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PACITION. In the Roman law, *pactio* was different from *pactum*. It was synonymous with *conventio*, and signified merely an agreement between two or more parties, irrespective of the question whether they were legally bound by that agreement. As a generic term, it embraced both pacts and contracts. *Stair*, B. i. tit. 10, § 6; *Heinec. Elem. Juris*. § 773. See *Pactum*.

PACTIS PRIVATORUM NON DEROGATUR JURI COMMUNI; a Roman law maxim, importing that the consent or private agreement of individuals cannot validate any contravention of the law, or render just, or sufficient, or effectual, that which is unjust or deficient in what the law declares to be indispensable. Thus, an agreement by a married woman, that she will not object, on the ground of her being a wife, to a personal obligation which she has incurred, will not sustain an action or charge brought upon that personal obligation. This maxim is not of universal application. If what the law commands be merely circumstantial, the agreement of parties may supply the want of it; and there are many things *quæ fieri non debent, facta valent*. Thus, although the purchase of a lawsuit by a member of the College of Justice is forbidden by the law, under the pain of deprivation, the purchase itself is good, and will sustain action. See *Buying of Pleas. Pactum Illicitum*. A married woman cannot hold the office of tutory; and a provision in a will, that the tutrix-testamentary shall retain her office notwithstanding her marriage, is invalid; *Stewart*, 1636, M. 9585; *Kerbechill*, 1586, M. 9585; — *v.* — 1585, *Brown's Sup.* i. 123; *Stoddart*, 30 June 1812, F.C. In like manner, an agreement between private parties to dispense with the statutory regulations as to cruives, is invalid, though acquiesced in for upwards of forty years; *Fullarton*, 1743, M. 9586. But an obligation by a party, that he shall be satisfied with the evidence of one witness, is lawful and binding in civil matters; June 1665, *Brown's Sup.* ii. 419. [As to legality of a stipulation dispensing with established practice in reference to enforcement of rights, see *Wylie*, 22 Dec. 1871, 10 Macph. 253; *Scot. Property Investment Co.* 31 May 1881, 8 R. 737.] See *Stair*, B. i. tit. 17, § 14; B. ii. tit. 9, § 38; *Brown's Synop.*

voce Pactum Privatum; [*Broom's Legal Maxims*, 650.]

PACTUM. In the Roman law, the word *pactum* had a peculiar signification, which appears not to have been adopted in any other system of jurisprudence. In that law, a *pactum* was an agreement between two or more persons to give or perform anything, but which was practically defective, in so far as it did not produce what was called a civil obligation. There were, however, certain agreements, to which, on account of their reasonableness or expediency, either express written law or prætorian equity gave the binding effect of a civil obligation; while there were others which, being adjected *in continenti* to a regular contract, were held to constitute part of that contract, and qualify or extend its provisions. Such *pacta* were styled *non nuda*, in contradistinction to the *pacta nuda* which produced no action. Yet a *pactum nudum*, although it gave no action, created a natural obligation, which furnished, like other natural obligations, a valid exception. The law of Scotland does not recognise the distinction between *pacta nuda* and *non nuda*; and the difference between the two systems may be illustrated by the real contracts—*e.g.*, loan, pledge, or deposit. Thus, the contract of loan requires for its completion that the thing shall have been actually given in loan. By the Roman law, the mere agreement to lend a thing was, without delivery, a *pactum nudum*, which could not be enforced by an action; but by the law of Scotland, one who legally binds himself to lend or impledge a subject, may be judicially compelled either to implement his obligation, or to pay damages for breach of bargain. *Ersk.* B. iii. tit. 1, § 17; *Heinec. Elem. Juris*. § 774; *Bell's Princ.* § 8.

There are several agreements to which the general word *pactum* has been applied, and which may be considered under this head.

Pactum Donationis.—This confers on the donee a *jus ad rem*, but gives no right to the thing itself, the donor continuing proprietor until delivery. If, therefore, the donor should, even gratuitously, give and deliver it to a second donee, the second donee becomes proprietor. *Ersk.* B. iii. tit. 3, § 90.

Pactum de non petendo; an agreement by which the creditor in an obligation binds himself not to insist for payment or per-

formance. If the agreement be absolute, it is equivalent to a renunciation; but if it is only temporary, it does not exclude a decree; it only supersedes the execution until the lapse of the specified time. The right of a reponed rebel to demand payment of a debt cannot be prejudiced by a *pactum de non petendo* made by the donator of his escheat. A *pactum de non petendo* made to a principal, or to one of several co-obligants, does not free the cautioner or the other co-obligants; nor does it free the persons in whose favour it is made from their obligations to relieve. See *Mor. Dict. h. t.*; *Stair*, B. i. tit. 18, § 1; B. iv. tit. 40, § 31.

Pactum de retrovendendo; is a stipulation that the seller should be entitled to purchase back his property within a stipulated time. There do not seem to be any examples in the law of Scotland of such an agreement being made with regard to the sale of moveable property; but there are instances of rights of reversion being adjoined to a regular sale of lands. Such a stipulation is strictly interpreted; and the seller loses his right of reversion if he allows the time specified to elapse without making payment of the price, because, in a fair and onerous sale, there is no penalty nor loss of property in consequence of such strict interpretation of the clause. This distinction exists between the right of reversion conferred by a *pactum de retrovendendo*, and that to which a wadsetter is entitled, that in the latter case the reverser may redeem even after the lapse of the prescribed term, and at any time before declarator of the irritancy. *Stair*, B. ii. tit. 10, § 1; *Ersk.* B. ii. tit. 8, § 2; *Bell's Com.* i. 260; ii. 270; *Brown's Synop.* 1532; *Brown on Sale*, 429. See *Redeemable Rights*.

Pactum Legis Commissorie.—By this agreement, in the Roman law, the sale became void if the price was not paid before a certain day. This condition, when expressly stipulated, does not suspend the sale—the property is transferred to the buyer by the delivery; but, on his failure to pay within the time limited, the sale resolves, and the property (as against the buyer and his representatives) returns to the seller. [This must be understood (as is pointed out in Ivory's note upon Erskine, *infra*) only as in a question with the buyer himself; for, as against third parties, whether creditors using diligence, or voluntary acquirers from the buyer, a condition merely resolute is of no avail. See also *Stair*, B. i. tit. 14, §§ 4, 5.] But where the payment is made a condition of the sale, that con-

dition is suspensive of the sale, which is not perfected until the condition be purified. The *pactum legis commissorie* was intended solely for the benefit of the seller, and could not be enforced against his will by the buyer. *Ersk.* B. iii. tit. 3, § 11; *Bell's Com.* i. 260; ii. 270; *Bank.* i. 107; *Brown on Sale*, 430. See *Conditional Obligation. Missives of Sale*.

The *pactum legis commissorie in pignori-bus* was also a Roman law paction, sometimes adjoined to a redeemable right, whereby it was provided, that, if the subject were not redeemed against a determinate day, the right of reversion should be irritated, and the subject should become the irredeemable property of him to whom it was impledged. Such stipulations were held in the Roman law to be *contra bonos mores*; but, by the law of Scotland, irritant clauses in contracts, obligations, infestments, and the like, are effectual. A.S. 27 Nov. 1592; 1661, c. 62, § 14. Where it happens, however, that the irritancy is penal, the right will not be forfeited by the mere lapse of the time agreed upon. An action of declarator of the irritancy is requisite, in which action the defender may still avoid the forfeiture by redeeming the lands or other subject. By the Scotch law, moveables which have been impledged cannot legally be sold by the creditor without the warrant of a judge, obtained on an application to which the debtor is made a party. *Ersk.* B. ii. tit. 8, § 14; *Stair*, B. i. tit. 13, § 14; B. ii. tit. 10, § 6; B. iv. tit. 5, § 7; tit. 18, § 5; *Brown's Synop.* 1092. See *Pledge. Legal*.

Pacta Liberatoria, in regard to land, are bargains whereby a real right is either passed from or restricted. Such agreements form an exception to the general rule, that writing must intervene in all that relates to land, in order to bar the *locus pœnitentie*, or power of resiling. Accordingly, a mere verbal obligation, followed by no *rei interventus*, agreeing to restrict an infestment in security, cannot be retracted, and may be proved by reference to the party's oath. Thus, a liberation from a bond by transaction, with regard to a sum in another obligation, was sustained without writing; *Hepburn*, 1661, M. 4865. So also was a promise to liberate part of the lands burdened with a liferent; *Ker*, 1666, M. 8465. See *Ersk.* B. iii. tit. 2, § 3; *Stair*, B. i. tit. 10, § 9; *Kames' Equity* (1825), 329; [*Dickson on Evidence*, §§ 627, 1029, 1102.]

PACTUM ILLICITUM; is a general term applied to all contracts opposed to law, either as being *contra legem*, *contra*

bonos mores, or inconsistent with the principles of sound policy. It is a general rule, that no action can lie for implement of an illegal contract. But in the case where the terms of the contract have been fulfilled, a distinction is taken between the case in which there is turpitude *ex parte utriusque*, and that in which the turpitude attaches to only one of the parties. In the former case, there can be no action for restitution; the rule is, *Potior est conditio possidentis*, and the law gives no remedy to either party. In the latter, according to Erskine, the thing given *ob turpem causam*, must be restored, whether the counterpart of the bargain has been performed or not. In the great majority of cases, however, the turpitude necessarily attaches to both parties; and the law does not interfere either to compel implement or restitution. [See *Gibson*, 3 Aug. 1840, 1 Rob. 260.] The following are instances of contracts which have most frequently come under the view of courts of justice as *pacta illicita* :—

Pactum de quota litis ; is an agreement between an advocate, or an agent or attorney, and his client, for a proportion of the subject of the suit, in place of his honorary or fees. Such an agreement was void by the Roman law, and the same principle has been adopted in the law of Scotland. The act 1594, c. 216, makes the purchase of the subject of a lawsuit by a member of the College of Justice punishable with deprivation of office. See *Buying of Pleas*. The course of decisions, however, has been to sustain the sale, and to regard the penalty as the only sanction of the act ; *Purves*, 1683, M. 9500 ; *Home*, 1713, M. 9502. But a distinction has been recognised, although not very precisely, between such a purchase of a plea which is struck at by the act, and the *pactum de quota litis*, which last seems to be held illegal, not by the express words of the statute, but rather as being at common law a *pactum illicitum*, and at the same time contrary to the spirit of the statute. Thus, in one case, after the plea that a transaction was a purchase of a lawsuit had been repelled, it was alleged that the right arose *ex pacto de quota litis*, and was therefore null. To this it was answered, that the statute was intended as a special remedy to supply the place of the Roman law respecting *pactum de quota litis*. This answer was not sustained ; and Fountainhall, in his report of the case, mentions the *pactum de quota litis* as differing from the buying of a plea ; *Ruthven*, 1680, M. 9499. The

course of decisions has been to annul *pacta de quota litis* ; *Mackenzie*, 1774, 5 Br. Supp. 528. In this case, the agent was likewise deprived of his office for a limited time. An agreement that a writer was to get half of certain property and rents, to be recovered in an action which he was to carry on, and that, if unsuccessful, he should charge nothing, was found null ; although it was pleaded that the statute did not apply, and that, at common law, such agreements are bad only with practitioners, which this writer was not ; *Johnston*, 1 Feb. 1831, 9 S. 364. An agreement by a country agent to employ an Edinburgh agent, and to make advances, on condition of receiving a share of the profits, was held illegal ; *A. v. B.* 12 May 1832, 10 S. 523. [But such agreement has now received statutory sanction ; see *Law Agent*, p. 642.] See generally, on *pactum de quota litis*, 1594, c. 216 ; *Mackenzie's Obs.* 289 ; *Stair*, B. i. tit. 10, § 8 ; *Bank. B. i. tit. 11, § 11* ; *Kames' Equity*, 12, 335 ; [*Bell's Princ.* § 36 (2).]

Pactum super hereditate viventis ; an agreement to sell a right of succession, during the life of the ancestor, was forbidden by the Roman law, as *contra bonos mores* ; but the law of Scotland permits an heir to dispose of his hope of succession during the life of his ancestor. *Stair*, B. i. tit. 10, § 8 ; *More's Notes*, lxiii. ; *Bank. i.* 326. [See *Reversionary Interest. Post Obi.*]

The law of Scotland takes no notice of debts contracted by gaming and betting. See *Gaming and Betting. Wager*. Agreements incentive to crime, or for compounding a crime, or procuring a pardon, cannot be the foundation of a judicial claim. A bond given as the price of prostitution gives no action ; but when the bond is given subsequently to the act of connection, as a reparation for the injury sustained, it is valid. There would seem, however, to be an exception to this rule where the grantee is a prostitute, or where she knew the granter to be married at the time of their connection ; although this has not been authoritatively settled. [See *Webster*, 17 Nov. 1886, 14 R. 90, and cases there cited.] The claim of the children of the connection to implement of the obligation has been admitted in cases in which that of the mother has been rejected. Obligations contracted on an indecent or mischievous consideration are void. No action can be maintained on a debt for spirituous liquors, unless *bona fide* contracted at one time to the amount of twenty shillings, or upwards ;

and the claim is not valid even as an item in an account, where the liquor delivered at one time and mentioned in the item, is not to the amount of twenty shillings; 24 Geo. II. c. 40. On this statute, action has been refused on a bill granted for the amount of an account for spirits furnished; *Russell*, 6 July 1808, F.C. [This act was so far repealed by 25 & 26 Vict. c. 38, that it does not now apply to spirituous liquors sold to be consumed elsewhere than on the premises where sold, and delivered at the residence of the purchaser in quantities not less at any one time than a quart. See *Barclay's Digest*, voce *Tippling Act*.] All contracts imposing restraints on marriage are void; but an engagement between two persons to intermarry, fortified by an agreement that if either of them shall marry a third party he or she shall forfeit to the other a stipulated sum, has been said to form an exception to the general rule. Bonds or agreements to pay a sum of money, as a consideration for using influence to bring about a particular marriage, called marriage brocage contracts, are *contra bonos mores*, and will found no action. Restraints on liberty are void, except in particular instances. A man may enter into a contract of service for wages, which will be binding, however long the stipulated term may be. So a man may bind himself not to exercise a trade or profession within certain limits, as within the same parish with the creditor in the obligation, or within half a mile of him, or within ten miles. But when the restriction extends to a whole country, or when it is manifest that the other party has no legitimate interest in the obligation being so strict, the contract is void. [See *Watson*, 14 July 1863, 1 Macph. 1110; *Macintyre*, 13 March 1866, 4 Macph. 571; *Fraser on Master and Servant*, 90. An agreement to avoid all occasions of taking the oath of allegiance, and to abstain from exercising the elective franchise, is not a *pactum illicitum*; *Ferguson Bequest*, 16 Jan. 1879, 6 R. 486.] Contracts for defeating the revenue laws are void, at least in so far as relates to the parties privy to the design; and every native of this country is presumed to be acquainted with the laws against smuggling. A foreigner is presumed to be aware of the design to smuggle if he knows that the goods have been packed so as to escape detection, or assists in preparing false papers, or is active in planning or aiding the scheme for evasion, or in landing the goods in this country. Contracts relative to contraband goods are

also void. This rule, however, does not hold when the goods are sold abroad, or when they have been bought *bona fide* in a market in this country. See *Smuggling*. It has been repeatedly decided in the English courts, that the sale or assignment of the pay or half-pay of an officer or soldier is void. At common law, the sale of offices of trust is void, except in those cases in which offices are expressly allowed to be sold, and in which the sale takes place under the authority of those who have the power of appointment, as commissions in the army. The common law forbidding the sale of offices has been aided by several statutes. See *Offices*. See generally on the subject of this article, *Ersk. B. iii. tit. 1, § 10*; *Stair, B. i. tit. 10, § 8*; *More's Notes*, v., lxiii.; *Bell's Com. i. 318*; *Bell's Princ. § 36*; *Kames' Equity*, 331-4; *Kames' Stat. Law Abridg. h. t.*; *Brown on Sale*, 113; [*Menzies' Conv. 48*; *M. Bell's Conv. i. 145*; *Pollock on Contract*, 261; *Anson on Contract*, 179. See *Pactis Privatorum*.]

PAINTING. Paintings are taken in the civil law, and by our institutional writers, as illustrative of the doctrine of accession. Where the picture is painted on a wall, or other immoveable subject, which it is evidently intended to embellish, the possessor of that subject becomes proprietor of the picture also. Where, again, the picture is painted on a moveable board, the board is accessory to the painting. Paintings are sometimes included in a deed of entail; but may, notwithstanding, be attached by the diligence of the creditors of the heir in possession. *Stair, B. ii. tit. 1, § 39*; *More's Notes*, clxxx.; *Bank. i. 509*. [See *Copyright*.]

[PAIS. In English law, a trial *per pais* signifies a trial by the country, *i.e.*, by jury. A conveyance by matter *in pais* is one transacted by two or more private persons *in pais*, *i.e.*, upon the very spot to be transferred. Matter *in pais* seems to signify matter of fact, probably so called because matters of fact are mostly triable by the country; *e.g.*, estoppels *in pais* are estoppels by conduct, as distinguished from estoppels by deed or by record. *Brown's Law Dict.*]

PALINODE; a recantation. [See *Defamation*.]

PANDECTS; are a digest of the whole Roman law made by the order of the Emperor Justinian. See *Roman Law*.

PANEL. The accused person in a criminal action, from the time of his appearance, is styled the panel. [See *Hume*, ii. 265,

[*note; Act of Adjournal*, 18 Nov. 1695.]
See *Criminal Prosecution. Diet.*

PANNAGIUM PORCORUM; an old law phrase, signifying the duty given to the king for the pasturage of swine in his forests. *Pannagium* signifies also a part of the king's domain given to a younger son. *Skene, h. t.*; [*Balfour's Practicks*, 139; *Innes' Legal Antiquities*, 41.]

PAPIST. [See *Roman Catholic.*]

PARAPHERNALIA; are those moveables which continue the sole property of the wife notwithstanding the marriage. They consist of her body clothes and wearing apparel, with all the ornaments of dress proper to a woman's person, necklace, earrings, breast or arm jewels. ["Nothing is paraphernal but the attire or ornaments of the wife's person;" *Elchies, Notes*, 191. But in *Cameron*, 5 Feb. 1876, 13 S.L.R. 278, a lady's wardrobe was held to be paraphernal. See authorities cited in *Fraser on Husb. and Wife*, i. 770 *et seq.*; and *Montgomerie*, 17 July 1845, 7 D. 1081.] Things of promiscuous use to man and wife, as watches, jewels, medals, plate, are not paraphernal, unless they have been presented by the husband before or on the marriage day. The same things presented to the wife after the marriage are not paraphernal,—they are gifts which the husband may revoke; and such things are paraphernal only with respect to the husband who gave them; for, in the event of the wife entering into a second marriage, they are held to be moveables only, and as such fall to the second husband. The present sometimes made by the purchaser to a wife, on occasion of her renouncing a liferent over her husband's lands, commonly called *Lady's Gown*, is also, by the custom of Scotland, regarded as paraphernal. [But see *Bell's Princ.* § 1560; *Fraser*, i. 775. The wife's paraphernalia are exempted from the *jus mariti*, and can neither be alienated by the husband, nor attached for his debts. But they are not excluded from the husband's right of administration. The wife's possession of them is sufficient to prove her ownership, in a question with the husband or his creditors; *Dicks*, 1695, M. 5821. On her death they descend to her own executors, in preference to the husband or his representatives; and she may bequeath them, even though acquired by her after deserting her husband; *Young*, 19 May 1880, 7 R. 760.] A wife may effectually impignorate her paraphernalia, in security of her husband's debts, even without his consent; [but see *Fraser*, i. 806.] She

cannot, however, validly impignorate even her paraphernalia, in security of her own debts, without her husband's consent; and, if she do so, the impignoration will be null. See *Ersk. B. i. tit. 6*, §§ 15, 27; *Stair*, B. i. tit. 4, § 17; *More's Notes*, xviii.; *Bank. i. 129*; *Bell's Com. i. 678*; [*Bell's Princ.* § 1554; *Fraser on Husb. and Wife*, i. 770, 805. See *Marriage. Jus Mariti.*]

PARCENERS. In English law, [where lands descend on an intestacy to several persons as co-heirs, *e.g.*, to several daughters at common law, or to several sons according to the custom of gavelkind, the persons so inheriting are called parceners, or (now more frequently) coparceners. Any one of the coparceners may insist on a partition of the lands. *Sweet's Law Dict.*; *Williams on Real Property*, 123. See *Heirs-Portioners. Common Property.*]

PARDON. The Queen, in virtue of her prerogative, has the privilege of extending her royal clemency to those whom penal laws in their strictness may have condemned. This power, however, extends no further than to liberate the offender from public penalty for his offence; it does not deprive the injured party of his claim of damages; and it is provided by various enactments, that the remission shall not be pleaded until the assythment to the private party be paid. See 1457, c. 74; 1528, c. 7; 1592, c. 155; and 1593, c. 174. It is in the case of pardon, or of the offender having fled from justice, that an assythment is claimable; and in this last case it will be due from the donator of the offender's escheat; for where the criminal has suffered the pains of law, no assythment is due. *Ersk. B. iv. tit. 4*, § 105; *Hume*, i. 285; ii. 496; *Bank. ii. 275*; *Swint. Abridg. h. t.* [See *Assythment.*]

PARENT AND CHILD. Children are either lawful or unlawful—that is, are either born in lawful wedlock or legitimated by the subsequent intermarriage of their parents, or they are bastards. See *Bastard. Legitimacy. Legitimation. Filiation.* The obligations arising from this relationship are reciprocal. They are, 1. The obligations of parents to children; and 2. The obligations of children to parents.

1. The father has the sole and absolute right of directing what relates to the person, education, or improvement of the mind of his lawful children; he is bound to support, clothe, and educate them according to their rank and station in life; and the performance of those duties may be judicially enforced. [But the parental authority is

[not the same, either in kind, or in degree, when the child has attained puberty, as when he is in pupillarity. The father's right of control over a *minor pubes* "may be easily lost, either by an apparent intention to abandon it and leave the child to his own guidance, or by circumstances or conduct showing the father's inability or unwillingness to discharge rightly the parental duty towards the child;" *per* Lord J. C. Inglis, in *Harvey*, 15 June 1860, 22 D. 1198, 1209.] It is sufficient, however, that the parent receive the child into his own house; unless he behave with too great a degree of harshness; in which case the child may be taken from the father, and the father compelled to give a reasonable sum for the maintenance of the child. [See *infra*, as to the father's right of custody of his children.] The father is likewise entitled to the profits of the labour of his child while he remains in family with him, and not forisfamiliated. [In *Menzies*, 27 Feb. 1839, 1 D. 601, a party having been found entitled to a certain sum as her share of the goods in communion as at the death of her mother many years before, it was held that she was entitled to 4 per cent. interest on that sum, but that interest ought not to be exigible while the party was maintained and educated in her father's house, until she had attained an age at which her service might be presumed to have compensated the expense of her clothing and aliment. In *Fairgrievies*, 30 Oct. 1885, 13 R. 98, it was held that a widow, able *aliunde* to support her children, who had in her hands £96 belonging to her daughter, as her share of her deceased father's estate, was entitled to impute the interest to account of sums expended on the daughter's maintenance and education, but was not entitled to retain on that account any part of the capital. The position of a mother was regarded as different from that of a father, whose obligation to aliment is primary and absolute. See *Galt*, 19 Jan. 1830, 8 S. 332.] The father is the administrator for managing any separate estate belonging to his children during their minority, unless (1) where the estate has flowed from a stranger, and the right of management has been given by the donor to another; (2) where the donor has excluded the management of the father without naming a curator, in which case a curator must be named by the judge; (3) where by the marriage of a daughter she is put under the curatory of her husband; or (4) where the child has an action to

maintain against the father, in which case a curator *ad litem* will be named by the court. See *Curatory*. [A father's poverty is no ground for depriving him of the administration; *Wardrop*, 6 Feb. 1869, 7 Macph. 532. With regard to a parent's duty, as *quasi-trustee*, to protect his child's interest, and with regard to the validity of transactions between parent and child, see *Smith Cunningham*, 25 April 1872, 10 Macph. (H.L.) 39; *Gray*, 5 Dec. 1879, 7 R. 332.] The administration of the father is restricted to such of his children as remain in family with him or live at his expense, though at a distance prosecuting their education, or acquiring a profession. The office of administrator belongs to the father alone; it requires no service; it is not necessary that he should take an oath *de fidei*; nor is he bound to find caution for his intromissions, unless his circumstances are low or embarrassed; nor is he obliged to make up an inventory. The presumed affection of a parent, and his consequent interest in the welfare of his child, supersede the necessity of those guarantees which the law requires from stranger guardians. The father is bound by the law of nature to provide for his children after his death, as well as during his lifetime. But this obligation is not enforced by the law, further than that, where a person leaves heritage, the heir succeeding to him must give an aliment to the younger children, where they are unable to provide for themselves; thus, sons must be maintained till their majority, and daughters till their marriage. See *Aliment*.

2. Children are morally bound to honour and respect their parents, although that obligation cannot be legally enforced. But the grosser breaches of filial respect and reverence may, under some of the Scotch statutes, be visited with the highest penalty of the law. See *Cursing of Parents*. Children are under an obligation to support their indigent parents, and this obligation may be enforced by law, [provided the child has a superfluity of means after providing for the maintenance of his own family; *Hamilton*, 20 March 1877, 4 R. 688. See *Aliment*.

[*Custody of Children*.—The legal right to the custody of a lawful child during pupillarity is in the father; *Leys*, 20 July 1886, 13 R. 1223; *Delaney*, 7 June 1889, 16 R. 753. The father's right, however, is not absolute, but subject to the control of the Court of Session, in the exercise of its *nobile officium*; the interests of the child, particularly in regard to its health, future

[prospects, and moral education, being of paramount importance; *Markey*, 14 July 1888, 15 R. 921; *Sutherland*, *infra*. By the Conjugal Rights Act (24 & 25 Vict. c. 86), § 9, in any action for separation *a mensa et toro*, or for divorce, the court may from time to time make such interim orders, and may in the final decree make such provision as to it shall seem just and proper, with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates. But in *Lang*, 30 Jan. 1869, 7 Macph. 445, the judges held that their powers under the statute were neither more nor less extensive than their powers at common law; the statute merely enabling them to do incidentally what under their *nobile officium* they could do on a separate application; and in regard to both cases they formulated the rule that the father's right should be interfered with "only when it can be shown that the children's health, life, or morals will be endangered by their remaining in their father's custody." They accordingly refused the petition of a wife, who had obtained judicial separation from her husband on the ground of cruelty, for the custody of her two children, aged seven and five respectively. See also *Nicolson*, 20 July 1869, 7 Macph. 1118; *Stewart*, 3 June 1870, 8 Macph. 821. In a more recent case, however, the House of Lords held that, in cases under the statute, the discretion of the court should be restrained by no rule of general application. Lord Chanc. Cairns observed:—"It appears to me that the Conjugal Rights Act has given the court the widest and the most general discretion, and has purposely done so. It appears to me that it must be the duty of the court in every case to consider the whole of the circumstances of the particular case before it—the circumstances of the misconduct which leads to a separation no doubt, the circumstances of the general character of the father, the circumstances of the general character of the mother, and, above all, it should be the duty of the court to look to the interests of the children, and carefully to weigh, as regards the interests of the children, the comparative advantages or disadvantages of leaving the custody of all or of any of them to the one parent or to the other." In that case, the House of Lords gave the custody of the sons to the father and the custody of the daughters during pupillarity to the mother, but subject to such regulations as the Court of Session might make for the access of each

[parent to the children in the custody of the other, and subject to an obligation by the parents not to remove the children from the jurisdiction of the court; *Symington*, 18 March 1875, 2 R. (H.L.) 41; 16 July 1875, 2 R. 974. The fact that the father has been guilty of adultery, though always a material consideration, is not conclusive against his claim to the custody of his pupil children; *Ketchen*, 2 July 1870, 8 Macph. 952; *Symington*, *supra*. When the mother is deprived of the custody of her children, she is generally allowed reasonable access to them, under regulation by the court, unless her conduct has been such as to disentitle her; *A.B.* 10 Dec. 1847, 10 D. 229; *M'Iver*, 2 July 1859, 21 D. 1103; *Lilley*, 31 Jan. 1877, 4 R. 397; *Mackenzie*, 5 March 1881, 8 R. 574. In the event of the father's insanity or death, the mother has, at common law, the custody of pupil children; *A.B.* 19 July 1850, 12 D. 1297; *Johnston*, 24 Feb. 1849, 11 D. 718; but in *Dallas*, 20 Dec. 1845, 8 D. 318, the age of seven years was spoken of as a limit to her right, in competition with tutors nominated by the father. In *Gulland*, 16 March 1878, 5 R. 768, the custody of a pupil whose father was dead, and whose mother was guilty of misconduct, was given to a factor *loco tutoris*, the court directing him to submit a scheme for the residence, maintenance, and education of the child; see also *Denny*, 16 Jan. 1863, 1 Macph. 268. In the case of bastards, the mother has the only legal title to their custody; and she cannot by any agreement deprive herself of this right; *Macpherson*, 4 June 1887, 14 R. 780; *Sutherland*, 22 Dec. 1887, 15 R. 224. But if it is contrary to the child's interests that it should live with its mother, the court will refuse her claim; *Sutherland*. An action by a mother for custody of an illegitimate child cannot be insisted in, on her death, by a tutor named by her; *Brand*, 24 Feb. 1888, 15 R. 449; but regard is paid by the court to the mother's desire as to the disposal of the child; *Brand*, 22 Dec. 1888, 16 R. 315.

[By the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), the law relating to the guardianship and custody of infants (meaning, in Scotland, pupil children, § 8) was amended, increased rights being given to mothers of lawful children. By § 2, on the death of the father of an infant, and in case the father shall have died prior to the passing of this act then from and after the passing of this act, the mother if surviving shall be the guardian of

[such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. (And it is no bar to a mother's right under this enactment that she has married again; *Maquay*, 27 June 1888, 15 R. 784.) When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother. (See *Martin*, 1 Dec. 1888, 16 R. 185.) By § 3, (1) The mother of any infant may by deed or will appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father of such infant (if such infant be then unmarried), and where guardians are appointed by both parents they shall act jointly. (2) The mother of any infant may by deed or will provisionally nominate some fit person or persons to act as guardian or guardians of such infant after her death jointly with the father of such infant, and the court, after her death, if it be shown to the satisfaction of the court that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, who shall thereupon be authorised and empowered so to act as aforesaid, or make such other order in respect of the guardianship as the court shall think right. (3) In the event of guardians being unable to agree upon a question affecting the welfare of an infant, any of them may apply to the court for its direction, and the court may make such order or orders regarding the matters in difference as it shall think proper. By § 5, the court may, upon the application of the mother of any infant, make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just. (See *Maquay*, 17 March 1888, 15 R. 606; *Beedie*, 20 March 1889, 16 R. 648, where the court entertained a petition presented under this section by a father.)

[By § 6, the Court of Session may, in their discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this act, and may also, if they shall deem it to be for the welfare of the infant, appoint another guardian in place of the guardian so removed. By § 7, in any case where a decree for judicial separation or for divorce shall be pronounced, the court pronouncing such decree may thereby declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children (if any) of the marriage; and, in such case, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children. In Scotland, the expression "the court," in this act, shall mean the Court of Session or the sheriff court within whose jurisdiction the respondent or respondents or any of them may reside; and the expression "the Court of Session" shall mean either Division of the said court, and in vacation the Lord Ordinary on the Bills; § 9. In Scotland any application made under this act to a sheriff court may be removed to the Court of Session, at the instance of any party, in the manner provided by and subject to the conditions prescribed by § 9 of the Sheriff Courts Act, 1877 (see *Sheriff*); and an appeal shall lie to either Division of the Court of Session from any order made by the Lord Ordinary on the Bills or a sheriff court under this act; § 10. The act does not apply to bastards; *Brand, supra*, 16 R. 315.]

See on this subject, *Ersk. B. i. tit. 6, § 49*; *Stair, B. i. tit. 5*; *More's Notes*, xxviii.; *Bank. i. 122*; *Bell's Com. i. 55*; *Bell's Princ. § 1624*; *Kames' Equity* (1825), 71; [*Fraser on Parent and Child*; *Mackay's Prac. i. 209*; ii. 367.] See *Patria Potestas*. [*Nobile Officium. Tutor.*]

PARES CURIÆ. *Curia* was the court or place where the superior exercised his power over his vassals; and those vassals, being all equally dependent on their superior, were termed peers, or *pares*; so that the *pares curiæ* were all the vassals holding of any one superior. They formed his court, and in their presence many things relating to the fee and the entry of heirs were transacted. *Ersk. B. ii. tit. 3, § 17*; *Bell on Completing Titles, 3*; *Bell on Leases, i. 20*; *Ross's Lect. ii. 119*.

PARI PASSU. In a competition of creditors claiming a common fund, those

who are preferred equally, or share and share alike, to the fund, are said to be preferred *pari passu*. See *Adjudication*. *Poincing*. *Competition*.

[**PARIS, DECLARATION OF.** See *Declaration of Paris*.]

PARISH. A parish seems anciently to have signified the diocese of a bishop, though now it signifies the territorial bounds connected with a particular church of the established religion, and for the support of which alone the tithes within those bounds can be allocated. The bounds of each parish are precisely fixed. Hence, in the description contained in the title-deeds of lands, there is joined to the name by which the lands are distinguished the name of the county and parish within which they are locally situated. It had been found necessary in many cases to divide some parishes or to unite others; and powers to that effect were given, by different statutes, to commissioners for the plantation of kirks, &c., as by 1617, c. 3,—1621, c. 5,—1633, c. 19,—1661, c. 61,—1693, c. 23. At last the power of all former commissions was transferred, by 1707, c. 9, to the Court of Session as commissioners; and under that act the judges of that court are empowered, with the consent of three-fourths of the heritors, to erect new churches and to disjoin parishes. [The consent of a simple majority in value is now sufficient; 7 & 8 Vict. c. 44, § 1.] But the court may annex or unite two parishes into one, on cause shown, without the consent of the heritors. [Besides proper civil parishes, of which there are 887 in Scotland, there are 437 parishes *quoad sacra*, erected under the provisions of 7 & 8 Vict. c. 44. See also the United Parishes Acts, 31 Vict. c. 30, and 39 Vict. c. 11. Parishes are either landward (rural), burghal (non-rural), or burghal-landward (partaking of both characters).] See *Ersk. B. i. tit. 5, § 21*; *Stair, B. ii. tit. 8, § 3*; *Bank. ii. 4*; *Bell's Princ. §§ 1132, 2195*; *Kames' Stat. Law Abridg. h. t.*; [*Dunlop's Parochial Law*; *Duncan's Par. Eccl. Law*; *Black's Par. Eccl. Law, 1*; *Goudy & Smith's Local Government, 1*; *Elliot's Erection of Parishes Quoad Sacra*; and as to parochial boards, *Rankine on Land-Ownership, 179.*] See *Disjunction*. *Union*. *Annexation*. *Poor*. *Kirk-Session*. *Heritor*. *Teinds*. *Church*. *Patronage*.

PARK; in the acceptation of the English law, is a large extent of ground enclosed and privileged for wild beasts of the chase, by royal grant, or by prescription. In Scotland, park has no such signification,

the synonymous term being *forest*, whereby is meant a large tract of enclosed ground where deer are kept. Woods or parks enclosed by private persons for deer are *juris privati*, and are carried in charters as part of the land disposed, though not expressed. *Ersk. B. ii. tit. 6, § 14*; *Bank. i. 91*; *Tomlins' Dict. h. t.* See *Forestry*. *Deer*.

PARLIAMENT. The parliament is the legislative branch of the supreme power of Great Britain. It consists of the sovereign—the lords spiritual and temporal—and the knights, citizens, and burgesses, representatives of the commons of the realm. The representatives of the commons of the United Kingdom amount in number to [670,] distributed in the proportions mentioned in the article *Commons, House of*. As to the manner of electing the representatives of the Scottish peerage and of the commons of Scotland, see *Election Law*.

In the present article will be considered the assembling of parliament; the laws and customs of parliament; the method of conducting business; and the adjournment, prorogation, and dissolution of parliament.

1. *Of the Manner and Time of assembling Parliament.*—The parliament is summoned by a writ from Chancery, in the name of the sovereign, issued by the advice of the privy council. [By a provision of *Magna Charta*,] this writ required to be issued forty days before the sitting of parliament; [and this was re-enacted by 7 & 8 Will. III. c. 25, § 1. But by 15 & 16 Vict. c. 23, the interval was shortened to thirty-five days.] The calling together of parliament is part of the royal prerogative, and a power properly and necessarily vested in the sovereign, as being the only branch of the legislature which has a separate individual existence. And although there may be instances of parliaments called without the king's writ, as in the Convention Parliament which restored Charles II., or the Convention of Lords and Commons which called in King William, yet those are exceptions from the rule, justified only by necessity, and beyond the influence of common rules. The sovereign is, by the law of the realm, bound to convoke a parliament “every year, or oftener if need be.” This has been interpreted by some as if the calling a parliament every year depended on the necessity of the measure; while, on the other hand, it has been maintained, that it was not the calling of a parliament annually, but calling it oftener than annually, which was to depend on the state of the times. But, by subsequent

statutes, this power has been regulated; and by 6 Will. & Mary, c. 2, it is enacted, that a new parliament shall be called within three years after the termination of the former one; though, practically, these regulations are of less value, [as the exigencies of public business necessitate the assembling of parliament in every year.]

2. *Of the Laws and Customs of Parliament as an Aggregate Body.*—The power and jurisdiction of parliament is, by Sir Edward Coke, said to be so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds. It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal—this being, by the British Constitution, the depository of that absolute power which must in all governments reside somewhere. All mischiefs and grievances, operations and remedies, which transcend the ordinary course of law, are within the reach of this tribunal. It can regulate and new-model the succession to the Crown; it can alter the established religion; it can change and re-model the constitution of the kingdom, and of parliament itself. It can, in short, do everything which is not naturally impossible; it is a power uncontrolled by any superior. The High Court of Parliament has its own peculiar law, called the *Lex et consuetudo Parliamenti*; a law to be learned out of the rolls and records of parliament, and by precedents and experience. Of this law the great maxim is, “That whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.” Hence, the Lords will not suffer the Commons to interfere in settling the election of a peer of Scotland; nor will the Commons allow the Lords to judge of the election of a member of their House. [What is said or done within the walls of parliament cannot be inquired into by a court of law; see *Burdett*, 14 East 1, 148; *Stockdale*, 9 A. & E. 1; *Bradlaugh*, 12 Q.B.D. 271.]

The House of Lords is a distinct court from the Commons for several purposes, and is the sovereign court of justice and *dernier ressort*. This House tries criminal causes or impeachments of the Commons, and has an original jurisdiction for the trial of peers upon indictments found by a grand jury.

It also tries causes upon appeal [from the Supreme Courts of Judicature in England and Ireland, and from the Court of Session in Scotland.] All the decrees of the House of Lords are as judgments, and may be executed in England by the Lord Chancellor—in Scotland by the Court of Session. The House of Commons is also a distinct court for many purposes. It is entitled to expel its own members, and to commit them to prison. The book of the clerk of the House is a record. The House is also the grand inquest of the kingdom, to present to the sovereign or lords public grievances or delinquents; and any member of the House of Commons has the privilege of impeaching a peer. The High Court of Parliament is the supreme court in the kingdom, not only for the making, but for the executing of the laws; by the trial of great and enormous offenders, whether lords or commons, by parliamentary impeachment. Acts of Parliament to attain particular persons of treason or felony, or to inflict pains and penalties, are new laws made *pro re nata*, and by no means an execution of those already in existence. But an impeachment before the Lords, by the Commons of Great Britain in Parliament, is a prosecution proceeding on the known and established law, being a presentment to the supreme court of criminal jurisdiction by the solemn grand inquest of the whole kingdom. The Commons, where a peer is impeached for treason, usually address the Crown to appoint a Lord High Steward, for the greater dignity and regularity of the proceedings; although it has been maintained that the House of Lords may proceed without such an appointment. The privileges of parliament are large and indefinite; and are preserved indefinite, that their powers may meet all the attempts which may at any time be made, by such expedients as the executive power in bad times may devise, for the purpose of violating the privileges of parliament. There are, however, certain privileges which are completely ascertained. These are the privileges of speech and of person. The privilege of speech is particularly demanded of the sovereign in person, by the Speaker of the House of Commons, at the opening of every new parliament. [See 1 Will. & Mary, stat. ii. c. 2.] But if any member, in the course of a debate, use offensive words, he may be called to the bar to receive a reprimand from the Speaker, or, if the offence be great, he may be sent to the Tower. [The publishers of parliamentary

[papers by authority of either House are protected by 3 & 4 Vict. c. 9. See *Defamation*.] With regard to privilege of person, it is now confined to freedom from arrest or imprisonment in civil matters; in the case of peers constantly, in that of commons during the sitting of parliament, and for forty days after each prorogation, and for as many days prior to the day to which the parliament is prorogued; and after a dissolution, the privilege continues for what is termed a reasonable time. All other privileges which obstruct the course of justice are now abolished by 10 Geo. III. c. 50; whereby it is enacted, that any suit may at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament, which shall not be impeded or delayed by pretence of any such privilege; except that the person of a member of the House of Commons shall not thereby be subject to any arrest or imprisonment on any such suit or proceedings. [See *D. Newcastle*, L.R. 4 Eng. & Ir. App. 661.]

3. *Of the Laws and Customs of the House of Lords*.—The Lords are entitled to have the attendance of the judges, for their advice in point of law, and for the greater dignity of their proceedings. Every peer may, by licence from the sovereign, appoint any lord of parliament his proxy to vote for him in his absence; and even the licence seems now to be presumed. A spiritual lord can alone be proxy for a spiritual lord, and a temporal for a temporal lord. These proxies cannot vote in a question of guilty or not guilty; and their authority ceases on the return of the lord by whom they are granted. No peer can hold more than two proxies at the same time. [By Standing Order of 31 March 1868, the use of proxies was discontinued; see *May's Parl. Prac.* 228, 417.] Each peer has a right, by leave of the House, when a vote passes contrary to his sentiments, to enter his dissent, with the grounds thereof, on the journals of the House. This is styled a protest. All bills which, in their consequence, may affect the peerage, by the custom of parliament originate in the House of Lords, and suffer no changes or amendments in the House of Commons. In its judicial capacity, the House of Lords is the supreme court of judicature in the kingdom. It possesses no original jurisdiction in civil causes, but only by appeal and writ of error, that it may rectify any injustice or mistake committed by the

courts of law. It has, however, an original criminal jurisdiction in the case of impeachment by the Commons, and in the trial of peers. [See *Appeal to House of Lords*.]

4. *Of the Laws and Customs of the House of Commons*.—The Commons, in making and repealing law, have equal power with the Lords; and it is the ancient indisputable privilege of the House, that all grants of subsidies, or parliamentary aids, shall be first introduced in that House; and all bills imposing taxes on the subject must also originate in the House of Commons, although such bills, in order to their being effectual as acts of parliament, must have the assent of the other branches of the legislature. So far is this privilege carried, that the House of Commons will not permit the House of Lords to alter or amend any money bill; and this extends even to tolls, rates, or duties to be collected, or where pecuniary fines are imposed for offences.

5. *The Method of Conducting Business*.—The mode of making laws is much the same in both Houses of Parliament. In each House there is a Speaker. The Speaker of the House of Lords is the Lord Chancellor; but if the seals are not in commission, the House of Lords, it is said, may elect a Speaker. The Speaker of the House of Commons is chosen by the House, and must be approved of by the sovereign. In this the usage of the two Houses differs—viz., that the Speaker of the House of Commons does not take part in the debate, nor offer his own opinion on the questions before the House; whereas the Speaker of the House of Lords (if a lord of parliament) may in all cases speak and argue. In either House the voice of the majority binds the whole, and this majority is declared by votes openly given. In the House of Lords, the Speaker gives his vote as one of the peers, and has no casting vote; and where the votes of the House are equal, the opinion of the non-contents is the prevailing one. Hence, were the peers equally divided in opinion on an appeal case, the judgment of the court below would remain unaltered. In the House of Commons, again, the Speaker never votes excepting where there is an equality without his vote, in which case his vote creates a majority in favour of that side to which he gives it. In the House of Commons there is no precedence as in the House of Lords, only the Speaker has, towards the upper end, a seat or chair in the middle of the House; and the clerk, with his assistant, sits near him at the table, just below the chair. The Lords have

robes ; the members of the House of Commons have none, except the Speaker and clerks, who wear wigs and gowns, as English lawyers do during term-time.

The members of the House of Commons are not at liberty to depart from parliament without leave of the Speaker and Commons assembled ; and the leave must be entered in the book of the clerk of parliament. A call of the House is intended for the purpose of discovering what members are absent without leave or just cause. On the calling over the names, such as are absent are marked ; and the defaulters being again called over on the same day, or the day after, and not appearing, are summoned by the serjeant-at-arms. [No call of the House has been enforced since 1836; *May*, 232.] Forty members are requisite to constitute a House for despatch of business. All bills, motions, and petitions, whether favourably or unfavourably received, and whether or not the bills pass into statutes, are, by order of parliament, entered on the parliament rolls. The Speaker of the House of Commons does not persuade or dissuade in passing a bill ; he gives a short account of it, with a view to explanation. If any question is put, he may explain, but he enters into no argument. When he desires to speak, he ought to be heard without interruption ; and when any other member stands up to speak at the same time, he ought to give way to the Speaker. When two members stand up to speak, he who is to speak against the bill should be first heard, or he who first caught the eye of the Speaker. [Till recently,] no member could be silenced unless by the Speaker ; [but now, by Standing Order, 18 March 1887, after a question has been proposed, any member may move "that the question be now put," and unless it appears to the Chair that such motion is an abuse of the rules of the House, or an infringement of the rights of the minority, it is put forthwith, and decided without amendment or debate. The motion for closure is decided in the affirmative, if not less than 100 members vote in the majority in support of it.] If any person speak impertinently, or beside the question, the Speaker may interrupt him, and ask the pleasure of the House, whether he shall be further heard. Whoever hisses or disturbs any person in his speech, is answerable at the bar of the House. [The Speaker, or Chairman, may order any member whose conduct is grossly disorderly to withdraw immediately from the House during the

[remainder of that day's sitting ; or he may name such member, or call upon the House to adjudge upon his conduct ; Standing Order, 28 Feb. 1888. When a member has been named by the Speaker, or by a Chairman of a committee of the whole House, after disregarding the authority of the Chair, or persistently and wilfully obstructing the business of the House, or otherwise, the Speaker or Chairman shall forthwith put the question, on a motion being made, "that such member be suspended from the service of the House." Suspension under this rule continues, on the first occasion, for a week ; on the second, for a fortnight ; on the third or any subsequent occasion, for a month ; Standing Orders, 28 Feb. 1880, 22 Nov. 1882.]

In enacting laws and other proceedings in parliament, the Lords give their voices in their House by the word *content* or *not content*, and the Commons by *yea* or *no*. When there is any difficulty, [in either House,] in determining on which side the majority is, the House divides, [the *contents* or *ayes* going into one lobby, and the *not contents* or *noes* going into another lobby. In the House of Commons,] four tellers are appointed by the Speaker, two on each side, and the tellers report to the Speaker the numbers. When a bill of a private nature is to be brought into the House, a petition must be presented by one of the members of the House of Commons. The petition, if founded on facts, is sent to a committee, who inquire into the facts, and report to the House ; and then, or if no investigation be necessary upon the bill, leave is given to bring in the bill. [See *Private Bill*.] In public matters, the bill is brought in by a motion, and without the necessity of a petition. Formerly, all bills were drawn in the form of petitions, which were entered on the parliament rolls, with the king's answer subjoined ; and at the end of each parliament the judges drew them into the form of a statute, which was entered on the Statute Roll. In the reign of Henry VI., bills in the form of acts (according to the modern custom) were first introduced. Any person may move for leave to bring in a bill, except it be for imposing a tax, [which can only originate in a committee of the whole House.] When prepared, the bill is drawn out on paper, with blanks wherever any point is dubious, or where blanks or sums are to be filled up. [Dates, amounts of salaries, &c., which were formerly required to be left blank, are now

[generally printed in italics; but the words so printed are still technically known as "blanks;" *May*, 539, 562.] The bill is read a first time, and at a convenient distance, a second time. After each reading, the Speaker states to the House the substance of the bill, [now a mere matter of form, as printed copies are circulated,] and puts the question, whether it shall proceed any further. The introducing of the bill may be opposed, as the bill itself may be at either of the readings; and if the opposition succeeds, the bill must be dropped for that session. If the bill passes the second reading, it is committed—that is, referred to a committee, which is either selected in matters of little moment, or where the measure is of importance, the House resolves itself into a committee of the whole House, which is done by the Speaker quitting the chair, and a member being appointed as chairman. The Speaker, in a committee of the whole House, may speak and vote as any other member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new-modelled. After the bill has been gone through, the chairman reports it to the House, with such amendments as the committee have made; and then the House reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. When the House has come to an opinion on the various points, the bill was [formerly] ordered to be engrossed, or written in a strong gross hand, on one or more long rolls of parchment sewed together. [But the practice of engrossing bills on parchment was discontinued in 1849, when both Houses agreed to substitute bills printed on vellum by the Queen's printer, for the parchment rolls; *May*, 581.] The bill is then read a third time. [In the Lords new clauses may be added, and amendments made, at this stage, and the same practice formerly prevailed in the Commons; but by Standing Order of 21 July 1856, no amendments, not being merely verbal, may be made to any bill on the third reading. If material amendments are required, it is usual to discharge the order for the third reading, to recommit the bill, and introduce the amendments in committee; *May*, 582.] The bill being read a third time, the Speaker once more states the nature of the bill, and, holding it up in his hands, puts the question, Whether the bill shall pass? If it be agreed to pass the bill, the title of it is settled,

and one of the members is commissioned to carry it up to the Lords, and to desire their concurrence. This member, attended by other members of the House, carries the bill to the bar of the House of Lords, and there delivers it to their Speaker, who comes from the woollack to receive it.

The bill then passes through the same forms in the House of Lords which it has passed in the House of Commons. If it be rejected, no further notice is taken of it, in order to prevent unbecoming altercations between the two Houses; but, if it be passed by the Lords, they send a message to the Commons, that they have agreed to the bill; and if no amendment has been made, it remains with them; but if amendments be made, they are sent down with the bill, to receive the concurrence of the Commons. Where the Commons do not agree to the amendments, a conference usually takes place between members chosen from either House, who meet and debate the matter. If, in consequence of this conference, the Commons agree to the amendments, the bill is sent back to the Lords by one of the members, with a message to acquaint them therewith; but should both Houses remain inflexible, the bill is dropped. When the bill originates in the House of Lords, the same form takes place; but when an act of grace or pardon is passed, it is signed by the sovereign, and then read over in each of the two Houses of Parliament, without any new engrossing or amendment; and where both Houses have agreed to a bill, it is deposited in the House of Lords, there to await the royal assent, unless it be a money bill, which, after receiving the concurrence of the Lords, is sent back to the House of Commons.

The royal assent may be given in two ways:—1. By the sovereign in person. In this case, the Queen goes to the House of Lords in her royal robes, with the crown on her head; and being seated on the throne, a message is sent to require the presence of the Commons, who appear at the bar. The titles of all the bills which have been passed are then read, and her answer is declared by the clerk of the parliament in Norman-French. In a public bill, where the sovereign consents, the clerk declares, "*La Reigne le veut*," The Queen wills it. If it be a private bill, the clerks repeats, "*Soit fait comme il est désiré*," Be it as it is desired. The refusal of the royal assent is expressed in these terms, "*La Reigne s'avisera*," the Queen will consider of it. When a bill of supply is granted, it is

carried up and presented to the Queen by the Speaker of the House of Commons, and the royal assent is then expressed, "*La Reine remercie ses loyals sujets, accepte leur benevolence et aussi le veut*," The Queen thanks her loyal subjects, accepts their benevolence, and wills it to be so. Where it is an act of grace, which originates with the sovereign, and has the royal assent in its first stage, the clerk of parliament pronounces the gratitude of the subjects in these terms, "*Les Prelats, Seigneurs, et Commons, en ce present parliament assemblez, au nom de tous vous autres sujets, remercient très humblement votre Majesté, et prient à Dieu vous donner en santé bonne vie et longue*," The Prelates, Lords, and Commons, in this present parliament assembled, in the name of all your other subjects, most humbly thank your Majesty, and pray to God to grant you in health and wealth long to live. 2. The royal assent may be given by letters-patent under the great seal, signed with the sovereign's hand, and notified in her absence to both Houses assembled in the House of Lords. When the bill has received the royal assent in any of those ways, it is then, and not before, a statute or act of parliament, and is placed amongst the records of the kingdom.

6. *Of the Adjournment, Prorogation, and Dissolution of Parliament.*—An adjournment is no more than a continuance of the session from one day to another, as the word itself imports; and this is done by the authority of each House separately every day, and sometimes for a fortnight, or even a month together, as at Christmas or Easter, or upon other particular occasions; but the adjournment of one House is no adjournment of the other. It has also been usual, on the suggestion of the sovereign, for both Houses to adjourn themselves for the time pointed out by her Majesty; and the advantage of an adjournment, in place of a prorogation, is, that everything remains as it was, and may be taken up on the meeting of parliament; whereas by a prorogation the session is at an end, and the bills at that time in their progress are lost, and must be begun of new. A prorogation is the continuance of the parliament from one session to another, and is made by the royal authority, expressed by the Lord Chancellor, or by a commission from the Crown, or by royal proclamation. [By 30 & 31 Vict. c. 81, when the Queen is pleased, with the advice of her privy council, to issue her royal proclamation to prorogue parliament, from the day to which it then stands sum-

moned or prorogued to any further day, being not less than fourteen days from the date of the proclamation, such proclamation is full and sufficient notice, without any subsequent issue of writs, of the royal intention, and parliament stands thereby prorogued to the day and place appointed. But this act does not apply to prorogation of parliament at the close of a session.] Both Houses are prorogued [by such proclamation,] it not being a prorogation of either House, but of parliament. The session is never understood to be at an end until it is prorogued. [The prorogation is to a day fixed; but when parliament stands prorogued to a certain day, or when both Houses stand adjourned for more than fourteen days, the Queen may issue a proclamation, with the advice of her privy council, declaring that parliament shall meet on a day not less than six days from the proclamation; 37 Geo. III. c. 127, and 39 & 40 Geo. III. c. 14, amended by 33 & 34 Vict. c. 81; *May*, 49.] All orders of parliament are determined by prorogation; and a person taken into custody by order of parliament may, after prorogation, be discharged on a *habeas corpus*; but impeachments brought up by the Commons, and all cases of appeal and writs of error, continue in the state in which they were at the prorogation or dissolution of parliament. Dissolution is the civil death of parliament; and this may be effected in [two] ways:—1. By the sovereign's will, expressed in person, or by representation; and this is a branch of the royal prerogative. 2. Parliament may dissolve by length of time; for, as the matter is now ordered, it must die a natural death at the end of every seventh year, if not sooner dissolved. [Hitherto, parliament has also been dissolved by demise of the Crown, or, at least, under 6 Anne, c. 7, within six months after that event. But by 30 & 31 Vict. c. 102, § 51, the parliament in being at any future demise of the Crown, shall not be determined by such demise, but shall continue so long as it would otherwise have continued, unless dissolved by the Crown. See *Stephen's Com.* ii. 337; *May's Parliamentary Practice*; *Anson on the Constitution*, vol. i.; *Dicey on the Constitution*, 35;] *Tomlins' Dict. h. t.* See *Amendment. Commons, House of. Election Law.* [*Oaths. Affirmation. Alien.*]

[PARLIAMENTARY CHURCHES.

This name has been applied to the churches instituted in virtue of the acts 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90, passed to authorise the building of additional churches

[in the Highlands and Islands of Scotland. Almost all the districts attached to these churches have now been erected into parishes *quoad sacra*. See article in *Ad-denda* to former edition of this work (1838); also *Elliot on Erection of Parishes*, 9.]

PAROCHIAL RELIEF; is a disqualification for registration as a voter. See *Alms*. [Poor.]

PAROLE PROOF; is evidence by the oaths of witnesses, in contradistinction to evidence by writ or oath of party. See *Evidence*.

PARRICIDE; the murder of a parent. This is a crime so monstrous and unnatural as to have excited the just indignation of all legislatures; and by the law of Scotland it is punished with more than ordinary severity. In addition to the punishment of death, it is ordered by 1594, c. 220, that he who has slain "his father or mother, gudschir or gudedame," shall suffer a total corruption of blood, *in linea recta*, and be "disherished in all time thereafter fra their lands, heritages, tacks, possessions," which are to devolve on the next collateral relation, in the same manner as if the direct line had failed. These terms, however, do not comprehend the offence of killing father or mother by affinity. To have the effect of disinheriting the posterity of a parricide, it has been held necessary that he be convicted by a jury; it not being sufficient that he has been fugitated for non-appearance. In some cases of conviction for this crime, the right hand of the criminal has been struck off before he was executed. *Hume*, i. 290; *Ersk.* B. iv. tit. 4, § 47; *Stair*, B. iii. tit. 5, § 35; *Bank.* ii. 331; *Kames' Stat. Law Abridg.* h. t.

PARSONAGE TEINDS; were those tithes which belonged to the parson; and they consisted of the tithes of corn, or of wheat, barley, oats, peas, &c. They are termed *decimæ rectoriæ* in our Latin charters, and sometimes *decimæ garbales*. *Stair*, B. iv. tit. 24, § 10; *More's Notes*, cccxxi.; *Ersk.* B. ii. tit. 10, §§ 12, 33; *Hutch. Justice*, ii. 349; *Connell on Tithes*, i. 76; *Connell on Parishes*, 303, 359. See *Teinds*.

PART AND PERTINENT. Lands are generally disposed with all parts and pertinents thereto belonging; and the effect of that expression is often very important. Thus, it may import a conveyance of lands, or rights of servitude, which have been possessed for forty years as part and pertinent of the principal subject conveyed. So, also, this expression carries everything which, from its close connection with land,

falls properly under the description of part and pertinent; hence, natural fruits, before they are separated, as fruit, natural grass, &c., are deemed part and pertinent. In the same way, woods or deer parks are *juris privati*, and are carried as part and pertinent; so is a seat in a church, or a burial-ground. But a steillbow stocking, unless the lands have been sold on a rental, does not accompany the lands as part and pertinent. [A grant of lands includes all parts and pertinents thereof, even though these words be not expressed; *Gordon*, 12 Nov. 1850, 13 D. 1.] See *Ersk.* B. ii. tit. 6, § 3; *Stair*, B. ii. tit. 3, § 60; *More's Notes*, cc.; *Bank.* i. 592; *Bell's Princ.* § 739; [*Menzies' Conv.* 545; *M. Bell's Conv.* i. 600; *Rankine on Land-Ownership*, 156, 171.] See *Commonly. Bounding Charter*.

PARTIAL CONFIRMATION. See *Confirmation*.

PARTIAL COUNSEL; [was formerly a ground of exclusion of a witness. But by 15 Vict. c. 27, § 1, this disqualification was removed, under reservation of the right to examine the witness on any point affecting credibility. See *Evidence*, p. 411.]

PARTIAL LOSS. See *Insurance*.

PARTIAL PAYMENT. No one is bound to accept part-payment of a debt; and the offer of part-payment has no effect in interrupting *mora*. But a creditor in two or more separate debts cannot refuse the payment of any one of those debts, though the debtor should decline to clear off even the interest on the others. It is a general rule, that payment of part of a debt extinguishes the debt to that extent; and the claim of the creditor receiving such payment from his debtor is, in ranking on his bankrupt estate, limited to the balance. This rule holds, whether the partial payment was made by the bankrupt himself, or by a solvent co-obligant. But partial payment, although it may diminish the debt, has no such effect on a real security given for it by way of pledge. Doubts were at one time entertained, whether partial payment to an adjudger did not diminish the security; but it is now settled, that notwithstanding such partial payment, the adjudger is entitled to rank for the undiminished amount of his original claim; [*Dalrymple*, 18 May 1825, 4 S. 16.] The case of a common heritable bond is different; it is a mere accessory to the debt, and is diminished as the debt decreases by intromissions, or by payments. A landlord may refuse part-payment of rent. The holder of a bill is not bound to take less than the whole sum contained in

the bill; but he is entitled to take a partial payment from the acceptor, without cutting off his claim of recourse against the other parties, provided he protest the bill, in so far as it is not paid, and in other respects negotiate the bill duly. Suing one of the obligants in a promissory-note, and thereby receiving part of the debt in the note, does not discharge the other obligant. Partial payment by an indorser has been held equivalent to a waiver of notice. A partial payment by the acceptor precludes the holder from suing either the drawer or indorsers for more than the balance. And although there was at one time some doubt upon the point, it has been decided, that the payment of part of a bill by the drawer precludes the holder from suing the acceptor for more than the balance; *Thomson*, 26 Jan. 1819, cited in *Thomson on Bills*, 434. Partial payments made by the debtor interrupt the long prescription; but none of the short prescriptions of debt are interrupted by partial payments. Yet markings of partial payments to account, made and entered in the debtor's hand-writing, after a bill has undergone the sexennial limitation, amount to an acknowledgment by the debtor's writ that the principal sum was due after the six years, and therefore afford evidence that it is still resting-owing, unless he proves the contrary. See *Ersk.* B. iii. tit. 4, § 1; tit. 7, § 39; *Bell's Com.* ii. 305, 425; *Thomson on Bills*, 262, 378, 382, 433, 482, 563. See *Payment. Indefinite Payment.*

PARTIBUS; is a note written on the margin of a summons, or of a note of suspension, when lodged for calling, containing the name and designation, in plain and legible writing, of the pursuer or suspender; or of each of them, if there be only two; or if more, the name and designation of the party first named, with the words, "*and others.*" And if the defenders are not more than three, their names and designations are inserted in the *partibus*; but if there be more, the *partibus* contains the name of the party first named, with the words, "*and others, as per roll,*" referring to a separate roll of all the defenders. The *partibus* must also contain the names of the pursuer's counsel and agent; [and must specify both the Lord Ordinary and the Division of the court to which the cause is to belong. See A.S. 11 July 1828, § 27; A.S. 14 Oct. 1868, §§ 8, 9.] As it is from this *partibus* that all the entries in the calling lists, rolls, and minute-book are made, it is of

great consequence that it be perfectly correct. [See *Craven*, 9 March 1854, 16 D. 811. See also *Shand's Prac.* i. 265; *MacKay's Prac.* i. 409.] See *Calling a Summons. [Appearance, Entering.]*

PARTICATA; in old law language, a rood of land. Three bere corns, without tails, set together, in length make an inch, one of which corns should be taken off the mid-rig, one off the side of the rig, and one off the furrow. Twelve inches make a foot. Three feet and an inch make an ell. Six ells make a fall; and six ells long by six broad make a square fall or rood. *Skene, h. t.*

[PARTICEPS CRIMINIS. See *Accomplice.*]

PARTICULAR AVERAGE. See *Average.*

PARTNERSHIP. Partnership, or society, is a consensual contract, by which the parties, either in writing, or *rebus ipsis et factis*, agree to conduct a certain business, trade, or manufacture, under certain conditions, and by the aid of a certain capital, dividing the profits and suffering the losses, arising in the course of the connection, according to certain proportions stipulated in the contract. [In *Pollock's Digest of the Law of Partnership* (p. 1), partnership is defined as "the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them." Seventeen other definitions are collected from various authorities in *Lindley on Partnership*, p. 2. By the Companies Act, 1862 (25 & 26 Vict. c. 89, § 4), no company, association, or partnership, consisting of more than twenty persons, may be formed for the purpose of carrying on any business, without being registered as a company under the act (unless it is formed in pursuance of some other act of parliament, or of letters-patent); and when the business is banking, the company may not consist of more than ten persons without being so registered. With regard to the characteristics which distinguish a joint stock company from an ordinary partnership, see *Joint Stock Company*. A partnership limited to a particular adventure or speculation is called a joint adventure; and so far as it extends, such an association is governed by the same principles as apply to partnership proper. See *Joint Adventure*. The business of a partnership is generally carried on under a social name or firm; as to which see *Firm*. The partnership forms a separate legal person, distinct from any of its members; and each partner is regarded as

[an agent for the firm in regard to all matters in the line of the company's business.

[*Constitution of Partnership.*—Partnership is usually constituted by a formal contract of copartnery, setting forth the agreement of the parties as to the duration of the partnership, the shares of capital and profits, &c. But it may be instructed by an informal writing, or even by parole evidence of facts and circumstances; *Fraser*, 4 March 1854, 16 D. 789; *Aitchison*, 16 June 1877, 4 R. 899; *Morrison*, 1 July 1879, 6 R. 1158. Pupils, and others incapable of consent, cannot be partners. One person cannot constitute a partnership; *Reid*, 10 July 1828, 6 S. 1120. But several persons may trade under a single name, as "William Drew;" *Drew*, 14 Jan. 1865, 3 Macph. 384. One person may be a member of several partnerships without confounding their interests; and several persons may, by various combinations of their number, make distinct partnerships for different objects; *Bell's Princ.* § 365.

[A man who is not in reality partner in a company, may yet be liable to the creditors of the company as if he were a partner. Any one who holds himself out, or suffers himself to be held out, as a partner, incurs partnership liability to all persons who may have been induced by his actings to deal in reliance on his credit. On the other hand, a sleeping or dormant partner is one who, though in reality a partner, does not appear publicly and ostensibly as such. It was formerly held in England—and the doctrine was accepted by Professor Bell in this country—that the fact of receiving a share of the profits of a business, or the existence of an agreement entitling a person to share in the profits, necessarily involved partnership liability. But a more correct, as well as more equitable, doctrine was laid down by the House of Lords in *Cox v. Hickman*, 1860, 8 H.L. Ca. 268. Participation in profits is, indeed, *prima facie* evidence of partnership; but the presumption which it raises may be rebutted, if the whole circumstances of the case show that the person participated on some other footing than that of partnership. The following passage from the opinion of Lord Cranworth (p. 306) indicates the true criterion of liability:—"It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords

[cogent, often conclusive evidence, that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, *i.e.*, that he stood in the relation of principal toward the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made." This view was further developed in the more recent cases of *Bullen*, 1865, L.R. 1 C.P. 86; *Holme*, 1872, L.R. 7 Ex. 218; *Mollwo*, 1872, L.R. 4 P.C. 419; *Tennant*, 1877, 6 Ch. D. 303. "The strong tendency of the above decisions is to establish the doctrine that no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*, or unless they are his agents;" *Lindley*, 33-4. See also the Scotch cases of *Eaglesham Co.* 15 July 1875, 2 R. 960, and *Stott*, 20 July 1878, 5 R. 1104; and article by Mr Andrew Mitchell, advocate, in *Law Magazine and Law Review* (N.S.), iv. 224.

[In 1865, the act 28 & 29 Vict. c. 86 ("Bovill's Act"), was passed "to amend the law of partnership." By § 1, the advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such. By § 2, no contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner. By § 3, no person being the widow or child of the deceased partner of a trader, and receiving

[by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader. By § 4, no person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business. And by § 5, in the event of the bankruptcy or insolvency of the trader, the lender of money, and the vendor of the goodwill, shall not be entitled to recover the money lent, or the profits or interest due to them, until the claims of the other onerous creditors have been satisfied. With regard to the effect of this statute, Mr Pollock (p. 12) observes that "it is by no means certain that this act adds anything material, except the disabilities imposed by § 5, to what had already been decided in *Cox v. Hickman*. In any case, the special provisions of the act, even if to some extent superfluous, are not to be taken as in any way detracting from the generality of the principle there laid down." See also *Pooley*, 1876, 5 Ch. D. 458 (*per* Jessel, M.R.); *Delhasse*, 1878, 7 Ch. D. 511 (*per* Thesiger, L.J.); and *Smith's L.C.* (9th ed.), i. 908. The case of *Pooley* is an instructive illustration of a kind of transaction to which the act affords no protection, viz., an advance made under colour of loan, but which is truly a contribution of capital by a dormant partner. When a contract of copartnership is entered into for a definite term, and after expiration of the term the partnership is carried on as before without a new contract, the partnership thereafter is a partnership at will, but in other respects the terms of the former contract remain in force so far as consistent with a partnership at will; *Neilson*, 4 March 1886, 13 R. (H.L.) 50.

[Rights and Obligations of the Partners.]

—Where there is no stipulation as to the respective shares of partners in the profit and loss of the business, the extent of each partner's interest is a question of fact, to be determined by a consideration of the whole circumstances of the case. In the absence of any contrary indication, equality is presumed; *Campbell's Trs.* 14 Feb. 1831, 5 W. & S. 16.] Generally speaking, the partners, even if lending their names merely, and whether ostensible or not, are liable for the company debts *singuli in solidum*, to the extent of their whole estates. [In the ordi-

nary case, however, the liability has reference only to debts incurred after the partner's admission to the company. But when the whole estate of a going concern is taken over by a new partnership, the new partners contributing no capital, and the business being continued on the same footing as before, the presumption is that the liabilities are taken over with the stock, and that the new partnership undertakes liability for all the trade debts previously contracted; *Heddlé's Exrx.* 1 June 1888, 15 R. 698; see also *M'Keand*, 17 March 1860, 23 D. 846; *Nelmes & Co.* 15 June 1883, 10 R. 974; *Stephen's Tr.* 14 June 1889, 16 R. 779.] When the partner of a company acquires a right in name of the company, the property belongs to the company; or, where the partner acquires a right in his own name, with the money of the company, he lies under an obligation to communicate the benefit to the company. [But this rule does not apply to a partner purchasing another partner's interest in the company; *Cassells*, 13 Jan. 1881, 8 R. (H.L.) 1. Each partner is bound to act in good faith as agent for the firm. He cannot, therefore, compete with his firm in the line of its business; nor can he take any personal benefit from any transaction in that line, beyond his share of the partnership profits; *Pender*, 31 March 1864, 2 Macph. 1428; *M'Niven*, 2 Dec. 1868, 7 Macph. 181. See *Principal and Agent*. A partner is bound to give his personal attention and diligence in the business of the partnership, without recompense. But this rule is frequently modified by special agreement. See *M'Whirter*, 26 Jan. 1821, 1 S. 295, Hume's Dec. 760; *Beath*, 3 March 1826, 2 W. & S. 25; *Faulds*, 14 Feb. 1867, 5 Macph. 373.] Every member of a company is understood to have the power of using the company firm; and, in every act of ordinary administration, in the line of the company's trade or employment, he may bind the company by the use of that firm. But he cannot use it to execute a deed which is not an act of ordinary administration; to execute a submission, for example, or to grant a bond; nor would his giving the company's firm for a private debt, where the party receiving it was aware of the fraud, be effectual to the person receiving it. [The purchaser of the goodwill of a partnership business acquires the exclusive right to the use of the firm name; *Smith*, 27 Oct. 1888, 16 R. 36; *Lindley*, 440.] A guarantee is implied by each of the partners of a company to third parties, of all the engage-

ments legally undertaken in the name of the company. The partners are even liable in restitution of what one of their number has obtained by fraud in the line of the company trade. [In the ordinary case, and apart from special proof of the company's course of dealing, a partner has not power to bind his firm by a guarantee or cautionary obligation; *M'Nair & Co.* 1803, Hume's Dec. 753; *Brettel*, 4 Ex. 623. A letter written and signed by a partner in the firm's name is holograph of the firm; *Nisbet*, 20 July 1869, 7 Macph. 1097.] Where there is no special agreement on the subject, a partner's share cannot be transferred, either by conveyance or by succession, except to the amount of his claim on the company at the time of their dividend; [see *Cassells*, *supra*, 8 R. (H.L.) 1.] Any partner whom he may, independently of the company, assume, continues to be his partner, not the company's, on the maxim, *Socius mei socii non est meus socius*. But one company may become, as it were, an individual partner of another company, and thus subject to the obligations of partnership a variety of companies. The stock of the company is liable, in the first place, to the company's debts; and the company debts rank on the private estates of the partners of the company, or of the survivors, or of those remaining solvent; who, however, have their recourse. The debts or losses of a private partner cannot come upon the company's funds until all the company's debts are paid. His creditors cannot transfer his share by poiding, though they may attach it prospectively by arrestment. [The title to heritable subjects cannot be taken in name of a firm: heritage belonging to a partnership must therefore stand in the name of the partners individually, as trustees for the firm. When property is held by a partner on behalf of a firm, the fact that it really belongs to the company may be proved *prout de jure*; the evidence not being restricted, as in the ordinary proof of trust, to writ or oath; *Forrester*, 5 June 1875, 2 R. 755. With regard to compensation, in questions between a company and an individual partner, see *Compensation*, p. 210; also *Campbell's Merc. Law*, 200. With regard to novation of contract between a customer and a firm, occasioned by the retirement of old and the introduction of new partners, see *Lindley*, 239; also *Novation*. By 19 & 20 Vict. c. 60, § 7, no guarantee, security, cautionary obligation, representation, or assurance, granted or made to or for a company or

[firm consisting of two or more persons, or to or for a single person trading under the name of a firm, shall be binding on the granter or maker of the same, in respect of anything done, or omitted to be done, after a change shall have taken place in any one or more of the partners of the company or firm to which the same has been granted or made, or of the company or firm for which the same has been granted or made; unless the intention of parties that such guarantee, security, cautionary obligation, representation, or assurance shall continue to be binding notwithstanding such change, shall appear, either by express stipulation, or by necessary implication from the nature of the firm, or otherwise.]

Dissolution of Partnership.—The death of a copartner dissolves the company, unless the contrary be provided for in the contract, or where the survivors tacitly or expressly agree to continue. [Intimation of the death is not required, to put an end to the copartnery; *Oswald's Trs.* 15 Jan. 1879, 6 R. 461.] The death of one of the partners does not dissolve the company, if it be expressly provided that heirs shall become partners; or if the right of heirs be necessarily implied, as in a contract exceeding the term of human life. Thus a partnership in a coal concern for 124 years, was held binding on the heirs taking up the succession; and while the concern was prosperous, and there was no reasonable apprehension of loss, the heir of one of the parties was not entitled to a dissolution of the partnership, to the prejudice of the other party; *Warner*, 1815, 3 Dow, 76; [*Hill*, 22 Feb. 1865, 3 Macph. 541.] Although the contract be declared to endure for a certain time, a partner may, in the meantime, apply to the court for judicial dissolution of the partnership, upon good grounds. Insanity, [where it incapacitates a partner from performing his part of the contract,] is a ground of dissolution. [But where a partner merely furnishes capital, and has not undertaken to give personal services, his incapacity is not incompatible with continuance of the partnership; *Eadie*, 19 Feb. 1885, 12 R. 660.] Insolvency, or bankruptcy under 1696, c. 5, of one of the partners, is also a ground of dissolution. [In *Hannan*, 16 Dec. 1879, 7 R. 380, a stipulation that a member of a firm should cease to be a partner in the event of "declared insolvency," was enforced. The court would also interfere on the ground of gross misconduct of a partner, if it were of such a nature as not merely to shake the

[credit of the firm in the eyes of the world, but to destroy the mutual confidence which ought to subsist between partners. See *Lindley*, 580. In *Miller*, 10 Dec. 1875, 3 R. 242, a joint adventure was put an end to on the ground that there was no reasonable prospect of profit being realised; see also *Young*, 23 Feb. 1887, 14 R. 490.] Sequestration is an *eo ipso* dissolution; [*Walker*, 24 Feb. 1886, 13 R. 599. The marriage of a female partner has been held to dissolve a partnership; *Russell*, 14 Nov. 1874, 2 R. 93; but this rule may possibly be modified by the Married Women's Property Acts of 1877 and 1881. See *Marriage*.] Where no term of endurance has been agreed upon, any of the partners may retire whenever he chooses, and so dissolve the partnership; but he is not entitled to do so at an unfavourable time, for the purpose of acquiring undue advantage at the expense of his copartners. [The same rule holds where a partnership is continued after the expiration of the original term of endurance, but no term of continuance is fixed; *Featherstonhaugh*, 1810, 17 Ves. 298, 307.] In order that a partner who has once appeared in a concern, may not mislead the public into a belief that he remains a partner, after he has withdrawn, and thus give greater credit to the company than they would otherwise have received, he and the remaining partners must be at great pains, by public advertisement, and even by circular letters to the correspondents of the company, to notify his retirement from the company. [See *Blacks*, 25 Nov. 1885, 13 R. 243. Even in the case of a sleeping partner, it appears that notice must be given to those who know that he is a partner; *Hay*, 27 Jan. 1809, F.C.; *Dunbar*, 10 March 1810, F.C.; *Mann*, 20 June 1879, 6 R. 1078. On dissolution of a partnership, if there is no special stipulation to the contrary, any partner, or the representative of a deceased partner, is entitled to insist on a sale of the company's stock, and is not bound to accept a valuation; and any partner who continues to trade on the joint property is liable to account for the profits. See *Crawshay*, 1808, 15 Ves. 218; *M'Niven*, *supra*, 7 Macph. 181; *M'Kersies*, 25 June 1872, 10 Macph. 861. In general, the goodwill of the business must be included in the sale of assets; see *Goodwill*.]

Winding up.—The partnership continues to subsist even after dissolution, for the purpose of winding up the concern. During this period, no new debts can be contracted. Special stipulations as to the winding up are

effectual; but if no arrangements have been made in that manner, the surviving or solvent partners are entitled to take the management; or, in case of dispute, a neutral person is judicially appointed to wind up. [The court, however, will not interfere, except in a case of necessity, or at least of clear expediency. Though the question is always largely one of circumstances, some general principles are deducible from the decisions:—(1) When all the partners in a copartnership are dead, the court will appoint a judicial factor to wind up the partnership estate; *Dixon*, 13 Aug. 1832, 6 W. & S. 229. (2) If there are surviving partners, who are not prevented by fault or incapacity from carrying on the business, the court will not interfere, but will leave the surviving partners to extricate their affairs in their own way; *Young*, 14 March 1853, 1 Macq. 385; *Nicoll*, 15 Nov. 1877, 5 R. 137; *Eadie*, *supra*, 12 R. 660. But (3), if any one of the surviving partners is unfitted, whether from failure of duty or from incapacity, for carrying on or winding up the affairs of the partnership, then the court may, and, if satisfied of the necessity, will appoint a judicial factor; *Dickie*, 12 June 1874, 1 R. 1030. (4) The court will not appoint a judicial factor merely for the purpose of clearing up partnership accounts; *Gow*, 19 June 1877, 4 R. 928. "But if there be good ground for doubt and dissatisfaction on the part of one partner of a dissolved company as to the credit or fidelity of another partner who is realising and appropriating the assets, or if the partners cannot agree on joint or separate measures for winding up the company, and there is consequently a danger of loss of the partnership property, a case arises in which a judicial factor should generally be appointed" (*per* Lord Shand). See *Fraser's Thoms on Judicial Factors*, 308; *Mackay's Prac.* ii. 398.]

The partners are liable for the expense of an unsuccessful attempt to enforce a debt alleged to be due to the company. An agreement to refer disputes to arbitration is effectual only if the arbiter be named. See *Arbitration*. [In general, the creditor of a company cannot sue an individual partner singly without constituting his debt against the company. But this rule does not hold, if the company is domiciled in a foreign country where a firm is not regarded as a separate *persona*, and where, therefore, a debt cannot possibly be constituted against it. (See, as to English law, *Parnell*, 5 Feb. 1889, 16 R. 917.) Nor is it a good objection

[to an action brought against a partner for a company debt, that copartners residing beyond the jurisdiction of the Scotch courts have not been likewise called in the action; *Muir*, 17 June 1862, 24 D. 1119. An action for payment of a partnership debt against one of several partners of a dissolved firm is incompetent, the pursuer being bound to call all the partners known to him; *M'Naught*, 17 Dec. 1885, 13 R. 366. If one of two partners dies after the firm has been dissolved by agreement, but before the winding up is completed, the survivor is in the same position as if the death had operated the dissolution, and may sue for a debt due to the firm in his own name as sole surviving partner; *Nicoll*, *supra*, 5 R. 137.

[A firm becomes bankrupt, when any one of the partners is made bankrupt for a company debt. On the sequestration of a partner, his estate is applicable to the payment *pari passu* of his personal debts, and of so much of the partnership debts as the partnership estate is insufficient to satisfy. The creditor in a company debt, in claiming upon the sequestered estate of a bankrupt partner, must deduct from the amount of his claim the value of his right to draw payment from the company's funds, and he is ranked as a creditor only for the balance. See *Second Report of Mercantile Law Commission*, Appx. A, p. 99; *Goudy on Bankruptcy*, 560.

[As to partnership *en commandite*, or limited partnership, see *Commandite*.]

See generally, on partnership, *Ersk. B. i. tit. 7, § 64*; *B. iii. tit. 3, § 18*; *Stair, B. i. tit. 16*; *More's Notes*, xcvi.; *Bank. i. 443*; *Bell's Com. ii. 499*; *Bell's Princ. § 350*; *Ross's Lect. i. 83*; *Thomson on Bills, 157*; *Jurid. Styles, ii. 115*; [*Clark on Partnership*; *Menzies' Conv. 421*; *M. Bell's Conv. i. 390*; *Campbell's Princ. of Merc. Law, 163*; *Lindley on Partnership*; *Pollock's Digest of the Law of Partnership*; *Parsons on Partnership*; *Addison on Contracts, 73, 792*; *Smith's Merc. Law, 19*; *Smith's L.C. i. 877*; *Ross's L.C. iii. 381*.]

PASSAGE. See *Road. Ish and Entry*.

PASSENGERS. As to the rights and liabilities of passengers by land and sea, see the articles *Nautæ*, *Carpones*. *Public Carriages*. *Carriers*.

PASSIVE TITLES. By the law of Scotland, the whole property of a deceased person is liable for all the debts he may have contracted; and the heir who takes up the succession of the deceased thereby incurs a personal liability for his debts and obligations. Anciently, it would appear that the

responsibility of the heir extended no further than to the value of the property to which he succeeded. But this was found to give facilities to the heir for secreting much of the deceased's property, and thereby defrauding creditors; and in order to obviate such frauds, certain acts on the part of the heir were held sufficient in law to render him universally responsible for the debts of the ancestor. This has been termed a passive title; by which the heir, without acquiring an active title, as by service or confirmation, tacitly and by implication subjects himself to the responsibilities belonging to the character of heir. All passive representation was founded on a presumption of fraud on the part of the heir; and therefore, where an heir was desirous of intromitting and fairly accounting for his intromissions to the creditors of the ancestor, he might do so by making an inventory of the heritable estate of the deceased, and serving with reference to such inventory, technically called entry *cum beneficio inventarii*. [See *Beneficium Inventarii*. A special service does not now infer a general representation, beyond the value of the lands embraced in it; and a general service may now be obtained to a limited effect, by annexing a specification, the party served being liable in respect of such service only to the extent or value of the lands contained in the specification; 10 & 11 Vict. c. 47, §§ 23, 25; 31 & 32 Vict. c. 101, §§ 47, 49. See *Service*. And the ancient law has now been restored by 37 & 38 Vict. c. 94, § 12, which enacts that an heir shall not be liable for the debts of his ancestor beyond the value of the estate of such ancestor to which he succeeds.] With regard to moveables, where the heir chooses to pursue the regular method, he is accountable only for the effects confirmed; and the inclination of the more modern decisions is in every case, whether relating to heritable or to moveable succession, to restrict the responsibility to the value of the succession, wherever fraud is not imputable to the heir.

The passive titles which have been introduced for the security of creditors, are, I. GENERAL: as, 1. *Gestio pro hærede*; 2. *Præceptio hæreditatis*; and, 3. Certain statutory or presumptive passive titles. Or, II. PARTIAL: as, 1. By stating a peremptory defence; or, 2. By failing to renounce. The only passive title relating to moveable succession is vitious intromission. A few words will explain, sufficiently for the present purpose, the grounds and nature of those passive titles:—

I. GENERAL PASSIVE TITLES.

1. *Gestio pro Hærede.*

Gestio pro hærede, or behaviour as an heir, signifies the heir's behaving or conducting himself in such a manner, with respect to his predecessor's heritage, as none but the heir is legally entitled to do. See *Behaviour as Heir*.

2. *Præceptio Hæreditatis.*

This passive title may be incurred where the heir-apparent accepts from his ancestor a gratuitous right to the heritage, or any part of it, to which he himself might have succeeded as heir. It is called *præceptio hæreditatis*, because it is a taking of the succession prematurely, and before it has opened to the heir by his ancestor's death. The effect of this anticipation is to render the heir liable for the debts of his predecessor contracted prior to the date of the gift. But should the disposition to the heir remain latent, and should no infetment be taken upon it, it may be reduced on the head of fraud by posterior creditors of the person in possession. In order to subject the heir in this passive title, the grant must be gratuitous; for there is nothing to prevent a fair sale to the heir for an adequate price, provided evidence of the onerosity of the transaction be preserved, and that there be no room for challenge under the act 1621, c. 18. See *Conjunct and Confident*. When a right of this kind is given in implement of an obligation under a marriage-contract, its effect, as regards the passive title, depends on the fact whether the contract creates a *jus crediti* in the heir, or a mere *spes successionis*. Where the marriage-contract vests a *jus crediti* in the heir, as, for example, when it contains an obligation to infet the heir of the marriage against a certain day, the heir, in that case, incurs no passive title by accepting the conveyance from his father. On the other hand, where the heir has a mere *spes*, he will incur the passive title by accepting a gratuitous conveyance from his father. This passive title may be incurred by the mediate as well as the immediate apparent heir in the direct line. Thus, a proprietor cannot convey gratuitously to his grandson any more than he can convey to his son, the father of that grandson. But, in the case of a gratuitous right granted to a brother by one who has no issue, the brother, though next in succession at the date of the

grant, is not liable *præceptione*; yet a daughter (though there might have been a male heir at the death of the father) was rendered liable *præceptione* for accepting of a disposition from her father. The conveyance of heritage, or an assignation to a loan, in the same way with a disposition to lands, falls under this passive title; but a conveyance of moveables to the heir in heritage has not the same effect. The heir who incurs the passive title of *præceptio hæreditatis* is no farther liable, in consequence of his acceptance, than he would have been had he, of that date, entered heir to the granter, so as to subject himself to the debts at that time chargeable against the granter. The heir has no concern with posterior contractions; not even with those contracted between the date of the right and the infetment following thereon. Hence, the heir is called *successor titulo lucrativo post contractum debitum*. See *Ersk. B. iii. tit. 8, §§ 87 et seq.*; *Stair, B. iii. tit. 5, §§ 10, 14, and tit. 7*; *More's Notes, ccxxxviii.*; *Bank. ii. 374*; *Bell's Com. i. 704*; *Bell's Princ. § 1918*; *Sandford on Heritable Succession, ii. 90-4*; [*M'Laren on Wills and Succession, ii. § 2264.*]

The passive titles of *gestio pro hærede* and *præceptio hæreditatis* agree in this, that neither of them can affect the heir, unless the subjects be such as, on the ancestor's death, he is entitled to take up *qua* heir. So much is this the case, that when a right is taken by a father, not to himself, but to his son, as the son does not take the property as heir but as donee, he is not liable on either of these passive titles. They farther agree in this, that neither title can be extended beyond the effect which would have been produced by the actual entry of the heir, so as to entitle him to the benefit of discussion and an action of relief against executors, or any other order of heirs, primarily liable in the debts he may have paid; and, lastly, they agree in this, that in both some intromission after the death of the ancestor must appear. These two passive titles differ, however, in so far that behaviour as heir, as being intromission without the order of law, is a *quasi delict*; and therefore, unless an action has been raised against the heir during his lifetime, the action cannot be brought against those who may succeed to him; because no action founded on a delinquency is transmitted against heirs, where there has not been litiscontestation while the delinquent was alive. But the *præceptio hæreditatis* is considered as equivalent to an entry as heir, by

which the heir enters into an implied contract with the creditors, and undertakes the burden of the ancestor's debts; and all obligations arising *ex contractu* are transmissible against heirs. *Ersk. B. iii. tit. 8, §§ 91, 92.*

3. Statutory Passive Titles.

1. *Adjudication on a trust-bond.*—[Entry by adjudication on a trust-bond, followed by intromission, was made to infer passive representation by A.S. 28 Feb. 1662, and subsequently by the act 1695, c. 25. See *Adjudication on Trust-Bond.*]

2. *The passing by an heir three years in possession.*—This passive title is established by the act 1695, c. 24, and it arises where an heir, passing by a preceding heir who had possessed as apparent heir for the period of three years, serves to a more remote heir. Thus, if he pass by his father, and enter as heir to his grandfather, or succeed to one more remote, upon an adjudication proceeding on his trust-bond, the effect of this is to render the heir so passing by liable for the debts and deeds of the heir passed by, to the value of the estate to which he enters. [The act was held to apply in a case where the heir, instead of serving, made up his title by precept of *clare constat*; *Brown*, 17 July 1852, 14 D. 1041.] In the sense of this act, the obligations come under by a marriage-contract will be effectual against the estate, because they are accounted onerous; but the heir passing by is not bound to give effect to the gratuitous deeds of the interjected apparent heir. [See *Russell*, 7 Dec. 1852, 15 D. 192; *Taylor*, 2 June 1854, 16 D. 885; *Glen*, 15 Dec. 1881, 9 R. 317; *Fleming's Trs.* 30 June 1882, 9 R. 1013.] Where, however, the heir, without entering, attains possession of the estate, he may continue the possession without falling under the statute, or incurring a passive title. [The heir incurring this statutory liability has the same benefit of discussion which he would have had by serving to his immediate predecessor; *Vint*, 1712, M. 3562. But see *Morris*, 28 Nov. 1867, 6 Macph. 60.] See *Ersk. B. iii. tit. 8, § 94*; *Bell's Com. i. 708*; *Bell's Princ. § 1929*; *Kames' Equity*, 124; [*M'Laren on Wills and Succession*, ii. §§ 2248 *et seq.*]

3. Under the same statute, 1695, c. 24, it is declared to constitute a passive title, that an apparent heir shall possess any part of the ancestor's estate, except upon lawful purchase by public roup, under a title vested in the person of any such near

relation as the apparent heir may also succeed to as heir. *Ersk. B. iii. tit. 8, § 94.* See *Apparent Heir.*

II. PARTIAL PASSIVE TITLES.

1. *By stating a Peremptory Defence.*—When an heir is cited as representing his ancestor, he incurs a passive title if he states a peremptory defence. For example, were he to state that the debt has been paid or extinguished, or that the debt is prescribed, he would incur a passive title, because, unless in the character of heir, he has no title to state such a plea. But this extends only to the particular debt, and does not infer a general passive title. *Ersk. B. iii. tit. 8, § 93*; [*Bell's Princ. § 1924.*]

2. *Where the Heir neglects to Renounce.*—Where an heir is charged to enter, if he does not mean to represent the deceased, he ought to renounce the succession; and if he neglects to do so, he incurs a passive title, and may be pursued personally for the debt. This, in the same manner with the former, infers no farther obligation than in regard to the particular debt charged on. This renunciation may be made and produced in the process of constitution at any time before decree is given, or even after decree has been pronounced, if it has been pronounced in absence. *Ersk. ib.*; [*Bell's Princ. § 1925.*]

VITIOUS INTROMISSION.

Vituous intromission is the only passive title recognised in moveable succession. It signifies an unwarrantable intermeddling with the moveable estate of a defunct without the order of law. This passive title is not, like those relating to heritage, limited to the persons legally entitled to the succession, but may be incurred by any one whose opportunities allow of his intromitting with the deceased's moveable effects; and the mere intermeddling is sufficient, although the article should not be applied to any use by the intromitter. So also, an executor confirmed, intromitting with more than is given up in the inventory in the confirmation, is accounted a vituous intromitter. But this passive title has no place—1. Where the article intromitted with had ceased to be part of the defunct's estate prior to the intromission. By the stat. 1696, c. 20, the confirmation of an executor-creditor, as being of the nature of a step of diligence, does not screen from the passive title a third party intermeddling, unless he claim through the

creditor confirmed, or unless his intromission has been merely with the special subject confirmed. 2. The passive title is excluded by any probable title in the intromitter sufficient to remove the presumption of fraud on which this passive title rests; and necessary intromission by the members of the deceased's family *custodie causa*, infers no passive title; [*Adam*, 17 June 1854, 16 D. 964.] *Lastly*, The passive title is excluded by the intromitter's confirmation as executor, whereby he incurs an obligation to account to the extent of the inventory confirmed; and where the intromitter is a relict, or one of the next of kin, her or his confirmation, at any time within a year after the death of the defunct, will exclude the passive title, notwithstanding a prior citation. As this passive title is intended for the benefit of creditors, it cannot be pleaded by legatees; and as it arises *ex delicto*, it cannot be founded on against the heir of the intromitter; but if the action be restricted to simple restitution, it may be insisted in against the intromitter's representative. [And it is pleadable by way of exception, not only against the intromitter, but against his heirs, and even against onerous assignees; *Simpson*, 31 May 1854, 17 D. 33.] It also follows from this being a delict, that all the vitious intromitters are liable *singuli in solidum* to the creditors—the intromitter who pays having a claim of relief *pro rata* against his co-delinquents; and if the creditors sue the intromitters jointly in the same summons, they are liable *pro virili*—*i.e.*, in equal sums according to their number, not according to the extent of their intromissions; [*Wilson*, 4 July 1865, 3 Macph. 1060.] The A.S. 23 Feb. 1692 establishes a presumptive vitious intromission against those who, on the death of a person who is succeeded by a minor, fail to seal up his repositories as soon as he becomes insensible. Where the defunct dies in his own house this must be done by his nearest relations. Where he dies in the house of another, the duty devolves on the master or mistress of the house, who must deliver the keys of his repositories to the judge ordinary, for behoof of all concerned. *Ersk.* B. iii. tit. 9, § 49; *Bank.* ii. 420; *Bell's Com.* i. 705; *Bell's Princ.* § 1921; *Jurid. Styles*, 2d edit. iii. 108, 112; *Stair*, B. iii. tit. 9; *More's Notes*, cccclxiv.; [*McLaren on Wills and Succession*, ii. § 2268.] See *Executor*.

PASTURAGE; is a known rural servitude, whereby the proprietor of the dominant tenement is entitled to pasture a certain number of his cattle on the grass grounds of

the servient tenement. This right may be constituted either by express grant or by prescription. The right of common pasturage is often given generally in the original feu-right, and in that case the extent of the burden will be explained by possession; or the grant specifies the ground over which the servitude is to extend. Where the right extends over a common, and is indefinite as to the number of cattle to be pastured, the right is not unlimited, but will be regulated as to its extent by the number of cattle which each of the dominant proprietors can fodder during the winter on the dominant lands. The action whereby the parties having servitudes of pasturage over a common adjust their rights is called an action of *sowming and rowming*. Common pasturage may be constituted by prescription—*i.e.*, by the acquirer's uninterrupted exercise of the right for forty years on lands contiguous to his own, under a general clause in his charter *cum communi pastura*; or even by the common clause of part and pertinent, without a clause of pasturage. The proprietor of the dominant tenement is not entitled to communicate the servitude to cattle and sheep not his own; thus, he cannot let the right of pasturage to drovers or others not actually possessing the dominant lands. The proprietor of the servient tenement may plough portions of the ground over which the servitude extends, provided he leave enough in grass for the use of the dominant tenement. *Ersk.* B. ii. tit. 9, § 14; *Bank.* B. ii. tit. 7, § 32; *Bell's Princ.* § 1013; *Ross's Lect.* ii. 176; *Bell on Leases*, ii. 280; *Stair*, B. ii. tit. 3, § 73; tit. 7, § 14; [*Rankine on Land-Ownership*, 376.] See *Sowming and Rowming*.

PATENTS. A letter-patent royal is a grant from the Crown under the great seal. The term *patent* is, however, generally understood to mean a patent for an invention. Patents for inventions were expressly excepted from the operation of the statute 21 James I. c. 3, against monopolies. See *Monopolies*. The 6th section declares, that the act shall not extend to letters-patent or grants of privilege for fourteen years, "of the sole working or making of new manufactures within the realm, to the true and first inventor and inventors of such manufactures, which others at the time shall not use, so as also they be not contrary to the law, nor mischievous to the State, by raising prices of commodities at home, or hurt of trade, or generally inconvenient." [Since the Union, the law of England and Scotland as to patents has been the same. The exist-

[ing enactments are contained in the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), as amended by 48 & 49 Vict. c. 63, 49 & 50 Vict. c. 37, and 51 & 52 Vict. c. 50. "The right to a patent monopoly of a useful invention is granted on the principle of a compromise or bargain between the inventor and the public; by which there is given to the public the full benefit of the discovery, on a fair disclosure of it in its most beneficial shape, and in terms so plain and intelligible that it may be used without danger of useless expense, and without the necessity of further experiment; and the public, on the other hand, is restrained for a time from interfering with the gains;" *Bell's Princ.* § 1349.

[*The Subject-matter of Letters-Patent.*—By the act of 1883 (§ 46), "patent" is declared to mean letters-patent for an invention; and "invention" to mean any manner of new manufacture, the subject of letters-patent and grant of privilege within § 6 of the Statute of Monopolies (*supra*). The subject must be something vendible. A mere principle or method would not be a proper subject; but if the patent were actually for a process or thing produced, it would not be a valid objection that it was described as a method. [See *Boulton*, 1795, 2 H. Bl. 463; *Hornblower*, 1799, 8 T.R. 95; *Wheeler*, 1819, 2 B. & Ald. 345; *Neilson*, 16 Nov. 1843, 6 D. 51; *Badische Anilin Fabrik*, 12 App. Ca. 710.] A new process of manufacture, to be carried on by known implements, or elements acting upon known substances, so as to produce some other known substance, may be a lawful subject of patent, provided it be in a cheaper, better, or more expeditious manner. [But, on the other hand, "you cannot have a patent for a well-known mechanical contrivance, merely when it is applied in a manner or to a purpose which is not quite the same, but is analogous to the manner or to the purpose in or to which it has been hitherto notoriously used;" *per* Lord Westbury, in *Harwood*, 11 H.L. Ca. 654, 682.] The improvement of an old commodity or manufacture is a fair subject of patent, provided the old part be not described as new. [A patent may be granted for a combination of machinery or substances, all of which were known and in use previously, provided the combination is new and useful. See *Foxwell*, 4 De G. J. & S. 298; *Harrisons*, 20 June 1876, 3 R. (H.L.) 55; *Clark*, 2 App. Ca. 315;

[*Badische Anilin Fabrik, supra.*] The improver of a machine under an existing patent cannot, without the consent of the patentee, use his invention till the expiration of the first patent. A discovery or invention imported may be the subject of a patent. But a patent for an invention truly made by the patentee will be good, although a model of a similar machine imported from abroad had been seen before the date of the patent, provided the machine itself have not previously been made and introduced into practice.

[*Prior Publication or Use.*—It is only for a "new manufacture" that a patent can be granted: hence a patent is invalidated by proof of prior disclosure of the invention by publication or use "within this realm" (*i.e.*, in the United Kingdom; *Brown*, 25 Feb. 1842, 1 Bell's App. 70). See *Plimpton*, 6 Ch. D. 412; *Patterson*, 3 App. Ca. 239; *United Telephone Co.* 21 Ch. D. 720; *Harris*, 35 Ch. D. 416. With regard to the vitiation of a patent by prior publication, Lord Westbury observed:—"The antecedent statement must be such that a person of ordinary knowledge of the subject would at once perceive, understand, and be able practically to apply the discovery without the necessity of making further experiments and gaining further information before the invention can be made useful. If something remains to be ascertained which is necessary for the useful application of the discovery, that affords sufficient room for another valid patent;" *Hills*, 4 De G. F. & J. 288, 300. The prior use which invalidates is such public use of the invention as might have enabled any other person than the patentee to acquire the knowledge of it. If an inventor does not publish his invention, a subsequent patent for the same invention is not void. Previous use by way of experiment only does not prejudice a subsequent patentee who has practically worked out the invention and communicated the benefit of it to the public. If the invention, however, have at any time been used in public, it is not necessary, to invalidate a subsequent patent, that the use should have been continued down to the time when the patent was granted; *Neilson*, 6 March 1843, 2 Bell's App. 1. By § 39 of the act of 1883, the exhibition of an invention at an industrial or international exhibition, certified as such by the Board of Trade, or the publication of any description of the invention during the period of the holding of the exhibition, or the use of the inven-

[tion for the purpose of the exhibition in the place where the exhibition is held, or the use of the invention during the period of the holding of the exhibition by any person elsewhere, without the privity or consent of the inventor, shall not prejudice the right of the inventor or his legal personal representative to apply for and obtain provisional protection and a patent in respect of the invention, or the validity of any patent granted on the application, provided that both the following conditions are complied with, namely, — (a) the exhibitor must, before exhibiting the invention, give the comptroller (see *infra*) the prescribed notice of his intention to do so; and (b) the application for a patent must be made before or within six months from the date of the opening of the exhibition. This provision may be extended by Order in Council to any exhibition, and the condition as to notice to the comptroller of intention to exhibit may be dispensed with; 49 & 50 Vict. c. 37, § 3.

[*The Patentee.*—As has been seen, the person entitled to apply for letters-patent is the “true and first inventor” of a manufacture, provided he is the first publisher of the invention; or the introducer of a foreign invention into this country; see *Beard*, 3 C.B. 97. A person is not the inventor, who has learned the thing from another; but it will not deprive one of the title that he has employed another in the investigation, provided the invention is not distinctly the separate and independent invention of such assistant; *Bell's Princ.* § 1350. Any person, whether a British subject or not, may apply for a patent; and “person” includes a body corporate; 1883, §§ 4 (1), 117. Two or more persons may make a joint application, and a patent may be granted to them jointly, although only one of them is the true and first inventor; 1883, § 4 (2); 48 & 49 Vict. c. 63, § 5. If a person possessed of an invention dies before applying for a patent, application may be made by, and a patent granted to, his legal representative; but the application must be made within six months of the decease of such person; 1883, § 34. If an inventor who has applied for a patent dies before the expiration of 15 months from the date of application, the patent may be granted to his legal representative; § 12 (3).] The patentee may either grant licence to certain individuals to use his right, or he may transfer his right by assignment. [A part of a patent, if separate and distinct, may

[be assigned; *Dunncliff*, 7 C.B. (N.S.) 209. And a patent may be assigned for any place in, or part of, the United Kingdom, as effectually as if it were originally granted to extend to that place or part only; § 36. A licensee under a patent cannot question its validity during the continuance of his licence; *Clark*, *supra*, 2 App. Ca. 423.

[*Patent Office.*—The act of 1883 establishes a Patent Office, which is under the immediate control of an officer called the Comptroller General of patents, designs, and trade marks. The comptroller, along with examiners and other officers, is appointed by the Board of Trade, and acts under its superintendence and direction; and anything directed to be done by or to the comptroller may, in his absence, be done by or to any officer for the time being in that behalf authorised by the Board of Trade; §§ 82–3.

[*Application for Patent.*—The application must be in the form prescribed by the Patents Rules, 1883, made by the Board of Trade under the power conferred on it by § 101 of the act of 1883; and it must be left at, or sent by post to, the patent office in the prescribed manner. It must contain a declaration to the effect that the applicant is in possession of an invention, whereof he, or in the case of a joint application, one or more of the applicants, claims or claim to be the true and first inventor or inventors, and for which he or they desires or desire to obtain a patent; and must be accompanied by either a provisional or complete specification. A provisional specification must describe the nature of the invention, and be accompanied by drawings, if required. A complete specification, whether left on application or subsequently, must particularly describe and ascertain the nature of the invention, and in what manner it is to be performed, and must either be accompanied by drawings, if required, or refer to drawings which accompanied the provisional specification. A specification, whether provisional or complete, must commence with the title, and in the case of a complete specification must end with a distinct statement of the invention claimed; act of 1883, § 5; 49 & 50 Vict. c. 37, § 2. The comptroller shall refer every application to an examiner, who shall ascertain and report to the comptroller whether the nature of the invention has been fairly described, and the application, specification, and drawings (if any) have been prepared

[in the prescribed manner, and the title sufficiently indicates the subject-matter of the invention; 1883, § 6. If the examiner reports that the nature of the invention is not fairly described, or that the application, specification, or drawings, has not or have not been prepared in the prescribed manner, or that the title does not sufficiently indicate the subject-matter of the invention, the comptroller may refuse to accept the application, or require that the application, specification, or drawings be amended before he proceeds with the application; and in the latter case the application shall, if the comptroller so directs, bear date as from the time when the requirement is complied with. Where the comptroller requires an amendment, the applicant may appeal from his decision to the law officer (*i.e.*, the Attorney General or Solicitor General for England; 1883, § 117), who after hearing parties, may make an order determining whether, and subject to what conditions (if any), the application shall be accepted. If, after an application for a patent has been made, but before the patent thereon has been sealed, another application for a patent is made, accompanied by a specification bearing the same or a similar title, the comptroller, if he thinks fit, on the request of the second applicant, or of his legal representative, may, within two months of the grant of a patent on the first application, either decline to proceed with the second application, or allow the surrender of the patent, if any, granted thereon; 1883, § 7; 51 & 52 Vict. c. 50, § 2.

[*Specification.*—Since the time of Queen Anne, the full disclosure of the invention, which is required as a condition of the grant of letters-patent, has been embodied in an instrument called a specification. "A man, to entitle himself to the benefit of a patent of monopoly, must disclose his secret and specify his invention in such a way that others of the same trade, who are artists, may be taught to do the thing for which the patent is granted, by following the specification, without any new invention or addition of their own. He must so describe it that the public may, after the expiration of the term, have the use of the invention in as cheap and beneficial a way as the patentee himself uses it;" *per* Justice Buller, quoted in *Coryton on Patents*, 128. The specification is also designed to show the public what they cannot use without infringing the patent; *Morton*, 20 March 1863, 1 Macph. 718. It must therefore be clear, accurate, and

[unambiguous. It is vitiated by error or omission, if material, or such as to mislead a competent workman; or by the statement of unnecessary matters in such a way as to induce the belief that they are material. If the specification claims as new any part of an invention which in fact is not new, the whole patent is void, though there be novelty in the other parts. If the novelty claimed consists merely in the improvement of a machine or process already known, the specification must distinguish what is new from what is old. "In a patent for an improved arrangement or new combination of machinery, the specification must describe the improvement and define the novelty otherwise, and in a more specific form, than by the general description of the entire machine; it must, to use a logical phrase, 'assign the *differentia*' of the new combination;" *per* Lord Westbury, in *Foxwell*, *supra*, 4 De G. J. & S. 298, 313. But in a subsequent Scotch case, the House of Lords held that, in a claim for a mere combination, it was not necessary to explain what was the novelty and what the merit of the invention, otherwise than by a description of the combination as a whole, nor to specify what of the combined parts were old and what were new; and that the claim to certain subordinate parts excluded the possibility of a claim to any other subordinate parts as novel without any special disclaimer; *Harrisons*, *supra*, 3 R. (H.L.) 55. See also *Templeton*, 23 Feb. 1848, 10 D. 796; *Morton*, *supra*; *Pennycook Glazing Co.* 13 Jan. 1882, 9 R. 414. In describing the invention, the final specification must correspond both with the general title of the patent, and with the provisional specification lodged with the petition. See *Dudgeon*, 4 July 1873, 11 Macph. 863; *Bailey*, 21 June 1877, 5 R. (H.L.) 179; *Gillies*, 19 Dec. 1878, 5 R. 337; *Hutchison, Main & Co.* 24 May 1888, 15 R. 644. Besides the requirements set forth in the preceding paragraph, the following provisions have been enacted in regard to specifications:—

[If the applicant does not leave a complete specification with his application, he may leave it at any subsequent time within nine months from the date of application; but unless a complete specification is left within that time, or within such extended time, not exceeding one month after the said nine months, as the comptroller may allow, the application shall be deemed to be abandoned; 1883, § 8; 48 & 49 Vict. c. 63, § 3. Where a complete specification is left

[after a provisional specification, the comptroller shall refer both specifications to an examiner for the purpose of ascertaining whether the complete specification has been prepared in the prescribed manner, and whether the invention particularly described in the complete specification is substantially the same as that which is described in the provisional specification. If the examiner reports that the conditions hereinbefore contained have not been complied with, the comptroller may refuse to accept the complete specification unless and until the same shall have been amended to his satisfaction; but any such refusal shall be subject to appeal to the law officer, who, after hearing parties, may make an order determining whether and subject to what conditions, if any, the complete specification shall be accepted. Unless a complete specification is accepted within twelve months from the date of application, or within such extended time, not exceeding three months after the said twelve months, as the comptroller may allow, then (save in the case of an appeal having been lodged against the refusal to accept) the application shall, at the expiration of the said twelve months, or extended time, become void; 1883, § 9; 48 & 49 Vict. c. 63, § 3. Reports of examiners shall not in any case be published or be open to public inspection, and shall not be liable to production or inspection in any legal proceeding, unless the court or officer having power to order discovery in such legal proceeding shall certify that such production or inspection is desirable in the interests of justice, and ought to be allowed; 1883, § 9 (5); 51 & 52 Vict. c. 50, § 3. On the acceptance of the complete specification the comptroller shall advertise the acceptance; and the application and specification or specifications with the drawings (if any) shall be open to public inspection; 1883, § 10. Where an application has been abandoned or become void, relative specifications and drawings shall not at any time be open to public inspection; 48 & 49 Vict. c. 63, § 4.

[*Opposition to Grant of Patent.*—Any person may at any time within two months from the date of the advertisement of the acceptance of a complete specification give notice at the patent office of opposition to the grant of the patent on the ground of the applicant having obtained the invention from him, or from a person of whom he is the legal representative, or on the ground that the invention has been patented in this country on an application of prior

[date, or on the ground that the complete specification describes or claims an invention other than that described in the provisional specification, and that such other invention forms the subject of an application made by the opponent in the interval between the leaving of the provisional and the leaving of the complete specification, but on no other ground. Where such notice is given the comptroller shall give notice of the opposition to the applicant, and shall, on the expiration of those two months, after hearing the applicant and the person so giving notice, if desirous of being heard, decide on the case, but subject to appeal to the law officer; who, having heard the applicant and any person so giving notice and being, in the opinion of the law officer, entitled to be heard in opposition to the grant, shall determine whether the grant ought or ought not to be made. The law officer may, if he thinks fit, obtain the assistance of an expert, who shall be paid such remuneration as the law officer, with the consent of the Treasury, shall appoint; 1883, § 11; 51 & 52 Vict. c. 50, § 4.

[*Sealing of Patent.*—If there is no opposition, or, in case of opposition, if the determination is in favour of the grant of a patent, the comptroller shall cause a patent to be sealed with the seal of the patent office; which has the same effect as if it were sealed with the Great Seal of the United Kingdom. A patent shall be sealed as soon as may be, and not after the expiration of fifteen months from the date of application, except in the following cases:—
(a) Where the sealing is delayed by an appeal to the law officer, or by opposition to the grant of the patent, the patent may be sealed at such time as the law officer may direct. (b) If the person making the application dies before the expiration of the fifteen months aforesaid, the patent may be granted to his legal representative and sealed at any time within twelve months after the death of the applicant. (c) Where an extension of time has been allowed by the comptroller, for the leaving or acceptance of a complete specification, a further extension of four months after the said fifteen months shall be allowed for the sealing of the patent; 1883, § 12; 48 & 49 Vict. c. 63, § 3. Every patent shall be dated and sealed as of the day of the application: provided that no proceedings shall be taken in respect of an infringement committed before the publication of the complete specification: provided also, that

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[*Extent and Term of Patent.*—Every patent when sealed shall have effect throughout the United Kingdom and the Isle of Man; § 16. The term limited in every patent for the duration thereof shall be fourteen years from its date. But every patent shall, notwithstanding anything therein or in this act, cease if the patentee fails to make the prescribed payments within the prescribed times.* If, nevertheless, in any case, by accident, mistake, or inadvertence, a patentee fails to make any prescribed payment within the prescribed time, he may apply to the comptroller for an enlargement of the time for making that payment. Thereupon the comptroller shall, if satisfied that the failure has arisen from any of the above-mentioned causes, on receipt of the prescribed fee for enlargement, not exceeding £10, enlarge the time accordingly, subject to the following conditions: (a) The time for making any payment shall not in any case be enlarged for more than three months. (b) If any proceeding shall be taken in respect of an infringement of the patent committed after a failure to make any payment within the prescribed time, and before the enlargement thereof, the court before which the

[*Protection by Complete Specification.*—After the acceptance of a complete specification and until the date of sealing a patent in respect thereof, or the expiration of the time for sealing, the applicant shall have the like privileges and rights as if a patent for the invention had been sealed on the date of the acceptance of the complete specification: provided that an applicant

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[proceeding is proposed to be taken may, if it shall think fit, refuse to award or give any damages in respect of such infringement; § 17.

[Amendment of Specification.]—An applicant or a patentee may, from time to time, by request in writing left at the Patent Office, seek leave to amend his specification, including drawings forming part thereof, by way of disclaimer, correction, or explanation, stating the nature of such amendment and his reasons for the same. The request and the nature of such proposed amendment shall be advertised in the prescribed manner, and at any time within one month from its first advertisement any person may give notice at the Patent Office of opposition to the amendment. Where such notice is given the comptroller shall give notice of the opposition to the person making the request, and shall hear and decide the case subject to an appeal to the law officer. The law officer shall, if required, hear the person making the request and the person so giving notice, and being in the opinion of the law officer entitled to be heard in opposition to the request, and shall determine whether and subject to what conditions, if any, the amendment ought to be allowed. Where no notice of opposition is given, or the person so giving notice does not appear, the comptroller shall determine whether and subject to what conditions, if any, the amendment ought to be allowed. When leave to amend is refused by the comptroller, the person making the request may appeal from his decision to the law officer, who, after hearing parties, may make an order determining whether, and subject to what conditions, if any, the amendment ought to be allowed. No amendment shall be allowed that would make the specification, as amended, claim an invention substantially larger than or substantially different from the invention claimed by the specification as it stood before amendment. Leave to amend shall be conclusive as to the right of the party to make the amendment allowed, except in case of fraud; and the amendment shall in all courts and for all purposes be deemed to form part of the specification. The foregoing provisions of this section do not apply when, and so long as any action for infringement or proceeding for revocation of a patent is pending; § 18, as amended by 51 & 52 Vict. c. 50, § 5. In an action for infringement of a patent, and in a proceeding for revocation of a patent, the court or a judge may at any time order that the

[patentee shall, subject to such terms as to costs and otherwise as the court or a judge may impose, be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed; § 19. Where an amendment by way of disclaimer, correction, or explanation, has been allowed under this act, no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of the court that his original claim was framed in good faith and with reasonable skill and knowledge; § 20. Every amendment of a specification shall be advertised in the prescribed manner; § 21.

[Compulsory Licences.]—If on the petition of any person interested it is proved to the Board of Trade that by reason of the default of a patentee to grant licences on reasonable terms—(a) The patent is not being worked in the United Kingdom; or (b) The reasonable requirements of the public with respect to the invention cannot be supplied; or (c) Any person is prevented from working or using to the best advantage an invention of which he is possessed,—the Board may order the patentee to grant licences on such terms as to the amount of royalties, security for payment, or otherwise, as the Board, having regard to the nature of the invention and the circumstances of the case, may deem just, and any such order may be enforced by mandamus; § 22. This enactment does not apply to patents granted prior to 1st Jan. 1884, or on applications then pending; § 45.

[Register of Patents.]—There shall be kept at the Patent Office a book called the Register of Patents, wherein shall be entered the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licences under patents, and of amendments, extensions, and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed. The register of patents shall be *prima facie* evidence of any matters by this act directed or authorised to be inserted therein. Copies of deeds, licences, and any other documents affecting the proprietorship in any letters-patent or in any licence thereunder, must be supplied to the comptroller in the prescribed manner for filing in the Patent

[Office; § 23. Where a person becomes entitled by assignment, transmission, or other operation of law to a patent, or to the copyright in a registered design, or to a registered trade mark, the comptroller shall on request, and on proof of title to his satisfaction, cause the name of such person to be entered as proprietor of the patent, copyright in the design, or trade mark, in the register of patents, designs, or trade marks, as the case may be. The person for the time being entered in the register of patents, designs, or trade marks, as proprietor of a patent, copyright in a design or trade mark as the case may be, shall, subject to the provisions of this act, and to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licences as to, or otherwise deal with, the same and to give effectual receipts for any consideration for such assignment, licence, or dealing. Provided that any equities in respect of such patent, design, or trade mark may be enforced in like manner as in respect of any other personal property. The register shall at all convenient times be open to the inspection of the public, subject to the provisions of this act, and to such regulations as may be prescribed; and certified copies, sealed with the seal of the Patent Office, of any entry in any such register shall be given to any person requiring the same on payment of the prescribed fee; §§ 87-8; 51 & 52 Vict. c. 50, § 22. Sealed copies are to be received in evidence in all courts; 1883, § 89. Provision is made for rectification of the register by the court; § 90; 51 & 52 Vict. c. 50, § 23.

[*Extension of Term of Patent.*—A patentee may, after advertising in manner directed by any rules made under this section his intention to do so, present a petition to Her Majesty in Council, praying that his patent may be extended for a further term; but such petition must be presented at least six months before the time limited for the expiration of the patent. Any person may enter a caveat, addressed to the Registrar of the Council at the Council Office, against the extension. If Her Majesty shall be pleased to refer any such petition to the Judicial Committee of the Privy Council, the said Committee shall proceed to consider the same, and the petitioner and any person who has entered a caveat shall be entitled to be heard by himself or by counsel on the petition. The Judicial Committee shall, in considering

[their decision, have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case. If the Judicial Committee report that the patentee has been inadequately remunerated by his patent, it shall be lawful for Her Majesty in Council to extend the term of the patent for a further term not exceeding seven, or in exceptional cases fourteen, years; or to order the grant of a new patent for the term therein mentioned, and containing any restrictions, conditions, and provisions that the Judicial Committee may think fit; § 25.

[*Actions with reference to Patents.*—In case of infringement of a patent right, the patentee may raise an action for the damages sustained; and he may also obtain an interdict restraining the wrongdoer from further infringement. The action may be defended, either on the ground that there has been no infringement, or on the ground that the patent is invalid. Ignorance of the existence of the patent is no defence; *Curtis*, 11 L.T.N.S. 245; *Stead*, 2 Webster's Patent Cases, 156. In an action for infringement, the court may, if it thinks fit, and shall, on the request of either of the parties, call in the aid of an assessor specially qualified, and try and hear the case wholly or partially with his assistance; the action shall be tried without a jury unless the court shall otherwise direct; 1883, §§ 28, 107. The pursuer must lodge particulars of the breaches complained of, and the defender must lodge particulars of any objections on which he relies. If the defender disputes the validity of the patent, the particulars delivered by him must state on what grounds he disputes it, and if one of those grounds is want of novelty must state the time and place of the previous publication or user alleged by him. At the hearing no evidence shall, except by leave of the court or a judge, be admitted in proof of any alleged infringement or objection of which particulars are not so delivered. Particulars delivered may be from time to time amended, by leave of the court or a judge; § 29. When a patentee alters his patent by a disclaimer, he cannot thereafter enforce an interdict which he had obtained upon the patent before the alteration; *Dudgeon*, 10 July 1877, 4 R. (H.L.) 88. See also §§ 19, 20 of act of 1883, *supra*, p. 786. If a patent is for a combination, there is no infringement unless all the essential and characteristic features of the combination are used; *Gwynne*, 5 March 1886, 13 R.

[684; see also *Henderson*, 23 Feb. 1883, 10 R. (H.L.) 38; and *Harrisons* and other cases cited *supra*, p. 783 b. In an action for infringement, the patentee cannot claim both profits derived from the infringement, and also damages, but must elect between them; *United Horse Shoe & Nail Co.* 12 March 1888, 15 R. (H.L.) 45. If a person against whom interdict has been granted in respect of infringement assumes a partner with a view to continuing to manufacture articles in infringement, the interdict may be enforced against the assumed partner; *Harvie*, 13 Nov. 1886, 14 R. 71. In an action for infringement of a patent, the court or a judge may certify that the validity of the patent came in question; and if the court or a judge so certifies, then in any subsequent action for infringement, the plaintiff in that action on obtaining a final order or judgment in his favour shall have his full costs, charges, and expenses as between solicitor and client, unless the court or judge trying the action certifies that he ought not to have the same; 1883, § 31. Proceedings in Scotland for revocation of a patent shall be in the form of an action of reduction at the instance of the Lord Advocate, or at the instance of a party having interest with his concurrence, which concurrence may be given on just cause shown only; § 109. See *Gillespie*, 20 July 1861, 23 D. 1357. In England, patents were formerly repealed by a process of *scire facias*; but now a petition for revocation is presented to the High Court of Justice; § 26.

[*The Crown*.—The granting of letters-patent is a prerogative of the Crown; and it is provided that nothing in the act of 1883 shall take away, abridge, or prejudicially affect the Crown's prerogative in relation to the granting of any letters-patent or to the withholding of a grant thereof; § 116. Prior to the act of 1883, the exclusive privilege conferred by a patent did not affect the Crown itself. Now, however, it is enacted that a patent shall have to all intents the like effect as against Her Majesty the Queen, her heirs and successors, as it has against a subject; but the officers or authorities administering any department of the service of the Crown may, by themselves, their agents, contractors or others, at any time after the application, use the invention for the services of the Crown on terms to be before or after the use thereof agreed on, with the approval of the Treasury, between those officers or authorities and the patentee, or,

[in default of such agreement, on such terms as may be settled by the Treasury after hearing all parties interested; § 27. This enactment does not apply to patents granted before 1st Jan. 1884, or on applications then pending; § 45. Provision is made for the assignment to the Secretary of State for War, on behalf of the Crown, for or without valuable consideration, of the benefit of any invention for the improvement of instruments or munitions of war, and of any patent for the same; and for keeping secret the particulars of such invention, if the Secretary shall certify that secrecy is desirable in the interest of the public service; § 44.

[*International and Colonial Arrangements*.—If arrangement is made with the government of any foreign state for mutual protection of inventions,* then any person who has applied for protection for any invention in such state shall be entitled to a patent therefore under the act of 1883, in priority to other applicants; and such patent shall have the same date as the date of the application in the foreign state; provided application be made in this country within seven months after the application in the foreign state; § 103; 48 & 49 Vict. c. 63, § 6. The Queen may apply these provisions, by Order in Council, to any British possession whose legislature has made satisfactory provision for the protection of inventions patented in this country; 1883, § 104.

[*Miscellaneous*.—A patent granted to the true and first inventor shall not be invalidated by an application in fraud of him, or by provisional protection obtained thereon, or by any use or publication of the invention subsequent to that fraudulent application during the period of provisional protection; § 35. If a patent is lost or destroyed, or its non-production is accounted for to the satisfaction of the comptroller, the comptroller may at any time cause a duplicate thereof to be sealed; § 37. There shall not be entered in any register kept under this act, or be receivable by the comptroller, any notice of any trust expressed, implied, or constructive; § 85. The comptroller may refuse to grant a patent for an invention, or to register a design or trade mark, of which the use would, in his opinion, be contrary to law or morality; § 86. The

* The following states have become parties to an international convention in regard to patent rights:—Belgium, Brazil, France, Great Britain, Guatemala, Holland, Italy, Portugal, San Salvador, Serbia, Spain, and Switzerland.

[comptroller is directed to issue periodically an illustrated journal of patented inventions, reports of patent cases, &c., to keep on sale copies of specifications and relative drawings, to prepare and publish indexes, abridgments of specifications, catalogues, &c.; § 40. The Department of Science and Art have the control and management of the Patent Museum; and may require patentees to furnish models of their inventions, on payment of cost; §§ 41-2. Copies of all specifications, drawings, and amendments left at the Patent Office are transmitted to the Edinburgh Museum of Science and Art; and certified copies or extracts, admissible in evidence in all courts, may be had on payment; § 100. The comptroller may correct clerical errors in applications, &c.; § 91. Where discretionary power is given to the comptroller, he may not exercise it adversely to an applicant without giving him an opportunity of being heard; § 94. Any person who represents that any article sold by him is a patented article (as by selling it with the word "patented" stamped on it), when no patent has been granted for the same, is liable for every offence on summary conviction to a fine not exceeding £5; § 105. Falsification of entries in registers is made a misdemeanour by § 93; and a penalty of £20 is imposed for unauthorised assumption of royal arms by § 106. A register of patent agents was established by 51 & 52 Vict. c. 50, § 1; and no person may describe himself as a patent agent unless registered as such, under a penalty of £20.

[A patent right is personal property, and liable to legacy duty; *Oswald*, 20 May 1848, 10 D. 969. See *Heritable and Moveable*.]

See on this subject, *Bell's Com.* i. 103; *Bell's Princ.* § 1348; *More's Notes to Stair*, cxli.; [*Guthrie Smith on Damages*, 310; *Stephen's Com.* ii. 24; *Williams on Personal Property*, 296; treatises by *Godson*, *Hindmarsh*, *Coryton*, *Curtis*, and *Agnew* (all prior to the act of 1883); recent treatises by *Lawson*, *Terrell*, *Brice*, and *Higgins*; also *Webster's*, *Goodeve's*, and *Higgins' Digests of Patent Cases*; *Johnson's Patentee's Manual*; *Carpmael's Patent Laws of the World* (with supplement, 1889). See *Copyright. Trade Mark.*]

PATER EST QUEM NUPTIÆ DEMONSTRANT. See *Filiation. Legitimacy.*

PATERNA PATERNIS, MATERNA MATERNIS. In the Roman law, where a person died leaving half-brothers, both consanguinean and uterine, a distinction

was taken, as to his succession, between what he had derived from his father and what he had derived from his mother. The former went to his brothers-consanguinean, the latter to his brothers-uterine, on the maxim, *Paterna paternis, materna maternis*. And generally, the principle of the maxim applied to any competition between relations on the father's and mother's side. This rule has no place in the law of Scotland. *Stair*, B. iii. tit. 4, §§ 8, 34. [See *Uterine*.]

PATERNITY. See *Filiation*.

PATRIA; in old law language, an assize or inquest of countrymen, which is called *recognitio patriæ*. *Skene*, h. t. See *Bona Patria*.

PATRIA POTESTAS. A term used to express the singular power of Roman citizens over their offspring. An unemancipated son, possessing in every other relation the high privileges of a Roman citizen, was merely a part of his parent's property. By the laws of the twelve tables, the father had the power of life and death over his children. He could expose them when infants, and their legitimacy depended upon his acceptance of them. He could sell them, or resign them, instead of paying the damages which he had incurred through their fault. He and they were, in matters of private right, held as one person, and there could be neither obligation or action between them. They could neither contract marriage nor do anything else of importance without his consent. But when he did permit his daughter's marriage, his paternal rights as to her were destroyed, and she became, equally with her own daughters, the *filia familias* of her husband. A son could acquire no property but with his father's consent; and even when such consent was granted, his acquisitions were called *peculium*, the term applied to the portion of a slave. See *Peculium*. The *patria potestas* yielded to the son's official dignity, but revived when that ceased, extending even to grandchildren and great-grandchildren, and ceasing only when extinguished by natural or civil death, or by the ceremony of emancipation. Emancipation was effected *per aes et libram*—i.e., by selling the son three times, in presence of a competent magistrate, to a *pater fiduciarius*, who was held bound, after the third sale, to re-sell him to his natural father, who then finally manumitted him, retaining the *jus patronatus*. Daughters and grandchildren, in their manumission, were sold only once, with the same for-

malities. But these troublesome ceremonies were gradually abolished; and under Justinian, a father could go before any competent magistrate, and with his son's consent declare him free. The despotic authority here described as exercised by Roman parents was not authorised by the later law. Several emperors had issued constitutions to restrain the cruelty with which fathers abused their trust. First the right of sale, and then the power of life and death were taken away; while that of moderate chastisement was reserved, and, in aggravated crimes committed by the son, the privilege of prescribing his punishment to the judge. *L. 3, et ult. C. de pat. pot.; L. un. C. de emend. propinqu.; L. un. C. de eis qui par. vel lib. occid.; L. 11, D. de lib. et postum.* In Scotland, authority so great has never been recognised; and the relations of parent and child are, directed by the light of nature, viewed through a milder medium. See *Parent and Child. Children. Forisfiliation. Aliment. Adoption. Arrogation.*

PATRIARCH; was the title anciently given to the head of the Christian Church. Thus there was the Patriarch of Jerusalem, of Alexandria, of Antioch, of Rome, and of Constantinople, each of which had primates, archbishops, and bishops under him; though the title bishop was used to express even the patriarch himself. These patriarchs originally were all of equal authority, and continued to be so until the beginning of the seventh century, when, from several favourable incidents, the Patriarch of Rome was acknowledged by almost all the western parts of Christendom as the first and universal bishop of the Church, by the name of *Papa*, or father; an appellation formerly common to all bishops. *Ersk. B. i. tit. 5, § 2.*

PATRIMONY; an hereditary estate or right descended from ancestors.

PATRIMONY OF THE CHURCH.

The patrimony of the Church consisted of two branches: 1. Of the property of such lands as had been gifted or devised to the Church, which was called the temporality of benefices. 2. Of the tithes of lands, which got the name of the spirituality of benefices. *Ersk. B. ii. tit. 10, § 4. See Teinds.*

PATRONAGE. A patron is one who enjoys, along with other rights of less importance, the right of presenting a parochial minister to a vacant charge. It would appear that patrons were originally merely the guardians of the temporal property of particular churches; and that the rights

afterwards attached to patronage were at first conceded by the Church only to those who endowed particular churches, with a view to encourage the practice. Afterwards, however, similar rights, in reference to other churches, were assumed by persons of influence in the neighbourhood; and while the Roman Catholic religion prevailed, the Pope, and since the Reformation the Crown, have claimed to be considered patrons of all churches in regard to which no right of patronage could be shown by individuals. In addition to the right of presentation, the patron in former times had a pre-eminent seat and a burial-place in the church, and a right of precedence in processions; his name and arms were engraved on the church, bells, &c. He had also the disposal of the fruits of the benefice during a vacancy, and his consent was necessary to the validity of leases or feus by the incumbent. The vacant stipends now go to the Minister's Widows' Fund. See *Vacant Stipend.* The statute 1567, c. 7, which abolished Popery and recognised the Reformed religion, reserved "the presentation of laick patronages," by "the just and auncient patrones." And, in still broader terms, the act 1592, c. 116, provided that the presbyteries, to whom all presentations were thereby appointed to be directed, "be bound and astricted to receive and admit quhatsumever qualified minister presented be his Majesty or laick patronis." The act immediately succeeding (c. 117) declared, in reference to benefices rendered vacant by the deposition of the incumbent, that if the presbytery refused a minister presented by the patron, the latter should be entitled to retain the fruits of the benefice. On the establishment of episcopacy, the principle of these acts was adopted in the act 1612, c. 1, by which presentations were appointed to be directed to the bishop of the diocese; and it was provided that if the bishop should refuse to admit a qualified minister, still undeprived, it should be lawful for the patron to retain the fruits of the benefice; and that if no sufficient reason should be given for refusal, letters of horning should be issued, charging the ordinary (*i.e.*, the bishop) to do his duty in receiving and admitting the presentee. Some time after the re-establishment of Presbytery, patronage was abolished by 1649, c. 23, which empowered presbyteries to settle ministers "on the sute and calling, or with the consent of the congregation, on whom none is to be obruded against their will." At the

Restoration, the act 1649 fell under the Rescissory Act. But patronage was again abolished by 1690, c. 23, and the right of election, for the approval of the congregation, given to the elders, with the heritors, or the magistrates in burghs. As compensation, patrons were to receive 600 merks (£33, 6s. sterling); on receiving which they were bound to execute a deed of renunciation of the patronage. Only three parishes (Cadder, Old and New Monkland) had obtained effectual renunciations, when the right of patrons to present was again restored by 10 Anne, c. 12, which declared that it should be lawful to all patrons, who had not executed renunciations in terms of the former statute, to present as formerly, and that presbyteries should be bound to admit the qualified presentees, as presentees ought to have been admitted before the passing of the act. [But if the patron did not make a presentation within six months from the vacancy, the presbytery supplied the vacancy by presenting to the charge, in virtue of the *jus devolutum*. The act of Queen Anne was modified by 6 & 7 Vict. c. 61 (Lord Aberdeen's act), which allowed parishioners to object to a presentee in respect of his ministerial gifts and qualities, either in general or with reference to the particular parish, and directed the presbytery, if satisfied that the objections were well founded, to reject the presentee; the patron having the right to make another presentation within six months. And by the Church Patronage Act, 1874 (37 & 38 Vict. c. 82), patronage, as a patrimonial right, was abolished, and the right of appointing ministers of the Established Church was transferred from the patrons to the congregations. The following are the leading provisions of the act:—By § 3, the act of Queen Anne and Lord Aberdeen's act are repealed; and the right of electing and appointing ministers to vacant churches and parishes is declared to be vested in the congregations, subject to such regulations in regard to the mode of naming and proposing such ministers by means of a committee chosen by the congregation, and of conducting the election and of making the appointment by the congregation, as may from time to time be framed by the General Assembly. But with respect to the admission and settlement of ministers appointed in terms of the act, nothing therein contained affects or prejudices the right of the church, in the exercise of its undoubted powers, to try the qualifications of persons appointed

[to vacant parishes; and the courts of the church are declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof. By §§ 4–6, provision is made for compensation to private patrons. See *E. Strathmore*, 1 Feb. 1888, 15 R. 364; *Paterson*, 20 July 1888, 15 R. 1060. By § 7, if, on occasion of a vacancy in any parish, no appointment of a minister shall be made by the congregation within six months after the vacancy, the right of appointment shall accrue and belong for that time to the presbytery of the bounds where such parish is, who may proceed to appoint a minister *tantum jure devoluto*. The word “congregation” includes communicants and such other adherents of the church as the kirk-session, under regulations framed by the General Assembly, may determine to be members of the congregation for the purposes of the act; § 9. The Court of Session has jurisdiction to decide whether, in any particular case, the right of appointment has accrued to the presbytery, or still belongs to the congregation; see *Stewart*, 15 Nov. 1878, 6 R. 178; *Cassie*, 25 Nov. 1878, 6 R. 221.]

Patronage was an heritable right. But it was naturally a *jus incorporale*, transferable by disposition without infeftment. It was, however, capable of being feudalised, after which it could be completely conveyed only by infeftment. The usual symbols were a psalm-book and the keys of the church. It was held that patronages were not included in the Act of Annexation, 1587. [But see *Ersk. B. i. tit. 5, § 10*; *Guthrie's Bell's Princ. § 836*.] Lords of Erection were held entitled to exercise a right of patronage, by presenting ministers to the several churches attached to the erected benefices. The Crown, as already said, had right to all patronages to which no title could be proved; and hence, in a question with the Crown, the failure of a subject to prove his title established the Crown's right. [The law as to patronage, as it was prior to the act of 1874, is stated more fully in earlier editions of this work, under the present head and in the article *Presentation*.] See also *Ersk. B. i. tit. 5, § 9*; *Stair, B. ii. tit. 8, § 27*; *More's Notes*, ccxlii.; *Bank. ii. 21*; *Bell's Princ. § 836*; [*Dunlop's Parochial Law*, 185; *Duncan's Par. Eccl. Law*, 76; *Black's Par. Eccl. Law*, 138; *Mair's Church Laws*, 153.] See *Admission. Jus Devolutum. [Church Judicatories.]*

PATTERNS. New patterns of linen, &c., are protected by the law of copyright. See *Copyright*.

PAWN. See *Pledge*.

PAWNBROKERS. [The law relating to pawnbrokers was consolidated by the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93). The term pawnbroker includes every person who carries on the business of taking goods and chattels in pawn; and the provisions of the act are extended to every person who keeps a shop for the purchase or sale of goods, on the understanding, expressed or implied, that they may be afterwards redeemed or repurchased on any terms (§ 6). See *Hunter*, 21 Nov. 1883, 11 R. (J.C.) 14. The act does not apply to loans of sums above £10 (§ 10); and in regard to loans of sums above 40s. but below £10, power is given to the pawnbroker, subject to certain specified conditions, to make a special contract with the pawner, excluding the application of the act (§ 24). Pawnbrokers are directed to keep books and other documents, according to forms prescribed in a schedule to the act (No. 3); and they are required to have their names, with the word pawnbroker, printed in large characters over their shop doors, and to exhibit in a conspicuous part of their shops the tables of rates, &c., prescribed in the same schedule (§ 13). The profits and charges allowed to pawnbrokers are specified in another schedule (No. 4). All pledges continue redeemable for one year with seven days of grace (§ 16). Pledges of 10s. or under, if not redeemed within that time, become the absolute property of the pawnbroker (§ 17). Unredeemed pledges for sums above 10s. are only to be disposed of by public auction (§ 19); and with reference to such auctions the regulations contained in schedule No. 5 are to be observed. At any time within three years after the auction, at which such pledge may have been sold, the holder of the pawn-ticket may inspect the entry of the sale in the pawnbroker's books; and if the pledge appear to have been sold for more than the amount of the loan, and the profit due at the time of the sale, the pawnbroker is, on demand, to pay the surplus to the holder of the pawn-ticket, deducting the expenses of the sale. But if, within twelve months before or after that sale, the sale of another pledge or pledges of the same person has resulted in a deficit, the pawnbroker may set off the deficit against the surplus, and pay the balance only (§§ 21, 22). The pawnbroker

[is bound to deliver the pledge on production of the pawn-ticket, the holder being presumed to be the person entitled to redeem the pledge (§ 25). A pawnbroker is not in the general case bound to give back a pledge, unless the pawn-ticket for it is delivered to him (§ 26); but provision is made, by §§ 29, 30, for the protection of owners of property unlawfully pawned, and of pawners not having pawn-tickets. A pawnbroker is guilty of an offence against the act, if he takes an article in pawn from any person appearing to be under the age of twelve years, or to be intoxicated; or if he purchases or takes in pawn or exchange a pawn-ticket issued by another pawnbroker; or if he employs any servant or apprentice under sixteen years to take pledges in pawn; or if he carries on the business of a pawnbroker on Sunday (or, in England, on Good Friday or Christmas day), or on any day appointed for public fast, humiliation, or thanksgiving; or if he under any pretence purchases, except at public auction, any pledge while in pawn with him; or if he suffers any pledge, while in pawn with him, to be redeemed with a view to his purchasing it; or if he makes any contract or agreement with any person pawning or offering to pawn any article, or with the owner thereof, for the purchase, sale, or disposition thereof within the time of redemption; or if he sells or otherwise disposes of any pledge pawned with him, except at such time and in such manner as are authorised by the act (§ 32). Further prohibitions against unlawful pawning and taking in pawn are enacted by §§ 33–36. Every pawnbroker must procure a yearly licence and pay an excise duty of £7, 10s. for each pawnbroker's shop kept by him (§ 37); and such licences are only to be obtained on production of a certificate granted by a magistrate or justices, as provided by §§ 40–43. See *Ersk. B. iii. tit. 1, § 33*; *Bell's Princ. § 209*; *Folkard's Pawnbroker's Guide*; *Turner's Contract of Pawn*; *Cavanagh on Securities*, 333; *Irons' Police Law*, 573; *Barclay's Digest*.]

PAYEE; the person in whose favour a bill or a draft is drawn. See *Bill of Exchange*.

PAYMENT. A creditor is entitled to demand full payment of his debt at once, and cannot be compelled to accept of partial payments, unless, by the original obligation, it has been made payable in parts; for in that case, there are held to be as many obligations as there are terms of payment. By the same rule, a creditor in two or more

separate debts cannot refuse to accept payment of any of them, though the debtor should not offer to pay the others, or although he should not pay even the interest then due on the others. See *Partial Payment*.

Indefinite Payment.—Where there are several debts due, and an indefinite payment is made by the debtor, without specifying to account of which debt he wishes the payment to be applied, the payment is applied according to certain equitable rules which show an equal regard to the interests of the debtor and to those of the creditor; the creditor's interest, however, being chiefly regarded. For these rules, see *Indefinite Payment*.

Payment bona fide.—Where payment has been made *bona fide*, though to a person not entitled to receive it, the payment may nevertheless be effectual. Where, for example, a payment is made to a person who was formerly factor for the creditor, but whose factory has been withdrawn, without intimation to the debtor; in that case, the debtor who pays *bona fide*—that is, without having reason to suspect, and without knowledge of the factory having been withdrawn—pays with safety; and the discharge of the person who was formerly factor will be to him an effectual discharge. *Bona fides* ceases from the time that citation is given by those having an interest in the debt. Payment made to one who never possessed a power of receiving or discharging the debt is not accounted a *bona fide* payment. Thus, a payment to a messenger-at-arms entrusted with the execution of diligence will not discharge the debt, unless the money is accounted for by the messenger to his employer; for a messenger is not authorised, *qua* messenger, to do more than merely to execute the diligence. His employer, indeed, may expressly authorise him to receive and discharge the debt; but otherwise his discharge will not be effectual against his employer; and as the debtor is presumed to know this legal doctrine, such a payment to a messenger, not specially authorised to discharge the debt, is not accounted a *bona fide* payment. [As to payment made in error, see *Condictio Indebiti*. Error. And as to *bona fides* of trustees in applying funds to a purpose *ultra vires*, see *Andrews*, 29 June 1886, 13 R. (H.L.) 69.] See *Ersk. B. iii. tit. 4, § 3*; *Stair, B. i. tit. 18, § 3*; *B. iv. tit. 40, § 33*; *More's Notes*, cxxiv.; *Bank. i. 486*; *iii. 82*; *Bell's Com. ii. 44*; *Kames' Principles of Equity* (1825), 405; *Hunter's*

Landlord and Tenant, ii. 437; *Thomson on Bills*, 270; [*Bell's Princ. § 561*; *M. Bell's Conv. i. 346*.]

Collusive Payment.—Rent is payable either at the legal terms of Whitsunday and Martinmas, or at such conventional terms as the parties may have fixed; and where a tenant anticipates the term of payment, and pays his rent beforehand to his landlord, such payment will be accounted collusive, in a question with the creditors of the landlord, who may have arrested before the term of payment, although posterior to the actual payment by the tenant. Hence the tenant will be obliged to pay over again to the arresters; [*Wilson*, 1611, M. 10022. In *Davidson*, 5 Nov. 1868, 7 Macph. 77, this rule was held not to apply in a question with a trustee on a landlord's sequestrated estate, who takes the estate *tantum et tale* as it existed in the person of the bankrupt, and is liable to equities, which might not have affected a purchaser or special assignee.] The same rule applies in the payment of feu-duties; but in common debts, the debtor may safely pay even before the term of payment. *Ersk. B. iii. tit. 4, § 4*; *Bell's Com. ii. 204*; [*Bell's Princ. § 562*; *Hunter's Landlord and Tenant*, ii. 438; *Rankine on Leases*, 280.]

Presumed Payment.—The payment of a debt is presumed to have been made wherever the voucher is found in the hands of the proper debtor, or of a cautioner. This holds not in bonds and bills only, but even an heritable bond with sasine, found in the hands of the debtor, will infer payment, unless it can be proved that the voucher of debt came into the hands of the debtor in some other way than on payment. [As to presumption of payment from other circumstances, see *Spence*, 24 Oct. 1873, 1 R. 46; *Tosh*, 9 Dec. 1873, 1 R. 254. From three consecutive discharges of periodical payments (as rents, interests, feu-duties, or salaries), payment of all preceding is presumed. But it is not enough that there have been three consecutive payments without a discharge.] See *Ersk. B. iii. tit. 4, § 5*; *More's Notes on Stair*, cxxiii-v.; *Bell's Princ. § 566*; *Thomson on Bills*, 269; [*Dickson on Evidence*, §§ 173, 618.] See *Chirographum*. [*Discharge*.]

Payment by a Third Party.—Payment of a debt by a third party is presumed *in dubio* to have been made with the proper money of the debtor. Thus, if a discharge or receipt bear the money to have been paid by A. in the name of B., the proper

debtor, the presumption is, that the money was B.'s, and that A. was merely interposed to make the payment. [This holds even when the person paying is the debtor's father; *Welsh*, 19 Jan. 1878, 5 R. 542. In *Wood*, 20 Dec. 1848, 11 D. 254, where payment was made by another than the debtor, receipts granted by the creditor to his own agent, who had advanced the money, though bearing discharge of the debtor, did not discharge him, being undelivered; but see *Tod*, 13 Dec. 1838, 1 D. 231. See *Menzies' Conv.* 273; *M. Bell's Conv.* i. 349.] In an obligation where several are bound, and payment is made, and the money said to have been received from one of the obligants, should that obligant afterwards cancel the ground of debt, the presumption is, that he was the principal debtor from the beginning, or that he had actually received their shares from the other obligants. *Ersk. B. iii. tit. 4, § 6.*

Proof of Payment.—It is a general and established rule, that payment of a debt constituted by writing cannot be proved by witnesses. Where, however, the written obligation binds the party to the performance of special facts, the performance of those facts may be proved by witnesses to the effect of discharging the obligation. Where the debt is not constituted by writing, payment to the extent of £100 Scots (£8, 6s. 8d.) may be proved by witnesses. *Ersk. B. iv. tit. 2, § 21; Stair, B. iv. tit. 32, § 3; tit. 43, § 4; Bell's Princ. § 564; Kames' Equity*, 507; *Thomson on Bills*, 265. See *Evidence*. On payment generally, see *Stair, B. i. tit. 18; [Ersk. B. iii. tit. 4, §§ 1 et seq.] Bell's Princ. § 556; Kames' Equity*, 375, 329; *Brown on Sale*, 388; [*Anson on Contract*, 279.] See *Place of Payment*. [*Price*.]

PECULIUM; in Roman law, was that property which a slave or a *filius familias* could acquire with his master's or father's consent. A son's *peculium* was of four kinds: *castrense*, acquired in war; *quasi castrense*, acquired in the exercise of public duty, or of some of the liberal arts; *adventitium*, derived from a stranger; or *profectitium*, derived from his father. The law as to the property of the *peculium* varied, according as it was of one or other of these kinds; *Stair, B. i. tit. 5, § 11*. Professor Bell uses the word *peculium* for the fund which, in addition to *paraphernalia*, is, by custom or special gift, appropriated to the wife, such as the "lady's gown," a sum secured by ante-

nuptial contract, or derived from a stranger, or with regard to which the husband has renounced his *jus mariti*. See *Bell's Princ. § 1560; [Fraser on Husband and Wife, i. 790-1.]*

PEDE PULVEROSUS; a "vagabond, especially a merchant or creamer who has no certain dwelling-place where the dust may be dight from his feet, to whom justice should be summarily ministered within three flowings and ebbings of the sea." *Skene, h. t.* See *Dustyfoot*.

PEDELLUS; according to Skene, the serjeant or beadle of the burgh, who should execute summonses, make attachment, or take poulds. *Skene, h. t.*

PEDLAR. By 34 & 35 Vict. c. 96, no person may act as a pedlar without a certificate authorising him so to do. For regulations in regard to such certificates, and penalties, see the act. By 44 & 45 Vict. c. 45, a certificate is valid throughout the United Kingdom. As to hawkers' licences, see 51 & 52 Vict. c. 33. See *Irons' Police Law*, 565; *Barclay's Digest*. See *Vagabond*.]

PEER. A peer is an equal; and hence all commoners, or those who are under the rank of nobility, are said to be peers of each other, being subject to the common tribunals and ordinary jurisdiction of the kingdom. But peers of parliament or of the realm are the nobility of the kingdom, and constitute a branch of the legislature. It would appear that originally the right of peerage was territorial, but it has gradually become personal. Peers are now created either by writ or by patent; a writ or patent being presumed in the case of those who claim by prescription. The creation by writ, or the Queen's letter, is a summons to attend the House of Peers, by the style and title of that barony which the Queen is pleased to confer. The creation by patent is a royal grant to a subject of any dignity and degree of peerage. [The three Lords of Appeal in Ordinary, created by 39 & 40 Vict. c. 59, § 6, are life peers, enjoying the rank of baron for life, and the right of sitting and voting in the House of Lords so long as they continue in office. See *May's Parl. Prac.* 14.] Peers are possessed of certain important privileges, among which is that of being judges of each other, and being exempt from the common and ordinary jurisdiction. By the Treaty of Union, art. 23, it is declared that the sixteen peers of Scotland, entitled to sit in the House of Lords, shall have all the privileges of parliament enjoyed by

the British peers, and particularly the right of sitting upon the trial of peers; and that all peers of Scotland, whether representative or not, shall be tried as peers of Great Britain, and shall enjoy all privileges as peers as fully as the British peers, except the right of sitting in the House of Lords, and the privileges depending thereon. The trial of a peer proceeds before the peers assembled in the court of the Lord High Steward of Britain; towards a trial before which tribunal a true bill must be found by a jury of twelve men, who may be commoners, before a special commission issued for that purpose; 6 Anne, c. 23. This matter, in relation to the peers of Scotland, is now regulated by 6 Geo. IV. c. 66, which enacts that the crimes on account of which such a commission may issue are—all treasons, misprisions of treasons, murders, and other crimes which infer a capital punishment by the law of Scotland; and all felonies and other crimes for which, if committed in England, a peer of the United Kingdom would be tried by his peers. And the statute declares it unlawful for the Court of Justiciary, or any other court in Scotland, to take cognisance of any of the aforesaid crimes when committed by a peer. [Peers are exempt from imprisonment for a civil cause, even when parliament is not sitting. A peer who is an adjudged bankrupt may not sit or vote in the House of Lords, or be elected as a representative peer; 46 & 47 Vict. c. 52 (English Bankruptcy Act), §§ 32, 33, 169, sched. 5. And “adjudged bankrupt” includes any person whose estate has been sequestrated, or with respect to whom a decree of *cessio bonorum* has been pronounced by a competent court in Scotland; 47 & 48 Vict. c. 16, § 5 (1). But the disqualification ceases on recall or reduction of the sequestration or *cessio*, or on the bankrupt obtaining his discharge from a competent court; *ib.* § 5 (3); 46 & 47 Vict. c. 52, § 32 (2). See also 34 & 35 Vict. c. 50, §§ 6–8 (which sections were saved from the general repeal of that act by the English Bankruptcy Act). See *Hume*, ii. 46; *Ersk.* B. i. tit. 3, § 8; B. iv. tit. 3, § 25; *Bell's Princ.* §§ 2138 *et seq.*; *Alison's Prac.* 14; *Goudy on Bankruptcy*, 77, 350; *Anson's Law and Custom of the Constitution*, 168; *Wharton's Lex. h. t.* See *Dignities*.] The law concerning the election of the sixteen peers of Scotland is given in the article *Election Law*.

PEJORATIONS; deteriorations; used sometimes, though rarely, in contradis-

tinction to meliorations. In *Graham*, 29 June 1831, 5 W. & S. 280, 295, the term was characterised in the House of Lords as a convenient one.

PENAL ACTIONS. An action is said to be penal when the conclusions of the summons are of a penal nature; that is, when not merely restitution and real damages, but extraordinary damages and reparation, by way of penalty, are concluded for. In such actions, whether they be of a *quasi* criminal character, and requiring the concurrence of the public prosecutor, or conclude for payment of heavy pecuniary penalties, great accuracy and precision are required in the summons or complaint. The time and place where the offence was committed must be distinctly libelled, and the person against whom the charge is made must be clearly pointed out. Indeed, it has been said that, in respect to the precision required, there is little or no distinction between such a summons or complaint, and an indictment in the criminal court. Actions in which the pursuer insists barely for an indemnification of real loss are transmitted against heirs; but actions in which some demand is made by way of penalty die with the delinquent or transgressor, on the maxim, *Actio penalis in hæredem non datur, nisi ex damno locupletior hæres factus sit.* *Ersk.* B. iii. tit. 1, § 15; B. iv. tit. 1, § 14; *Bank.* iii. 67; [*Shand's Prac.* i. 218; *Mackay's Prac.* i. 368. See *Damages*.]

PENAL IRRITANCIES. Irritancies were formerly strictly interpreted. Hence the A.S. 27 Nov. 1592, declared that irritancies were to be explained according to their express words and meaning; and although the act 1661, c. 62, in consideration of the political confusions which had preceded the passing of the act, allows proprietors to redeem wadsets within five years, yet in the statute it is assumed that the penal irritancies which those wadsets may contain are lawful; and, according to our ancient practice, the offer of payment before decree of declarator, in an action of declarator of irritancy, was not competent after the irritancy had been incurred. A distinction, however, is now made between irritancies penal and not penal. Where the irritancy is not penal, as in the irritancy of a sale for a just price, provided payment be not made at a certain term, the condition receives full effect even without declarator. But wherever it is of a penal nature, as in a redeemable right for a sum less than the value of the subject, the

court will soften the rigour of the condition, and allow the reverser a power of redemption, even after the time allowed by the deed; and at any time before declarator, provided the long prescription of forty years has not run after the term of redemption, for, by the lapse of that time, the power to redeem is cut off by the negative prescription. *Ersk. B. ii. tit. 8, § 14; tit. 5, § 25.*

[**PENAL SERVITUDE**; was substituted in lieu of transportation, as a punishment for grave offences. See 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47; 34 & 35 Vict. c. 112. See *Prevention of Crimes Act.*]

PENAL STATUTES; are strictly interpreted—that is, they are not extended against the offender. Where a thing is prohibited by statute under a penalty, if the penalty, or part of it, be not given to him who sues for it, it goes to the Crown. See *Ersk. B. i. tit. 1, § 55; Tomlins' Dict. voce Penal Laws; King's Advocate, 1793, M. 4900.* As to the limitation of penal statutes, see *Prescription of Crimes.*

PENALTIES. Where an obligant fails to perform any act to which he has become bound, he will be liable in damages to the person who suffers by his breach of agreement. But in estimating this damage, where there has been no fraud, consequential or indirect damage is not taken into account. Thus, the failure to pay money at a stipulated time may occasion indirect damage to the creditor, but is not a damage which the law can estimate; and therefore the creditor's demand is limited to the principal sum with interest, and the expenses to which the creditor has been put. In order to cover the damage which may be sustained by failure in performance, penalties are usually adjoined to obligations. Where the penalty relates to the payment of money, it is fixed at a fifth part of the principal sum—probably because this is the extent of the statutory penalty in appraisings and adjudications; but this fifth part is never enforced beyond the amount of the expenses actually incurred by the creditor in endeavouring to recover payment. When, therefore, the debtor offers the principal sum, interest, and the expense of diligence, no more can be demanded out of the penalty. Even where an action has been raised, and decree obtained, the expense of that process cannot be demanded out of the penalty, unless expenses have been awarded by the decree. [In some cases, where a sum is stipulated to be paid

[in the event of non-performance of the obligation undertaken, such sum, though loosely called a “penalty,” is really of the nature of a conventional liquidation of the damage, in order to avoid a question as to its extent. In such cases, no inquiry into the actual damage is competent, unless the sum assessed is exorbitant and unconscionable; *Fraser, 25 Feb. 1813, F.C.; Johnston, 1 March 1861, 23 D. 646; Forrest & Barr, 26 Nov. 1869, 8 Macph. 187.* There is another class of cases, however, in which the sum stipulated to be paid in the event of breach of contract is not to be regarded as pactional or liquidated damages, but merely represents the general agreement that a money payment shall be made to the extent of the damage caused by the breach of contract. In such a case the penalty is held to cover, but not to assess the damage. The party complaining of breach of agreement is entitled to conclude for the full amount of the penalty, without alleging damage, it being open to the defender to say that the demand is exorbitant, and that the penalty should be modified, because the damage sustained has been less than the penalty; see Lord J. C. Inglis, in *Craig, 3 July 1863, 1 Macph. 1020*; see also *Robertson, 2 March 1881, 8 R. 555.* Where in a contract a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious, and others but trifling damage, the presumption is that the parties intended the sum to be penalty and subject to modification; but if the stipulated payments are made proportionate to the extent to which the debtors may fail to implement their obligation, and are to bear interest from the date of failure, payments so adjusted with reference to the actual amount of damage, are not be regarded as penalties, but as liquidate damages; *per Lord Watson, in L. Elphinstone, 29 June 1886, 13 R. (H.L.) 98, 106.* The mere use of the word “penalty” or “liquidate damages” is not conclusive; *ib.* A fixed penalty, adjoined to a stipulation *ad factum præstandum*, is not held to come in place of performance; nor is one entitled to violate a prohibition, on payment of the penalty; *Mackenzie, 18 June 1811, F.C.; Gold, 16 July 1870, 8 Macph. 1006; Dalrymple, 5 June 1878, 5 R. 847.* In general, obligations of this kind bear that the penalty is to be exigible “over and above,” or “by and attour performance;” but even without these expressions, the performance

of the fact may be enforced by diligence. From this, however, there is an exception, as where a person becomes bound that another shall perform an act under a penalty; for here, as the obligant cannot perform the act himself, the conventional penalty, as to him, must free him from further diligence. [Where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it. To enable a common informer to sue for such penalty, an interest therein must be given him by express words or by sufficient implication; *Bradlaugh*, 8 App. Ca. 354; *Mackintosh*, 3 July 1875, 2 R. 877. Where a penalty is imposed by statute on an act, its prohibition is implied; *Pollock on Contract*, 280.] See *Ersk. B. iii. tit. 3, § 86*; *Bell on Leases*, i. 253; *Bell's Com.* i. 699; *Stair*, B. i. tit. 10, § 14; B. iii. tit. 2, §§ 32, 54; B. iv. tit. 3, § 2; tit. 18, § 3; *More's Notes*, lxxi.; *Bank. i. 473*; *Bell's Princ.* § 34; *Hunter's Landlord and Tenant*, ii. 531, 532; *Ross's Lect.* i. 32, 58; [*Addison on Contracts*, 1111; *Anson on Contract*, 262; *Maxwell on Interpretation of Statutes*, 238, 256, 483.] See *Damages*.

PENANCE; an ecclesiastical punishment, by which a penitent gives satisfaction to the church for the scandal he has occasioned by his ill example. The judicatories of the Church of Scotland judge of and punish gross immorality, heresy, and schism, but with a degree of temper and moderation suited to the state of society in this country, and better calculated than a more rigid exercise of ecclesiastical discipline would be to attain the end in view. When penance is inflicted, it is done by applying the lesser excommunication; which excludes the offender from the ordinances of the church; and time and opportunity are given for reconciliation. It is only in the case of more hardened offenders, and where the offence is of a nature which cannot be overlooked, that the greater excommunication is used. See *Excommunication*.

PENDENTE LITE NIHIL INNOVANDUM. This maxim of the Roman law is adopted generally in the law of Scotland, and, according to Erskine, has been applied to the case where rights are rendered litigious by an action of ranking and sale for behoof of creditors. Accord-

ing to this rule, no diligence carried on or perfected while the action of sale is pending, and intended to create a new preference to the user, in competition with the other creditors, ought to receive effect. But, in practice, this rule has been disregarded; and Erskine's doctrine, stated as referable to the maxim *Pendente lite nihil innovandum*, seems to be properly referable to the principle, that wherever the process can be regarded as a general measure, it ought to supersede the diligence of individual creditors. [This doctrine is now established by express enactment; 19 & 20 Vict. c. 91, § 4.] See *Bell's Com.* ii. 147; *Ersk. B. ii. tit. 12, § 65*. [See *Litigiosity*. It has been held that this maxim "applies only to things done by the debtor or defender in the action, which tend to make the right of the creditor or pursuer worse, but cannot hinder the creditor or pursuer from making his right better, even in competition with another creditor or pursuer;" *Massey*, 1785, M. 8377. See *Trayner's Maxims*, 433.]

PENSION; is defined by Skene to be a duty, such as an annual rent. *Skene, h. t.*

PENSION; an annual allowance paid for a person's maintenance at the will of another. It is criminal to receive a pension from a foreign prince or state without leave of our Sovereign. [By 1 & 2 Vict. c. 2, § 5, Her Majesty is empowered to grant pensions to the amount of £1200 *per annum*, chargeable on her civil list revenues. As to commutation of pensions, see 34 & 35 Vict. c. 36; 39 & 40 Vict. c. 73; 45 & 46 Vict. c. 44.] No person having any pension from the Crown is capable of being elected member of parliament, or of sitting or of voting, and a penalty of £500 is imposed upon pensioners who sit or vote; 6 Anne, c. 7, §§ 25-29; 1 Geo. I. stat. 2, c. 56. [But pensions granted for civil services according to the provisions of any act of parliament do not disqualify; 33 & 34 Vict. c. 15; nor do diplomatic pensions; 22 & 23 Vict. c. 5; 32 & 33 Vict. c. 43.] Pensions from the Sovereign are held as alimentary, although they do not expressly bear a declaration to that effect. [Hence they are not arrestable. But by the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79, § 149), the Lord Ordinary or sheriff may order such portion of the pay or pension of any bankrupt, as, on communication from the Lord Ordinary or sheriff to the chief officers of the department under which such pay or pension may be enjoyed by the bankrupt, they may consent to in writing,

[to be paid to the trustee and applied in payment of the bankrupt's debts. The trustee may petition the Lord Ordinary or sheriff to this effect, making intimation to the bankrupt; *Scott*, 26 Nov. 1884, 12 R. 182. The sheriff's judgment is appealable under § 170 of the Bankruptcy Act; *Scott*, 17 Jan. 1885, 12 R. 540. In that case the court refused to allow any portion of a pension of £46 *per annum* to be paid to the trustee for the creditors, though the sheriff had recommended the deduction of one-half, and the Postmaster General had consented to the deduction of £10. See *Goudy on Bankruptcy*, 358.] It has been repeatedly decided, that a pension granted for services done and to be done is good, although the pensioner should, from circumstances, find it impossible to perform these services for the future. See *Stair*, B. ii. tit. 5, § 16; B. iii. tit. 1, § 37; *Ersk.* B. iii. tit. 6, § 7; *Bank.* i. 654; ii. 14; *Bell's Com.* i. 125; *Jurid. Styles*, ii. 97; *Kames' Stat. Law*, h. t. See *Annuity*.

PENURIA TESTIUM. The disqualifications formerly attaching to witnesses, and especially that of relationship, were sometimes disregarded in occult or private facts, where there must, from the nature of the case, be a scarcity of unexceptionable witnesses; but such witnesses were examined *cum nota*—i.e., reserving consideration of their credibility. It was not enough in this sense, to constitute a *penuria testium*, to prove that the other evidence was scanty and defective; it had to be shown farther that the *penuria* was necessarily occasioned by the very nature of the question at issue. *Tait on Evidence*, 373; *Macfarlane's Jury Prac.* 92; [*Dickson on Evidence*, § 1615.] See *Evidence*.

PERAMBULATION. Actions upon briefs of perambulation were authorised by the act 1579, c. 79, and were intended to settle the line of march between conterminous properties. *Ersk.* B. iv. tit. 1, § 48; *Stair*, B. iv. tit. 3, § 14; tit. 27, § 3; *Bank.* i. 281; *Kames' Stat. Law*, h. t. [See *Brieve*.]

PERDUELLION; treason. See *Treason*.

PEREMPTORY DEFENCES. See *Defences*.

PERICULUM; risk. The general rule with regard to risk is, that a subject perishes to its *dominus*, or to him who has the right of property in it—*Res perit domino*. But this rule is frequently modified by the introduction of certain opposite principles, by the rules of particular contracts, and by

the effect of *culpa* or fault in subjecting those to the risk of loss who would not otherwise be liable. The most important exception occurs in the case of a subject sold, but not delivered. The rule of the law of Scotland, adopted from the Roman law, is, that property is not transferred without delivery—*Traditionibus dominia rerum transferuntur*. Before delivery, the buyer has merely a *jus ad rem*: he is creditor for the delivery of the thing sold. See *Jus ad Rem. Jus Crediti*. And yet, if the subject perish undelivered, it perishes to the buyer—*Periculum rei vendite, nondum tradite, est emptoris*. [See *Sale*.] The modifications of the rule, that the risk is with the owner, arising from the obligation to a reparation of loss occasioned by fault or carelessness, and from the peculiar doctrines of certain contracts, such as affreightment and carriage by land, are noticed in other articles. See *Carriers. Innkeepers. Public Carriages. Damages. Insurance. Bond of Bottomry*.] See *Stair*, B. i. tit. 11, § 2; tit. 14, § 7; *More's Notes*, lxxii.—viii., lxxxv.—vii.; *Ersk.* B. iii. tit. 1, §§ 19, 20, 26, 31, 33; tit. 3, § 7; *Bell's Com.* i. 179, 461, 472, 488; *Brown on Sale*, 355; *Bell's Princ.* §§ 87, 141, 152, 199, 202, 206, 227, 232; *Kames' Stat. Law. Abridg.* h. t.

PERJURY; is the judicial affirmation of a falsehood upon oath. The essence of the crime consists in affirming a plain and obvious falsehood; for, where the oath can in any reasonable way be reconciled with truth, or an innocent intention, there is no perjury. Neither must there be any doubt about the true state of the fact, or the sense in which the panel's words are to be understood; and where it is possible to account for what may have the appearance of a falsehood, on the ground of its being an omission, that will save the panel. To constitute the crime of perjury, the person must have sworn absolutely, and not to the best of his recollection, where the matters are not recent, or of a nature not to call for his particular attention; for, where the matters are recent, or of a nature to which his attention may be supposed to have been specially directed, he will not be allowed to screen himself under the pretext that he had forgotten. The falsehood must be wilfully affirmed by one who knows the truth, and who, for some corrupt purpose, resolves to conceal it. Hence, there can be no prosecution for perjury where the oath is pure matter of opinion and belief, as in the oath of calumny,

where his own prejudices may lead the deponent to view the cause in a different light from that in which it will be viewed by any other person. Of the same kind is the oath in lawburrows, where the complainant expresses his apprehensions of danger; which fears may have been genuine in him, though entirely chimerical. The oath, to found the charge of perjury, must be material to the point at issue, in the question where it is given; for where the falsehood extends only to trifling particulars, it will be attributed to inadvertency or oversight, rather than to that dole, or corrupt intention, which is the essence of this crime. The falsehood must have been affirmed on oath, in contempt of that high adjuration which the witness makes. The most formal written declaration is therefore no ground of prosecution as perjury. To this, however, the word of honour of a peer, [and all affirmations recognised by law as equivalent to oaths,] are exceptions. [See *Oath. Affirmation.*] It is farther necessary that the oath should be given before a magistrate or other person empowered by law to administer an oath; because, without that, an oath has neither those consequences, in point of interest, to the man himself, nor that prejudice to his neighbour, which are the proofs of that malice which is principally the object of punishment. Neither can falsehood contained in a voluntary affidavit given before a magistrate be the ground of prosecution for perjury. Not only must the oath be taken before a person entitled to administer it, but it must have been given in the due and accustomed form, in the department of business to which it relates; for example, it must have been read over, approved of, and signed, when the person can write. In short, all the requisite forms must have been observed. The crime of perjury may be committed by a party on a reference to oath, as well as by a witness in a cause. The same may happen in taking the oath to obtain the benefit of the act of grace—a suspender's oath at passing a bill on juratory caution—at obtaining the benefit of the *cessio bonorum*—or a discharge of debts under the bankrupt statute. [See 19 & 20 Vict. c. 79, § 178.] The evidence of the terms of the oath ought to be the written oath, signed by the panel, or certified by the judge; and where the oath has not been taken down in writing, the terms of the depositions must be established by respectable and intelligent witnesses. The evidence of the falsehood may be by

parole proof, or by writing; [*Roberts*, 25 Oct. 1882, 10 R. (J.C.) 5.] It is not enough that the fact actually was contrary to what has been sworn to by the panel; it must further be proved, or sufficiently inferred from circumstances, that the panel actually knew, at the time he was delivering his oath, that the fact was inconsistent with what he was swearing. [It is competent to charge two or more panels on the same indictment with perjury, if the alleged perjury related to the same matter, and was designed to compass the same defeat of justice; *Marr*, 4 Feb. 1881, 8 R. (J.C.) 21.] The punishment of perjury was [formerly] directed by statutes, the last of which, 1555, c. 47, declared perjury to be punishable by confiscation of moveables, by piercing the tongue, and infamy; to which the judge, in aggravated cases, might add any other penalty that the case seemed to require. [The punishment is now penal servitude or imprisonment. Until recently the sentence always contained a declaration that the panel was “infamous, and incapable of holding any trust or office or of passing upon any inquest or assize, or of giving evidence in any court of justice in all time coming.” But the disability to give evidence was taken away by 15 Vict. c. 27, § 1; and it has been questioned whether the declaration of infamy should not now be discontinued in the majority of cases; *Marr*, *supra*. See also *Maxwell*, 31 Jan. 1865, 5 Irvine, 65. Perjury may be tried before a sheriff, though he cannot pronounce infamy; *Marr*, *supra*; *Roberts*, *supra*.] It may be tried by the Court of Session, where it occurs in any examination on oath taken in the course of an action before that court. Subornation of perjury, which consists in tampering with those who are to appear as witnesses, and directing them what to say, without regard to truth, is directed, by 1555, c. 47, to be punished with the pains of perjury. See *Hume*, i. 366–85; *Alison's Princ.* i. 464; [*Macdonald*, 234;] *Stair*, B. iv. tit. 43, § 6; *Ersk.* B. iv. tit. 4, § 74; *Bank.* i. 299; *Kames' Stat. Law Abridg. h. t.* See *Oath. [Subornation.]*

PERMISSIVE LAWS. A law permitting certain persons to have or enjoy the use of certain things, or to do certain acts, by direct implication prohibits all others from obstructing the exercise of the right so conferred. *Ersk.* B. i. tit. 1, § 24.

PERMIT; a licence or warrant for persons to pass with and sell goods, on having paid the duties of customs or excise

for them. See 2 & 3 Will. IV. c. 16. See *Excise*.

PERMUTATION or **BARTER**; is the exchange of one moveable subject for another; and, by the law of Scotland, the contract is completed by consent alone, so as to enforce the subsequent exchange. By this contract the property is transferred. *Stair*, B. i. tit. 10, § 14, and tit. 14; *Ersk.* B. iii. tit. 3, § 13. See *Barter*.

PERPETUITY. In the law of England, a perpetuity seems to have been originally equivalent to a Scotch entail; but in that law an entail may be defeated by a common recovery. ["The rule against perpetuities, or the doctrine of remoteness, applies to the *corpus* of property, whether real or personal, and whether limited by deed or will, and may be thus stated: that the vesting of property cannot be postponed, or the alienation of it restricted, beyond any number of lives in being, and twenty-one years from the death of the surviving life, absolutely and wholly independent of infancy (*i.e.*, a gross term of twenty-one years), together with one or two periods of actually existing gestation;" *Wharton's Lex. h. t.*] See *Sandford on Entails*, 25, 31; [*M'Laren on Wills*, i. § 586. See also *Entail. Thellusson Act.*]

PERSONA STANDI IN JUDICIO; the right enjoyed by all, except by those who are deprived of it on account of civil death, nonage, or other disability, to pursue for and defend their rights in a court of justice. What *persona standi* is, may be more easily learned by considering the loss of it by civil death or outlawry. The outlaw is said *amittere legem terræ*, to be repelled *ab agendo et defendendo*, to be incapable of pursuing or defending in any process, civil or criminal. But there are others besides outlaws who have no *persona standi*. A pupil cannot pursue or defend; that must be done by his tutor in his name. And companies, as such, have not a *persona standi*. See *Firm.* [*Joint Stock Company.*] *Persona standi* is different from title to pursue. *Persona standi* applies to the *status* of the person, as qualified to pursue or defend in actions generally; title to pursue applies to particular actions, and requires, in addition to a *persona standi*, that the party have a proper legal interest in the particular action pursued or defended. Thus, although a superior possess a *persona standi*, he cannot pursue a declarator of non-entry unless he produce an infettment in the lands; see *Brown's Synop. h. t.* See *Title to Pursue. Interest.*

PERSONAL BOND. See *Bond*.

PERSONAL EXECUTION. See *Capitulation. Diligence. Imprisonment. Liberation. Act of Grace. Act of Warding.*

PERSONAL OBJECTION or **EXCEPTION**. When a party is, by his own act, or by the peculiar circumstances in which he is placed, incapacitated from maintaining a certain plea in an action or in a defence, he is said to be barred from maintaining that plea *personali exceptione*. Thus, one is barred *personali exceptione* or *objectione* from redarguing his own judicial assertion; from objecting to a deed to which he has already consented; from pleading the defect of his own or his author's title; from taking benefit by his own fault or neglect. It was even held in the Court of Session (M. 10,456), that a woman who had been privately married, and who had connived at a second marriage which her husband entered into, was barred, *personali exceptione*, from challenging the second marriage. This was reversed in the House of Lords; *Campbell*, 1753, 1 Pat. 519. [But see *Bell's Report of a case of Putative Marriage*, p. 83.] For illustrations of the cases where personal objection is or is not inferred, see *Brown's Synop. h. t.*; [*More's Lect. ii.* 265; *Guthrie's Bell's Princ.* § 27 A; and the *Digests*. The same principle is recognised in English law under the name of estoppel by conduct (or estoppel *in pais*). "The rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time; *per* Lord Denman, in *Pickard*, 6 A. & E. 474. It is added by Lord Cranworth, in *West*, L.J. 20 Ch. 362, that "this doctrine is not confined to cases where the original representation was fraudulent. Even where a representation is made in the most entire good faith, if it be made in order to induce another to act upon it, then *prima facie* the party making the representation is bound by it, as between himself and those whom he has thus misled." See *Smith's L.C. ii.* 911, 927; *Stephen's Digest of Law of Evidence*, art. 102, and note xxxviii.; *Bigelow on Estoppel*; *Everest and Strode on Estoppel*. See *Acquiescence. Mora.*]

PERSONAL RIGHTS. A real right, or *jus in re* entitles the person vested with it to possess the subject of the right as his

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own, and to reclaim or vindicate it from others; whereas the creditor in a personal right or obligation has no more than a *jus ad rem*, or a right of action against the debtor or his representatives, whereby they may be compelled to implement the obligation, by transferring the subject to the creditor, or by paying or performing in terms of the obligation. See *Obligation*. [*Jus ad rem*.] Heritable rights in the persons either of heirs or of disponees, not completed by infeftment,—such, for example, as the right of one who has obtained a disposition to an heritable subject on which he has not taken infeftment,—are also termed personal rights. In such a case, the disponee, before taking infeftment, may sell the subject, and may assign to the purchaser the unexecuted warrants, in virtue of which the purchaser may complete his right by infeftment. Or the first disponee, as if he were actually infeft, may himself grant a disposition to the purchaser, on which the latter may obtain himself infeft; and although such infeftment will be ineffectual so long as the first disponee remains uninfeft, yet, as soon as he completes his title, the prior infeftment of the purchaser and the feudal right will be perfected by accretion. [See *Accretion*.] Before the recent series of conveyancing statutes, the usual form of conveyance of a personal right to lands was by a Disposition and Assignment. This deed contained all the clauses of an ordinary disposition, except the procuratory of resignation and precept of sasine, and also contained a special assignment of the procuratory and precept in the original disposition, which still remained unexecuted. Disposing words, however, were not essential; the transference of the warrant, with the expressed design that the assignee should thereby obtain infeftment, constituted the essence of the conveyance. See *Renton*, 18 Aug. 1843, 2 Bell's App. 214; *Ross's L.C.* ii. 435.

[A new mode of transmitting a right to an unrecorded conveyance was introduced by the Titles to Land Act of 1858, and re-enacted by the Consolidation Act of 1868. Any person having right to an unrecorded conveyance may now assign his right by assignation in statutory form, either written on the conveyance assigned, or as a separate deed. In the former case, the feudal title is completed by recording the conveyance, with assignation thereon, and warrant of registration. When the assignation is written apart, the title is completed either

[by recording both the conveyance, with warrant of registration, and the assignation, docquetted with reference to the warrant of registration; or by recording the conveyance with warrant of registration along with a notarial instrument, docquetted with reference to the warrant, and setting forth the conveyance, the title or series of titles whereby the assignee acquired right to it, and the nature of his right; or by recording a notarial instrument alone, setting forth the nature of the conveyance, and containing those portions thereof which convey the lands in regard to which the instrument is expedite, and by which real burdens or conditions are imposed, and also setting forth the title by which the assignee acquired right to the conveyance. See 31 & 32 Vict. c. 101, §§ 22, 23.]

But the holder of a personal right is not so divested by a first conveyance as to prevent him, if fraudulently inclined, from granting a second conveyance to another disponee, which second conveyance, if first perfected by infeftment, will exclude the first conveyance—and that although up to the date of the competition the original disponee's right should remain personal. [See *Bell*, 1737, M. 2848; *Ross's L.C.* ii. 410; *Laurie*, 10 March 1854, 16 D. 860. In this respect a personal right to lands differs from a mere *jus crediti*, which is fully and effectually transmitted by assignation duly intimated. See *Edmond*, 26 Feb. 1858, 3 Macq. 116.

[A personal right in an estate in land now vests, without service or other procedure, in the heir entitled to succeed thereto, by his survivance of the person to whom he is entitled to succeed; and the personal right so vested is of the like nature, and attended with the like consequences, and is transmissible in the same manner, as a personal right to land under an unfeudalised conveyance; 37 & 38 Vict. c. 94, § 9. The title of an heir or disponee of a proprietor vested under this provision with a personal right to lands, or of any person acquiring right from him, may be made up in like manner as if the person making up a title had held a disposition from the proprietor last infeft in the lands in favour of his immediate successor therein, and a disposition and assignation from each intervening heir or disponee. The procedure is by petition to the sheriff of chancery, or to the sheriff of the county, as in a petition for special service; and on the extract decree in such petition being recorded, the petitioner is held to be duly infeft in the

[lands; *ib.* § 10. See *Apparent Heir. Service.*] See *Ersk.* B. ii. tit. 7, § 26; B. iii. tit. 1, § 2; *Stair*, B. iii. tit. 1, § 2; B. i. tit. 3, § 1; *Bell's Princ.* §§ 779, 851; *Ross's Lect.* ii. 308, 314; [*Menzies' Conv.* 652; *M. Bell's Conv.* ii. 759, 1083, 1095.]

PERSONAL SERVICES. It was anciently the custom in feu-rights to bind the vassal to attend the superior at huntings and hostings, with many other personal services peculiar to a rude and warlike period. But after the Rebellion 1715, by 1 Geo. I. stat. 2, c. 54, those personal services, whether due by charter or custom, were abolished. Notwithstanding this statute, however, there is nothing to prevent the superior from stipulating in the charter, that the vassal shall perform certain specified agricultural services. Thus, in *D. Argyle*, 1762, M. 14,495, the vassal was taken bound to keep the castle of Tarbet, and to defend it against the enemies of the family of Argyle, as well as to keep a boat with six oars and a steersman for the use of the Duke in going from one place of the coast to another. All that related to the military part of this obligation was held to fall under the statute; but the keeping of the boat was held to be a legal obligation on the vassal. Where the personal obligations consist in annual agricultural services, the vassal is free unless they are demanded within the year. [See *Hope*, 18 Jan. 1872, 10 Macph. 347. All carriages and services exigible by any superior may now be commuted either by agreement, actual or constructive, or judicially, by application to the sheriff, at the instance either of the superior or of the vassal; 37 & 38 Vict. c. 94, §§ 20, 21.] See *Ersk.* B. ii. tit. 5, § 2; *More's Notes on Stair*, ccvii.; *Kames' Stat. Law*, voce *Service*; [*Bell's Princ.* § 691; *Menzies' Conv.* 521, 552; *M. Bell's Conv.* i. 573, 633.]

PERSONALTY AND REALTY. In the law of England, the distinction between real and personal property is almost but not entirely the same as the distinction between heritable and moveable property in the law of Scotland. Things real are described by Blackstone to be such as are permanent, fixed, and immoveable, which cannot be carried out of their place, as lands and tenements; while things personal include all sorts of things moveable, which may attend a man's person wherever he goes. Things personal, however, include something in addition to things moveable; they comprehend everything which wants the two requisites of a real estate—duration

as to time, and immobility as to place. Whatever, therefore, is not a real estate, is a personal estate or chattel. There is also a subordinate division of personal estate or chattels into chattels real and chattels personal. Chattels personal are, properly and strictly speaking, things moveable, such as animals, household stuff, money, jewels, &c. Chattels real are interests issuing out of or annexed to real estates, such as terms for years of land, the next presentation to a church, &c. The essential distinction between a chattel real and a real estate is, that the duration of the former is limited to a time certain, beyond which it cannot subsist. Chattels real are not conveyed by sasine or corporal investiture; the possession of them is gained simply by the entry of the tenant. Two of the most important points in which the personalty of England does not coincide with the moveable property of Scotland are leases and securities affecting land. By the law of England, leases, of whatever duration, are chattels real, and of the nature of personal estate, and upon the lessee's death go to the personal representatives. By the law of Scotland, they are heritable as to succession, but moveable as to the fisc. Mortgages and securities for money affecting lands or real estate in England, and bonds of all kinds, are of the nature of personal estate, and go to the personal representative; while in Scotland, all securities for money, affecting lands or heritable property, are themselves, [at common law,] heritable, and descend to the heir. [But see *Heritable Securities*. See also *Kerr's Blackstone*, ii. 13, 338.] *Robertson on Personal Succession*, 307. See *Heritable and Moveable. Bond. Chattels. Succession*.

[PERSONATION. In parliamentary and municipal elections, personation is an offence punishable by imprisonment for a term not exceeding two years, with hard labour; 35 & 36 Vict. c. 33, §§ 24, 26. See *Election Law*, p. 381. Personation in order to obtain any land, money, or other property, is a felony, punishable by penal servitude or imprisonment; 37 & 38 Vict. c. 36.]

PERTINENT. This term is used in our charters and dispositions in conjunction with *parts*. Thus, lands are disposed with *parts* and *pertinents*; and that expression may carry various rights and servitudes connected with the lands. See *Parts and Pertinents. Bounding Charter. Community*.

PETARIA TURBARIA. The clause, *Cum petariis, turbariis*, &c., gives the

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privilege of taking fuel, by peats and turfs, in mosses and muirs. *Stair*, B. ii. tit. 3, § 76.

[PETITION.] Formerly, all Court of Session petitions were presented to the Inner House; but, by 20 & 21 Vict. c. 56, § 4, all summary petitions and applications to the Lords of Council and Session, "which are not incident to actions or causes actually depending at the time of presenting the same, shall be brought before the Junior Lord Ordinary." This clause has been limited in practice to the classes of petitions enumerated in the same section, viz.:—(1) Petitions under the Entail Acts; (2) Petitions under any of the General Railway Acts, the Lands Clauses Consolidation Act, or any local or personal act; (3) Petitions relative to money consigned under any statute or law, subject to the order, disposal, or direction of the Court of Session; (4) Petitions for the appointment of judicial factors, factors *loco tutoris* or *loco absentis* or curators *bonis*, or by any such factors or curators for extraordinary or special powers, or for exoneration or discharge; (5) All petitions, applications, and reports, under the Pupils Protection Act. These are still, however, deemed Inner House processes, and must be boxed to all the judges. Petitions other than those enumerated above are presented to one of the Divisions of the Inner House: see Lord Pres. McNeill, in *Campbell*, 17 July 1867, 5 Macph. 1052. But certain statutory petitions may be presented to any Lord Ordinary, viz.:—petitions under the Conjugal Rights Act, 1861; petitions under the Trusts Act, 1867; and petitions for restoration of property or for specific performance of statutory duty, under § 91 of the Court of Session Act, 1868. Incidental petitions for recall of arrestment or inhibition are presented to the Lord Ordinary before whom the action depends on which the arrestment or inhibition has been used. During vacation the Lord Ordinary on the bills has the same powers in regard to petitions for appointment of factors *loco tutoris*, curators *bonis*, and judicial factors, as are conferred by the above act on the Junior Lord Ordinary; 20 & 21 Vict. c. 56, § 10. On a petition being presented, an order is made for intimation thereof on the walls and in the minute-book, and service on all persons interested; A.S. 14 Oct. 1868, § 18. If no answers are lodged within the *induciae* (8 days), and if no investigation is necessary, the prayer of the petition is at once granted or refused. If

[investigation is required, the Lord Ordinary generally remits to a man of business or a man of skill, to report on the petition; 20 & 21 Vict. c. 56, § 5. Petitions in the Court of Session are signed, and should also be prepared or revised, by counsel; see 18 D. 33. But petitions in the Bill-Chamber or in sequestration proceedings may be signed by the party or his agent. In the ordinary sheriff court, every action is now commenced by a petition, as to which see 39 & 40 Vict. c. 70, § 6; also *Sheriff*. See *Shand's Prac.* ii. 968; *Mackay's Prac.* ii. 351; *McKechnie & Lyell's Styles*, 192. See *Inner House*.]

PETITION AND COMPLAINT. In the judicial procedure of the Court of Session, a petition and complaint is the form in which certain matters of summary and extraordinary jurisdiction are brought under the cognisance of the court. [It is a process of a quasi-criminal nature, and, at common law, requires the concurrence of the Lord Advocate; see *Bell*, 28 Nov. 1862, 1 Macph. 85; *Paterson*, 19 Nov. 1872, 11 Macph. 76. A petition and complaint, concluding merely for payment of a sum of money without any conclusion for censure of the respondent, is incompetent; *Bell*, 24 June 1848, 10 D. 1413.] Petitions and complaints are addressed to one or other of the Divisions of the Inner House. The petition sets forth the matter of complaint, generally in an argumentative detail of the facts, and concludes with a prayer, first for a warrant of service on the adverse party, and an appointment on him to answer; and then, that on resuming consideration of the petition and complaint, with or without answers, the court may grant the appropriate remedy, the nature of which is specified; or such other redress as to them may seem proper in the circumstances. The petition and complaint is prepared and signed by counsel, and the occasions on which redress may be sought in this form are various. Thus, under the old parliamentary election law, this was the form of bringing the proceedings of freeholders and of magistrates of royal burghs, at their Michaelmas head-courts and election meetings, under the review of the court. This branch of the jurisdiction of the Court of Session was taken away by the Reform Act of 1832; but petitions and complaints are still competent in the following cases—viz., against magistrates and officers of the law, or against members of the College of Justice or judicial factors, or other managers appointed by the court, for malversation in office,—against parties guilty of breach of interdict

or of contempts of court of all kinds,—and in general, against all parties, officially or otherwise, summarily amenable, for irregularities or misconduct, to the jurisdiction of the Court of Session. When such petitions and complaints are presented, they are enrolled in the Single Bill Roll; and when moved in the course of that roll, an interlocutor is pronounced, granting warrant for service, and ordering answers to the petition within a certain number of days, varying in ordinary cases from eight to fifteen. By the same interlocutor, the case is sometimes remitted *de plano* to the Junior Lord Ordinary, although the court have power, if they please, to remit to any of the other Lords Ordinary. But such a remit is not uniformly made, it being competent to the court to order answers to themselves, and to hear and decide according as the circumstances of the case may require, without a remit to the Lord Ordinary. When a remit is made to the Lord Ordinary, he proceeds as soon as the answers are put in with the preparation of the cause, agreeably to the form in other processes; that is, he superintends the making up and closing of the record; with this proviso, that in the event of no answers being lodged to the petition, or on the failure of either party to obtemper any of the orders of the Lord Ordinary, it is competent to him to report the cause to the court, in order that judgment may be pronounced in absence, or by default. After the case has been prepared, and the record closed before the Lord Ordinary, he reports the case to the Inner House. All proceedings in petitions and complaints are summary, both before the Lord Ordinary and the Inner House. See A.S. 11 July 1828, §§ 83–90. See also *Beveridge's Forms of Process*, i. 206; [*Shand's Prac.* ii. 1012, 1035 *et seq.*; *Mackay's Prac.* i. 139, 161, 241; ii. 438. See *Fraudulent Bankruptcy.*] *Contempt of Court.*

PETITORY ACTIONS; are actions by which something is sought to be decreed by the judge [to be done by the defender,] in consequence of a right of property or a right of credit in the pursuer. Thus, all actions on personal contracts, by which the granter has become bound to pay or to perform, are petitory actions. *Ersk.* B. iv. tit. 1, § 47; *Stair*, B. iv. tit. 21, 22, 24; *Bank.* ii. 616; *Ross's Lect.* ii. 279; [*Mackay's Prac.* i. 359.]

PETTY AVERAGE. See *Average.*

PHARMACY. See *Poisons.*

PHYSICIANS' FEES; may be pursued for, but are presumed to be paid, unless inconsistent with the practice of the place, and

excepting where the patient is on deathbed. In Edinburgh, a surgeon's fees do not fall under the presumption of payment. *Ersk.* B. iii. tit. 7, § 17; tit. 9, § 43; *Bank.* iii. 76; *Bell's Princ.* § 568; [*Dickson on Evidence*, § 187.] See *Fee. Honorary.*

PICKERY; is the stealing of trifles, which has never been punished in any other way than by an arbitrary punishment. The breaking into gardens and orchards, and the stealing of green wood, are punishable by a pecuniary fine, which rises in proportion as the crime is repeated; and it would appear that, when frequently committed, even a capital punishment has been inflicted. *Hume*, i. 87; *Ersk.* B. iv. tit. 4, § 59; *Tait's Justice*, voce *Theft*.

PICTURES. See *Paintings.*

PIEPOWDER COURT. See *Dustfoot.*

PIGEON. See *Dovecot.*

PILLORY; an instrument by which an offender is fastened to the market-cross or other public place, and exposed *in modum pœne* to the contempt and derision of the public; to whom he is thus, as it were, introduced as a base and infamous person. [The punishment of the pillory was finally abolished by 7 Will. IV. & 1 Vict. c. 23. See *Hume*, ii. 79;] *Stair*, B. iv. tit. 36, § 8; *Ersk.* B. iv. tit. 4, § 102.

PILOTS; persons licensed to offer themselves as guides, for navigating ships through narrow firths and rivers, or into ports, or through any place where the navigation is difficult. In England, pilots are established at several ports, under the appointment of certain incorporations, regulated by statute. In Scotland, this matter has been left to common law, and the regulations and usages of the several ports, firths, and rivers. By royal charter, the Trinity House of Leith has authority to examine and appoint pilots for the Firth of Forth, and for the seas and firths and along the coasts and islands of the Northern and German Oceans. The town of Edinburgh has a right to appoint pilots for the navigation of the port, harbour, and roads of Leith. But the magistrates are not liable for damage suffered by ships under the guidance of those whom they appoint; *Ogilvie*, 22 May 1821, 1 S. 24. [The statutory law as to pilotage is contained in the Merchant Shipping Acts of 1854 and 1862 (17 & 18 Vict. c. 104, §§ 330–338; 25 & 26 Vict. c. 63, §§ 39–42). By these acts, the powers and jurisdiction of existing pilotage authorities are confirmed to them; and power is given to them to enact bye-laws, with consent of Her Majesty, in council, making and extending exemptions from

[compulsory pilotage, determining the qualifications of pilots, and making other regulations. Subject to exemptions so authorised, and to powers conferred on the Board of Trade by 25 & 26 Vict. c. 63, § 39, the employment of qualified pilots continues to be compulsory in all districts in which it was so before the act of 1854. By § 388 of the latter act, no master or owner of a ship is answerable for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of the ship, within any district where the employment of such pilot is compulsory. In all matters bearing upon the due prosecution of the voyage, the pilot supercedes the master in the control of the ship, and is entitled to the obedience of the crew. As to signals for pilots, see 36 & 37 Vict. c. 85, § 19. Harbour trustees, employing an unlicensed pilot, were found liable in damages for his fault, in *Holman*, 1 Feb. 1877, 4 R. 406.] In contracts of affreightment and insurance, the obligation of the owners to have the ship provided with persons sufficient to navigate her implies the obligation to have a pilot on board, wherever a pilot is, by regulation or usage, held to be necessary. Where a pilot cannot be had, the aid of persons locally acquainted with the navigation must be taken. It is a sufficient compliance with this condition, if the master take a person authorised by the regular custom of the port, or the law of the place, to act as a pilot, provided he be at the time fit to act, and not manifestly incapable through intoxication or otherwise. [See 17 & 18 Vict. c. 104, § 362.] See *Bell's Com.* i. 599, 640; *Brodie's Supp. to Stair*, 985-9, 1004; [*Bell's Princ.* § 408; *Abbott on Shipping*, 148, 709, 853; *Mac-lachlan*, 273, 772, 888; *Maude and Pollock*, i. 248. See *Shipping Law*.]

PIMP-TENURE. As a matter of historical curiosity, and as indicative of the manners of that age, it may be mentioned that *Willielmus Hoppeshor tenet dimidiam virgatum terre in Rockhampton de domino rege per servitium custodiendi sex demisellas, scil. meretrices, ad usum Dom. Reg. 12 Edw. 1.—viz., by Pimp-tenure. Tomlins' Dict. h.t.*

[PIN MONEY] ; is properly a term of English law, signifying gifts by the husband to the wife of clothes, or money to purchase ornaments, or to be applied to her personal expenditure, either by yearly allowance settled on her before the marriage, or by gratuitous gifts or payments afterwards made by him to her. The term sometimes occurs in Scotch marriage contracts. See *Fraser*

[*on Husb. and Wife*, i. 776; *Stephen's Com.* ii. 293; *Brown's Law Dict.*; also *Buie*, 9 July 1831, 9 S. 923, 3 Sc. Jur. 603; *Howard*, 2 Cl. & Fin. 634 (Lord Brougham). See *Marriage. Paraphernalia*.]

PIRACY ; is hostility committed at sea by an individual without licence or commission from any acknowledged state or government. Any adventurer, therefore, who sails on a voluntary unlicensed warfare, and who disposes of his prizes at sea or elsewhere by his own authority, is properly a pirate. Even where a person engaged in an adventure of this kind holds a commission, if he take the ships of his own nation, or of a nation not at war with his own, or if he act contrary to the terms of his commission, he is guilty of this offence. It is piracy in the captain or crew to run away with the ship or cargo. The trial of this crime formerly belonged to the High Admiral or his deputy: but the sentence of that court was liable to review by the Court of Justiciary, in the form of suspension. Since the abolition of the Admiralty Court, the only competent court is the Court of Justiciary. The punishment of this crime is death, [by the common law of Scotland; but in less aggravated cases, the pains would probably be restricted. See 1 Vict. c. 88.] See *Ersk. B.* iv. tit. 4, § 6; *Hume*, i. 480; *Alison's Princ.* 639; [*Macdonald*, 59;] *Bank*. i. 528; *Bell's Com.* i. 607; *Brodie's Supp. to Stair*, 989.

[PIRACY] ; the infringement of copyright. See *Copyright*.]

PIT AND GALLOWES. See *Fossa et Furca*.

PLACE OF CRIME. See *Locus Delicti*.

PLACE OF PAYMENT. If the place at which an obligation is to be performed be previously stipulated, the agreement must be adhered to, unless access to that place be unsafe or impossible, in which case the rule is the same as if no place had been named. Where no place is named, and if the thing to be performed is delivery of a certain species or *corpus*, the place where the subject is understood; but if it be a quantity, the place of contract, or where the debtor resides, is understood; *Stair*, B. i. tit. 17, § 19. Whether or not this rule, as laid down by *Stair*, be still the law is doubtful. [A later writer lays down the rule, with regard to debts generally, that "when a debtor engages to pay without specifying the place of payment, he contracts an obligation to pay the creditor at the term of payment, and is bound to do so wherever the creditor may be, while the

[creditor fulfils his part of the contract by receiving and discharging the debt;” *Thomson on Bills*, 252. This is in conformity with the doctrine held in England; see *Leake on Contracts*, 852.] The general rule that the debtor is bound to seek out the creditor applies to the case of bills and notes, where no summary diligence is to be used; presentment and protest being in all cases necessary to authorise summary diligence. To preserve recourse against the drawer and indorsers, it is indispensably necessary to present the bill for payment to the debtor personally, or at his residence, unless he has himself, in his acceptance, specified some other place of presentment. See *Bell's Princ.* § 337; *Bell's Com.* i. 436; [*Thomson on Bills*, 44, 252, 286; *Byles on Bills*, 99, 261, 287.]

PLACE OF SUBSCRIPTION. The insertion in the testing clause of the place where a deed was subscribed is not a statutory requisite, and is not essential to the legal authentication of the deed. But it is the invariable custom to insert the place of subscription; and in a doubtful or suspicious case, the omission would be a very unfavourable circumstance. *Ross's Lect.* i. 141; *Stair*, B. iv. tit. 42, § 19; *Ersk.* B. iii. tit. 2, § 18.

PLACITUM; “pley, contention, strife, or debate.” *Skene, h. t.*

PLACK BILLS. [Plack bills were bills on which summonses and letters of diligence proceeded. They were so called because of the fee formerly paid on them, and passed as matter of course, at the peril of the person who obtained them; *Mackay's Prac.* i. 65, note (a). See *Bill*.]

PLAGII CRIMEN; or the stealing of living human creatures; is a crime not known, [except in the case of children,] in the present state of society in this country; but in former times, under the notion that it was a treasonable usurpation of the royal authority in detaining the King's free lieges, it was punishable with death. [It is only in the case of children under puberty that *plagium* infers theft. The crime is committed by taking a child away from the possession or custody of its parents, whatever may have been the motive or purpose of the act; and it is immaterial whether the child was enticed away, or merely found wandering. There are instances of a capital sentence for child-stealing in the earlier part of the present century; but the punishment now is arbitrary. See *Wade*, 2 Oct. 1844, 2 Broun, 288; *Oates*, 22 July 1861, 4 Irv. 74.] See also *Hume*, i. 82;

Alison's Princ. 280; *Kames' Stat. Law, h. t.*; [*Macdonald*, 25. See *Theft*.]

PLAGUE. See *Quarantine*.

PLAINTIFF; in English law, he that sues or complains in an assize or action personal. *Tomlins' Dict. h. t.* See *Pursuer*.

PLAN. A particular plan of building may be enforced, provided it be clearly made a condition of the feu-contract. The plan of Charlotte Square of Edinburgh, which the feuars were called upon to sign and adhere to, was held binding; *Dirom*, 5 June 1812, [reported in note to *Young, infra*. See also *Croall*, 20 Dec. 1870, 9 Macph. 323.] But the mere exhibition of a plan of a new street, at the time of the sale of a piece of ground for building a house in the intended line of the street, does not of itself amount to a warranty or engagement that all that is exhibited on the plan shall be done; *Heriot's Hospital*, 4 May 1814, 2 Dow, 301; *Gordon*, 9 Feb. 1819, 5 Dow, 87. In a subsequent case, however, the feuars, having proceeded on the plan of the New Town of Edinburgh in taking their feus, were held entitled to prevent any building deviating in an inconvenient or material degree from that plan; *Young*, 17 Nov. 1814, F.C. In a judicial sale, plans of the estate ought to be prepared, in which the lots may be distinguished as they are exposed to sale. Plans are allowed to be founded on as evidence, when distinctly authenticated and sworn to. They are not, however, properly evidence of themselves; they are rather adminicles, explanatory and illustrative of other and proper evidence. [A plan, docquetted and referred to in the title, has been held “fully as good as any words describing the line of boundary;” *N. Brit. Railway*, 19 Dec. 1862, 1 Macph. 200. See also *N. Brit. Railway*, 8 Feb. 1879, 6 R. 640; *Place*, 17 July 1874, 1 R. 1202.] All plans, maps, models, or other such productions, proposed to be used at a jury trial, must be lodged eight days before the trial, [unless the parties consent to a shorter period;] if the trial is to be at Edinburgh, with the jury-clerk, at the office in the Register House; if on circuit, either with the jury-clerk, or with the sheriff-clerk of the county; [and notice of the lodging thereof must be at the same time served on the opposite agent; and no other productions may be used at the trial, unless by permission of the court, on its being made out on oath, to the satisfaction of the court, that such productions could not be

[lodged in time; A.S. 16 Feb. 1841, §§ 18, 42.] See *Bell's Com.* ii. 255; *Bell's Princ.* §§ 868, 994; *Macfarlane's Jury Prac.* 183; [*Dickson on Evidence*, §§ 1044, 1047, 1221-2, 1374, 1816-7; *Rankine on Land-Ownership*, 94, 387. See *Jus Quæsitum*.]

PLANTING AND INCLOSING.

Various acts of the Scotch Parliaments were passed for the encouragement of planting and inclosing, and for the punishment of those guilty of injuring or destroying growing trees and plantations; and with regard both to planting and inclosing, justices of the peace have a statutory jurisdiction. At common law, injuries done to trees and inclosures are also punishable as malicious mischief. The general act, 1661, c. 38, directs justices to enforce the older laws for the protection and encouragement of planting, with a modification in the punishment—the penalties being thereby made pecuniary. The older statutes for the encouragement of planting are in desuetude; but injuries to existing plantations are still punishable, and may be punished by two justices, on proof of the facts: such are, setting fire to trees; cutting, breaking, or pulling them up, or peeling them; the penalty in these last cases being £10 Scots for each tree less than ten years old, and £20 Scots for each older tree. The haver or user of such trees is liable in the same penalties, unless he produce the party who brought him the trees. And in default of payment, the party convicted must, for each half merk of penalty, work one day for the party injured, on receiving meat and drink only; 1685, c. 39. Tenants and cottars are likewise liable in the same pecuniary penalties, if the injury be proved to have been done by their families, servants, or others living with them; although it has been thought that these statutory penalties are subject to mitigation. See on this subject, and also as to inclosing, the acts 1 Geo. I. c. 48; [6 Geo. I. c. 16;] 1 Geo. I. sess. ii. c. 18; 6 Geo. III. c. 36; 13 Geo. III. c. 33; 9 Geo. III. c. 41; [all of which, however, except the two first mentioned, have been repealed by the Statute Law Revision Acts.] The Scotch statutes on the same subject which may be consulted are—1457, c. 80, and c. 83; 1424, c. 33; 1503, cc. 71 and 74; 1535, cc. 10 and 11; 1579, c. 84; 1661, c. 41; 1685, c. 39; 1669, c. 17; 1503, c. 71; 1535, c. 11; 1587, c. 83; 1607, c. 3; 1641, c. 45; 1686, c. 11; 1689, c. 16. The statutes regarding inclosures and the protection of fences may be executed by

sheriffs and other judges, and also by justices of the peace. Such are the statutes concerning mutual and march fences. See *Marches. Runrig*. And the statute 1685, c. 39, imposes penalties on parties injuring ordinary inclosures, or allowing animals to go over them; giving one-half of the penalty to the owner of the fence, and the other to the fund for repairing roads and bridges in the parish. A stranger found within a broken inclosure will be presumed to be the breaker; 1661, c. 41. By 1686, c. 11, the herding of cattle is enjoined under certain penalties. [See *Poinding of Stray Cattle. Winter Herding*. See *Ersk. B. i. tit. 4, §§ 4, 13*;] *B. iii. tit. 6, § 28*; [*B. iv. tit. 4, § 39*;] *Kames' Stat. Law, h. t.*; *Watson's Stat. Law, h. t.*; *Bank. i. 679*; *iii. 27*; *Bell on Leases, i. 207*; [*Barclay's Digest, h. t.*; *Rankine on Land-Ownership, 507*.]

PLAT, DECREES OF. See *Teinds*.

[**PLEA IN BAR.** A plea in bar of a criminal trial is a preliminary plea, which, if sustained, will prevent further proceedings. See *Pupillarity. Insanity. Jurisdiction. Res Judicata. Accomplice. King's Evidence. Criminal Prosecution*. See also *Macdonald, 460*.]

PLEA IN LAW. Pleas in law, as a distinct portion of a record, were introduced by the Judicature Act, 6 Geo. IV. c. 120, § 9, in which they are defined as “a short and concise note, drawn and signed by counsel, of the pleas in law on which the action or defence is to be maintained; and in such note the matter of law so to be stated shall be set forth in distinct and separate propositions without argument, but accompanied by a reference to the authorities relied on.” At first those pleas were put into process as a separate paper, but they are now subjoined to the paper to which they relate; A.S. 11 July 1828, § 49. [The reference to authorities is not now customary in practice.] It is the statutory duty of the Lord Ordinary, in adjusting the record prior to closing it, to suggest any new plea which may appear to him to be necessary for exhausting the disputable matter; and the pleas in law stated on the record are to be held as the sole grounds of action or defence, to which the future arguments of the parties are to be confined; with power, however, to the parties, with the leave of the Lord Ordinary, or of the court, to add to the record any additional plea which may have been suggested by the Lord Ordinary or the court, or by the party, as fit to be discussed in relation to the facts already set forth; stat.

§ 11. If, after closing the record, either party wishes a new plea or ground in law to be stated on the record, he must enrol the cause and furnish the new plea to the opposite party forty-eight hours before the enrolment; A.S. 11 July 1828, § 59. [Under 31 & 32 Vict. c. 100, § 21, new pleas may be added to the record at any stage before final judgment, "upon such terms as to expenses or otherwise as to the court or Lord Ordinary shall seem proper." See *Shand's Prac.* i. 331;] *Mackay's Prac.* i. 391. See *Record. Amendment.*

PLEA OF PANEL. The plea of the panel must either be *guilty* or *not guilty*. In pleading not guilty, the panel is not always to be understood to deny the whole allegations of the libel. Thus, to a charge of murder he may plead *not guilty*, and yet admit the homicide. The panel may plead guilty to certain charges, and deny the rest; or he may admit the crime and deny the aggravations. In the latter case the prosecutor may either rest satisfied with the plea of guilty, so far as it goes, or proceed to prove the charges which are denied. The panel cannot plead guilty of the aggravations and not guilty of the crime. See 9 Geo. IV. c. 29, § 14; *Hume*, ii. 282; *Alison's Prac.* 357; [*Macdonald*, 466. See *Criminal Prosecution. Plea in Bar.*]

PLEAS OF THE CROWN. See *Crown, Pleas of the.*

PLEDGE; is a moveable subject put into the hand of a creditor by his debtor in security of a debt, or of an advance of money; which subject the creditor is to re-deliver on receiving repayment. [The term is also used to denote the contract of impignoration. The contract is constituted by delivery of the subject, on terms or conditions, proved either by writing or by witnesses. In *Hamilton*, 13 Dec. 1856, 19 D. 152, the opinion was expressed that there must be transference of the actual corporeal possession of the subject; but see as to this Lord McLaren's notes in *Bell's Com.* ii. 21. See *Clark v. West Calder Oil Co.* 30 June 1882, 9 R. 1017.] The creditor is liable in [ordinary] diligence for preserving the pledge (*præstat culpam levem*); and should it perish without any fault imputable to the creditor, beyond what is implied in this degree of diligence, it perishes to the debtor, as being the proprietor; and the creditor is entitled to the expense profitably disbursed on the subject while in his hands. The pledge cannot be sold without judicial authority; and therefore, where a sale

becomes necessary, the proper course is to apply to the judge ordinary for a warrant to sell the subject by public sale—the pledger being called as a party. [Pledge operates as a security for the whole debt, though part has been paid. "It is an important question, whether a pledge is maintainable against third parties for more than the original advance, where additional advances have been made to the debtor. When an absolute conveyance is made, though intended only as a security, and a new loan takes place during its subsistence, the restitution is not demandable without payment of the whole debt. But if there be proof to limit the pledge to the specific advance made at the time of its constitution, there does not appear to be any ground on which, as against purchasers or creditors, the original security by pledge can be held as extended. The security may be expressly extended to cover a further advance, but not after diligence by third parties to attach the subject, nor after sequestration;" *Bell's Princ.* § 1367. See also *Hamilton, supra*; *National Bank*, 3 Dec. 1858, 21 D. 79. Where the acceptor of bills holds goods in pledge against these bills, his trustee in bankruptcy is entitled, the drawer also being bankrupt, to apply the proceeds of the goods towards relieving the acceptor's estate of all payments made out of it to the holder of the bills; *Royal Bank*, 10 July 1882, 9 R. (H.L.) 67.] See *Ersk.* B. iii. tit. 1, § 33; *Bell's Com.* i. 278; ii. 19; [*Bell's Princ.* §§ 203, 1362;] *Stair*, B. i. tit. 13, § 11; B. ii. tit. 10, § 1; *More's Notes*, lxxvii.; *Brodie's Supp.* 913; *Bank.* i. 383; *Ross's Lect.* ii. 321; [*Goudy on Bankruptcy*, 513; *Campbell's Merc. Law*, 112; *Addison on Contracts*, 592, 627; *Story on Bailments*. See *Pactum (Legis Commissorie). Culpa. Pawn-brokers. [Retention. Hypothec.]*

PLEGIUS; "a pledge, borgh, or cautioner. *Dimittere terras ad plegium*, to let lands to borgh, is when, any controversy being for the possession of lands, the same are, after inquisition and trial taken thereanent, given and committed to their last lawful possessor, under borgh and caution that he shall restore them to him who shall be found to have right thereto." *Skene, h. t.*

PLOUGH GOODS. By the act 1503, c. 98, horses, oxen, and other goods pertaining to the plough, are forbidden to be pointed at the time of labouring the ground, when the debtor has other goods. The time of labouring in this statute is

understood to be the time at which the individual is engaged in labouring, whether he be earlier or later than the rest of the country. This labouring does not extend to summer fallowing, but only to the labour necessary for raising the crop of the season, so that the land may not lie waste. Where there are not enough of other moveables to answer the debt, the messenger may poind even the plough-goods. If the messenger has been shown other poindable effects equal to the debt, exclusive of the plough-goods, and has notwithstanding poinded the latter, it amounts to a spulzie. If, on the other hand, the messenger has poinded plough-goods in consequence of not having made a sufficient search for others, the debtor is entitled to restitution merely. *Ersk. B. iii. tit. 6, § 22; Stair, B. i. tit. 9, § 29; B. iv. tit. 30, § 5; tit. 47, § 34; Hunter's Landlord and Tenant, i. 604; ii. 609.* By the act 1587, c. 82, the offence of destroying plough-graith in time of tillage is punishable as theft; the offence may be tried before the judge ordinary, and without a jury. *Ersk. B. iv. tit. 4, §§ 39, 62.* See *Poinding*.

PLOUGHGATE OF LAND. According to Balfour, "ane pleugh sould contene viii oxengang, the oxengang sould contene xii aikers, the aiker sould contene iiiii rudis," &c.; *Balfour's Prac. voce Brieve of Division*, c. 98, p. 441. But although this may have been a rule in measuring land anciently, it will not be found to correspond with the measurements specified in charters. A ploughgate of land is the property qualification to hunt under the game laws; [1621, c. 32. See *Barclay's Digest, h. t.; Innes's Legal Antiquities*, 241; *Irvine on Game Laws*, 43; *Rankine on Land-Ownership*, 132. See *Game Laws*.] Acre.

PLUMPER. If there be more seats vacant than one in the same [constituency,] and a voter chooses to vote for only one of the candidates, he can give him a single vote, which is then called a plumper. [See *Election Law*.]

PLURIS PETITIO; is the asking more judicially than is truly due. Where an adjudication is led for a larger sum than what is actually due to the adjudging creditor, it is said to be a *pluris petitio*, which, where it is material, or where there has been culpable neglect, or fraud, will have the effect of annulling the adjudication. Where the *pluris petitio* is slighter, its only effect is to reduce the adjudication to a security for principal and interest, without expenses or penalties. *Pluris*

petitio in the libel is immaterial, if decree be taken only for the sums really due. *Bell's Com. i. 780; Kames' Equity*, 296; [*Shand's Prac. ii. 671, 720; Mackay's Prac. i. 384; ii. 335.*] See *Adjudication. Articulate Adjudication*.

[POACHING; the unlawful taking or destroying of game; a purely statutory offence. By 1707, c. 13, common fowlers hunting without a subscribed warrant from the landowner were subjected to a penalty of £20 Scots, besides forfeiture of their dogs, guns, and nets; and fowlers and all other persons were prohibited from coming within any heritor's ground, without leave asked and given by the heritor, with setting-dogs and nets for killing fowls by nets. This act is said to be still in observance; *Boyd's Justice*, 312; *Rankine on Land-Ownership*, 133. But it is practically superseded by subsequent acts.

[By the Night Poaching Act (9 Geo. IV. c. 69), if any person shall by night unlawfully take or destroy any game or rabbits in any land open or enclosed, or shall by night enter or be in any land, whether open or enclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game, he shall be liable, for the first offence, to imprisonment with hard labour for three months, and to find sureties; for the second offence, to imprisonment with hard labour for six months, and to find sureties; and for the third offence, to penal servitude; § 1. See *Granger*, 17 Sept. 1863, 4 *Irv.* 432; *Duncan*, 29 Feb. 1864, 4 *Irv.* 474. Power is given to owners and occupiers of land, and their servants, to apprehend offenders; and any offender assaulting or offering violence is guilty of a misdemeanour, and liable to penal servitude; § 2. See *Puller*, 1 March 1870, 1 *Coup.* 398. If any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or enclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, firearms, bludgeon, or any other offensive weapon, each of such persons shall be guilty of a misdemeanour, and liable to penal servitude; § 9. See *M'Nab*, 14 March 1845, 2 *Broun*, 416; *M'Arthur*, 3 May 1866, 5 *Irv.* 243. For the purposes of this act, night commences at the expiration of the first hour after sunset, and concludes at the beginning of the last hour before sunrise; § 12. As to what is to be deemed game, see *Game Laws*. The

[sheriff has now exclusive jurisdiction in regard to offences under this act, and the other acts mentioned below; 40 & 41 Vict. c. 28, § 10. The Night Poaching Act was amended by 7 & 8 Vict. c. 29, which imposed similar penalties on persons unlawfully taking or destroying game or rabbits on any public road, highway, or path, or at the openings, outlets, or gates from any land into any such public road, highway, or path. See *Burns*, 23 April 1863, 4 Irv. 437; *Kinnear*, 25 May 1868, 1 Coup. 56.

[By the Day Trespass Act (2 & 3 Will. IV. c. 68), if any person shall commit any trespass by entering or being in the daytime, upon any land, without leave of the proprietor, in search or pursuit of game, or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies, he shall be liable to a fine not exceeding £2, and expenses; and if any person having his face blackened, or otherwise disfigured for the purpose of disguise, or if any persons to the number of five or more together shall commit such trespass, each shall be liable to a fine not exceeding £5, and expenses; § 1. It has been decided that an agricultural tenant cannot commit this statutory trespass on the lands of which he is tenant; *E. Kinnoull*, 15 Dec. 1859, 3 Irv. 501. But it is otherwise in the case of a farm servant; *Raper*, 6 Feb. 1860, 3 Irv. 529. See also *James*, 28 Jan. 1880, 7 R. (J.C.) 10; *Stuart*, 13 Nov. 1884, 12 R. (J.C.) 9; *Jack*, 18 Feb. 1887, 14 R. (J.C.) 20; *Niven*, 10 Feb. 1888, 15 R. (J.C.) 42. As to constructive trespass under this enactment, see *Stoddart*, 8 June 1880, 7 R. (J.C.) 11 (which seems to overrule *Colquhoun*, 16 Nov. 1876, 4 R. (J.C.) 3). Such trespassers may be required, by any person having the right of killing game on the land, or by the occupier of the land, or by any gamekeeper or servant of either of them, or by any person authorised by either of them, to quit the land, and to give their names and addresses; and in case of refusal they may be arrested; § 2. See *Mackenzie*, 21 Nov. 1859, 3 Irv. 459. They may also be required, by the same persons, to deliver up any game in their possession; and in case of refusal such game may be seized; § 5. Trespassers assaulting or obstructing any person acting in virtue of the powers of this act, are liable to an additional penalty of £5, or imprisonment for three months; § 6. Day is deemed to commence at the beginning of the last hour before sunrise, and to conclude at the expiration of the first hour

[after sunset; § 3. These provisions do not apply to persons hunting or coursing, and being in fresh pursuit of any deer, hare, or fox already started; § 4. Trespass for the purpose of taking dead game is not an offence under the act; *Macdonald*, 28 Feb. 1879, 6 R. (J.C.) 14. Further provisions are made in regard to arrest, conviction, appeal, &c. By § 16, the act does not preclude civil actions for damages in respect of trespass, except that where proceedings have been instituted under this act in respect of any trespass, no action at law is maintainable for the same trespass by any person at whose instance or with whose concurrence or assent such proceedings have been instituted. Prosecutions under this act must be commenced within six months after the offence; § 17; *Ferguson*, 12 June 1885, 12 R. 1083.

[By the Prevention of Poaching Act (25 & 26 Vict. c. 114), any constable or peace officer, in any highway, street, or public place, may search any person whom he has good cause to suspect of coming from any land where he has been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game; and he may also stop and search any cart or other conveyance in or upon which he has good cause to suspect that any such game, article, or thing is being carried by any such person, and may seize and detain such game, article, or thing, if found. Conviction of having obtained such game by poaching, or of having used such article or thing for poaching, involves a penalty not exceeding £50, and forfeiture of such game, article, or thing; § 2. See *Anderson*, 7 March 1868, 1 Coup. 18; *Gillan*, 14 Dec. 1877, 3 Coup. 551. A special definition of "game," for the purposes of the act, is given by § 1.

[See these acts, with annotations, in *Rankine on Land-Ownership*, 133, 727, 747. See also *Ersk. B. ii. tit. 6, § 6*; *Alison's Princ.* 548; *Macdonald*, 188; *Irvine on Game Laws*; *Rankine on Leases*, 414. See *Game Laws. Game Licence. Summary Prosecutions*. As to salmon-poaching, see *Salmon-Fishing*.]

POINDING; is the diligence whereby the property of the debtor's moveables is transferred to the creditor using the diligence. Pounding is either real or personal. Real pouncing proceeds on *debita fundi*, and it affects the moveables on the

lands to which the debt attaches; personal poinding, on the other hand, is used by creditors in ordinary personal obligations, and affects the debtor's moveable goods and effects. There is a third description of attachment which has also been termed poinding, whereby cattle found trespassing on the grounds of another are detained until the owner of the cattle make satisfaction for the injury.

1. REAL POINDING, OR POINDING OF THE GROUND.

This species of poinding commences with an action and proceeds on an heritable security, or such other *debitum fundi* as may be the warrant of the action; which is of the nature of a real diligence or execution for poinding all the goods on the lands over which the security extends. This action is competent to a superior for his feu-duties, to an annual-renter for the arrears of his interest, or to an heritable creditor, and, in general, to all creditors in debts which constitute a real burden or lien on lands. [A *quondam* superior, who has parted with his right to the land, has no title to poind the ground for arrears of feu-duties; *Scot. Heritages Co.* 23 Jan. 1885, 12 R. 550. Poinding of the ground in security for interest current, but not yet due, is competent, but payment cannot be demanded till the term arrives; *Stewart*, 10 Dec. 1880, 8 R. 270. As to whether a composition payable on entry of a singular successor can be recovered by a poinding of the ground, see *Morrison's Trs.* 16 May 1878, 5 R. 800.] An assignee and disponent to an heritable bond on which sasine had been taken, though not himself infeft in the conveyance in his favour, was found entitled to pursue a poinding of the ground; *Tweedie*, 22 Jan. 1836, 14 S. 337. But it is not competent to proprietors, or even to creditors or others in possession of the ground—an action of mails and duties being the proper action for recovering what is due to such possessors by the tenants in the natural possession. This rule of law has given rise to the question how far it is competent to an heritable creditor who has taken his security in the form of an absolute disposition, qualified by a back-bond, to poind the ground. The principle recognised in one old case is, that the absolute disponent cannot competently poind the ground; because, in virtue of his absolute title, he may enter into the natural possession; *L. Garthland*, 1632, M. 10545; *Ross's Lect.* ii. 430. [This

[principle was applied to the case of a creditor infeft on an *ex facie* absolute disposition, though qualified by a back letter, in *Scot. Herit. Security Co.* 14 Jan. 1876, 3 R. 333. It does not extend to creditors who have not a title equal to proprietors, but are mere incumbancers. Hence a creditor under a bond and disposition in security, who is in possession under a decree of mails and duties, may poind the ground; *Henderson*, 7 Jan. 1875, 2 R. 272. See also *Scot. Union & National Ins. Co.* 5 June 1886, 13 R. 928.]

The effect of this diligence is to give the user of it a right to the rents; but he cannot, in virtue of it, assume the natural possession of the lands. [The citation of a tenant on a summons of poinding of the ground is not equivalent to intimation of assignation of rents, so as to interpel the tenant from paying subsequent rents to the landlord, as they fall due; *Royal Bank v. Dixon*, 8 July 1868, 6 Macph. 995. But see *Lang*, 8 June 1854, 16 D. 908.] In an action of poinding of the ground, not only the tenants, but the proprietors must be made parties. There is no personal conclusion against the defender, the object being to make the goods on the ground subject to the diligence. Hence, when decree is given, and letters of poinding issued, they are executed without any previous charge against the tenants to make payment; for there being no decree against the tenants, there can be no warrant for a charge. Hence, also, after letters of poinding are once granted, they may be put in execution as long as the pursuer lives, though the original defender be dead or removed. The goods falling under this diligence must be the goods of the owner or of the tenants; other goods on the land are not subject to the diligence. But by 1469, c. 36, the goods of tenants cannot be poinded for their landlord's debt to any greater extent than the amount of the term's rent due by the tenant, or the arrears which he may be due at the time. [See *Brown*, 21 Dec. 1859, 22 D. 273. Only those goods which are on the ground at the date of serving the summons can be attached; *Urquhart*, 16 June 1883, 10 R. 991; and only those goods which belong to the debtor; *Thomson*, 18 Jan. 1882, 9 R. 430. The mere fact that moveables belonging to a third party have been erroneously included in the poinding does not entitle him to damages; *Nelmes*, 30 May 1883, 10 R. 890.] In a competition of poindings of this nature, the superior poinding the ground for un-

paid feu-duties and casualties will be preferred. [And the collector of poor-rates has a preference over any poinding creditor; *N.B. Property Investment Co.* 12 July 1888, 15 R. 885.] Where there is no such ground of preference, [poinding creditors are preferable *inter se*, not according to priority of poinding, but according to priority of infetment. If the infetments are of the same date,] the process having the first citation is preferred. In *Athole Hydro. Co.* 19 March 1886, 13 R. 818, Lord Pres. Inglis observed:—"The security which a heritable creditor holds over moveables is of exactly the same nature and has the same effect as that which he holds over the *fundus* itself. In extent, of course, it varies with the amount of moveables on the ground, but his right to them is secured by his infetment, not by his action of poinding of the ground. A heritable creditor, therefore, in raising his action is not seeking to obtain a preference, but to give effect to a preference which is already his; but it is a preference which ranks with the preferences of other heritable creditors according to the priority of the dates of the creditor's titles." The sheriff's jurisdiction is cumulative with that of the Court of Session in poindings of the ground; [and an execution of poinding may proceed immediately upon the extract decree of the sheriff, without either letters of poinding under the signet, or a separate precept by the sheriff; *Kennedy*, 17 Feb. 1852, 14 D. 513.]

[By the Bankruptcy Act, 1856, the whole property of a bankrupt debtor is vested in the trustee in his sequestration, by the act of confirmation, to the same effect as if, *inter alia*, a poinding of the ground had been executed at the date of the sequestration, subject to such preferable securities as then existed, and to the creditor's right to poind the ground; 19 & 20 Vict. c. 79, § 102 (re-enacting earlier provisions). In competition with the trustee, heritable creditors who have not used poinding of the ground have no preference over moveables found on the ground; *Hay*, 22 March 1826, 2 W. & S. 71. But the mere execution of a summons of poinding of the ground, even after sequestration, if before confirmation of the trustee, secures to the poinding creditor, at common law, a preference over the whole moveables on the ground, to the full extent of his debt, principal and interest; *Campbell's Trs.* 13 Jan. 1835, 13 S. 237. See also *Barstow*, 11 March 1856, 18 D. 846; *Lyons*,

[21 Oct. 1880, 8 R. 24. This preference, being deemed oppressive to personal creditors, was restricted by the Bankruptcy Act of 1839 (2 & 3 Vict. c. 41, § 95), which provided that no poinding of the ground, not carried into execution by sale of the effects sixty days before sequestration, should be available in any question with the trustee, except for the interest of the current half-yearly term, and arrears of interest for one year immediately before such term. This limitation was re-enacted by § 118 of the Bankruptcy Act of 1856 (19 & 20 Vict. c. 79); and the matter continued to be regulated by that section till 1874, when it was repealed by the Conveyancing Act of that year (37 & 38 Vict. c. 94, § 55); and as the act of 1856 had repealed the earlier Bankruptcy Act *in toto*, the effect of § 55 of the Conveyancing Act was to restore the common law, as declared in *Campbell's Trs. supra*. See *Royal Bank v. Bain*, 6 July 1877, 4 R. 985. By a recent statute, however, § 118 of the act of 1856 has been re-enacted, so far as it relates to poindings of the ground; 42 & 43 Vict. c. 40, § 3. In *Athole Hydro. Co., supra*, the limitation was held not to apply to creditors in the liquidation of a company; but by 49 Vict. c. 23, § 3 (4), it was made applicable to these as well as to creditors in a sequestration. The restriction was held not to apply to creditors of the bankrupt's ancestor; *Millar's Trs.* 5 Feb. 1886, 13 R. 544; nor to creditors in a question with the trustee in an English bankruptcy; *Scot. Union & National Ins. Co., supra*. But by 50 & 51 Vict. c. 69, § 2, notwithstanding anything contained in the Bankruptcy Act, 1856, the provisions of 42 & 43 Vict. c. 40, § 3, "shall be applicable to all poindings of the ground by which moveables forming part of or belonging to a bankrupt estate, whether administered in Scotland or furth thereof, are sought to be attached or affected, and that whether the debts or securities in respect of which such poindings of the ground shall be brought shall have been constituted or granted by the bankrupt, or by any ancestor or predecessor of the bankrupt, or by any other person." The effect of a summons of poinding of the ground executed *after* the trustee's confirmation, which was alluded to as a doubtful point in *Campbell's Trs.* and *Barstow, supra*, was decided in favour of the poinder, in *Dick's Trs.* 28 Jan. 1879, 6 R. 586. See, on poinding of the ground, *Ersk. B. ii. tit. 8, §§ 32, 33;* B. iv. tit. 1, §§ 11-13; *Bell's Com. ii. 56; Ross's Lect. ii. 392;*

Stair, B. iv. tit. 23; tit. 47, § 26; *More's Notes*, ccv.-ccxi; *Bank*. i. 648; *Bell's Princ.* §§ 699, 2285; *Hunter's Landlord and Tenant*, ii. 611; [*Menzies' Conv.* 877; *M. Bell's Conv.* ii. 1195; *Campbell on Citation and Diligence*, 290; *Begg's Conv. Code*, 408; *Sturrock's Conv. Acts*, 164; *Mackay's Prac.* ii. 313; *Dove Wilson's Sher. Court Prac.* 475; *Rankine on Leases*, 535; *Goudy on Bankruptcy*, 246, 525; *Jurid. Styles*, iii. 202, 383.]

2. PERSONAL POINDING.

Personal Poining—that is, the poining of moveables for debt—may proceed either in virtue of the ordinary letters of horning issuing from the signet, or on the decrees of inferior courts as to moveables within the inferior judge's jurisdiction. [It now commonly proceeds on warrants contained in the extracts of decrees of the supreme or sheriff court, or in the extracts of registered obligations and documents on which execution may competently proceed; 1 & 2 Vict. c. 114, §§ 1, 4, 9; 40 & 41 Vict. c. 40, §§ 1-3.] The first step is to charge the debtor to pay the debt, and the days of the charge being elapsed, the poining may proceed; 1669, c. 4; [1 & 2 Vict. c. 114, § 4. But no charge is necessary in poinings by the Crown of the effects of deceased debtors, under the Court of Exchequer Act (19 & 20 Vict. c. 56, § 36).] A debtor's goods may be poined by one creditor, though previously arrested by another creditor; [*Ferguson*, 3 March 1882, 9 R. 687.] Growing corn may be poined; but poining of a growing crop only braided, and of clover-grass, is ineffectual; *Elders*, 5 July 1833, 11 S. 902. The goods of tenants cannot be farther poined than to the extent and in the manner pointed out in the preceding article; neither can plough-goods (where the debtor has other effects) be poined during the period of tillage. See *Plough-Goods*. [The competency of poining bank notes, or money in a man's pocket, has been questioned, but not decided; *Alexander*, 10 Feb. 1826, 4 S. 439. But in poinings at the instance of the Crown the sheriff has power to attach the debtor's "whole moveable effects without exception, including bank notes, money, bonds, bills, crop, stocking, and implements of husbandry of all kinds;" 19 & 20 Vict. c. 56, § 32. Goods sold but not delivered may be poined by the seller, while in his own possession, for a debt due by the purchaser, at any time before a re-sale of the goods has been intimated; 19 & 20 Vict.

[c. 60, § 3. And, generally, a creditor may point goods of his debtor which are in the creditor's own possession; *Lochhead*, 28 Nov. 1883, 11 R. 201.] Arrestment, and not poining, is the appropriate diligence for the attachment of ships and goods on ship-board; but, by the Merchant Shipping Act, the ship and her tackle, &c., may be poined for the unpaid wages of seamen; 17 & 18 Vict. c. 104, § 523. Goods of which the debtor is only joint-owner, or liferenter, cannot be poined; *Fleming*, 2 Dec. 1828, 7 S. 92; *Scott*, 13 May 1837, 15 S. 916. A poining cannot be executed within the Palace of Holyrood, because of its privilege as a royal residence; *E. Strathmore*, 22 Feb. 1826, 2 W. & S. 1. A poining must be begun before sunset, and ended in daylight; *Douglas*, 1675, M. 3739.

[The procedure in poining is regulated by 1 & 2 Vict. c. 114, §§ 23-30. The officer is bound to conjoin in the poining any creditor who, before its completion, delivers to him a warrant to point. On the effects being poined, the officer causes them to be valued by two valutors, one valuation being sufficient; § 23. The appraisement is an essential part of the process; the appraisers should be sworn, and are bound to use their best skill and care in valuing; *Le Conte*, 1 Dec. 1880, 8 R. 175. The poined effects are then left with the person in whose possession they were, when poined; along with a schedule, specifying the effects, at whose instance they were poined, and their value; § 24. (This does not apply to Crown debts, as to which see 19 & 20 Vict. c. 56, § 32; 43 & 44 Vict. c. 19, § 97.) The execution must be reported to the sheriff within eight days; § 25. The sheriff then gives orders, if necessary, for the security of the moveables; or, if they be perishable, for their immediate disposal. If not so disposed of, the sheriff grants warrant for their sale by public roup at such time and place, and with such public notice, as seem to him expedient, and at the sight of a judge to be named by him; but not sooner than eight, nor later than twenty days, after publication of the notice of sale; § 26. See *Kewly*, 8 March 1843, 5 D. 860; *Macvicar*, 2 July 1857, 19 D. 948; *Simpson*, 23 Nov. 1888, 16 R. 131. The poined moveables are then offered for sale at upset prices, not less than their appraised values; but if no offerer appear, they are delivered by the judge of the roup to the poining creditor, such part of them

[at least as will satisfy his debt, with interest and expenses, subject to the claims of other creditors; § 27. See *M'Neill*, 13 Feb. 1841, 3 D. 554; *M'Kinnon*, 21 June 1866, 4 Macph. 852. A report of such sale or delivery is made to the sheriff within eight days; a note of the sale (if any) and of the proceeds is lodged with the sheriff-clerk; and the nett sum is paid to the poinding creditor, to the extent of his claim, but subject to the claims of other creditors; § 28. The poinder, or any other creditor, may purchase effects exposed to sale; § 29. Unlawful intromitters with poinded goods are liable to imprisonment, until they restore the effects, or pay double their appraised value; § 30. Nothing in this act affects the landlord's, or any other hypothec; § 31. The warrants for poinding under the Personal Diligence Act contain authority to "open shut and lockfast places;" but in poindings in the old form, and under the Small Debt Act, this power must be obtained by special warrant; *Scott*, 22 May 1846, 5 Bell's App. 126. Under the Bankruptcy Act (19 & 20 Vict. c. 79), sequestration operates as a completed poinding; and no poinding executed within sixty days before sequestration is effectual; § 108. All poindings within sixty days before notour bankruptcy, or within four months thereafter, are ranked *pari passu*; § 12. By 49 Vict. c. 23, § 3, a winding up of a company by the court (as at the commencement thereof) or subject to the supervision of the court (as at the date of presentation of the petition on which a supervision order is afterwards pronounced) is equivalent to an executed or completed poinding; and no poinding of the effects of the company, executed within sixty days prior to the commencement of the winding up by the court, or the presentation of the petition on which a supervision order is made, is effectual.] An erroneous notion prevails, that if a party has betaken himself to the diligence of poinding, he is not also entitled at the same time to follow out personal diligence against his debtor, and to incarcerate him. But there is no foundation in law for this notion. A creditor may poind, arrest, inhibit, incarcerate, and adjudge, *unico contextu*, for one and the same debt; the only exception being in the case of a special adjudication, as to which the rule is, that the creditor, after he has attained possession under that diligence, shall have no farther execution against his debtor, by arrestment, caption, or otherwise. The special adjudication,

however, is never resorted to in practice, and there is no other restraint on the simultaneous use of every legal form of diligence. [But see *Imprisonment*.] See also *Adjudication for Debt*. See *Ersk.* B. iii. tit. 6, § 20; *Bell's Com.* ii. 58; *Stair*, B. i. tit. 9, § 21; B. iv. tit. 30; tit. 47, § 29; *More's Notes*, cccxxx.-i.; *Bank.* iii. 23; *Bell's Princ.* §§ 2286, 2297; *Ross's Lect.* i. 385; *Hunter's Landlord and Tenant*, ii. 390, 608; [*Menzies' Conv.* 304; *M. Bell's Conv.* i. 546; *Campbell on Citation and Diligence*, 225; *M'Glashan's Sher. Court Prac.* 354; *Dove Wilson's Sher. Court Prac.* 342; *Mackay's Prac.* ii. 211; *Goudy on Bankruptcy*, 524; *Jurid. Styles*, iii. 338, 343, 370.]

3. POINDING OF STRAY CATTLE.

The poinding of cattle found trespassing on inclosures, or committing depredations on corn, grass, or plantations, is of a different description from the above-mentioned poindings. Such a poinding does not transfer the property, but merely gives a right of detention to the person who seizes the cattle on his grounds, until satisfaction is made to him for the damage. Where the parties do not agree about the amount of the damage, it may be ascertained by the appraisers of the barony, with the expense of keeping the cattle. The statute 1686, c. 11, which confirms this right in the proprietor, gives a penalty of half a merk *toties quoties* for each of the cattle found trespassing, over and above the damage; and for these claims—viz., the damage, penalty, and expense of keeping the cattle—the proprietor is understood to have right. The poinder must take care that the cattle poinded be put into a proper place, where they may have fodder and water. Such poindings may be made *brevi manu*, and without judicial warrant. See *Ersk.* B. iii. tit. 6, § 28; *Bank.* iii. 27; [*Rankine on Land-Ownership*, 507.] See *Brevi Manu*. [*Planting and Inclosing. Winter Herding*.]

POISON. By 1450, cc. 30 and 31, the importers of poison, by which bodily harm may be taken, are over and above death, to forfeit lands and goods. But this law is in desuetude. Death by poisoning is the most difficult to distinguish from natural death. The best proof is the existence of poison in the body of the deceased; but this is by no means essential, and there have been many convictions of murder by poisoning without such proof. [By 10 Geo. IV. c. 38, §§ 1, 2, the wilfully

[administering poison, with intent to murder or disable, is made a capital offence. See also 23 Vict. c. 8. By the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), certain qualifications are prescribed as requisite for all persons selling or compounding poisons, or assuming the title of chemist or druggist. The articles deemed poisons in the sense of the act are enumerated in a schedule. By § 17 of the act, it is made unlawful to sell any poison, either by wholesale or by retail, unless the box, bottle, vessel, wrapper or cover, in which such poison is contained, be distinctly labelled with the name of the article, and the word *poison*, and with the name and address of the seller of the poison. The same section prohibits the sale of certain poisons (including arsenic, prussic acid, cyanides of potassium, and all metallic cyanides, strychnine, and all poisonous vegetable alkaloids and their salts, aconite, emetic tartar, corrosive sublimate, cantharides, savin, and ergot of rye), to any person unknown to the seller, unless introduced by some person known to the seller; and enacts that, on every sale of any such article, the seller shall, before delivery, make an entry in a book to be kept for the purpose, stating, in form prescribed, the date of the sale, the name and address of the purchaser, the name, and quantity of the article sold, and the purpose for which it is stated by the purchaser to be required; to which entry the signature of the purchaser and of the person, if any, who introduced him, is to be affixed. A saving clause is added to the section, with reference to sales by wholesale dealers, and to sales of medicines supplied or dispensed by legally qualified apothecaries, or registered practitioners. See also 15 & 16 Vict. c. 56, and 32 & 33 Vict. c. 117. The sale of arsenic is still regulated by 14 Vict. c. 13. See *Christison on Poisons*; *Taylor on Poisons*; *Alison's Princ.* 75, 167; *Macdonald*, 124, 144.]

POLICE. This term, in a large acceptance, has been applied to the due regulation and domestic order of the kingdom, though it is more generally applied to the internal regulation of great cities. A system of police has been established both in Edinburgh and Glasgow, and in other considerable towns in Scotland, by special statutes, the details of which are foreign to a work like the present. [See 42 & 43 Vict. c. cxxxii., and 30 & 31 Vict. c. xlv. (Edinburgh); 29 & 30 Vict. c. cclxxiii. (Glasgow); 40 & 41 Vict. c. cxxiii. (Greenock); 45 & 46 Vict. c. clxxxv. (Dundee).]

The object of these statutes, generally speaking, is to secure the watching, lighting, and cleaning of the streets, and the summary conviction and punishment of minor offences. The expense of those establishments, where introduced in Scotland, is provided for by an assessment on the inhabitants; and the superintendence of the whole system of expenditure and management is entrusted to certain commissioners chosen by the inhabitants paying assessment. [The General Police and Improvement Act, 1862 (25 & 26 Vict. c. 101), enables burghs, which adopt the act, to establish a general system of police, and to impose a police assessment. The duty of providing a police force is laid on the commissioners of supply in counties, (20 & 21 Vict. c. 72), and on the commissioners of police in burghs (25 & 26 Vict. c. 101). As to the election of the latter, see 13 & 14 Vict. c. 33; 31 & 32 Vict. c. 102; *Sime*, 15 Nov. 1877, 5 R. 132.] See *Ersk. B. iv. tit. 4, § 38*; *Kames' Princ. of Equity* (1825), 341; *Kames' Stat. Law Abridg. h. t.*; [*Irons' Manual of Police Law*; *Rankine on Land-Ownership*, 663-8; *Goudy and Smith's Local Government*, 67; *Smith's Secretary for Scotland*, 37, 42; *Digests, sub hac voce*. See *Nuisance. Public Health. Constables.*]

POLICY OF INSURANCE; is an obligation in writing, specifying the nature of the risk insured against, and the premium of insurance; and in marine insurance the underwriters oblige themselves to warrant the ship and cargo, to the extent of the sums annexed to their names, against all dangers arising from the sea, enemies' ships, pirates, or other misfortunes whatsoever. Those who undertake this obligation put down their names, and the sum for which they respectively become bound; and it is from thus *underwriting* the obligation that they are called underwriters. [The word policy is from *polyptychum*, a register or roll; *Skeat's Etym. Dict.*] See *Insurance*.

POLL. [See *Indenture. Deeds.*]

POLL; is the taking of the votes of the electors *per capita*, or individually. For the regulations regarding the polling of electors, see *Election Law*.

[**POLLUTION OF RIVERS.** See *River.*]

POOR; those destitute persons who are able but unwilling to labour, or those who by reason of age and infirmity, have become a burden on society.

1. *Idle Poor.*—Several acts have been made for the punishment of sturdy beggars and vagabonds—*e.g.*, 1424, c. 42; 1535,

c. 22; 1579, c. 74; all of which are ratified by the act 1698, c. 21. Under the descriptions in those acts are comprehended all who pretend to tell fortunes, jugglers, minstrels, and all who can give no good account of the manner in which they gain their subsistence, or who, though able-bodied, are idle, and shun labour; those also are included, who, without any sufficient testimonials, allege that they have been shipwrecked, burned out of their houses, or herried. The punishment provided for them by those statutes is whipping and burning in the ear; and by 1579, c. 74, a repetition of the crime is made punishable with death. The execution of those acts is entrusted to magistrates of burghs, and sheriffs, and to justices of the peace; 1661, c. 38; *Ersk.* B. iv. tit. 4, § 39. But, except as to some minor penalties kept up against vagabonds, these statutes may be considered in total desuetude. See *Vagabonds*.

2. *Infirm Poor*.—Those who, from age or infirmities, are unable to maintain themselves, are ordered to be maintained by a tax levied on the parish (1535, c. 22); and by an act, 1663, c. 16, a power is given to the landholders in landward parishes to assess themselves for the maintenance of such of the poor as cannot fully maintain themselves, and to demand relief of one-half of the sum from their tenants. The acts 1695, c. 43, 1696, c. 29, and 1698, c. 21, which relate to the same subject, ratify the former acts, give directions for carrying them into execution, grant power for that purpose to the Privy Council, and ratify their proclamations. Under this authority, four proclamations were issued by the Privy Council, on August 11, 1692; August 29, 1693; July 31, 1694; and March 3, 1698: [But these statutes and proclamations are now for the most part superseded by the Poor Law Act of 1845 (8 & 9 Vict. c. 83); under the provisions of which, as amended by 24 & 25 Vict. c. 18, and other acts cited *infra*, the relief of the poor is now administered.]

[*Parochial Boards and Board of Supervision*.—The Poor Law Act provides for the establishment of a parochial board in every parish, and of a central Board of Supervision. The latter body is regulated by §§ 2–16. It consists of the following persons, viz.:—The Lord Provosts of Edinburgh and Glasgow, the Solicitor General of Scotland, the sheriffs-depute of the counties of Perth, Renfrew, and Ross and Cromarty, and three other persons appointed by Her Majesty. One of the latter receives a salary, and

[gives regular attendance at the Chambers of the Board in Edinburgh; and a paid secretary is appointed by the Crown. The Board has full powers to inquire into the condition of the poor throughout the parishes, and makes an annual report, which is laid before Parliament. By § 16, the Board has power to combine two or more adjoining parishes for poor law purposes. And by 24 & 25 Vict. c. 18, provision was made for the dissolution, by the Board of Supervision, of combined parishes. Parochial boards are regulated by §§ 17–32 of the Poor Law Act. In those parishes (now comparatively few in number) in which it has not been resolved, as after mentioned, to raise the funds requisite for the relief of the poor by assessment, the parochial boards consist of the persons who, if the act had not been passed, would have been entitled to administer the poor laws, viz., the magistrates of burghs in the case of burghal parishes, and the heritors and kirk sessions in the case of non-burghal parishes. In parishes where assessment has been resolved on, the constitution and mode of election of parochial boards, as provided by the act, differ according as the parish is burghal or non-burghal. (1) *In burghal parishes*.—The persons assessed within the parish or combination of parishes elect, to be members of the parochial board, such number of persons being not more than thirty, and being possessed of such qualification by ownership or occupancy of lands within the parish, as the Board of Supervision may fix (but the qualification being in no case fixed at a higher annual value than £50); the magistrates of the burgh nominate four members; and the kirk session (or kirk sessions, if there be more than one within the parish) nominate four of themselves to be members. The election of members by assessed persons is conducted under such regulations as the Board of Supervision may direct, and the parish may be divided into wards or divisions for the purpose of the election. Every person assessed in respect either of ownership or of occupancy of lands and heritages is entitled to vote. If the annual value of the lands be under £20, he has one vote; if under £40, two votes; if under £60, three votes; if under £100, four votes; if under £500, five votes; if £500 or upwards, six votes. Any person assessed both as owner and as occupant may vote in both capacities. But no person may for himself have more than six votes in all. And no person may vote who has been exempted from payment of poor rates on the ground of inability to pay,

[or who has not paid all such rates due from him at the time of voting. (2) *In non-burghal parishes*.—The parochial board consists of the owners of lands and heritages of the yearly value of £20 and upwards, the provost and bailies of any royal burgh in the parish, the kirk-session of the parish (or six of its members, if the kirk-session consists of more than six members), and such number of elected members as may be fixed by the Board of Supervision. The latter are elected from their own number, by persons assessed in the parish, who are not owners of lands of the yearly value of £20, or provosts or bailies of any royal burgh in the parish, or members of the kirk-session, and as such members of the parochial board. The mode of election is in most respects, and in particular in respect of the number of votes to which each person assessed is entitled, similar to that above explained in reference to burghal parishes. Any heritor who is a member of the parochial board, may act at the board through an agent appointed by writing under his hand. See *Thompson*, 30 Nov. 1871, 10 Macph. 178. Elected members, both in burghal and in non-burghal parishes, act for one year, and may be re-elected. Disputes as to elections are determined by the sheriff, whose decision is final. Every parochial board must hold at least two general meetings in every year, to revise and adjust the roll of paupers and their allowances. By § 87, in case any parochial board shall refuse or neglect to do what is by law required of them, or in case any obstruction arises in the execution of the act, the Board of Supervision may apply by summary petition to the Court of Session, or to the Lord Ordinary on the Bills in vacation, who may do as seems just. See *Board of Supervision*, 17 Jan. 1880, 7 R. 469.]

Funds for Relief of the Poor.—The funds out of which the poor are supported consist either of such as arise from voluntary contributions, mortifications, &c., or of such as are levied by assessment. [As to the former, see *Collections in Churches*. *Mortification*. By § 52 of the Poor Law Act, property or revenues which at the date of the act were vested in the heritors and kirk-session of a parish, or the magistrates of a burgh, under any statute or law or usage, or in virtue of gift, grant, bequest or otherwise, for the use or benefit of the poor of such parish, were transferred to the parochial boards of the respective parishes. Where the property is held for particular classes of poor, and not for the general class of those legally en-

[titled to relief as poor, this section does not apply. See *Bathgate*, 14 July 1854, 16 D. 1075; *Linlithgow*, 15 Nov. 1855, 18 D. 37; *Kinglassie*, 14 June 1867, 5 Macph. 869; *Aberdour*, 24 Nov. 1869, 8 Macph. 176. By § 53, direction is given as to the investment of funds vested in parochial boards for behoof of the poor; and the Board of Supervision may require returns as to such funds.

[*Assessment*.—By § 33 of the act, the parochial board of any parish may resolve that the funds for relief of the poor shall be raised by assessment. Such resolution is final, and cannot be altered without consent of the Board of Supervision. By § 34, as amended by 24 & 25 Vict. c. 37, one-half of the assessment is to be imposed on the owners, and the other half on the tenants or occupants, of all lands or heritages within the parish, rateably according to their annual value. But by § 35, the parochial board, with approval of the Board of Supervision, was empowered to continue any system of assessment which had been established in the parish by local act or usage. See *Croll*, 16 March 1861, 23 D. 747. Assessment under § 34 is imposed one-half on the owners as a class, and the other half on the occupants as a class; *Galloway*, 19 March 1875, 2 R. 650; and, by § 36, the parochial board may, with concurrence of the Board of Supervision, classify the lands according to the purposes for which they are used, and rate the occupants accordingly. But such classification, in order to be valid, must be exhaustive; *N.B. Railway*, 17 Feb. 1887, 14 R. 478. A parochial board which has adopted a classification with concurrence of the Board of Supervision, is entitled to abandon it without such concurrence; *Bruce*, 7 March 1889, 16 R. 568. The whole assessment may be levied from the tenant or occupant; and he may recover one-half thereof from the owner, or retain it out of his rents; § 43. The annual value of lands is taken to be the rent at which one year with another they might in their actual state be reasonably expected to let from year to year, under deduction of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in their actual state, and all rates, taxes, and public charges payable in respect thereof; § 37. For the purposes of assessment, the valuation roll, as completed in terms of the Valuation Act, 1854, is conclusive as to the yearly rent or value of lands and heritages entered therein (but subject to the deductions just men-

[tioned); and the Court of Session has no jurisdiction to review the process by which the entry there made was reached; *Mags. of Glasgow*, 14 Jan. 1887, 14 R. 319. See *Valuation of Lands*; also *Rankine on Land-Ownership*, 647-9, and cases there cited. The parochial boards fix yearly or half-yearly the amount of assessment, and make up a roll of the ratepayers, and of the sums to be levied from each; §§ 38-41 of the Poor Law Act. Each year's assessment should cover the year's necessities; but this principle cannot always be rigorously followed out; see *Archibald*, 24 Jan. 1856, 18 D. 329. Where a canal or railway passes through more than one parish, the proportion of the annual value on which assessment is made for each parish is according to the number of miles which the canal or railway passes through such parish in proportion to its whole length; § 45; and a railway or canal company is assessable both as owner and as occupant; *Edinr. & Glasgow Railway*, 2 May 1885, 2 Macq. 331. Owners and occupiers of lands are not liable to be assessed in respect thereof in more than one parish; § 46. Assessments may be recovered summarily in the same way as land and assessed taxes; § 88; 52 Geo. III. c. 95, § 13. See *Oakley*, 6 Nov. 1867, 6 Macph. 12; *M'Tawish*, 3 Feb. 1876, 3 R. 412. They may also be sued for in the small debt court; and in case of bankruptcy or insolvency they have a preference over other debts of a private nature; § 88. The triennial prescription does not apply to assessments for the poor; *Munro*, 21 Nov. 1857, 20 D. 72. The proper remedy for a overcharge is suspension of a charge for payment; see *Stewart*, 16 Oct. 1869, 8 Macph. 26. The parochial board has power to exempt from payment of assessment, on the ground of inability to pay; § 42. See *Walkinshaw*, 29 Nov. 1850, 13 D. 198. Clergymen are liable to assessment in respect of their stipends; § 49. But manse and glebes are exempt from assessment; *Forbes*, 14 June 1852, 1 Macq. 106; and by 28 & 29 Vict. c. 62, the exemption is extended to all churches and premises exclusively appropriated to public worship. Scientific and literary societies are also exempt under certain conditions; 7 & 8 Vict. c. 36; and Sunday and ragged schools either are exempt or may be exempted by the rating authority; 32 & 33 Vict. c. 40. Property belonging to the Crown or any of the departments of the Government is exempt; *Oliver*, 19 Jan. 1852, 14 D. 356. But

[property held as a public trust for the community is not exempt; *Clyde Navigation Trs.* 22 June 1865, 4 Macq. 931; *Leith Docks Commrs.* 12 March 1866, 4 Macph. (H.L.) 14; *University of Edinr.* 8 June 1868, 6 Macph. (H.L.) 97; *Heriot's Hospital*, 28 March 1866, 4 Macph. 675. See *Crown Lands*. A tramway company is liable in respect of the tramways; *Craig*, 27 May 1874, 1 R. 947. Parochial boards may borrow on the security of the assessments, on procuring a certificate by the Board of Supervision; Poor Law Act, § 62; 19 & 20 Vict. c. 117, § 3; 49 & 50 Vict. c. 51.]

Persons entitled to Relief.—Those who are entitled to parochial relief are, poor persons of seventy years or upwards, or under that age if so infirm as to be unable to gain a livelihood by their work; orphans and destitute children under fourteen years of age, whether lawful or illegitimate; all who, from permanent bodily disease or infirmity, are unable to work, so as to gain a livelihood; and lastly, idiots and insane persons. A foreigner may acquire a settlement by residence, so as to entitle him to relief. To entitle any person to parochial relief, it is necessary that he be destitute of funds. Even a vested interest, in property not actually possessed by the pauper, which may be disposed of so as to raise funds, will deprive him of his claim for relief. And if a pauper, although in this and other respects entitled to relief, have relations able, and so near in degree as to be bound, to aliment him, the parish of his settlement has a claim against them to the effect of recovering the sums advanced for his support, and having them declared liable for aliment in future. See *Aliment*. [By § 68 of the Poor Law Act, assessments were made applicable to the relief of occasional as well as permanent poor; but this provision was declared to confer no right to demand relief on able-bodied persons out of employment. An able-bodied man is, "one who suffers under no personal inability, bodily or mental, to work;" see *Petrie*, 4 March 1859, 21 D. 614. Such a person has no claim, either for himself or for his pupil children, although destitute and unemployed; *Adams and Thomson*, 26 March 1852, 1 Macq. 120, 155; and a parochial board has no right to give relief to an able-bodied man, the right to give, and the right to demand relief being correlative; *Isdale*, 12 Feb. 1866, 4 Macph. (H.L.) 1. But this rule does not seem to apply to an able-bodied woman, deserted by her husband, and

[burdened with several children; *Doonan*, 25 June 1851, 13 D. 1223 (contrasted with *Scott*, 3 July 1880, 7 R. 1047); nor to an able-bodied man with a lunatic child; *Paterson*, 29 Jan. 1857, 19 D. 332. And in *Beattie*, 12 June 1880, 7 R. 907, a lad of sixteen years was held entitled to relief. As to pauper lunatics, see 20 & 21 Vict. c. 71, §§ 73–79, 95, 112; 25 & 26 Vict. c. 54, § 8; 29 & 30 Vict. c. 51, §§ 8–11. See *Lunatic*. When a pauper, whether lunatic or not, acquires estate by succession, the parish of settlement is not entitled to reimbursement for past outlays in his maintenance; *Campbell*, 6 March 1885, 12 R. 713. Nor may a parochial board have recourse against any moneys which a pauper or pauper lunatic may be entitled to as member of a friendly or benefit society; 49 & 50 Vict. c. 51, § 4.]

Settlement.—It is the parish within which a man has been born (unless he shall have formed a new settlement for himself by residence) which is bound to support him; but where a man has resided [five] years in another parish, it is the parish within which he has resided for the [five] years preceding his application for charity, which is bound to support him. A woman, by marriage, immediately acquires the settlement of her husband; and she cannot, during the subsistence of her marriage, acquire a settlement independent of him. Children under fourteen years of age cannot acquire a settlement by residence. The settlement of children not forisfamiated does not depend upon the place of their birth, but upon that of the settlement of their parents. [Settlement is, therefore, either by birth, by residence, by marriage, or by parentage. The two former of these kinds of settlement are based on statutory provision; the two latter are derivative, founded on the disability which at common law incapacitates persons under coverture or in nonage from acquiring a settlement. In considering the different kinds of settlement, it is to be kept in view that to the pauper himself it is immaterial what parish is legally liable for his relief. For under the Poor Law Act, as is mentioned below, a pauper is entitled to immediate relief from any parish in which he may happen to be when compelled to seek relief; the relieving parish being entitled to claim reimbursement from the parish which shall eventually be found liable to maintain the pauper. 1. *Settlement by birth*.—This settlement is permanent, and cannot be extinguished. It

[is suspended during the subsistence of a residential or derivative settlement, but when these are lost, the settlement by birth revives. It is the parish in which the birth actually took place that is liable, although the mother's presence in the parish at the time of the birth may have been merely casual; *Craig*, 12 March 1867, 39 Sc. Jur. 390. See also *Russell*, 26 Jan. 1881, 8 R. 440. As to proof of birthplace, see *Hay*, 19 Jan. 1854, 16 D. 364; *Beattie*, 19 March 1878, 5 R. 775; *Lemon*, 26 Nov. 1887, 15 R. 92. A child born in a combination poorhouse is deemed, in a question of liability for maintenance, to have been born within the parish by which the mother of the said child was sent; 49 & 50 Vict. c. 51, § 5. 2. *Settlement by Residence*.—This is regulated by § 76 of the Poor Law Act, which declares that “no person shall be held to have acquired a settlement in any parish or combination by residence therein, unless such person shall have resided for five years continuously in such parish or combination, and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief; and no person who shall have acquired a settlement by residence in any parish or combination shall be held to have retained such settlement, if during any subsequent period of five years he shall not have resided in such parish or combination continuously for at least one year.” This enactment altered the previous law in regard both to the acquisition and to the loss of a settlement by residence; for such settlement was formerly acquired by three years' residence, and, when once acquired, it could not be lost except by the acquisition of another settlement. The continuity of residence is not held to be broken by occasional absence, even for some weeks at a time; provided there be no distinct indication of severance of connection with the parish. See *Greig*, 25 Oct. 1888, 16 R. 18. The residence may be constructive, as where the wife and family of a sailor have resided in a parish, while he has been absent during long periods in pursuit of his calling; see *Moncreiff*, 5 Jan. 1869, 7 Macph. 331; *Deas*, 17 June 1884, 11 R. 945. As to loss of such settlement by non-residence in terms of the section quoted, see *Allan*, 23 Dec. 1864, 3 Macph. 309; *Caldwell*, 9 Dec. 1887, 15 R. 166. 3. *Settlement by Marriage*.—“A married woman is in law incapable *stante matrimonio* to have

[any settlement in her own right, or independently of her husband. If her husband has a settlement, that also is her settlement. If her husband has no settlement, just as little has she;" *per* Lord J. C. Inglis, in *M'Crorie*, 7 March 1862, 24 D. 723. The application of this principle has given rise to much conflict of opinion. For a full discussion of the doctrine, besides the case of *M'Crorie*, see *Hay*, 13 June 1850, 12 D. 1019; and *Carmichael*, 28 Feb. 1863, 1 Macph. 452. On the husband's death, his settlement, if he had any, enures to the widow. If the husband's settlement at the time of his death was in the parish of his birth, it continues to be the wife's settlement until she acquires a new one for herself; which she is free to do, being no longer *vestita viro*. If the husband's settlement at his death was a residential one, the widow may lose it by non-residence, in terms of § 76 of the Poor Law Act (*supra cit.*). If the husband had no settlement at his death, and the widow has acquired none by residence, she is chargeable on her own birth parish; *Gibson*, 10 June 1854, 16 D. 926. If the husband died possessed of a settlement, and the widow, having acquired a separate settlement for herself by residence, has subsequently lost that settlement by non-residence, she is chargeable on the parish of her own birth, not on that of her husband's; *Hay*, 24 Feb. 1860, 22 D. 872. The husband's desertion of his wife has the same effect as his death; hence a wife who is deserted, and becomes a pauper, if she has not acquired a residential settlement for herself, is chargeable on the parish of her own birth; *Carmichael*, *supra*; *Johnston*, 13 June 1873, 11 Macph. 699. "The rule admits of no qualification except in this respect, that desertion only remains equivalent to death so long as the desertion lasts. The deserting husband may return, and then a new rule may come in to fix the parish which is bound to maintain him or his wife and family. He may revive a settlement which during his desertion cannot be gone against for the support of the wife and family, or he may put an end to a settlement which has enured to the wife and family;" *per* Lord Pres. Inglis, in *Greig*, 16 May 1876, 3 R. 642; see also *Beattie*, 11 Dec. 1883, 11 R. 250. The effect of a woman's second marriage is to extinguish entirely any settlement derived from the first marriage; see *Greig*, 2 March 1865, 3 Macph. 575; *Kirkwood*, 14 March 1871, 9 Macph.

[693. The case of a lunatic woman is exceptional in this respect, that the burden of her maintenance is imposed by statute on the parish of her settlement at the date of seclusion in the district asylum; and that parish remains liable even though the woman's husband change his settlement during his wife's confinement in the asylum; 20 & 21 Vict. c. 71, §§ 75, 95; *Palmer*, 1 Dec. 1871, 10 Macph. 185. 4. *Settlement by Parentage*.—It is the policy of the poor law that the members of one family be kept together and not dispersed into different parishes according to the accident of their birth. Hence legitimate children, unforisfamiated, follow the settlement of their father, whether by birth or by residence; *Barbour*, 30 May 1853, 1 Macq. 376. Illegitimate children follow the settlement of their mother, however acquired; *Hay*, 6 Feb. 1856, 18 D. 510; *Greig*, 21 June 1878, 5 R. 977; *Caldwell*, 20 July 1883, 10 R. 1263. After the father's death, in the case of lawful children, the mother may acquire a residential settlement for herself and all the children residing with her; *Crieff*, 19 July 1842, 4 D. 1538. Failing both a settlement derived from the father, and a settlement acquired by the mother's residence, pupil children are chargeable on the birth parish of the mother; *Gibson*, 10 June 1854, 16 D. 926. And where a father, who had no settlement in this country, deserted his family, and the mother shortly thereafter died, their pupil child was held to be chargeable on the mother's birth parish; *Carmichael*, 28 Feb. 1863, 1 Macph. 452. A person who is an absolute idiot is like a perpetual pupil, incapable of having a settlement in his own right, and therefore takes the settlement of his father; but this rule does not apply to one who is merely imbecile; *Cassells*, 24 June 1885, 12 R. 1155; *Nixon*, 20 Dec. 1887, 15 R. 191. A minor *pubes* who is forisfamiated, and whose father has no residential settlement, is chargeable on the parish of his own birth (not on that of his father's), until he acquire a residential settlement for himself; *Craig*, 18 July 1863, 1 Macph. 1172; *M'Lennan*, 28 June 1872, 10 Macph. 908. But where the father had a residential settlement, a minor forisfamiated at the death of the father continues the derivative settlement till it is lost by four years' non-residence, in terms of § 76 of the Poor Law Act; *St Cuthberts*, 12 Nov. 1873, 1 R. 174; *Beattie*, 8 March 1878, 5 R. 737; *Hendry*,

[13 Jan. 1880, 7 R. 458; *Simpson*, 6 June 1883, 10 R. 928. In *Fraser*, 5 June 1867, 5 Macph. 819, a lunatic son, above majority, was held not to be forisfamiliated by being sent to an asylum. See also *Milne*, 3 Dec. 1879, 7 R. 317; *Milne*, 11 Dec. 1883, 11 R. 273. In *Dempster*, 26 Nov. 1879, 7 R. 276, a daughter who was in domestic service was held to be forisfamiliated, although she returned every night to her father's house.

[*Method of Administration*.—The inspector of the poor in each parish or division of a parish has the custody of all books and documents relating to the relief of the poor; and it is his duty to make himself acquainted with the circumstances of the case of every poor person in receipt of relief; to keep a register of all applications for relief; to visit and inspect personally, at least twice in the year, at their places of residence, all poor persons belonging to the parish or division of the parish in the receipt of parochial relief, provided they live within five miles of any part of the parish or division, and to report to the parochial board and the Board of Supervision upon all matters connected with the management of the poor; § 55 of Poor Law Act. Inspectors pursue and defend actions on behalf of the parochial boards; § 57. They are appointed by the parochial boards; § 32; and may be suspended or dismissed by the Board of Supervision; § 56. See, as to the position of an inspector of poor, *Board of Supervision*, 17 Jan. 1880, 7 R. 469. By 19 & 20 Vict. c. 117, power was given to the Board of Supervision to appoint two general superintendents to assist in the execution of the Poor Law Act. By §§ 60–66 of the Poor Law Act, provision is made for the erection of poorhouses, and their regulation by the Board of Supervision. In every case in which a poor person in any parish applies for parochial relief, the inspector is bound to make inquiry forthwith into the circumstances of the applicant; and although he may have no settlement in the parish, if he is in other respects legally entitled to parochial relief, the inspector is bound to furnish him with sufficient means of subsistence until the next meeting of the parochial board; and the parochial board must continue to afford him maintenance until the parish to which he belongs be ascertained, and his claim upon such parish admitted or otherwise determined, or until he be removed; and every inspector to whom application is made is bound to re-

[turn an answer to such application within twenty-four hours; § 70. See *M'Caig*, 4 March 1887, 14 R. 539. Applicants are bound to give all information required; § 70. The monies expended in affording such interim relief may be recovered from any parish within Scotland to which the poor person may ultimately be found to belong, or from any persons legally bound to maintain him; but when relief is given to a person having a settlement in another parish, notice must be given to the inspector of that parish, and only such charges may be recovered as are incurred after the date of such notice; § 71. See *Anderson*, 12 June 1878, 5 R. 904. If the parish to which a poor person has been ascertained to belong does not provide for his removal from the parish affording him interim relief, within a reasonable time after notice, the latter parish may cause him to be removed at the expense of the former, unless he is too infirm; § 72. The removal of English and Irish paupers is regulated by § 77; and by 8 & 9 Vict. c. 117; 10 & 11 Vict. c. 33; 24 & 25 Vict. c. 76; 25 & 26 Vict. c. 113; 26 & 27 Vict. c. 89. When relief is refused to any applicant, he may apply to the sheriff, who may direct interim support to be given, until final judgment on the merits; but the sheriff may not interfere in respect of the amount of relief to be given; § 73 of Poor Law Act; A.S. 12 Feb. 1846. If the pauper considers the relief granted him to be inadequate, he may lodge a complaint with the Board of Supervision; and if the said Board are of opinion that the complaint is well founded, a minute to the effect entitles the pauper to the benefit of the poor's roll in the Court of Session; § 74. But no action relative to the amount of relief is competent in any court, unless the Board of Supervision have declared that there is a just cause of action; § 75. By § 80, provision is made for the prosecution, under the act 1579, c. 74, of husbands or fathers deserting or neglecting to maintain their wives or children, and of mothers and putative fathers neglecting to maintain their illegitimate children. By § 86, every action on account of anything done in the execution of the act shall be brought before the sheriff court and shall be commenced within three months after the fact committed, and notice thereof shall be given to the defender one month at least before the commencement of the action. See *M'Coll*, 31 Jan. 1882, 9 R. 470.]

See on this subject generally, *Ersk. B. i.*

tit. 7, § 63; *Stair*, B. ii. tit. 1, § 6; *Bank*, i. 61; *Bell's Princ.* §§ 1135, 2190; *Dunlop's Parochial Law*, 161; *Monypenny on Poor Law*; [*Dunlop on Poor Law*; *M'Neel Caird on Poor Law*; *Guthrie Smith's Digest of Poor Law*; *Reid's Digest of Poor Law Cases*; *Ersk. Princ.* (17th ed.), 113; *Rankine on Land-Ownership*, 646; *Goudy and Smith on Local Government*, 39.]

POOR'S ROLL; the roll of litigants who, by reason of poverty, are privileged to sue or defend *in forma pauperis*. This privilege is conferred by the court, [in accordance with the provisions of the act 1424, c. 45,] on being satisfied of the poverty of the applicant, and that he has *probabilis causa litigandi*; and the advantage of being admitted to the benefit of the poor's roll is, that the party has his cause thereafter conducted gratuitously by the counsel and agents for the poor, and is relieved from the fee-fund and enrolment fees, and from all other court fees and charges. This being a privilege which exposes the adverse party in the suit to the hardship of litigating with a pauper opponent, the court has guarded against the abuse of conferring the privilege except upon good grounds. The A.S. 16 June 1819, provides that the faculty of advocates shall appoint six of their number annually to be advocates for the poor; and that the writers to the signet, and agents and solicitors, shall each nominate, in the month of December annually, four of their number respectively to be writers and agents for the poor. [It was formerly part of the duty of the counsel and agents for the poor, so appointed, to report to the court, whether or not an applicant for admission had a *probabilis causa*. But the A.S. 21 Dec. 1842, which now regulates the poor's roll, provides that the faculty of advocates, the writers to the signet, and solicitors before the supreme courts, besides electing counsel and agents for conducting the causes of the poor as formerly, shall also respectively name two advocates, one writer to the signet, and one solicitor each year, to act exclusively as the reporters on the *probabilis causa* of the pauper applicants for the benefit of the poor's roll; § 1. No person is entitled to the benefit of the poor's roll, unless he produce a certificate, under the hands of the minister and two elders of the parish where he resides, setting forth his circumstances, according to a formula annexed to the act of sederunt; § 2. The formula states the applicant's age, whether he (or she) be married or not, the number of his children, the length of his

[residence in the parish, the property of which he is possessed, his trade and earnings, and whether he have any other lawsuit. If the party's health admit of it, he must appear personally before the minister and elders, to be examined as to the facts required by the formula; and the minister and elders must then certify how far the statement of the party consists with their own knowledge, or that of any one of them, or whether its credit rests solely on the statement of the applicant; in which case they must certify whether he or she be of good character and worthy of credit; § 3.] Where the clergyman or elders refuse to give a certificate to a party applying for the benefit of the poor's roll, the court will cite them to give evidence at the bar as to the applicant's condition; *Craigie*, 10 Feb. 1832, 10 S. 315; *Glass*, 7 March 1833, 11 S. 543. Where a kirk-session obstinately refuse to take the declaration of an applicant for the poor's roll, in terms of the Act of Sederunt, and thereby occasion unusual delay and expense to the pauper, the court will subject them in expenses to him; *Morris*, 10 July 1835, 13 S. 1092. [But in several cases, on reasonable ground shown, the court has remitted to the sheriff of the county, instead of to the minister and elders of the parish, to inquire and report as to an applicant's circumstances; *Rattray*, 8 July 1824, 3 S. 232; *Mackellar*, 15 July 1863, 1 Macph. 1114. In *Stewart*, 8 Dec. 1853, 16 D. 164, the remit was made to a justice of the peace.] A certificate by the minister and elders of a dissenting congregation is not sufficient to support an application for the benefit of the poor's roll; *Elphinstone*, 11 Feb. 1836, 14 S. 463. [But a certificate by the minister and elders of a duly constituted *quoad sacra* parish is sufficient; *Murrie*, 24 Dec. 1853, 16 D. 325.] The subscription of the minister implies his attestation, that the other subscribers designing themselves elders are really so; and a petition was ordered to be remitted to the lawyers for the poor, notwithstanding an allegation that these parties never had been ordained elders; *A. B.* 26 Nov. 1833, 12 S. 127. The kirk-session has nothing to do with the merits of the action; *Smith*, 8 July 1834, 12 S. 890. [Ten days' previous intimation, by letter post paid, must be given to the adverse party of the time and place fixed for making the declaration or statement before the minister and elders; the despatch of such letter to be certified, in form prescribed, by the agent of the

[pauper, or by a messenger-at-arms, or other officer of the law, and one witness; § 4. The said declaration and certificates are then transmitted to one of the agents for the poor, and must be lodged, within three months from the date of the declaration, with one of the principal clerks of session, by whom they are entered in the minute book. On the elapse of eight days after the date of insertion in the minute book, or of four days next after publication of the printed minute book containing said intimation, if the papers have been lodged during vacation or recess, the party's agent boxes a note to the Lord President of the Division, simply stating the names and designations of the parties, and craving a remit to the reporters on the *probabilis causa*; on moving which the court may, on hearing any objections, either refuse the application *de plano*, or remit to the reporters; who, on considering the party's case, and hearing all objections, are directed to report whether the applicant has a *probabilis causa litigandi*, and otherwise merits the benefit of the poor's roll; said report not to be made sooner than six days after the remit, except with consent of the adverse party. If the application be not forthwith proceeded in before the reporters, and if their report be not lodged within three months after the remit, it is, *ipso facto*, held as abandoned and out of court, without prejudice to the party again applying for new certificates; § 5. All objections to the admission of an applicant, on the ground that his circumstances are not such as to entitle him to the benefit of the poor's roll, must be stated when the application is moved in the single bills, and before remit is made to the reporters; *Allan*, 28 Feb. 1872, 10 Macph. 510; *Douglas*, 18 March 1881, 8 R. 677. In regard to the degree of poverty which entitles one to sue *in forma pauperis*, "it is not enough that it should be inconvenient, or even highly inconvenient, for a party to bear the expense of litigation; he must make out a case of necessity;" *Christie*, 14 Dec. 1830, 9 S. 169 (*per* Lord Gillies). But no definite rule of general application can be laid down; and there is at present a variance in the practice of the two Divisions of the Inner House. The First Division, in *Robertson*, 8 July 1880, 7 R. 1092, though they admitted the applicant in respect of special circumstances, held that in the ordinary case a man earning 23s. a week is not entitled to be admitted, even though for the time he is out of employment. In the Second Division, on the other hand, appli-

cants have in recent cases been admitted on the general ground of inability to pay law agent and counsel; see cases in 12 R. 548, 959, 1263; 15 R. 826. The court have repeatedly refused to interfere with the decision of the reporters as to the *probabilis causa*; no allegation of error in judgment will be listened to, unless there have been gross miscarriage of justice, or failure in duty on their part; *A. B.* 19 Nov. 1833, 12 S. 58; *Irvine*, 22 Dec. 1842, 5 D. 372; *Robson*, 12 May 1876, 13 S.L.R. 421. But if the applicant have not been fully heard before the reporters, or if new grounds of action be produced, the court will make a new remit; *Currie*, 21 Jan. 1829, 7 S. 302. When the reporters are equally divided in opinion, the court, in actions commenced in the Court of Session, have generally admitted the applicant; *Smith*, 12 Feb. 1852, 14 D. 484; *Marshall*, 13 July 1881, 8 R. 939; but in appeals from the sheriff court, where the sheriffs had both decided against the applicant, the court refused to admit; *Carr*, 1 Nov. 1885, 13 R. 113; *Watson*, 17 Nov. 1888, 16 R. 111; and in *Shanks*, 11 March 1886, 13 R. 749, they refused in respect of the special nature of the action.

[When the court have found the applicant entitled to the benefit of the poor's roll, the cause is remitted to one advocate, one writer to the signet, and one solicitor, whose names are taken in regular rotation from the lists of counsel and agents for the poor; and who are appointed to conduct the cause till its conclusion, or so long as the applicant remains on the poor's roll, though they may have ceased to be advocates and agents for the poor; A.S. 1842, §§ 6, 7. All warrants for admission to the poor's roll remain in force during the dependence of the cause, subject to the right of the opposite party to have investigation made into any alleged change in the pauper's circumstances; and provided the action is raised and executed within three months from the date of admission; § 8. If circumstances emerge, at any stage of the cause, showing that the pauper has no *probabilis causa litigandi*, the Lord Ordinary may report the circumstances verbally to the court, or remit the process to the reporters for their opinion; and if the court or the reporters are of opinion that there is no *probabilis causa* the pauper forfeits all right of exemption thereafter, unless upon caution being found for expenses; § 9. Thus a pursuer has been struck off the poor's roll, for refusing to accept a sufficient tender; *M'Intosh*, 18

[Dec. 1821, 1 S. 218; *A. B.* 8 July 1836, 14 S. 1114. In each spring vacation a report is boxed by the reporters to the Lord Justice General, stating the result of the causes remitted to them during the previous year, with any special matter thereanent which they may think the court ought to know; § 10. When a case is remitted to the reporters, it is the duty of the agent presenting the application to lay before the reporters a memorial of the circumstances of the case, intimating the lodgment thereof to the opposite party by post; and to direct and assist the applicant in procuring any farther evidence required; § 11. The names of the advocates and agents to whom the cause is remitted must be marked on the margin of the summons or defences, or notes of appeal or suspension, and on the back of every subsequent paper given in for that party in the cause. No enrolment can be made except by the agent appointed as above, nor in the name of any advocate except the counsel so appointed. The word "*Poor*" must be prefixed to the name of the party on every paper given into court; § 12. No other advocate or agent than those appointed as above can be employed, or allow their names to be used in any stage of the cause; unless on application to the Lord Ordinary or the court, by a note signed by the advocate and agent already appointed, the assistance of one of the other advocates or writers for the poor is specially authorised; in which case, those first appointed, and those so added, shall thereafter act conjunctly in the cause; § 13.] Notwithstanding this provision, it has been decided that senior counsel is entitled, on application by the counsel for the poor, to act in the poor's cause without the special authority of the court; *Bell*, 7 Dec. 1833, 12 S. 187. [In case of neglect or failure in any of the particulars above specified, the court, on the application of the adverse party, open up and set aside the previous proceedings in the cause, and deprive the party of the benefit of the poor's roll, or apply such other remedy as the circumstances of the case require; § 14. The expense of the application for admission, and procedure thereon, is not now, as formerly, chargeable by the agent against the pauper, except to the extent of actual outlay; nor is it now included in the "expenses of process," which may afterwards be found due against the adverse party; but if there be unreasonable or vexatious opposition to the application for admission, the Inner House has

[a discretionary power to dispose of the expenses thereby occasioned; § 15. By §§ 16 and 17, regulations are made for the recovery of court dues, &c., in the case of pauper litigants found entitled to expenses.] A party on the poor's roll is liable to be subjected in expenses of process like other litigants. But if he reside beyond the jurisdiction of the court, he is not bound to sist a mandatory who shall be liable for expenses; [*Carling*, 10 March 1826, 4 S. 548.] See *Mandatory*. A party on the poor's roll is equally liable with other litigants to suffer the penalties imposed in consequence of the neglect of agents. Thus, he cannot be reponed against a decree in absence without payment of previous expenses like other litigants, unless it appear, upon investigation, that the decree so pronounced has gone out from the inability of the party to furnish information, and not from any fault or neglect of the agent in the cause, or the wilful neglect of the pauper himself; *A.S.* 23 Dec. 1825, and 11 July 1828, § 73. [See *Ord*, 12 Nov. 1861, 24 D. 25.] The court exercises the same discretion in awarding expenses in regard to the causes of parties on the poor's roll as to those of other litigants.

[The poor's roll in the sheriff court is regulated by *A.S.* 11 July 1839, part 1, c. 21, §§ 134–136, and *A.S.* 16 Jan. 1877; according to which the procurators of court annually appoint one or more of their number to act as procurators for the poor *gratis*, which appointment must be approved of by the sheriff. In *Colquhoun*, 8 March 1850, 12 D. 851, the appointment of a procurator who resided twenty miles from the court, and in another county, was held to have been rightly vetoed by the sheriff.]

In the House of Lords, parties are admitted to plead *in forma pauperis*, upon a petition setting forth their poverty accompanied by an affidavit thereof, and a certificate from the minister and two elders of the parish where they reside; and if the prayer of the petition be granted, the cause proceeds in all other respects like any other cause, except that the fees of office and all other fees are avoided. [See *Macqueen's Appellate Jurisdiction*, 259, 335. An appellant appearing for the public interest is not allowed this privilege; *Bowie*, 10 Aug. 1888, 15 R. (H.L.) 114.

[See, on the subject generally, *Shand's Prac.* i. 513; *Mackay's Prac.* i. 334; ii. 577; *Duncan's Par. Eccl. Law*, 714; *M'Glashan's Sher. Court Prac.* 340; *Dove Wilson's Sher. Court Prac.* 207.]