner transmits to his representative on his death, and may be transferred during his life, to the effect of rendering the disponent one of the incorporation. See *Corporation. Exclusive Privilege.*

**INCUMBRANCES.** However unexceptionable the titles to land may be, the land may be burdened with incumbrances, and these the seller is bound to discharge, the purchaser being entitled to retain the price until this is done. The burdens by real

security remain as incumbrances on the land, although extending beyond the price which the purchaser has agreed to pay; and a receipt from the creditors whose debts are paid off, with a discharge of the price by the seller, will not free the land. But, in judicial sales, and in sales under the Sequestration Act, the burden is limited to the amount of the price. Payment of the price to creditors, as ranked in the judicial sale, disburdens the land; and, in sequestration, payment of real securities to the amount of the price, with a discharge by the trustee, completely disencumbers the land. The real burdens which are to be discharged from the price before the trustee draws any part of it, are such only as are preferable to the disposition or decree vesting the estate in the trustee. Inhibition does not fall under this description, the Bankrupt Act declaring that the adjudication or conveyance to the trustee shall not be struck at by any prior inhibition; [19 & 20 Vict. c. 79, § 102;] and hence the purchaser is not entitled, before paying the price, to insist for a discharge of the inhibition. The purchaser's right of retention until incumbrances be purged, may be, by stipulation, limited to a certain number of years; or, if the years of prescription have expired, and warrandice is given, with caution to relieve, the court will in equity interpose to order payment of the price; [*Marjoribanks*, 1715, M. 14187.] In the case of a voluntary sale by trustees, in terms of which the purchaser was not bound to pay the price till incumbrances were purged, the court, when the purchaser had been in possession for six years, ordered that the annual rents of the price should be paid to the trustees, to be by them laid out at interest till the incumbrances were purged; [*Elchies*, Sale, No. 2.] In another case (*L. Clunie*, 1626, M. 543), the court found that the purchaser possessing the land and retaining the price was liable in payment not only of the interest, but of the excess of the profits of the subject above the interest. [But see *Rodger*, 24 June 1859, 21 D. 1022.] See *Bell's Princ.* § 892; *Brown on Sale*, 200; [*Menzies' Conv.* 885; *M. Bell's Conv.* ii. 713.] See *Burdens. [Heritable Securities.]* It is of importance for a lender on heritable security, or a purchaser, to discover the incumbrances which affect the borrower's or the seller's estate. This is effected by a search for incumbrances, some practical directions as to which will be found under the article *Search of Incumbrances*.

**INDEBITI SOLUTIO.** The payment of what is not due, when made from ignorance or mistake, may be recalled. See *Condictio Indebiti*. [*Error*.]

**INDECENT EXHIBITION.** Any gross lewdness publicly practised, or indecent exhibition, is an indictable offence. [Indecent exposure of the person is not, however, of itself a crime. Regard must be had to the circumstances and conditions under which it is made, and to the effects flowing from it. Accordingly, where certain parties, who had been bathing, were charged with wickedly and feloniously exposing their persons in a state of nudity, at a certain place, to the annoyance of the lieges, without stating how the lieges were annoyed, or that the place was a public place, or in view of many people, the indictment was held irrelevant; *Mackenzie*, 14 Nov. 1864, 4 Irv. 570. See *Macdonald*, 202. As to sale of indecent books, prints, or pictures, see *Robinson*, 9 Nov. 1843, 1 Broun, 643; 25 & 26 Vict. c. 101, § 251. As to indecent advertisements, see 52 & 53 Vict. c. 18.]

**INDECENT PRACTICES;** by which the morals of female pupils are corrupted, [constitute a crime punishable by imprisonment or penal servitude, according to circumstances.] See *Hume*, i. 309; *Alison's Princ.* 225; [*Macdonald*, 200. See *Criminal Law Amendment Act*.]

**INDEFINITE PAYMENT;** is where a debtor is due several debts to one creditor, and he makes a payment to the creditor, without specifying to which of the debts he means the payment to be ascribed. The rules which are adopted in this case have in view the interest of the creditor more than that of the debtor. Thus, if there be one debt secured by inhibition, and the other not, the payment is ascribed to the debt unsecured. But this does not happen where the security is an adjudication, because the rigorous nature of that diligence may carry off the estate of the debtor; and, therefore, the payment will be imputed to account of the debt covered by the adjudication. Again, where one debt bears interest, and another does not, the indefinite payment is applied in extinction of the debt which does not bear interest; and indefinite payments must always be applied in extinction of interest before being applied to principal sums. It has even been held that the creditor is not bound to apply the payment to a debt which he was employed to recover; [*M'Leod*, 26 June 1821, 1 S. 89.] But where a cautioner is bound for one debt, and another debt is unsecured,



although the interest of the creditor might lead to the application of the payment in extinction of the debt unsecured, yet the interest of the cautioner counterbalances that consideration, and equity divides the payment between the cautioner's debt and the others. It has also been decided that a creditor cannot apply the payment in such a manner as to leave the debtor exposed to penal consequences. The payment cannot be ascribed to a disputed debt, nor, on emerging circumstances, can it be applied differently from what was understood at first. A dividend from a sequestrated estate cannot be applied otherwise than to the whole debt. [When there is an account current between debtor and creditor, and payments are made without specific appropriation by either party, the law appropriates the payments to the various debts in their order; *Jackson*, 14 Jan. 1870, 8 Macph. 408; *Maclaren*, 12 Dec. 1874, 2 R. 185; *Scott's Trs.* 10 Jan. 1884, 11 R. 407. As to indefinite payments to beneficiaries by a trustee holding two separate funds, see *Beith*, 30 Nov. 1875, 3 R. 185.] See *Ersk.* B. iii. tit. 4, § 2; *Stair*, B. i. tit. 18, § 3; *More's Notes*, cxxvii., cclxxv.; *Brodie's Sup.* 940; *Bell's Com.* ii. 428; *Bell's Princ.* § 563; *Kames' Equity*, 265. See *Payment*.

**INDEMNITY.** Acts of indemnity, after rebellions, have been passed for quieting the minds of the people, and throwing former offences into oblivion; but it has been made a question whether those acts were meant only to protect against criminal prosecutions, or also against civil actions for reparation of damages suffered by individuals. Acts of indemnity are passed every session of Parliament for the relief of those who have neglected to take the necessary oaths, &c., required to qualify them for their respective offices. *Ersk.* B. iv. tit. 4, § 106; *Kames' Stat. Law*, h. t.; *Hutch. Just. of Peace*, i. 48.

**INDENTURE**; in the law of England, is a writing containing some contract, agreement, or conveyance between two or more persons, indented in the top (according to the older definition) to correspond with another part having the same contents. As contradistinguished from a *Deed Poll* [i.e., close cut or shaved,] an indenture is a bilateral or other deed of the nature of a contract, whereby the parties undertake reciprocal obligations, whereas a deed poll is unilateral. *Tomlins*, h. t. See *Deeds*.

**INDENTURE.** This term is in our practice commonly applied to the mutual contract between master and apprentice, by

which the master becomes bound to teach the apprentice his trade or profession, and the apprentice to give his time and services, and to pay an apprentice fee. See *Apprentice*.

**INDICTMENT**; is the form of process by which a criminal is brought to trial at the instance of the Lord Advocate. It runs in the name of the Lord Advocate; and addressing the panel directly by name, charges him with being guilty of the crime for which he is to be brought to trial. [All prosecutions for the public interest before the High Court of Justiciary, and before the sheriff court where the sheriff is sitting with a jury, proceed on indictment in name of the Lord Advocate; *Criminal Procedure Act*, 1887 (50 & 51 Vict. c. 35), § 2. Prior to that act,] indictments were prepared in a syllogistic form, in which the major proposition stated the nature of the crime that was meant to be charged against the offender, and, in general, that it was severely punishable; the minor proposition stated the offence actually committed, and averred that it constituted the crime stated in the major proposition; the conclusion was, that on the panel's conviction by the jury, he ought to suffer the punishment inflicted by law on the crime. [But by the act of 1887, a short and simple form was authorised, consisting of a plain statement of the act or acts done, such as the following:—"A.B., you are indicted at the instance of J.H.A.M., Her Majesty's Advocate, and the charge against you is that on 20th 188-, in a shop in George Street, Edinburgh, occupied by C.D., draper, you did steal a shawl and boa," or "you did assault E.F., your wife, and did beat her, and did murder her." These and other illustrative examples are given in sched. A annexed to the act. The accused is sufficiently named and designed by stating the name and residence which he gave when examined on declaration; § 4. It is enough if the indictment set forth facts relevant and sufficient to constitute an indictable crime, though no *nomen juris* be used to specify it; § 5. See *Beuglass*, 10 Feb. 1888, 15 R. (J.C.) 45. When two or more persons are charged together, it is not necessary to allege that "both and each or one or other," or "all and each or one or more" of them committed the crime, such alternatives being always implied; § 6. The charge of guilt "as actor, or art and part," is also always implied; § 7. Nor is it necessary to allege that any act of commission or omission charged was done or omitted to be done

## INDICTMENT

525

["wilfully" or "maliciously," or "wickedly and feloniously," or "falsely and fraudulently," or "knowingly," or "culpably and recklessly," or "negligently," or "in breach of duty," or to use such words as "knowing the same to be forged," or "having good reason to know," or "well knowing the same to have been stolen," or any similar words or expressions qualifying any act charged; such qualifying allegation being implied in every case in which its insertion would formerly have been necessary in order to make the indictment relevant; § 8. In a recent case the charge was that "you did pretend to J.H. that you were possessed of a sum of money amounting to £1900, and that you were about to receive payment of the said money, and did thus induce him to give you credit to the amount of £46, 9s. 9d., which you failed to pay and had no intention of paying." Objection was taken to the relevancy of this indictment on the grounds (1) that the acts charged were not alleged to have been done falsely and fraudulently, and (2) that the libel did not specify the money or goods constituting the sum of which the person was to be proved to have been defrauded. The latter objection was sustained by the court, but the former was repelled; *Swan*, 10 Dec. 1888, 16 R. (J.C.) 34 (overruling *Dingwall*, 26 May 1888, 15 R. (J.C.) 69). In *Swan*, Lord J. C. Macdonald observed:—"The statute was intended to reduce the charge to a statement of the acts which the prisoner is to be proved to have done, leaving it to the judge to direct the jury whether these acts, or part of them, being proved, constitute a crime. It provides by its clauses, and especially by the schedule, certain illustrations of the statement which the public prosecutor may make as a good charge. It will be seen by the schedule that where the consequences of the acts the accused did must be of a certain nature in order to there being anything criminal in the acts, these consequences must also be set forth in the statement. That may be done for one of two reasons, either to show the completion and effect of the crime, or to show the distinction between one crime and another. Thus, in stating a crime of violence the prosecutor is to state whether the consequence was death or injury to the person assaulted. In the former case the crime is of a higher and different quality from what it is in the latter. Again, in certain cases it is not sufficient to detail the act done, but it is necessary also to detail the intent with which it was done.

[An example of this is the case of fire-raising. To charge a mere act of fire-raising is not sufficient to inform the accused of what is laid to his charge, and accordingly the prisoner is entitled to be told whether it is intended to be proved that his acts were wilful or merely culpable. . . . Subject to these exceptions, there is, I think, no instance in which it is necessary to do more than to state the acts which the accused has done." Some of the other judges, however, reserved their opinions as to whether there might not be other crimes besides fire-raising, in which the quality of the crime would be altered, according as one or another of the qualifying phrases mentioned in § 8 were read into the indictment. In statutory charges, it is enough to refer to the act of Parliament and any section of it founded on, without quotation, and to allege that the act charged was done in contravention of it; § 9. The usual latitude of three months is implied in all statements of time where an exact time is not of the essence of the charge; and the latitude in statements of place, usually expressed by adding to the word "at" or "in," the words "or near," or "or in the near neighbourhood thereof," is implied, unless the actual place is of the essence of the charge; § 10. Where greater latitude as to time or place is made necessary by the circumstances of the offence, these need not be set forth in the indictment, nor need it be stated that the particular time or place is to the prosecutor unknown. Where more than reasonable latitude is taken, the court may give a remedy by adjournment or otherwise; *ib.* See *A.E.* 5 Dec. 1887, 15 R. (J.C.) 32; *McDonald*, 29 Feb. 1888, 15 R. (J.C.) 47. Where quantities are set forth, such words as "or thereby," "or part thereof," "or some other quantity to the prosecutor unknown," are always implied; and a similar latitude is implied in the statement of details connected with the perpetration of any act regarding persons, things, or modes; § 11. Where buildings, goods, money, or other property are mentioned, it is not necessary to allege the property or possession thereof to be in any person, official, corporation, or company; and the allegation that such articles were not the property of the accused is implied wherever it is essential to the criminality of the charge; § 12. Persons are sufficiently described by their names and ordinary addresses, such words as "now or lately residing at" being implied; § 13. Goods or things may be described generally,



[without specifying the materials of which they are made, or particulars distinguishing them from similar articles, unless such particulars are essential to the constitution of the crime; *ib.* Money includes all current coin of the realm, post-office orders, postal orders, bank or bankers' notes; and it is not necessary to specify whether a sum of money consisted of coin, notes, or orders; § 14. No document need be quoted at length: a general description is enough, with a reference to its number (if produced) in the list of productions; § 15. The mention of the accused's declaration, and the setting forth of any previous convictions or productions that are to be used against him, were formerly requisite in the indictment, but are now dispensed with; § 19. But the fact of such previous conviction must be stated, *e.g.*, by adding to the first example given *supra* the words "and you have been previously convicted of dishonest appropriation of property." See *Previous Conviction*. And a list of the productions, along with a list of the witnesses, is appended to the indictment. Indictments, whether principal or copies, may be written or printed, or partly written and partly printed; § 21. Deletions or corrections before service are sufficiently authenticated by the initials of any person who has or could by law have signed it, or, in the case of the service copy, by those of the person serving it; *ib.* For the provisions of the act in regard to amendment of the indictment, the competency of conviction of part only of what is charged, and other matters bearing upon this article, see *Criminal Prosecution*. See *Macdonald's Manual of the Act of 1887*; and for the former law, see *Ersk. B. iv. tit. 4, § 87*; *Hume, ii. 153*; *Alison's Prac. 212*; *Bank. ii. 524*; *Macdonald, 282*. See also *Criminal Letters. Declaration. Diet.*]

**INDIVISIBLE.** It is an exception to the action of removing, that the defender possesses the lands in question *pro indiviso* with other lands. But this is not relevant against removing from any subject of which there are daily profits divisible, as a coal-heugh or fishing. Neither is it relevant for a liferenter on her terce against the fiar of an indivisible tenement, for the heir may remove the relic and pay her a third part of the rent. So, if a tenement be possessed by several tenants *pro indiviso*, and having different houses, any of these tenants may be removed, and another put in his place, or the landlord may possess it. Indivisible rights fall to the eldest of heirs-portioners.

See *Heirs-Portioners*. The stock of a company is held *pro indiviso* by all the partners in trust. Under the head "*Indivisible*" in the *Dictionary of Decisions*, are digested questions arising as to subjects legally indivisible, and part of which it is therefore incompetent to adopt without the whole. Thus, a decree-arbitral is indivisible, and when *ultra vires compromissi*, cannot be registered, even with respect to those parts of it which are within the submission. But this rule may be modified by circumstances. When an obligation to pay money would otherwise be null on account of informalities in the deed, such as being a deed notarially executed, but subscribed by only one notary or only three witnesses, the claim may be restricted to £100 Scots, which is proveable by parole evidence. So also, a verbal legacy exceeding £100 may be restricted to that sum. See also *Brown's Synop. h. t.*; and *Stair, B. iv. tit. 26, § 8*; *Bank. ii. 115*; *Bell's Princ. §§ 58, 353*; [*Bell's Com. i. 362.*]

#### **INDORSEMENT, or INDORSATION.**

This term was formerly used to signify the executions of messengers, which, being usually written on the back of the letters, were hence termed indorsements; but the term is now more generally applied to the transference of a bill, by the drawer or indorser putting his name on the back of the bill. A bill, although it be not taken payable to the drawer "or order," is transferable by indorsation. [See the Bills of Exchange Act, 1882, §§ 31 *et seq.*, 55. These provisions are set forth in the article *Bill of Exchange*. See also authorities cited there. With regard to the indorsement of a bill of lading, see *Bill of Lading*.]

**INDORSING OF A WARRANT.** See *Backing a Warrant*.

**INDUCIÆ LEGALES**; are the days which intervene between the citation of a defender and the day of appearance in the action or process; or the days which are allowed to a debtor to obey [a charge on a decree, &c.] *Induciæ* differ according to circumstances. [They have been shortened in most cases, both as to citations and charges, by the Court of Session Acts of 1853 and 1868. By § 14 of the latter act, summonses before the Court of Session proceed on *induciæ* of seven days, where the defender is within Scotland, or fourteen days where he is in Orkney or Shetland, or in any other island of Scotland, or furth of Scotland (unless where shorter *induciæ* were previously sufficient). The same *induciæ* apply to all letters passing the signet, bearing a citation, charge, publication, or ser-

[vice, and to all edictal charges upon decrees, and registered protests; *ib.* But the practice is still to insert twenty-one days as the days of charge against parties furth of Scotland, which was the *inducie* under 13 & 14 Vict. c. 36, § 21; *Mackay's Prac.* i. 607 (*b*). The *inducie* on decrees against parties within Scotland have not been shortened by the recent acts, and remain, as formerly, fifteen days. The *inducie* on bills and notes, and on deeds with consent to registration for execution, are six days, or fourteen if the debtor be furth of Scotland; 31 & 32 Vict. c. 101, § 138. The *inducie* on Exchequer decrees are six days; 19 & 20 Vict. c. 56, § 28; and on teind decrees, ten days, or sixty if the party be furth of Scotland; A.S. 4 March 1840. Privileged summonses have *inducie* of six days, when the defender is within Scotland; 6 Geo. IV. c. 120, § 53; and multiplepointings have, by practice, the same short *inducie*. See *Privileged Summons*. *Multiplepointing*. As to *inducie* in criminal prosecutions, see *Criminal Prosecution*.] See *Ersk. B. ii. tit. 5, § 55*; *tit. 12, § 40*; *B. iv. tit. 1, § 6*; *tit. 3, § 10*; *tit. 4, § 87*; [*Mackay's Prac. i. 394, 401, 607*; *Campbell on Citation, 17, 24, 72, 191*; *Jurid. Styles, iii. 337*.] See *Citation*. *Edictal Citation*. [*Appearance, Entering. Absence. Default*.]

**INDUCTION OF A CLERGYMAN**; was a term used in the times of episcopacy. When the clergyman was inducted to his living, there were three acts: 1. Presentation by the patron; 2. Collation by the bishop, which signified his approbation; and, 3. Induction, which consisted in his being placed in the pulpit by a deputation of presbyters appointed by the bishop. These forms fell with the abolition of prelacy. *Ersk. B. i. tit. 5, § 18*; *Bank. ii. 85*. [The term is still popularly used in Scotland to denote the formal introduction, by the presbytery, of a newly-appointed clergyman to his charge. But the term is not now a *nomen juris*; and the act has no effect in altering the terms of the appointment of a minister or missionary; *Hastie, 4 June 1889, 16 R. 715*. See *Duncan's Par. Eccl. Law, 144*; *Mair's Church Laws, 186, 201*.]

**INDUSTRIAL ACCESSION**. See *Accession*. *Specification*. *Contexture*.

**INDUSTRIAL SCHOOLS**. See *Schools* (*sub fine*).]

**INDUSTRIAL AND PROVIDENT SOCIETIES**. These are regulated by 39 & 40 Vict. c. 45. They are formed for the purpose of carrying on any labour, trade, or handicraft, whether wholesale or

[retail, including the buying and selling of land, and under certain restrictions the business of banking. Such a society must consist of at least seven persons; and no member may claim an interest in the funds exceeding £200. A society registered under the act has certain privileges, such as limited liability of the members, and exemption from income tax. But by 43 Vict. c. 8, if a society sells to non-members, it loses its exemption from income tax. See *Friendly Societies*.]

**INFAMOUS**. A person is said to be infamous who has been convicted of crimes that infer infamy, or who has been declared infamous by a sentence of the Court of Session or of Justiciary. [See *Perjury*.] Such a person was formerly inadmissible as a witness; [but the objection of infamy as a ground for excluding a witness has been abolished by 1 Will. IV. c. 37, § 9, and 15 Vict. c. 27, § 1. The right, however, to examine a witness on any point affecting his credibility is not affected by these statutes.] See *Hume, ii. 352, 489*; *Alison's Princ. 482, 567*; *Alison's Prac. 385, 448, 451, 672*; *Ersk. B. iv. tit. 2, § 23*; *Bank. i. 273*; *iii. 58*; *Macfarlane's Jury Prac. 162*; [*Bell's Princ. § 2243*; *Dickson on Evidence, § 1617*.] See *Evidence, p. 410*.

**INFANG**. See *Fang*.

**INFANGTHEFE**; "is a liberty or power, pertaining to him who is infeft therewith, to cognosce upon theft committed by his own man taken within his own dominion and lands." *Skene, h. t.*

**INFANT**. See *Child-Murder*. *Concealment of Pregnancy*.

**INFANTS**. This term, in the law of England, is applied to every person under the age of majority. In Scotland, the term is not used in that sense. The periods of life distinguished by our law are three: pupillarity, which reaches from the birth of the child to the age of fourteen in males and twelve in females; and during this period they are termed pupils: puberty, which reaches from the termination of pupillarity to the age of twenty-one years, which is the period of majority in both sexes: and from that time forward the person is said to be of lawful age. *Tomlins' Dict. h. t.* See *Curatory. Minor. Pupil. Tutor*.

**INFETMENT**; may be said, correctly speaking, to be the act of giving symbolical possession of heritable property; [but the term is also used to denote the instrument of sasine (or its modern equivalent), which is the legal evidence of delivery of posses-



[sion.] Anciently, infestment seems to have been synonymous with investiture; in which last sense it signified both the charter by which the superior conferred the right, and the sasine or infestment by which possession was given. There was in former times less room for any distinction, because the superior, by one and the same act, in presence of the *pares curie*, gave out lands to his vassal, and gave him sasine; and this was done without the intervention of writing, the evidence of the *pares curie* being that on which the rights of superior or vassal depended. [In course of time, a written declaration of the grant, called a *breve testatum*, was given to the vassal, and served to attest both the grant and the delivery of possession. This was called the *proper* investiture; the vassal's sasine, *i.e.*, the delivery of possession to him, being antecedent to his written title, which was a certificate of the fact of delivery. Afterwards, to save the superior's personal attendance, the *breve testatum* came to be executed before the ceremony of infestment, and contained a warrant from the superior to a deputy or bailie to give possession to the vassal. Infestment thus given by the bailie in lieu of the superior, and attested by the seal of the former, completed what was called the *improper* investiture. Then the *breve testatum* was superseded by a formal charter, granted by the superior, along with a precept or mandate to his bailie to give possession to the vassal. This precept, which at first was a separate deed, but afterwards came to be incorporated in the charter, furnished the vassal with a direct title to obtain himself feudally infest in the lands. See *Charter. Precept of Sasine*. The ceremony of infestment took place on the lands which were the subject of the grant. Symbolic delivery was given by the bailie of the superior to the attorney of the vassal, in presence of a notary-public and two witnesses. An instrument of sasine was then drawn up by the notary, as permanent evidence of the vassal's infestment. See *Sasine*. For the protection of third parties, it was further required by the act 1617, c. 16, that all instruments of sasine should be recorded in a public register within sixty days after their date, otherwise to make no faith in judgment; and by 1693, c. 13, in all competitions of rights, sasines were made preferable according to the date and priority of registration. See *Registration*. The efficacy of the infestment had thus come really to depend, not so much upon

[the ceremony of giving sasine, as upon its publication in the records. It was not, however, until the year 1845 that symbolical delivery was dispensed with. By 8 & 9 Vict. c. 35, it was provided that sasine should be effectually given in lands, and infestment obtained, by producing the warrants of sasine to a notary-public, and by expeding and recording an instrument of sasine, setting forth that sasine had been given, and subscribed by the notary and witnesses. Short forms, both of the precept and of the instrument of sasine, were provided by the act, which also made registration competent at any time during the grantee's life; the date of the instrument to be the date of presentment and entry marked thereon by the keeper of the record. By the Titles to Land Act, 1858 (21 & 22 Vict. c. 76, § 1), the instrument of sasine was rendered wholly unnecessary; registration of the conveyance, with warrant of registration thereon, in the register of sasines, being declared to have the same legal effect as if the conveyance so recorded had been followed by an instrument of sasine duly expedite and registered. Conveyances may be recorded at any time in the life of the person on whose behalf they are presented for registration, the date of entry in the minute-book being deemed the date of registration (§ 19). These provisions were re-enacted by the Consolidation Act (31 & 32 Vict. c. 101, §§ 15, 142), which also provides that, when a disponee does not desire to record the whole of a conveyance or deed, he may expedite and record a notarial instrument setting forth generally the nature of the deed, and containing at length only those portions whereby the lands are conveyed (§ 17). See *Notarial Instrument*. By § 15 of the same act, a short form is provided, by which a husband may give his wife infestment *proprieis manibus*, by recording a conveyance in favour of himself, with a warrant of registration in favour of himself and his wife.] See *Ersk. B. ii. tit. 3, § 17*; *Stair, B. ii. tit. 3*; *More's Notes, clvii.*; *Bank. i. 545*; *Ross's Lect. ii. 178*; [*Menzies' Conv. 528, 564*; *M. Bell's Conv. i. 649*; *Craigie's Digest (Herit.), 28.*]

**INFESTMENT IN SECURITY.** According to the modern use of the term, infestment in security is used to express an heritable bond and sasine, or a disposition in security and relative sasine, by which the creditor is infest in an annual rent out of the lands, corresponding to the principal sum, and in the lands themselves in secu-

rity of the principal sum, interest, and penalty, or in the lands themselves redeemably, in security of the principal sum and interest. *Stair*, B. iv. tit. 35, § 24; *More's Notes*, ccx.; *Ersk.* B. ii. tit. 8, § 35. See *Bond. Annualrent*. [*Heritable Securities*.]

**INFETMENT OF RELIEF.** An heritable security to a cautioner or co-obligant, that he shall be relieved from the engagement he has come under, by which the cautioner is infet in lands, in security of such relief, is termed an infetment of relief. *Stair*, B. ii. tit. 3, § 48; *Ersk.* B. ii. tit. 8, § 35; *Bank.* ii. 122. See *Bond of Relief*.

**INFENSARE CURIAM**; "is when the judge informs the suitors in things whereof they are ignorant." *Skene, h. t.*

**INFORMATION.** Under the old form of process in the Court of Session, an information was a written argument ordered by the Lord Ordinary, when he took a cause to report to the Inner House. It served to explain to the judges the circumstances of the case which the Lord Ordinary was to report, and to enable them to give their decision in the cause. The analogous pleading, according to the present practice, is called a *case*. See *Cases*. In the Court of Justiciary, in cases of difficulty on questions of law and relevancy, the court orders informations, on which the points raised are argued fully in writing. [This is now of rare occurrence.] See *Criminal Prosecution*. [In Exchequer causes, commenced by *subpoena*, informations are lodged by the Crown, and served on the defender; as to which see 19 & 20 Vict. c. 56, §§ 6, 7. See also next article. See *Exchequer, Court of*.]

**INFORMATION**; in English law, is an accusation or complaint exhibited against a person for some criminal offence, either immediately against the Sovereign, or against some private person. It differs from an indictment in being only the allegation of the officer who exhibits it. Informations are either partly at the suit of the Crown, and partly at the suit of a subject, or only in the name of the Crown. The former are usually brought upon penal statutes, inflicting a penalty on conviction of the offender, one moiety to the Crown, and another to the informer. The latter are also of two kinds: *First*, Such as are properly the Crown's own suits, and are filed, *ex officio*, by the Attorney General. The objects of such suits are enormous misdemeanours, tending to disturb or en-

danger Government. *Secondly*, Those in which, though the Sovereign is the nominal prosecutor, it is at the instance or promotion of some private person, or common informer. These are filed by the master of the Crown office, under the express direction of the court, and are directed against any gross misdemeanours, riots, &c., deserving of public animadversion. *Tomlins' Dict. h. t.* [A Crown information, which was filed in the Court of Exchequer while that court existed, is a suit for recovering money or other chattels, or for obtaining satisfaction, in damages, for any personal wrong committed in the lands or other possessions of the Crown. It is instituted to redress private wrongs, while criminal informations are resorted to to punish public wrongs, or heinous misdemeanours. The most usual Exchequer informations are in cases of *intrusion*, for trespasses on Crown lands; *debt*, for Crown moneys due upon breaches of penal statutes; and *in rem*, when any goods are supposed to become the property of the Crown, no one claiming them, as treasure trove, wrecks, waifs, and estrays. *Wharton's Lex.* See also *Stephen's Com.* iii. 700; iv. 383; *Broom's Common Law*, 226.]

**INFORMER.** Various statutes enact pecuniary penalties, and award part, or the whole, to the informer. In such a case it is usually provided that any person may prosecute; and then it is not necessary to qualify a peculiar interest, or to have the concurrence of the procurator-fiscal. [An informer is not disqualified as a witness; *Dickson on Evidence*, § 1584; *Hunter*, 3 Jan. 1838, 2 Swinton, 1.] In questions of defamation, a person informing against his neighbour as disorderly, or a thief, will be presumed to have done so to satisfy justice, or maintain good order. The Lord Advocate and inferior public prosecutors in Scotland may be compelled to give up their informers; [but see *Dickson*, §§ 1652-3;] and if the information was malicious, the informer will be liable in damages and expenses. [See *Defamation. Wrongous Imprisonment*.] See *Ersk.* B. iv. tit. 1, § 17; [tit. 4, § 80;] *Bank.* ii. 610; *Alison's Prac.* 94; [*Hume*, ii. 77, 135, 352, 364; *Bell's Princ.* §§ 2039, 2054.]

**INHABITED HOUSE DUTY**; an imperial tax leviable upon occupiers of houses, under 14 & 15 Vict. c. 36, amended by 32 & 33 Vict. c. 14, § 11, 34 & 35 Vict. c. 103, § 31, 41 Vict. c. 15, § 13, and 44 & 45 Vict. c. 12, § 24. A duty of sixpence in the pound is charged for every inhabited



[dwelling-house which, with the household and other offices, yards, and gardens therewith occupied and charged, is worth £20 annual rental,—where such dwelling-house is occupied by any person in trade who exposes to sale and sells any goods in any shop or warehouse, being part of the same dwelling-house, and in the front and on the ground or basement storey thereof; or is occupied by any person licensed to sell therein by retail beer, ale, wine, or other liquors; or is occupied in the business of a hotel, inn, or coffee-house keeper, unlicensed; or is a farm-house occupied by a tenant or farm-servant, and *bona fide* used for the purposes of husbandry only. Where any such dwelling-house is not occupied and used for any of these purposes, the duty is ninepence in the pound. See *Edin. Life Assurance Co.* 2 Feb. 1875, 2 R. 394; *Union Bank*, 2 Feb. 1878, 5 R. 598; *Glasgow Coal Exchange Co.* 18 March 1879, 6 R. 850; *Douglas*, 14 Nov. 1879, 7 R. 229; *Cowan & Strachan*, 22 Jan. 1880, 7 R. 491; *Campbell*, 21 Feb. 1880, 7 R. 579; *Glasgow & S.W. Railway*, 16 July 1880, 7 R. 1161; *Glasgow Corporation*, 19 Oct. 1880, 8 R. 17; *Strathearn Hydropathic Co.* 14 June 1881, 8 R. 798; *Russell*, 14 Dec. 1881, 9 R. 261; *Smiles*, 6 March 1886, 13 R. 730; *Cheape*, 27 Nov. 1888, 16 R. 144. See *Rankine on Land-Ownership*, 694.]

**INHIBITION**; is a writ passing under the signet, whereby the debtor or party inhibited is prohibited from contracting any debt which may become a burden on his heritable property, or whereby his heritage may be attached or alienated to the prejudice of the inhibitors' debt. This diligence may proceed on a liquid ground of debt, or on the decree of a court, or on a decree of registration; and it may also proceed on a depending action, or even on a conditional debt. [The form of letters of inhibition in use prior to 1868 is given in *Jurid. Styles*, 2d edit. iii. 526. That form is still competent, but a shorter form was provided by the Consolidation Act, and is now generally adopted. The abridged form contains simply the names and designations of the inhibitor and the party inhibited, and a short narrative of the document on which the inhibition proceeds; and concludes with a will, inhibiting the debtor "from selling, disposing, conveying, burdening, or otherwise affecting his lands or heritages to the prejudice of the complainer;" 31 & 32 Vict. c. 101, § 156, sched. QQ. The mode of obtaining

[warrant for signeting letters of inhibition in this form is "by production of a *fiat ut petitur* duly obtained in the Bill-Chamber on a bill, presented along with a proper ground of debt, or along with a depending summons, on which inhibition has been raised;" A.S. 18 Nov. 1871. See *Bill-Chamber*. Inhibition on a depending action, however, now generally proceeds on a warrant contained in the will of the summons, as provided by § 18 of the Court of Session Act, 1868. Such warrant may be executed either at the same time as the summons is served, or at any time thereafter, and is declared to have all the like force and effect as letters of inhibition formerly in use. To render inhibition on the dependence competent, the summons must have pecuniary conclusions other than those for expenses; *Weir*, 19 Jan. 1870, 8 Macph. 1070. See also *Telford's Exr.* 3 Feb. 1866, 4 Macph. 369; *Stafford*, 20 Nov. 1875, 3 R. 149; *Burns*, 9 Dec. 1879, 7 R. 355; *Jack*, 16 Jan. 1880, 7 R. 465. Inhibition for a debt not yet due is competent only when the debtor is *vergens ad inopiam*; *Dove*, 11 Jan. 1865, 3 Macph. 339; and in that case the proper procedure is by bill; *Symington*, 3 Dec. 1875, 3 R. 205. In regard to the competency of interdicting the threatened use of inhibition and arrestment on the dependence of an action, see *Beattie & Son*, 20 July 1880, 7 R. 1171.

[Inhibition is executed against the debtor personally, or at his dwelling-house, if within Scotland, or if furth thereof, at the office of the Keeper of the Record of Edictal Citations. Prior to 1868, the inhibition required, further, both to be published at the head burgh of the shire where the debtor resided, or edictally, if he was furth of the kingdom; and, within forty days thereafter, to be recorded in the General or Particular Register of Inhibitions. But, by 31 & 32 Vict. c. 64, § 16, the Particular Registers were abolished; and it was made unnecessary to publish an inhibition in any other way than by registration in the General Register of Inhibitions. When letters of inhibition are used, the letters themselves, with the execution thereof, must be recorded; and when the warrant of inhibition is contained in a summons, the summons itself, including the warrant of inhibition, and the execution of the warrant, must be registered, but not the condensation or pleas in law; 31 & 32 Vict. c. 100, § 18. Formerly, litigosity commenced from the date of publication

[of the inhibition, provided registration followed within forty days; and a sale by the debtor, after publication, was struck at by the inhibition. Hence the protection afforded by the records to parties transacting with the person inhibited, failed to cover the period of forty days, which might intervene between publication and registration. This defect was remedied by 31 & 32 Vict. c. 101, § 155, which provides that, if a short notice of inhibition (in form prescribed) is registered in the Register of Inhibitions, the inhibition shall take effect as from the date of the registration of such notice, provided the inhibition itself, and the execution thereof, are registered within twenty-one days thereafter; otherwise the inhibition takes effect only from the date of its own registration.]

The inhibition, thus completed, strikes against all the acts and deeds of the debtor falling within the words of the prohibition, subsequently done or granted. But the diligence is strictly personal to the party inhibited, and strikes against the debtor only. If he should die, his heir will not be affected by the prohibition, unless it be renewed against him. [Though the operation of the diligence has long been restricted to heritage, the terms of the prohibition, according to the former style, included moveables; but the new form introduced by the act of 1868 is directed only against lands and heritages. Contrary to the former law, inhibition does not now affect *acquirenda*, except such lands as were, at the date of registration, destined to the person inhibited by a deed of entail, or similar indefeasible title; 31 & 32 Vict. c. 101, § 157.] Inhibition strikes only against the voluntary deeds of the debtor posterior to its completion, and not against debts or deeds resulting from obligations previously contracted. Thus if, prior to the date of inhibition, the debtor has become bound, by minute of sale, to sell his lands, a disposition, in implement of that prior obligation, although executed posterior to the inhibition, will not be affected thereby. Neither will the inhibition strike at posterior judicial rights, such as an adjudication, proceeding on a debt contracted prior to the date of the inhibition. [See *Livingstone*, 27 July 1842, 5 D. 1; *Campbell*, 9 Dec. 1870, 9 Macph. 252.] Another peculiarity in this diligence is, that it confers no active right on the creditor using it. It is an inert prohibition, merely negative in its operation; and although the creditor is entitled to reduce

deeds to his prejudice, executed *spreta inhibitione*, he cannot rank on the debtor's estate in virtue of the inhibition *per se*. In order to give himself an active right, he must follow up his inhibition by an adjudication. Practically, no doubt, an inhibition becomes a very efficient diligence; since, so far as concerns voluntary sales, no purchaser will pay the price until the inhibitions appearing on the record are discharged. Still, if, apart from this indirect advantage, the creditor mean to take active steps, he must adjudge; and then his inhibition, followed by adjudication, will give him an available preference over all the creditors whose debts were contracted posterior to the execution of the inhibition. Prior personal creditors by bond, bill, or decree, antecedent to the date of the inhibition, may also adjudge, and will not be prejudiced by the inhibition. But if such personal creditors do not secure a *pari passu* ranking, by adjudging within year and day of the inhibiting and adjudging creditor, he will exclude them, in virtue, not of his inhibition, however, but of his adjudication. On the other hand, personal creditors, whose debts were contracted posterior to the inhibition, will be entirely excluded in competition with the inhibiting creditor. [See this more fully in *Bell's Com.* ii. 138 *et seq.*] In the case of sequestration under the bankrupt statute, [the trustee's right is not challengeable on the ground of any prior inhibition; saving, however, the effect which such inhibition may be entitled to in the ranking of creditors; 19 & 20 Vict. c. 79, §§ 102, 105; see also § 48.] It is thus, in strict principle, incorrect to describe inhibition as a real diligence. It is rather of the nature of a personal prohibition, which, by certain ulterior proceedings on the part of the inhibiting creditor, may secure him a preference on the debtor's heritage, in competition with the posterior debts or contractions by the inhibiting party. [Inhibition on the dependence may be recalled or restricted, with or without caution, by the Lord Ordinary in the cause, or by the Lord Ordinary on the Bills in vacation, subject to the review of the court; 31 & 32 Vict. c. 101, § 158. See *Burns*, 9 Dec. 1879, 7 R. 355. This provision does not apply to inhibitions on liquid grounds of debt, which can only be recalled by the court; *Greig*, 20 July 1866, 4 Macph. 1103. Inhibitions prescribe now in five years; but they may be renewed for additional periods of five years, by again



[recording the inhibition itself, or a memorandum in form prescribed; 37 & 38 Vict. c. 94, § 42.] See *Stair*, B. iv. tit. 50; also tit. 20, § 28; tit. 35, § 21; *More's Notes*, ccccxiii.; *Ersk.* B. ii. tit. 11; *Bank.* B. i. tit. 7, § 139; *Bell's Com.* ii. 134, 407, 494; *Bell's Princ.* § 2306; *Kames' Elucid.* art. 42; *Brown on Sale*, 203; *Bell on Purchaser's Title*, 368, 374; *Ross's Lect.* i. 459; [*Menzies' Conv.* 871; *M. Bell's Conv.* ii. 714, 722, 1188; *Mackay's Prac.* i. 68, 379; ii. 423; *Goudy on Bankruptcy*, 518; *Jurid. Styles*, iii. 269.]

#### INHIBITION AGAINST A WIFE.

This diligence is intended to notify to the public that the wife's legal *præpositura* over the domestic affairs has ceased; so that she may not longer have it in her power to burden her husband with the expense of domestic furnishings, usually falling within the wife's province. Like the inhibition for debt, this is a writ in the Sovereign's name passing the signet, obtained upon a bill presented to the Lord Ordinary on the Bills; and it prohibits and discharges all and sundry from transacting with the wife, or from giving her credit. It is executed against her and against the public, and recorded like an inhibition by a creditor. The husband is not bound (how rigorous and harsh soever it may appear) to assign any reason for this step; nor will he be allowed, in the narrative of his diligence, to assign any grounds injurious to the wife. The consequence of this is, that the inhibition cannot be stopped by the wife, however little ground there may be for the measure. Its effects, though it saves the husband from liability for such furnishings as he can prove to have been otherwise made for the family, will not protect him against paying for those which are proper and necessary, and for which he has not otherwise provided. See *Ersk.* B. i. tit. 6, § 26; *Stair*, B. i. tit. 4, §§ 15, 17; B. iv. tit. 50, § 21; *More's Notes*, xxii.; *Bank.* i. 126; *Bell's Princ.* § 1566; [*Fraser on Husb. and Wife*, i. 629;] *Jurid. Styles*, iii. 280. See *Præpositura*. [*Marriage*.]

**INHIBITION OF TITHES**; is a writ issuing under the signet, by which the titular of teinds is enabled to interrupt the possession of a tenant of the teinds possessing by tacit relocation. In consequence of this diligence, the titular, in place of the teind-duty stipulated in the lease, is entitled to draw the full teind; and all concerned are discharged from meddling with the teinds. This founds an action at the

instance of the titular, in which he will be entitled to the actual proven teind of each year, or where there is a valuation to the valued teind. [The inhibition may be derelinqushed; *Drysdale*, 24 Feb. 1872, 10 Macph. 499.] See *Ersk.* B. ii. tit. 10, § 45; *Stair*, B. ii. tit. 8, § 23; B. iv. tit. 24, § 2; *Bank.* ii. 65; *Bell's Princ.* § 1157; [*Connell on Tithes*, i. 128;] *Brown's Synop.* 292, 974, 2418; *Jurid. Styles*, 2d edit. i. 683-5; iii. 227, 542, 900; [3d edit. iii. 281.]

**INHIBITION**; in English law, a writ to forbid a judge from further proceeding in a cause depending before him. *Tomlins' Dict. h. t.*

**INIQUITY**. This is a technical expression, usually applied to the decision of an inferior judge who has decided contrary to law; he is in that case said to have committed iniquity. *Ersk.* B. iv. tit. 2, § 41.

**INITIALIA TESTIMONII**. [See *Evidence*, p. 413.]

**INITIALS**, *Subscription by*. The initials of a party's name, adhibited to a writing, are in some cases held equivalent to subscription. *Erskine* says, it is seldom admitted as a ground sufficient by itself for supporting a subscription by initials, that the granter usually signed in that way; a proof by the instrumentary witnesses being also required that the granter did *de facto* sign the particular deed in question, at least if it be challenged during the life of the instrumentary witnesses. A subscription by initials, however, with the attestation by one notary that the party could not write otherwise, and production of another writing by the same party subscribed in a similar way, was found good; [*Weirs*, 22 June 1813, F.C.] And a cautioner's subscription by initials to a lease was sustained, it not being denied that the initials were those of the cautioner; [*E. Traquair*, 1724, M. 16809.] This mode of subscription is inadmissible in the case of a witness. A bill subscribed by initials will not authorise summary diligence; but it will be a valid document of debt and a good ground of action, if, as in the case of other writings so subscribed, it be proved that the indorser *de facto* adhibited his initials, and that it was his usual mode of subscribing. Even when no such proof is brought, a bill signed by initials may be received as an adminicle in proof of the debt. [See *Bill of Exchange*, p. 121b (§ 91).] See *Ersk.* B. iii. tit. 2, §§ 8, 26; *Bell's Com.* i. 363, 415; *Bell's Princ.* § 323; *Ross's Lect.* i. 136; *Thomson on Bills*, 31; [*Dickson on*

[*Evidence*, § 670; *Menzies' Conv.* 107; *M. Bell's Conv.* i. 48, 461; also observations in *Gardner*, 21 March 1878, 5 R. (H.L.) 105 (L.C. Cairns, p. 107; Lord Pres. Inglis, 5 R. p. 645).] See *Testing Clause*.

**INJUNCTION**; [in English law, a judicial order by which a party is required to do, or to refrain from doing, a particular thing. Injunctions are, however, more commonly preventive than mandatory. They are either interlocutory or perpetual. See *Sweet's Law Dict.*; *Kerr on Injunctions*.] In *Shand*, 2 Dow, 523, and *Goldie*, *ib.* 536, the English reporter applies the word injunction to Scotch cases. See *Interdict*.

**INJURY**. An injury is defined to be anything said or done with the intention of hurting, and which actually does hurt another in his person, character, or property. It is so called, as being an infringement of the natural right which every one has to safety in goods and person. It has been usual to make a division of injuries into verbal and real; the former comprehending wrongs which an individual suffers, in consequence of the words or writings of another; the latter, such as are inflicted by deeds. A verbal injury, pointed against a private person, consists in the uttering or writing of contumelious words which tend to vilify his character, or render it little or contemptible. For satire, though it does not blacken a man's moral character, but only places him in a ridiculous light, may be injurious. The *animus injuriandi*, which is of the essence of this crime, will be inferred from presumptions; and in general, it is presumed from the words themselves, especially where they are made use of to hurt one in his moral character, or to fix some particular guilt upon him, as if one should give his neighbour the name of thief, cheat, liar, &c. This presumption, however, may be either weakened or elided by special circumstances; *e.g.*, if the expressions have been used in the heat of passion, with no previous or subsequent indication of a malicious purpose. Verbal injuries are punished by fine, according to the circumstances of the case. They also found a civil claim for damages or reparation, at the instance of the injured party, against him who has done the injury. A real injury is committed by doing anything which may hurt one's person, infringe his right of personal liberty, or affect his honour and dignity. The offender is liable both to a criminal prosecution, and to a civil action for reparation and *solatium*. Although, strictly speaking, no act ought

to be called injurious, where there is not *animus injuriandi*, yet the term is frequently applied where there is reparation due on account of wrongs suffered through gross carelessness, the law holding such fault equivalent to malice. *Stair*, B. i. tit. 9, § 1; *Ersk.* B. iii. tit. 1, § 13; B. iv. tit. 4, § 81; *Bank.* i. 248, 302; *Bell's Princ.* § 2028. See *Damages. Defamation*.

**INLAND BILLS**. [A bill which is or on the face of it purports to be both drawn and payable within the British Islands (including the Channel Islands), or drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.] See *Bill of Exchange*.

**INNER HOUSE**; the name given to the chambers in which the First and Second Divisions of the Court of Session hold their sittings; applied also to the courts themselves, and used in contradistinction to the Outer House, in which the Lords Ordinary sit to hear motions and causes. [See *Session, Court of*. Most] causes, commencing in the regular form by summons, arrive at the Inner House, [as a court of review,] after passing through the Outer House. But there are some cases, which, though originating with summonses, are specially appropriated to the Inner House. [This class of actions formerly included reductions, actions of aliment, and of *cessio bonorum*; but these now commence in the ordinary way in the Outer House (except cessios, which must now originate before the sheriff; 39 & 40 Vict. c. 70, § 26). The only actions which still remain peculiar to the Inner House are provings of the tenor, divisions of commonry, divisions of runrig lands, actions of ranking and sale, and actions of cognition and sale (of which the three last are now rarely, if ever, met with in practice). In these causes the Lord Ordinary may decide preliminary questions, and take evidence; but he then makes great *avizandum* with the cause to the Inner House, by whom judgment is given. See the articles in which these actions are specially dealt with. The Inner House has also an original jurisdiction in all cases in which the *nobile officium* of the court is appealed to; see *Nobile Officium*. Hence all summary petitions were formerly brought before the Inner House. But, under 20 & 21 Vict. c. 56, § 4, most summary petitions and applications, not incident to depending causes, are brought, in the first instance, before the Junior Lord Ordinary. They are still, however, addressed to the Lords



[of Council and Session, and are technically Inner House processes; *Wemyss*, 24 Jan. 1860, 22 D. 556. Petitions for the removal of factors or trustees, on the ground of misconduct, do not fall under the last-mentioned act, and must still be presented to the Inner House. See *Petition*. Appeals from the sheriff court are now brought directly before the Inner House, 31 & 32 Vict. c. 100, § 66; and special cases for the opinion and judgment of the court are only competent before one of the Divisions; *ib.* § 63.] The usual manner in which an ordinary cause comes into the Inner House is by reclaiming note (see *Reclaiming Note*); but there are several other modes. Thus, the Lord Ordinary, without himself pronouncing any decision, may report a case which appears to be attended with more than usual difficulty or importance, to that Division of the Inner House to which the cause belongs; [see *Report*. See also *Exceptions, Bill of Jury Trial*. The Divisions possess co-ordinate authority. The pursuer in an ordinary action, or the appellant in an appeal, has the right to select the Division to whose judgment he will submit his cause; but the Lord President has power to transfer causes from one Division to the other, when he considers it necessary or expedient for the despatch of business; 20 & 21 Vict. c. 56, §§ 1-3, 7. See *Stair*, B. iv. tit. 2, § 9; *Ersk.* B. i. tit. 3, § 16; *Shand's Prac.* ii. 751, 757, 963; *Mackay's Prac.* i. 49, 118, 218, 361, 544, 577. See *Rolls of Court. Counsel. Default. Pro-rogation. Consultation of Judges.*]

**INNKEEPERS.** This seems to be the appropriate head for an explanation of the extent to which the Roman law edict, *Nautæ caupones stabularii*, has been adopted in the law of Scotland. Under that edict, the masters of ships, inns, stables, &c., were held liable for the loss of luggage, goods, &c., placed under their charge by passengers, lodgers, and the like. The principle of that edict has been fully recognised in our practice; and with us the liability extends not only to losses arising from the fault, negligence, or fraud of the innkeeper himself, but also to those cases in which the loss has resulted from the fault or crime of his servants, or of the other inmates of his house. The only case in which the innkeeper is not liable, is when the loss arises from an unavoidable accident, or *damnum fatale*. The rule, as laid down in England, is, "that nothing is an excuse except an act of God, or of

the King's enemies." (See *Act of God*.) What is to be considered *damnum fatale* is sometimes a question of considerable difficulty. Some authorities do not reckon fire such an accident; but in one case, it was decided that an accidental fire, whereby both stables and horses were destroyed, did not subject the innkeeper. Loss by robbery is also a controverted point; but it is unquestionable, that in England it is not held *damnum fatale*, and that even in Scotland loss by theft makes the innkeeper responsible. The edict applies to the keepers of tippling-houses, with whom travellers lodge, and even to mere vintners; but it is a question still open, whether it applies to lodging-house keepers. (See *Lodging-Houses*.) Where a horse has been put into a stable to bait, and money or goods have been abstracted from a valise or portmanteau on the horse's back, the stabler must make good the loss; and a stabler has been found liable for the value of a horse which died in consequence of an accident while under his care. An innkeeper neglecting to give a parcel containing money to a carrier, as he ought to have done, was held liable for its contents. But this liability does not extend to money contained in a parcel, addressed to his care, but to a person not a guest in his house. It is sometimes a question whether, in order to make the innkeeper liable for a certain article, it is necessary to give him information respecting it, or to commit it to his care. An innkeeper has been found not liable for a purse of gold alleged to have been lost, of which he was told nothing previously. But he was held liable for a pair of breeches and their alleged contents, said to have been abstracted from a traveller's room. The danger of admitting such allegations without proof is apparent; and it is now established, that although the extent of the loss may be ascertained against the innkeeper by the oath *in litem* of the party suffering the loss, fortified in the general case by such reasonable collateral evidence as may prevent an extravagant demand, yet it is necessary for the traveller to prove that some of his property has been carried away, or some of his securities broken open. An innkeeper has a lien upon a traveller's luggage and goods for the price of his lodging and entertainment, and upon his horse for its provender and stabling. This lien operates even against the true owner of the horse, though it had been stolen by him who brought it to the inn. It is

strictly confined to the keep of the horse itself, and is lost without revival, if the horse has once been allowed to go away. Effects belonging to a traveller in an inn or hotel are not subject to the landlord's hypothec. In the *Jurid. Styles*, iii. 29, will be found the form of a summons upon the edict, *Nautæ caupones*, against an innkeeper for the loss of a horse. [The liability of innkeepers at common law was limited by 26 & 27 Vict. c. 41, § 1, which provides that no innkeeper shall be liable to make good to any guest any loss or injury to goods or property brought to his inn, not being a horse or other live animal, or any other gear appertaining thereto, or any carriage, to a greater amount than the sum of £30, except in the following cases: (1) Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper, or any servant in his employ; (2) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper. To secure the benefits of this act, the innkeeper must place a copy of the first section in a conspicuous part of the hall or entrance to his inn. An innkeeper is bound to receive and entertain, to the extent of the accommodation which he possesses, all travellers who offer themselves in a proper condition, and are ready to pay the customary charges. He has no right to detain the person of a guest in order to secure payment; but he has a lien on his property brought into the inn. And by 41 & 42 Vict. c. 38, an innkeeper is entitled, after an interval of six weeks, and after due notice by advertisement, to sell by public auction any goods, chattels, carriages, horses, wares, or merchandise deposited with him or left on his premises by a person who had become indebted to him for board or lodging, or for the keep of a horse or other animal left at livery.] See *Stair*, B. i. tit. 9, § 5; *More's Notes*, lvii.; *Brodie's Supp.* 918; *Ersk.* B. iii. tit. 1, § 28; *Bank.* B. i. tit. 16; *Bell's Com.* i. 498; ii. 99; *Bell's Princ.* § 236; [*Stephen's Com.* ii. 89; *Addison on Contracts*, 297; *Smith's L.C.* i. 132.] See *Nautæ Caupones. Carriers. Public Carriages.*

**[INNOMINATE.** See *Nominate.*]

**[INNOVATION.** See *Novation.*]

**INNS OF COURT.** In England, the colleges of municipal or common law professors and students are called *inns*. The inns of court are governed by masters, principals, benchers, stewards, and other

officers; and they have public halls for exercises, readings, and the like. Although these societies have no judicial authority over their members, there exist among themselves certain orders or regulations, which have, by consent, the force of law. The four principal inns of court are the Inner and Middle Temple, Lincoln's Inn, and Gray's Inn. [These have the exclusive privilege of conferring the rank or degree of barrister at law. They have a common Council of Legal Education for giving lectures and holding examinations. The "Consolidated Regulations" presently in force are given in *Wharton's Lex.*] The *Inns of Chancery* were formerly preparatory colleges for younger students; and many were entered there before they were admitted into the inns of court. They are now almost entirely occupied by attorneys, solicitors, and others. They all belong to one or other of the inns of court. They are Thavie's, New, Symond's, Clement's, Clifford's, Staple, Furnival's, and Bernard's Inn. See *Tomlins' Dict.*; [*Stephen's Com.* i. 16.]

**INNUENDO.** [In actions of damages for defamation, it often happens that the words complained of are harmless in themselves, but are said to have conveyed an injurious imputation, when taken in connection with surrounding circumstances. In such cases the latent meaning is explained, both in the record and in the issue, by an *innuendo*, which is usually introduced by the words "meaning thereby," following the expressions libelled on. See *Defamation*, p. 299.] The word is also frequently used in English writs, declarations, and pleadings, to ascertain a person or thing named before, but left doubtful; as "he (*innuendo*, the plaintiff) did so and so." *Tomlins, h. t.*

**INQUEST**; is a certain number of men to whom the trial of a question, civil or criminal, is committed. They are termed the inquest, from their being appointed to inquire into the state of the facts; and jury, because they are sworn to give their verdict according to the evidence. See *Jury. Jury Trial. [Coroner.] Brieve. Service.*

**INSANITY.** There are various degrees of aberration of intellect recognised in the law of Scotland as calling for its special protection. But in determining the appropriate measure of protection to be afforded to persons affected in mind, they may be divided into two great classes. The first comprehends every one who is, in legal



language, fatuous and naturally an idiot, or furious, mad, and a lunatic; or whose external senses are so imperfectly organised as to render him totally incapable of the independent management of himself or his affairs. The second comprehends those who, although not so devoid of reason as to be absolutely incapable of acting for themselves in the minor affairs of life, are yet, from imbecility or weakness of judgment, considered by the law fit subjects for a limited degree of restraint, in matters of importance. The remedy in the former case is to place the fatuous or furious person under permanent and unlimited curatory; and for that purpose an inquiry is made into his state of mind by a cognition and inquest, the proceedings in which are explained *infra*. The remedy afforded in the latter class of cases is interdiction, by which lavish and facile persons are disabled from signing any deed to their prejudice without the consent of their interdictors. See *Interdiction*.

[Prior to 1868,] the state of idiocy was ascertained by the verdict of an inquest, on a brieve directed to the judge ordinary of the bounds within which the person resided. There were two heads in this brieve; the first related to the state of the person—the second to the nearest male agnate. On the first head, it was not only necessary to inquire into the state of the person at the time of the inquest, but how long he had been in that state; for the act 1475, c. 66, provided that no alienation made by the person after the time fixed on by the inquest as the commencement of the distemper should be valid. In this inquest it was necessary to produce the person to the jury, that they might judge of his condition; the date of the commencement, as well as the endurance of the disease, was proved by the evidence of witnesses examined before the jury. Under the second head of the brieve, the jury were required to ascertain who was the nearest male agnate of twenty-five years of age. The brieves for cognoscing an idiot or a furious person were nearly similar. They differed in the description of the circumstances into which the jury were to inquire. The question for the inquest in the brieve of idiocy was thus expressed, *Si sit incompus mentis, fatuus et naturaliter idiota*. The brieve of furiosity was expressed in these terms: *Si sit incompus mentis, prodigus et furiosus, viz., qui nec tempus, nec modum impensarum habet, sed bona dilacerando profundit*. Where there

was any doubt as to the proper character of the infirmity, brieves of both kinds might be taken out, and claims given to the jury on both, so as to enable the jury to adapt their verdict to the one or to the other, according to circumstances; and the brieve to which the verdict applied was the only one retoured to Chancery. See *Kilkerran*, Idiocy and Furiosity, No. 1; see also Mr Ludovic Colquhoun's report of the case of *Yoolow*, 28 Jan. 1837, for an interesting disquisition on the different degrees of mental infirmity, in reference to that case; the report of which also illustrates the mode in which the judicial inquiry was conducted, according to the [former] practice of the law of Scotland.

[The present procedure in cognoscing insane persons is regulated by 31 & 32 Vict. c. 100, § 101, and A.S. 3 Dec. 1868. The statutory enactment is in these terms:—“It shall no longer be competent to direct a brieve for the cognition of a person alleged to be *incompus mentis prodigus et furiosus*, or of a person alleged to be *incompus mentis fatuus et naturaliter idiota*, to the judge ordinary; and the brieves of furiosity and idiocy hitherto in use are hereby abolished; and in lieu thereof it is enacted, that a brieve from Chancery, written in the English language, shall be directed to the Lord President of the Court of Session, directing him to inquire whether the person sought to be cognosced is insane, who is his nearest agnate, and whether such agnate is of lawful age; and such person shall be deemed insane if he be furious or fatuous, or labouring under such unsoundness of mind as to render him incapable of managing his affairs; and such brieves shall be served upon the person sought to be cognosced, on *induciae* of fourteen days; and the brieve shall be tried before the said Lord President and a special jury, or before any other judge of the Court of Session to whom the said Lord President may remit the same, and a special jury; and the trial shall be conducted in the same manner as jury trials in civil causes in Scotland are conducted, with all the like remedies as to motions for new trials and bills of exceptions which are competent with reference to such jury trials; and the court shall have power to award expenses against either party; but they shall not award expenses against the party prosecuting the brieve, unless they are of opinion that the same was prosecuted without reasonable or probable cause; and the verdict and service of the jury shall be

[retoured to Chancery, and shall, unless set aside on any ground, have the like force and effect, and be followed by the like procedure, as a retour of the verdict and service of the jury before the judge ordinary according to the present law and practice." The A.S. 3 Dec. 1868, ordains that when a brieve is presented to the Lord President, under the above provision, he shall issue a precept directed to messengers-at-arms, commanding them to summon the person sought to be cognosced to compare for cognition at a time not less than fourteen days after service; and within the said fourteen days, the person presenting the brieve must give public notice thereof, once in the *Edinburgh Gazette*, and by advertisement twice at least in a newspaper published within the county—or if there be none such, in the county next adjoining to that—in which the person sought to be cognosced resides; § 1. Claims and answers are then appointed to be lodged, and the time and place of trial fixed; directions being given for securing the attendance at the trial of the person sought to be cognosced, or otherwise his being seen and examined by or in presence of the jury, or of some of them; § 2. A special jury is summoned by the sheriff, for trial of the cause; and the reducing the jury to twenty, the calling and balloting of the special jury of twelve, and the returning of their verdict, unanimously or by a majority, are conducted according to the ordinary rules of jury trial in civil causes; § 4. See *Jury Trial*. When the jury return their verdict affirming the whole heads of the brieve, it is noted generally "cognosce;" when the jury do not affirm the whole heads of the brieve, the verdict is noted generally "not cognosce," unless there be any special finding regarding the person claiming in the character of nearest agnate. The clerk then makes out and subscribes a formal writing, embodying the verdict, and answering the different heads of the brieve, which are retoured to Chancery, if they are affirmed, but not otherwise. And if the whole heads are not affirmed in favour of the person claiming as nearest agnate, then the formal writing bears that the brieve and claim are not proven, and that the claim is therefore dismissed by the jury; which formal writing is recorded in the books of sederunt; § 6. Provisions are made with regard to expenses, bills of exceptions, and motions for new trial, by §§ 7, 8; and with regard to applications for authority to transmit the retour to

[Chancery, by § 9. The pursuer of the brieve need not be the nearest agnate, but may be any near relation; *Larkin*, 8 Dec. 1874, 2 R. 170.

[A more usual method of putting under guardianship the estates of persons incapable of managing their own affairs, is by the judicial appointment of a curator *bonis*. This is done without formal cognition, on summary petition to the Junior Lord Ordinary, at the instance of any near relative. See *Bryce*, 23 July 1828, 3 W. & S. 323. Failing relatives, the application may be made by any interested party; *Mason*, 22 Jan. 1852, 14 D. 761; *Ross*, 11 March 1851, 13 D. 950. And in *Swan*, 29 Jan. 1853, 2 Stuart, 184, such an application was granted at the instance of the incapable person himself. Under the Lunacy Act (20 & 21 Vict. c. 71, § 81), the Lord Advocate may apply for the appointment of a curator *bonis* to any one who is a lunatic, as defined by that act. See *Lunatic*. The definition of an insane person, given, for the purposes of cognition, by 31 & 32 Vict. c. 100, § 101, (viz., "one furious or fatuous, or labouring under such unsoundness of mind as to render him incapable of managing his affairs,") comprehends most of the cases in which a curator *bonis* would be appointed by the court. But there is this difference, that incapacity arising from physical causes, which could not warrant cognition, has in several cases been held to justify the appointment of a curator *bonis*; *Mark*, 14 June 1845, 7 D. 882; *Allan*, 15 July 1852, 14 D. 1009. The court, however, will not interfere on the ground of physical defect, without urgent necessity; *Kirkpatrick*, 8 June 1853, 15 D. 735; *Mackie*, 24 Nov. 1866, 5 Macph. 60. Along with the petition, certificates by two medical men must be produced, certifying on soul and conscience that the person is incapable of managing his own affairs; *Robertson*, 24 Dec. 1853, 16 D. 317. The certificates must also state the cause of incapacity, and its duration; and they ought to bear the date on which the person was last seen; *Laidlaw*, 31 Jan. 1846, 8 D. 426; *L. Advocate*, 24 June 1860, 22 D. 555. The petition must in every case be served on the alleged incapable; *Thomson*, 25 Nov. 1847, 11 D. 148; *McGregor*, 23 Dec. 1848, 11 D. 285; and this should be done in presence of the sheriff; *Scott*, 7 Feb. 1855, 17 D. 362. Where a process of cognition was in dependence, a petition for appointment of curator *bonis* was held competent, but was



[superseded till the process of cognition was concluded; *Irving*, 7 Nov. 1868, 7 Macph. 86. As to recall of curatory, on cessation of mental derangement, see *Forsyth*, 19 July 1862, 24 D. 1435.

[A deed granted by a person labouring under mental incapacity is null. But such deed must be set aside by action of reduction. Even when the party has been cognosed by verdict of a jury, a reduction is necessary; for the verdict merely reverses the legal presumption in favour of the deed; *Towert*, 16 May 1817, 5 Dow, 131; *Johnstone*, 11 March 1857, 19 D. 706.] As a state of idiocy unfits the person for entering into transactions, a proof, even after his death, that the granter of a deed was an idiot at the time of granting it, will be sufficient for reducing that deed; and, according to Bankton, restitution on the ground of idiocy is competent to idiots against their curators within four years after their convalescence, in the same way that it is to minors; *Bank. B. i. tit. 7, § 106*. [See *Facility. Circumvention*. In *Nisbet's Trs.* 30 June 1871, 9 Macph. 937, a will executed by a person in a lunatic asylum, where he had been confined for several years, and in which he died two months after the date of the will, was sustained. The will was proved to have been made during a lucid interval, and the rationality of the deed itself was an important element in the judgment. A testamentary writing, in itself reasonable, will not be deprived of effect merely on the ground that the testator was at the time subject to an insane delusion, from which he never recovered; *Ballantyne*, 3 March 1886, 13 R. 652.] The insanity of a partner, when of a permanent nature, is a ground for dissolving a partnership; *Bell's Com. ii. 525*. Notwithstanding a mandant's supervening insanity, the acts of a mandatory, previously appointed, are good to the public against the mandant's estate; *ib. i. 525*. The curators of insane persons can grant leases of a duration only equal to that of their office; *Hunter's Landlord and Tenant*, i. 170. [With regard to the title to sue and defend, see *Mackay's Prac. i. 315, 346*. With regard to capacity to give evidence, see *Evidence*, p. 410 a.] Insane persons are not liable to criminal prosecution, if their insanity amount to a total alienation of reason. It is also a sufficient excuse that the panel labours under an illusion which misleads his judgment in the particular case, though he may be aware of the distinction between right and wrong in general.

[See *Gibson*, 23 Dec. 1844, 2 Broun, 332; *Milne*, 11 Feb. 1863, 4 Irv. 301; *Ferguson*, 28 Dec. 1881, 4 Coup. 552; *Brown*, 13 April 1882, 4 Coup. 596; *Small*, 6 Dec. 1880, 4 Coup. 388.] Where there is a mixture of guilt and derangement in the commission of the crime, the course which Hume recommends is, that the jury should convict, with a recommendation to mercy. The plea of insanity is more readily received in crimes of a violent nature, than in such as require art and perseverance. The *onus probandi* lies upon the panel; and the insanity must have existed at the time, but need not be proved to have existed either before or after. If, however, there is no direct evidence applicable to the period, the situation of the panel, before and after committing the act, and the general nature of his malady, will form the grounds of determination. [When insanity is pleaded in bar of trial, and proved, the court find that the accused cannot be tried, and order him to be kept in strict custody until Her Majesty's pleasure be known; 20 & 21 Vict. c. 71, § 87. The same course is followed if the accused goes to trial, but is found by the jury to be then insane. If, though sane at the time of trial, the accused is found by the jury to have been insane at the time of committing the crime, he is acquitted on the ground of insanity, and the court order him to be kept in strict custody, until Her Majesty's pleasure be known; *ib. § 88*. See also 34 & 35 Vict. c. 55, § 2.

[See on this subject, *Ersk. B. i. tit. 7, § 48*; *B. iv. tit. 4, § 7*; *Bell's Princ. § 2103*; *Hume*, i. 37; *Alison's Princ. 645*; *Macdonald*, 11, 460, 525; *Fraser on Parent and Child*, 524; *M'Laren on Wills*, i. § 534; *Menzies' Conv. 42*; *M. Bell's Conv. i. 125*; *Mackay's Prac. ii. 300, 374*; *Thoms on Judicial Factors* (ed. Fraser), 275. With regard to the treatment of insane persons in lunatic asylums, see *Lunatic*.]

**INSOLVENCY.** [This subject will be treated under the following heads:—

I. *Definition of Insolvency* (p. 539).

II. *Effects of Insolvency.*

1. *Generally* (p. 539).

2. *With reference to Gratuitous Alienations, and Preferences to Creditors* (p. 540).

(a) *Gratuitous Alienations and Preferences—at Common Law* (p. 540).

(b) *Gratuitous Alienations—under the Statute 1621, c. 18, part 1* (p. 544).

[(c) *Preferences, in shape of Alienations in defraud of the Diligence of Creditors—under the Statute 1621, c. 18, part 2* (p. 546).

3. *With reference to Notour Bankruptcy* (p. 546).

For relation to Special Contracts—Sale, Partnership, &c. — see *Sale, &c.*

III. *Private or Extrajudicial Settlements by an Insolvent with Creditors* (p. 546).

1. *By way of Composition-Contract* (p. 547).

2. *By way of Trust Deed for Creditors* (p. 548).

#### I. DEFINITION.

Insolvency consists in inability to pay debts or fulfil obligations—irrespective of the circumstance that the inability is or is not public and notorious; *Bell's Com.* ii. 153. When the inability is publicly acknowledged, in manner determined by statute law, and is thus “notour,” insolvency becomes bankruptcy; see *Bankruptcy*. The latter term, however, is sometimes used for insolvency; and the earliest Scotch legislation did not distinguish between them. The final stage of insolvency is sequestration, *i.e.*, bankruptcy accompanied by divestiture of the bankrupt in favour of a judicial administrator for creditors; see *Sequestration*. “Declared insolvency” does not appear to be a technical term in Scotch law; see *Hannan*, 16 Dec. 1879, 7 R. 380; also *Nelson Mitchell*, 21 Dec. 1878, 6 R. pp. 430–433.

The inability to pay or fulfil, which constitutes insolvency, need not, in the general case, be absolute, or imply ultimate inadequacy of assets: it is enough if there be defect in relation to the debt or obligation as undertaken. Professor Bell (*Com.* ii. 153) gives the following as a “practical view” of insolvency:—“Where a man is unable to fulfil the obligations which he has undertaken, and according to his undertaking, he is insolvent. More particularly, he is insolvent when the engagements which he is unable to answer are so numerous, or so great in amount, that he cannot proceed without the aid of some general arrangement with his creditors, some indulgence given in point of time, some consent that his payments shall be taken in small portions. A person in this state is truly insolvent; and

[it does not follow that he is not insolvent, because in the end his affairs may come round, and he may ultimately have a surplus on winding them up.” Again, he says:—“The debtor is insolvent from the moment that he voluntarily pauses, or is, by the operation of his creditors, impeded in the course of his dealings.” In this the practical, and ordinary, sense of the term, insolvency is evidenced by such facts as the dishonour of a bill, or failure to pay an admitted debt; or, more clearly, by a general suspension of payment (“stopping payment,” see *Carter*, 5 March 1886, 13 R. p. 699), and the adoption of some general method of arranging with creditors. In questions under the early or modern Bankruptcy Acts the insolvency must be proved, as at one or more dates, by specific comparison of the debts with the funds; but still the question is whether the creditors’ claims can be met as they arise from day to day; see *Bell's Com. l.c.*; *Teenan's Tr.* 19 March 1886, 13 R. 833; *M'Nab*, 16 March 1889, 16 R. 610. For insolvency under the Companies Acts, see *Nelson Mitchell*, *supra*.

#### II. EFFECTS OF INSOLVENCY.

##### 1. Generally.

Insolvency, as above defined, does not operate so as altogether to tie up the hands of the insolvent. It does not, by itself, affect the title to sue—not even to the extent of inferring caution for expenses, unless the insolvency be unequivocal; *Mackay's Prac.* i. 321; *Goudy on Bankruptcy*, 20; see *Ritchie*, 2 June 1881, 8 R. 747; *Weir*, 18 Oct. 1876, 4 R. 8. Actual insolvency, with or without knowledge on the part of the insolvent, leaves the insolvent capable of performing all such acts and deeds as are conceived—to use the words of Lord Kames—“with a view to carry on affairs, and in the hopes of better fortune” (*Grant*, 1748, M. p. 951). Even where there is knowledge of present insolvency, the insolvent is still free to perform all ordinary acts of management, and to enter into contracts, and prosecute business in the ordinary course. With knowledge, however, or strong suspicion, of insolvency, there arises a disability with regard to extraordinary acts of management, and—where the present insolvency is clearly irretrievable and must end in bankruptcy—disability with regard to all business transactions. See *Bell's Com.* i. 264–266; ii. 170, 220; *Morton*, 7 Jan. 1858, 20 D. p. 369; *Anderson's Tr.* 17 March 1871, 9



[Macph. p. 722; *Ehrenbacher*, 10 July 1874, 1 R. p. 1135; *Seath*, 9 Dec. 1884, 12 R. pp. 264, 273. See *Sale. Partnership*.

2. *Disability with reference to Gratuitous Alienations, and Preferences to Creditors* (pp. 540–546).

The most prominent of the restrictions thus lying upon an insolvent who has knowledge or suspicion of his insolvency have reference to the making of gratuitous (*i.e.*, non-onerous) alienations in favour of third parties, or granting preferences to particular creditors. Such alienations and preferences are outside of the ordinary course of business or management, and are illegal and invalid both at common law and under statute. The basis of the illegality is that, upon insolvency, a debtor's whole means and estate cease to be his own and become the common property of his creditors, he being merely a trustee or manager for them; *Bell's Com.* i. 8; ii. 170: see Bankruptcy Act, 1856, §§ 29, 121, 155; Debtors Act, §§ 8, 9; Bankruptcy and Cessio Act, § 11. A gratuitous alienation to a third party for behoof of the insolvent himself is, on this plain ground of equity, which has been called "the common law of bankruptcy" (*M'Kay*, 31 Jan. 1866, 4 Macph. p. 334, *per* Lord J. C. Inglis), a fraud against the creditors (Prof. Bell calls it embezzlement, *Com.* ii. 170, 191; but see *Clendinnen*, 2 Dec. 1875, 3 R. (J.C.) 3); and, in view of the same consideration—the right and interest of the whole creditors in the insolvent estate, and the prejudice they suffer when these are interfered with—a gratuitous alienation by an insolvent to a third party, not a creditor, for behoof of that party, or a preference voluntarily granted to one creditor over another, is inequitable, and where, as is nearly always the fact, the debtor knows of his insolvency, also in character fraudulent. (For view of statute criminal law on this subject, see Debtors Act, 1880, § 13, B. 5). The injury is greater in the former cases than in the latter, where the favoured person is a creditor; but there is in both classes an implied breach of trust; see *Goudy*, 24; *Bell's Com.* ii. 191, 227. It is on this ground—of being inequitable, and thus fraudulent towards creditors—that the common law, and the statutes 1621, c. 18, and 1696, c. 5, with certain differences of operation, disallow these alienations and preferences. A conveyance in either class is thus struck at, whether made directly or circuitously, with

[writing or by mere delivery or otherwise, and whether of money or goods or securities or other kind of attachable property or right.

(a) *Gratuitous Alienations, and Preferences*  
—at Common Law.

Prof. Bell, in a passage approved by Lord J. C. Hope, in *M'Cowan*, 10 March 1853, 15 D. p. 504, thus states, in this connection, what he calls "the fundamental principle of the bankrupt law:"—"at common law a debtor acts fraudulently, who, conscious of his insolvency, gives away the funds which ought to be divided among his creditors; or, who, after his funds have become inadequate to the payment of all his debts, intentionally, and in contemplation of his failing, confers on favourite creditors a preference over the rest;" *Com.* ii. 226. It has been thought, with regard to gratuitous alienations, that the inequity towards creditors of itself constitutes the legal fraud, even if the debtor is unaware of his insolvency (see *Goudy*, 25, and cases cited, and 23); and in at least one other passage Prof. Bell seems to take this view (*Com.* ii. 170). But cases presenting the special feature of insolvency, donation, and absence even of suspicion of insolvency on the part of the insolvent, must be very rare (*infra*, p. 541); and in a recent important case as to gratuitous alienation, *Main*, 30 June 1881, 8 R. 880, while the burden of proving the debtor's knowledge was undertaken, there was no judicial declaration that this was, or was not, necessary. In questions of preference, on the other hand, the form of issue in use, especially as contrasted with the issue for cases of the former class, seems to infer there the element of knowledge on the part of the debtor—being in these terms:—"Whether the said deeds were granted . . . . fraudulently, to disappoint the legal rights of the said creditors;" see *M'Cowan*, 6 July 1852, 14 D. 968, for both forms, and *infra*, p. 544; see *Ersk.* B. iv. tit. 1, § 44. Dread of failure, rather than contemplation of bankruptcy, seems to be sufficient knowledge.

With regard to both classes the question at common law is unaffected by any presumption; and, in proceedings to set aside the conveyances, the whole constituents of the fraud fall to be proved (*cf.* the presumptions and requirements of proof, under the acts 1621, c. 18, *infra*, pp. 544–546, and 1696, c. 5, *supra*, p. 90). These are, as above explained—in both cases, the primary fact of the debtor's insolvency, at the date of the conveyance, and also at the date of the

[challenge, when the loss and prejudice have arisen through the inadequacy of the funds, and in addition, in the former class of cases, that the alienation was made for non-onerous causes, *i.e.*, to a person who had no proper claim, and, in the latter, that conveyances or securities were granted by the debtor, in knowledge of his insolvency, to one creditor and not to another.

Apart from the question of the debtor's knowledge of insolvency, it appears to be the rule of our law, both for gratuitous alienations and preferences, that conscious and active fraud need not be proved—as Prof. Bell himself states the rule, that the creditors “are not required to enter on any scrutiny into the secret plans and fraudulent views of their debtor and of his friends” (*Com.* ii. 170, see also 184). But Prof. Bell, in dealing specifically with preferences, seems, inconsistently, to require their participation on the part of the creditor in the act or design of the debtor (ii. 226–230; see criticism in *M'Cowan*, *supra*, 15 D. pp. 504, 512); see also *Campbell's Princ. of Merc. Law*, p. 5, where this view is advocated; see *Goudy*, 38–40.

In the case of preferences, decisions, it is thought, have settled the rule, to the effect that, as a general principle, it is not necessary to aver fraud or collusion on the part of the receiver, even his knowledge of the grantor's insolvency, or of the very fact of the conveyance, although such proof is relevant to the question of the grantor's knowledge and purpose. The fact of undue advantage over the other creditors is the inequity; and the conscious creation by the debtor of that advantage is held to constitute the fraud in law. In the early case of *Grant*, *supra*, M. 949, conveyances in favour of particular creditors were reduced, although the favoured creditors did not know of their existence; and this precedent and principle were deliberately followed, after lengthened discussion, in *M'Cowan*, *supra*, 15 D. 494, still the leading case on the subject; see also *Ersk.* B. iv. tit. 1, § 44; and the analogous question in Bankruptcy, p. 91, *supra*. In *Guild*, 16 Jan. 1858, 20 D. 392, this rule was held equally to apply to alleged preferences by way of cash payments outside of the ordinary course of trade. When, however, in questions of preference, the circumstances include or imply the favoured creditor's knowledge of his debtor's insolvency, it is part of the actual case, and so naturally of the averments and proof, that the receiver's conduct was fraudulent

[—as, *e.g.*, in *Lindsay*, 5 Dec. 1867, 6 Macph. 85 (see pp. 86–88, 91); *Thomas*, 19 Dec. 1866, 5 Macph. 198 (see pp. 200, 201); *Seath*, 9 Dec. 1884, 12 R. 260 (see pp. 264, 265, 273). See also *Ehrenbacher*, 10 July 1874, 1 R. p. 1136. In *Thomas*, where the fraud of the receiver as well as of the grantor is found in two of the issues sent to the jury on the common law question, the apparent approval of these issues by the court suggests a divergence from the rule in *M'Cowan*; but there is no argument, in the reports, against or for having the receiver's fraud in issue, nor any reference to such discussion in the judges' opinions; and the session papers show that the issues in question were in the terms proposed by the pursuer, who thus appears to have taken on himself, as did the pursuer in *Lindsay* (6 Macph. p. 91), probably for good reasons, an additional burden of proof. To prove fraud on the part of the receiver may well, where easily accomplished, facilitate proof of the grantor's fraud. The rule as laid down in *M'Cowan* has not been questioned by the court, so far as appears in any reported judgment.

In questions of alleged gratuitous alienation, it is undoubted that knowledge on the part of the receiver need not, in the ordinary case, be averred. *Ex hypothesi* the receiver is not a creditor; and the question is one, not of preference, but of onerosity—not of an admitted claim, with undue advantage, but whether there is any proper claim at all. Now, it is obvious that disinterested, *bona fide*, gift by an insolvent to any third party, not a creditor, must be (as above remarked) of rare occurrence. Sir George Mackenzie says (*Works*, ii. 17)—“A debtor will be desirous to prefer his creditors to strangers;” and the same proposition, it is thought, is true, in measure, with respect to relations or close friends. Accordingly, conveyances without value to third parties, whether strangers or friends, are usually, if not always, found to be conceived with the fraudulent design of setting aside funds or estate for the insolvent's own use after bankruptcy and discharge, or after flight from the country. For obvious reasons, too, the grantee in such alienations is generally a party to the fraud: only an accomplice—in the person of a relation or friend—would be asked to hold property for which no consideration was given by him. Further, to avert question, the appearance of an onerous transaction is, as a rule, stimulated by the conspiring parties—as, *e.g.*, in *Forsyth*, 8 July 1863,



[1 Macph. 1054, where a bond and disposition in security was granted as in security of a pretended loan, and *Shaw*, 2 Feb. 1869, 7 Macph. 449, a case of conveyance of heritage as for a supposed price instantly paid: *Dobie*, 22 Nov. 1854, 17 D. 97, is an instance of a collusive transference of cash without any pretext of consideration. In questions of gratuitous alienation, therefore, as matter of fact, there is usually found, along with averment of (insolvency and) gratuitousness, averment of fraud or collusion of grantee with granter (see *Dobie*; *Shaw*; *Edmond*, 1 June 1853, 15 D. 703). Further, conversely, in these cases non-onerosity is always present where collusion is; for no one would incur risks from complicity in defrauding another person's creditors who himself gave full value for what he got. To sustain a challenge, then, averment and proof of either gratuitousness or collusion must be made, along with averment and proof of insolvency (see *Forsyth*, *supra*; see *Thomas*, 13 Jan. 1865, 3 Macph. 358, more fully reported in 37 Jur. 166); but, for the reasons stated, the averments in these cases, as a rule if not always, contain, along with insolvency, both the other elements—of gratuitousness and collusion of granter and receiver. It falls to be noted here that (as is pointed out by Lord Pres. M'Neill, in *Forsyth*) a conveyance might be fraudulent towards creditors on the part of the granter, and yet both onerous and *bona fide* on the part of the grantee, and therefore irreducible—if, *e.g.*, an insolvent obtained a loan on heritable security or sold heritage for cash, with the secret purpose of absconding with the money—a thing he could not do with the heritage. In such circumstances the grantee would be innocent of the fraud; and, having also given full value, he could not be dispossessed. To exclude this possibility, apparently, the fraud of the receiver was, in *Forsyth*, required by the court for the issue. In gratuitous alienations—as also in preferences—if the subject has been retransferred by the receiver to a third party, who claims to be a *bona fide* and onerous holder, the fraud of such holder as well as of the insolvent granter must be instructed; *Adamson*, 7 Feb. 1868, 6 Macph. 374 (a challenge of indorsed bills of lading).

If the grantee in an alleged gratuitous conveyance by an insolvent, or an alleged preference, has in any proper sense an onerous claim to the effect in question, and so far as he has such *jus crediti*, there is no unfair prejudice of creditors and no ground

[of challenge—the conveyance in the one case not being gratuitous, and in the other being made under an obligation which might be enforced. Thus, with regard to the former class, if adequate value is given in money, &c., or in discharge of a debt, as the counter-consideration, the alienation is obviously not gratuitous; see *Molleson*, 15 June 1880, 7 R. 951. Similarly, antenuptial marriage-contract provisions, made by either intending spouse in favour of the other, are onerous, the marriage itself being held valuable consideration (see *Bell's Com.* i. 682; *Watson*, 14 May 1874, 1 R. 882; *Carphin*, 24 May 1867, 5 Macph. 797); and where, further, there are settlements on both sides, an additional element of onerosity is recognised. This onerosity, however, in both phases, falls to be estimated as in relation to the rights of the provider's general creditors. Accordingly even antenuptial marriage provisions by an insolvent are reducible, at the instance of the granter's creditors, *quoad excessum*, or—in Prof. Bell's words (*Com.* i. 683)—“beyond the limits of a reasonable and moderate allowance,” as being so far gratuitous and in law frauds against the creditors' right in the insolvent estate. See *Watson*, *Carphin*, *supra*. But this criterion is of difficult application, where the competing claims are founded on considerations so diverse as marriage and payment of money or the like; and the circumstances to be taken into account in determining the rationality of a marriage provision are not well defined. Prof. Bell (*l.c.*) says, in relation to the case of provisions by an intending husband, “the wife's situation and fortune are chiefly to be regarded; but they are by no means to be taken as the sole grounds on which to proceed;” and he apparently includes the husband's own ostensible position at the time. It seems clear, on the authorities, that, whatever circumstances are to be looked at, “we are not,” to quote Lord Neaves, in *Carphin* (5 Macph. p. 804), “to measure the rationality of the provision in nice scales;” see also *Hepburn*, 2 Dow, 358, *per* Lord Eldon. Lord Fraser, in opposition to the current view, argues that marriage is no valuable consideration at all to support against creditors a provision by an insolvent husband—on the ground that the husband, being insolvent, has nothing of his own to give (*Husband and Wife*, ii. 1348–1350, 1502). Where, in the case of any marriage-contract provision, the granter is purposely, with knowledge of his insolvency, setting aside funds for his

[own behoof, to the prejudice of creditors, the provision is reducible on the ground of fraud. Post-nuptial provisions by an insolvent are not regarded as onerous—the marriage not having been entered into on the faith of the provision; and, though secured by trust or otherwise, are, it is thought, reducible in their entirety by creditors. At one time such provisions were held good to the extent of a bare subsistence or aliment; but the rule now seems to be as above stated. See *Goudy*, 30–31. Where the husband is solvent at the date of the provision, but insolvency supervenes, a post-nuptial provision for a widow is sustained, in competition with creditors, so far as suitable to the circumstances of the provider as at the date of the settlement—on the ground of natural obligation suitably to aliment a wife for the period after viduity, if funds be free and available; see *Galloway*, 17 July 1861, 4 Macq. 267; *Learmonth*, 17 May 1870, 42 Sc. Jur. 418 (H.L.); see also *Dunlop*, 2 April 1867, 5 Macph. (H.L.) 22; *Learmonth*, 3 May 1875, 2 R. (H.L.) 62. See *Bell's Com.* i. 684, 687; *M'Laren on Wills and Succession*, i. § 824. To be thus sustained, the grant must be constituted as an irrevocable provision, through a proper direct title, a trust, or otherwise; see *Honeyman & Wilson*, 7 Dec. 1886, 14 R. 163—a case of inadequacy of executry funds to meet a trade debt. In *Rust*, 3 Macph. p. 383, Lord Deas seems to think that intention of irrevocability is sufficient. In *Main*, 30 June 1881, 8 R. 880, an averment, by a trustee in bankruptcy, that a husband had during insolvency augmented the estate held by his ante-nuptial marriage-contract trustees for his wife and family, to an extent largely beyond the contract obligation, by erecting a mansion-house on the estate, was found relevant, and proof of the alleged beneficial expenditure was allowed. Ante-nuptial provisions for children are, similarly, upheld to a reasonable amount, as against creditors, when made during solvency, and are probably altogether reducible, if made in insolvency; but, to stand good at all in questions with creditors, they must be prestatable, in principal or interest, during the providing parent's life; see *Goddart*, 9 March 1844, 6 D. 1018. See *Bell's Com.* i. 685; *M'Laren*, i. §§ 809–811, 818; *Fraser*, ii. 1379; *Goudy*, 29. With regard to post-nuptial provisions to children, see *Bell*, i. 687; *M'Laren*, i. § 826; *Fraser*, 1502; *Goudy*, 31. See also *Contract of Marriage*; and *Insurance*, p. 567, for statutory protection

[of policies of insurance in favour of a wife or children (43 & 44 Vict. c. 26).

The common law rule with regard to preferences and specific implement of an enforceable obligation is substantially the same as under the act 1696, c. 5 (see *supra*, pp. 93, 94). It is thus stated by Lord J. C. Hope, in *M'Cowan*, *supra*, 15 D. p. 505 (as derived from *Horne*, 12 Feb. 1847, 9 D. 651):—"The obligation to grant a security must" (to be safe against challenge) "in general—probably in every case, but it is enough to say in general—be a condition on which the money was advanced, so that the security, although delayed, was in truth only implement of a condition without which the money would not have been advanced, and which should have been fulfilled at the time, or immediately thereafter." See also *Molleson*, 15 June 1880, 7 R. 951. At common law, too, cash payments, and conveyances, in the ordinary course of dealing, and *nova debita*, are secure from challenge; see *M'Cowan*, *supra*, pp. 503, 504; *Guild*, *supra*, 20 D. p. 397; *Thomas*, 19 Dec. 1866, 5 Macph. 198; *Coutts' Tr.* 8 July 1886, 13 R. 1112, comparing therewith *Shaw's Tr.* 15 Nov. 1887, 15 R. 32, and *Jones' Tr.* 25 Jan. 1888, 15 R. 328; see also *Bankruptcy*, pp. 91–93.

In treating briefly of the common law remedies available to creditors against alienations by their debtors, Erskine (B. iv. tit. i. § 44) defines the rights which can be set aside as those which carry in them "evident marks of fraud," and again those where fraud appears "*ex facie* of the right." As illustrations, he instances the case of a disposition *omnium bonorum*, "especially if it be granted to a son, or where the granter, notwithstanding the right, continues to act as a proprietor;" and a security "granted by a debtor knowing himself insolvent, in favour of one set of creditors, to the exclusion of another creditor equally onerous, without being pressed to it by diligence." This definition, as illustrated, seems to accord with the analysis above given, in its various elements of gratuitous (and collusive) alienation for the insolvent debtor's own behoof, and unfair preference to favoured creditors.

The question in cases both of gratuitous alienation and preference being one of unfair dealing or fraud, all creditors who are prejudiced—whether prior or subsequent—have alike the right of challenge. Even where the granter was solvent at the date of the conveyance, the creditors seem to enjoy this right of challenge, if the



[conveyance was fraudulently conceived to secure against the risk of future insolvency; and proof of such fraud is not limited, under the statute 1696, c. 25, to the writ or oath of the grantee; *Wink*, 3 Dec. 1867, 6 Macph. 77. In the case of gratuitous alienations, the whole grant is the object of the challenge; in preferences, only the preference, not the original right. As to form of action and *forum*, see *Bankruptcy*, p. 95, *supra*. As to form of issues, see *supra*, p. 540; *Mackay's Prac.* ii. 144-145; and *Birnie's Notes on Issues*. See, on whole subject, *Goudy*, chs. iii. iv.

(b) *Gratuitous Alienations—under the Statute 1621, c. 18, part 1.*

By this act, and decisions following, the common law prohibition of gratuitous conveyances by insolvents has been materially strengthened. The leading enactment runs thus:—"they" (the Lords of Council and Session) "will decree and discern all alienations, dispositions, assignations, and translations whatsoever, made by the debtor, of any of his lands, teinds, reversions, actions, debts, or goods whatsoever, to any conjunct or confident person, without true, just, and necessary, causes, and without a just price really paid, the same being done after the contracting of lawful debts from true creditors, to have been from the beginning, and to be in all time coming, null, and of none avail, force, nor effect, at the instance of the true and just creditor, by way of action, exception, or reply, without farther declarator." The new point here is that the receiver is, definitively, a "conjunct or confident person" (as in relation to the granter), *i.e.*, a near relative, or a confidential adviser or employee, or a partner, or the like. What was in the view of the common law, where it occurred, only a circumstance in the question of fraud, is made a specific element; and, by the course of judicial construction, this element has been emphasised; see Lord Rutherford's opinion in *Wilson*, 20 Dec. 1853, 16 D. p. 278, and authorities there referred to. As the result of a series of decisions, the statute is interpreted—or rather supposed—to create two presumptions of law, in favour of a prior creditor challenging a conveyance by his debtor as fraudulent because of insolvency and non-onerosity, where the conveyance is to a conjunct or confident person, *viz.*, that the insolvency existed at the date of the conveyance, and that the conveyance was granted without value; see *Bell's Com.* ii. 172; see *N. Brit.*

[*Ry. Co.* 16 Nov. 1882, 20 S.L.R. 129. Proof of the elements of the fraud is thus not necessary for the challenge, as it is at common law; the *onus* lies on the grantee; and the challenge can only be met by full evidence of solvency or of onerosity; *Dawson*, 12 July 1888, 15 R. p. 895, *per* Lord Rutherford Clark; *N. Brit. Ry. Co. supra*: see *infra*, p. 545, as to last clause of the act. Averments of the facts raising the presumptions, and also of what is thus presumed, are requisite. See *Bolden*, 6 March 1863, 1 Macph. 522; *Wilson, supra*.

The statute has been so construed that these benefits are confined to prior creditors—those who were creditors before the date of the alienation complained of; *Edmond*, 1 June 1853, 15 D. 703. It has, however, been thought that if a posterior creditor should undertake to prove the insolvency of his debtor at the date of the alienation—the grantee being always a conjunct or confident person—that creditor would be entitled to a challenge under the statute; see *Bell's Com.* ii. 172, 173; and Lord Curriehill, in *Edmond*, p. 704. Until the Bankruptcy Act of 1856 introduced the change, a trustee for creditors could sue under 1621, c. 18, only so far as he represented, and solely for behoof of, prior creditors. Section 11 enacts as follows:—"The trustee on a sequestrated estate under this act shall be entitled to set aside" (see § 10) "any . . . deed or alienation, for behoof of the whole body of creditors, and in so doing shall be entitled to the benefit of any presumption which would have been competent to any creditor." In all cases of challenge, whether by a trustee or by a single creditor, action must be taken within a reasonable time, else the benefits of the presumptions will be lost. For form of issue, see *M'Cowan*, 6 July 1852, 14 D. 968; *Caird*, 3 Dec. 1857, 20 D. 187; *cf. Bolden, supra*; *Thomas*, 20 July 1865, 3 Macph. 1160; see also *Mackay's Prac.* ii. 147.

The conveyances subject to challenge under the statute are stated by Prof. Bell (*Com.* ii. 174) to include "deeds of all sorts, conveyances, assignations, contracts, obligations, bills, discharges; whatever may confer on the grantee property belonging to the debtor, or enable him to claim as a creditor in competition with the true creditors of the granter, or save him from a demand for payment of what he owes to the debtor." This is apparently in accordance with the principle of construction of the act ap-

[proved, at an early period, by Sir George Mackenzie (Works, ii. 8), with regard to the point in question and generally, viz., that the particulars specified are set down rather as examples than as restrictions, and that the expressed reason of the law should be the measure of its application. It has been decided, in recent times, that a promissory note is within the scope of the statute (*Thomas, supra*, 3 Macph. 1160), the ground of judgment, as derived from Sir George Mackenzie and from Stair, being that, although not primarily an alienation, a promissory note lays a *nexus* on the grantor's property, and forms a warrant for diligence, by which it may be attached, and is so far transferred. With regard to the consideration, failing which the statutory prohibition applies, it was early settled that the words "without true, just, and necessary causes, and without a just price really paid," were to be taken not conjunctively but disjunctively, *i.e.*, alternatively; *Grant, supra*, M. p. 952; see *Dawson, supra*, 15 R. p. 894. Any deed granted for a genuine and adequate consideration—pecuniary or other—or in consequence and implement of a previous specific obligation ("necessary cause"), is therefore free from challenge under the statute. The enactment here corresponds substantially with the common law prohibition of gratuitous conveyances, and of preferences, and on practically the same grounds; and the various cases of gratuitous conveyance above cited are illustrative of this statutory prohibition, with regard to the particular of consideration, as also generally—*minus* the element that the grantee is conjunct and confident. The cases of *Williamson*, 29 May 1882, 9 R. 859, and *Matthew's Tr.* 28 June 1867, 5 Macph. 957, show the inapplicability of the enactment where the receipt of loans had constituted money debts and vouchers were given for these after insolvency. The case of *Horne, supra*, 9 D. 651, is a reduction under the statute as well as at common law, and the existence of an onerous and enforceable obligation to grant the conveyance in security there in question, and the fact that the granting of the security was the condition of the loan, form the grounds of judgment under both heads (see opinions of Lords J. C. Hope, and Moncreiff, as to the question on the statute, pp. 668, 669, 674). Professor Bell (*Com.* ii. 177) seems to hold that it is sufficient consideration under the act, if the security or conveyance is granted in satisfaction

[or security of a prior debt, and that "a proper legal obligation . . . to grant the conveyance under challenge" is not required. An intermediate view is referred to by Lord Moncreiff, in *Horne's* case (p. 675), as having been formerly maintained, viz., that an agreement, when the money was advanced, that some security, indefinitely, should be granted, ought to be held sufficient to satisfy the conditions of the law (see also *per* Lord J. C. Hope, p. 671). This view, and that of Professor Bell, are not approved in *Horne's* case, and appear to be unsupported by any recent decision: *cf.*, as to act 1696, c. 5, *Bankruptcy*, p. 82 (4). The position of marriage provisions is not affected by the act, save that, where these are post-nuptial, the *onus* of proof is laid on the wife or husband benefited, who is conjunct and confident. Those marriage provisions which are onerous at common law, have, on the same grounds, under the statute, "true, just, and necessary causes" of granting. See *Bell's Com.* ii. 176; *Hodge*, 26 Oct. 1883, 21 S.L.R. 40. Trustees in a testamentary settlement are not rendered conjunct or confident by the mere fact that the persons they represent fall within the category (*Young*, 23 Jan. 1835, 13 S. 305): the point does not seem to have been raised, generally, with regard to marriage-contract trustees (see *Main, supra*, 8 R. 880). In *Watson*, and *Carphin, supra*, the question was touched on, with reference to antenuptial trustees; and in *Watson* an opinion was expressed, by Lord J. C. Moncreiff, that such trustees were "third persons," representing parties who were not at the time of the trustees' appointment themselves conjunct or confident. An entail by an insolvent father in favour of a daughter as institute has been reduced under the act, as gratuitous, her right by the infetment to security for a provision in her favour in terms of her father's antenuptial contract being reserved; *Globe Ins. Co.* 15 Dec. 1854, 17 D. 216.

The remaining sentences of this part of the statute provide for the case of *bona fide* purchases by innocent third parties from the "interposed persons" or receivers, and define what is "sufficient probation" of the statutory fraud. Such *bona fide* purchase is declared valid, and the receiver of the price ("the interposed person") is bound to make it good to the insolvent's creditors. It has been decided that a second conveyance, *e.g.*, a translation of assigned rights of succession, is reducible when the sub-grantee has knowledge of the



[original fraud, and that the want of a just and competent price need not also be put in issue; *Caird*, 3 Dec. 1857, 20 D. 187. Payments by the receiver to creditors of the grantor are "allowed" as part payments, the receiver remaining liable to make forthcoming any balance to the other creditors. With regard to the provision of the statute as to proof, viz., that the writ or oath of the receiver admitting want of value, or instructing that on a sale by him the price in whole or in part went to the insolvent grantor, is sufficient, it falls to be observed that the "party receiver" is not here, in terms at least, limited to a person conjunct or confident, and that the judicial interpretation of the whole enactment, as above explained, has laid the *onus* of proof on the conjunct or confident grantee—the presumption being that the conveyance is gratuitous. In the event of a defence on the ground of onerosity, this provision might come into effect. See, on whole subject, *Goudy*, ch. v.

(c) *Disability with regard to Preferences by way of alienations in defraud of the Diligence of Creditors—under the Statute 1621, c. 18, part 2.*

The second part of the statute, in connection with the allowance of payments by the receiver to lawful creditors of the grantor, makes enactment, for the protection of creditors who have used "lawful and more timely diligence," against "any voluntarie payment or right" in favour of "any person" or "con-creditor," by the insolvent-granter or the interposed person, in defraud thereof. The application of this part of the act was, from its character, much less extensive than that of the former—diligence, and diligence begun but not yet completed, being the limited case in contemplation. The enactment is, in Prof. Bell's view, an application of the principle of litigiousity; *Com.* ii. 185; 143–147. The terms used—"any person," "another creditor," &c.—leave it uncertain, so far, whether the other "person" also must be a creditor. See *Goudy*, 59. All deeds of conveyance or security are covered by the term "right;" and the word "voluntarie" includes deeds not granted in completion of previous deeds, and those not in implement of prior specific and enforceable obligations. See *Mansfield*, 28 June 1833, 11 S. p. 824. Cash payments made in ordinary course, and transactions where value is given for value (*nova debita*), are held not to be within the scope of the

[prohibition; see *supra*, p. 543, and *Bankruptcy*, pp. 91–93. The most recent decision under this branch of the statute is *Mackenzie*, 26 May 1868, 6 Macph. 833, where the statute (and the common law, see *per* Lord Neaves) was held effectual to cut down such preference as a trust disposition granted by an insolvent, for behoof of creditors, to one particular creditor, after a charge on a bill had been made by another creditor. The case of *Grant*, 6 Feb. 1835, 13 S. 424, illustrates the peculiar scope of this provision, as applicable to the case of diligence begun but not finally executed, *e.g.*, where a charge has been made on a bill but no poiding has yet been effected—within a period still reasonable. Professor Bell (*Com.* ii. 185, 190) states that this enactment was originally prejudicial to the interests of an insolvent's creditors as a whole, by tending to further "the race of diligence," but that the course of decisions confined its application to cases where the insolvency of the grantor was notorious, or at least known to the receiver (who is thus himself a transgressor against equity and the general good); and he points out that the modern bankruptcy statutes have equalised the rights *inter se* of creditors using diligence; see *Bankruptcy*, pp. 96, 97. By this operation of these acts this enactment has become practically of little importance. Both *Grant* and *Mackenzie* are cases where the grantor's insolvency must have been known to the grantee: see, however, *Ersk.* B. iv. tit. 1, § 37, note (a), as to possible effect of *M'Cowan's* case on this point. See *Bell's Com.* ii. 184–191; *Goudy*, ch. vi.

3. *Effects with reference to Notour Bankruptcy.*

Insolvency is a statutory element in the constitution of the status of notour bankruptcy, where there is not sequestration; see *Bankruptcy Act*, 1856, § 7, 2d; *Debtors Act*, 1880, § 6. See *Bankruptcy*, p. 89; *Insolvency*, p. 539, *supra*. For relation to *cessio*, and to sequestration, see *Cessio. Sequestration*.

III. PRIVATE OR EXTRAJUDICIAL SETTLEMENTS BY AN INSOLVENT WITH CREDITORS (pp. 546–551).

When a debtor finds himself insolvent and cannot hope to recover his position, the alternative methods available for dealing with his creditors with regard to their

{claims, on the footing of inability to meet those claims, are public bankruptcy and sequestration (see *sub vocibus*), or some voluntary or extrajudicial, and more or less private, method of arrangement and settlement. Of the latter methods the principal are composition or composition-contract (private or extrajudicial as distinguished from composition in sequestration, see *Hannan*, 16 Dec. 1879, 7 R. 380), and a trust deed for creditors—appropriate, respectively, for cases where the insolvent, being engaged in business, is to carry on or resume his business (Lord Gifford, in *Miller*, 4 March 1876, 3 R. p. 553), and where a business is to be wound up or estate disposed of, so far as the insolvent is concerned (see *Mackenzie*, 28 May 1872, 10 Macph. 749; *Campbell*, 11 Jan. 1862, 24 D. 1097). Where sequestration has been awarded, a bankrupt cannot be reinvested in his estate, under a private arrangement, without reference to the Bankruptcy Act, even although by the arrangement he may have been discharged by all his creditors; *Anderson*, 13 March 1866, 4 Macph. 577.

1. *By way of Composition or Composition-Contract.*

With regard to composition-contract, Prof. Bell (*Com.* ii. 398) thus writes:—"A composition is an agreement between a debtor and his creditor, that the debtor shall at a particular time pay part of his debt, and that the creditor, on condition of its being so paid, shall discharge the debt. Such a contract may be entered into with an individual creditor, or generally with all the creditors. In the former case the contract will be valid, whatever may be the consideration agreed upon between the creditor and the debtor. The latter is a mutual contract, proceeding on two implied conditions: one is, that all the creditors shall be dealt with equally; the other, that all shall concur, and that no one shall be bound unless all are bound." As this definition indicates, this method of settlement proceeds by way of compromise of the creditors' claims, and provides expressly for the insolvent's discharge. There is obviously here no divestiture of the insolvent, and no question of reinvestment or retrocession; see *Douglas & Co.* 14 July 1859, 21 D. 1302; *Mackinnon*, 24 Dec. 1881, 9 R. p. 401. The implied condition of equal dealing with all the creditors—"that the creditors are all to be

[upon the same footing, and that no creditor shall receive a higher composition, or any gratification of which the rest do not participate" (*Bell's Com.* ii. 399)—exists at common law, and rests on the consideration that with respect to what is, subject to lawful preferences, the common property of all, no creditor would enter into a joint arrangement on any other than an equal footing. Under the common law rule of ranking, which differs in this respect from the rule in sequestration, a secured creditor is entitled, apart from stipulation, to composition without deduction of the estimated value of his security; *Univ. of Glasgow*, 10 Feb. 1882, 9 R. 643; *Macbride*, 14 March 1884, 11 R. 702; see *Goudy*, p. 498 (a). With regard to illegality of preference arising under these contracts, the element of intention is fundamental; and, accordingly, the decided cases hinge on the question whether the alleged payment, or promise to the creditor, expressed or understood, was stipulated for or granted as the condition of or inducement to the composition contract; see *Macfarlane*, 14 Dec. 1864, 3 Macph. 237; *Bank of Scotland*, 5 July 1870, 42 Jur. 557; *Ironside*, 14 Nov. 1871, 9 S.L.R. 73. Apart from such previous unfair and illegal compact, composition-contract is no bar to full payment to any (or all) creditors, after discharge, out of subsequent acquisitions—subsequent payment of debt being commendable and a moral obligation. Even where there is such bargain, payment is unobjectionable so far as voluntarily made—e.g., to the bargaining creditor himself, who cannot enforce his own illegal contract. Payment of a bill to an onerous indorsee of the creditor so bargaining is held not to be voluntary to this effect, but "through concussion," i.e., actual or possible compulsion. See *Macfarlane*, *Ironside*, *supra*. The condition that all the creditors shall concur before any are bound, which arises from the fundamental idea of equality, is frequently expressed and not left to implication; and the concurrence is generally required within a limited time. The concurrence of a number less than the whole creditors is sometimes the stipulation expressed—the other creditors being left to claim their full rights. The challenge and remedy are by way of reduction, or reduction and repetition; and are competent not only to creditors, but to the discharged insolvent himself or his cautioner, or to the trustee in a sequestration following the composition agreement; *Macfarlane*, *Bank of Scot-*



[*lanl, supra*; *Arrol*, 24 Feb. 1826, 4 S. (N.E.) 504. Fraud, by way of concealment or misrepresentation as to the insolvent's circumstances, is an independent ground of challenge.

Arrangements of this kind, while as voluntary contracts they affect only those who are parties to them (see *Montgomerie*, 9 Nov. 1841, 4 D. 332), within that range have all the elasticity belonging to voluntary contracts. The various provisions are adapted to the views of the parties, with regard, *e.g.*, to the number and dates of the instalments by which payment is to be made, and the method of securing them by caution; the time of granting the discharge; the relation of implement of the contract to the discharge; and even the accession of all or any particular creditor or creditors. With regard to the point last specified the rule is, in absence of express stipulation—unlike the rule in sequestration—that, failing payment of the composition, the debt revives; *Bell's Com.* ii. 400, 357; see *Alexander*, 15 Nov. 1873, 1 R. 185; see *Sequestration*. It is a common practice that bills or notes be granted for the instalments; and caution is usually offered for the payment of at least the later or last instalments. Where a creditor, whose claim arose out of a bill of exchange, acceded to a composition, but received no composition bills, his assignee was found entitled to charge on the bill, when past due, for its whole amount, it being left to the debtor to plead the composition and have the charge restricted to that amount; *Dick*, 13 Nov. 1845, 8 D. 1. In *Thomson*, 12 June 1863, 1 Macph. 913, it was held that a cautioner's estate was not relieved from liability, by the fact that the creditors had, on failure of the composition and consequent (stipulated) revival of their debts, claimed on the sequestrated estate of the principal debtor. In some cases a trust deed for creditors co-exists with the composition-contract, constituting a security for the instalments, see, *e.g.*, *Miller, supra*, 3 R. 548; see *Mackinnon, supra*, 9 R. 193. Sub-arrangements as to management, security to the cautioner, &c., are competent between the insolvent and the cautioner; but risk may thus arise to the cautioner of being held to be principal or partner as in a question with subsequent creditors of the insolvent; *Eaglesham*, 15 July 1875, 2 R. 960. The contract ought to be constituted by a formal deed; but Prof. Bell thinks that improbable writings would probably be sufficient

[evidence, under the rule for mercantile and privileged writs; see *Com.* ii. 399; also 393. In *Thew & Co.* 1 Feb. 1881, 8 R. 467, it was held that mere retention of a composition bill for ten months did not, in the face of an averment that the composition had been previously declined, prove acceptance of the composition and accession; and the averments of acceptance and declinature were sent to proof. The cautionary obligation, as to proof and otherwise, is subject to the provisions of the Merc. Law Amend. Act (19 & 20 Vict. c. 60). See "form" of contract, in *Goudy*, 800; in *Murdoch*, 750.

## 2. By way of a Trust Deed for Creditors.

When an insolvent wishes to wind up his affairs through a trustee, he may proceed either with or without the concert of creditors. In both ways the arrangement is private as compared with sequestration, in which advertisement of insolvency and divestiture is made to the whole public; but a trust for creditors either may be a secret—for a period at least—known only to the truster and trustee, or it may from its commencement (and this is the general case) be within the knowledge of part or the whole of that portion of the public who are the truster's creditors. The granting of a trust deed for creditors does not constitute "notour" bankruptcy under the act 1696, c. 5, or the modern bankruptcy statutes; nor is it, necessarily, conclusive evidence of insolvency (see *Goudy*, 19, 21).

In all cases alike, the trust, being a trust for creditors, is irrevocable by the granter during insolvency, and the trustee holds for them and adversely to the granter, and is accountable to the creditors till they discharge him; *Globe Ins. Co.* 16 Feb. 1849, 11 D. 618; *Bell's Com.* ii. 383. On obtaining possession, the trustee represents the creditors in their just proportions; and all preference by individual diligence is excluded; *Globe Ins.*; *Nicolson*, 6 Dec. 1872, 11 Macph. 179; *Henderson*, 22 Nov. 1882, 10 R. 185. On the other hand, the truster retains the radical right, including the right to any reversion, with all powers necessary for the protection of this right, such as power to enforce a just administration, to redeem and revoke if he becomes solvent, to compel the trustee to account (see *Ritchie*, 2 June 1881, 8 R. 747), or—on recovered solvency—to denude, to obtain sequestration, &c. The truster remains undivested of the feudal title of

[heritage conveyed in trust, the conveyance creating merely a burden or security; *Gilmour*, 3 July 1873, 11 Macph. 853 (where it was held that such truster's heir could not complete his title by conveyance from the trustee), following *Campbell*, 14 Jan. 1801, M. App. Adjud. No. 11. The trustee's title being derived from the truster, he is more fully subject to obligations lying on the truster, and takes the estate more entirely *tantum et tale*, than a trustee in sequestration, who has an independent statutory title; see *Hogarth*, 16 June 1882, 9 R. 964. The trust may be constituted by absolute disposition with back bond, or, as is more usual, by a trust disposition. To be effectual against creditors, the title must be duly completed, according to the nature of the conveyance made (see *Lamb*, 9 Nov. 1883, 11 R. 76); and, unless all the creditors are parties, the trust must contain no extraordinary provisions.

In the case of a trust without concert of creditors, the sole legitimate purpose, according to Prof. Bell (*Com.* ii. 383, 385), is to vest the estate and effects in the person of the trustee for realisation and distribution among the whole creditors—the law so far supporting the conveyance by an insolvent of what is the property of his creditors, but all provisions with regard to particulars of the trust administration, and all conditions stipulated in favour of the truster, *e.g.*, his discharge in return for the surrender, forming grounds of challenge at common law, as being interferences with the creditors' interests. In *Henderson*, 22 Nov. 1882, 10 R. 185, Prof. Bell's suggestion (p. 384) that, if the insolvent-truster dispenses with conditions thus made in his favour, these may be held *pro non scriptis*—the conveyance being otherwise effectual—is not approved, as leaving this option in the wrong party; and it was held that conditions with regard to the debtor's discharge as on the footing of sequestration (usual in such deeds, for the sake *inter alia* of the statutory rule of ranking, see *Goudy*, 468) was not such an extraordinary provision as to invalidate the trust conveyance, and let in preferences by arrestment, the view being that the creditors might deal with the provision at the close of the trust, or any one of them terminate the trust by sequestrating. In *Ogilvie*, 27 Jan. 1887, 14 R. 399, where it was made a condition that acceptance of dividend should import discharge, there is a similar criticism of Prof. Bell's suggestion (*per* Lord J. C. Moncreiff, p. 402); a similar recognition

[of the exclusion of diligence for preference; and allowance of action to a non-acceding creditor for the dividend free of the condition—and of direct action against the trustee. The creation of preferences, through a trust for creditors, is a fraud at common law, and renders the trust conveyance liable to reduction; see *Bell's Com.* ii. 387 (Lord Fraser's opinion in *Lamb*, *supra*, 11 R. p. 79, is not really contrary). Under the statutes 1621, c. 18, part 2 (*supra*, p. 546), and 1696, c. 5 (see *Bankruptcy*, p. 90, *Nicolson*, *supra*, 11 R. 179), these trust deeds are liable to challenge and reduction, at the instance of creditors, on the grounds respectively of defraud of diligence, and preference within the period of constructive bankruptcy. When the sixty days fixed by 1696, c. 5, is past—reckoning from the date of registration or other completion of the right—secret conveyances of this kind may be disclosed to creditors, being then so far effectual against them.

Where the trust is devised with concert of creditors, the arrangement is a mutual one, finding expression on the part of the creditors in a reciprocal deed or writ of accession, separate or indorsed (see, *e.g.*, *Mackinnon*, 24 Dec. 1881, 9 R. p. 394, 403), or now, more generally, in a minute of accession appended to the trust deed (see *Goudy*, p. 800). The object of the mutual agreement is the common benefit of all concerned—of the creditors through the prevention of new preferences and the speedy realisation and distribution of the estate according to existing rights and interests, and of the insolvent debtor by provisions for his discharge, or also for his interim protection from personal diligence—where imprisonment for debt is still competent—and his maintenance. It is an implied condition of accession by deed or otherwise, as of composition, that equality—relative to existing rights—be maintained among the creditors, and that they all concur or acquiesce; *Bell's Com.* ii. 395. If the assent of one or more be purchased by advantages secretly given or promised, any other creditor may reduce the contract or demand repetition of what has been unfairly paid. If a creditor who has not acceded proceeds to use diligence, those acceding are freed and may take similar steps. These implied conditions may themselves be expressed, and in the exact form appropriate to the particular circumstances. The farther conditions expressed in such voluntary agreements are various, and are conceived to suit the specialities of each case. They



[may include, *e.g.*, provisions with regard to compromise or actions by the trustee, and his remuneration; arbitration by the trustee or a third party; the lodging, forfeiture, method of ranking, and the judging of claims; payment of dividends; the appointment and powers of a committee of creditors to aid the trustee (see *Gardner*, 25 March 1889, 26 S.L.R. 535); the accession of creditors and its effects; supersession of diligence against the debtor, and his discharge, &c. See narrative in *Gilmour*, *supra*, 11 Macph. 853; and "Form" in *Murdoch*, 750, in *Goudy*, 798, and in *Jurid. Styles*, ii. 460. The object of the express provisions very generally is to conform the rules and procedure to those applicable in sequestration. Thus, *e.g.*, deduction of the value of securities in ranking is usually provided for; and, similarly, payment of the trustee by a percentage commission, with a lien over the estate, while he is undivested, for it and for outlays (see *Dall*, 15 July 1870, 8 Macph. 1006). It has been decided that the provisions of the Trusts Act of 1867, as of the earlier acts, are inapplicable to any trust which is not gratuitous, and so to trusts of this character; *Mackenzie*, 28 May 1872, 10 Macph. 749. The case of *Marianski*, 8 March 1871, 9 Macph. 673, illustrates a distinction stated by Prof. Bell (*Com.* ii. 393, 394) between accession to the effect of barring the creditor from the use of separate diligence and that which binds to the whole judgments of the trustee and to the discharge of the debtor; and finds the former accession, the aim and intention of which is equality among the creditors, proved by such facts and circumstances as would not sufficiently instruct the latter; see also *Paterson*, 19 May 1868, 5 S.L.R. 503; *Athya*, 29 Jan. 1881, 18 S.L.R. 287. The proper legitimate evidence of the latter accession is formal writ. Besides the grounds of challenge above referred to, fraud on the part of the insolvent, by concealment or misrepresentation of his circumstances, opens the way for similar proceedings, at common law, at the instance of the creditors, or of the trustee, if power is given him by the creditors. The existence of consent and accession precludes objections under the statutes 1621, c. 18, part 2, and 1696, c. 5, to which trusts without concert of creditors are liable; but, if individual creditors refuse to accede, they are free to challenge under these statutes. See *Accession, Deed of*.

A trust conveyance with accession may

[be superseded, even after it has stood for sixty days, by sequestration at the instance of non-acceding creditors; see *Kyd*, 5 June 1880, 7 R. 884; *M'Alister*, 3 June 1874, 1 R. 958; also *Henderson*, 22 Nov. 1882, 10 R. p. 189. Even acceding creditors are free to apply for sequestration of their debtor, where, as in *Jopp*, 14 Dec. 1845, 7 D. 260, and *Campbell*, 11 June 1862, 24 D. 1097, there seems to be danger that non-acceding creditors will carry off the whole estate. In *Murray*, 15 Dec. 1864, 3 Macph. 250, subsequent sequestration did not have the effect of superseding a trust for creditors, the trust funds there having been provided by another than the debtor; and, similarly, in *Thomson*, 26 May 1880, 7 R. 1035, a trustee for creditors, who had at his own cost and on his own credit completed certain contracts of the debtor's, was preferred on the contract price over a trustee in a supervening sequestration, subject to a liability to account for any surplus. Prof. Bell (*Com.* ii. 391) says that where an estate vested in trustees is sold and disputes arise as to the division of the price, the only practicable mode of settling matters is by a multiplepinding, raised either by the trustees or in their name—adding, that there can be no doubt such a proceeding is competent (see also p. 384). In *Kyd*, *supra*, 7 R. 884, the authority of these propositions as "absolute and unqualified" was denied, and a multiplepinding, which had been raised in a trustee's name by a non-acceding creditor after use of arrestments in the trustee's hands, was held incompetent. It was recognised, in the judges' opinions, that a trustee might employ a multiplepinding to enforce his discharge, or to distribute a residue of the insolvent estate among competing claimants; but sequestration and direct action against the trustee, were stated to be the remedies competent to non-acceding and acceding creditors respectively, where either are not satisfied with the trust administration. See *Ogilvie*, *supra*, 14 R. 399. The case of *Kirkaldy*, 8 Dec. 1841, 4 D. 202, exhibits the conversion of a *mortis causa* trust disposition and settlement, containing the usual trust purposes of payment of debts, into a trust for behoof of creditors, by means of the consent of creditors. The opinions of the judges in the same case well set forth the distinction (mentioned above) between the common law rule of ranking of creditors, obtaining in these trusts, and that under sequestrations, viz., that in the former the secured creditor ranks on the

[general fund for his whole debt (up to twenty shillings in the £1), and not merely for the balance; see also *Bell's Com.* ii. 419, 420; *Goudy*, 497. The case of *Miller*, *supra*, 3 R. 548, illustrates the combination of a trust for creditors with a composition-contract. This case also shows the risk a trustee may run, similar to that of a cautioner in a composition-contract (see *supra*, p. 548), of being sued as the principal in transactions entered into by the debtor after the date of the trust. In *Macphail*, 16 Nov. 1887, 15 R. 47, a trustee for an insolvent was held, in the circumstances, liable, to the extent of the trust estate, for certain orders given by the debtor, on the ground that the truster was therein acting as the trustee's agent. See *Caird*, 24 Jan. 1888, 15 R. p. 320 *et seq.*—a *cessio* case.

Of this method of settlement Prof. Bell writes thus (*Com.* ii. 496):—"If there be no obstruction to a voluntary trust, it seems the best and least expensive of all modes of settlement, provided a trustee is chosen who is skilful in the profession of a trustee, and on whose fidelity, knowledge, and vigilance the creditors may rely. And many of the benefits of the sequestration law may be enjoyed by an agreement in the deed of accession, that the rights and preferences of the creditors shall be regulated in the same manner as if sequestration had been awarded at the date of the trust deed." See *Goudy*, 464.

The same authority refers (ii. 385) to another competent form of conveyance for behoof of creditors by an insolvent, viz., directly to the creditors themselves, but only to disapprove of it as cumbrous, dangerous to omitted creditors, and subject to reduction at their instance on the ground of unjust preference. See *Goudy*, 466 (*d*). As Prof. Bell says, the trust conveyance is "the preferable way" and the one "common in practice" (ii. 385; see also 388); and in fact dispositions *omnium bonorum* made directly to creditors have practically become obsolete.

On the subjects here treated, see *Stair*, B. i. tit. 9, § 15; B. iv. tit. 35, § 18; tit. 45, § 14; *More's Notes*, lxi. (as to act 1621, c. 18); *Sir George Mackenzie, Works*, ii. 1 (Obs. on act 1621, c. 18); *Ersk. Inst.* B. iii. tit. 3, §§ 38-44; B. iv. tit. 1, §§ 28-40, 44-45; *Ersk. Princ.* (17th ed.) 597; *Bell's Com.* i. 678-689; ii. 152-154, 170-191, 226-232, 381-401, 488-498; *Bell's Princ.* §§ 64, 2322-2324; *Murdoch on Bankruptcy*; *McLaren on Wills*, chap. xxiii;

[*Fraser on Husband and Wife*, ii. 1348-1356, 1379-1382, 1498-1504; *Mackay's Prac.* ii. 144-149; *Goudy on Bankruptcy*, 1-61, 465-487. See also *Bankruptcy. Fraudulent Bankruptcy. Imprisonment. Cessio. Sequestration.*]

**INSTALMENT.** When parties have agreed that a sum of money due shall not be paid in the gross, but in parts, at certain stated intervals, the sum is said to be payable by instalments. In the case of a bill or note payable by instalments, effect is given to a condition inserted in the bill, that if there should be a failure to pay one instalment, the whole shall become due. [See *Macfarlane*, 11 June 1864, 2 Macph. 1210. Without such express stipulation,] neither action nor diligence can be raised on such a bill or note, except for the several instalments as they respectively become due. [The bill or note seems to have the same effect with reference to the different instalments, as if there were separate documents for each instalment. See the Bills of Exchange Act, 1882, § 9, quoted under *Bill of Exchange*, p. 109; also *Bell's Princ.* § 46; *Thomson on Bills*, 44, 435. As to contracts for delivery of goods by instalments, see *Anson on Contract*, 296-8, and cases there cited.]

**INSTITOR**; in the Roman law, was a person to whom the immediate management of any manufactory, shop, or undertaking was committed. A mercantile consignee or factor is, in this sense, an *institor*. Those granting the deputation were termed *prepositors*. In the same way with exercitors, who are liable for the acts of the shipmaster (see *Exercitor*), prepositors are liable for the acts of the institor; only that it is more incumbent on those who transact with institors that they should know precisely the powers of the institor. Institors do not, like shipmasters, bind themselves in their transactions; they bind only their constituents. See *Ersk. B.* iii. tit. 3, § 46; *Stair*, B. i. tit. 13, § 18; *Bank.* i. 400; *Bell's Com.* i. 506, 510; *Bell's Princ.* § 231. See *Factor. Mandate*.

**INSTITUTE**; is the person to whom the estate is first given in a destination. Thus, where a person executing a settlement disposes his lands to A., whom failing, to B., &c., A. is the institute, B., and all who follow him in the destination, are heirs, or substitutes, as they are also termed. Hence a considerable degree of nicety sometimes arises in completing the title to the estate; for the procuratories of resig-



nation and precepts of sasine for completing the title of the disponee may be directly used by the institute, but cannot be used by any of the heirs without a service. When the institute predeceases the granter of a deed, the next in order becomes the institute, and takes without a service. In directing the conditions or prohibitions of the deed against those who are called to possess the estate, it is also requisite to distinguish between the institute and the heir, since conditions, directed against heirs only, will not affect the institute. See *Ersk.* B. iii. tit. 8, § 44; *Stair*, B. iii. tit. 8, § 17; *Bell's Com.* i. 45; *Bell's Princ.* § 1745; *Sandford on Herit. Succession*, i. 264, 380; *Sandford on Entails*, 48, 135-6-8, 317. See *Entail. Conditional Institute*. [*Substitution.*]

**INSTRUMENTARY WITNESSES**; are such as attest the subscription of parties. The witnesses to a formal written deed or instrument must be above fourteen years of age, [and subject to no legal incapacity. There is no disqualification in respect of sex; 31 & 32 Vict. c. 101, § 139.] Where a person is so blind as to be incapable of seeing the party touch the pen of the notaries who subscribe for him, or of knowing whether a paper laid before him is written upon or not, he is an *inhabile* instrumentary witness. The witnesses ought to know the party, and to see him subscribe, or hear him acknowledge his subscription. In the latter case they ought, immediately after the acknowledgment, to add their subscriptions as witnesses; [1685, c. 5.] This is not necessary in the former case; and, indeed, two witnesses may attest all the subscriptions, however numerous, and although adhibited on different days, provided they have seen the parties subscribe. [See *Stewart*, 1 Feb. 1877, 4 R. 427. Acknowledgment of a subscription need not be in words; *Cumming*, 31 May 1879, 6 R. 963.] At first, the rules as to instrumentary witnesses were very lax; designation was not necessary; and it was not even required that the witnesses should subscribe, it being sufficient that their names were mentioned in the testing clause. But the act 1681, c. 5, enacted that only subscribing witnesses should be probative, and that they should be designed in the body of the writ. [The law, however, was again altered by the Conveyancing Act, 1874, which enacts (§ 38) that it shall be no objection to the probative character of a deed, that the witnesses are not named or designed in the body of the deed or in the

[testing clause, provided that, where they are not so named and designed, their designations shall be appended to their subscriptions; which may be done either by the witnesses themselves or by others, and at any time before the deed is recorded or founded on in any court. And by § 39 of the same act, deeds subscribed by the granter and two witnesses are not to be deemed invalid because of any informality of execution, but the burden of proving their authenticity lies on the parties upholding them. These enactments, however, do not apply to deeds executed prior to 1st October 1874; *Gardner*, 21 March 1878, 5 R. (H.L.) 105. A deed subscribed by a witness *ex intervallo*, and after the death of the granter, was sustained, in *Tener's Trs.* 28 June 1879, 6 R. 1111.] Where there is any error in specifying the name or designation of the witness, or where he is named by a familiar appellation instead of his true name, or where there is an error in his Christian name, the deed, [if prior to 1st Oct. 1874,] is null. Where such mistakes were committed inadvertently, they might be corrected before producing the deed in judgment, by inserting at the end of the testing clause a correction of the mistake. Grammatical errors are not regarded when the meaning is plain. Witnesses are necessary to authenticate the subscription of consenters (such as curators), as well as of the principal party. Where a deed is granted by two persons, and subscribed by a notary for one of them, the same witnesses may authenticate both subscriptions. It has been said [*Ersk.* B. iii. tit. 2, § 23,] that where the parties to a deed are numerous, they are presumed to be witnesses to one another's subscriptions; but there are several more recent decisions establishing a contrary doctrine. [See *Miller*, 29 May 1835, 13 S. 338.] Where a tack or other contract has been subscribed by the parties, but not by the witnesses, the witnesses cannot *ex intervallo* subscribe it at the desire of one of the parties; [*Home*, 1730, M. 16898.] In terms of 1686, c. 17, witnesses to sasines required to subscribe each leaf; [*Duff*, 15 April 1725, Robertson's App. 525.] The objections of partial favour, undue influence, or immoral character, [which formerly disqualified witnesses *in judicio*,] did not affect instrumentary witnesses, in so far as they attested the subscription of parties. [The attestation of a will is not invalid by reason of the witness taking benefit under it; *Simson*, 19 July 1883, 10 R. 1247.] The instrumentary

witnesses may be examined as to the fact of their having seen the granter subscribe, or heard him acknowledge his subscription; but it will not invalidate the deed that they do not distinctly recollect having seen it subscribed. Yet, if it be clearly proved that one of the instrumentary witnesses neither saw the party subscribe, nor heard him acknowledge his subscription, it is a relevant ground for reducing the deed, though it should not be alleged that the deed is false or forged. But a party cannot, without averring forgery of his subscription, challenge his own deed on the ground of its not having been subscribed in the presence of the instrumentary witnesses. It is not necessary for the witnesses to a messenger's execution, or a notarial instrument, to see the messenger or notary sign; they do not attest the subscription, but the transaction narrated. For the same reason, where an execution consists of several pages, they ought, like the executor, to sign each page. Witnesses cannot sign by initials. See *More's Notes on Stair*, clxii. ccxcvii.; *Ersk. B. iii. tit. 2, § 7*; *B. iv. tit. 2, § 27*; *Bank. i. 349*; *Ross's Lect. i. 127, 141*; [*Bell on Testing of Deeds*; *Dickson on Evidence*, § 629; *Kirkpatrick's Digest*, § 98; *Menzies' Conv. 111*; *M. Bell's Conv. i. 29, 50*. See *Deeds, Execution of. Testing Clause*.]

**INSTRUMENTS.** In the phraseology of the Scottish law, the term instrument is usually applied to notarial instruments, such as instruments of sasine, instruments of resignation, instruments of intimation of an assignation, instruments of premonition, of protest, and the like. Where certain demands are by contract agreed to be made, it is generally under form of instrument that the demand is made. The evidence which these notarial acts afford varies according to circumstances. Thus, instruments of sasine or of resignation are the only legal evidence of those acts of possession and of divestment; whereas the notarial intimation of an assignation may be supplied by equipollents; and demands made, or facts attempted to be established by notarial instruments, require, if disputed, to be established by the evidence of those concerned in the act. [See *Dickson on Evidence*, § 1233.] See *Sasine. Resignation. Assignation. Evidence*.

**INSUCKEN MULTURES.** [See *Multures*.]

**INSURANCE**; is a contract by which a person, who thence is termed the insurer, in consideration of a sum of money (techni-

cally called a premium), becomes bound to indemnify the insured against certain risks to which his property is exposed. Insurance is a consensual contract; but a written instrument, on stamped paper, is, by statute, requisite to its constitution. This instrument is called the policy, and specifies the premium, the risk, the names of the underwriters or insurers, and the name of the insured. The best known and most important kinds of insurance are:—

1. *Marine Insurance* (pp. 553–64).
2. *Insurance against Fire* (pp. 564–5).
3. *Insurance upon Lives* (pp. 565–73).
- [4. *Accident and Guarantee Insurance* (p. 573).]

#### I. MARINE INSURANCE.

1. *Of the Parties to the Contract.*—Under this head, it may be questioned whether an insurance in favour of an alien enemy would be effectual. Against such insurances there have been temporary statutes, as 21 Geo. II. c. 4, and 33 Geo. III. c. 27, § 5. But, independently of these, the intercourse which such a contract occasions seems to be contrary to the allegiance of a subject; it is inconsistent with the superior maritime power of the country, and counteracts its influence on the enemy; nor would it be possible to enforce such an agreement during war, as the alien would not be permitted to appear in court. This seems to be the only exception to the rule, that every person may insure his goods at sea. The question, who may be parties to the contract, was [formerly] affected by the statute 6 Geo. I. c. 18, which authorised His Majesty to grant a monopoly to two companies for the insurance of ships, goods, and merchandises at sea, or lending money on bottomry. In pursuance of that power, the two companies of the Royal Exchange Assurance and the London Assurance were established by royal charter, 22d June 1720; and under their charters they had the exclusive right of making marine insurances, as a company or partnership, on a joint capital. [But this privilege (which did not affect the right of any private person to underwrite policies or lend on bottomry, except in so far as the transaction was on account of a corporation or partnership) was taken away by 5 Geo. IV. c. 114.]

2. *Of the Articles Insured.*—The subject must be lawfully insurable. An insurance of contraband and illicit trade is void, or rather cannot be enforced by a court of



justice. But where the object of the voyage is inimical to the revenue laws of another state, this rule does not necessarily apply. So also warlike stores, carried to a nation with whom Great Britain is at war, whether they belong to a native or to a foreigner, cannot lawfully be insured in Britain; and it has been found in England, that trading with an enemy without the Sovereign's licence is illegal, and therefore that the insured could not recover on a policy which covered trade of that description; *Marshall on Insurance*, B. i. ch. 3, § 4.

3. *Of the Interest of the Insured.*—Insurance is a contract of indemnity, and it is absolutely necessary that the subject be one in which the insured has an interest, though it need not be specified. This rule is enforced by statute, prohibiting assurances by way of wagering or gaming, and assurances, "interest or no interest; or without farther proof of interest than the policy;" 19 Geo. II. c. 37. The insurance of profit on a fishing adventure is not a mere wager policy, and has been held effectual; *Addison*, 1793, M. 7077. A qualified property in the thing insured, or any reasonable expectation of profit or advantage, will constitute that sort of interest which the party may legally protect by insurance. The holder of *respondentia*, or bottomry bonds, may insure the interest thence arising to him from the ship over which the bonds extend. See *Bottomry. Respondentia*. It is held to create an insurable interest, if a person has already underwritten a policy; and he will be allowed to protect himself against his own risk, as an original insurer or underwriter, by what is termed a re-assurance. See *Re-insurance*. The freighter has an insurable interest in any advances made to the shipmaster, provided they be distinguished as freight, or made to depend on the earning of freight. [See *Watson & Co.* 16 May 1873, 11 Macph. (H.L.) 51.] The effect of stopping *in transitu* a cargo insured has, in one special case, been held to annihilate the vendee's interest under the policy; but this case has not been held to settle the general point; and its principle has been questioned; see *Bell's Princ.* § 461; *Illust. ib.* [See *Stoppage in Transitu*. It has been observed that, "upon the whole, the leaning seems to be at present towards a more confined signification of the word *interest* than has been attributed to it by some of the older authorities; *Smith's Merc. Law*, 338. See *Devaux*, 6 Bing. N.C. 358; *Lucena*, 2 B. & P. N. R. 321; *Sea-*

[*grave*, L.R. 1 C.P. 305; *Ebsworth*, L.R. 8 C.P. 596; *Anderson*, 1 App. Ca. 613; *Inglis*, 10 App. Ca. 263; *Colon. Ins. Co. of N. Zealand*, 12 App. Ca. 128.]

4. *Of the Voyage.*—The voyage may be distinguished from the trade in which a vessel is engaged: Thus, the trade may be illegal, and the voyage perfectly lawful; or the voyage may be illegal, though the goods are not contraband. The general rule is, that no insurance can be legally made on a voyage prohibited by law. Hence, a voyage contrary to the British navigation laws cannot be the object of insurance.

5. *Of the Risks insured against.*—All the risks incident to a sea voyage may be insured against, subject, however, to such exceptions as are founded on public policy; as, for instance, an insurance cannot be made against losses arising from the fault of the insured, nor against losses arising from an infringement of the laws; nor, before the slave trade was declared illegal, could policies on the slave trade insure the dealers in that traffic against the mortality of slaves by natural death or ill-treatment, or by throwing them over-board on any account whatever; 30 Geo. III. c. 33, § 8; 34 Geo. III. c. 80, § 10; and 39 Geo. III. c. 80, § 24. The words of the policy by which the risks are described are broad and extensive. The perils against which the underwriters become bound to insure "are of the sea, men-of-war, fire, enemies, pirates, rovers, jettisons, letters of mart and counter-mart, surprises, takings at sea, arrests, restraints and detentions of all kings, princes and people, of what nation, condition or quality soever, barratry of master and mariners, and all other perils, losses, or misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, &c., or any part thereof, during this adventure." But to the policy is added a memorandum which qualifies the obligation on the underwriter. The memorandum is in these terms:—"N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average, under 5 per cent.; and all other goods, also the ship and freight, are warranted free from average under 3 per cent., unless general, or the ship be stranded." This form of the memorandum is used in the English policies, and has given rise to much dispute, whether the words "free from average, unless

general, or the ship be stranded," be a condition or an exception. This is a point on which the highest authorities in England have differed, though latterly they have come to consider the stranding as a condition, which, in the event of its happening, takes off entirely the effect of the restriction created by the memorandum, and gives the same meaning to the policy as if no such memorandum had been entered in it. A case taken notice of by *Marshall* (p. 170), puts this question in a very clear light. The ship had struck on a rock off Sicily, and to save the vessel it was run on shore; the cargo was saved, and brought to the port of destination, but considerable damage was done to some fruit which had been insured, though the damage did not arise from the stranding of the vessel, but from the opening in the ship's bottom made by the rock against which it struck. The question was, whether, as the damage arose from one of the perils of the sea against which the general tenor of the policy insured, and not from the stranding, the underwriters were liable; and this raised the question, whether the memorandum created an exception or a condition: for, if it made an exception only of the damage arising from stranding, then the damage that occurred in this case was not owing to the stranding; whereas, if the memorandum created a condition, as if it had said that no average should be due unless the ship was stranded, the condition being purified by the stranding of the ship, an average loss (in the same way as if there had been no restriction by the memorandum) was due. The court found that the stranding of the ship rendered the underwriters liable for the loss, in precisely the same manner as if there had been no memorandum annexed to the policy. Lord Kenyon said, "I do not know how to construe the words of the memorandum grammatically, but by saying, that if the ship be stranded, that destroys the exception, and lets in the general words of the policy. If a general provision be made in any instrument, and it be then said that certain things shall be excepted, unless another thing happen, if that other thing do happen, it destroys the exception, and gives effect to the general operation of the deed;" [*Burnett*, 7 T.R. 210.] The Scotch policies are not all expressed in the same terms with the English private policies (those of the two English companies omit the condition in regard to the stranding). Some of the Scotch policies bind the underwriters for a

particular average on the articles excepted in the memorandum, only where the damage happens "from stranding or bulging," and this leads necessarily into the cause of the damage, which it seems to have been the great object of the memorandum to avoid. The insertion of the clause, "unless the ship be stranded," in the memorandum, has given rise to a number of questions as to what amounts to stranding. These are considered under the article *Stranding of Ships*. [Distinct and separate losses occurring during the same voyage may be added together so as to ascertain whether the aggregate loss exceeds the limit of 3 per cent., but not such losses occurring in more than one voyage; *Stewart & Co.* 16 Q.B.D. 619; but see *Arnould*, 829.] As regards the total loss of part of the cargo, it has been settled, after considerable fluctuation, that "where memorandum goods of the same species are shipped, whether in bulk or in packages, not expressed by distinct valuation or otherwise in the policy to be separately insured, and there is no general average and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire package or packages, and although such package or packages be entirely destroyed or otherwise lost by the specified perils;" *Ralli*, 6 E. & B. 422. See *Arnould*, ii. 1016.]

The duration of the risk differs on the goods, on the ship, and on the freight. 1. *Upon goods*.—By the policy, the insurance on the goods is made "from the loading thereof on board the said ship, until the same be discharged and safely landed." From these terms, it would seem that the risk commences when the goods are actually put on board, and terminates when they are landed or put on board another ship. But this general rule has exceptions, as,—*1st*, The course of trade in the port of loading or unloading must regulate the endurance of the risk; and, therefore, where lighters are used, the risk of the goods while in these lighters is part of the risk insured against. In English practice, a distinction has been made where the insured receives the goods on board his own lighter. This has been considered as a delivery to the insured, and sufficient to put an end to the insurance. In the same way, although the goods are to be delivered as soon as convenient at the port of delivery, yet the course of trade will also regulate this matter; *Noble*, 2 Doug. 510. A ship



in the Labrador trade arrived at her point of destination June 22, and from the time of her arrival the crew were employed in fishing till August 13, when an American privateer took the ship. Lord Mansfield, on the practice of the trade, held the insurers to be liable for the loss, and so the court decided. 2*d*, In the case of the ship being disabled in a storm, so as to render it necessary to shift the cargo to another ship, the risk will continue on the new ship till she arrive at the port of destination in the common way. 2. *Upon the ship*.—The terms of the policy and the nature of the voyage seem to regulate this matter a good deal. Where the policy bears from one port to another, the risk commences only from the time the ship breaks ground; but if it be expressed at and from a port, then the risk commences from the date of subscribing the policy. Where the policy bears, “from the ship’s arrival at a port abroad,” then the risk commences from her first arrival there during her continuance at that port. The policy bears, that the risk continues until the ship be moored at anchor twenty-four hours in good safety; but it is not a mooring, in this sense of the expression, where she is obliged to perform quarantine; she must be moored with a power of unloading; and where a ship was destroyed by fire during the time she was lying at quarantine, the underwriters were held to be answerable for the loss; *Waples*, 2 Str. 1243. [As to the construction of the words “in port,” where the ship was insured for the voyage, “and while in port thirty days after arrival,” see *Hunter*, 30 July 1888, 15 R. (H.L.) 72; also *Garston Co.* 15 Q.B.D. 580.] The risk on the rigging, tackle, furniture, and provisions, continues no longer than while they are attached to the ship, unless when they are put on shore in order to repair the ship; *Pelly*, 1 Bur. 341; *Brough*, 4 T.R. 206. Liberty to touch at a place or places, means places in the course of the voyage; liberty to touch and stay does not authorise the ship to trade. 3. *Upon freight*.—The risk begins from the time the goods are put on board; but, if the ship be chartered to proceed to a port, and there to take her cargo on board, the freight may be insured, and the risk commence from the sailing of the vessel to the port where the cargo is to be shipped; and a capture before its arrival at that port will give the owner a claim for the freight against the insurers; *Thomson*, 6 T.R. 478. See *Charter-Party*. The nature of the risk under a policy of insurance cannot be

changed, unless with the consent of the insurers, otherwise it voids the policy. For instance, letters of marque given to a trading vessel after she has been insured is such an alteration in the condition of the ship as to change the risk entirely.

6. *Of the Policy*.—[Under the act 30 Vict. c. 23, a policy means any instrument whereby a contract or agreement for any sea insurance is made or entered into; and a sea insurance is any insurance (including re-insurance) made upon any ship or vessel, or upon its machinery, tackle, or furniture, or upon any goods, merchandise, or property on board thereof, or upon the freight of or any interest which may be lawfully insured in or relating to any ship or vessel; § 4. By 47 & 48 Vict. c. 62, § 8, the term sea insurance is extended so as to cover land carriage when part of the transit, and delay in warehouse when incidental to the transit. No contract or agreement for sea insurance is valid unless it is expressed in a policy; 30 Vict. c. 23, § 7. In practice, the policy is preceded by a note of the contract, called a *slip*, which, though not valid as a contract, may be given in evidence to show the intention of the parties. See *Slip*. Every policy must specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and failure in any of these particulars voids the policy; 30 Vict. c. 23, § 7. See *Inverkeithing Assurance Assn.*, 6 July 1882, 9 R. 1043; *Arthur Average Assn.*, L.R. 10 Ch. 542; *Padstow Total Loss Assn.*, 20 Ch. D. 137. No policy may be made for more than twelve months; and a policy made for a longer period is altogether void; § 8. The stamp duties payable on marine policies (as set forth in schedule B, annexed to the act) are as follows:—For every policy of sea insurance for or upon any voyage,—in respect of every £100 insured, or fractional part thereof, 3*d*.: For every policy for time,—in respect of every £100 insured, or fractional part thereof—where the time does not exceed six months, 3*d*.; where the time exceeds six, but does not exceed twelve months, 6*d*. But by 50 & 51 Vict. c. 15, § 5, the duty was reduced to 1*d*., where the premium or consideration does not exceed the rate of 2*s*. 6*d*. per cent. of the sum insured by the policy. A provision in 30 Vict. c. 23, as to charging the duty separately upon the separate and distinct interests of two or more persons insured by one policy was repealed by 47 & 48 Vict. c. 62, § 8. By § 9 of 30 Vict. c. 23, no

[policy is valid, unless duly stamped; and after-stamping is prohibited, with two exceptions—(1) in favour of mutual policies, (2) in favour of policies made abroad. The latter exception has been superseded by the Stamp Act, 1870 (33 & 34 Vict. c. 97), § 117, as modified by 50 & 51 Vict. c. 15, § 6, under which a policy made abroad may be stamped within ten days after being received in the United Kingdom. And the prohibition of after-stamping has been further modified by 39 Vict. c. 6, § 2, which provides that an insufficiently stamped policy may be received in evidence (under § 16 of the Stamp Act), on payment of the unpaid duty and a penalty of £100. By § 10 of 30 Vict. c. 23, alterations may be made in policies, provided they are made before notice of the determination of the risk originally insured, and do not prolong the time covered by the insurance beyond six months, in the case of a policy made for a less period than six months, or beyond twelve months, in the case of a policy made for more than six months, and provided also that the articles insured remain the property of the same person, and that no additional sum be insured by means of the alteration. By § 11, as amended by 47 & 48 Vict. c. 62, § 8, policies for a voyage and also for time, or which cover any period beyond thirty days after the ship has been anchored on arrival, must be stamped both as policies for a voyage and as policies for time. By § 12, any agreement by a carrier or other person to insure goods or property while on board ship, for payment of additional freight or otherwise, is declared to be a contract for sea insurance. By §§ 13–15, persons effecting or negotiating an insurance otherwise than by duly stamped policy, are liable to a penalty of £100.]

A policy may be distinguished as an interest or as a wager policy. It is the former only which constitutes a proper contract of insurance binding on the underwriters. The interest policy may be either an open or a valued policy. The open policy is one where the value is left to be ascertained should a loss arise. A valued policy is when a value has been set on the ship or goods insured, the sum specified being demandable without proving the amount, when there is no fraud. At first it was thought that valued policies were struck at as wager policies by the statute of Geo. II.; but the contrary is now established. [See *Barker*, L.R. 3 C.P. 303; *Lidgett*, L.R. 6 C.P. 616; *Williams*,

[1 C.P.D. 757.] Investigation is open to the insurer, to see that there is no fraud. The insurance is usually made by the interposition of an insurance broker. Mutual accounts are kept, in which the broker states in the underwriter's account all the premiums which he is authorised by the underwriter to draw, as already received, and as articles to the underwriter's credit, against which he places all return premiums or sums received for losses (if he be authorised to recover them), and he settles the account periodically with the underwriters. On the other hand, in account with the insured, he debits him with the unpaid premiums, giving him credit for any return premiums, or for losses which he may be empowered to recover. This arrangement is accomplished by means of a receipt for the premiums signed by the underwriter, in these terms: "The assurers confess themselves paid the consideration due to us for this assurance by the assured." This receipt, delivered to the broker, is a warrant to him to receive the premiums so acknowledged; but it is not effectual to discharge the insured, since it is not delivered to him as his document of discharge. When, however, the broker gives the insured credit for the premiums, the underwriter is bound by his discharge, although the broker never paid any part of them. But recall of the broker's authority while things are entire, transfers the accounting to the insurers and insured, and the former are entitled directly to claim the unpaid premiums. In this question, the broker's bankruptcy is equivalent to a recall. The receipt has the effect of laying the *onus probandi* on the underwriter, to show that neither actual payment has taken place, nor such a settlement of accounts between the parties as is equivalent to payment of the premiums; *Bell's Com.* i. 646. An agent for a merchant abroad must employ a broker and procure insurance: 1. Where the agent has effects in his hands. 2. Where the agent here has been in use to answer orders of insurance on former occasions. 3. Where the agent here receives bills of lading with an order to insure. In making the insurance, the agent must proceed regularly and actively, and will be answerable for the failure of the act he has undertaken to perform. [See *Marshall*, 228 *et seq.*]

The policy may be considered under the following heads: (1.) *The names of the insured*.—The statute 28 Geo. III. c. 56, provides that no person shall effect any



policy on "any ship or goods, without first inserting the name or names, in the usual style and form of dealing, of one or more of the persons interested, or of the consigner or consigners, consignee or consignees, of the property to be insured, or of the person or persons residing in Great Britain, who shall receive the order for and effect such policy, or of the person or persons who shall give the order to the agent or agents immediately employed to negotiate or effect such policy; and every policy made contrary to the true intent and meaning of this act shall be null and void;" [Symers, 25 Nov. 1846, 9 D. 168.] (2.) *The name of the ship, &c.*—It is necessary that the name of the ship should be mentioned, in order that the nature of the risk may be known; and no other ship can be substituted unless in the case of necessity, or with the consent of the underwriters. At the same time, where it is not known in what ship a cargo is to be sent home, it may be insured generally, as goods on board "ship or ships." The name of the master ought also to be declared; but it is generally expressed in the policy, "or whosoever else shall go as master in the said ship;" and under these terms the master may be changed; but this ought not to be done unnecessarily. The names of the ship and master are required, not as a warranty, but as identifying the risk; and an innocent mistake in those names will not defeat the insurance, provided there is clear proof of the identity of the ship. (3.) *The subject insured.*—The policy must express whether it be goods, freight, ship, or whatever is the object of the insurance; but it is not necessary that the goods be specified, though it is sometimes done on the foot of the policy; and in that case, no other goods than those expressed will be insured. (4.) *Description of the voyage.*—The voyage must be truly and accurately described; the time and place at which the risk is to commence; the time of the ship's departure; her destination; and the time when the risk shall end; or, when the insurance is on time, the commencement and end must be distinctly specified. (5.) *The perils insured against.*—The perils are sufficiently expressed in the policy; but those arising from bad stowage, from wet, from theft and embezzlement of the master or mariners, do not fall on the underwriter. In the policy, the words "lost or not lost" are inserted, and they insure against losses whether they happen subsequent or prior to

the date of the policy. (6.) *The powers of the insured in case of loss.*—Under a clause in the policy, the insured, or those acting for them, may take every means to defend, preserve, or recover the goods insured, the expense of which shall be contributed proportionally by the underwriters. [See as to this clause, which is called the "sue and labour clause," *Kidston*, L.R. 2 C.P. 357; also *Aitchison*, 4 App. Ca. 755 (referred to *infra*, p. 561*b*).] (7.) *The acknowledgment of the receipt of the premium.*—This acknowledgment does not preclude the underwriter from demanding the premium, nor can it be founded on by the insured as a discharge of the premium. (8.) *The common memorandum.*—The use of this is to save the parties from adjusting trifling losses arising from causes which, properly speaking, do not fall under the nature of the contract, and which would not admit of being easily settled. [Marine policies may be assigned by indorsement on the policy, and the assignee may sue thereon in his own name; 31 & 32 Vict. c. 86.]

7. *Of Warranties.*—A warranty is an absolute condition, expressed or implied, which, if not true, or not complied with, defeats the insurance, whether material to the risk or not. An express warranty is a stipulation on the part of the insured affirmative or promissory, and it is binding according to the commercial meaning put upon the words. But it must be strictly and literally performed; and therefore the falsehood of an affirmative, or the non-performance of a promissory warranty, will vacate the policy. [See *Birrell*, 17 March 1884, 11 R. (H.L.) 41.] The warranty to sail on a given day must be strictly performed; nor would the best reason, or even detention by Government, be received as an excuse for not complying with the warranty. But should the ship break ground on the day of sailing, and begin the voyage, the fact of her being afterwards brought back (however little way the vessel had made), and laid under an embargo, would not vacate the policy. The warranty to sail with convoy must also be strictly complied with. In sailing with convoy, the following things are essential: 1. The vessel must sail with a regular convoy appointed by Government. 2. It must be from the place of rendezvous appointed by Government. 3. It must be a convoy for the voyage. 4. The ship insured must have sailing instructions. 5. It must depart and continue with the convoy, unless separated by necessity. See *Convoy*. There are also certain implied

warranties, the most important of which is sea-worthiness. See No. 10, *infra*. It is of no avail, in defence against breach of warranty, that the representation was true, according to the belief of the insured. The insured is not bound to disclose what is the subject of a warranty. The truth of the warranty is presumed, especially of sea-worthiness, subject to refutation by evidence or counter presumption.

8. *Of Representations.*—A representation means a collateral statement of such facts and circumstances as are material in forming a judgment of the risk. This statement may be untrue, either fraudulently or innocently. Where the representation is untrue, with a fraudulent design to impose on the underwriter, the policy is completely vacated; and a loss, even from a cause not depending on the untrue statement, will not be covered by the policy. But where the statement has been fairly and honestly made, and, though not true in every point, yet, if it be substantially true, it is not judged of with the same precision as a warranty, and does not necessarily vacate the policy. The warranty is invariably made part of the policy by an entry on the back or margin of the policy; but a representation is made on a separate paper, as in a letter shown to the underwriters.

9. *Of Concealment.*—This consists in the suppression of any circumstance material to the risk, and it vitiates completely the policy; nor does it alter the case that the concealment has been the effect of inadvertency alone. The insured ought therefore to disclose every circumstance which has come to his knowledge with the most perfect frankness. But there are certain things which the insured is not bound to communicate, because the insurer must be supposed to be equally well acquainted with them; as, general intelligence, the result of political speculations, the natural perils to which the voyage is subject. It is such facts only as vary the nature of the contract, which one party privately knows, and the other is ignorant of, and has no opportunity of knowing, which cannot be legally concealed. The question, therefore, in cases of concealment, must always be, whether, under all the circumstances at the time the policy was underwritten, there was or was not a concealment, material to the risk, or which, if known to the underwriter, would probably have altered his resolution. [See *Hutchinson & Co.* 23 May 1876, 3 R. 682. Concealment of a material fact by a broker employed to effect an

[insurance, but who was not the broker by whom the insurance was ultimately effected, was held not to vitiate the policy; *Blackburn*, 12 App. Ca. 531; but see *Blackburn*, 21 Q.B.D. 144.]

10. *Of the Ship.*—Under this head the principal obligations on the insured are, that the ship shall be sea-worthy—that it shall not be changed—and that it shall be navigated according to law. In regard to sea-worthiness, if the ship be found incapable of performing the voyage insured, from some latent defect existing before the voyage commenced, the insurer is not bound. Under sea-worthiness is understood that the ship shall be tight, staunch, and strong, properly manned, provided with all necessary stores, and in all respects fit for the intended voyage; for, otherwise, the insurer has not a fair chance of gaining the premium. He undertakes to indemnify the insured against the extraordinary and unforeseen perils of the sea, but the ship must be in a condition to encounter the ordinary perils of her voyage. See *Charter-Party*. [In a time policy there is no implied warranty of sea-worthiness; *Dudgeon*, 1877, 2 App. Ca. 284; *Kenneth & Co.* 2 Feb. 1883, 10 R. 547.] If in the course of the voyage the ship be disabled, by stress of weather or any other peril of the sea, the captain ought to hire another vessel for completing the voyage; so that, although the rule certainly be, that the ship ought not to be changed on the insurer, yet, where it is an act of necessity, the change may be made without liberating the insurer. It is allowable to insure goods from abroad by a ship or ships, where the insured is ignorant of the ships by which the goods are to be sent. The ship must be navigated according to law, that is, according not only to the laws of this country but according to the treaties subsisting between this country and foreign states. In short, in the branch of trade in which the ship is employed, all the statutory regulations in regard to that trade must be observed. See *Sea-Worthiness*.

11. *Of Deviation.*—By deviation is understood voluntary deviation; and from the moment that a voluntary deviation takes place, the insurer is discharged from all subsequent responsibility. In judging of a deviation, it is not the shortest possible way from the port of departure to the port of delivery that constitutes the voyage; it is the usual tract of the voyage that is the rule, hence stopping at such places as it has been the usual and settled practice to



stop at in the course of the voyage, is no deviation. But where a deviation has been made, it will be no answer that after the deviation the ship regained her original tract. In order to discharge the insurer, the deviation must be a voluntary deviation; for where the captain, in making the deviation, acts fairly and *bona fide*, e.g., deviates to avoid danger, the insurers are not liberated. Thus, a deviation may be made by stress of weather, from the necessity of repairs, in order to avoid an enemy, or in consequence of a mutiny in the crew. These are all cases of imperious necessity, sufficient to authorise a deviation; but it must in its extent be commensurate to the cause, and will in no case be allowed to exceed what necessity requires. See *Deviation*.

12. *Of Loss*.—A loss in this sense is damage sustained by the insured from one or other of the misfortunes against which the insurer is bound to indemnify him; and they are all very particularly enumerated in the policy. Losses are distinguished into total or partial losses. A total loss is either where the thing insured is completely destroyed, or where, although it specifically remains, it is of no value, or not sufficient to bring the amount of the freight. A partial loss is one short of a total loss; or, where the articles insured are actually landed at the port of delivery, the injury will amount to a partial loss. A partial loss is sometimes denominated an average loss, because these partial losses are often the subject of average contributions; and they are distinguished into general and particular averages. See *Average*. The losses insured against may be brought under the following heads:—(1.) *Loss by perils of the sea*.—This may happen from the ship's foundering. Of this fact the insurers are not entitled to require direct and positive evidence; and the law has fixed on no time within or beyond which a legal presumption of the ship's being lost arises; the circumstance must be left to the mind of the court, or the jury. The loss may happen from the ship stranding; which is either accidental, where the vessel is driven on shore by the winds and waves; or voluntary, when it is run on shore to save it from a worse fate. Stranding may be followed by shipwreck, in which case the loss is total; or the vessel may be got off in a condition to prosecute the voyage, in which case the damage and expense incurred will be a partial loss, of the nature of an average. Another peril of the sea is

the ship's striking against a rock, which may occasion a leak or absolute shipwreck. A loss consistent with the ordinary service in which a ship is engaged founds no claim against the underwriter, as where an anchor is lost by the rubbing of a cable on the rocks; but, should it happen from the violence of the winds, it becomes a loss within the policy. Where animals on board a ship are insured, their death, if occasioned by the shot of an enemy, or by a tempest, or by their being necessarily thrown overboard, founds a claim against the insurer. (2.) *By running foul*.—The injury sustained by one ship running foul of another is a loss within the policy, unless it be imputable to the misconduct of the master or mariners; though even then it might be covered under the head of barratry, and relief would be due by those to whom the accident was imputable. See *Collision*. (3.) *Loss by fire*.—This is one of the losses falling under the policy; and it will authorise a claim even where the ship is set on fire by the master to preserve her from the enemy. (4.) *Of loss by capture*.—Capture may be either by an enemy, according to the rules of war, or contrary to those rules, or by a pirate; but in whatever way the capture may be made, and whether or not the property be thereby actually transferred, the insurers are bound to indemnify the insured to the extent of their loss, in so far as they are respectively bound. A capture may be total, as where the ship is not recovered; or partial, where the ship is recaptured; in which case the underwriter is bound to pay the salvage, and the expense which the insured may have been put to. When a capture takes place, the insured lose all control over the property, and are entitled to abandon; but should they not declare that intention, and should the ship be retaken, they cannot then abandon, unless the object of the voyage has been lost by the capture. In all cases, therefore, between the insurers and the insured, there is no question as to the legality of the capture or the change of property, but simply whether it be a total or a partial loss, and whether it admits of an abandonment; and these depend on the circumstances which have been already taken notice of. (5.) *Of loss by detention*.—This applies to all detentions by the ruling power of the country, and whether of any foreign country or of this, on whatever account the detention may be made, unless from the fault of the captain or mariners, by infringing rules which occasion the de-

tention; in all other cases the detention by the ruling power of a country occasions a loss falling under the policy. (6.) *Of loss by barratry.*—Barratry is any species of fraud, knavery, deceit, or cheating, committed by the master or mariners, whereby the owners sustain an injury, as by running away with the ship, wilfully carrying it out of the course of the voyage, sinking or deserting it, embezzling the cargo, smuggling, or any other offence whereby the ship or cargo may be subjected to arrest, detention, loss, or forfeiture; barratry, in short, comprehends every fraud which may be committed by the master or mariners against the owners. But this does not protect the insured against loss arising from the ignorance or unskilfulness of the master; the cause must be fraud, [or misconduct amounting to gross malversation.] See *Barratry*. (7.) *Of loss by average contributions.*—Average signifies a contribution made by the owners of the ship, freight, and goods on board, in proportion to their respective interests, towards any particular loss or expense sustained for the general safety of the ship and cargo, to the end that the particular loss may fall equally on all; as where goods are thrown overboard in a storm, or where the masts, cables, or anchors are cut away or destroyed for the general preservation, or money or goods given as a composition to pirates, or damage sustained in defending the ship against an enemy, or expense in curing the wounded, or the expense of defending an action for discharging the ship from an unjust capture, or detention. In those cases, and in every one where an expense is *bona fide* incurred to prevent a total loss, it ought to be borne rateably by all concerned; and this equitable contribution is called general or gross average. In opposition to this is particular average; but this means nothing more than a particular loss, and has no affinity to an average loss properly so called. [As to mode of ascertaining particular average loss, see *Marine Ins. Co.* 11 App. Ca. 573.] Besides these, there are what are called *petty* or *accustomed averages*—as pilotage, towage, beaconage, anchorage, &c. But, where these are incurred in the ordinary course of the voyage, they are not considered as losses, but as part of the necessary expense; it is only where charges of that kind are incurred for an extraordinary purpose, and to provide against any impending danger, that they will be deemed gross or general average, for which the insurer will be liable. The

contribution, in this case, is settled by ascertaining the value of the ship and cargo as if it had arrived safe. They are then valued at the ready-money price they would bring at the port of discharge; and the nett amount, deducting all charges, is the sum subject to the contribution; and each person's share of the loss will be in the same proportion to the value of his property as the whole loss bears to the whole property. These contributions, under the general words of the policy, are a charge which the underwriter is bound to pay.

(8.) *Of loss by the expense of salvage.*—

The expense of salvage, like other average contributions, is a charge for which the insurer is liable. It is understood to mean the allowance made to those by whose means the ship or goods have been saved from shipwreck, fire, pirates, enemies, or any other loss or misfortune. When the salvage is very high, the insured may abandon. See *Average. Contribution*. [In *Aitchison*, 4 App. Ca. 755, it was held that general average and salvage do not come within either the words or the object of the "sue and labour" clause. But see Mr Maclachlan's remarks on this judgment in his edition of *Arnould*, pp. 792, 807; or in *Maclachlan on Shipping*, 639, 644. The underwriters of a ship that has been lost are entitled, on making good the indemnity, to succeed to all the ways and means by which the insured might have protected himself against, or reimbursed himself for, the loss. Being subrogated to the insured, they are entitled to the ship *in specie*, if they can find it, and they can assert any right which the owner might have asserted against a wrongdoer, to recover damages for the act which caused the loss. But they are no more than assignees of the owner, and cannot claim where the latter could not have done so; *Simpson & Co.* 13 Dec. 1877, 5 R. (H.L.) 40. See also, as to subrogation, *Burnand*, 7 App. Ca. 333, and *Castellain*, 11 Q.B.D. 380 (fire insurance).]

13. *Of Abandonment.*—[Total loss may be either absolute or constructive. There is constructive total loss, when the subject insured has been so far damaged by the perils insured against that the expense of repairing it would exceed its marketable value when repaired; see *Stewart*, 1 Sept. 1848, 1 Macq. 328; *Roux*, 3 Bing. N.C. 266; *Tudor's L.C.* 166.] In such cases the insured may abandon as for a total loss. In consequence of this abandonment, the insurers come into the place of the insured, and are entitled to all that can be rescued



from destruction. [It was formerly held that, when the voyage was lost, or was not worth pursuing, the insured might abandon. But it has been observed that "this doctrine is narrowed by late decisions; and it does not seem possible to imagine a case in which the loss of the voyage, independently of some great jeopardy affecting the subject-matter of insurance, would entitle the assured to abandon;" *Smith's Merc. Law*, 383. The election to abandon must be made as soon as the insured has received probable intelligence of the loss, and intimation must be made to the underwriters within a reasonable time; *Fleming*, 18 April 1848, 6 Bell's App. 278; *Kaltenbach*, 3 C.P.D. 467.] The insured may not abandon after having once treated the loss as a partial one. Where a ship is not heard of for a reasonable time, the insured may abandon. There does not seem to be any form of intimation by which the insured must intimate to the underwriters that they mean to abandon; on the contrary, it would appear that the intimation may be effectually made by letter to the underwriter, or to the agent who has subscribed for him. Where an abandonment takes place, the insured resigns his entire interest in the ship or in the goods insured, and they become the property of the underwriters, in proportion to their respective subscriptions. [Hence the underwriters are entitled to freight subsequently earned; *Stewart, supra*; *Turner*, 3 March 1853, 1 Macq. 334. The question, at what point of time the right to claim for a total loss is to be determined, cannot be answered with certainty. On the Continent and in America, the claim is judged as at the date of notice of abandonment. In England, on the contrary, unless notice of abandonment has been accepted by the underwriters, the date of raising action on the policy is the point of time which determines the rights of parties; so that what was a total loss, when notice of abandonment was given, may become a partial one, by circumstances intervening before action is brought. See *Arnould*, ii. 1028. In Scotland, there is an early decision of the Court of Session, adverse to the English view; *Robertson, Forsyth & Co.* 18 Feb. 1809, F.C., more fully reported in Buchanan's Reports, 73. This decision was affirmed by the House of Lords, but on a special ground, viz., acceptance of abandonment; *Smith*, 1814, 2 Dow, 474. In *Shepherd*, 25 Feb. 1881, 8 R. 518, the question was again raised before the Court of Session, but not decided.

[The views expressed by the judges inclined against the English rule, in point of principle; but the inexpediency of a conflict between the English and Scotch systems, on a point of mercantile law, was acknowledged. It was suggested that there might be grounds for distinguishing between cases of loss by capture (to which the leading English decisions seem to apply), and cases of damage by perils of the sea.] When there has not been a full insurance, and the insured means to abandon, he abandons in proportion. Thus, if the value of the goods was £5000, of which only £4000 was insured, he abandons to the extent of four-fifths of what is saved; and to the extent of the fifth retained, he will have a right of common property along with the underwriters. In the case of shipwreck or other misfortune, the ship and goods continue the property of the insured until abandonment; but, by a clause in the policy, the master and others may do everything to preserve the property without being understood to act for the insured, or to deprive them of the right of abandoning; and the underwriters are liable for the expense which such attempts to save the property may occasion. The captain, therefore, acts for those who may ultimately be found to have an interest in the ship or cargo. [See *Marshall*, 443; *Arnould*, ii. 951.]

14. *Of the Adjustment of Losses.*—The first thing to be considered is how the quantity of the damage for which the underwriters are liable shall be ascertained; the next point is by what rule this shall be appreciated. (1.) *How the amount of damage shall be ascertained.*—The insured ought to be well informed of the circumstances; and if it appear to be a total loss, and he decide to abandon, he must intimate his intention, or he will be held to have waived his right, and to be entitled to claim only as for a partial loss. When the loss is total, and the policy valued, the insured is entitled to receive the sum insured, subject to the deductions pointed out by the policy, on his proving that the goods insured were actually on board. Where the policy is not valued, but an open policy, the insured must prove not only that the goods were on board, but he must also prove their value, which value, not exceeding the sum insured, is the amount of his claim. In the case of a partial loss, the same inquiry as to the value of the loss must be made, whether the policy be a valued or an open one. Where the loss is that of ten barrels out of an hundred, the

English practice seems to render this a loss which the underwriter must pay. Where goods have been damaged, their present value is taken from the prime cost, and the difference is the damage. Where articles are insured for one entire sum, but each article separately valued, the insured will recover the amount of any one of the articles which may have been lost. When the underwriters are to be freed from average under so much per cent., any loss that may arise must be estimated on the cargo as it stood at the time of the loss; and whether the proportion renders it a claim on the underwriters or not will depend on the proportion between the loss and cargo as it then stood. (2.) *How the loss is to be appreciated.*—In England, the practice, in case of a loss, is to value the goods at the prime cost, and the duties, expenses of shipping, and premium of insurance. The ship is valued at the price she is worth at the time of her sailing, including the expense of her repairs, the value of her furniture, provisions, and stores, the money advanced to the sailors, and, in general, every expense of the outfit, and premium of insurance. A partial loss, on either ship or goods, is that proportion of the prime cost which is equal to the diminution in value occasioned by the damage. Where the policy is valued, the loss is that proportion of the value in the policy which the difference between the price of the sound, and the price of the damaged, bore to the price of the sound at the port of delivery. Thus, if sugars are valued in the policy at £30 per hogshead, and are so damaged as to be worth no more than £20, 0s. 8d. per hogshead, while, if sound, they would have brought £23, 7s. 8d., the difference being £3, 7s., the loss would be that proportion of the £30, which £3, 7s. bears to £23, 7s. 8d.; and the same rule holds whether the goods come to a rising or to a falling market; [*Lewis*, 2 Burr. 1167.] (3.) *The effect of an adjustment.*—An adjustment of the loss indorsed on the policy, and signed by the underwriters, is like a note of hand, and supercedes all further proof on the point. At the same time, the underwriters will be allowed to traverse it by direct evidence, disproving the grounds of adjustment. [See as to adjustment, *Marshall*, 499; *Arnould*, ii. 1091; *Stevens on Average*, 84.]

15. *Of Return of Premium.*—The premium and risk are co-relatives. The insurer cannot be exposed to the risk without being entitled to the premium, nor entitled to the premium without having been exposed to

the risk. It remains, therefore, to be considered, under what circumstances the insured shall be entitled to demand a return of premium. (1.) *Where the contract is void ab initio.*—This is owing either to want of interest in the insured, or because the insurance is illegal, or on account of fraud. When there is no interest, or an interest much below the sum insured, the insurer must return the whole premium, or retain so much of it only as may be proportioned to the actual interest; and where there are more than one policy, the underwriters settle according to the sum subscribed by each, without regard to priority of dates. If the insurer might at any time have been called on for the loss, the premium is carried; therefore, in a valued policy, though there be twice the amount of the value insured, no return is claimable. A voyage on trade with an enemy is not insurable; yet the premium cannot be demanded back—*Potior est conditio possidentis*. But when the policy is void without any fraud on the part of the insured, the premium may be demanded; or where it is void from the fraud of the underwriter, the same thing happens. [Where the policy is void on account of actual fraud on the part of the insured, it is now settled, after some fluctuation, that the premium cannot be demanded back; *Marshall*, 522–5.] (2.) *Where the risk has not been commenced.*—In this case, whether it be owing to the neglect or fancy of the insured, the return of the premium may be demanded, since the underwriters never ran the risk of which it was the consideration. When the voyage is divided into separate risks, the premium may be allocated according to the several risks; and in case one or more has not commenced, a proportional return may be demanded. When the insurance is at and from a place with convoy, and the ship sails without convoy, the premium may be demanded back, but under a small deduction for the insurance at the port of departure, for which the underwriters were liable. When the risk has commenced, though the insurer should be relieved by a deviation, or by the voyage being abandoned, the premium cannot be demanded back by the insured. (3.) *Upon the performance of some stipulations.*—It is frequently a stipulation, that upon the happening of certain events, or the performance of certain things, the insurer shall return a part of the premium. If the event shall have happened, the insured will be entitled to the return, though the underwriter be liable for a



partial loss. (4.) *Of the deduction of one-half per cent. on a return of premium.*—Where the insurer puts a stop to the risk, the underwriter is entitled to one-half per cent. from the premium, which, in that case, he retains, on account of the entries he has had to make in his books. [See *Marshall*, 515; *Arnould*, ii. 1100.]

See on the subject of marine insurance, *Bell's Com.* i. 645; *Ersk. B.* iii. tit. 3, § 17; *Bank.* i. 419, 426; *Bell's Princ.* § 457; *Illust. ib.*; *Jurid. Styles*, ii. 822; *Kames' Equity*, 213; *Brodie's Supp. to Stair*, 988; [*Ersk. Princ.* (17th ed.), 415; *Emerigon on Insurance*; *Benecke's Principles of Indemnity*; *Addison on Contracts*, 674; *Smith's Merc. Law*, 332; English treatises on Marine Insurance by *Park*, *Marshall*, and *Arnould*; and American treatises by *Phillips*, *Duer*, and *Parsons*. See *Reinsurance*.]

## II. INSURANCE AGAINST FIRE.

This is a contract by which the insurer undertakes, in consideration of the premium, to indemnify the insured against all losses which he may sustain in his house, furniture or goods by means of fire, within the time limited in the policy. The contract must be by policy on stamped paper; but the agreement may be so conclusively fixed before delivery of the policy, as to ground an action for implementing it by a regular policy; [*Christie*, 10 Feb. 1825, 3 S. 519. The stamp duty is 1d.; see Stamp Act, 1870 (33 & 34 Vict. c. 97, sched.). A percentage duty of 1s. 6d., formerly payable in respect of fire insurances, was abolished by 32 & 33 Vict. c. 14, § 12. By § 118 of the Stamp Act, a penalty of £20 is imposed on every person who receives or takes credit for any premium or consideration for any contract of insurance, and fails, within one month thereafter, to make out and execute a duly stamped policy. The insured must have an interest in the subject of insurance, and, in the event of loss, he cannot recover more than the amount of such interest; 14 Geo. III. c. 48.] But it is not required that he should have the absolute and unqualified property of the effects insured: he may insure as a trustee, an heritable creditor, a fiar, or a factor with the custody of the goods; [*Gillespie*, 28 Jan. 1874, 1 R. 423. Warehousemen, and other custodiers of goods belonging to others, may effect a floating insurance upon all goods that may be in their premises;

[*Dalglish*, 17 Jan. 1854, 16 D. 332.] The nature of the property must be distinctly specified; and all the insurances, by those having an interest in the same subject, must not exceed its fair value. Fire policies are not valued policies: they limit, but do not measure, the liability for loss. The settlement is on the principle of average loss, not of abandonment. When insurance against fire is made at different offices, intimation of the different insurances should be made to each office, [so as to afford the means of contribution; and it is frequently stipulated that failure in this duty shall invalidate the policy. As to contribution, see *Scottish Amicable Assn.* 11 Dec. 1883, 11 R. 287; *North Brit. Ins. Co.* 5 Ch. D. 569.] The dangers against which the insurer undertakes to indemnify the insured are those arising from fire; but there is an exception of those arising in case of invasion, foreign enemy, or any military or usurped power, or civil commotion; and to this effect a memorandum or condition is entered in the policy. Fire policies are assignable, provided the interest goes with them. Upon the death of the insured, the interest is continued in his heir; but it can be assigned only with the consent of the insurer. Where a loss happens, evidence of the loss must be produced to the office; and allowance is made not only for what has been actually consumed, but for what has been damaged, and also for the expense incurred in removing the furniture. [But consequential damage, such as loss of rent or profit, during the period of repair, is not covered by the policy, without special stipulation; *Menzies*, 13 Feb. 1847, 9 D. 694.] It is not held a loss by fire if there be no ignition; as in heat by effervescence, or injury by the over-heating of a flue not followed by actual ignition, [or by concussion from explosion of gunpowder; *Everett*, 19 C.B.N.S. 126. As to explosion of gas, see *Stanley*, L.R. 3 Ex. 71. The policy comes to an end on expiry of the time mentioned therein. Sometimes by the policy fifteen days of grace are added; but this does not maintain the policy, without express stipulation that the insurance shall be continued, and the property covered by the policy, until expiration of the days of grace; *Salvin*, 6 East, 571; *Simpson*, 2 C.B.N.S. 257. Warranties and conditions are enforced with the same strictness, and misrepresentation or concealment has the same effect in voiding a policy, as in marine insurance; *Newcastle Ins. Co.* 10

[July 1815, 3 Dow, 255; *supra*, pp. 558-9. Alteration of the premises so as to increase the risk, unless with consent of the insurer, invalidates the policy; *Sillem*, 3 E. & B. 882; *Glen*, 8 Ex. 617; *Stokes*, 1 H. & N. 533. A purchaser of property which is insured does not, by the mere fact of the purchase, become entitled to the benefit of the policy; *Poole*, 33 L.J. Ch. 639. Hence, in an English case where the owner of a house which was insured contracted to sell it, and thereafter, but before the time fixed for completion, the house was damaged by fire, it was held, in a question between the seller and the purchaser, that the latter was not entitled to the benefit of the insurance, either by way of abatement of the price or reinstatement of the premises, his contract containing no reference to the insurance; *Rayner*, 1881, 18 Ch. D. 1. In consequence of this decision, the insurance company, who had paid the insurance money to the seller, sued him for repayment thereof, on the ground that their contract with the seller was one of indemnity merely, and that he having received the price from the purchaser, there was no loss to be indemnified; and this contention was sustained by the Court of Appeal; *Castellain*, 1883, 11 Q.B.D. 380. In that case Lord Justice Brett observed:—"The very foundation, in my opinion, of every rule which has been applied to insurance law is this, viz., that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the insured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified." See also *Darrell*, 1880, 5 Q.B.D. 560. But it does not follow from this that the aggregate of all the sums payable in respect of the same subject, under several policies insuring different interests, may not exceed the value of the subject. In *Westminster Fire Office*, 10 Aug. 1888, 15 R. (H.L.) 89, postponed bondholders who had insured the subject of their security, were held entitled to be indemnified to the extent of their insurance, notwithstanding that the company had already paid to prior bondholders a sum sufficient to reinstate the premises. An option is commonly reserved to the insurance company to settle the loss either by payment or by reinstatement; *Sutherland*, 22 May 1852, 14 D. 775; *Brown*, 28 L.J. Q.B. 275. By 14 Geo. III. c. 78, § 83, insurance offices are directed, on the request of any one interested, to

[cause the insurance money to be laid out in rebuilding. This enactment was supposed at one time to be confined to London, but was held, in *Goreley*, 1864, 4 De G. & S. 477, to be of general application. Lord Watson, however, in *Westminster Fire Office*, *supra*, expressed the opinion that its operation does not extend to Scotland. As in marine insurance, the insurer, on indemnifying for a loss, is subrogated to the insured, and entitled to all his remedies; see *Castellain*, *supra*; also *supra*, p. 561 b.] See on fire insurance, *Bell's Com.* i. 671; *Bell's Princ.* § 508; *Hunter's Landlord and Tenant*, i. 389; ii. 257; [*Addison on Contracts*, 730; *Smith's Merc. Law*, 408; *Bunyon on Fire Insurance*; *Wood on Fire Insurance*; *Porter on Insurance*; *May on Insurance*.]

### III. INSURANCE UPON LIVES.

[*Nature of Contract.*—The contract of life insurance has been defined to be a "mutual contract, by which the insurance company, on the one hand, come under an obligation to pay a certain sum of money upon the death of the assured, and the assured, on the other hand, becomes bound to pay certain sums, either annually or otherwise, in name of premium;" *per* Lord Pres. Inglis, in *Scot. Widows' Fund v. Buist*, 14 July 1876, 3 R. 1078. In practice, there are variations in the reciprocal obligations undertaken by the parties. Thus, the insurers, instead of insuring for the whole life, may engage to pay the sum in the policy only in the event of the insured dying within a specified period, or in the event of his predeceasing a third party. And the insured may either pay his premium in one gross sum, or he may engage to make a fixed periodical payment, usually annual, during his whole life, or during a specified period of years, the engagement, however, always terminating at his death. Or the life insured may be, not that of the party contracting with the insurance company, but that of a third party, provided the contracting party have an interest in the life of the insured (see *infra*). The premium, in whatever form payable, is fixed according to the probable duration of the life at the time when the contract is entered into. In ordinary use, this contract is termed indifferently *assurance* or *insurance*. Some have thought that the word *assurance* is more appropriate in connection with life risks, and *insurance* in connection with risks from sea or fire;



[see *Encyc. Brit.* (8th edit.) *voce Insurance*. Other writers apply the term *the insured* to the person whose life is insured, and the term *the assured* to the person for whose benefit the insurance is effected; see *Bliss*, § 5. But neither of these distinctions has obtained general recognition.

Life insurance is not, like marine and fire insurance, a contract of indemnity. In marine and fire insurance, the liability of the insurers is contingent on the occurrence of loss or damage, by sea or fire respectively, to certain specific property, and is measured by the amount of such loss or damage. But in life assurance, the whole sum in the policy is due on the death of the assured, irrespective of any pecuniary loss. The contract is one of mutual risk. "A. and Co. engage with B. that, in consideration of £1 a year, paid by him during his life, they will pay £20 to his representatives as soon as he shall be dead. Both parties run a risk; A. and Co. that of having to pay B. more than they receive; B. that of paying more than will at his death produce £20. But the risk of the office is of immediate loss, and that of B. of deferred loss: that of the former is also continually lessening, and that of the latter increasing; until, should B. live long enough, both risks become certainties. If the insurance be only for a term of years, B. runs the risk of losing his premiums altogether;" *De Morgan on Probabilities*, 244.

*Insurable Interest*.—At common law, a man may insure his own life, or the life of any other, to any amount. But, in order to repress gambling and speculation on lives, the statute 14 Geo. III. c. 48, enacts as follows:—No insurance shall be made by any person on the life of any other person, or on any other event whatsoever, wherein the person for whose use or benefit, or on whose account, the policy shall be made, shall have no interest, or by way of gambling or wagering; and every insurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever; § 1. It shall not be lawful to make any policy on the life of any person, or other event, without inserting in such policy the name of the person interested therein, or for whose use and benefit, and on whose account, the policy is made; § 2. In all cases where the insured has interest in such life or event, no greater sum shall be recovered or received from the insurers than the amount or value of the interest of the

[insured in such life or event; § 3. But these provisions do not extend to insurances on ships, goods, or merchandises; § 4.

Under this act, a policy effected by a creditor on the life of his debtor was held to have fallen on payment of the debt, the creditor having no longer an interest in the life insured; *Godsall v. Boldero*, 1803, 9 East, 72. But this decision was overruled in *Dalby*, 1855, 15 C.B. 365, as proceeding on the erroneous principle that life insurance is a mere contract of indemnity; and it is now settled that both the validity of the insurance and the amount recoverable under the policy are to be judged by the interest which the insured had in the life at the time of effecting the insurance. See also *Law*, 1855, 1 K. & J. 233. If a person insure the same interest with several insurers, he cannot recover upon the whole more than the amount of his insurable interest; if, therefore, he has received the whole amount from one company, he has no claim against any other; *Hebden*, 1863, 3 B. & S. 579. Every man has an interest in his own life, insurable to an unlimited extent; and a wife has an insurable interest in the life of her husband; *Reed*, 1795, Peake's Add. Ca. 70. The interest of a husband in his wife's life is denied by most English writers (*Bunyon*, 14; *Porter*, 35; *Leake on Contracts*, 755, *contra*). But it was affirmed by Lord Moncreiff, in *Wight*, 27 Jan. 1849, 11 D. 459, 470; and it is assumed by the Income Tax Act (16 & 17 Vict. c. 34, § 54). Of course, when the husband has an interest in an annuity or other property dependent on the life of his wife, the question does not arise. In *Halford*, 1830, 10 B. & C. 724, an insurance effected by a father on the life of his son was held void under the statute; and this case seems to establish the general principle that the interest required is a pecuniary interest—relationship (apart from the case of spouses) not being sufficient *per se*. The statute, however, does not affect the validity of an insurance made by a father on his son's life, for the son's benefit; and the presumption of law would be that a policy opened in the son's name was intended to be for the son's benefit. In a case where a father insured his son's life, and where—the son having died, and the father having taken out administration to his estate—the insurance company paid the sum in the policy without questioning its validity, the father was held entitled to retain the money as against the son's creditors, the court

[being satisfied on the evidence that the father intended the policy to be for his own benefit; *Worthington*, 1875, 1 Ch. D. 419. In reference to the plea of want of insurable interest, which was urged in that case on behalf of the creditors against the father, Lord Justice Mellish observed:—"I agree that, even if the story told by the father is true as to the expense to which he had been put in his son's education, that gave him no such interest in his son's life as would support the policy; and I am therefore of opinion that the insurance company would have a good defence under the act, if an action had been brought against them on the policy. But although the company had sufficient knowledge of the circumstances to call their attention to the question, they acted as insurance companies usually do, and never attempted to set up this defence; and when administration to the son was taken out by the father, they paid the money without farther dispute to him. The question then is whether, the money having been so paid, it is part of the intestate's assets, or belongs to the father." The illegality of the insurance, under the act of Geo. III., was thus held to be a point which only the insurance company was entitled to plead. A creditor has an insurable interest in the life of his debtor, to the extent of the debt, if it be a fair and legitimate debt. When a creditor, having insured his debtor's life, debited him in account with the premiums, it was assumed that the policy was effected as a security for the debt, and on satisfaction thereof, it reverted to the debtor; *Drysdale*, 8 De G. M. & G. 546. See also *M. Queensberry*, 8 March 1842, 1 Bell's App. 183; *Lindsay*, 19 Feb. 1851, 13 D. 718; *Shand*, 31 May 1859, 21 D. 878. A contract for employment at a fixed salary for a certain term gives the employer an insurable interest in the life of the employer; *Hebden*, *supra*, 3 B. & S. 579. On the question, what amounts to insurable interest, see *Porter on Insurance*, 35 *et seq.*

*Married Women.*—The Married Women's Policies of Assurance Act (43 & 44 Vict. c. 26), extended to Scotland the facilities for effecting policies for the benefit of married women and children, which already existed in England, under 33 & 34 Vict. c. 93. By § 1 of the Scotch act, a married woman may effect a policy of assurance on her own life, or on the life of her husband, for her separate use; and the same and all benefit thereof, if expressed to be for her separate use, shall, immediately on being so effected,

[vest in her, and shall be payable to her, and her heirs, executors, and assignees, excluding the *jus mariti* and right of administration of her husband, and shall be assignable by her either *inter vivos* or *mortis causa*, without consent of her husband; and the contract in such policy shall be as valid and effectual as if made with an unmarried woman. By § 2, a policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children; and such policy, immediately on its being so effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy, or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control, or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency: And the receipt of such trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the assurance office: Provided always that if it shall be proved that the policy was effected and premiums thereon paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof. A policy effected under this section by a man on his own life for behoof of his wife may be surrendered at any time by the trustee who holds it, with concurrence of the wife; *Schumann*, 5 March 1886, 13 R. 678. A policy taken by a husband in favour of trustees for behoof of his wife and the children of the marriage does not confer a vested right on the beneficiaries without delivery, actual or constructive, of the policy; *Jarvie's Tr.* 28 Jan. 1887, 14 R. 411, contrasted with *Craig*, 17 July 1861, 4 Macq. 267. With regard to the respective rights of the spouses in policies of assurance, see *Marriage*.

*Non-disclosure.*—It has generally been laid down, in regard to life insurance



[as well as in regard to marine and fire insurance, that misrepresentation or non-disclosure of any material fact, though made without fraudulent intention, vitiates the policy. In the case of *Life Association v. Foster*, 31 Jan. 1873, 11 Macph. 351, Lord Pres. Inglis said:—"Concealment or non-disclosure of material facts by a person entering into a contract is, generally speaking, either fraudulent or innocent, and in the case of most contracts where parties are dealing at arm's-length, that which is not fraudulent is innocent. But contracts of insurance are in this, among other particulars, exceptional, that they require on both sides *uberrima fides*. Hence, without any fraudulent intent, and even *in bona fide*, the insured may fail in the duty of disclosure. His duty is carefully and diligently to review all the facts known to himself bearing on the risk proposed to the insurers, and to state every circumstance which any reasonable man might suppose could in any way influence the insurers in considering and deciding whether they will enter into the contract. Any negligence or want of fair consideration for the interests of the insurers on the part of the insured leading to the non-disclosure of material facts, though there be no dishonesty, may therefore constitute a failure in the duty of disclosure which will lead to the avoidance of the contract. The fact undisclosed may not have appeared to the insured at the time to be material, and yet if it turn out to be material, and in the opinion of a jury was a fact that a reasonable and cautious man proposing insurance would think material and proper to be disclosed, its non-disclosure will constitute such negligence on the part of the insured as to void the contract." The law, as here stated, is in agreement with all the older authorities, and does not appear to have been questioned until the decision of the English Exchequer Chamber in *Wheelton v. Hardisty*, 1858, 8 E. & B. 232, 27 L.J. Q.B. 241. The result of that decision is thus stated in *Leake on Contracts*, 416: "It seems to have been held at one time that insurance of life was subject to the same rule as insurance of shipping and other property, as to the representations upon which the assurance is made; and that misrepresentation or non-disclosure of a material fact, although not fraudulent, vitiated the contract. But it has been recently laid down in a Court of Appeal that in insurance of life, if it be intended that the representations of the insured shall be the basis of

[the contract, and a condition of its validity, it must be expressly provided to that effect in the policy; and that, in the absence of such provision, a misrepresentation or non-disclosure, unless it be also fraudulent, will not avoid the policy." See to the same effect *Pollock on Contract*, 490; *Crawley on Life Insurance*, 131. Other writers, however, do not concur with these in accepting the decision in *Wheelton* as overruling the earlier view of the law; see *Bunyon*, 39; *Porter*, 8; *Smith's Merc. Law*, 406; and especially *Anson on Contract*, 155. See also *London Assurance*, 1879, L.R. 11 Ch. D. 363.

*Warranty.—Declaration.*—In practice, it is usual for insurance companies to require a person making a proposal for insurance to subscribe a declaration relative to his age, health, and other circumstances; and this declaration is incorporated, expressly or by reference, in the policy, and is made the basis of the contract; a proviso being frequently added, to the effect that, if the declaration should contain any untrue statement, the policy should be void. The result of this is to make every statement in the declaration, whether material or not, a warranty or condition of the validity of the policy; *Anderson v. Fitzgerald*, 1853, 4 H.L. Ca. 484; *Standard Life Assurance Co.* 1 Aug. 1884, 11 R. (H.L.) 48. But the language of the contract must be interpreted "in the sense in which the agreement would be understood by a layman who was about to enter upon an insurance transaction" (*per* Lord Chief-Justice Cockburn, in *Fowkes*, 1863, 32 L.J. Q.B. 153); and ambiguous words are construed strictly *contra proferentem*. A statement that the person whose life is to be insured is in good health, or is free from disease, does not import a warranty against all latent and unknown disease; *Hutchison*, 21 Feb. 1845, 7 D. 467 (see this case commented on in *Standard Co. supra*). Several cases have turned on the meaning of the word "untrue" in the declaration. In *Life Association v. Foster*, *supra*, a statement which was untrue in point of fact, but not untrue in the knowledge of the party making it, was held not to infer breach of warranty. In other cases, however, it has been held to be a condition of the policy that the particulars of the declaration should be actually and literally true. See English cases cited in *Foster*, and commented on by Lord Deas; also *Macdonald*, 1874, L.R. 9 Q.B. 328, and *Standard Co. supra*. The question is one mainly of

[construction, depending on the context and on the nature of the contract in each case. In *Foster*, all the judges distinguished between an insurance effected by a person on his own life, and one effected on the life of another. Lord Pres. Inglis observed:—"In such cases (of insurance on another's life) it is held, on obvious principles of equity, that where one states as a matter of fact that which is not within his own knowledge, with a view to induce another to enter into a contract, he does so at his own peril. He is under no obligation or necessity to do so; and if he does not possess positive evidence of the fact, he should qualify his statement as being to the best of his belief. But if he states it without qualification, he is justly held to warrant the statement as consistent with fact. On the other hand, a person making a statement regarding his own health must be assumed generally to be speaking according to his own personal knowledge, and there are many facts regarding his health of which he cannot be ignorant, a misstatement of which would of course be fraudulent. But there may be many other facts, materially affecting his state of health and prospect of longevity, of which a person without medical skill or medical advice can know nothing. No doubt a contract of insurance may be so expressed as to make freedom from certain specified diseases, however latent, matter of warranty, but the contract will not so readily bear that construction in the case of a person insuring his own life and making statements as to his own health, as in the case of one who makes such statements respecting the health of another for the purpose of obtaining a policy of insurance upon the life of that other person. The latter has no personal knowledge of that of which he is speaking, and therefore speaks from information and evidence in his possession, not accessible to the other party, on which of course the other party relies implicitly when he states unqualifiedly what is its result and import. The former has much personal knowledge, and may fairly be presumed to speak from that personal knowledge only." This distinction is undoubtedly an important element in the construction of such words as *true* and *untrue*, as applied to a statement in regard to health. But it is not to be inferred from the Lord President's observations that, in the case of a party insuring the life of another, ambiguous statements in the declaration would in general be interpreted unfavourably for

[the declarant, any more than they would in the case of one insuring his own life. In neither case should the policy contain any "form of expression by which the party assured can be caught" (*per* Lord St Leonards, in *Anderson v. Fitzgerald*, *supra*); and if the insurance company, who frame the printed forms of proposal, intend to require a warranty, that intention must be plainly conveyed to the mind of the proposer. The recent tendency of insurance companies has been to contract on the footing that forfeiture shall not be incurred, unless the statements in the declaration are fraudulent as well as untrue.

The declaration, being the basis of the contract, is to be read as at the date of completing the policy; and any material change of circumstances since making the declaration must be communicated. Thus, when a party having declared that he was in good health, and given the name of his last medical attendant, subsequently, but before completing the policy, consulted another physician, from whom he learned that his health was precarious, non-disclosure of this fact was held fraudulent, and the policy was reduced; *British Equitable Ins. Co.* 1869, 38 L.J. Ch. 314. See also *Canning*, 1886, 16 Q.B.D. 727. Where one person insures the life of another, the party whose life is insured, if applied to for information, is not, in giving it, impliedly the agent of the party insuring: the latter, therefore, is not bound by his statements, and in the absence of any condition to that effect, or fraud on his own part, will not suffer should they be false; see *Wheelton*, *supra*, 8 E. & B. 232; *Huckman*, 3 M. & W. 505. When a declaration or form of proposal is filled up, on behalf of one intending to insure his life, by an agent of the insurance company, the latter acts as agent *pro hac vice* of the assured, who is therefore responsible for the statements made; see *Parsons*, 15 L.J. Ch. 379. Where a company published a prospectus stating that all insurances effected with them would be indisputable except in case of fraud, and an insurance was made on the faith of the prospectus; though the policy was made conditional on the truth of the declaration of the assured, yet it was held, on equitable grounds, that the company were precluded from challenging the policy on the ground of an unintentionally untrue statement in the declaration; *Wood*, 11 Exch. 493, 25 L.J. Exch. 129. An agreement that a policy should be indefeasible even in case of fraud would be void—if,



[indeed, it would not wholly invalidate the policy; see *Bunyon*, 89. When a policy is reduced on any ground not involving fraud, premiums already paid are, by the general rule of law, recoverable; but it is usual for companies to stipulate in the policy that, if it should become void by reason of any untrue statement or breach of warranty, the premiums paid shall be forfeited to the company. See Lord St Leonards, in *Anderson v. Fitzgerald*, *supra*.

**Forfeiture.**—It is a common stipulation, in policies effected by the insured on their own lives, that they shall be forfeited in the event of the assured dying by suicide, or by duelling, or by the hand of justice. But, except with regard to suicide by one insane, these conditions are superfluous, for the forfeiture is implied by law; see *Amicable Society*, 4 Bligh, 194; *Clift*, 3 C.B. 437; *Horn*, 30 L.J. Ch. 511. The stipulated forfeiture is now frequently restricted to the case of suicide within a limited period from the date of the policy; and it is generally made subject to the qualification that the policy shall remain in force to the extent of any *bona fide* interest a third party may have acquired in it. But assignment by operation of law (*e.g.*, under the Bankruptcy Act) does not come within such a proviso, and will not keep the policy alive for the benefit of creditors; *Moore*, 4 E. & B. 243; *Jackson*, 1 E. & E. 463.

**Premium.**—Payment of the stipulated premium is an invariable condition of the validity of the policy; but a certain number of days of grace are usually allowed for payment after the premium falls due. But where the policy was to continue provided *the assured* paid the premium within twenty-one days after it became due, and the assured died during the currency of the days of grace, without having paid, it was held that his executors had no right to pay the premium and keep up the policy; *Simpson*, 2 C.B.N.S. 295. See also *Pritchard*, 3 C.B.N.S. 642; *Phoenix Life Ass. Co.* 8 H.L. Ca. 745. When a policy lapses through non-payment of premium, it is not set up by subsequent receipt of the premium by the company's ordinary local agent; *Accey*, 7 M. & W. 151.

Policies of assurance do not bear interest, unless delay in payment of the sum assured is caused by the fault of the insurance company; *Webster*, 1880, 15 Ch. D. 169 (overruling *Crossley*, 4 Ch. D. 421).

**Stamp.**—Under the Stamp Act, 1870 (33 & 34 Vict. c. 97), a stamp duty, amounting (roughly) to 1s. for every £100

[insured, is payable in respect of policies of insurance. But this rate does not apply to payments agreed to be made upon the death of any person only from accident or violence, or otherwise than from a natural cause, on which the duty is only 1d. An ordinary policy is liable to be stamped as an agreement, not as a promissory note; *Mortgage Ins. Corporation*, 21 Q.B.D. 352. By § 117 of the Stamp Act, the term *policy* includes every writing whereby any contract of insurance is made, or agreed to be made, or evidenced. By § 118, a penalty of £20 is imposed on every person who receives, or takes credit for, any premium or consideration for any contract of insurance, and does not within one month thereafter, make out and execute a duly stamped policy of such insurance; or who makes or delivers, or pays or allows in account any money in respect of a policy which is not duly stamped. The duties must now, in every case, be denoted by impressed stamps, the use of adhesive stamps for this purpose being prohibited by § 44 of the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12).

**Assignment.**—In England, a policy assurance, being a *chose in action*, cannot at common law be assigned so as to give the assignee a right to sue upon it in his own name. But the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), which applies to the United Kingdom, enables assignees of life policies to sue in their own names; § 1. Written notice, however, of such assignment must first be given to the company at one of their principal places of business (which must be specified on every policy); the date on which the notice is received regulates the priority of all claims under an assignment; and a payment *bona fide* made by a company in respect of any policy before the date on which notice is received is as valid as if the act had not been passed; §§ 3, 4. On receiving such notice, and on payment of 5s., the company are bound to give an acknowledgment thereof, under the hand of one of their principal officers; § 6. Assignment may be made either by indorsement, or by a separate instrument, in form prescribed; § 5. Onerous assignees of a policy hold it subject to reduction on the same grounds on which it might have been challenged in the hands of the original grantee; *Scot. Widows' Fund v. Buist*, 14 July 1876, 3 R. 1078; 13 July 1877, 4 R. 1076, *affd.* 18 Feb. 1878, 5 R. (H.L.) 64. An assignment confers no right unless duly stamped; 51 Vict. c. 8, § 19.

[*Life Assurance Companies Acts.*—By the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), and the amendment acts of 1871 and 1872 (34 & 35 Vict. c. 58, and 35 & 36 Vict. c. 41), important provisions were enacted for the protection of shareholders and policyholders against fraud and recklessness in the management of insurance companies. By enforcing yearly publication of accounts, and periodical actuarial investigation, these enactments inaugurated a salutary system of state supervision, which, without undue interference with legitimate enterprise, has secured for the public the means of judging as to the position and financial soundness of any particular office. The main provisions are as follows:—By § 3 of the leading act, every company established after the passing of the act, is required to deposit the sum of £20,000 with the Accountant General of the Court of Chancery, to be invested by him, and returned so soon as the life assurance fund of the company, accumulated out of the premiums, shall have amounted to £40,000. See also 1871, § 1, and 1872, § 1. Under authority of the last of these, the Board of Trade have made rules in regard to the payment, repayment, and investment of such deposit, and the payment of the interest or dividends accruing in respect thereof. These rules are printed in *Buckley's Companies Acts*, 606. All companies transacting other business besides that of life assurance, are required to keep a separate account of all receipts in respect of the life assurance and annuity contracts of the company, which are to form a separate fund called the life assurance fund of the company; and this fund is as absolutely the security of the life policy and annuity holders as if it belonged to a company carrying on no other business than that of life assurance; 1870, § 4, amended by 1872, § 2. Every company is required to prepare an annual statement of its revenue account, and of its balance sheet at the close of its financial year, in form prescribed; 1870, § 5. Every company established after the act of 1870 is required once in every five years, and every older company once in every ten years (or at such shorter interval as may be prescribed by its constitution or regulations), to cause an investigation to be made into its financial condition by an actuary, and to make an abstract of his report, in form prescribed; § 7. Within nine months after each such investigation, every company is required to prepare a

[statement of its life assurance and annuity business, in form prescribed; § 8. All such statements or abstracts, required as above, must be signed by the chairman and two directors of the company, and by the principal officer managing the life assurance business; and must be printed and deposited with the Board of Trade, and by them laid before Parliament; 1870, §§ 10, 24; 1872, § 3. By 1870, §§ 11–13, provision is made for the furnishing to shareholders or policyholders, on application, copies of statements, &c., deposited under the above provisions, lists of shareholders, and deeds of settlement. The amalgamation of companies, and the transfer of the life assurance business of one company to another, are regulated by §§ 14–15. Such amalgamation or transfer can only be effected under sanction of the Court of Session, and may be prevented by the dissent of one-tenth in value of the policyholders (including, by § 2, annuitants). Certified statements of the assets and liabilities of companies concerned, and of the nature and terms of the arrangement made, must be deposited with the Board of Trade. Default in complying with these requirements renders the company liable in a penalty of £50 for every day; and if it continue for three months after notice of default by the Board of Trade, the court may order the winding-up of the company, on the application of any policyholder or shareholder; § 18. The court may, under certain regulations, order the winding-up of a company, on the application of any policyholder or shareholder, on insolvency being proved; account being taken of its contingent or prospective liability under policies and annuity and other existing contracts; § 21. Or the court may reduce the amount of the company's contracts, in place of making a winding-up order; § 22. See *Great Brit. Mutual Society*, 1882, 20 Ch. D. 351. Where the business of one company has been transferred to another, the winding-up of the subsidiary company is ancillary to that of the principal company; 1872, § 4. By § 5, a rule is prescribed for valuation of annuities and policies, in a winding-up. By § 7, in case of a transfer or amalgamation, no policyholder in the transferor company is deemed, by reason of payment of premiums to the transferee company, or any other act, to have abandoned any claim which he would have had against the transferor company on the due payment of premiums to it, or to have accepted in lieu thereof the



[liability of the transferee company, unless such abandonment and acceptance have been signified by writing signed by him or his authorised agent. See *Novation*. See these statutes annotated in *Buckley's Companies Acts*, 580; *Thring's Joint Stock Companies*, 600. By the Companies Act, 1862 (25 & 26 Vict. c. 89, § 44), every insurance company under that act is required, before commencing business, and also on the first Monday in February and the first Monday in August in every year during which it carries on business, to make a statement of assets and liabilities, in form prescribed; a copy of which must be put up in a conspicuous place in the registered office and in every branch office of the company; and in case of default, a penalty of £5, for every day, is imposed both on the company and on every director and manager who is cognisant of such default.

*Proprietary or Mutual.*—Insurance offices may be said generally to be either *proprietary* or *mutual*. The former are joint stock companies, with subscribed capital, trading in life assurance, and dividing the profits among the proprietors. In mutual offices, there is no proprietary body, and no share capital; each member depends for his insurance upon the premiums contributed by all the members; and the whole profits are divided among the insured. Few offices, however, are either purely proprietary, or purely mutual; for almost every proprietary company issues policies on the footing of participation, to a certain extent, in the profits; and almost all the mutual offices issue non-participating policies.

*Liability of Policyholders.*—In the event of failure of an insurance company, questions have arisen as to the personal liability of policyholders for the debts of the company. Where the company is incorporated, individual liability is, of course, entirely absent, except (in the case of proprietary companies) to the extent of the uncalled-up capital. See *Joint Stock Companies*. In the case of unincorporated companies, it was at one time supposed that participating policyholders were necessarily partners, and liable for the company's debts. But this view was corrected by the decision of the House of Lords in *Cox v. Hickman*, 1860, 8 H.L. Ca. 268, which settled that persons who share the profits of a business do not incur the liabilities of partners, unless the business is carried on by themselves personally or by others as their real or ostensible agents.

[See *Partnership*. This principle was applied to the case of a proprietary insurance company in *Eng. & Ir. Church & Univ. Ins. Society*, 1863, 1 Hem. & M. 85, where it was held that participating policyholders were not liable as partners, either to the other policyholders, or to the general creditors of the company, and that participating and non-participating policyholders were equally entitled to rank *pari passu* with the general creditors in the distribution of assets. With regard to mutual insurance companies, the abstract question of the liability of participating policyholders cannot often arise; for—besides the fact that most mutual offices are incorporated—a special clause is usually inserted in their policies, providing that the funds of the society shall alone be liable in respect thereof; and this clause is an effectual protection, in respect, at least, of all claims by other policyholders or creditors who contracted on the same footing; see Companies Act, 1862, § 38 (6); *Lethbridge*, 1872, L.R. 13 Eq. 547; *Accidental Death Ins. Co.* 1878, 7 Ch. D. 568. Apart from such special grounds of protection, the precise position of policyholders in mutual offices does not appear to have been judicially determined; but the observations of the judges of the Court of Appeal, in the winding-up of the Albion Company, throw light on the subject. Under the special terms of the articles of that company, it was held that the participating policyholders were members and contributories; *Winstone's Case*, 1879, 12 Ch. D. 239; but that they could not be called upon to contribute, until the shareholders had been exhausted; *Albion Life Assurance Society*, 1880, 16 Ch. D. 83. In that case, after alluding to the periodical bonus payable to policyholders, the Master of the Rolls (Jessel) observed:—"If there had been nothing more in the articles, I should have thought there was no partnership at all between the policyholders and the shareholders. Although the bonus was declared in proportion to the profits, it was not really a payment out of the profits: it was in fact a return of the excess of the premiums paid above the amount necessary to secure the policies; and even if it had been more clearly a share of the profits, since the decision of the House of Lords in *Cox v. Hickman*, it does not follow that people are partners merely because they have a share in the profits in an indirect way." The ground on which the policyholders were held liable was that, under

[their particular contract, they had agreed to become members of the company.

As to the extent of an insurance company's liability to pay income tax, see *Scottish Union and National Ins. Co.*, 8 Feb. 1889, 16 R. 461, and other cases, the import of which is stated in the article *Property and Income Tax*.

On the subject of life insurance, see treatises by *Bunyon*, *Crawley*, and *Porter* (English); *Bliss* and *May* (American); also *Bell's Com.* i. 675; *Bell's Princ.* § 518; *Smith's Merc. Law*, 400; *Addison on Contracts*, 739; *Lindley on Company Law*, 634, 643; *Smith's L.C.* ii. 286; *Park on Insurance*, ii. 905.

#### [IV. ACCIDENT AND GUARANTEE INSURANCE.

Accident insurance is a contract of similar nature to life insurance, and is generally governed by the same principles of law. The act 14 Geo. III. c. 48, requiring insurable interest (*supra*, p. 566 a), applies to accident insurance; *Shilling*, 1 F. & F. 116, 2 H. & N. 42. The insurance may either be for life, or for a certain time, or for a particular journey; and it generally secures a gross sum in the event of death by accident, and a weekly allowance in the event of disablement. Different conditions and limitations are attached by different offices to the insurance; and accidents occurring during intoxication, or caused by voluntary exposure to peril, or by breach of the law, are usually excepted from the risk. In general, the insurance does not cover loss of time or profit, but only compensates for expense, pain, and loss immediately connected with the accident; *Theobald*, 23 L.J. Ex. 249; and it applies only to accidents arising from material and external causes. See *Trew*, 6 H. & N. 839; *Fitton*, 17 C.B.N.S. 122; *Sinclair*, 30 L.J. Q.B. 77; *Smith*, L.R. 5 Ex. 302; *Winspear*, 6 Q.B.D. 42; *Lawrence*, 7 Q.B.D. 216. Insurance against railway accident is commonly effected by a ticket purchased at the station; see the *Railway Passengers Assurance Company's Act* (27 & 28 Vict. c. cxxv.). See recent cases on construction of accident policies, *Morrison*, 14 Dec. 1888, 16 R. 212; *Scott*, 19 March 1889, 16 R. 630. See *Porter on Insurance*, 445; *Bunyon on Life Insurance*, 100; *Crawley*, 140; *Bliss*, 702; *May*, 780; *Addison on Contracts*, 748; *Journ. of Jurisp.* xxiv. 645. As to guarantee insurance, see *Porter*, 465; *Bunyon*, 107; *May*, 828.]

**INTENDMENT**; the understanding, intention, and true meaning of law. Also, the true meaning of parties contracting, as distinguished from the literal interpretation of the words employed. *Tomlins' Dict. h. t.*

**INTERCOMMUNING, LETTERS OF.** Letters of intercommuning were letters from the Scotch Privy Council passing (on their act) in the King's name, charging all and sundry the lieges not to reset, supply, or intercommune with the persons thereby denounced; not to furnish them with meat, drink, house, harbour or any other thing useful or comfortable; nor to have intercourse with them by word or writing, or otherwise, under pain of being reputed art and part in their crimes, and dealt with accordingly; desiring all sheriffs, bailies, &c., to apprehend and commit such rebels to prison. See *Nimmo's Hist. of Stirling* (1817), ii. 426; [*Kames' Elucidations*, 418.]

**INTERDICT**; is an order of the Court of Session, or of an inferior court, pronounced, on cause shown, for stopping any act or proceedings complained of as illegal or wrongful. The interdict is obtained in the Court of Session on presenting what is termed a [note] of suspension and interdict to the Lord Ordinary on the Bills. It may be resorted to as a remedy against all encroachments either on property or possession; and is a protection against any unlawful proceeding. [The note prays for suspension and interdict, either with or without caution, as the case may be. A form is given in *Shand's Prac.* ii. 1059. There must be annexed an articulate statement of the facts on which the complaint is founded, together with a note of pleas in law; 1 & 2 Vict. c. 86, § 6. The note] is presented in the Bill-Chamber; and, if a *prima facie* case be made out, the Lord Ordinary on the Bills will immediately grant an *interim* interdict, and order the [note] to be answered. When the answers are lodged, the Lord Ordinary on the Bills resumes consideration of the case, and either passes the [note] and continues the interdict, or refuses it and recalls the interdict, as justice may require, [his interlocutor being subject to the review of the court. The procedure is for the most part similar to that in suspensions. See *Suspension*. By § 89 of the Court of Session Act, 1868, "where a respondent in any application or proceeding in the Bill-Chamber, whether before or after the institution of such proceeding or application, shall have done any act which the court in the exercise of its



[preventive jurisdiction might have prohibited by interdict, it shall be lawful for the said court, or for the Lord Ordinary on the Bills, upon a prayer to that effect, in the note of suspension and interdict, or in a supplementary note, to ordain such respondent to perform any act which may be necessary for reinstating the complainer in his possessory right, or for granting specific relief against the illegal act complained of."'] In the course of the proceedings, the propriety of granting an interdict will be discussed. But the decision on that point is quite distinct from the question of right; and an interdict may be granted in consequence of previous possession, though there be no ground to support an ultimate decision in favour of such possession. It is necessary, however, that the party applying should have both title and interest to apply for an interdict. [He must satisfy the court that a wrong has been either done or threatened to be done by the party against whom he applies; *Weir*, 7 April 1834, 7 W. & S. 244; and the wrong must be an appreciable one; *Winans*, 3 June 1885, 12 R. 1051.] When a [note] of suspension and interdict is passed, and a declaratory action also brought into court, the action of suspension and interdict and the declaratory action may be conjoined, and the right in dispute settled in the course of the conjoined action. In the inferior courts, the procedure is analogous, only that, instead of a [note] of suspension and interdict, the process commences by a summary petition to the inferior judge. See *Ersk. B. iv. tit. 1, § 47; tit. 3, § 20; Bank. ii. 619; Bell's Com. i. 120; [Shand's Prac. i. 460; M'Glashan's Sher. Court Prac. 410; Mackay's Prac. ii. 210; Rankine on Land-Ownership, 12; Jurid. Styles, iii. 458.]* See *Injunction*.

**INTERDICTION**; is a system of judicial, or of voluntary restraint, provided for those who, from weakness, facility, or profusion, are liable to imposition. It is directed at the sight of the judge, on proper evidence of the facility of the party, or voluntarily imposed by the party himself. Hence the distinction into voluntary and judicial interdiction. *Voluntary interdiction* is imposed by the sole act of the interdicted person, who, being conscious of his facility, lays himself under this restraint. This interdiction is usually executed in the form of a bond, whereby the granter obliges himself to do no deed which may affect his estate, without the consent of certain persons therein named, technically called interdictors. But although this is a

voluntary restraint, it cannot be recalled at the pleasure of the person who has laid himself under it. It may be removed, however, 1. By a sentence of the Court of Session, either on the ground that it was originally unnecessary, or that the interdicted person has, since the date of the bond, become *rei sue providus*. 2. Without judicial interference, it may be removed by the joint act of the interdictors and the interdicted person. 3. Where a quorum of interdictors is named, the restraint ceases, if by death, or otherwise, the number of interdictors is reduced below the quorum. *Judicial interdiction* is imposed by sentence of the Court of Session; generally proceeding on an action at the instance of a near kinsman of the facile person; but sometimes *ex nobili officio* of the court, where, during the dependence of a suit, they discover that any of the litigants, by reason of natural infirmity, is subject to imposition. Judicial interdiction cannot be recalled but by the authority of the Court of Session, by whom it was imposed. The sentence of the court, recalling the interdiction, affords security to those afterwards contracting with the interdicted person, even although evidence should be brought that he still continues profuse. An interdiction need not be served against the interdicted person. It was [formerly] executed or published by a messenger-at-arms at the market-cross of the jurisdiction within which the prodigal resided, by publicly reading the interdiction there, after three *oyesses*. A copy of the messenger's execution was affixed to the cross; and thereafter the interdiction and execution were registered in the books both of the jurisdiction within which the interdicted person resided, and of that within which his lands lay, within forty days after the publication; 1581, c. 119; 1597, c. 264; or the interdiction might be recorded in the general register at Edinburgh; 1600, c. 13. [But, by 31 & 32 Vict. c. 64, § 16, the local registers of interdictions were abolished, and no publication of the interdiction is now necessary, otherwise than by registration in the General Register of Inhibitions.] Before such registration, the interdiction has no effect against third parties, although they should be in the private knowledge of it; but it operates against the interdictors themselves, as soon as it is delivered to them. All deeds done by the interdicted person, after interdiction thus duly completed, without the consent of the interdictors, and affecting his heritable estate, are reducible. Inter-

diction imposes no restraint on the interdicted person's management of his moveable property, of which he may dispose not only by testament, but by deeds of present alienation. Hence creditors in personal bonds, granted after interdiction, may use execution against the debtor's person, and against his moveable estate; such bonds being reducible only in so far as diligence against the heritable estate may have proceeded upon them. Onerous or rational deeds, granted by the interdicted person, are effectual without the consent of the interdictors. [According to Erskine,] he cannot alter the succession of his heritable estate by any settlement, however rational; [but it has since been held that interdiction does not apply to deeds of mere succession; *Mansfield*, 26 June 1841, 3 D. 1103.] Deeds granted with consent of the interdictors are not reducible, although lesion or prejudice to the interdicted person should be proved. In such a case the only remedy is an action against the interdictors for indemnification of the loss occasioned by their undue consent. [But an interdictor can take no benefit from a deed to which he has given his consent, without proof that the transaction is rational, or beneficial to the interdicted person; *Rankin*, 19 Nov. 1868, 7 Macph. 126.] The interdictors have no concern in the management of the interdicted person's estate, or in the receipt of his money; their duty is confined merely to interposing their authority to reasonable deeds; and hence they are accountable for nothing but fraud or fault in giving their consent. Where a deed has been granted by the interdicted person, which is liable to reduction on the head of interdiction, an action of reduction, *ex capite interdictionis*, may be brought not only by the heirs of the interdicted person, and by the interdictors, but by the interdicted person himself. See *Ersk.* B. i. tit. 7, § 53; *Stair*, B. i. tit. 6, § 28; B. iv. tit. 20, § 30; *Bank.* i. 191; *Bell's Com.* i. 134; *Bell's Princ.* § 2123; [*Fraser on Parent and Child*, 554; *Jurid. Styles*, iii. 72, 293.] See *Facility*. [*Insanity*.]

**INTEREST** (*as a Qualification or Disqualification*). In order to entitle a party to institute an action in a court of law, he must have a title, and also a proper interest in the issue, for if he can derive no benefit from the result, the action will not be sustained; the presumption being, "that it is calculated to distress the defendant, *in æmulationem vicini*"; *Kames' Equity*, 37. [This rule is illustrated by the cases to

[which the maxim applies—*Frustra petis quod mox es restitutus*; *Burke*, 27 March 1865, 3 Macph. 799; *Ker's Trs.* 7 Nov. 1866, 5 Macph. 4.] Such cases are necessarily of rare occurrence; but it is a question frequently tried, whether a person has sufficient interest to sist himself as a pursuer or defender, in a cause to which he has not been specially summoned. Where an action is raised against a party, who, if unsuccessful in his defence, will have a claim of relief against another, the party liable in relief may appear and defend the action. One may appear and defend his author's title, where an action has been raised for setting it aside. A landlord having interest may sist himself as defender in an action raised against his tenant. In actions of competition, such as multiplepoindings, ranking and sale, &c., a party, though not cited, may appear and compete, and crave a preference. In some cases, the interest has not been held sufficient to make it competent for a party to sist himself. Thus, one cannot appear and defend an action raised against another for payment of a sum contained in a document of debt, on the ground that he has the preferable right to the debt. Nor can the debtor, in an action of maills and duties, object to decree passing against his tenants who have not entered appearance. [See *Kames' Elucidations*, 213; *Shand's Prac.* i. 139, 489; *Mackay's Prac.* i. 279, 496. All policies of insurance, whether marine, fire, or life, are invalid unless the insurer has an interest in the subject insured; 19 Geo. II. c. 37; 14 Geo. III. c. 48. See *Insurance*.] Interest in the cause is a ground of declination of a judge. See *Declination*. [Interest was formerly a ground of exclusion of a witness; but it is now no disqualification; 15 & 16 Vict. c. 27, § 1. See *Evidence*.]

**INTEREST OF MONEY**; may be defined to be the creditor's share of the profit which the borrower or the debtor is presumed to make from the use of the money. The prohibition in the law of Moses to take interest had operated so powerfully with the clergy, that by the canon law it was prohibited, and the taking of interest was regarded as criminal. This led to various devices, such as the introduction of wadsets and of annualrent rights; until at last, on the wider diffusion of commercial notions, the taking a certain rate of interest was made lawful. See *Bond*. [*Annualrent*. *Wadset*.] After the Reformation there was no restraint on the amount of interest, when by 1587, c. 52,



the rate of interest was regulated, and was then fixed at 10 per cent. From that time it gradually fell, till by 12. Anne, stat. 2, c. 16, it was reduced to 5 per cent. [All laws against usury were repealed by 17 & 18 Vict. c. 90, and it is now lawful to stipulate for any rate of interest, except in pawnbroking transactions. But in the absence of special stipulation, 5 per cent. is still "legal interest."]

Interest is due *ex lege* or *ex pacto*. It is due *ex lege*, or by the act of the law itself: 1. By statute, as in the case of bills of exchange, inland bills and promissory notes, which by 1681, c. 20, 1696, c. 36, 12 Geo. III. c. 72, bear interest from their date, in case of non-acceptance, or from the day they fall due, in case of non-acceptance or non-payment. Interest is due on the whole sum contained in a horning, interest as well as principal, accumulated into a principal sum from the day of denunciation, if made at the head burgh of the debtor's residence; 1621, c. 20. [By 1 & 2 Vict. c. 114, § 10, the registration of the execution of an expired charge accumulates the debt and interest into a capital sum whereon interest runs, in the same way as denunciation on letters of horning; and by 19 & 20 Vict. c. 91, § 4, an adjudication and a decree in a ranking and sale have the same effect.] Sums paid by cautioners on distress bear interest by A.S. 21 Dec. 1590. [Judicial factors, tutors at law, and similar guardians, are bound to lay out and accumulate annually the funds under their management; 12 & 13 Vict. c. 51, §§ 4, 5; and every bank in which any judicial factor, tutor, or curator has lodged money, is bound to accumulate interest and principal at least once in every year; *ib.* § 37.] 2. Interest is also due *ex lege*, [from the nature of the transaction.] Thus it is due on the price in a sale of lands, from the time at which the purchaser gets right to the rents, and that from whatever cause the delay to pay the price may have originated. Where one receives money belonging to another, which formerly bore interest, he is liable for interest on the sum received; or, when money is paid at the desire of one, he must be liable for the interest of the money advanced at his desire. [See *Cunninghame*, 29 May 1868, 6 Macph. 890; *Blair's Trs.* 8 Nov. 1884, 12 R. 104. In general, when a debt becomes due, whether by statute or by contract, interest begins to run as soon as payment is demanded, whether judicially or extrajudicially. In a case relating to

[arrears of poor-rates, the rate allowed was  $2\frac{1}{2}$  per cent.; *Greig*, 12 March 1879, 6 R. 801.] Merchants are entitled to interest on the price of goods sold by them, where the payment is beyond the usual credit of the trade. [It is not settled at what point of time interest begins to run on a tradesman's account; *Cardno*, 9 July 1869, 7 Macph. 1026; *Guthrie's Sher. Court Cases*, 227 *et seq.*; *Blair's Trs. supra*. In the last-mentioned case the opinion was expressed, with reference to a law-agent's professional charges, that "no interest ought to be allowed on such claims on open account except when there is a judicial demand, or some such intimation given in writing as that interest will be claimed from the date of the demand" (*per Lord Fraser*).] Interest is not due on feu-duties [or ground-annuals] *ex lege*; it requires express stipulation; *Napier*, 31 May 1831, 9 S. 655; [*Moncrieff*, 24 Nov. 1835, 13 S. 61; *M. Tweeddale*, 2 March 1842, 4 D. 862; *M. Tweeddale's Trs.* 25 Feb. 1880, 7 R. 620. As to arrears of teinds, see *Drummond*, 7 Dec. 1842, 5 D. 277; *Css. Cromertie*, 14 July 1871, 9 Macph. 988. A legacy, in the ordinary case, carries interest at the rate of 5 per cent. from the death of the testator; *Kirkpatrick*, 15 Nov. 1878, 6 R. (H.L.) 4. Policies of insurance do not bear interest, unless delay in payment of the sum assured is caused by the fault of the insurer; *Webster*, 15 Ch. D. 169 (overruling *Crossley*, 4 Ch. D. 421). Interest is also due by paction; either express, as where the ground of debt bears a clause of interest; or implied, as where a person becomes bound for interest on a sum for the time past, which presumes an obligation for the time to come.] By 48 Geo. III. c. 151, § 19, the House of Lords is empowered, upon hearing appeals from Scotland, to adjudge the payment of compound interest upon the sums found due, if the House thinks meet so to do. [As to accumulation of principal and interest of a debt sued for, see *M'Neill*, 26 May 1826, 4 W. & S., 455; *Napier*, 3 Oct. 1831, 5 W. & S. 745; *Maclean*, 15 Feb. 1856, 18 D. 609.] See *Ersk.* B. iii. tit. 3, § 75; *Stair*, B. i. tit. 17, § 16; *More's Notes*, lxxviii.; *Bank.* i. 436; *Bell's Com.* i. 690; *Bell's Princ.* § 32; *Ross's Lect.* i. 3, 4, 5; ii. 379; [*M. Bell's Conv.* i. 256, 264; *Mackay's Prac.* i. 381 (with addendum in ii. 606).]

**INTERIM DECREE**; is a decree disposing of part of a cause, but leaving the remainder unexhausted. The most ordinary

examples of such decrees occur in cases of accounting, or in actions concluding for a certain sum, where the defender admits so much to be due, but disputes the balance. In these, and similar cases, it is competent to the pursuer to apply for an interim decree to the amount of the admitted or indisputable balance. [This may be done before, as well as after, closing the record; *Connacher*, 9 Dec. 1857, 20 D. 252. An interim decree of interdict differs from other interim decrees, in not finally disposing of any part of the cause, but only regulating the interim possession. When money has been paid or recovered in implement of an interim decree, the court, in any interlocutor recalling or altering such decree, may order repayment, or pronounce such warrant *ad factum præstandum* or other order as may be necessary, although the Lord Ordinary's interlocutor has been extracted and put to execution; 31 & 32 Vict. c. 100, § 57. See *Mackay's Prac.* i. 582. See *Decree. Aliment. Possession. Interdict*. As to extract of interim decree, see *Extract*.]

**INTERIM EXECUTION**, *pending an Appeal*. The presentment and intimation of a petition of appeal to the House of Lords, and warrant of service, suspends execution of a decree of the Court of Session. But, by 48 Geo. III. c. 151, § 17, "when any appeal is lodged in the House of Lords, a copy of the petition of appeal shall be laid by the respondent or respondents before the judges of the Division to which the cause belongs, and the said Division, or any four of the judges thereof, shall have power to regulate all matters relative to interim possession or execution, and payment of costs and expenses already incurred, according to their sound discretion, having a just regard to the interests of the parties, as they may be affected by the affirmation or reversal of the judgment or decree appealed from." Under this statutory provision, the practice is, for the respondent in the appeal who wishes to have interim execution pending the appeal, to present a summary petition to the Division of the court to which the cause belongs, to which petition a copy of the petition of appeal is appended; and the prayer of the petition for interim execution is, that the court may allow the decree of the Court of Session appealed against to go out and be extracted in name of the petitioners, and execution to proceed thereon, notwithstanding the appeal, with the expense of extract, upon caution to repeat what may

be paid under the decree, in the event of the decree being reversed in the House of Lords. This petition is intimated by delivering copies to the agent of the appellant in the Court of Session, and in the ordinary case the prayer of it is granted; [*Cochrane*, 11 Dec. 1849, 12 D. 302. As to caution for repetition, see *Ross*, 7 Dec. 1847, 10 D. 222; *A.B.*, 6 July 1884, 11 R. 1060. The quorum of four judges is a statutory requisite; but the number may be made up by calling in an Outer House judge; *Paterson's Trs.* 5 July 1828, 6 S. 1086; *Campbell*, 17 Nov. 1854, 17 D. 61. In a petition by a landlord for execution pending appeal against a decree of removing, the court ordained the tenant, as a condition of his remaining in possession, to consign rents due; *D. Hamilton*, 25 Jan. 1878, 5 R. 588. The effect of service of an appeal to the House of Lords, in stopping the currency of a charge on the decree appealed against, is removed on the court granting warrant for interim execution of the decree, and a new charge is not necessary; *Clark*, 16 May 1885, 12 R. 939. See *Ersk.* B. iv. tit. 3, § 2; *Mackay's Prac.* ii. 428; *Macqueen's Appellate Jurisdiction*, 321; *Denison & Scott's Appeal Prac.* 76. See *Appeal to House of Lords*.]

**INTERIM POSSESSION**. [See *Possession. Sheriff. Appeal to Court of Session. Interim Execution. Interdict*.]

**INTERLINEATIONS**. The subscription at the bottom of the page of a formal writ does not apply to the interlineations in that page. Such interlineations, when of no importance, are held *pro non scriptis*, and as if they were blank. [They are effectual, however, when signed by the party, and mentioned in the testing clause.] See *Stair*, B. iv. tit. 42, § 19; *More's Notes*, cccviii.; *Ross's Lect.* i. 143; [*Ersk.* B. iii. tit. 2, § 20; *Menzies' Conv.* 127; *M. Bell's Conv.* i. 68; *Dickson on Evidence*, § 738.] See *Erasures. Testing Clause*.

**INTERLOCUTORS**; correctly speaking, are judgments or judicial orders pronounced in the course of a suit, but which do not finally determine the cause. The term, however, in Scotch practice, is applied indiscriminately to the judgments or orders of the court, or of the Lords Ordinary, whether they exhaust the question at issue or not. All interlocutors pronounced by Lords Ordinary must be signed by the judge pronouncer; and interlocutors of either Division of the court must be signed by the presiding judge in presence of a quorum of the court; *I.P.D.*, for *In*



*Præsentia Dominorum*, being added to the presiding judge's signature; 1693, c. 18. [See *Smith*, 26 Nov. 1846, 9 D. 190.] Every paper given in to process in the Inner or Outer House, in terms of an interlocutor ordering or allowing the same to be given in, and also every reclaiming note, must have prefixed thereto a full copy (including the date) of the interlocutor ordering or allowing such paper, or of the interlocutor complained of, as the case may be; [A.S. 11 July 1828, § 110.] Every interlocutor of the Lord Ordinary is final in the Outer House, subject, however, to the review of the Inner House; 6 Geo. IV. c. 120, § 17. The Lord Ordinary may, with consent of both parties, correct or alter any interlocutor at any time before extract, provided that consent be given by the counsel for the parties in a minute signed by them; A.S. 11 July 1828, § 63. [The Inner House has the power to correct errors which are merely clerical, if applied to shortly after the judgment has been signed; *Gray*, 22 Nov. 1839, 2 D. 128; *Ritchie*, 16 Nov. 1849, 12 D. 119; *White*, 13 May 1873, 11 Macph. 602. In *Harvey*, 20 July 1875, 2 R. 980, an interlocutor pronounced and signed under error in fact, induced by the parties, was cancelled by the First Division. But in general no substantial alteration will be made, after the opinions of the judges have been delivered; *Cuthill*, 20 March 1862, 24 D. 849; *Hard*, 14 Nov. 1862, 1 Macph. 14. A sheriff may correct any merely clerical error in his judgment, at any time before the proceedings have been transmitted to the court of review, not being later than seven days after the date of the judgment; 16 & 17 Vict. c. 80, § 20. By § 47 of the same act, sheriffs were empowered to pronounce and sign interlocutors, when furth of their sheriffdoms; but, by 39 & 40 Vict. c. 70, § 50, such interlocutors shall bear date at the seat of the court as of the day on which they are received there by the sheriff-clerk, and entered by him in the books of court. By 31 & 32 Vict. c. 100, § 94, interlocutors may be signed by the Lords Ordinary during vacation; *Grant Suttie's Tutors*, 16 Oct. 1883, 11 R. 3. See *Ersk.* B. iv. tit. 2, § 40; *Bank.* ii. 675; *Dickson on Evidence*, § 1286; *Shand's Prac.* i. 346; *Mackay's Prac.* i. 581, 599; *McGlashan's Sher. Court Prac.* 336; *Dove Wilson's Sher. Court Prac.* 191. See *Reclaiming Note. Decree. Interlocutory Judgment. Final Judgment.*]

**INTERLOCUTORY JUDGMENT.** As contradistinguished from a final judgment, an interlocutory judgment is any judicial order or interlocutor pronounced in the preparation or disposal of a cause, whether in the Court of Session or in an inferior court, which is not decisive of the whole merits of the suit. An appeal to the House of Lords is not competent against an interlocutory judgment of the Court of Session, except with the leave of the Division pronouncing it, or unless there has been difference of opinion among the judges; 48 Geo. III. c. 151, § 15. [Interlocutory decrees in the Outer House, except those by which the mode of proof is settled, can be reclaimed against only with leave of the Lord Ordinary; 31 & 32 Vict. c. 100, §§ 28, 54. The case of appeal from the sheriff court to the Court of Session against interlocutory judgments is regulated by 16 & 17 Vict. c. 80, § 24; and the case of appeal from the sheriff-substitute to the sheriff, by 39 & 40 Vict. c. 70, § 27. See *Mackay's Prac.* i. 582. See *Appeal. Reclaiming Note. Interlocutor.*]

**INTERNATIONAL LAW.** The term *law of nations*, among the Romans, had a somewhat different signification from that which it bears in modern times. It comprehended all those laws and customs which are so reasonable in themselves, as to be embraced by all civilised nations, modified by the particular constitution of each individual state. But the division of modern Europe into a number of independent kingdoms, and the frequent intercourse maintained between them, has given birth to a system of express or tacit rules, scarcely, if at all, known among the Romans, and termed the law of nations, or international law. This law considers independent nations as so many political persons in a state of equality, and owing to each other duties similar to those which individuals reciprocally owe. By it are constituted the rights of war, the security of ambassadors, the obligations arising from treaties, and the like. It also comprehends those rules generally received by sovereign powers for fixing the order of their mutual correspondence during war and peace; such as the form of declaring war previous to any acts of hostility, the regulations relating to reprisals, to contraband goods found on board neutral ships, to the exchange of prisoners, and to suspensions of arms or negotiations of peace, the ceremonial of receiving and entertaining ambassadors, the privileges indulged to their servants and

domestics, &c. Recent legal authors have also considered under this head questions relative to the conflict of laws; to what is called *comitas*; to the effect given in one country to the law of another; the constitution, evidence, interpretation, and dissolution of foreign contracts; the force of foreign awards; the laws of succession to foreign heritage or moveables; the mutual relation between the bankrupt laws of different countries, and so forth. See *Inst. of Justinian*, lib. i. tit. 2, and *Commentators*; *Grotius de Jure Belli ac Pacis*; *Mackintosh's Discourse on the Law of Nature and Nations*; *Stair*, B. i. tit. 1, §§ 11 and 16; *More's Notes*, i. *et seq.*; *Ersk.* B. i. tit. 1, § 14; *Bank.* i. 9; [and treatises, on public international law, by *Phillimore*, *Kent*, *Wheaton*, *Twiss*, *Hall*, and *Lorimer*; and on private international law, by *Savigny*, *Story*, *Wharton*, and *Westlake*.] See *Foreign*.

**[INTERPLEADER.** In English law, when two or more persons claim the same thing of a third, and he, laying no claim to it himself, is ignorant which of them has a right to it, and fears he may be prejudiced by their proceeding against him to recover it, he may make them litigate their title between themselves instead of litigating it with him, *i.e.*, cause them to *interplead*. *Brown's Law Dict.* The corresponding procedure in Scotland is by action of multipoleinding.]

**INTERPRETATION.** It is scarcely possible to express laws in such terms as to avoid all ambiguity. Such a degree of precision is perhaps unattainable; and the want of a clear and distinct idea of the object, or of views sufficiently comprehensive, or the defect of language, will constantly either encumber the regulation, or leave some parts of the rule to be inferred. Even in the framing of private deeds (which properly form the law of the transaction, for the regulation of which they are provided), the same inaccuracy prevails; and, circumscribed as the object is, the provisions of the deed will be found in many cases to have fallen short of, or to have misrepresented the views and intentions of the parties. Hence, rules of interpretation are required, which may insure just and uniform decisions. The rules for interpreting a statute have been laid down by Mr Erskine; and every deed which receives the decision of a court has rules of interpretation peculiar to itself, drawn from the general scope and intention of the deed; from the nature of the transaction; from

the legal rights of the parties, independently of agreement; and from circumstances which it is impossible to particularise, but which render this one of the most important studies of the lawyer, and in a particular manner of the conveyancer; since a thorough knowledge of the rules of interpretation must ever be the surest ground on which to place that knowledge which is required in framing deeds. See *Stair*, B. iv. tit. 1, § 61; tit. 42, § 21; *More's Notes*, i.; *Bank.* i. 339; iii. 52, 82, 93; *Ersk.* B. i. tit. 1, § 49; *Sandford on Entails*, 155, 175, 287; [*Elphinstone on Interpretation of Deeds*. As to the interpretation of statutes, see *Statute*.] See also *Conveyancing Deeds. Contract of Marriage*.

**INTERROGATORIES.** An interrogatory, although frequently used to signify every kind of question put to witnesses or others, is applied in a technical and more limited sense to a written question previously adjusted. [By A.S. 16 Feb. 1841, when the court is satisfied that the evidence of a witness may not be available at the day of trial, owing to his being beyond jurisdiction, or to infirmity, or to his being obliged to go into foreign parts, they may grant commission to examine such witness on adjusted interrogatories. In practice, the interrogatories are usually dispensed with. In some circumstances, they are of advantage. See *Bættcher*, 17 Jan. 1861, 23 D. 322; *M'Lean & Hope*, 9 March 1867, 5 Macph. 579.] In *Macfarlane's Jury Prac.* App. x. 343, and *Jurid. Styles* (2d edit.), iii. 785, will be found the form of interrogatories attached to a commission for taking a proof. See also *Bell's Com.* ii. 325; *Macfarlane*, 88, 93, 188; [*Dickson on Evidence*, § 1742; *Mackay's Prac.* ii. 81.] See *Commission to take Proof Evidence*.

**INTERRUPTION**; as a law term, is usually applied to the step legally requisite to stop the currency of the period of a prescription. Various prescriptions have been introduced, depending on uninterrupted possession or uninterrupted silence, or acquiescence for a longer or shorter period of time, according to circumstances. The principles of these prescriptions, and the nature and effect of each, [as well as the modes of their interruption,] are explained under the title *Prescription*. At present it is only necessary to observe, that the acts whereby each of the prescriptions may be legally interrupted, and in effect put an end to, are of various kinds—as by an acknowledgment of debt—as by citation



in an action, or by execution of diligence—by partial payments, in the long negative prescription—and by payment of interest in all of them—by an instrument of protest, which is termed civil interruption, or interruption *via facti*. [The register of interruptions of prescriptions was abolished by 31 & 32 Vict. c. 64, § 15. See *Prescription. Citation*.]

**INTIMATION**; is a step necessary in certain circumstances for the complete transference of a right. An assignation is completed by intimation, which is necessary both for completing the transference, and for interrupting *bona fides* on the part of the debtor, so as to give the assignee a preference in competition. [See *Assignation*.]

**INTOXICATION**. See *Drunkenness*.

**INTRINSIC**; is a term applied to circumstances sworn to by a party on an oath of reference, so intimately connected with the point at issue that they make part of the evidence afforded by the oath, and cannot be separated from it. See *Evidence*, p. 416. *Extrinsic*.

**INTROMISSION**; is the assuming of the possession and management of property belonging to another, either on legal grounds or without any authority. Intromission is therefore either legal or vicious.

#### I. LEGAL INTROMISSION.

1. *Intromission as an adjudger*.—The adjudication was originally a purchase under reversion; and the estate having been in general proportioned to the debt, the rents were held to indemnify the adjudger for the interest of his money. But as this diligence degenerated from its original purity, the estate was carried off by the debt, however inadequate it might be to the value of the estate. An attempt was made to remedy this injustice, by 1621, c. 6, by which the rents of the estate, in so far as they exceeded the interest of the debt, were annually, during the legal, to be applied in payment of the principal sum. And, in the case of a minor, this was, by 1663, c. 10, to continue during his minority; and if, after this, the debt were not completely paid off, the estate, by the expiration of the legal, or period of redemption, was to become the property of the adjudger. This so far checked the abuse; and hence, where adjudgers have entered into possession by a decree of maills and duties, they are accountable, not only for what they have intromitted with, but for what they might

have intromitted with by proper diligence. They are chargeable by a rental, and are entitled to take credit for those arrears only, in attempting to recover which they can show that they have used the most exact diligence. [See *Bell's Com.* ii. 425.] See *Adjudication. Expiry of Legal*.

#### 2. *Intromission as an heritable creditor*.

—In the common case, a written obligation requires a written discharge; but heritable bonds usually contain a clause empowering the creditor to intromit with the rents of the subject; and as, when the creditor has intromitted, his intromissions consist of acts which may be proved, the proof of these forms one of the exceptions to the general rule that a written obligation requires a written discharge. Proof of intromission under such a warrant, therefore, will be received to reduce the debt in whole or in part. [See *Bell's Com.* ii. 42.] See *Discharge*.

#### 3. *Intromission on more than one title*.—

Where one in possession of an estate is called to account by a person claiming a right to the estate, and the person in possession holds two titles, one of which is preferable, the other inferior, to the title in the person competing, it becomes a question whether the previous intromissions are to be imputed to the strongest or weakest of his titles; for, should the intromitter be obliged to impute his intromissions to the preferable title—as, for instance, to an adjudication or heritable bond—then all his intromissions must go to extinguish the heritable debt, which being thereby paid off, he draws nothing in respect of his inferior title; whereas, if he be allowed to impute his former intromissions to his inferior title, his future intromissions, after the appearance of the competitor, will go in extinction of his preferable claim, and thus a considerable advantage will be enjoyed by him. The rule of the law of Scotland, under certain modifications, authorises this last mode of settlement. See *Ersk. B.* ii. tit. 1, § 30; *Stair, B.* iii. tit. 2, § 29; *Bank. ii.* 229; *Bell's Com.* ii. 424.

#### II. VITIOUS INTROMISSION.

The term vitious intromission is applied exclusively to the heir's unwarrantable intromission with the moveable estate of the ancestor; his intromission with the heritage or rents of the heritage, being termed *gestio pro hærede*. The effect of vitious intromission is to render the heir who is guilty of it liable, under the passive title of vitious

intromission, for the debts of the ancestor universally—the severity of this passive title being intended to prevent the carrying off of moveables, which are, from their nature, so liable to embezzlement. With the same view, its consequences are extended to every intromitter with the effects of the deceased, whether he be the heir or a stranger to the succession. [But any *bona fide* title of intromission, or circumstances removing the suspicion of fraud, and affording a check on the intromission, relieves from the penal consequences. Where representatives, without a title, intromit with the funds of a person deceased, they are liable *in solidum*, to the extent, at least, of their intromissions; *Wilson*, 4 July 1865, 3 Macph. 1060.] A confirmation as executor puts an end to the vitious intromission, since it infers an intention on the part of the intromitter to account for his intromissions, which takes off the vitiosity, and renders him liable only to the extent of his intromissions. This passive title is available only to creditors whose debts are constituted by an obligation *inter vivos*; and therefore legatees, or donees *mortis causa*, cannot sue upon it. [Vitious intromission may be pleaded by the heir of the deceased, by way of exception, not only against the intromitter, but against his heirs, and also against assignees for value; *Simpson*, 31 May 1854, 17 D. 33; 22 Feb. 1855, 17 D. 478.] See *Ersk. B. iii. tit. 9, § 49*; [*Bell's Com. i. 705*; ii. 81; *Bell's Princ. § 1921*; *McLaren on Wills, ii. § 2268*.] See *Executor. Behaviour as Heir. Passive Titles*.

**INTRUSION**; is the delict of entering into possession of an heritable subject without any title in the person entering. See *Ejection and Intrusion*.

**INVECTA ET ILLATA**. This term, in questions of hypothec and thirlage, applies to the articles brought within the tenement, or within the thirl. In the case of urban tenements, there is an hypothec upon the *invecta et illata*; that is, on the household furniture and articles for the use of the family, or for ornament, which are brought into the house; or over the instruments and utensils brought into a workshop by the tenants, for carrying on the business of the shop or manufactory. In retail shops, the articles there are liable to the same hypothec; but, to render it effectual to the landlord, the goods on sale must be sequestrated. In thirlage, again, there is sometimes a thirlage of the *invecta et illata*, in the case of a village where all

the grain brought within the village “*that tholes fire and water*” (such are the terms of the astrictio) is liable to certain thirlage. These terms apply to malting and drying within the thirl, but not to baking and brewing; and accordingly no multure is due, in the thirlage of *invecta et illata*, for flour or oatmeal imported in that state into the thirl. See *Stair, B. i. tit. 13, § 15*; *B. ii. tit. 7, § 20*; *B. iv. tit. 25, § 3*; *More's Notes, lxxxii.*; *Ersk. B. ii. tit. 6, § 64*; *Bank. i. 386, 688*; *Bell's Com. ii. 26*; *Bell's Princ. §§ 1028, 1275*; *Bell on Leases, i. 387*; *Hunter's Landlord and Tenant, i. 261*; ii. 369, 374; [*Rankine on Leases, 328, 337, 352*. See *Hypothec. Thirlage*.]

**INVENTORY**; is a regular list of articles, or of an estate, describing each article fully and precisely by itself, and *seriatim*, so as to point out every article of which the estate consists. The evidence afforded by a regular and orderly list of articles has been resorted to by the law on different occasions, for the benefit of heirs, or of creditors, or of minors; and regular inventories have been required in different circumstances, where those beneficially interested in the estate are unable to attend to their own interest; as in the case of heirs and minors.

#### I. INVENTORY FOR THE SECURITY OF HEIRS.

This has been resorted to in the case of moveable succession as well as of heritage.

1. *Inventory in a service cum beneficio inventarii*.—The entry of an heir by inventory was introduced by the act 1695, c. 24, entitled, an “Act for obviating the frauds of apparent heirs,” which, after making certain provisions against the contrivances of such heirs in prejudice of the creditors of their predecessors, provided that thereafter they might enter to their predecessors “*cum beneficio inventarii*, or upon inventory, as use is in executors and moveables.” This inventory required to be full and particular as to the heritable estate of the ancestor, and was lodged within the year, with the clerk of the shire within which the lands lay: it was signed by the heir, the judge, and clerk of court, and recorded in the sheriff-clerk's books. An extract of the inventory was recorded, within forty days after the expiration of the *tempus deliberandi*, in a register kept for that purpose in the books of Session. When the inventory had been made up within the year, and recorded in the books



of Session within the forty days after the expiration of the year, the heir might enter at any time thereafter, with all the advantage of the act 1695, c. 24; and there was no alteration in the form of the service farther than that it was stated that he was served heir *cum beneficio inventarii*. The lodging of the inventory inferred of itself no passive title, provided it was not followed up by service. See *Bank. ii.* 311; *Bell's Com. i.* 706; *Bell's Princ. § 1926*. [For the present limitation of an heir's liability, see *Service. Heir. Beneficium Inventarii*.]

2. *Inventory of personal estate*.—Is a list of the whole moveable effects belonging to a deceased person, which must be given up on oath by his executor or nearest of kin, or other person entering on their administration. [See *Inventory Duty. Confirmation*.]

## II. INVENTORY FOR THE SECURITY OF MINORS.

The tutorial or curatorial inventory is a list of the whole estate, heritable or moveable, which belongs to a minor, made up by the tutor or curator before he enters on his office, at the sight of a judge, and after citing the nearest of kin on the sides of the father and mother of the minor. This inventory was ordered to be made up by the act 1672, c. 2, and three duplicates thereof, subscribed by the tutor or curator, and by the next of kin, and by a delegate appointed by the judge, were directed to be judicially produced before the judge ordinary; and, after being signed by the clerk of court, one duplicate was delivered to the next of kin by the father, another to the next of kin by the mother, and the third to the tutor or curator. If, after completing the inventory, any other property or estate was discovered, or should open to the minor, it required to be added to the former inventory within two months after the minor had attained possession; the same forms being observed as at first. The penalties of neglecting to make this inventory were, 1. That no expense incurred in the affairs of the minor was allowed to the tutors; and, 2. That they were accountable for omissions, and might be removed from their offices as suspect. [The procedure under the act 1672, in making up inventories, was superseded, in so far as regards tutors-at-law, tutors-dative, factors *loco tutoris*, and curators *bonis*, by the provisions of the Pupils Protection Act (12 & 13 Vict. c. 51, §§ 3, 25, 30), which requires that a rental, list,

[and inventory of the ward's estate be lodged with the Accountant of Court, within six months after lodging the bond of caution. See *Judicial Factor*.] See *Ersk. B. i. tit. 7, § 21*; *More's Notes to Stair*, xli.; *Bank. i.* 168; *Bell's Princ. §§ 2081-95*; [*Fraser on Parent and Child*, 197, 359, 362; *Jurid. Styles*, ii. 903.] See *Curatory. Tutor*.

**[INVENTORY DUTY]**; is a stamp duty (corresponding to the English *probate duty*) chargeable in respect of succession to moveable estate. By 48 Geo. III. c. 149, § 38, all executors and others intromitting with the moveable estate in Scotland of a deceased person, are required to exhibit upon oath, before confirmation, a full inventory, duly stamped *ad valorem* of the estate. Such inventory must be given up within six months of the death of the deceased, and must be recorded in the sheriff court of the county in which the deceased died domiciled. If additional effects are subsequently discovered, an additional inventory thereof must be given up within two months of the discovery. [The additional inventory is "chargeable only with such amount of stamp duty as, together with the stamp duty charged upon any former duly stamped inventory of the estate and effects of the same deceased person already exhibited and recorded," makes up the full amount chargeable on the total value; 16 & 17 Vict. c. 59, § 8. The oath on the inventory may be taken before the sheriff, or the sheriff-clerk, or a commissioner appointed by the sheriff, or any justice of the peace; 21 & 22 Vict. c. 56, § 11.] The inventory may include personal estate situated in England or Ireland, provided the person applying for confirmation satisfy the sheriff that the deceased died domiciled in Scotland; but the effects in England and Ireland must be separately stated, and the inventory must be stamped according to the value of the whole effects, wherever situated; § 9. See also §§ 12-15; 39 & 40 Vict. c. 70 §§ 41-43; and *Laidlay's Exrs.* 12 July, 1889, 26 S.L.R. 738. Personal estate which a person has disposed of by will, under any authority enabling him to dispose thereof as he thinks fit, is deemed personal estate of the person so dying, for the purpose of payment of inventory duty; 23 & 24 Vict. c. 15, § 4. Money secured on heritable property and by heritable bonds was made liable to inventory duty, by 23 & 24 Vict. c. 15, § 6, and c. 80, § 1; and a mode of payment by special inventory was provided

[in respect to such money; but these enactments do not now apply to heritable securities, in so far as they were made moveable by the Consolidation Act of 1868. See *Heritable Securities*. The inventory must be stamped according to the value of the property at the time it is sworn to, including the proceeds accrued down to that time; 23 & 24 Vict. c. 80, § 5. Interest at 5 per cent. runs on the inventory duty after six months from the death of the deceased; *ib.* No stamp duty is payable, when the effects do not exceed £100; 27 & 28 Vict. c. 56, § 5. Special facilities for recording inventories and obtaining confirmation at a small cost, in the case of estates not exceeding £150, were provided by 38 & 39 Vict. c. 41 (as to intestate estates), and 39 & 40 Vict. c. 24 (as to testate estates); and these acts were extended so as to apply to estates not exceeding £300, by 44 Vict. c. 12, § 34. By 5 & 6 Vict. c. 79, § 23, return of inventory duty is allowed in respect of any payments by the executor of "debts due and owing from the deceased, and payable by law out of his or her personal or moveable estate," provided the return is claimed within three years after recording the inventory. As to what marriage-contract provisions are reckoned "debts," in the sense of this enactment, see *Hagart's Exrs.* 2 May 1872, 10 Macph. (H.L.) 62; *Moir's Trs.* 7 Jan. 1874, 1 R. 345; *Marshall's Exrs.* 20 March 1874, 1 R. 847; *Galletly's Trs.* 12 Nov. 1880, 8 R. 74. In *Hagart's Exrs.* it was held that the whole of the debts due to the deceased, heritably secured, should be added to the gross amount of the personal estate, in order to ascertain the duty payable. See further, as to what subjects are liable to inventory duty, *Anstruther*, 23 Dec. 1850, 13 D. 450; *Brown*, 28 June 1852, 1 Macq. 79; *M. Lansdowne*, 15 Oct. 1872, 11 Macph. 6; and as to the valuation for inventory duty of contingent and reversionary interests, *Meiklam*, 23 Nov. 1860, 23 D. 57; *Pringle*, 12 June 1878, 5 R. 912. Property vested in bodies, corporate or unincorporate, formerly escaped liability to inventory and other succession duties, but is now subject to a duty of five per cent. on the annual value (with certain deductions); 48 & 49 Vict. c. 51, § 11; *Writers to the Signet*, 3 Nov. 1886, 14 R. 34. The amount of inventory duty presently payable is regulated by 44 Vict. c. 12, § 27, and is as follows:—Where the estate whereof the inventory is to be exhibited and recorded,

[exclusive of what the deceased may have been possessed of or entitled to as trustee, and not beneficially, is above £100 and not above £500—£1 for every £50 or fraction thereof: where the estate is above £500 and not above £1000—£1, 5s. for every £50 or fraction thereof: where the estate is above £1000—£3 for every £100 or fraction thereof. But where an inventory has been lodged prior to 1 June 1881, an additional inventory, lodged after that date, is chargeable with the duty which would have been payable if the act 44 Vict. c. 12, had not been passed. By § 34 (2) of the same act, where the estate is above £100 but not above £300, the inventory duty is thirty shillings. By § 28, where the deceased died domiciled in the United Kingdom, the executor is empowered to deliver a schedule of debts due by the deceased to persons resident in the United Kingdom, and of the funeral expenses, and to deduct these from the value of the estate. Debts to be deducted under the power hereby given are "debts due and owing from the deceased and payable by law out of any part of the estate and effects comprised in the inventory, and are not to include voluntary debts expressed to be payable on the death of the deceased, or payable under any instrument which shall not have been *bona fide* delivered to the donee thereof three months before the death of the deceased, or debts in respect whereof any real estate may be primarily liable, or a reimbursement may be capable of being claimed from any real estate of the deceased or from any other estate or person." The funeral expenses to be deducted are only such as are reasonable according to law. By § 40, double duty is chargeable in case of default. The publication of an annual calendar of confirmations and inventories is required by 39 & 40 Vict. c. 70, § 45. See *Bell's Com.* ii. 78; *Bell's Princ.* § 1898; *Jurid. Styles*, ii. 857, 874; *Griffith's Stamp Digest*, 113, 128, 269; *Hanson on Probate, &c., Duties Acts*; *Trevor's Taxes on Succession*; *Williams on Personal Property*, 432. See *Confirmation of Executors.*]

**INVENTORY OF PROCESS.** [Along with every summons, there must be lodged an inventory of process; A.S. 11 July 1828, § 27. The principal inventory cannot be borrowed; but a duplicate inventory, which must be lodged along with the principal, must at all times accompany the process, when borrowed and returned; A.S. 7 July 1858. *Mackay's Prac.* i. 409, 453.]



**INVESTITURE**; is the term applied to the whole progress of titles, whereby a real right in lands is vested in the feudal proprietor. Where, therefore, lands have been vested in a person by charter and sasine, the charter and sasine are said to be the investiture of the estate; and the person called by the title-deeds to succeed on the death of the vassal, whether heir-male of the vassal's body, or heir-at-law, is said to be the heir of investiture. [See *Infestment*.]

**INVOICE**; a particular account of merchandise, with its value, custom, and charges, &c., sent by a merchant to his factor, or correspondent in another country. *Tomlins' Dict. h. t.*

**I.O.U.**; a written acknowledgment of a debt, so called because it commences with those letters, which custom has substituted for the words, *I owe you*, because they have the same sound. It ordinarily runs thus:—"To Mr A. B., I.O.U. Twenty pounds. C.D. January 1st, 1863." If in this form, it requires no stamp, being neither receipt, agreement, nor promissory note. If it contains a promise to pay the money, it must be stamped as a promissory note. It should be addressed to the creditor by name, but that is not essential to its validity. It is evidence of an account stated with the creditor, if named; if he is not named, it is *prima facie* evidence of an account stated with the person producing it. It is not negotiable. *Wharton's Lex.* In order to instruct loan or payment of money, an I.O.U. must be holograph or probative. See *Hamilton's Exrs.* 2 Dec. 1858, 21 D. 51; *Woodrow*, 15 Nov. 1861, 24 D. 31; *Haldane*, 7 March 1872, 10 Macph. 537; *Williamson*, 29 May 1882, 9 R. 859; *Anderson's Trs.* 23 Oct. 1883, 11 R. 35; *Neilson's Trs.* 17 Nov. 1883, 11 R. 119; *Robb*, 4 June 1884, 11 R. 881; also *Loan*, and cases there cited. See *Byles on Bills*, 33; *Cavanagh on Money Securities*, 1; *Bell's Princ.* § 202 A; *Dickson on Evidence*, §§ 594, 610. See *Promissory Note*.]

**IRRITANCY, LEGAL AND CONVENTIONAL.** The irritancy of a right is its forfeiture in consequence of some neglect or contravention. Such a forfeiture takes place either by the force of the law alone (*ex lege*), or in consequence of some previous stipulation (*ex contractu*). Of the former kind, is the irritancy of a feu from non-payment of the duty during two years. See *Tinsel of the Feu*. In like manner, a lease may be dissolved during its currency, by the operation of a legal as well as of a

conventional irritancy. *Legal irritancies* are incurred by the lessee allowing his rent to fall into arrear for two full years, or by the lessee deserting possession, or neglecting to cultivate the farm at the usual period. The law with regard to this irritancy was formerly rather uncertain, and the A.S. 14 Dec. 1756, was passed with the view of establishing a definite and permanent rule. Where a tenant has irritated his lease by being two years in arrear, the lessor may have the irritancy declared before the judge ordinary, and insist on a summary removing; [§ 4.] If a tenant run one full year's rent in arrear, or desert his possession and leave the farm unlaboured, action may be raised before the judge ordinary, who may decern him to find caution within a limited time, for arrears, and for the rent of the five succeeding crops, or during the currency, if the lease be of shorter duration than five years; and on failure, may decern him to remove, and eject him in the same way as if the lease were determined, and the lessee had been legally warned in terms of the statute, 1555, c. 39; [§ 5.] If the amount of a year's rent be due, it is of no consequence whether it be the rent of a single crop, or made up of portions of the rents of several years. The landlord is not bound to accept of partial payments; and debts of the landlord, or even public burdens, paid by the tenant without authority, are not computed so as to diminish the year's rent due. In construing the act relatively to desertion, or leaving the ground unlaboured, the leaning has been in favour of the tenant. The A.S. is applicable only to agricultural subjects, not to mines, collieries, nor fisheries. Urban subjects are also excluded. But it is thought that the older law, viz., that the tenant might be removed, if he were behind in payment of his rent, unless he found caution with regard to the future, is still applicable to urban subjects. [See *Wright*, 30 Oct. 1875, 3 R. 68. By 16 & 17 Vict. c. 80, § 32, the sheriff has jurisdiction to declare an irritancy on account of two years' non-payment of rent, in the case of leases for more than twenty-one years, of subjects under £25 of yearly value. And by § 27 of the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 62), it is provided that in any case in which the landlord's right of hypothec for the rent has ceased and determined, when six months' rent of the holding is due and unpaid, it shall be lawful for the landlord to raise an action of removing before the

[sheriff against the tenant, concluding for his removal from the holding at the term of Whitsunday or Martinmas next ensuing after the action is brought, and unless the arrears of rent then due are paid, or caution is found to the satisfaction of the sheriff for the same, and for one year's rent further, the sheriff may decern the tenant to remove, and eject him at such term in the same manner as if the lease were determined, and the tenant had been legally warned to remove. A tenant so removed shall have the rights of an outgoing tenant to which he would have been entitled if his lease had naturally expired at such term of Whitsunday or Martinmas. In cases where the procedure under this enactment is competent, the provisions of § 5 of A.S. 14 Dec. 1756 do not apply. The effect of this enactment, taken along with the A.S. 1756, "is briefly this, that the A.S. is left untouched as the sole rule in regard to legal irritancies under farm leases current on 11 Nov. 1881" (being the commencement of the Hypothec Abolition Act, 1880, which contained provisions relative to this matter which are superseded and repealed by the above section of the act of 1883); "and that in respect to leases not then current, the 4th section of the A.S. (providing for irritancy on arrears of rent for two years) is still a competent remedy, though in most cases its operation will be anticipated by a resort to the modern remedy, which, if and when it applies, (1) supersedes § 5 of the A.S.; (2) gives an earlier recourse to the sheriff; and, on the other hand, (3) safeguards the tenant against confiscation of improvements, &c., and against removal between terms; and (4) withholds the remedy of caution and removing from a landlord who finds his holding deserted or unlaboured;" *Rankine on Leases*, 461.]

Conventional irritancy is the result of a stipulation in the lease. To secure regular payment, a clause is sometimes inserted in the lease, bearing, that if one whole year's rent shall remain unpaid after the term of payment specified, or if two years' rent be allowed to run into the third unpaid, the lease shall, in the option of the lessor, be null and void, without any procedure of law, and the irritancy shall not be purgeable. In construing this clause, the decisions at first fluctuated a little; but it is now settled, that the irritancy is constituted by two years' rent remaining unpaid. Of course conventional irritancies must vary according to the views of the contracting parties, and any complete enumeration of them is impossible. [Any reasonable stipulation, not involving gross

[abuse or oppression, shall be given effect to by the court; *Stewart*, 20 July 1864, 2 Macph. 1414; *Mags. of Glasgow*, 23 Feb. 1883, 10 R. 635. But see *Wylie*, 22 Dec. 1871, 10 Macph. 253; *Scot. Property Invest. Co.* 31 May 1881, 8 R. 737.] The following stipulations sometimes occur:—That the lease shall be void, on the bankruptcy of the tenant; on his non-residence [*Edmond*, 26 May 1871, 9 Macph. 782]; on his not searching for minerals, within a specified time, and continuing to work them; on his assigning or subletting; on his not possessing the farm with his own stocking. This last clause has not been strictly construed. [As to conventional irritancies in feu-rights, see *Conditions in Feudal Grants*; also *Tailors of Aberdeen*, 1840, 1 Rob. 296, 312–17.]

[Legal] irritancies are purgeable at any time before decree. This is done by payment, where the irritancy is for failure in payment, or by producing a renunciation or decree of reduction of a sublease, where it is founded on the tenant's subsetting the farm; and in general by performing, where that is possible, the thing, the failure to perform which occasioned the irritancy. See *Purging an Irritancy*. But should the tenant allow a decree in absence to go against him and be extracted, he may find it difficult to get quit of the irritancy; and where there has been an appearance for him in the action, however absurd the defence, he will, on that decree becoming final, be deprived of all relief. [It is now settled, at least in regard to leases, that a conventional irritancy, fairly incurred, cannot be purged by payment, when there has been no abuse or oppression; see *Stewart*, *supra*; *Lyon*, 13 Feb. 1874, 1 R. 512; *Hannan*, 16 Dec. 1879, 7 R. 380. The failure of a tenant in a building lease under the Montgomery Act, to comply with the statutory condition as to building, was held to be not a purgeable irritancy, but a statutory nullity; *Carrick*, 16 June 1868, 6 Macph. (H.L.) 101.] See *Stair*, B. ii. tit. 10, § 6; B. iv. tit. 5, § 3; and tit. 18; *More's Notes*, lxxx.; *Bank.* i. 584; ii. 101; *Bell's Princ.* §§ 701, 1248; *Bell on Leases*, i. 180, 199, 229; ii. 14, 17; *Hunter's Landlord and Tenant*, ii. 41, 121; [*Rankine on Leases*, 458; *Dove Wilson's Sher. Court Prac.* 484; *M'Glashan's Sheriff Court Prac.* 45; *Shand's Prac.* 554; *MacKay's Prac.* i. 203, 622;] *Jurid. Styles*, iii. 62; *Kames' Equity*, 45, 148; *Ross's Lect.* ii. 483 *et seq.* See *Lease. Declarator. Removing*. As to declarator of irritancy in entails, see *Rankine on Land-Ownership*, 574; also *Entail. Irritant Clause*.]



**IRRITANT CLAUSE**; is a clause by which certain prohibited acts specified in a deed, if committed by the person holding under the deed, are declared to be void and null. But where the right of property is conferred on the donee or substitute, his acts and deeds as far burden the property. Hence, in order to make the prohibition effectual, another clause, called a resolute clause, is required, whereby the right of the contravener is resolved and put an end to on his committing the acts against which the irritancies are directed. It is by the joint aid of those two clauses that the object of the maker of the deed is attained. See *Stair*, B. i. tit. 14, § 4; *Elchies' Annotations*, 110; *More's Notes*, clxxvi.; *Ersk. B. i. tit. 8, § 25*; *Bank. i. 584*; ii. 101; *Bell's Princ. § 1731*; *Sandford on Entails*, 61. See *Entail. [Irritancy.]*

**ISH AND ENTRY.** The clause, *cum libero exitu et introitu* ("with free ish and entry"), in the *tenendas* of a charter, imports a right to all ways and passages, in so far as they may be necessary, to kirk and market, through the adjacent grounds of the granter, who is, by the clause, laid under that burden. But though the ground through which the donee must necessarily pass should belong to another than the granter, and though it should not be subjected to any conventional servitude, it arises from the rights and obligations essential to property, that every proprietor must afford to, and is entitled to claim from his neighbour, free ish and entry. This right, however, which is founded in necessity, will not be extended to all convenient passages, or to roads by the nearest line, or through different parts of the grounds belonging to the contemninous proprietor. See *Stair*, B. ii. tit. 3, § 79; *Ersk. B. ii. tit. 6, § 9*; *Bank. i. 592*.

**ISSUE**; has different significations in law. It means the progeny begotten between a man and his wife; the profits arising from amerciaments and fines; or the profits of lands and tenements (see *Exitus*); but it most generally signifies the question of law or fact issuing out of the allegations and pleas of the pursuer and defender in a cause. When, in the course of pleading, one party makes an averment which his opponent denies, the parties are said to be at issue. Issues are either upon matter of law, or upon matter of fact. Issues in law are pure questions of law for the determination of a judge. In Scotland, an issue in law is brought out either, 1st, As preliminary, or in the shape of a question of relevancy; or, 2d, As resulting from ad-

mitted or proved facts; or, 3d, As arising out of a special verdict, bill of exceptions, or reserved question of law. [When the controversy between the parties is upon matters of fact, and it is to be determined by jury trial, the case is usually presented to the jury in the form of an issue, which is a concise statement of the question to be answered by the verdict. Issues may also be tried, of consent, by the Lord Ordinary without a jury, under 13 & 14 Vict. c. 36, § 47; but this course is never, in practice, adopted. And a cause may be tried by jury without issues, upon the record, if the Lord Ordinary deems this expedient; A.S. 10 March 1870, § 1 (5); *Brannan*, 4 Nov. 1884, 12 R. 61. Issues in jury causes are adjusted either at the time of proof being appointed, or on a day fixed not later than eight days thereafter; and the parties must lodge the issues respectively proposed by them two days before the day so fixed; *ib.* All appointments for lodging or adjusting issues are peremptory; in case of failure, decree by default may be taken, and can only be opened up by reclaiming note; A.S. 15 July 1865, § 12. But see *Guardian Assurance Co.* 6 June 1866, 4 Macph. 796. When issues have been adjusted, they are approved by interlocutor, and signed [and authenticated by the judge as relative thereto; 13 & 14 Vict. c. 36, § 39. As to amendment of issues, see *Amendment of Record*. Where a party desires that an issue approved of by the Lord Ordinary should be varied, but not disallowed *in toto*, he must apply by motion to the Inner House, within six days, specifying precisely the variation desired; 31 & 32 Vict. c. 100, § 28; A.S. 14 Oct. 1868, § 6; *Croucher*, 14 June 1889, 16 R. 774. But see *Craig*, 16 March 1871, 9 Macph. 715.] No issue can be allowed on a point not fairly within the action as laid, nor on a matter even within the grounds of action, if vaguely and indefinitely, or inconclusively set forth in the record. [It is usual to preface the issues with the admitted facts, so far as they bear upon the matter in dispute; see *Admissions*.] Where several different claims are involved, they are referred to as specified in a schedule subjoined; but this schedule is not in any other sense to be held a part of the issues than as showing the limits of the claims. [As to the use which may be made of the record, in the trial of an issue, contrast *Leys, Mason & Co.* 7 Sept. 1831, 5 W. & S. 384 (L. C. Brougham, p. 403);

[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