

less would yield to the fact in cases where it was otherwise; [*Kinloch*, 14 Jan. 1814, F.C.; *Innes*, 18 May 1859, 21 D. 832.] 2*d*, To preserve the servitudes over the undivided portions, or to commute them if those in right of the servitudes will consent, and to give them a portion of land in lieu. 3*d*, To allocate to the proprietor of a barony his share, according to the state of his possession. But where the proprietor of a barony, to which a common was attached, had feued out the whole barony, and given the feuars rights of servitude over the common, it was decided that he was still to be held as possessing by means of his feuars, and that he was entitled, accordingly, to have a share of the common set apart for him, corresponding to the aggregate valuation of the feuars, and subject to their servitudes; *D. Buccleuch*, 16 June 1812, F.C. 4*th*, To continue as common such mosses as are indivisible, with free ish and entry to the moss, whether divided or not. In the case of mosses the rule is not the valued rent, but the extent of the respective lands lying along the edge of the moss. In making the division, the common is first subdivided amongst the joint proprietors, as above. Then each proprietor divides his share with those whose servitudes are derived from him or his authors; although this seems to be an arrangement which can only be made of consent of parties; and in questions between the common proprietors and those having rights of servitude, the division is regulated not by the valued rent, but by the number of cattle the parties in right of the servitudes have been in use to pasture on the common, or according to the value of their interests in the common, whatever they may be; *Maitland*, 1772, M. 2485. Formerly the proprietor, in such cases, got a *præcipuum* of a fourth, over and above his share in the division; but no such rule is now acted on: all that the proprietor gets is the residue, after deducting the value of the servitudes. The proprietor has also a right to the coals and minerals, the parties in right of servitudes having right merely to the surface. If there be no objections [to the report of the commissioner,] decree of division is pronounced by the Inner House in terms thereof. If there be objections, they are either disposed of at once, or a remit is made by the Inner House to the Lord Ordinary to prepare the cause, and decide on the objections in the usual way, and subject of course to the review of the court. The expense of the

division is paid proportionally to the benefit each heritor has derived from the division, as proved by the value of the portion allocated to him. Tenants, however, are not liable in any part of the expense, nor even for the interest of the expense so disbursed by their landlords. [This action is now competent in the sheriff court, when the subject in dispute does not exceed in value £50 by the year, or £1000 value; 40 & 41 Vict. c. 50, § 8 (3). Decree of division has the effect of a conveyance by all the joint proprietors, with assignation of writs, and may be recorded; 37 & 38 Vict. c. 94, § 35; *Begg's Conv. Code*, 376.] See *Ersk. B. iii. tit. 3, § 56 et seq.*; *Bell's Princ.* § 1087; *Kames' Stat. Law, h. t.*; *Jurid. Styles*, iii. 49; [*Rankine on Land-Ownership*, 496; *Shand's Prac.* ii. 845; *Mackay's Prac. i. 361*; ii. 303.]

COMMUNI DIVIDUNDO ACTIO; in the Roman law, was an action for the division of what was possessed in common by more than one; *Stair, B. i. tit. 7, § 15*. [See *Brock*, 27 Jan. 1852, 19 D. 701.]

COMMUNION ELEMENTS. [See *Sacraments. Tennds.*]

COMMUNION OF GOODS. See *Goods in Communio*.

COMMUNIS ERROR. Where, through oversight or negligence, an erroneous practice has prevailed, and has become inveterate, and especially where parties in the transactions have relied on the prevailing practice as correct; or where there is danger of disturbing judicial procedure in past cases; the Court of Session is in use, instead of correcting the error by a decision in a particular case, to overrule the objection when so stated, but to pass an Act of Sederunt, enjoining the observance of the correct practice in future; and certifying all concerned that they will hereafter decide accordingly. Such are the Acts of Sederunt, 26 Feb. 1684, 17 July 1741, and 17 Jan. 1756; in some of which cases the erroneous practice had been directly in the face of statutory enactments. See also *Beattie*, 22 May 1830, 8 S. 784, where the *commun error* was in the will of a summons; and *Russel*, 7 July 1837, 15 S. 1263, where the error was in the ordinary form of the prayer of bills of suspension. See *Acts of Sederunt. Suspension*.

COMMUNITY. [See *Corporation*.]

COMPANY. [See *Joint Stock Company. Partnership. Firm*.]

COMPARATIO LITERARUM. The comparison of handwritings. This is one of the means of proving the truth or falsehood

of an allegation of forgery; and where genuine subscriptions or writings are brought to prove that a subscription or writing is truly not of the handwriting of the person whose it is said to be, much weight is given to this species of evidence. But when the *comparatio literarum* is resorted to, to prove that a particular writing has been written by the accused, it is considered as a much more doubtful species of evidence. [The evidence of engravers and other skilled witnesses is competent in the trial of such questions, but is reckoned of small value. In a trial for forgery, the court refused to receive the evidence of a bank-officer, who had no knowledge of the signature except *comparazione literarum*; *Beveridge*, 6 Oct. 1860, 3 Irv. 625.] See *Ersk. B. iv. tit. 4, § 71*; *Macfarlane's Jury Prac.* 225; *Hume*, i. 164; *Bell's Princ.* § 2228; *Dickson on Evid.* i. § 402; *Kirkpatrick*, § 87. See *Handwriting. Evidence.*

COMPEARANCE. This term is applied to the appearance made for a defender in an action. In the Court of Session, if a party appears by counsel, and propones defences, such appearance will have the effect of rendering the decree pronounced in the action what is termed a decree *in foro*; and the question in dispute between the parties, when decided by a final judgment in which appearance has been made for both parties, is termed a *res judicata*. See *Decree. Res Judicata. Absence.*

COMPENSATION; is a provision of the law of Scotland, by which, where two parties are mutually debtors and creditors, their debts, if equal, extinguish each other; and, if unequal, leave only the balance due. Compensation, except by way of action, was unknown in the law of Scotland until 1592, c. 141 [or 143,] which provides that compensation, *de liquido ad liquidum*, may be pleaded by way of exception or defence *before* decree, but not by way of suspension or reduction *after* decree. [The doctrine was introduced in order to prevent unnecessary actions: hence, unless a person has an active title to sue for a debt, he cannot plead it in compensation; *Johnston*, 20 July 1875, 2 R. 986.] Although compensation does not operate *ipso jure*, but must be pleaded, yet, where it is pleaded and sustained, the mutual debts are held to have been extinguished as at the time of concurrence; and from that time downwards, the currency of interest on either side is stopped. In order to found compensation, it is necessary—(1) That each party be debtor and

creditor in his own right: hence, a tutor cannot compensate a debt, properly due to himself, with a sum for which he is creditor *tutorio nomine*. An executor confirmed, however, is held in this respect to be the same person with the deceased; and therefore, where he owes a debt *proprio nomine*, he may plead compensation upon a debt due to the deceased; and, on the other hand, a debt due to one who afterwards becomes executor to a person deceased, may be compensated with a debt due by the defunct to the executor's debtor. [A purchaser of goods from one whom he knows to be agent for another who is unknown, cannot set off a debt due to him by the agent against the principal's claim for the price; *Matthews*, 20 Feb. 1873, 1 R. 1224.]

(2) The parties must be debtors and creditors to each other at the same time: hence if, before the concurrence, one of them has regularly assigned his debt to a third party, compensation cannot be pleaded against the assignee, on any debt afterwards arising between the original parties, although, where the concurrence has taken place before the assignation, the debtor may effectually plead compensation against the assignee, upon the debt due by the cedent; *Ersk. B. iii. tit. 4, § 14.*

(3) The debts to be compensated must be of the same species and quality: hence a sum of money cannot be compensated with a quantity of corn; because, until the price is fixed at which the corn is to be converted into money, the two debts are incommensurable; yet, in this case, some short time would probably be allowed for ascertaining the conversions, in order to make such a debt a proper subject of compensation; *Ersk. ib.* § 15.

(4) A debt already due, and payable, cannot be compensated with a conditional debt, or one, the term of payment of which has not arrived; *Ersk. ib.* But this holds only where the parties are solvent; for if one of them is bankrupt, the other may plead compensation for a debt which may become due at a future time; *Bell's Com.* ii. 122.

(5) In strictness, compensation ought not to be admitted where the mutual debts are not clearly ascertained, either by the writ or oath of the adverse party, or by the decree of a judge. But, by invariable practice, if a debtor in a liquid sum pleads compensation upon a debt due to him by his creditor, but not actually constituted, the rule, "*quod statim liquidari potest pro jam liquido habetur*," is applied, and sentence delayed *ex aequitate*, until the ground of compensation be made effectual. This rule has

been applied not only where the counter-claim was offered to be instantly proved by writ or oath, but even where the constitution of the debt required a proof by witnesses (*Ersk. ib.* § 16); and although a debtor might not, in the ordinary case, be allowed to avoid the payment of what is liquid and payable, during a long litigation on an illiquid counter-claim, yet there is an exception even to this rule in balancing accounts on bankruptcy; for a solvent debtor will not be compelled to pay the liquid debt, and rank for his own illiquid claim, but may plead compensation; *Bell's Com. ib.* [The *concurso debiti et crediti* must exist before bankruptcy; and where the debt, though constituted before, was not acquired by the party pleading compensation till after bankruptcy, the plea is inadmissible; *Goudy on Bankruptcy*, 542. See *Hammy & Sons' Tr.* 22 March 1877, 4 R. (H.L.) 43. In the liquidation of a company, a creditor who is a shareholder cannot, after the order for winding-up has been pronounced, set the debts due by the company to him against the calls due by him to the company, as that would give him a preference over other creditors; *Cowan*, 25 Jan. 1878, 5 R. 581. The rule that an illiquid cannot be set off against a liquid claim does not interfere with the rule that a party to a mutual contract cannot enforce the stipulations in his favour unless he has performed, or is ready to perform, his part of the contract; *Johnston*, 1 March 1861, 23 D. 646; but see *Burt*, 6 Nov. 1861, 24 D. 13.] (6) From the exuberant trust implied in deposit, compensation is not pleadable by the depository against the depositor. [It cannot be pleaded against a debt given or bequeathed as an alimentary fund; *Bell's Com. i.* 125 (note 2); see *Reid*, 25 Nov. 1884, 12 R. 178.] Nor can it be pleaded against the holder of a note payable to the bearer by the debtor, upon a debt due to the debtor by any former possessor of the note—a doctrine extended to indorsed bills of exchange, which the acceptor cannot compensate against the holder by debts due to the acceptor by any of the indorsers; *Ersk. ib.* § 17. Neither is compensation admitted upon a debt extinguished by the long prescription at the time compensation is pleaded, even although at the time of concurrence the prescription had not run; *Carmichael*, 1719, M. 2677. This rule holds also with respect to the shorter prescriptions, where the debtor is dead. But where the debtor is alive, the debt seems not to be in a worse condition than an illiquid debt, which may be in-

stantly liquidated by reference to oath; *Bell's Com. ii.* 123. (7) Where the concurrence is made by the debtor acquiring right to a debt due by his creditor, compensation is not admitted, either where the acquirer is presumed to have had a bad intention, or where the compensation, if sustained, would void the diligence of third parties. Thus, a factor who is sued by his constituent for intrusions cannot plead compensation upon a debt by the constituent, to which the factor has acquired right, after receiving the rents sued for. Nor can the debtor of a deceased person who, after his creditor's death, has acquired right to a debt due by the deceased, plead compensation on such debt in a question with the creditors of the defunct; *Ersk. ib.* § 18. Nor, indeed, can compensation be pleaded in any case on a debt which has been acquired *mala fide* to gain any undue advantage; *Bell's Com. ii.* 124. (8) Compensation may be pleaded not only by the principal debtor, but by any one having an interest, as by a cautioner, or by a competing creditor who has an interest to enlarge the fund for division, by extinguishing the debt of one of the claimants; *Bell's Com. ib.* [(9) Where the creditor of a company sues for a company's debt, compensation may be pleaded on a private debt due by the creditor to a partner of the company; *Bogle*, 1793, M. 2581; *Scott*, 13 June 1809, F.C.; *Russel*, 26 May 1824, 3 S. 63; *Salmon*, 17 Dec. 1824, 3 S. 406. See also *Thomson*, 10 March 1855, 17 D. 739; *Heggie*, 26 Nov. 1858, 21 D. 31; *Mitchell*, 5 Feb. 1869, 7 Macph. 480. Prof. Bell (*Com. ii.* 553) argues that, in such a case, bankruptcy would operate as a bar to compensation, by preventing the implied assignation, which is necessary to make a concurrence; and this view is supported by Ivory and More, in their notes to Erskine and Stair; but it is contrary to the decisions cited above. A company's debtor, however, cannot compensate a company's debt by a private debt due to him by a partner of the company; for there is here no *concurso debiti et crediti*, the company not being liable for the debts of the partners.]

By 1592, c. 141 [or 143], if compensation has not been pleaded by way of exception in the course of an action, it cannot be pleaded after decree, either by way of suspension or reduction. But if it has been pleaded, and unjustly repelled, it may be again insisted on, either in a suspension or a reduction, where these forms of process are not otherwise incompetent. Decrees in

absence, whether of inferior judges or of the Court of Session, are held to be decrees in the sense of the statute; although Erskine seems to think that, as the act of regulations 1672, c. 16, provides that all defences competent in law may be pleaded against a decree in absence, in the same manner as if there had been no decree, so the defence of compensation ought in no case to be excluded by such a decree; *Ersk. ib.* § 19. But where the decree in absence has followed upon a summons against one of many debtors included in the same summons, this has been held a sufficient specialty to allow compensation to be pleaded in a suspension; *Corbet*, 1707, M. 2642; *A. v. B.* 1747, M. 2648. So also where the decrees have been set aside on some legal nullity, or the charge has been turned into a libel, compensation is still pleadable; *Wright*, 1676, M. 2640. Neither do baron decrees, nor summary decrees on a clause of registration, exclude compensation; *Bank. B. i. tit. 24, § 4, par. 27.* But it has been found that, after a decree of furthcoming, compensation cannot be pleaded by way of suspension by an arrestee against the arrester on a debt due to the arrestee by the common debtor, although the decree of furthcoming was pronounced in absence of the arrestee; *Cunninghame & Co.* 17 Jan. 1809, F.C. This decision, however, seems to have proceeded chiefly on the ground, that the decree of furthcoming operated as a transfer of the debt to the arrester, who was entitled to trust to his arrestment and furthcoming. When a pursuer is creditor to a defender by a separate debt not included in the libel, he may elide the defender's plea of compensation by pleading recompensation on the separate debt. The rules applicable to recompensation and to compensation are the same; and when recompensation is pleaded, the matter generally resolves into an action of count and reckoning; *Ersk. ib.* [With regard to the equity of compensation, which arises when a beneficiary under a settlement is prejudiced by an heir or next-of-kin repudiating the settlement, and betaking himself to his legal rights, see *Approbate and Reprobate.*] See *Stair*, B. i. tit. 18, § 6; *More's Notes*, cxxviii.; *Ersk. B. iii. tit. 4, § 11*; *Bank. B. i. tit. 24, § 4 (23)*; *Bell's Com. ii. 118, 553*; *Bell's Princ. § 572*; *Thomson on Bills*, 571; *Kames' Equity* (1825), 7, 258; [*Mackay's Prac. i. 509, 618*; *Goudy on Bankruptcy*, 538, 565. See *Retention. Recompensation.*]

COMPENSATIO INJURIARUM. The plea of *compensatio injuriarum* is most

frequently met with as a defence against actions of damages for slander or defamation. This plea, however, is not properly a bar to the action, but of the nature of a set-off or counter-claim, which extinguishes or modifies the pursuer's claim. The mutual injuries thus to be set off against each other must be, generally speaking, injuries of the same kind. Thus, a claim of damages for defamation could not be successfully met by an outstanding counter-claim of damages for a former assault; the defender's remedy there being obviously a separate action of damages. On the other hand, a claim of damages for a libel in a newspaper, or in judicial pleadings, may be met and extinguished by a counter-claim for contemporaneous defamation of the same character, conveyed through the same or a similar medium. A good deal of judicial discussion has occurred on the question, whether or not a counter-action at the instance of the defender is necessary in order effectually to raise this plea; and it is not, perhaps, very easy to reconcile the authorities and judicial dicta on this point. It has been said, that the plea "is allowed without any separate action, where the injuries are of the same kind" (*per* Lord Gillies, in *Gilchrist, infra*); but more recently, the leaning of judicial authority has been in favour of a separate action. [See *Tullis*, 8 March 1850, 12 D. 867; *Bertram*, 7 March 1885, 12 R. 798.] This much, however, seems certain, that without a separate action, a defender, in his defences, and at the trial, may found on concomitant injuries of the same kind inflicted on him by the pursuer, and this not only as part of the *res gestæ*, but as justifying the injury complained of, and extinguishing the claim of damages on that account. Recompensation, however, cannot be proved, since that plea, if well founded, ought to have formed part of the pursuer's direct claim. And in one case, where the defence of *compensatio injuriarum* had been sustained, and one shilling only of damages given, the court refused to give the pursuer his costs, holding that the jury must be presumed to have balanced accounts between the parties, and found them equally wrong; *Gilchrist*, 10 Sept. 1823, 3 Mur. 363; *Godard*, 4 Nov. 1816, 1 Mur. 156; *Edwards*, 24 June 1824, 3 Mur. 385. See *Borthwick on Libel*, 279, 433; *Macfarlane's Prac.* 223, 288; [*Guthrie Smith on Damages*, 248. See *Defamation.*] As to *compensatio injuriarum*, considered as a defence against an action of divorce on the head of adultery, see *Recrimination*.

COMPETENT AND OMITTED.

Those pleas which might have been maintained in the course of a suit, but which have not been stated, are said technically to be competent and omitted. By 1672, c. 16, § 19, it is enacted, "that decreets *in foro contradictorio* before the Lords of Session be not again suspended upon reasons competent to have been proponed, or which were repelled in the former decret." The rule as to pleas competent and omitted is not effectual against a minor, although, if the plea has been proponed for the minor, and repelled, he cannot open up the decree. [Nor can it in any case be stated against a pursuer, who may raise as many actions as he has different *media concludendi*; *L. Macdonald*, 11 Aug. 1842, 1 Bell's App. 819. The court, however, will not allow an undue or oppressive accumulation of actions; *Bruce*, 1793, Hume's Dec. 596. The objection of competent and omitted is pleadable against succeeding heirs of entail, when the previous litigation was conducted by the heir then in possession in *bona fides*; *Carmichael*, 19 June 1866, 4 Macph. 842.] See *Stair*, B. iv. tit. 1, §§ 44, 50; *Ersk.* B. iv. tit. 3, § 3; *Bank.* B. iv. tit. 36, § 16; *Bell's Com.* ii. 259; [*Shand's Prac.* i. 314; ii. 652; *Mackay's Prac.* i. 589; *Shaw's Digest*, voce *Res Judicata*. See *Decree. Res Judicata. Res Noviter Veniens*.]

COMPETITION. A competition, generally speaking, takes place wherever two or more persons are claimants for the same right, or on the same fund; but in the technical language of the Scotch law, the term is most frequently applied to those contests which arise on bankruptcy between creditors, claiming in virtue of their respective securities or diligences. In all competitions of real rights or of real diligences, the preference depends in general upon priority of registration; and, in personal rights, the general rule is, that priority of diligence, not of obligation, determines the preference. But these general rules have been considerably modified by the various bankrupt statutes, one object of which has been to equalise diligences used or securities granted, within a certain period of bankruptcy. The rules according to which the preference of rights and diligences is determined will be explained in the separate articles in which those rights and diligences are treated of. The chief processes of competition—that is, those processes in which the competing rights or claims are usually determined—are the processes of multiplepointing,

ranking and sale, and mercantile sequestration under the bankrupt statute.

COMPETITION OF BRIEVES. See *Service of an Heir*.

COMPLAINT. See *Petition and Complaint*. [*Summary Prosecutions*.]

[COMPLETION OF TITLE. See *Infeftment. Conveyancing. Confirmation*.]

COMPOSITION BY A BANKRUPT.

The creditors of an insolvent person are said to accept of a composition, when they agree to give him a discharge in full, on his paying them a part, instead of the whole, of the debt he owes them. Extrajudicial agreements of this kind may be entered into either with a single creditor, or with the whole creditors. In the former case, the agreement will be valid, whatever may be the consideration agreed upon between the creditor and the debtor. Where the agreement is entered into with the whole creditors, it is a mutual contract proceeding on two implied conditions,—the one that all the creditors are dealt with equally; the other, that all shall concur, and that no one shall be bound unless all are bound. The proper evidence of an agreement of this kind is a regular deed on stamped paper, although less formal evidence, particularly where followed by payments, or *rei interventus*, may bind the parties. It would seem, indeed, that such contracts are within the privileges conceded to writings *in re mercatoria*, and do not require to be either holograph or tested. In extrajudicial arrangements for settling by composition, no creditor can be required to accept the composition offered unless he pleases. [Such private composition-contracts between debtor and creditors are considered more fully in the article *Insolvency*. See also *Bell's Com.* ii. 398; *Goudy on Bankruptcy*, 480; *Murdoch on Bankruptcy*, 13.

[In sequestrations, a statutory composition-contract is authorised by the Bankruptcy Act; by which, if an offer, made by the bankrupt or his representatives, of composition on the whole debts, with security for payment of the same, be accepted by a certain proportion of the creditors, and appear reasonable to the court, the bankrupt may be discharged, except as to payment of the composition; 19 & 20 Vict. c. 79, §§ 137–143. See this fully, under *Sequestration*; also *Bell's Com.* ii. 348; *Bell's Princ.* § 2347; *Goudy*, 383; *Murdoch*, 36, 326.]

COMPOSITION TO A SUPERIOR; is the name given to the entry-money paid to the superior by a singular successor.

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[Though not strictly a feudal casualty, composition is commonly understood and spoken of as such, and is included in the definition of casualties in the Conveyancing Act, 1874 (§ 3). It is also held to be included in an obligation to relieve of casualties; *Stirling*, 4 Sept. 1844, 3 Bell's App. 128; *Edinr. Gas Light Co.* 5 July 1843, 5 D. 1325.] The amount of this composition is sometimes fixed, or taxed, as it is termed, in the original charter; but where that is not the case, the superior is legally entitled to demand a year's rent of the subject. The superior's right to this exaction is founded on the acts 1469, c. 37, 1669, c. 18, and 1681, c. 17, by which superiors are bound to enter appraisers, adjudgers, and purchasers at judicial sales, on payment of a year's rent. There was formerly no direct mode of compelling a superior to enter a voluntary purchaser; but as this might always have been accomplished indirectly, under those statutes, by means of adjudication on a trust-bond or bill, the practice prevailed of entering purchasers by private consent, for the same composition which was legally exigible from adjudgers; and the statute 20 Geo. II. c. 50, by providing that heirs or purchasers may force an entry from the superior upon payment to him of such fees or casualties "as he is by law entitled to receive upon the entry of such heir or purchaser," is held to have placed purchasers and adjudgers in the same situation with respect to entry-money. [As to whether composition is a *debitum fundi*, see *Morrison's Trs.* 16 May 1878, 5 R. 800. It is clearly so when taxed by the feu-contract; *Stewart*, 10 Dec. 1880, 8 R. 270.] By the present practice, in settling the composition for a singular successor, the following rules seem to be fixed:—(1) In the case of a land estate, the superior is entitled to a year's rent, as the lands are let to tenants, under deduction of feu-duties, public burdens, and annual burdens imposed with the superior's consent. [Teinds are among the burdens to be deducted; and these, whether valued or not, are reckoned as one-fifth of the rent; *Thomson*, 24 Nov. 1825, 4 S. 224.] (2) In the case of houses built in a village on ground feued, the same rule applies, with the additional deduction of a reasonable sum for repairs of houses, or other perishable subjects; *Aitchison*, 1775, M. 15,060; *Hailes*, ii. 612. (3) Where the vassal has granted a subfeu, at a fair feu-duty, and not for an elusory payment, or with the view merely

of defeating the superior's right, the purchaser or adjudger of the vassal's right is entitled to an entry on payment of one year's subfeu-duty; *Cockburn Ross*, [24 July 1820, 6 Pat. 640, Ross's L. C. ii. 193. Where the subfeu is granted for a price as well as a feu-duty, the superior is entitled to the interest of the price, as well as the subfeu-duty; *Campbell*, 28 June 1832, 10 S. 734.] In strict law, the composition by an adjudger is due to the full extent, without regard to the amount of the debt on which the diligence is led; but, *ex æquitate*, it is frequently modified below its true value; *Baird*, 1633, M. 15,054; and where the adjudger is excluded by a liferenter, he is not bound to pay the composition while the liferent subsists. If the right adjudged be a bare superiority, a year's feu-duty is all to which the superior is entitled as composition, because the feu-duty is the only rent to which the adjudger acquires right by his diligence; *Monkton*, 1634, M. 15,020. Where several adjudgers charge the superior to enter them, he is not entitled to more than one year's rent for the whole, for all of their rights make but one right to the land adjudged. In lands holden by the Crown, the composition payable by an adjudger is regulated, not according to the rent of the lands, but by a percentage on the amount of the principal sum adjudged for; *Ersk.* B. ii. tit. 12, § 24. Where the subject adjudged is an annualrent holden base of the debtor, he is bound to receive the adjudger *gratis*. In like manner, magistrates of royal burghs, being merely the Crown's officers, are bound to enter adjudgers, and even voluntary purchasers, without exacting any composition; *Bank.* B. ii. tit. 4, § 32.

[The entry with the superior which is now implied in the case of every registered conveyance, does not affect the superior's right to casualties due at the date of entry, but it does not entitle a superior to demand any casualty sooner than he could, by the former law, or by the conditions of the feu-right, have required the vassal to enter, or to pay such casualty irrespective of his entering; 37 & 38 Vict. c. 94, § 4 (3). See *Mounsey*, 20 Nov. 1884, 12 R. 236; where the opinion was expressed that where a series of implied entries have been taken during the life of the vassal who last paid a casualty, on the death of the latter the superior's right to another casualty emerges against the vassal last impliedly entered, but that he has no claim against any intermediate vassal in respect

[of his implied entry. See *Journ. of Jurisp.* xxix. 177; *Scot. Law Review*, iii. 69, 89; also *M. Huntly*, 5 Dec. 1885, 14 R. 1091; *E. Home*, 9 Dec. 1887, 15 R. 193. Where a disposition contains the usual clause of relief, the seller is bound to relieve the purchaser of any casualty which the superior was entitled to demand prior to the purchaser's entering into possession; *Straiton Estate Co.* 16 Dec. 1880, 8 R. 299.

[Prior to 1874, a superior was not bound to receive a corporation, or a body of trustees, as his vassal; *Hill*, 17 Jan. 1815, F.C. Such cases were generally arranged by fixing a certain period on the lapse of which, or a certain individual on whose death, another casualty should be payable. The act of 1874 does not interfere with any such arrangement. But unless it be otherwise stipulated, all corporations acquiring lands are to pay, at the date at which the first composition would have been payable if the act had not been passed, and every twenty-fifth year thereafter, a sum equal to what, but for the act, would have been payable on entry by a singular successor; and where a composition, payable on the death of the vassal, becomes exigible from any trustee or body of trustees, another composition is to be payable at the end of every twenty-five years, so long as the lands shall be vested in such trustee or trustees. Where, by the terms of the feu-right, a taxed composition is payable on each sale or transfer of the property, as well as on the death of each vassal, and a composition in consequence of the acquisition of the property becomes exigible from a corporation or body of trustees, another composition is to be payable at the end of every fifteen years from the date of the acquisition, so long as the lands are vested in the corporation or trustees. If the corporation or trustees cease to be proprietors after having paid a composition, their successor infert in the lands at the time when, but for the change of ownership, another composition would have been payable by such corporation or trustees, is then to pay a composition, and the casualties are to fall due thereafter at the same time and in the same manner as if the lands had never been vested in such corporation or trustees. Where a taxed composition is due on each sale or transfer of the property, as well as on the death of the vassal, and where an entry is implied, in terms of the act, in favour of two or more parties having separate interests, as liferenter and fiar respectively, or as suc-

[cessive liferenters, a composition, or, in the case of parties interested *pro indiviso*, a rateable share of a composition, is to be exigible from each of such parties in the order in which they severally take benefit under such entry; 37 & 38 Vict. c. 94, § 5.

[Before 1874, when a vassal died, having granted a disposition *a me vel de me*, the disponent, instead of entering himself, might offer the heir of the deceased vassal for entry with the superior; and if the heir consented to enter, the superior was bound to receive him, on payment of the relief; by which feudal device the disponent was saved from paying the composition of a year's rent. See *Piggot*, 9 Dec. 1829, 8 S. 213; *Hyslop*, 13 May 1863, 1 Macph. 535. But under the recent act, this is no longer possible, if the disponent has taken infertment; because the constructive entry implied thereby has the same effect as a charter or writ of confirmation would have had under the former law, and therefore extinguishes the mid-superiority, while it reserves the superior's right to the composition which he would have been entitled to demand, had he actually granted a confirmation. See *Ferrier's Trs.* 26 May 1877, 4 R. 738; *Rossmore's Trs.* 23 Nov. 1877, 5 R. 201; *Lamont*, 27 Feb. 1880, 7 R. (H.L.) 10; *Stuart*, 18 July 1889. But where the disponent has only a personal right, and, in place of making up a feudal title, tenders the heir as vassal, the superior is bound to enter the heir on payment of relief; *D. Hamilton*, 6 July 1883, 10 R. 1117 and 1122. And where the disponent is heir of the last-entered vassal, he is liable, though infert, in relief duty only; *Mackintosh*, 5 March 1886, 13 R. 692. Where, by any *mortis causa* writing, heritable estate is conveyed to trustees for behoof of, or with directions to convey the same to, the heir of the testator, forthwith or after any time not exceeding twenty-five years, or where by virtue of such *mortis causa* writing the heir of the testator has the ultimate beneficial interest in the estate, the trustees, on entering with the superior, are not liable to any other casualty than would have been payable by the heir if he had succeeded directly; and the heir, on entering thereafter with the superior, is not liable for any further casualty; but another casualty becomes exigible on the heir's death, whether he was entered or not; 50 & 51 Vict. c. 69, § 1. See also *Confirmation. Non-Entry.*]

The superior is bound to enter an heir of entail, who is likewise heir of the former investiture, for a mere *duplicando* of the

feu-duty; and he is also bound to enter the institute, when not heir of line, on payment of the usual composition due by a singular successor; but it is not held to be settled whether, when the heirs of entail are not also the heirs of the former investiture, the superior is entitled to a year's rent. In two cases in which superiors insisted on having a clause inserted, declaring their right to a composition of a year's rent whenever the heir of entail was not also heir of line to the last vassal, the court held that the superior is not entitled to insert such a clause, but that he may insert a reservation of his right to make the claim when the separation takes place; *M'Kenzie*, 1777, M. 15,053, App. Sup. and Vas. No. 2; *D. Argyll*, 1795, M. 15,068. [But on payment of a single composition by a singular successor, the superior is bound to grant a charter in favour of whatever series of heirs the new vassal may choose to name; all of whom, though strangers in blood, will on entering be liable in payment of relief only. See *Lockhart*, 1760, M. 15,047; *D. Hamilton*, 22 Nov. 1827, 6 S. 94; *Stirling*, 4 Sept. 1844, 3 Bell's App. 128; *Swinton*, 14 Nov. 1854, 17 D. 21; *M. Hastings*, 27 May 1859, 21 D. 871. See *Ross's L. C.* ii. 329. Where a charter with a clause taxing the composition is conceived in favour of the grantee "and his heirs and assignees," only assignees *before infeftment* are included under that expression; so that, if the vassal be once infeft, an assignee deriving right from him gets no benefit of the taxation, unless the contrary is indicated by the tenor of the deed; *Mags. of Inverness*, 1769, M. 15,059; *Hamilton*, 16 July 1853, 15 D. 925; *Mags. of Inverkeithing*, 30 Oct. 1874, 2 R. 48. By the Conveyancing Act, 1874, § 23, no composition or other casualty is due by law, irrespective of express stipulation, in any feu granted after the date of the act; and it is made unlawful to stipulate for a casualty to be paid on the acquisition of a singular successor, or in any way except at fixed intervals. For the provisions of the act regarding redemption and commutation of casualties, and for the means of enforcing payment thereof, see *Casualties*.] See *Stair*, B. ii. tit. 3, § 41; B. ii. tit. 4, § 32; *Ersk.* B. ii. tit. 7, § 7; tit. 12, § 24; *Bank.* B. ii. tit. 4, § 11; B. iii. tit. 10, § 15; *Bell's Com.* i. 22; *Bell's Princ.* § 715; [*Menzies' Conv.* 525, 815; *M. Bell's Conv.* i. 624; ii. 1142; *Craigie's Digest* (Herit.), 4.]

COMPOUND INTEREST. See *Interest*.

COMPOUNDING FELONY; in English law, is where a party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. It is a misdemeanour punished with fine and imprisonment. *Tomlins' Dict. h. t.* See *Theft-Bote*.

COMPRISING, or APPRISING; was the ancient form of diligence used for attaching land for debt. See *Adjudication*.

COMPROMISE; [an adjustment of disputed claims by mutual concession. See *Transaction*.]

COMPULSION. Acts done or rights granted on compulsion, or under the influence of force and fear, such as would shake a man of ordinary firmness and resolution, are reducible; *Ersk.* B. iv. tit. 1, § 26; *Bell's Princ.* § 12. See *Force and Fear*. In like manner, in the case of crimes perpetrated under constraint, where *vis major* and imminent personal danger are distinctly proved; as for example, where a person has been found in arms against government during a rebellion,—or acting with a mob, or with pirates,—or even engaged in some minor outrage,—where the continued influence of superior force can be proved, it will be a sufficient defence against the criminal charge. *Hume*, i. 50:

COMPURGATOR; one who bears testimony to the credibility of another. Of old, a man's credit, in courts of law, depended on the opinion which his neighbours had of his veracity; and a party swearing was accompanied with a certain number of his neighbours to attest his credibility. *Tomlins, h. t.*

COMPUTATION OF TIME. The question whether or not a particular period of time has legally expired, may have very important effects on the rights of parties; and it is therefore of importance to attend to the rules by which time is computed. Where time is computed by years, as in the prescriptions, the years will be reckoned from the nominal day in one year to the same nominal day in the following year. Thus, if a debt be payable on the 15th May 1800, the 15th May 1840 will be the last day of the long prescription, and an interruption on that day will be effectual. Where a right is made to depend upon the expiration of a single year, a day is generally added *in majorem evidentiam*; hence the expression "*year and day*;" and the running of any part of the additional day completes the period. In this case, the brocard, *Dies inceptus pro completo habetur*, is applicable. Thus, a marriage contracted

on the 23d November 1677 was held to have subsisted year and day, to the effect of giving the husband right to the tocher, when the wife died on the morning of the 24th November 1678; *Waddel*, 1680, M. 3465. In reckoning the year and day for the *pari passu* ranking of adjudications, if the first adjudication were dated 1st January 1800, an adjudication dated 2d January 1801 would have the benefit of the *pari passu* ranking; *Bangour*, 1681, M. 3467. In computing by days, the days are reckoned from midnight to midnight. Thus, where an imprisoned debtor applies for liberation under the act of grace, the ten days will not be held to have expired until twelve o'clock, p.m., of the tenth day; *Blair*, 1704, M. 3468; *Hood*, 14 Dec. 1813, F.C.; [*Thomson*, 23 Jan. 1878, 5 R. 561.] Where the granter of a deed challenged under the law of deathbed lived for fifty-nine days and three hours, computed *de momento in momentum*, after executing the deed, it was held to be reducible; *Ogilvie*, [1796, 3 Pat. 434.] But if, exclusive of the day of executing the deed, the granter lived until the morning of the sixtieth day after, the maxim, *Dies inceptus pro completo habetur*, applied; *Mitchell*, 1801, M. App. Deathbed, No. 4. On the same principle, the sixty days before bankruptcy, under 1696, § 5, and the sequestration statutes, are reckoned backwards, exclusive of the day of the bankruptcy, the first of the sixty days commencing from the midnight preceding the bankruptcy, and being held as concluded the moment the sixtieth day begins; *Blaikie*, 21 Jan. 1809, F.C.; *Anderson*, 2 March 1813, F.C. In citations, and in computing the *induciae* of diligence, the action cannot be called, nor a horning denounced, until after the midnight of the last day of the citation or charge. In computing the sixty days within which an instrument of sasine had to be recorded, the day of taking the infetment, as being the *terminus a quo*, was not counted, and registration at any time on the sixtieth day after that was effectual; *Bell's Com.* ii. 167; *More's Notes to Stair*, cclvii., ccxv. [As to computing number of days for notices of motions, &c., in jury trial procedure, see A.S. 16 Feb. 1841, § 44. See *Jury Trial*. For rules in reckoning days under the Bills of Exchange Act, 1882, see §§ 14, 92 (*supra*, pp. 110, 121). "Month" means a calendar, not a lunar month, if there is nothing in the context of the statute, contract, or will, to indicate the contrary; 13 & 14 Vict. c. 21, § 4; *Ashley*, 20 June

[1873, 11 Macph. 708; *Campbell's Trs.* 20 Oct. 1880, 8 R. 21; *Farquharson*, 3 Feb. 1886, 13 R. (J.C.) 29. See *Stair*, B. i. tit. 17, § 18; *More's Notes*, cclvii.; *Ersk.* B. ii. tit. 6, § 46; B. iii. tit. 8, § 96; B. iv. tit. i. § 41; *Bell's Com.* i. 84, ii. 167-8; *Bell's Princ.* § 46 (note by Mr Guthrie); *Hunter's Landlord and Tenant*, ii. 50.]

CONCEALING CRIMES. The protection of a criminal *after* the commission of a crime, by concealing him from justice, knowing his guilt, is a distinct offence, which may be punished arbitrarily. Where, however, the protection is given in consequence of an agreement entered into *before* the commission of the crime, such concealment will found a charge against the concealer of art and part in the principal crime; *Ersk.* B. iv. tit. 4, § 12. See *Accessory. Accomplice.* [*Art and Part.*]

CONCEALMENT OF PREGNANCY.

By 1690, c. 21, concealment of pregnancy authorised conviction for the murder of the child, if it was amissing or found dead. But by 49 Geo. III. c. 14, if a woman "shall conceal her being with child during the whole period of her pregnancy, and shall not call for or make use of help or assistance in the birth; and if the child shall be found dead or be amissing, she shall be imprisoned for a period not exceeding two years." By the latter statute, the concealment is not held to be a presumption of the murder, but to be itself a crime. The concealment must continue down to the death of the child; for the mother's keeping and acknowledging the child, for however short a time, will render the statute inapplicable. Premature labour, shown to be the cause of the child's death, is a sufficient defence; but the burden of proving it lies upon the panel. [Disclosure to the putative father is a sufficient defence; *Gall*, 24 Jan. 1856, 2 Irv. 366. From the nature of the offence, there can be no accession, and no charge of art and part; *Punton*, 5 Nov. 1841, 2 Swin. 572.] The punishment usually awarded is from three to six, and, in aggravated cases, from nine to eighteen months' imprisonment. *Hume*, i. 291; *Alison's Princ.* 153; [*Macdonald*, 147.] See *Child-Murder*.

CONCOURSE OF ACTIONS. By the Roman law, different actions were competent on the same ground of right; but by the law of Scotland there is no civil action in which the pursuer has this privilege; for although, in some actions partly of a penal nature, the pursuer may insist either for the actual damage, or for violent

profits, yet, if he once make his election, and claim simple restitution only, he cannot afterwards sue for violent profits. But our law admits a concurrence of actions, in the special case of facts which may be prosecuted either civilly or criminally; for a prosecution to satisfy public justice is entirely different, both in its nature and object, from a mere prosecution *ad civilem effectum*; and even although, in the criminal prosecution, the accused may have been acquitted, yet it is still competent for the private party to institute a civil action against him, founding on the same facts, which, in a civil process, where a debt or damages only are sought, may be referred to the defender's oath; a mode of proof inadmissible in a criminal prosecution. *Stair*, B. iv. tit. 48, § 9; *Ersk.* B. iv. tit. 1, § 64.

CONCOURSE OF THE LORD ADVOCATE. Although a private party who has a proper interest may institute a criminal prosecution at his own instance, concluding for the ordinary pains of law against the accused person; yet by ancient and invariable style, such prosecution at the instance of a private party must be raised with concurrence of the Lord Advocate. This concurrence is necessary to every libel in the Court of Justiciary, whether the full pains of law, or pecuniary reparation only be concluded for. In the ordinary civil action of reduction-improbation, which, *fictione juris*, is laid upon criminal grounds, but which is pursued *ad civilem effectum* only, the Lord Advocate's concurrence [was formerly requisite; but this necessity was removed by 31 & 32 Vict. c. 100, § 17. It is still required, however, in reductions of letters-patent, under 15 & 16 Vict. c. 83, § 43.] In mutual libels at the instance of the private parties founded on the same facts, the Lord Advocate must give his concurrence to the action of each party. [The discretion of the Lord Advocate in granting or withholding his concurrence is presumed to have been rightly exercised, and unless special grounds be shown to the contrary, the absence of his concurrence is fatal; but the High Court of Justiciary possesses power to give a remedy, should a case proper for their interposition be presented, either by requiring the Lord Advocate to concur, or by granting permission to prosecute without his concurrence; *Mackintosh*, 4 Nov. 1872, 2 Coup. 236, 367; *Robertson*, 28 Oct. 1887, 15 R. (J.C.) 1. See *Ersk.* B. iv. tit. 4, § 2; *Hume*, ii. 119, 126; *Alison's Prac.*, 112; *Macdonald*, 277.] See *Criminal Prosecution*. [*Advocate, Lord.*]

CONCOURSE OF PROCURATOR-FISCAL. See *Procurator-Fiscal*.

CONCURSUS DEBITI ET CREDITI.

See *Compensation*.

CONDESCENDENCE; [an articulate statement annexed to a summons, setting forth in substantive propositions the allegations in fact, which form the grounds of action. See 6 Geo. IV. c. 120, § 8; 13 & 14 Vict. c. 36, § 1. The condescendence should be as concise as possible, and contain no argumentative matter. See *MacKay's Prac.* i. 389. See *Record. Pleas in Law.*] *Multiplepoinding*.

CONDICTIO INDEBITI; was an action in the Roman law for repetition of money paid to a person, under the belief that there was a debt due to him, when there was in reality no debt due. By the law of Scotland, action is also given for recalling a payment madethrough mistake or ignorance. Writers on the civil law, founding on the maxim, "*Ignorantia juris neminem excusat*," have made it a question whether a sum paid through a mistake in law is recoverable by this action; but the Court of Session, on the ground that this is an equitable relief, has held that a mistake, whether in law or in fact, is a sufficient reason for recalling a payment; *Carriek*, 1778, M. 2931; *Bank.* B. i. tit. 8, § 23. [But see *Error*, and cases there cited.] Payment made under a natural obligation, though the law would not have enforced it, cannot be recalled. [Nor can payment which is made in the knowledge that it is not due; for such payment imports a waiver of all objections, and an admission that the debt is justly due; *Ersk.* B. iii. tit. 3, § 54; *Dalmellington Iron Co.* 26 Feb. 1889, 16 R. 535.] A payment made in consequence of a compromise, and in order to put an end to a law-suit, cannot be recalled, though it may afterwards turn out that the claim so compromised was unfounded; *Oliver*, 1798, noted in *Ersk. ib.* [See *Transaction*.] A creditor who had obtained a preference in a ranking, to which he was not entitled, was found liable to repetition, although he had got no more than payment of his debt; *Keith*, 1792, M. 2933. See *Stair*, B. i. tit. 7, § 9; *More's Notes*, xlix.; [*Ersk.* B. iii. tit. 3, § 54;] *Bell's Princ.* § 531; *Kames' Equity* (1825), 200; [*Journ. of Jurisp.* xxiv. 113.]

CONDICTIO causa data, causa non secuta; was a Roman law action, by which things given with the view to a certain event might be reclaimed if that event did not take place. The example of this com-

monly given, is that of presents made in contemplation of a marriage which did not take place. But if the expected event had been prevented by a cause not imputable to the receiver, no action lay, unless he unduly delayed, when he might have performed. *Stair*, B. i. tit. 7, § 7; *Ersk.* B. iii. tit. 1, § 10; *Kames' Equity* (1825), 131.

CONDITIO SI SINE LIBERIS DECESSERIT. By the Roman law, if one made a donation of all, or the greater part of his estate, when he had no children, and came afterwards to have children, the gift became void, upon the presumption that, if the donor had anticipated having children of his own, he would not have made it. There is no example of this implied condition in our law, where the donation was *inter vivos*, and perfected by delivery; but in testamentary settlements, or donations *mortis causa*, the doctrine is recognised with us, if the testator leaves a child, of whose existence *in utero* he is not presumed to have known. But if the children have been actually born during the testator's life, and if, notwithstanding, he allows the settlement to remain for a reasonable time unrevoked, it would rather seem that it cannot be set aside, especially if it was not of the whole, or the greater part of his estate, and provided it does not prejudice the child's legal or conventional provisions. The principle on which this doctrine rests has been applied in heritable as well as moveable succession, and has been extended to the case where a testator makes a provision for, or a destination in favour of his child or children, whom failing, to a stranger. In such a case, where the immediate children of the testator have predeceased him, but leaving children, the grandchildren will exclude the stranger substitute. But as this rule of construction rests on a legal presumption, that presumption may be elided by contrary evidence, or by opposite presumptions, founded on the circumstances of the particular case. [The *conditio si sine* has been extended not only to all descendants, however remote (*Grant*, 3 Nov. 1882, 10 R. 92), but to any collateral relatives, to whom the testator may stand *in loco parentis*; *Wallace*, 1807, M. App. Clause, No. 6; *Bogie's Trs.* 26 Jan. 1882, 9 R. 453. It does not, however, apply to cousins or more remote relatives, to whom the testator does not stand *in loco parentis*; *Rhind's Trs.* 5 Dec. 1866, 5 Macph. 104; *Bervick's Ecr.* 23 Jan. 1885, 12 R. 565. It does not apply to natural children; *Martin's Trs.* 24 Dec. 1864, 3 Macph. 326;

[nor to descendants called in the character of heirs whatsoever, or next-of-kin; *Cockburn's Trs.* 10 June 1864, 2 Macph. 1185. In the case of collaterals, if they are called, not collectively, but as individuals *nominatim*, there is held to be *delectus persone*, and the *conditio si sine liberis* is inapplicable; *Hamilton*, 8 Feb. 1838, 16 S. 478. The condition applies only to provisions, not to simple personal legacies, nor to special legacies of plate, pictures, or such like; *Douglas' Exrs.* 5 Feb. 1869, 7 Macph. 504; *M'Alpine*, 20 March 1883, 10 R. 837. See also *Blair's Exrs.* 18 Jan. 1876, 3 R. 362; *Findlay's Trs.* 15 July 1886, 14 R. 167; and other cases in the Digests.] See *Ersk.* B. iii. tit. 8, § 46; *Bank.* B. i. tit. 9, § 5; *Bell's Princ.* § 1776; [*M'Laren on Wills*, i. § 1285; *Menzies' Conv.* 462, 479, 499; *M. Bell's Conv.* ii. 903, 921, 989, 996.]

CONDITIONS IN FEUDAL GRANTS.

Where particular conditions or stipulations are inserted in feudal grants, with the view either of more effectually securing, or of modifying in some respect the rights of parties, it is an important inquiry, whether such stipulations are to be considered as mere personal obligations, binding upon the parties and their heirs, or as real qualifications or conditions of the grant, effectual against singular successors. ["To constitute a real burden or condition either in feudal or burgage rights, which is effectual against singular successors, words must be used in the conveyance, which clearly express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs alone, and those words must be inserted in the sasine which follows on the conveyance, and of consequence appear upon the record. In the next place, the burden or condition must not be contrary to law, or inconsistent with the nature of this species of property; it must not be useless or vexatious; it must not be contrary to public policy—for example, by tending to impede the commerce of land, or create a monopoly. The superior, or the party in whose favour it is conceived, must have an interest to enforce it. Lastly, if it consists in the payment of a sum of money, the amount of the sum must be distinctly specified. If these requisites concur, it is not essential that any *voces signate* or technical form of words should be employed. There is no need of a declaration that the obligation is real, that it is *debitum fundi*, that it shall be inserted in all the future infeftments, or that it shall attach to singu-

[lar successors. It is sufficient if the intention of the parties be clear, reference being had to the nature of the grant, which is often of great importance in ascertaining its import. Neither is it necessary that the obligation should be fenced with an irritant clause, and far less with irritant and resolute clauses. . . . If the condition is one usually attaching to the lands in a feudal or burgage holding, in particular if it has a *tractus futuri temporis*, or is of a continuous nature, which cannot be performed and so extinguished by an act of the disponent or his heir, words less clear and specific will suffice to create it than when the burden appears to be of a personal nature—for example, the payment of a sum of money once for all in terms of a family settlement;” per Lord Corehouse, in *Tailors of Aberdeen v. Coutts*, 3 Aug. 1840, 1 Rob. 296, Ross’s L. C. iii. 269. See also *Preston*, 1805, M. App. Pers. and Real, No. 2; *Campbell*, 4 March 1828, 6 S. 679; *Clark*, 8 Aug. 1854, 1 Macq. 668; *Croall*, 20 Dec. 1870, 9 Macph. 323; *Ewing*, 23 Nov. 1877, 5 R. 230; *Mags. of Edinr.* 20 Dec. 1883, 11 R. 352. In *E. Zetland*, 12 June 1882, 9 R. (H.L.) 40, a condition in the titles of feuars to the effect that it should not be lawful for them to sell or retail liquor, or to keep public-houses, on the ground feued, was sustained as a valid prohibition. The superior’s interest to enforce such a condition is presumed, and the *onus* is upon the vassal who seeks relief from the contract, to prove that, owing to change of circumstances, the superior’s interest has ceased to exist; per Lord Watson, in *E. Zetland*, *supra*. As compared with a real burden in the strict sense, relating to the payment of a specific sum of money, an inherent condition of a grant of lands has the advantage of being enforceable by a personal action against the proprietor for the time, whereas a real burden cannot be enforced by personal action. But on the other hand, a properly constituted real burden gives an absolute preference to the creditor named, which is not conferred by an inherent condition; per Lord Deas, in *M. Tweeddale’s Trs.* 25 Feb. 1880, 7 R. 620. See also *Blackwood*, 6 Dec. 1882, 10 R. 6; *Marshall’s Tr.* 19 June 1888, 15 R. 762. All conditions inferring a monopoly in favour of a superior’s agent in preparing or recording a conveyance are now null and void; 37 & 38 Vict. c. 94, § 22. Lands may be validly affected by real burdens or other conditions, by reference to a recorded deed in which such conditions are set forth at length; see 31

[& 32 Vict. c. 101, §§ 10, 146; 37 & 38 Vict. c. 94, § 32. See *Stair*, B. ii. tit. 3, § 54; B. iv. tit. 35, § 24; *Bank. B.* ii. tit. 5, § 25; *Ersk. B.* ii. tit. 3, § 13; *Bell’s Com.* i. 25;] *Bell’s Princ.* § 861; *Ross’s Lect.* ii. 304, 362; [*Duff’s Feud. Conv.* i. 194; *Menzies’ Conv.* 601; *M. Bell’s Conv.* i. 613. As to building restrictions, see *Rankine on Land-Ownership*, 385.] See *Burdens. Clause of Pre-emption. Clause de non Alienando.*

CONDITIONAL INSTITUTE. Under destinations of heritage, those who are entitled to take up the succession as the immediate disponees of the granter, are called *institutes*, in contradistinction to the substitutes, who succeed as heirs to such persons. Frequently, however, the institution of a particular person is, by the terms of the deed, made contingent upon certain events. Thus, a person may be instituted conditionally, upon the failure of others prior to the period when the destination will take effect. [“One substituted in such terms that his right fails, if the institute survive the granter, is called a *conditional institute*, *i.e.*, one whose right depends upon the condition, that the first grantee shall predecease the granter. Proper *substitutes* are those whose right does not fly off upon the succession of the institute, but continues, so that they may take the provision when the institute, after enjoying the right, shall die;” *Menzies’ Conv.* 459. See farther, as to this distinction, *voce Substitution.*]

CONDITIONAL OBLIGATION. A conditional obligation is an obligation depending on the existence of a condition. Such an obligation has no force until the condition exist, or be purified, as it is termed, because it is in that event only that the party declares his intention to be bound; hence the condition of an uncertain event suspends not only the execution of the obligation but the obligation itself. An obligation of this kind is held to be “an obligation in hope till the condition be existent;” *Stair*, B. i. tit. 3, § 7; but the granter is so far bound that he cannot revoke the hope he has given. Creditors may attach conditional debts; and if the obligation does not depend on the life of the particular individual, it is transmitted to heirs, in case the creditor should die before the existence of the condition. All obligations depending on uncertain events are properly conditional; thus, an obligation depending on the arrival of a day which may possibly never arrive is conditional; hence a provision payable to a child on his

arrival at a particular age falls if the child die before reaching that age; and the same rule is also extended to legacies, although a contrary doctrine at one time prevailed; *Ersk. B. iii. tit. 1, §§ 6, 7* (note). Conditions adjoined to obligations are divided into *possible* and *impossible*; the former are such as may naturally and legally happen; the latter such as either naturally or legally cannot come to pass, for what is contrary to the law, or *contra bonos mores*, is held to be legally impossible. Possible conditions are distinguished into *potential* or *potestative*, *i.e.*, such as are within the power of the party burdened with them; and *casual*, being such as depend upon an uncertain event over which the party has no control. Contracts are null, if illegal or impossible conditions are annexed, it being presumed that the parties are not serious. But such conditions adjoined to legacies are simply held *pro non scriptis*, and the legacy remains pure; for *nemo præsuntur ludere in extremis*, and the testator is presumed to have seriously intended to give the legacy. The same rule holds in bonds of provision by parents to children in implement of the natural obligation; illegal or irrational conditions annexed to them being held *pro non adjectis*; *Bank. B. i. tit. 4, § 17*. It was formerly held that this rule was also applicable to unfavourable conditions, such, for example, as a condition that the grantee should not intermarry with a particular person, or without the consent of certain individuals; but the rule at present established seems to be different; for although these and such like conditions are not strictly enforced, if unreasonably insisted on, yet they are to a certain extent held to be effectual. Thus, if consent to a suitable marriage is unreasonably withheld by the parties whose consent is made a condition, the provision will be effectual even although the marriage is contracted without the consent, and this whether the provision comes from a father or from a stranger; *Ersk. B. iii. tit. 3, § 85*. And in general, all potestative conditions will be held as fulfilled if the grantee has done his utmost to fulfil them; thus, if the condition be that the grantee shall intermarry with a particular person named, the condition will be purified by the grantee's paying his addresses to that person, although he is rejected; provided he has not unduly delayed doing so, or made his addresses in such a manner as to ensure their being rejected; *Ersk. ib.* Conditions depending merely on accident must be purified before the obligation can

be enforced; but if the arrival of the condition has been prevented by the act of the debtor, or of any other person unduly interested in preventing its arrival, it will be held as purified, on the principle that no man can profit by his own wrong; *Ersk. ib.* [See *Paterson*, 18 March 1881, 8 R. 646.] Although an uncertainty annexed to an obligation renders it conditional, it is to be observed, that an uncertain day is not merely a day the arrival of which is uncertain, but the very existence of which is uncertain. Thus the day on which a person shall arrive at a particular age may never exist, but the day of his death must certainly arrive; the former, therefore, is an uncertain day, which creates a condition; the latter creates no condition; and an obligation to take effect on the day of a person's death is not in law a conditional obligation, although its operation is suspended until that event arrives. This distinction ought to be kept in view in applying the maxim, "*Dies incertus pro conditione habetur*." ["The contingency operates either in suspending the debt, or in dissolving it. . . . Under a *suspensive* condition, there is no debt till the event exists (*dies nec cedit nec venit*), and yet the engagement cannot be defeated otherwise than by failure of the condition. When the condition is fulfilled, the debt becomes perfect. If the condition be *resolutive*, the debt at once ceases on the event stipulated;"] *Bell's Princ. § 47*. A similar distinction (more commonly used by English writers) is that between conditions precedent and subsequent: "A condition *precedent* is one which delays the vesting of the right until the event happens; thus, if I give £100 to A if he shall act as my executor, A's right to the legacy is dependent on a condition precedent; because the performance of it must precede his receipt of the £100. A condition *subsequent* is where the event is to destroy or divest an existing right; thus, if I give an annuity of £100 to C so long as she shall remain my widow, this creates a condition subsequent, because the performance of it is subsequent to the vesting of the right;" *Sweet's Law Dict.*] See *Stair, B. i. tit. 3, § 7 et seq.*; *Ersk. B. iii. tit. 1, § 6*; [tit. 3, § 85;] *Bank. B. i. tit. 4, § 19*; *Bell's Com. i. 257*; *Bell's Princ. §§ 47, 109, 1883*; *Kames' Equity* (1825), 149; [*Pollock on Contract*, 384; *Anson on Contract*, 300.]

CONDONATION; forgiveness; usually applied, in Scotch law language, to the plea of *remissio injurice*, as a defence against an

action of divorce on the ground of adultery. See *Remissio*.

CONFARREATIO; the most sacred of the three solemn modes of contracting marriage among the Romans. It consisted, as the name imports, in the *pontifex maximus* and *flamen dialis* joining and contracting the man and woman, by making them eat of the same cake of salted bread; or, according to Ulpian, in the offering up of some pure wheaten bread, each of the parties eating a portion, and throwing a portion upon the victims sacrificed on the occasion. See *Marriage*.

CONFESSION; the acknowledgment or avowal of a fact. A confession or declaration of guilt made by a criminal in presence of a judge, is not admitted of itself as evidence against him; but it affords a presumption: and being proved to the jury on the trial by those present at the time when the confession was made, to have been truly the voluntary confession of the criminal, it will be held to be evidence, in terms of 1587, c. 91. The evidence required for establishing the fact of the acknowledgment having been made by the panel, is that of two concurring witnesses. But this declaration is not equivalent to a confession by the panel in presence of the jury, [which is conclusive evidence against him; 9 Geo. IV. c. 29, § 14;] nor ought it by itself to be received by the jury as a proof of the crime. It will necessarily affect their minds in weighing the evidence in the cause, but it ought to do no more; *Hume*, ii. 324; [*Bell's Notes*, 239; *Alison's Prac.* 578; *Macdonald*, 515.] A confession, before ecclesiastical courts, of adultery, or of any other offence which gives church scandal, being held as extrajudicial as to prosecutions on the same grounds before other courts, is no proof against the party either as to civil or criminal effects, even although it be followed by public church censure; *Bank. B. iv. tit. 32, § 20*. See *Stair*, B. iv. tit. 44, § 1; [*Ersk. B. iv. tit. 2, § 33*; *Dickson on Evidence*, i. §§ 286, 339, 343, 375; *Kirkpatrick's Digest*, §§ 46, 181; *Stephen's Digest (Evidence)*, art. 21.] See *Declaration*. [*Evidence. Criminal Prosecution*. As to acknowledgments of fact in ordinary civil actions, see *Admissions*.]

CONFIDENT PERSON. See *Conjunct or Confident*.

CONFIDENTIALITY. In order to insure perfect freedom of communication between a law-agent and his client, a bar is generally placed upon the production, in

modum probationis, of their communications. Neither can an action of damages be founded upon confidential letters by a law-agent to his client, nor upon statements made by a client to his agent, in reference to a depending or threatened process. But an agent must produce all writings which the party himself would have been bound to produce; and even letters between the client and another party, put into the hands of the agent as legal adviser. It has been decided that a former agent is bound to secrecy. [In some cases, it has been held that communications made without reference to any legal proceedings, pending or in contemplation, are not protected by confidentiality; *Bower*, 26 May 1810, F.C.; *Lady Bath's Ecers.* 12 Nov. 1811, F.C.; *Jarvis*, 5 June 1841, 3 D. 990. In England, however, no such qualification is recognised; *Greenough*, 1833, 1 My. & Kee, 98; and the more recent *dicta* in Scottish cases have been favourable to the English view; see *M'Cowan*, 14 Dec. 1852, 15 D. 229; *Munro*, 11 Dec. 1858, 21 D. 103.] An agent concealing that the debt for which he demands and attempts to enforce payment is already paid, is liable to repeat it. [A bankrupt's law-agent must answer all lawful questions as to the bankrupt's affairs; 19 & 20 Vict. c. 79, § 91; *A.B.* 4 June 1858, 20 D. 1058. An agent cannot waive the privilege of confidentiality; but, if the client waives it, the agent cannot refuse his testimony.] The client, by calling his own agent as a witness, waives the privilege of his agent's silence; [15 Vict. c. 27, § 1.] Factors, accountants, &c., are not included in the rule of silence. There are, however, other relations in which confidentiality is preserved. Thus, public officers are not entitled nor compellable to produce written communications made to them officially, relative to the character and conduct of a party applying for a public office, where the production is demanded in contemplation of an action of damages against the writer. An agent in a criminal trial has the same privilege in reference to anything he knows as agent. But professional men, as surgeons, physicians, &c., are not entitled to withhold anything, however confidential. [It is not settled whether confessions made by a criminal to a clergyman are privileged; see *Hume*, ii. 335, 350; *Alison's Prac.* 471, 537, 586; *Dickson*, ii. § 1684; *Macdonald*, 496; *M'Laughlin*, 17 Jan. 1863, 4 Irv. 273. As to report by medical adviser, see *M'Donald*, 22 Feb.

[1881, 8 R. 357. The Evidence Act of 1853 (16 Vict. c. 20), while making husband and wife admissible as witnesses for or against each other in civil actions, preserves the confidentiality of their mutual communications. But where the action involves the terms on which they lived, conversations or correspondence between them may be proved. And in bankruptcy, a wife may be examined in regard to communications made to her by her husband relating to his estate; 19 & 20 Vict. c. 79, § 90; *Sawers*, 17 Dec. 1858, 21 D. 153.] See *Ersk. B. iv. tit. 2, § 25*; *Bell's Princ. § 2254*; [*Dickson on Evidence*, ii. § 1658; *Kirkpatrick's Digest*, § 172; *Begg on Law Agents*, 312. See *Agent and Client. Evidence.*]

CONFIRMATION BY A SUPERIOR.

[Prior to the Conveyancing Act of 1874, the usual] form of disposition to a purchaser included the clauses of a charter *a me* as well as *de me*; and when the donee had taken infeftment on the indefinite precept of sasine, contained in a disposition with this double manner of holding, such infeftment not only constituted a valid *base* right in the person of the donee, from the date of the infeftment; but the superior might, by confirmation, render that infeftment equivalent to infeftment on a precept of sasine granted by himself, and thus render the right *public*. This was accomplished by a charter of confirmation from the superior; so called, because it ratified and confirmed the right granted to the purchaser, and the sasine following upon it. The charter of confirmation narrated and specially confirmed the whole conveyances and infeftments since the last public infeftment, and declared them to be as effectual as if they had been *verbatim* engrossed in the charter of confirmation, or as if it had been granted before taking the infeftment. The confirmation, [if no mid-impediment intervened,] operated *retro* to the date of the infeftment, and rendered it as effectual as if it had proceeded from the first on the superior's precept. [It had therefore the farther effect of evacuating the barren estate of mid-superiority, which still remained with the seller, after the purchaser's base infeftment had divested him of the *dominium utile*; *Fullarton*, 22 Nov. 1833, 12 S. 117. If the holding contained in the disposition was *a me* only, *i.e.*, if the obligation to infeft was limited to an *a me* holding,] a mere infeftment on the precept carried nothing until confirmed by the

superior; and, in the event of double rights to the same subject being granted by dispositions containing holdings *a me* only, the preference depended, not on the date of the registration of the sasine on the rights confirmed, but on the date of the confirmation; because, as such rights were imperfect without confirmation, the right first perfected was preferable; [*Rowand*, 14 July 1830, 4 W. & S. 177.]

A charter of confirmation was one of the most ordinary methods of completing a purchaser's title; at the same time, where the progress was intricate, unless particular attention was paid to the state of the titles, serious mistakes might be committed. Suppose, for example, that A, who stood publicly infeft in lands holden of the Crown, disposed to B, who took infeftment on A's precept, and then disposed to C by disposition containing procuratory and precept; and that C applied for a charter from the Crown, which was expedited in the following manner: Resignation was made on the procuratory in A's disposition to B, which remained still unexecuted, and B's base infeftment was confirmed. Upon feudal principles, that charter was void, because the confirmation of B's base infeftment rendered it public from the date of the sasine, and thereby totally divested A both of property and superiority, and consequently left nothing to be resigned on his procuratory. In such a case, the proper method of completing C's title by confirmation would have been to infeft C upon B's precept, and then to confirm the two dispositions and sasines. When the donee wished to confirm intermediate base rights, and to resign on the procuratory of his immediate author, so as to complete his own title by a charter of resignation from his superior, care had to be taken that the confirmation ended with the sasine in favour of the granter of the procuratory on which the resignation was intended to proceed; for, by confirming the donee's own sasine, his right became public, and his author's procuratory useless, as in the case supposed.

[Most of these difficulties have disappeared under modern enactments. The hardship arising to purchasers from the superior's arbitrary power of refusing to accept a singular successor as vassal, had already, by 20 Geo. II. c. 50, been remedied to the extent of enabling purchasers to obtain entry by resignation; but the Lands Transference Act of 1847 (10 & 11 Vict. c. 48, § 6) first empowered donees, on

[tendering all dues, to compel superiors to grant entry by confirmation. See 31 & 32 Vict. c. 101, §§ 97, 100. The Lands Transference Act also enacted (§ 7), that every charter of confirmation should be held to confirm the whole prior titles requiring to be confirmed in order to complete the vassal's investiture. See 31 & 32 Vict. c. 101, § 115. By 21 & 22 Vict. c. 76, § 7, a writ of confirmation, indorsed on the recorded conveyance or sasine, was made competent, instead of a separate charter. See 31 & 32 Vict. c. 101, § 98. Now, however, under the Conveyancing Act of 1874, charters and writs of confirmation are unnecessary and incompetent; and every proprietor infest is held to be duly entered with the superior, as at the date of registration of his infestment, to the same effect as if the superior had granted a writ of confirmation; 37 & 38 Vict. c. 94, § 4. As to the effect of this statutory confirmation on the rights of superior and vassal, as contrasted with the effect of confirmation prior to 1874, see Lord Curriehill's judgment in *Ferrier's Trs.* 26 May 1877, 4 R. 738. See also *Composition*. See *Stair*, B. ii. tit. 3, § 28; *More's Notes*, clxvii.; *Ross's Lect.* ii. 149; [*Ersk.* B. ii. tit. 7, § 13; *Bell's Princ.* § 806; *Duff's Feudal Conv.* 212; *Menzies' Conv.* 629; *M. Bell's Conv.* ii. 731. See *Conveyancing. Disposition. Resignation. Base Rights.*]

CONFIRMATION OF EXECUTOR;

is the form in which a title is conferred on the executor of a person deceased, to intromit with and administer the defunct's moveable effects, for behoof of the executor himself, or of those interested in the succession. There are, properly speaking, only two cases recognised in the law of Scotland, where the interposition of judicial authority is in this respect dispensed with, viz.—1st, With regard to those effects of which the next-of-kin, when not excluded by a preferable title, can obtain actual possession; and, 2d, With regard to those which the deceased has specially conveyed to another, either *per expressum*, or by reference to an inventory; an exception from the general rule introduced by 1690, c. 26. [See *Lyle*, 2 Dec. 1842, 5 D. 236. The act is construed to include special legacies, as well as special assignations.] It has also been said, that *legitim* and *jus relictæ* are exceptions, since both vest without confirmation; and that the same is the case, where the representative of the defunct gets from the defunct's debtor a bond of corroboration; but *legitim* and *jus*

relictæ do not vest *jure representationis*; and in the case of a bond of corroboration, confirmation is obviously rendered unnecessary by the substitution of a new obligation. Hence, the two above specified seem to be the only proper exceptions. [But savings banks, friendly societies, &c., may pay sums not exceeding £100 to nominees or representatives of deceased depositors or members, without confirmations; 46 & 47 Vict. c. 47.] A mere nomination as executor, or a mere decree-dative without a confirmation, vests no right, except a title to pursue. It is the confirmation which confers the right to recover and discharge. [See *Chalmers' Trs.* 12 May 1860, 22 D. 1060; *Bones*, 21 Dec. 1866, 5 Macph. 240.] As to the transmission of the right to confirm, it is enacted by 4 Geo. IV. c. 98, § 1, that in all cases of intestate succession, where the person who, at the death of the intestate, was his next-of-kin, dies before confirmation is expedite, the right of such next-of-kin shall transmit to his or her representatives, so that confirmation may be granted to such representatives in the same manner as it might have been granted to the deceased next-of-kin, immediately on the death of the intestate. [See *Frith*, 3 March 1837, 15 S. 729; *Cunningham*, 15 Jan. 1856, 18 D. 312. Where one is to confirm to a person who has died unconfirmed, a double confirmation is necessary; see *Bell's Princ.* § 1896.] In confirming executors, the commissary is bound to follow certain prescribed rules as to the order of preference, for which see *Executor*. As to the form of procedure:—Where the executor is an executor-nominate, he lodges with the clerk of court the deed containing his nomination, along with an inventory of the defunct's moveable estate. It was formerly necessary for him to find caution; but, by 4 Geo. IV. c. 98, § 2, this is dispensed with in the case of an executor-nominate; and an extract, containing the inventory and a copy of the deed, with the act of confirmation by the judge, completes his titles. This is called a confirmation of a testament-testamentary. [When the judge confers the office of executor on a person of his own nomination, that is the confirmation of a testament-dative; the procedure in which is regulated by 21 & 22 Vict. c. 56. By § 1 of that act, the former practice of raising edicts of executry was abolished (see *Edict of Confirmation*); and in place thereof, a person desirous of being decerned executor must present a petition to the commissary of the county wherein the

{deceased died domiciled, or, if he was a foreigner, or had no fixed domicile, to the commissary of Edinburgh; §§ 2, 3. The petition is to be intimated by the commissary clerk affixing a full copy thereof on the door, or some conspicuous place of the commissary court-house, and of the office of the commissary-clerk; and by the keeper of the record of edictal citations inserting in a book, kept for the purpose, the names and designations of the petitioner and the deceased, the place and date of his death, and the character in which the petitioner seeks to be decerned executor; these particulars to be published along with the weekly abstracts of petitions for service; § 4. Such intimation and publication must be certified on the petition by the commissary-clerk; and where a second petition for confirmation is presented with reference to the same personal estate, direct intimation must also be made to the first petitioner; § 5. The petition may be called in court on the expiration of nine days after such intimation and publication have been certified. An executor may then be decerned, on finding caution; and decree-dative may be extracted three days thereafter; § 6. By § 8, inventories and relative testamentary writings may be given up and recorded in, and confirmations may be granted and issued by, any commissary court to which application might be made for appointment of an executor-dative. Forms of confirmations, both of testament-testamentary and testament-dative, are provided by § 10. By 22 Vict. c. 30, persons paying on the faith of confirmations, probates, or letters of administration, under 21 & 22 Vict. c. 56, are to be indemnified and protected in so doing, notwithstanding any defect in their validity. By 39 & 40 Vict. c. 70, § 35, the commissary courts were abolished, and their powers and functions transferred to the sheriffs. The office of commissary-clerk was also abolished, except in the case of the commissary-clerk of Edinburgh (§§ 36-40). By 21 & 22 Vict. c. 56, § 9, the inventory of any person who died domiciled in Scotland may include personal estate in any part of the United Kingdom; provided that the commissary find by his interlocutor that the deceased died domiciled in Scotland; and by §§ 12, 13, Scotch confirmations, produced in the Probate Court of England or Ireland, along with a certified copy of the commissary's interlocutor finding that the deceased died domiciled in Scotland, may be sealed there, and have then the effect of probate or letters

[of administration granted by these courts. See *Orr Ewing's Trs.* 24 July 1885, 13 R. (H.L.) 1. In like manner, probate or letters of administration granted by the Court of Probate in England or Ireland, when produced in the commissary court and certified, have the effect of confirmation; § 14. See also A.S. 19 March 1859. By 39 & 40 Vict. c. 70, § 41, where it is desired to include in the personal estate of a domiciled Scotsman personal estate in England or Ireland, a special proof of domicile and interlocutor thereon are dispensed with. The fact of the Scotch domicile at death is set forth in the affidavit to the inventory, and that is sufficient warrant to the sheriff-clerk to insert in the confirmation, or to note thereon and sign a statement that the deceased died domiciled in Scotland. Additional confirmations may be sealed, though they contain no Scotch estate; and confirmations or additional confirmations with note of trust funds in England or Ireland may be sealed; §§ 42, 43 of same act. The commissary-clerk of Edinburgh is directed to publish annually a calendar of confirmations and inventories (§ 45).

[Special facilities have been provided for confirmation to estates under £300 in value by the acts 38 & 39 Vict. c. 41 (as to intestate estates), and 39 & 40 Vict. c. 24 (as to testate estates)—both as amended by 44 Vict. c. 12, § 34, which raised the limit from £150 to £300. Any person requiring confirmation to such small estate may apply to the sheriff (or commissary) clerk, who, if satisfied as to the identity and relationship of the applicant, and having no reason to believe that the estate exceeds £300, fills up an inventory, takes the oath of the applicant thereto, and on caution (where necessary) being found, expedes confirmation and delivers it to the applicant on payment of a fee in no case exceeding 15s. If the estate exceeds £100, a fixed duty of 30s. is payable on the inventory. If the estate is subsequently discovered to have exceeded £300, the stamp-duty for the true value must be paid, without deduction for previous payments.

[Where an application for confirmation has been made] by one of the nearest of kin, or by a creditor, any other equally near in kin, or any other creditor *in pari casu*, may be conjoined in the office on application. By the existing statutes regulating the duties on moveable succession, it is incumbent on every person who applies to be confirmed executor, whether testa-

mentary or dative, to give up on oath a full inventory of the deceased's moveable estate, so far as known to him; and the whole moveable estate of the deceased known at the time must now be confirmed. [See 48 Geo. III. c. 149, §§ 3, 38, 42.] But it is lawful to make an *eik* to such confirmation, also upon oath, of any part of the estate which may be afterwards discovered, special assignments under the act of 1690, c. 26, being excepted; as also in the case of confirmations by executors-creditors, the confirmation may be limited to the amount of the debt and sum confirmed, to which the creditor must make oath; every application for confirmation as executor-creditor being notified in the *Edinburgh Gazette*, at least once, immediately after such application shall be made; which must be proved by production of a copy of the *Gazette*, before the confirmation can be further proceeded in; 4 Geo. IV. c. 98, §§ 3, 4. See, on the subject of this article, *Stair*, B. iii. tit. 8, § 54; *More's Notes*, cccliv.; *Ersk.* B. iii. tit. 9, § 27; *Bank.* ii. 406; *Bell's Com.* i. 77; *Bell's Princ.* § 1888; [*Menzies' Conv.* 484; *M. Bell's Conv.* ii. 1119; *M'Laren on Wills*, ii. §§ 1667, 1687; *Dove Wilson's Sher. Court. Prac.* 542; *Currie on Confirmation of Executors*; *Jurid. Styles*, ii. 648.] See *Executor. Executor-Creditor. [Inventory.]*

CONFIRMATION; in English law, [a species of conveyance by which a voidable estate is made valid and unavoidable, or by which a particular estate is increased. Estates which are void cannot be confirmed, but only those which are avoidable. *Wharton, h. t.*]

CONFISCATION; is a forfeiture of lands or goods to the Crown, being part of the punishment of certain crimes. See *Stair*, B. iii. tit. 3, § 1; [*Macdonald's Crim. Law*, 131, 216, 225.] See *Escheat*.

CONFUSIO; is a kind of specification, and is used to express the mixture of liquids or fluids; *Ersk.* B. ii. tit. 1, § 17; see *Commixtion*. See following article.

CONFUSION; is one of the modes by which obligations may be extinguished. It takes effect where the debt and credit meet in the same person, either by succession or by singular titles; for, as one cannot be a creditor or a debtor to himself, the law holds the debt to be extinguished *confusione*, whenever a person stands in that predicament, whether he has succeeded as heir, or has acquired right by assignation. But, although this be the general rule, there are certain modifications and excep-

tions which must be kept in view in applying it. (1) Where a cautioner for a debt succeeds to that debt, or acquires right to it, his cautionary obligation is of course extinguished; but the principal obligation remains as effectual as ever. (2) Where a creditor in a moveable debt succeeds to the heritable estate of his debtor, the debt is not lost *confusione* by that succession; for, though the heir in heritage be liable, it is only *subsidiarie*, and therefore he may demand the debt from the executor, who is primarily liable in personal debts. (3) Where an executor acquires right to an heritable debt, the debt, in like manner, is not extinguished, but may be made effectual against the heir in heritage. (4) A debt affecting the ancestor's estate, acquired by an apparent heir after the death of the ancestor, is not extinguished *confusione* by being vested in the person of the apparent heir; for the heir, while unentered, does not represent the debtor, and consequently the debt and credit do not meet in the same person. Upon the same ground, a debt purchased by the debtor's heir, who is liable *præceptione hereditatis*, is not extinguished in the person of the heir; a *præceptio hereditatis* not being considered as conferring such an universal active title as renders the heir *eadem persona cum defuncto*. (5) The conveyance of a debt affecting an entailed estate, in favour of one of the heirs of entail and his heirs whomsoever, may not have the effect of extinguishing the debt *confusione*. The debt, indeed, is dormant during the life of the heir of entail to whom it was conveyed; but if the next heir of entail is not also heir of line to his predecessor, the debt will revive in the person of the heir whomsoever against the heir of entail; *Gordon*, 1757, M. 11,161; *Crawford*, 11 March 1809, F.C. A debt does not become extinguished *confusione*, when the succession to the fund or subject liable for it happens to be afterwards divided from the succession to the debt itself. See *Stair*, B. i. tit. 18, § 9; *Ersk.* B. iii. tit. 4, § 23; *Bank.* i. 496; *Bell's Princ.* § 580; [*M. Bell's Conv.* i. 350.]

CONGÉ D'ELIRE; is the name given to the king's licence or permission, sent to a dean and chapter, to proceed to the election of a bishop, when any bishopric becomes vacant. [The permission is accompanied by a letter missive from the king, containing the name of the person whom he would have them elect; and if the dean and chapter delay their election above

[twelve days, the nomination devolves to the king. See *Stephen's Com.* ii. 696;] *Tomlins' Dict.*

CONJOINING OF PROCESSES.

Where two or more processes in the Court of Session, relating to the same subject-matter, and in which the same parties are interested, are in dependence, and it appears expedient that they should be discussed together, the Lord Ordinary before whom they depend, on the motion of the parties, may pronounce an interlocutor conjoining the processes; after which they are proceeded in as one process. [Even where the parties to the two processes are not the same, if the issue raised is one and the same, the processes should be conjoined; *D. Buccleuch*, 30 Nov. 1876, 4 R. (H.L.) 14. But although the actions are between the same parties, and relate to the same subject-matter, if the issues raised are different, a motion for conjunction will be refused; *National Exchange Co.* 12 July 1861, 23 D. 1278.] The processes, at the time of being conjoined, must be both awake and in dependence before the same judge. Where, therefore, they have been originally brought before different Lords Ordinary, it is necessary that they should be remitted *ob contingentiam* to the leading process, and both in the roll, or at *avizandum*, together, before an interlocutor conjoining them can be produced. See *Contingency*. Where necessary, the court may disjoin conjoined processes. See *Ivory's Form of Process*, i. 161; ii. 52; *Beveridge*, ii. 509 *et seq.*; [*Shand's Prac.* 500; *Mackay's Prac.* i. 522.]

[**CONJUGAL RIGHTS ACT** (1861); 24 & 25 Vict. c. 86. See *Marriage. Desertion.*]

CONJUNCT RIGHTS; are rights taken to two or more persons jointly.

Conjunct Rights to Strangers.—Where a right is granted in favour of two persons, strangers to each other, "*in conjunct fee and liferent, and their heirs*," the two are equal fiars during their joint lives. On the death of either of them, the survivor has the liferent of the whole, and after the survivor's death, the fee divides equally between the heirs of both. Where the right is taken "*to two jointly and their heirs*," the conjunct fiars enjoy the subject equally during their lives; and on the death of either, his share descends to his own heir. Where the right is taken "*to two jointly and the longest liver, and their heirs*," the expression, "*their heirs*," is understood to mean the heirs of the longest

liver; and therefore, although the creditors of either of the conjunct fiars may attach their respective shares while both are alive, yet, upon the death of either, the survivor has the fee of the whole, exclusive of the heir of the predeceased, in so far as the predeceased's share is not exhausted by his debts. Where the right is taken "*to A and B jointly, and to the heirs of B*," B is the only fiar, and A's right resolves into a simple liferent. See *Stair*, B. ii. tit. 6, § 10; *Ersk.* B. iii. tit. 8, § 35; [*Bell's Princ.* § 1709; *M. Bell's Conv.* ii. 843; *Craigie's Digest* (Herit.) 71.]

Conjunct Rights to Husband and Wife.—

In questions between husband and wife, where the right is taken to them, "*in conjunct fee and liferent, and the heirs of their body*," or "*their heirs*" indefinitely, the general rule is that the husband is sole fiar, and the wife a mere liferentrix; "*their heirs*," therefore, are held to be the heirs of the husband, and his creditors may attach the right, subject only to the wife's liferent. But this general rule suffers several exceptions, founded on the presumed intention of the parties, as arising out of the different circumstances of particular cases. Thus, where the subject comes from the wife, or her relations, and the expression is not such as to indicate a preference in favour of the husband, the wife is fiar, the husband merely liferenter, and his creditors cannot attach the subject. The wife, however, cannot convey it, nor can her creditors attach it, without a reservation of the husband's liferent. The wife is also fiar on her survivorship, if the fee be destined to the survivor. Where the destination is to husband and wife, and the survivor, and "*their heirs*," if the husband predecease, the fee will be held to be in the wife and her heirs, not in the heirs of the marriage. In a case where heritable property was conveyed by a husband, in an antenuptial contract of marriage, to himself and wife, "*in conjunct liferent, during all the days of their lifetime, and to the longest liver of them, and their heirs or assignees, in fee*," the fee was held to be in the surviving wife; *M'Grigor*, 3 Jan. 1831, 9 S. 695. But where the subject so destined belonged originally to the husband, it would seem that, during his life, he may alienate it, or his creditors may attach it; *Ferguson*, 1739, M. 4202; *Riddels*, 1747, M. 4203. Where the subject has come from the wife as tocher, and has been destined to the husband and wife in conjunct fee and liferent, the

strongest expressions of preference in favour of the wife will be required, in order to vest her with the fee; *Henderson*, 1790, M. 4215, where the fee was held to be in the husband. If the wife's heirs are preferred in the destination, the fee is also in the wife. It is to be observed, however, that it is not a proper criterion of this preference, that the wife's heirs are last-named in the substitution, unless there be no intermediate substitutes between the heirs of the marriage and them; for where there are such substitutes, that spouse is deemed *fiar* whose heirs are first called after the heirs of the marriage. See *Stair*, B. ii. tit. 6, § 10; *Ersk.* B. iii. tit. 8, § 36; *Bell's Com.* i. 54; *Bell's Princ.* § 1953 *et seq.*; [*M. Bell's Conv.* ii. 834; *Fraser on Husband and Wife*, ii. 1427; *Craigie's Digest*, 74.]

Conjunct Rights to Parents and Children.

—Where rights are taken to a father in *liferent*, and to his children *nascituri* in fee, the fee is in the father, and the children have a mere *spes successionis*, defeasible by the father's creditors; *Frog's Creditors*, 1735, M. 4262. But where the children are in existence, and the right is taken to the child or children *nominatim* in fee, the fee is held to be in the child named, even although the right has been acquired by the father, and destined to the child gratuitously; *M'Intosh*, 28 Jan. 1812, F.C. Even where the children are not yet born, if the right be taken to the father in *liferent*, "for his *liferent* use *allenary*, and to his children *nascituri* in fee," this form of expression will limit the father's right to a mere fiduciary fee, for behoof of the children, which cannot be affected by the father's debts or deeds; *Newlands*, 1794, M. 4289, [affd. 4 Paton 43;] *Watherstone*, 1801, M. 4297; *Harvey*, 26 May 1815, F.C. But the words, in order to exclude the father, must be clearly *taxative*; a destination of the subject to the father "*during all the days of his life*, and to the children in fee," will import a full fee in the father; *Lindsay*, 1807, M. App. *Fiar*; *Robertson*, 1806, M. App. *Fiar* absolute, limited. Where a subject is conveyed to trustees for behoof of a certain person in *liferent*, and of his children *nascituri* in fee, the father is not *fiar*; *Seton*, 1793, M. 4219. Where a subject had been taken to husband and wife, "and longest liver of them two in *conjunct fee* and *liferent*, for *her liferent* use *allenary*," and to their son *nominatim* in fee, with a reserved power of disposal to the father, the fee was found to be in the father, on the ground apparently, that,

by the terms of the destination, there was a fee actually vested in him; *Wilson*, 14 Dec. 1819, F.C. See *Stair*, B. ii. tit. 6, § 10; *Ersk.* B. iii. tit. 8, § 35; *Bank.* i. 575; ii. 337; *Bell's Com.* i. 55 *et seq.*; [*M. Bell's Conv.* ii. 837; *Ross's L. C.* iii. 602; *Craigie's Digest*, 75. See *Destination*.]

CONJUNCT OR CONFIDENT PERSONS.

By the A.S. 12 July 1620, ratified and approved as law by stat. 1620, c. 18, the Court of Session declares that, in all actions pursued by any "true creditor for recovery of his just debt, or satisfaction of his lawful action and right, they will decree and decern all alienations, dispositions, assignments, and translations whatsoever, to any conjunct or confident person, without true, just, and necessary causes, and without a just price really paid, the same being done after the contracting of lawful debts from true creditors, to have been from the beginning, and to be in all time coming, null, and of no avail, force, or effect, at the instance of the true and just creditor, by way of action, exception, or reply, without further declarator." And in case any one shall have *bona fide* purchased the subject from the conjunct or confident person for a fair price, or shall have obtained it in satisfaction of a just debt, in that case "the right lawfully acquired by him, who was nowise partaker of the fraud, shall not be annulled in manner foresaid, but the receiver of the price of the said lands, &c., from the buyer, shall be holden and obliged to make the same forthcoming to the behoof of the bankrupt's true creditors in payment of their lawful debts. And it shall be sufficient probation of the fraud intended against the creditors, if they, or any of them, shall be able to verify, by writ or oath of the party receiver of any security from the dyvour or bankrupt, that the same was made without any just and necessary cause, or without any true and competent price; or that the lands and goods of the dyvour and bankrupt being sold by him who bought them from the said dyvour, the whole or the most part of the price thereof was converted, or to be converted, to the bankrupt's profit and use." In the sense of this act, conjunct persons are brothers, sisters, sons, sons-in-law, uncles by consanguinity or affinity, step-sons, sisters or brothers-in-law, and, in general, all persons who, by their relationship to the insolvent person, would be legally incapable of acting as witnesses or judges

in a cause in which he was concerned. A confident person is a confidential and intimate friend; *e.g.*, a partner in trade, or a factor, or steward, or confidential man of business, or a servant, or other dependent. This statute, which has given rise to questions of construction of considerable difficulty, was intended to aid the common law, by which, independently of statute, all fraudulent alienations by insolvent persons, to the prejudice of their lawful creditors, are reducible. The chief benefit, indeed, conferred by the act 1621, seems to be that of creating certain legal presumptions, which have the effect of throwing the burden of disproving fraud on the parties concerned in the transaction, wherever they are so connected as to give rise to strong suspicions of collusive or fraudulent proceedings; and with reference to this object, the statute has been liberally interpreted. The following points in the construction of it deserve attention:—(1) The challenging creditor must have been a creditor at the date of the alienation challenged; or, at least, his debt must have had its origin prior to the date of the alienation, or he must have lent money to pay off prior creditors, so as to come into their place. It is sufficient, however, that the debt of the challenging creditor is conditional, or even gratuitous; and, where the challenge is at the instance of a trustee for creditors, it is enough if the debt of any of his constituents is prior to the alienation. (2) The deeds liable to challenge are all conveyances or obligations, direct or indirect, which may confer on the grantee property belonging to the debtor, or which may enable the grantee to claim in competition with onerous creditors, or save him from a demand for payment of a debt due by him to the debtor. (3) The proof of conjunct or confident lies with the challenging creditor; but if that be proved, the presumption of law is, that the debtor was insolvent at the time of granting the deed, and that it was granted without value; and in order to support it, the person founding on it must prove either that the granter was solvent at the time of granting it, or that a just price, or some other onerous consideration, was given for it. (4) With regard to the consideration, it must be a fair price paid *bona fide*, and not collusively, to answer the debtor's purposes. It is not necessary, however, that the consideration should be a payment in money; it will be a sufficient onerous cause to support the deed challenged, if it has been granted in

consequence of a legal obligation undertaken during solvency, or if it be a deed in implement of an antenuptial contract of marriage. It is a more difficult question where the deed has been granted in implement of a mere natural obligation, as in the case of provisions made for a wife or children in a postnuptial contract; but even in such a case it would seem that the marriage will be regarded as a sufficient onerous cause, to support moderate provisions, provided they are not struck at by 1696, c. 5, nor are otherwise objectionable; *Ersk. B. iv. tit. 1, § 33 et seq.* (5) It is a sufficient defence against a challenge under this act, that the debtor was solvent at the time of granting the deed challenged; *Ersk. ib. § 32.* [(6) The challenge may now be made either by action of reduction before the Court of Session; or by way of exception or reply, in the Court of Session or the sheriff court; 19 & 20 Vict. c. 79, § 10; 20 & 21 Vict. c. 19, § 9. See *Dickson*, 7 June 1860, 4 Macph. 797.] (7) The effect of a decree of reduction is a *restitutio in integrum*, as between the parties to the fraud; but where a third party has *bona fide* purchased from the conjunct or confident person, without being aware of the nullity to which his title was exposed, the sale will be effectual, the challenger's remedy in that case being a claim against the *bona fide* purchaser for the price if not paid, and, if paid, an action against the receiver of the price for restitution. *Lastly*, the benefit of the legal presumptions created by this act may be lost by undue delay, or *mora*, in bringing the challenge. [See *Stair*, B. i. tit. 9, § 15; *More's Notes*, lxi.; *Ersk. B. iv. tit. 1, § 28*; *Ersk. Princ.* (17th ed.) 599; *Bell's Com.* ii. 170; *Murdoch on Bankruptcy*, 157; *Goudy on Bankruptcy*, 44.] See *Collusion. Diligence. Bankruptcy.* [*Insolvency.*]

CONJUNCTION OF ADJUDICATION.

When a first adjudication is called in court, the process must be intimated on the walls and in the minute-book, in terms of 54 Geo. III. c. 137, § 9, that those ready to adjudge may be conjoined. For this purpose, twenty sederunt days are allowed, in order that those who have liquid grounds of debt, and summonses of adjudication libelled and signed, may produce them in the clerk's hands, and be conjoined in the adjudication. [*Mackay's Prac.* ii. 334.] See *Adjudication.*

CONJUNCTLY AND SEVERALLY.

When two or more persons are bound conjunctly and severally to perform an obligation, they are liable *singuli in solidum*, and

it is in the option of the creditor either to exact performance from each of them proportionally, or to enforce the obligation to the full extent against any one of them, leaving him to seek his relief from the rest. [See *Dundee Police Commrs.* 24 Feb. 1884, 11 R. 586; *Burns*, 14 Feb. 1887, 14 R. (H.L.) 20.] The general rule in joint obligations is, that the obligants are bound *pro rata*, unless the contrary be expressed, or unless in the case of bills of exchange, or where the obligation is an obligation *ad factum præstandum*, and so indivisible. [When the obligants are bound merely "conjunctly," only *pro rata* liability is inferred (though Prof. Bell held otherwise); *Campbell*, 1724, M. 14,626. See *Ersk. B. iii. tit. 3, § 74*; *Bell's Com. i. 362*; *Bell's Princ. § 56 et seq.*; *Duff on Deeds*, 20; *Menzies' Conv.* 211; *M. Bell's Conv. i. 261*; *Thomson on Bills*, 155. See *Co-obligant*.]

CONQUEST. In explaining this term, it is necessary to distinguish between its meaning, as applied to succession in heritage, and the construction it receives when it occurs in a contract of marriage.

Succession of Conquest.—Those heritable rights to which the deceased has succeeded as heir to his ancestor, are sometimes termed *heritage* in a strict sense, in contradistinction to *conquest*, which term is applied to such heritable rights as the deceased has acquired by singular titles, *e.g.*, by purchase, donation, or even excambion. When left to the destination of the law, [until recently altered, *ut infra*,] heritage as thus limited, descended to the heir of line, and conquest ascended to the heir of conquest. There was room for this separation in the succession, however, only where the deceased had died without lawful issue, leaving brothers both older and younger than himself, or the issue of such brothers, or two or more uncles, older and younger than the father of the deceased, or the descendants of such uncles. In such cases heritage descended to the immediate younger brother of the deceased, or to the next younger brother of his father, but conquest ascended to the immediate elder brother or uncle. Where the deceased was the youngest brother, and left two elder brothers, the youngest surviving brother was heir both in heritage and conquest; and where the deceased left but one brother, he was necessarily heir both of line and conquest. In conquest as well as in heritage, the whole blood excluded the half blood. Conquest ascended but once: thus where one who had acquired an estate by singular titles died, although this estate might

ascend to the heir of conquest, yet in the person of such heir it became heritage, and descended to his heir of line. Where a father propelled an heritable subject to his eldest son, who at the date of the gift was heir *alioqui successurus*, it was not conquest in the son. But such a grant in favour of an heir-presumptive merely seems to have been conquest; if the right was granted, for example, by a person having no lawful issue, in favour of his brother, it was conquest in the brother; see *Short*, 1771, M. 5615. All rights to lands, and other heritable rights which required sasine to complete them, fell under conquest, including heritable bonds; but rights to teinds, leases, annuities, pensions, and personal bonds, excluding executors, descended to the heir of line. [By § 36 of the Conveyancing Act, 1874, the distinction between fees of heritage and fees of conquest was abolished with respect to all successions opening after 1st Oct. 1874, and fees of conquest now descend to the same persons and in the same manner as fees of heritage.] See *Stair*, B. iii. tit. 5, § 10; *Ersk. B. iii. tit. 8, § 15*; *Bell's Princ. § 1670*; *Sandford on Herit. Succession*, i. 3, 30; [*M. Bell's Conv. i. 248*; ii. 925; *McLaren on Wills*, §§ 132, 142, 1146, 1634.] See *Succession*.

Provision of Conquest in a Contract of Marriage.—In contracts of marriage, the conquest acquired during the marriage, or a certain proportion of it, is sometimes [now, however, rarely] settled either on the heir or on the issue of the marriage; and in giving effect to a provision of this kind, it is to be observed, that conquest in this sense means only such an accession of fortune as renders the husband *locupletior*, and does not therefore necessarily include all that has been acquired during the marriage by singular titles. A subject purchased with money acquired by industry or economy is conquest in this sense; but land or any other subject purchased with borrowed money, is not conquest of the marriage, except in so far as the subject may be of greater value than the price paid for it. [See *Diggins*, 20 May 1867, 5 Macph. (H.L.) 75.] A clause of this kind will be regarded as little more than a simple destination, so that the provision may be defeated not only by onerous or rational deeds, but even gratuitously, to a certain extent; although a deed merely gratuitous, alienating the whole or a considerable proportion of the conquest, would be reducible, as granted *in fraudem* of the provision. The father retains, however, during his life, the uncontrolled right of fee

in the conquest; and notwithstanding the dissolution of the marriage, no action lies at the instance of any of the children for enforcing the provision; so that the conquest *quoad* the father must be computed, not as at the time of the dissolution of the marriage, but at the time of his death; [*Arthur*, 30 June 1870, 8 Macph. 928. The father has also ample power of distribution, but not of exclusion; *Dowie*, 1728, M. 13,004.] The question as to what subjects fall under a clause of conquest, will be determined by the expressions used in the particular clause out of which the question arises. Without an express provision to that effect, it will not include what devolves on the husband by succession. Thus legacies to a wife *stante matrimonio*, falling to the husband *jure mariti*, were found not to be conquest under such a clause, generally expressed; *Rae*, 23 Jan. 1810, F.C. But, on the other hand, where the clause conveyed "all heritages, goods, gear, debts, sums of money, or other moveables which should be acquired during the standing of the intended marriage," it was held to carry leases acquired during the marriage, although leases do not, in their own nature, fall under the denomination of conquest; *Duncan*, 15 Feb. 1810, F.C. [See also *Hunter's Trs.* 25 May 1839, 1 D. 817.] See *Stair*, B. iii. tit. 5, § 52; *Ersk. B. iii. tit. 8, § 43*; *Bell's Princ.* § 1974; *Kames' Eluc.* art. 6; [*Menzies' Conv.* 440, 688; *M. Bell's Conv.* ii. 869, 896; *M'Laren on Wills*, § 803.]

[**CONSANGUINEAN.** See *Half-Blood*.]

CONSANGUINITY; is the relationship of persons descended from the same ancestor. It is either lineal or collateral. Lineal or direct consanguinity is that formed between the persons generating and generated; and is either descending, as in case of parent and child,—or ascending, as from the child to the parent. Collateral consanguinity, termed also transverse or oblique, is that which exists between persons descended from the same common ancestor, but not from one another, as brothers, uncles, and nephews. *Bell's Princ.* §§ 1527, 1646 *et seq.* See *Kindred. Heir.*

CONSENSUS, NON CONCUBITUS, FACIT MATRIMONIUM; a Roman law maxim, adopted in the law of Scotland, importing that marriage is constituted by the *conjunctio animorum*, or consent alone; so that, though the parties, after consent given, should, by death or disagreement, or from any other cause, except impotency, happen not to consummate the marriage, *conjunctio corporum*, they are neverthe-

less entitled to all the legal rights consequent on marriage. *Ersk. B. i. tit. 6, §§ 2, 5.* See *Marriage. Consent. Impotency. Divorce.*

CONSENT. The consent of parties is implied in all legal and binding contracts; hence, persons legally incapable of giving consent, as idiots, pupils, &c., cannot be parties to a contract. By the Roman law, and by our more ancient usage, this disability was extended to deaf and dumb persons; but if this be the general rule of the law of Scotland, it plainly must suffer exceptions in favour of those persons who, notwithstanding this infirmity, possess abilities which qualify them for the discharge of the most important duties of life. Persons in a state of absolute drunkenness cannot give legal consent, although a lesser degree of intoxication will not afford sufficient ground for annulling a contract. The consent, although given by a person labouring under no disqualification, is null where it proceeds on essential error, or where it has been obtained by fraud, or by force and fear. *Stair*, B. i. tit. 10, § 11; *More's Notes*, clix., cclxiv.; *Ersk. B. iii. tit. 1, § 16*; *Bell's Com. i. 313*; *Bell's Princ.* § 10. See *Deaf and Dumb. [Error. Force. Fraud. Drunkenness. Insanity.]*

CONSENTER. [The question has been disputed, whether a disposition is valid, which is granted by one who is not truly the owner, but to which the owner subscribes as consenter. Craig says "that in his time the question was not clearly determined, nor is he positive in it, but this far, if the resigner had no title, no consent could be sufficient; yet if he had a colourable title, the consent of the true vassal might validate it." Lord Stair states that such a disposition "will be as valid as if the consenter himself had granted the disposition or a procuratory; for the act of the disponent, though more express and amplified, is no more but his consent; and so the other consenting doth the same materially, which he would do, if he were disponent, formally. Neither is there necessity to distinguish whether the disponent have a colourable title or not, seeing it is the consent of the true vassal, and the resignation as flowing from, and warranted by that consent, which transmitteth the right." Erskine also holds that Craig's distinction is without a real difference. His own view is cautiously expressed, to the effect that "the proprietor's consent, in whatever form adhibited, must have the effect, either of transmitting the property, or at least of creating an obligation against

[the consenter, on which the grantee may bring an action of adjudication in implement." Lord Stair's view has been confirmed by the two leading cases of *Buchan*, 1739, M. 6528, Ross's L. C. i. 33; and *Mounsey*, 1808, Hume's Dec. 237. Baron Hume suggests that, though the true owner himself, being a consenter, is barred from challenge, the position of a *bona fide* disponee of the owner might not be quite so clear. "Probably, however," he adds, "the present case, joined to Lord Stair's opinion, and that also of Lord Kilkerran, who transiently delivers the same law (p. 279, No. 2), ought to lay this question to rest." But where a person, who holds an heritable security over lands, signs as consenter to a disposition of those lands, his consent imports merely that he is not to use his security to the prejudice of the disponee's right, not that he is to discharge his claim for the debt against the debtor personally; [*Buchan*, *supra*.] A mere consenter is not liable in any implied warrandice, for he is not the seller, and only gives his consent at the purchaser's desire; and although he thus resigns his own right entirely, he incurs no obligation to warrant the right conveyed, unless his warrandice is made matter of express stipulation. [Hence his consent has reference only to rights then existing in his person, and does not extend to rights which may subsequently arise in his favour; *Forbes*, 1668, M. 7759; *Stuart*, 1681, M. 7762. See *Craig*, B. iii. dieg. 1, § 29; *Stair*, B. ii. tit. 11, § 7; B. iii. tit. 2, § 9;] *Ersk.* B. ii. tit. 3, §§ 21, 25; [tit. 7, § 4; *Menzies' Conv.* 534; *M. Bell's Conv.* i. 581. See *Accretion*.]

CONSEQUENTIAL. See *Damages*.

CONSERVATOR. The conservator of the Scotch privileges in the Netherlands formerly held a mercantile court for Scotchmen resident in the Scotch factory at Campvere, to which he had four merchants as assessors; 1503, c. 81; 1597, c. 259. The Court of Session had a cumulative jurisdiction with the conservator's court over Scotchmen established at the factory. This was one of the offices the appointment to which vacated a seat in the House of Commons. *Ersk.* B. i. tit. 4, § 34.

CONSIDERATION; is the name given to the cause or reason of granting a deed, or of entering into a contract. The consideration may be either onerous or gratuitous. Where value in money, or goods, or services, has been given in return for the deed, the consideration is said to be onerous. Where the deed is granted without value,

and from mere love and favour to the grantee, the consideration is termed gratuitous. But where the deed is granted in implement of a natural obligation, such, for example, as the natural obligation on a husband to make a rational provision for his wife or children, it would seem that, although the consideration for such a deed does not fall properly under the denomination of onerous, as above explained, yet that it differs essentially from a consideration merely gratuitous; *Ersk.* B. iv. tit. 1, § 33. By the law of Scotland, a deed granted for a gratuitous [or inadequate] consideration, where not struck at as a fraud against onerous creditors, is as effectual as a deed granted for a valuable consideration, or in implement of a valid legal obligation. [See *Tennent*, 15 March 1870, 8 Macph. (H.L.) 10. In England, on the contrary, an obligation without adequate consideration is a mere *nudum pactum*, and cannot be enforced. See *Bell's Princ.* § 63; *Pollock on Contract*, 167; *Anson on Contract*, 70.] See *Conjunct and Confident.* [*Stamp Laws. Bill of Exchange*, p. 112.]

CONSIGNATION; is the deposition in the hands of a third party of a sum of money, which is the subject either of a dispute or of a competition. Consignation may be made where the existence or amount of the debt is judicially questioned, as in a suspension; or where the creditor refuses to receive his money, as in wadsets and other redeemable rights; or where it has not been finally determined to whom the money is to be paid, as in the case of consignation of the price of subjects bought at judicial sales, or of the fund *in medio* in a process of multiplepounding. The general rules as to consigned money are—(1) That the risk of loss, either from the failure of the consignee or the loss of interest, or the expense of consignation, lies with the consigner, where he ought to have made payment, and not consignation, or has consigned a part only, or has chosen as consignee a person neither authorised by law nor named by the parties; *Ersk.* B. iii. tit. 1, § 31. (2) The charger or other creditor runs the same risk if he has charged for sums not due, or has, without good reason, refused payment when offered, whereby the consignation has become necessary; *Ersk. ib.* Where, indeed, the creditor has unwarrantably refused to take the money when tendered to him, consignation in the hands even of a private party who is solvent, not only stops the currency of interest against the debtor, but is said by Erskine to be equivalent to pay-

ment of the debt; *Ersk. B. iii. tit. 4, § 5.* (3) It is the duty of the consignee to keep the money in safe custody until called for. If, therefore, he puts it out to interest, he does so at his own risk; but, for the same reason, he has right, according to Erskine, to the interest he draws, without being liable in interest to the consigner; *Ersk. B. iii. tit. 1, § 31.* This doctrine, however, appears to be questionable; and, in practice, it is usual to consign money in a public bank, so that the party entitled to it receives it with bank interest for the time it has remained consigned. (4) It is lawful for the purchaser at a judicial sale, at any term of Whitsunday or Martinmas after the term of payment of the price, to lodge the same, with the interest due on it, [in any joint stock bank of issue in Scotland,] at such interest as can be procured for it; and by doing so, and intimating it to the agent in the sale, the purchaser shall be discharged of the price; [19 & 20 Vict. c. 91, § 2.] By the same section of the statute, the Court of Session is empowered, upon the application of any of the creditors, to order the purchaser to lodge the price and interest in any such bank, at any of the foresaid terms after the term of payment, sufficient intimation of such application being given to the purchaser and the common agent; [*Ersk. B. ii. tit. 12, § 63.*] (5) The effect of consignment in terms of this statute seems to be, that each creditor's right, whether previously secured over the lands heritably or not, becomes merely personal, and may be attached by the diligence applicable to moveables; *Bell's Com. ii. 6, 256.* See also *Stair, B. i. tit. 13, § 6; tit. 18, § 4; More's Notes, lxxviii; Bell's Princ. § 215; Thomson on Bills, 251; Ross's Lect. i. 383, 458; ii. 363.* [As to consignment in a suspension, see *Mackay's Prac. ii. 188.*]

CONSIGNATORY; a consignee, or the person in whose hands consignment is made; *Ersk. B. iii. tit. 1, § 31.*

CONSIGNMENT. In mercantile law, the term consignment is generally applied to goods delivered over or transmitted by one merchant to another, or by a merchant to a mercantile agent or factor, for sale, or for some other specific purpose. The bankruptcy of either the consigner or the consignee may give occasion to questions of considerable difficulty, both in regard to reputed ownership, and on other points connected with the rights of the parties or their creditors. But these are questions which must obviously depend in a great degree on

the circumstances under which they arise, so that it would be difficult to comprehend them under any general rule. One very ordinary transaction, however, is for the consignee to make advances, either in money or bills, to a certain extent, on the faith of the expected sales of the goods consigned; and in such a case the following general rules seem to be fixed:—(1) If the consignee should fail, and the consigner be obliged to pay the bills granted to him for such advances, the consigner may demand back his consignment in so far as unsold. (2) If the consigner should fail, the consignee has a lien over the consignment, to the amount of all engagements on the faith of the goods consigned. (3) When both parties fail, the holder of such bills may rank upon both estates for the full amount of the bills provided he does not draw more than twenty shillings in the pound on his debt. *Bell's Com. i. 294; Bell's Princ. § 1456.* See *Factor. [Reputed Ownership. Carrier. Stoppage in Transitu.]*

[CONSISTORIAL ACTIONS.] These, in a wide sense, are all actions which were formerly competent before the consistorial or commissary court. See *Commissaries.* But in the usual and proper sense, and as defined by the Conjugal Rights Act (24 & 25 Vict. c. 86), § 19, the term denotes “actions of declarator of marriage, of declarator of nullity of marriage, of declarator of legitimacy and bastardy, actions of separation *a mensa et toro*, of divorce and of adherence, and of putting to silence, and actions of aliment between husband and wife instituted in the Court of Session.” Proper consistorial actions are competent only in the Court of Session; 1 Will. IV. c. 69, § 33; 13 & 14 Vict. c. 36, § 16; and proof is always necessary, even when they are undefended. Proof is taken before a Lord Ordinary; 24 & 25 Vict. c. 86, § 13. See *Proof. Commission.* The parties are now competent witnesses; 37 & 38 Vict. c. 64, § 2. See *Shand's Prac. i. 420; Mackay's Prac. i. 186; ii. 248; Jurid. Styles, iii. 153.* See also *Summons. Citation. Judicial Examination. Oath on Reference. Arrestment. Inhibition.*

CONSISTORIAL COURT. This term was applied to the commissary court, lately abolished, which came in place of the bishops' court; and the bishops' court derived the term from the courts held by the Roman emperors. See *Commissaries.*

CONSISTORY; in English law, a *prætorium* or tribunal. It is commonly used

for a council-house of ecclesiastical persons, or place of justice in the spiritual court; a session or assembly of prelates. *Tomlins' Dict. h. t.*

CONSOLIDATION; in feudal law, is the reunion of the property, or *dominium utile*, with the superiority, or *dominium directum*, after they have been feudally disjoined. [It will be convenient to consider the law on this subject,—first, as it was prior to the Conveyancing Act of 1874, and then, as it has been since the passing of that act.]

[1. *Before the Act of 1874.*] A proprietor might subfeu his lands to be holden of himself as superior. The subfeu was called a base right, and conveyed what is denominated the *dominium utile*, or property; that which remained with the granter of the subfeu being termed the *dominium directum*, or superiority. When the subvassal wished to reconvey the property to his superior, he did it by a resignation *ad remanentiam* in the superior's favour; a mere renunciation of the subfeu not being held sufficient to accomplish this object. By such resignation the *dominium directum* and the *dominium utile* were again united or consolidated as one property in the person of the superior. Where the superior succeeded to the *dominium utile*, as heir to the vassal, it was necessary for him to complete his title to the property by a precept of *clare constat*, granted by himself in his character of superior, to himself as heir to his vassal, on which precept he was infeft. He would then hold the superiority under his former titles, and the property under the precept of *clare constat* and infeftment; the two estates, although vested in the same person, being entirely distinct. In order to unite them, the proprietor, in the double capacity of superior and vassal, had to resign the *dominium utile* in his own favour *ad remanentiam*; and in this, as in the former case, consolidate the two estates of property and superiority. In like manner, if the vassal succeeded to the superiority, it was necessary for him, after having completed his title to the superiority, to consolidate the two estates in the same manner, by resignation *ad remanentiam*. The same rule held where, by adjudication or otherwise, the two estates came to be vested by separate titles in the same person. According to our more ancient practice, it was considered incongruous for the same individual to act in the double capacity of superior and vassal to himself, so that, wherever the two estates came to be vested in the same person,

an *ipso jure* or virtual consolidation was held to have taken place. But the practical inconvenience attending this notion of *ipso jure* consolidation, and, in particular, its prejudicial effect on the security of the records, led to the adoption of a different view; and it was at last settled that consolidation could not be effected *ipso jure*, or without resignation *ad remanentiam*; *Bald*, 1768, M. 15,084 (affd. on appeal). [But full and uninterrupted possession of the *dominium utile* for forty years, or an *ex facie* absolute title to the superiority, had the effect of working off the base infeftment in the property, and so consolidating the two estates; *L. Elibank*, 21 Nov. 1833, 12 S. 74; *Bontine*, 6 Aug. 1840, 1 Rob. 347; *Wilson*, 29 Nov. 1839, 2 D. 159; *Dalrymple*, 10 March 1841, 3 D. 837. See *Ross's L. C.* ii. 110, 230; iii. 531, 534, 568, 571.] The separation of property and superiority might take place, not only by a regular subinfeudation, but also where a conveyance had been made by a disposition containing a double manner of holding. If, for example, the disponent died after taking infeftment on the precept of sasine in such a deed, and his heir made up his title, by serving heir in general to his ancestor, so as to carry the unexecuted procuratory of resignation, and then expedite, and was infeft on, a charter of resignation on the unexecuted procuratory, to which he had thus acquired right, he would have carried the mid-superiority merely, and would have left the property *in hæreditate jacente* of his ancestor. In order to complete his titles, and unite the property and superiority, it would have been necessary for him to grant a precept of *clare constat* to himself, as heir to his ancestor in the property, and afterwards to consolidate the two estates by resignation *ad remanentiam* in his own hands.

[2. *Since the Act of 1874.* Under this act, resignation *ad remanentiam*, though not expressly abolished, was practically superseded by a simpler method of effecting consolidation. By § 6, where a superior has acquired and completed a title by infeftment to the property or mid-superiority of lands, or where a proprietor or mid-superior has acquired and completed a title to the superiority, he may, by recording a minute in form prescribed, consolidate the property or mid-superiority with the superiority, to the same effect as formerly by resignation *ad remanentiam*. By § 7, consolidation is not to affect or extend the rights of any over-superior, or entitle him to more than

[the duties or casualties to which he would otherwise have had right. By § 34, the period of positive prescription was reduced to twenty years; prescriptive possession, therefore, for that period, on a title to the superiority, will now effectually consolidate the property and superiority.]

[In *E. Zetland*, 11 July 1870, 8 Macph. (H.L.) 144, a base right to lands, with salmon-fishings, was resigned *ad remanentiam* into the hands of the superior, who had no title to the salmon-fishings; and it was maintained that the consolidation had destroyed the right of fishing, because, after the consolidation, the only subsisting title was that of the superiority, which contained no mention of salmon-fishings. But the consolidation was held not to have extinguished the base right to the fishings. Lord Westbury contrasted consolidation with the English doctrine of *merger* thus:—"A thing surrendered, by English law, so as to produce a merger, is lost and destroyed. A thing resigned, in Scotch law, *ad perpetuam remanentiam*, if it be a subject in which the *dominium utile* has been granted, is restored to the superior. It is again conjoined to the thing from which it was taken, as an integral part thereof, to remain conjoined with it for ever." But see *Park's Curator*, 8 March 1870, 8 Macph. 671; *Pattison v. Dunn's Trs.* 23 July 1868, 6 Macph. (H.L.) 147; also *E. Glasgow*, 28 Jan. 1887, 14 R. 419.]

[See on this subject, *Ersk. B. ii. tit. 7, § 19*; *B. iii. tit. 8, § 81*;] *Stair, App. 787*; *Bell on Purchaser's Title*, 319; *More's Notes to Stair*, ccv., cclxiii.; *Bell's Princ.* § 821; *Ross's Lect. ii.* 222, 292, 368; [*Duff's Feudal Conv.* 235; *Menzies' Conv.* 664; *M. Bell's Conv. ii.* 773; *Craigie's Digest* (Herit.), 51.] See also *Confirmation. Resignation. Disposition. Charter.*

[**CONSOLS**; are the consolidated bank annuities of the United Kingdom of Great Britain and Ireland. They are called *consolidated*, because in the year 1787, the three separate capital funds representing the national debt, theretofore variously designated the *aggregate fund*, the *general fund*, and the *South Sea fund*, were combined together into one consolidated fund; *Brown's Law Dict.* See also *Stephen's Com. ii.* 607; *Encyc. Brit. h. t.*]

[**CONSPIRACY**. Conspiracy to commit crime is a substantive offence. Conspiracy to accuse falsely of crime, or to intimidate workmen, or to effect a rise of wages or other like object by violence or criminal threats, or to defeat or obstruct the ad-

ministration of justice, or "to effect an alteration of the laws and constitution of the realm by force and violence, or by armed resistance to lawful authority," is indictable at common law. See *Hume*, i. 170; *Alison's Princ.* 369; *Macdonald*, 240, and cases there cited; *Pollock on Torts*, 267. As to conspiracy in restraint of trade, see 38 & 39 Vict. c. 86; *Stephen's Hist. of Crim. Law*, iii. 202; *Stephen's Digest*, art. 390; also *Trade Unions*.]

CONSTABLE OF SCOTLAND. The office of Lord High Constable of Scotland is one of great antiquity and dignity. The Lord High Constable had anciently the command of the King's armies while in the field, in absence of the King. He was likewise judge of all crimes or offences committed within four miles of the King's person, or within the same distance of the Parliament, or of the Privy Council, or of any general convention of the states of the kingdom. The office is hereditary in the noble family of Errol, and is reserved, both in the Treaty of Union, and in the statute 20 Geo. II. c. 43, by which heritable jurisdictions were abolished. *Ersk. B. i. tit. 3, § 37*.

CONSTABLES; are the officers of the justices of the peace, entrusted with the execution of their warrants, decrees, or orders. They are appointed by the justices at their quarter-sessions, two at least for every parish, and more if thought necessary. In royal burghs, constables are appointed by the magistrates. It is the duty of constables, *ex officio*, and without any special warrant from a justice of the peace, to apprehend offenders against the peace, vagrants, and such as can give no account of themselves, and take them to the next justice. [See *Vagabonds*.] It is also their duty to suppress riots, and apprehend the rioters; but after the riot is over, a constable is not authorised to apprehend, *brevi manu*, any person concerned in it, unless one has been dangerously wounded in the fray. [See *Mobbing*. Assaulting a constable when in the execution of his duty is an offence punishable by imprisonment for six, or (if the person has been convicted of a similar assault within two years) nine months, with or without hard labour, or by a penalty of £20, or (in default of payment) imprisonment for six months, with or without hard labour; 34 & 35 Vict. c. 112, § 12. See *O'Brien*, 30 Oct. 1880, 8 R. (J.C.) 8. Resisting or wilfully obstructing a constable or peace officer when in the execution of his duty is likewise an offence, punishable by a

[fine of £5 or (in default of payment) imprisonment for two months; 48 & 49 Vict. c. 75. The act 20 & 21 Vict. c. 72, authorises commissioners of supply to establish and maintain an efficient constabulary within their respective counties, and contains the regulations presently in force regarding the powers and duties of constables. The act 21 & 22 Vict. c. 65 (repealing § 8 of the previous statute), provides for the appointment, by the sheriff of any county, of additional constables to keep the peace on public works, such as railways or canals, in progress of construction within the county. As to burgh police, see 25 & 26 Vict. c. 101. By 1 Geo. IV. c. 37, justices of the peace were authorised to appoint special constables, "not only in case of actual tumult, riot, or felony, but also on the reasonable apprehension thereof, for prevention of the same." This act was repealed, probably through inadvertence, by the Stat. Law Revision Act, 1861. In England, its enactments were repeated and extended by 1 & 2 Will. IV. c. 41, and 35 & 36 Vict. c. 92; but in Scotland no such provisions for preservation of the peace are now in force.] See *Ersk. B. i. tit. 4, § 16*; *Hume, i. 386*; *ii. 75*; [*Barclay's Digest*; *Iron's Police Law, 55, 60.*]

CONSTITUTION, DECREE OF. Every decree by which the extent of a debt or obligation is ascertained, is a decree of constitution; but the term is usually applied especially to those decrees which are requisite to found a title in the person of the creditor, in the event of the death of either the debtor or the original creditor. Thus, where the debtor dies, the creditor must obtain a decree, constituting the debt against the heir of the debtor, before he can proceed with diligence to attach the debtor's heritable or moveable estate, unless the heir chooses voluntarily to grant a new obligation in his own name for the debt; or unless he renounces the succession, in which last case a decree of cognition is pronounced. *Jurid. Styles* (2d ed.), iii. 328, 363. See *Adjudication. Cognitionis Causa.*

CONSTITUTION; means an ordinance, decision, regulation, or law, made by authority of any superior, ecclesiastical or civil. The constitutions of the Roman emperors had the authority of laws. See *Roman Law.*

[CONSTRUCTIVE; denotes (1) that a right, liability or status has been created by the law without reference to the intention of parties, as in the case of a con-

structive trust, or constructive notice; or (2) that a transaction or operation has not really taken place, but that something equivalent has. Thus, where delivery of goods is required, if the goods be ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, *e.g.*, by the delivery of the key of the warehouse in which the goods are lodged, or of some other *indicia* of property, such as a bill of lading. This is called constructive delivery. *Sweet's Law Dict.*]

CONSUETUDINARY LAW. Consuetudinary or customary law, in contradistinction to written or statutory law, is that law which is derived by immemorial custom from remote antiquity. Such is the common law of Scotland: *Stair, B. i. tit. 1, § 16*; *Ersk. B. i. tit. 1, § 43*. See *Common Law. [Custom.]*

[CONSUL. A consul is an officer appointed by competent authority to reside in a foreign country, to facilitate and extend the commerce carried on between the subjects of the country which appoints him and those of the country or place in which he is to reside. The office of consul appears to have originated in Italy about the middle of the 12th century, and was generally established all over Europe in the 16th century. The right of sending consuls to reside in foreign countries depends upon convention, tacit or express. It is the duty of a consul to watch over the commercial interests of the subjects of the state whose servant he is; to be ready to assist them with advice on all doubtful occasions; to see that the conditions in commercial treaties are properly observed, and that those he is appointed to protect are subjected to no unnecessary or unjustifiable demands in conducting their business; to represent their grievances to the authorities at the place where they reside, or to the ambassador of the sovereign appointing him, at the court on which the consulship depends, or to the government at home; in a word, to exert himself to render the condition of the subjects of the country employing him, within the limits of his consulship, as comfortable, and their transactions as advantageous and secure as possible. *Wharton's Lex.* See also *Phillimore's Internat. Law, ii. 265*; *Abdy's Kent's Internat. Law, 125*; *Hall's Internat. Law, 285*; *Encyc. Brit. hac voce.*]

CONSULTATION OF JUDGES. [In the event of the judges of either Division

[of the Inner House being equally divided in opinion on a question of fact arising upon a proof, or upon a cause which in their opinion does not involve any legal principle of importance, such Division may appoint the cause to be reheard before themselves, along with such additional judge or judges, to be named by the President of that Division, as shall make up the number of five judges; 31 & 32 Vict. c. 100, § 59. In cases of equal division of opinion, involving legal principle, and in all cases of difficulty and importance, it is competent for either Division to direct that the printed papers in the cause shall be laid before three other judges to be named in the interlocutor, with a view to their opinions being communicated in writing, or to direct that the cause shall be argued before themselves with the assistance of such three judges, (or four, where necessary to complete the number of seven at the time of the rehearing); *ib.* § 60. See also 13 & 14 Vict. c. 36, § 35. Such hearings are appointed to take place on Mondays during the sittings of the court, with power to the court to continue the hearing on other days; 31 & 32 Vict. c. 100, § 11. It is farther competent to the judges of either Division, in cases where it shall appear to them advisable to have any question occurring before them settled by the judgment of the whole court, to order that such matter should be heard before the whole judges, including the Lords Ordinary; or to require the opinions of the whole judges of the court, on questions stated in writing; 6 Geo. IV. c. 120, §§ 23, 24. In practice, when all the judges are consulted, there is no hearing in presence before the whole court; but cases, or written pleadings on the merits, are directed to be prepared by the parties, and are transmitted to the consulted judges. At one time, under 48 Geo. III. c. 151, the consulting Division were not bound to decide according to the opinion which they had obtained. But now, since 6 Geo. IV. c. 120, judgment is in every case pronounced according to the opinion of the majority of all the judges, consulting and consulted, and bears to be the judgment of the Division before which the cause depends, after consulting with the other judge or judges. See *Haldane's Trs.* 15 Dec. 1881, 9 R. 269, 298. See *Ersk. B. i. tit. 3, § 16*; *Shand's Prac. i. 57*; *ii. 966*; *Mackay's Prac. i. 56*. See *Session, Court of.*]

[**CONTAGIOUS DISEASES**; 29 & 30 Vict. c. 35; 31 & 32 Vict. c. 80; 32 & 33

[Vict. c. 96; all repealed by 49 Vict. c. 10. As to diseases of cattle, 41 & 42 Vict. c. 74; 47 & 48 Vict. cc. 13 and 47; 49 & 50 Vict. c. 32; *Barclay's Digest*; *Dunlop*, 22 Nov. 1888, 16 R. (J.C.) 14.]

CONTEMPT OF COURT. This term is generally applied to any disrespect or indignity offered to judges while sitting in judgment, or on account of their proceedings in their judicial capacity; including personal violence or indecorous expressions towards the court or its members, libellous attacks written or spoken against the judges or their mode of administering justice, and contemptuous or illegal disobedience to the orders of the court, or to the rules prescribed by the court for the conduct of business before it. Outrageous contempts, such as striking or threatening judges for their proceedings as such, or committing an assault in open court, are offences punishable either capitally or by very severe arbitrary pains; 1593, c. 173; 1600, c. 4. See *Beating of Judges*. Inferior acts of insult or contempt, although they may not fall under any statutory enactment, are nevertheless punishable at common law. The defaming of judges, or casting imputations upon the integrity of the court, are offences of this description; and if committed in the course of a depending process, or connected with a process which has been lately in dependence, they may be punished summarily *ex proprio motu* of the court to which the insult has been offered. See *Jamieson*, A.S. 17-28 January 1815. In like manner, every court must necessarily be vested with the power of inflicting punishment summarily for all disorders, or acts of contempt, committed during the sitting of the court. Where the contempt has not been committed in the immediate presence of the court, but has relation to a matter in dependence, or recently before the court, the proper form seems to be to bring the offence under the notice of the court by summary complaint at the instance of the public prosecutor. And in such cases, the punishment of censure, fine, or imprisonment may be inflicted. See *Jamieson*, 1 Feb. 1822, 1 S. 285; *Hay*, 1 Feb. 1822, 1 S. 288; [*Lawrie*, 26 May 1882, 9 R. (J.C.) 22; *Macleod*, 18 March 1884, 11 R. (J.C.) 26. Contempt of court is either direct, when the judges themselves are the objects of it; or constructive, when the administration of justice is otherwise unduly interfered with, as by threatening letters addressed to parties or witnesses in

[a cause. See *Paterson*, 19 July 1865, 3 Macph. 1119.] See *Stair*, B. iv. tit. 37, § 8; *Hume*, i. 405; ii. 138; [*Macdonald*, 456; *Mackay's Prac.* i. 244; *Barclay's Digest*.]

CONTEXTURE; is a mode of industrial accession, borrowed from the Roman law. It takes place "where things belonging to one are wrought into another's cloth, and are carried therewith as necessary." It is similar to constructure, whereby, if a house be repaired with the materials of another, the materials accrue to the owner of the house, full reparation, however, being due to the owner of the materials. If the materials have been obtained *mala fide*, the person using them will be liable for their value, ascertained by the owner's oath *in litem*; or he may be prosecuted for theft, according to the circumstances under which he has acquired them. It would also appear that, where there has been *mala fides*, the former owner may estimate the materials *per pretium affectionis*. *Stair*, B. ii. tit. 1, § 39; *Bank*. B. ii. tit. 1, § 17. See *Adjunction*. *Accession*.

CONTINGENCY OF A PROCESS.

[Where two processes, relating to the same subject, or having a connection or contingency in regard to their subject, are brought before different Divisions or Lords Ordinary, the process first enrolled is called the leading process, and the Division or Lord Ordinary before whom the subsequent process is brought is directed to remit the same to the consideration of the Division or Lord Ordinary before whom the first process had been brought; 48 Geo. III. c. 151, § 9. If the two causes appear in the calling list on the same day, that enrolled before the senior Lord Ordinary is deemed the leading cause; A.S. 7 Dec. 1871, § 2. As to what constitutes contingency, see *Western Bank*, 21 Jan. 1860, 22 D. 447; *D. Athole*, 16 Dec. 1869, 8 Macph. 304; and other cases cited in *Mackay*, *infra*.] The remit is usually made on a simple motion at the bar; [but the question of contingency may be raised by the court *ex proprio motu*; *McNeill*, 17 March 1866, 4 Macph. 608. The provision of the statute is imperative, and leaves no discretion to the court; *Bryce*, 14 Dec. 1859, 22 D. 213. The motion for a remit *ob contingentiam* may be made at any stage, so long as the cause is in dependence; *Bryce*, *supra*; *Cleland*, 27 Feb. 1850, 7 Bell's App. 153; *Forster*, 12 Jan. 1871, 9 Macph. 397.] The effect of remitting

processes in this manner is merely to bring them before the same Division of the court, or the same Lord Ordinary. In other respects they remain distinct; the pleadings may be unconnected; and no step taken in the one will prevent the other from sleeping. Where an action has been brought into the Court of Session, and a process between the same parties in relation to the same subject-matter is depending in an inferior court, [the case was formerly brought from the inferior court into the Court of Session, by an advocacy *ob contingentiam*. Now, however, a party desiring to remove such action to the Court of Session may lay before the Lord Ordinary or the Division before whom the Court of Session process is actually at the time, a copy of the inferior court record, or of such pleadings as may have been lodged, and of the interlocutors in the cause, certified by the clerk of the inferior court, and may move for the transmission of the inferior court process to the Court of Session; warrant for which is granted, if the Lord Ordinary or the Division are of opinion that there is contingency between the processes; 31 & 32 Vict. c. 100, § 74. The decision of the Lord Ordinary or the court, on such motion, is final at that stage; but, if refused, the motion may be renewed at any subsequent stage of the cause; *ib.* § 75. See *Ivory's Form of Process*, ii. 51; *Shand's Prac.* 442, 500; *Mackay's Prac.* i. 512, 518; *Coldstream's Procedure*, 91. See *Conjoining of Processes*.]

CONTINGENT DEBTS; are debts due provisionally, in a certain event. Creditors in such debts are, by the law of Scotland, entitled to rank upon the estate of a bankrupt. A discharge obtained under the sequestration statute operates against such debts, as well as against debts due at the time of the bankruptcy. A contingent creditor, however, is not entitled to concur as a creditor in the petition for sequestration, or to vote in the election of the trustee, or in the other steps of the procedure, [nor can he draw a dividend in respect of such contingent debt; but, on application to the sheriff, or to the trustee in the sequestration (if elected), a value is put on the debt, and the creditor is then entitled to vote and draw dividends in respect of such value, and no more. See *Bell's Com.* i. 332; ii. 308; *Bell's Princ.* § 47; *Goudy on Bankruptcy*, 185, 309, 398. See *Sequestration*.]

CONTINGENT LEGACY; is a legacy, the existence of which depends upon an

uncertain future event, as where a legacy is given, provided the legatee shall arrive at a certain age. See *Conditional Obligation. Legacy. [Vesting.]*

CONTINUATION OF THE DIET.

The summons in a civil process authorises the defender to be cited to appear on a certain day, "with continuation of days," and the summons may be called in court, either on the day named, or within year and day of the day of compareance, unless it be forced on by protestation. See *Calling of a Summons. Protestation.* But in a criminal prosecution the diet is peremptory, and the libel must be called on the precise day, and, in some way or other, disposed of; otherwise the action falls, and cannot be resumed. The diet may be continued, however, by an act of court, made in the presence of a single judge, and in the absence of the parties. Such an act is not even signed by the judge, but merely entered in the books of adjournal by the clerk, in the judge's presence. [The continuation must not be indefinite, but to a specified day; otherwise the diet will fall; *Fraser's*, 1 June 1852, 1 Irv. 1. It is in the discretion of the court to grant or refuse adjournment, and strong grounds are required to justify delay. See *Robertson*, 25 Oct. 1869, 1 Coup. 348; *Thomson*, 10 July 1871, 2 Coup. 103.] See *Stair*, B. iv. tit. 2, § 2; tit. 38, § 2; *Hume*, ii. 263, 275, 417; [*Ersk. B. iv. tit. 4, § 90; Alison's Prac.* 343; *Macdonald*, 459, 528.] See *Diet. Criminal Prosecution.*

CONTRA NON VALENTEM AGERE NON CURRIT PRÆSCRIPTIO; a Roman law maxim, received in the law of Scotland, importing that prescription does not operate against one under a legal incapacity to interrupt it. *Ersk. B. iii. tit. 7, § 37.* See *Prescription.*

CONTRABAND GOODS; are those goods which are imported to this country, or exported from it, without paying the duties imposed by law. Contracts for smuggling, or for the delivery of goods known to be contraband, found no right of action; and no party participant in the smuggling, or by whom the contraband goods have been delivered in this country, can legally claim under the contract. But foreigners, or even native Scotchmen settled abroad, selling and delivering goods which are afterwards smuggled into this country, have action here for the price, even although the seller suspected or knew that the buyer meant to smuggle the goods into Britain, provided the seller was not himself accessory

to the smuggling; *Cullen & Co.* 1793, M. 9554; *Reid*, 1793, M. 9555. Where the buyer of contraband goods knows them to be contraband, he has no claim for delivery, and no action of damages for breach of contract, the maxim being, that, in all demands upon illegal contracts, *Potior est conditio possidentis et defendentis.* It seems, however, to have been thought at one time, that where a bill was granted for the price of contraband goods, action or diligence was competent on the bill; but more recently action has been refused, where the bills were in the hands of the original parties, or of their trustees; [*Duncan*, 1776, M. App. Pact. Illicit. No. 1. See *Stair*, B. ii. tit. 2, § 14; *Ersk. B. iii. tit. 3, § 3; tit. 1, § 10;*] *Bell's Com.* i. 326; *Bell's Princ.* § 42. [See *Smuggling.*]

CONTRACT. A contract is "the voluntary agreement of two or more persons, by which something is to be given or performed upon one part, for a valuable consideration, either present or future, on the other part;" *Ersk. B. iii. tit. 1, § 16.* Consent of parties being implied in all contracts, persons incapable of consent, such as idiots, pupils, persons absolutely drunk, &c., cannot contract. Persons who have been compelled to give their consent by force or fear, or who have been induced to consent by means of fraud or deception, cannot be said to have legally consented; and all contracts, therefore, exposed to such objections, are null and reducible. In like manner, error in the essentials—*e.g.*, either in regard to the contracting parties, or the subject-matter of the contract—will vacate the agreement. A contract, by which the parties, or any of them, become bound to perform what is naturally impossible, or to do any illegal act, or in which stipulations *contra bonos mores* are inserted, can found no action; and the contracting parties are neither liable in performance nor in damages for non-performance. But all facts, in themselves legally possible, are the subjects of obligation, although beyond the power of the contracting party, and he is liable in damages if he cannot perform; *Ersk. B. iii. tit. 3, §§ 83, 84.* Things exempted from commerce, either by nature, by destination, or by statute, cannot be the subject of obligation. The *nominate* contracts in Scotch, as in the Roman law, are loan, commodate, deposit, pledge, sale, permutation, location, society, and mandate,—for which see the separate articles. There are also in our law, as well as in the Roman law, a great variety of contracts, which, not having been

CONTRACT OF MARRIAGE

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distinguished by special names, are termed *innominate*, all of which are obligatory on the contracting parties from their date; so that neither party can rescind, even although one has, and the other has not, performed his part of the contract; *Ersk. B. iii. tit. 1, § 35*; *Bank. i. 328*. Breach of contract subjects the party guilty of it not only to an action for enforcing it, but also to a claim for damages. See *Stair, B. i. tit. 10*; *More's Notes, lxii.*; *Bell's Com. i. 312*; *Bell's Princ. §§ 5, 15, 524*; [*Pollock on Contract*; *Anson on Contract*.]

CONTRACT OF MARRIAGE; is the technical name given to a written contract entered into between parties, who are either about to become husband and wife, or actually married to each other. In the one case, it is termed an antenuptial contract, and in the other a postnuptial contract.

1. *Antenuptial Contract*.—The object of this contract generally is, to make some modification on the legal rights of the parties and their children, and more effectually to guard against the risk of the husband's insolvency. An antenuptial contract is held to be strictly an onerous deed, by which either a real security, or a *jus crediti*, may be constituted in favour of the wife or children, which will, in the one case, give them a preference, and, in the other, entitle them to rank as creditors. With regard to the wife.—Instead of her legal provisions of *terce* and *jus relictæ*, the husband may become bound to infest her in liferent in certain lands; and infestment on the contract will render her right real. Lands thus set apart for the wife are called *locality lands*. Or he may secure her by infestment in an annuity, which is termed a *jointure*: or he may bind himself to invest money in real security for her behoof, or to provide her in a certain annuity. All which obligations, if expressed with sufficient precision, will vest a *jus crediti* in the wife, which, in case of the husband's insolvency, will entitle her to rank as a creditor for such provisions, or will give her an absolute preference, [according as the provisions are or are not fortified by real security. And the term "real security" is applied in a loose sense, to indicate the security afforded by a preferential right to property, whether heritable or moveable in its nature. "Such security may be given by a completed conveyance, either to the beneficiaries of the marriage-contract, or to trustees for their behoof. Thus, provisions in favour

[of a wife may be secured by infesting her in lands for her own use, exclusive of the husband's rights, or by assigning personal bonds, policies of assurance, stock, or other moveable rights, to her, under the same form of destination and duly intimating the assignation. The same result may be attained indirectly by a conveyance to trustees for the wife's behoof;" *M'Laren on Wills, i. § 813*. But a husband cannot give his wife a preference over furniture or corporeal moveables which he retains in his possession; *Campbell, 13 June 1848, 10 D. 1280*; *Brown, 19 Dec. 1850, 13 D. 373*.] By contract of marriage the *jus mariti* may be excluded [either] as to a particular subject, [or *per aversionem*; see *Jus Mariti*.] Thus, an annuity may be purchased by the husband for the wife for her aliment, or a bond may be taken, payable to her, excluding the *jus mariti*, provided this is done by an antenuptial deed; for, after marriage, all such provisions between husband and wife are revocable as donations. The *terce* is excluded by a conventional provision to the wife, unless the contrary be expressed; 1681, c. 10. The rule is different with regard to the *jus relictæ*, which requires an express exclusion, even where conventional provisions are made. *Bell's Com. i. 682*.

Provisions in favour of children, in an antenuptial contract, are also held to be onerous deeds; but it depends entirely upon the manner of expressing the provisions, whether they shall confer either a preference or a *jus crediti*. In the ordinary case, the contract makes the children merely heirs, having only an expectancy, or *spes successionis*; but, on the other hand, it is not possible, by means of an antenuptial contract of marriage, to deprive the children of the marriage of their legal provision of *legitim*, [without securing to them some conventional provision, however small, in lieu of *legitim*. See *Maitland, 14 Dec. 1843, 6 D. 244*; *L. Panmure, 29 Feb. 1856, 18 D. 703*.] See *Legitim*. Where the property is settled on the children *nascituri* in fee, or the provisions made payable after the death of the father, the children cannot compete with onerous creditors, although they may reduce gratuitous alienations to the prejudice of their provisions. In order to confer a *jus crediti*, the children must be vested with the character of creditors during their father's life, which may be done by an

obligation to pay the provisions, or the interest on them, at a term which either must or may happen during the father's life. Where it is intended to give the heir or children a preferable right, to be effectual against onerous creditors, it may be done by the father, in an antenuptial contract, binding himself not to contract debt, or to infest the heir against a determinate day, or by a clause restricting his own right to a mere liferent; and such obligations, though granted *liberis nascituris*, when secured by proper diligence, and perfected by sasine, found a preference against all posterior deeds of the father. Where the husband's or wife's titles are not complete, or where any other obstacle prevents the execution of a regular antenuptial contract, antenuptial marriage articles may be entered into, under which a *jus crediti* may be effectually vested in the parties; and any deed after marriage in implement of these articles, if it does not fall within the bankrupt statutes, and if it be otherwise unobjectionable, will be effectual. *Ersk. B. iii. tit. 8, § 40.* [For rules to distinguish between *jus crediti* and *spes successionis*, see *Jus Crediti*. Although the court is always unwilling to interfere with provisions made in an antenuptial contract, yet if these are extravagant and unreasonable, and the husband is insolvent, they may be reduced *quoad excessum*. See *Bell's Com. i. 683*; *Carphin*, 24 May 1867, 5 Macph. 797. *Erskine (B. iii. tit. 8, § 42)* says that a father may, notwithstanding a first marriage-contract, settle a jointure upon a second wife, or provisions upon the issue of a second marriage, though he should thereby encroach on the funds provided to the heirs of the first marriage-contract, if he had no other funds available. But later decisions have made it questionable, how far such power may be exercised at the expense of children of the first marriage, vested with a proper *jus crediti*. See *Dykes*, 9 Feb. 1811, F.C.; *Guthrie*, 21 Nov. 1846, 9 D. 124; *Harvie*, 3 July 1847, 9 D. 1420; *Wilson's Trs.* 2 July 1856, 18 D. 1096. See also *Mackie*, 1 March 1884, 11 R. (H.L.) 10; where a provision to children of a contemplated marriage, and also to children of a former marriage, all as a single class, was held to confer an immediate vested interest. An assignation in a marriage-contract requires to be intimated; and the criterion of preference, in competition with any other onerous assignation, is the date of intimation; *Tod's Trs.* 20 July 1869, 7 Macph.

[1100; *Campbell's Trs.* 11 July 1884, 11 R. 1078. "The mere circumstance of a lady in a marriage-contract conveying her fortune to the marriage-contract trustees does not deprive her of her absolute right to that property; something must be done with it. It must be not only conveyed to the trustees, but it must be settled, and they must be directed to apply it to purposes of the marriage-contract, and if they have to do so they must keep it until these purposes are fulfilled; but if it is not directed to be so applied, or, in other words, is not settled, then the mere circumstance of the lady having given what then becomes a gratuitous conveyance to the marriage-contract trustees will not prevent her from demanding from these trustees a reconveyance of that estate when she thinks fit;" *per* Lord Pres. Inglis, in *Laidlaws*, 1 Feb. 1884, 11 R. 481, 488. In *Cooper*, 24 Feb. 1888, 15 R. (H.L.) 21, Lord Watson, following certain of the judges of the Court of Session, expressed the opinion that a deed in the form of an antenuptial contract might receive effect as such though not signed till immediately after the marriage ceremony. But Lord Macnaghten doubted whether a contract executed after the status of the party had been definitely altered by marriage could be regarded as an antenuptial contract.]

2. *Postnuptial Contracts*.—After marriage, the wife and children can take nothing in competition with his creditors, which the husband cannot legally bestow. Postnuptial contracts must always be construed with reference to this principle, in so far as creditors are concerned; and, in so far as regards the husband and the wife, they are exposed to the risk of revocation by either of the parties, as *donationes inter virum et uxorem*. See *Ersk. B. i. tit. 6, § 29*. As to the wife's provisions under such a contract, it has been held, in questions with creditors, that a moderate provision granted to her during her husband's solvency will be effectual; and to the extent of a moderate aliment, even after the contraction of debt by the husband. [But it appears now to be the prevailing view, that such provisions granted during insolvency would not be sustained to any extent; *Sharp*, 19 Jan. 1839, 1 D. 396; *Galloway*, 17 July 1861, 4 Macq. 267; *M'Laren on Wills*, i. § 824. And only such provisions are sustained as take effect after the husband's death; *Dunlop*, 2 April 1867, 5 Macph. (H.L.) 22.] As to children, it is held that pro-

visions to them made in a postnuptial contract after contraction of debt, are ineffectual although granted in implement of the natural obligation to aliment. Where insolvency does not follow, and where the provisions are reasonable and proper, the rights of the parties (with the exceptions above-mentioned) may be effectually settled in a postnuptial contract of marriage. See *Jeffrey*, 24 May 1825, 4 S. 32. Where a separation has taken place between the husband and wife, without a dissolution of the marriage, whether the separation has been judicial or by decree-arbitral, or by voluntary contract of separation, the husband may, in such a case, vest his wife either with a *jus crediti*, or a preference for her aliment or other stipulated provision according as his obligation is personal, or completed by infestment in security, provided such provision is made during solvency. The provisions of such contracts are of course revoked by a reconciliation; *Bell's Com.* i. 687.

The framing of the contract of marriage, so as to provide for the various events contemplated by that deed, and to secure the fulfilment of the different stipulations, is one of the most important and difficult duties of a conveyancer. See *Stair*, B. ii. tit. 3, § 41; tit. 6; B. iii. tit. 5, § 19; tit. 8, § 45; *Ersk.* B. i. tit. 6; B. iii. tit. 3, § 30; tit. 8, § 38; [B. iv. tit. 1, § 33;] *Bank.* B. i. tit. 5, § 1; *Bell's Com.* i. 681; *Bell's Princ.* § 1941; *Jurid. Styles*, i. 174; ii. 497; [*Duff's Feud. Conv.* 389; *Menzies' Conv.* 439, 672; *M. Bell's Conv.* ii. 850; *Fraser on Husband and Wife*, ii. 1334; *M'Laren on Wills*, i. § 790; *Craigie's Digest* (Herit.), 79; *Craigie's Digest* (Mov.) 249.] See *Marriage*. [*Destination. Conjoint Rights Appointment. Fee and Liferent. Conquest.*]

CONTRAVENTION; may be defined generally to be any act done in violation of a legal condition or obligation, by which the contravener is bound. The term, however, is most frequently applied to an act done by an heir of entail in opposition to the provisions of the deed, whereby a forfeiture of the contravener's right may be incurred; or to acts of molestation or outrage committed by a person in violation of lawburrows, whereby the contravener exposes himself to the penal action of contravention of lawburrows. *Stair*, B. i. tit. 9, § 30; B. iv. tit. 48; *Jurid. Styles*, 2d edit. iii. 96, 190. See *Entail. Lawburrows*.

CONTRIBUTION; takes place where

several parties pay their share of a common expense. The term, in a legal sense, is generally applied to contributions made for equalising the loss arising from sacrifices made for the common safety in sea voyages, where the ship is in danger of being lost or captured. The basis of our law upon this subject is the celebrated *Lex Rhodia de Jactu*, the natural equity of which has led to its adoption in the maritime law of most European states. The general rule in this country seems to be, that where any part of the ship or cargo has been sacrificed to save the rest, the loss is to be adjusted by a contribution from all who have partaken of the benefit. [Everything saved pays contribution according to its value. The ship contributes, deducting stores and provisions; the cargo contributes, including the goods thrown overboard; and the freight, after deducting wages.] Persons on board, however, bear no share in the contribution, *quia liberi corporis nulla est aestimatio*; [nor does their personal wearing apparel, provided it is not put up in boxes or chests.] The most valuable goods, such as diamonds or other precious stones, though their weight should have been incapable of putting the ship in hazard, are to be estimated at their just price, on the ground that they could not have been saved but for the ejection of the other goods. [In valuing and apportioning the contribution, the guiding principle is that the owner of the property sacrificed is to be placed in the same condition as if his property had been part of what is saved. The following rules are given by Professor Bell (*Princ.* § 441):—"If the ship reaches her port without further damage, the property sacrificed is to be valued at the market price of the port of delivery, freight, duties and charges deducted; and they must bear their share of the contribution. The goods which arrive in port undamaged are taken at their actual value in the port of discharge, deducting charges, &c.; if put back, they are taken at the invoice price; if stopped short of their destination, at their value where stopped. If the goods saved be damaged after the jettison, the deteriorated value must be taken. The owner of goods lost pays no contribution for them." If a mast has been cut away, or an anchor parted with, in order to save the ship, contribution takes place; [but if they have been lost through the violence of the storm, and not by a voluntary act for the general benefit, the loss falls on the ship and freight alone. As to whether contribution

[is due in respect of expense in warehousing and reloading, when a ship has been obliged to put into port, see *Attwood*, 5 Q.B.D. 286; *Svensden*, 13 Q.B.D. 69.] In order to found the right to contribution, it is necessary that the goods shall not have been rashly or unnecessarily sacrificed, but after such consultation as the exigencies of the occasion may admit of; and in case of difference of opinion amongst the crew as to the necessity of the sacrifice, a majority shall determine. In such a case, the opinion of the master, where he had no adverse interest, would be entitled to great weight. In all cases in which a part either of the ship or cargo has been sacrificed for the common benefit, an account of the circumstances under which it happened ought to be entered in the log-book, with a specification of the articles thrown overboard, or otherwise destroyed, to which affidavit should be made at the first port, otherwise the presumption will be against the master and crew. See *Ersk. B. iii. tit. 3, § 55*; *Bank. i. 233*; *Bell's Com. i. 629*; *Bell's Princ. § 437*; *Stair, B. i. tit. 8, § 8*; *More's Notes*, lv.; *Brodie's Supp.* 1006; *Smith's Merc. Law*, 323; *Abbott on Shipping*, 497; *MacLachlan on Shipping*, 653; *Arnould on Marine Insurance*, ii. 845; *Hopkins on Average*; *Lowndes on General Average*.] See *Salvage*.

CONTRIBUTORY; [one liable to contribute to the assets of a joint stock company on its being wound up.] See *Joint Stock Company*.

[CONTRIBUTORY NEGLIGENCE. See *Damages*.]

CONTUMACY; is a wilful disobedience to any lawful summons or judicial order. In a criminal process, the punishment of contumacy in the accused person is sentence of fugitation. In a civil action, the only consequence of the defender's contumacy, in refusing obedience to the citation, is that the judge will take cognisance of the cause, and decern in his absence. *Stair, B. iv. tit. 3, § 27*; *tit. 38, § 27*; *Ersk. B. iv. tit. 1, § 7*. See *Fugitation. Absence. Contempt of Court*.

CONVENTICLE; in English law, a private meeting or assembly for the exercise of religion; first used as a term of contumely for the meetings of Wickliffe above five hundred years ago; and afterwards applied to meetings of the Nonconformists. *Tomlins' Dict. h. t.*

CONVENTION OF ESTATES. In Scotland, before the Union, a convention of the estates of the kingdom was in use to

be summoned, for the purpose of imposing a taxation to answer a present exigency, or upon any special occasion requiring immediate deliberation. Those conventions consisted of any number of the estates that might be suddenly called together without a formal citation, such as was required in summoning a regular parliament. The power of the convention was limited to that particular business for which it had been assembled; and, regularly, the estates could be so convened only by royal authority; but, in case of absolute necessity, they met without it, as in the convention for settling the government at the Revolution of 1688. *Ersk. B. i. tit. 3, § 6*; *Bank. ii. 449*; *Mackenzie's Inst. B. i. tit. 3, § 5*. See *Parliament*.

CONVENTION OF ROYAL BURGHS.

By 1487, c. 111, the royal burghs are ordered to meet once a year, by commissioners, to treat of the "welfare of merchandise, the gude rule and statutes for the common profite of burrows, and to provide for remeid upon the skaith and injuries sustained within the burrowes." These powers are renewed by later statutes; and accordingly, commissioners from each burgh meet annually in Edinburgh, to treat of the subjects committed to their charge. The powers, however, of this convention were never understood to be final or uncontrollable; consequently, its deliberations excite little interest, and are, in general, directed to matters of no public importance. [See *Cunningham*, 5 Aug. 1842, 1 *Bell's App.* 628; the report of which contains an account of the constitution and powers of the convention.] See *Ersk. B. i. tit. 4, § 23*; *Bank. ii. 579*; *Bell's Princ. § 2172*. [See *Burgh, Royal*.]

CONVENTIONAL OBLIGATIONS; are obligations resulting from the special agreement of parties. The term is generally used in contradistinction to *natural* or *legal* obligations, which arise from the operation of the law itself, independently of contract. *Stair, B. i. tit. 9*; *Bell's Princ. § 7*. See *Obligation. Contract*.

[CONVERSION. See *Heritable and Moveable. Trust*.]

[CONVERSION. In England, at common law, conversion is that tort which is committed by a person who deals with chattels not belonging to him in a manner which is inconsistent with the rights of the lawful owner. Thus if a person in possession of goods belonging to another wrongfully refuses to deliver them up to him, or sells, disposes of, parts with or destroys

[them, he is guilty of a conversion. *Sweet's Law Dict.; Pollock on Torts*, 288.]

CONVEYANCE; is a deed executed according to all the forms required by law, and by which a right is either created, or transferred, or discharged.

CONVEYANCING. The literal meaning of this term is, the preparing of conveyances; and, in professional language, the word conveyancer is sometimes used as contrasted with that of agent; the one being regarded as a preparer of deeds, and the other as a conductor of law-suits. But, in its larger acceptation, the term conveyancing not only includes the preparation of all voluntary deeds, constituting, transmitting, or extinguishing rights or obligations, but extends to those forms prescribed by law, for accomplishing the same objects, when the party is either unwilling or unable to do so by a voluntary act. The object of voluntary written deeds, generally speaking, is to express the purpose of the parties, or to impose obligations on them in apt terms, so as to insure their being carried into full effect; and, as practice and adjudged cases have attached certain determinate meanings to many of the terms employed in deeds, it is necessary that a conveyancer should be intimately acquainted, not only with the various deeds themselves, and the clauses peculiar to each, but that he should be fully aware of the legal import of every clause or expression which he may have occasion to use in expressing, in technical and formal language, the intentions of the parties. In Scotland, as in every other country of Europe, the forms of the deeds which relate to land rights have been very much modified by the feudal system; and, by a concurrence of circumstances, partly accidental, the feudal forms have, in this country, been combined with a system of records, remarkable both for its completeness and utility. The titles to landed property in Scotland have thus attained a very high degree of security. The forms of Scotch deeds concerning moveable property are, in general, simple and natural; and the authentication or testing of all formal deeds, whether relating to heritable or moveable property, is regulated by statutory enactments, calculated, as far as seems practicable by human ingenuity, to guard against fraud or interpolation. These, however, as well as the forms of voluntary and judicial conveyancing, are subjects which are necessarily treated of in separate articles. See *Ross's Lect.* i. 147; ii. 1. See also *Charter.*

Disposition. Infeftment. Sasine. Bond. Assignment. Adjudication. Ranking and Sale. Registration. Testing Clause.

[In the present article, it may be appropriate to mention briefly one or two elementary principles of feudal conveyancing, not elsewhere treated of. It is the characteristic and inherent condition of a feu that there must be a superior and a vassal. The Sovereign is the original source of all feudal land rights, and is therefore either immediate or ultimate superior in every feu. The vassal's right being primarily, and until modified by statute, of the nature of a voluntary grant, in consideration of services to be rendered, *delectus personæ* was implied; and consequently the right could not be alienated to a stranger, without the superior's consent. It was no derogation from this feudal principle, that from the earliest times the vassal seems to have had the power of granting subfeus, or base rights, to be holden of himself as immediate superior. Such a grant was not regarded as an alienation. It created a new feu; and, in theory at least, did not affect the rights of the original superior, in any question with his own vassal. Practically, however, the multiplication of subfeus became a source of embarrassment to superiors, by diminishing the security of their duties and casualties. In England, this difficulty led to the passing of the statute *Quia Emptores*, in the 18th year of Edward I. (1290), which put an end to subinfeudation, by enabling vassals to sell their lands to be holden of the seller's superior, independently of his consent. A Scottish act to the same effect is printed along with the *Regiam Majestatem*, as Rob. I. st. 2. c. 24. But that act, if authentic (which is doubtful), was not observed; and down to the latter end of the 15th century, the powerful influence of the barons prevailed to maintain the ancient rule that no change of vassal could take place without the superior's consent.

[A conveyance, therefore, to be holden *a me de superiore meo*, required the intervention of the superior to give it feudal effect. The transmission might be completed either by resignation or by confirmation; and therefore, until the recent series of conveyancing statutes, such a disposition generally contained both a procuratory of resignation and a precept of sasine. By the former method, the vassal or his procurator, in virtue of the procuratory, resigned the subjects disposed into

[the hands of the superior, *in favorem* of the disponee; and the title of the latter was completed by infeftment on a charter of resignation granted by the superior. See *Resignation*. If the title was to be completed by confirmation, infeftment was taken at once on the precept of sasine; and the subsequent ratification of the superior, by charter of confirmation, validated the transaction from the date of infeftment. But, until confirmed, the conveyance gave no security to the purchaser. It did not feudally divest the seller, and was defeasible by any subsequent disposition first confirmed, as well as (in regard to the *dominium utile*) by any completed infeftment on a subfeu. See *Confirmation*. A subfeu, on the other hand, or conveyance to be holden *de me*, to which the superior was no party, while it gave immediate title to the *dominium utile*, left the subvassal exposed to all the casualties, including even forfeiture of the feu, which might be incurred through the death or delinquency of the granter, who still held the position of vassal. See *Base Rights*. In order to combine the advantages of the public and the private modes of transmission, the older practice was to grant two separate dispositions, the one holding *a me*, and the other *de me*. But about the beginning of the 17th century, the expedient of a single deed with alternative manner of holding, *a me vel de me*, came into use. The precept of sasine in such conveyance being indefinite, infeftment thereon was referable either to the public or the private holding. The disponee infeft had therefore, until confirmation, a complete title as subvassal of the disponer; and possessed at the same time the means of converting his base right into a public one, as soon as confirmation could be obtained. See *Bishop of Aberdeen*, 1680, M. 3011.

[Meanwhile, the act 1469, c. 36, had gone far to break down the old feudal restraints, and pave the way for the gradual introduction of free commerce in land. That act was limited in its intention to creditors-apprisers, whom it empowered to enforce an entry from their debtor's superior, on payment of a year's rent; but ordinary purchasers contrived to share the privilege, by going through the form of apprising in collusion with the sellers. This power was extended to adjudgers by 1672, c. 19; and to purchasers of bankrupts' lands at judicial sales by 1681, c. 17. At length, by the act 20 Geo. II. c. 50, passed shortly after the Rebellion of 1745, the superior's right

[to refuse a vassal was abrogated; and any purchaser, holding a procuratory of resignation from the last-entered vassal, was enabled to compel the superior to give entry by charter of resignation, on payment of all fees and casualties due by law. The power, still nominally retained by the superior, of refusing entry by confirmation, was taken away by the Lands Transference Act of 1847. And finally, by the Conveyancing act of 1874, entry with the superior is now implied by force of statute, and without intervention of the superior, in the case of every registered conveyance. See *Duff's Feudal Conveyancing*; *Menzies' Lectures*; *M. Bell's Lectures*; *Begg's Conveyancing Code*; *Hendry's Manual* (4th ed. by Wood); *Craigie's Digest*.]

CONVICT; is a person found guilty of a crime. Convictions generally proceed on the verdict of a jury; but our law also admits of summary convictions, without the intervention of a jury, in certain circumstances, as in cases of contempt of court, of attempts to corrupt or withhold evidence, of malversation by persons intrusted with the criminal police of the country, of certain offences against the revenue laws provided for by special statute, and in proceedings before sheriffs, police magistrates, and justices of the peace for minor offences. See *Hume*, ii. 138. [See *Previous Conviction. Prevention of Crime Act*.]

CONVOCAATION; in England, an assembly of the representatives of the clergy, to consult of ecclesiastical matters. [There are two convocations, one for the province of Canterbury, and the other for that of York. And there are two distinct houses of either convocation, of which the archbishop and bishops form the upper house, and the lower consists of deans, archdeacons, the proctors for the chapters, and the proctors for the parochial clergy. See *Stephen's Com.* ii. 554; *Phillimore's Eccl. Law*, ii. 1923.]

CONVOY; is the name given to the ship or ships of war, appointed by Government, to accompany merchant vessels during war, as a protection against capture. During the wars with France, merchant ships were prohibited by statute to sail without convoy. During war, the obligation to sail with convoy is an implied condition of the contract of affreightment; and in case of insurance, it is a warranty in the contract with the underwriters. It is sufficient implement of this obligation if the vessel join the convoy at the usual place of assembling, and accompany it as far as

it goes on the destined voyage, provided it is the only convoy appointed for vessels destined to that port. If, however, the convoy have sailed, the vessel cannot legally endeavour to overtake it; although, if the vessel have sailed with convoy, and is driven back, she need not wait for new convoy, but may proceed on the voyage. The convoy must be the naval force appointed for the purpose, and the vessel must continue with it, unless driven off by stress of weather or other inevitable accident. It is not sufficient to sail with any ship of war about to undertake the same voyage, unless such ship be also appointed a convoy. See *Bell's Com.* i. 602; *Bell's Princ.* § 408; [*MacLachlan on Shipping*, 420, 561. See *Insurance*.]

CO-OBLIGANT. [When two or more persons undertake an obligation as principal debtors, they are bound either *singuli in solidum* or *pro rata parte*. Where the obligation is indivisible, e.g., an obligation for delivery of a special subject, the co-obligants are bound *singuli in solidum*, even though such obligation may resolve into a claim of damages; *Bell's Princ.* § 58 (correcting *Ersk.* B. iii. tit. 3, § 74). But when the obligation is for payment of a sum of money, or for anything else which is divisible in its nature, the general rule is that the co-obligants can be sued only *pro rata*, or each for his own share, unless they are expressly taken bound conjunctly and severally. But, by the usage of trade, bills and promissory notes are always held to infer a joint and several obligation; and in all contracts importing a co-partnership, the co-obligants are bound *singuli in solidum*. And if the obligation bear the money to be for the use of one of the parties, the rest are held to be cautioners, and liable for the whole. A co-obligant, however, who has paid more than his rateable proportion of the debt, even when bound *in solidum* to the creditor, is entitled, as against his co-obligants, to relief or indemnification for the excess of his payment beyond his proper share. This right of relief arises by law, without the necessity of an assignation from the creditor of his debt. But the insolvency of a joint obligant lays on the rest *pro rata* the burden of his share. See *Stair*, B. i. tit. 8, § 9; tit. 17, § 20; *More's Notes*, lvi., cxviii.; *Ersk.* B. iii. tit. 3, § 74; *Bell's Com.* i. 361; *Bell's Princ.* § 53; *M. Bell's Conv.* i. 261; *Kames' Equity* (1825), 78; *Ross's Lect.* i. 76. See *Cautionry. Relief. Conjunctly and Severally. Correi Debendi*.]

COPARTNERSHIP. See *Partnership*.

COPYHOLD. [In England, lands held by copyhold tenure are lands, forming part of a manor, originally granted by the lord for tenancies at will merely, which have by immemorial custom become converted into estates independent of the will of the lord in everything but name, and of various degrees of duration, according to the custom of the manor. Copyholds are so called because the evidence of the title to such lands consists of copies of the court roll of the manor. See *Sweet's Law Dict.*; *Williams on Real Property*, 392.] This tenure is unknown in the law of Scotland. *Ross's Lect.* ii. 479.

COPYRIGHT; is the property which an author or his assignee has in any original work or composition. The question has been much agitated, whether, at common law, and independently of statute, the copyright vests in the author, so as to entitle him to claim reparation and damages from those who infringe his right. But it has been finally settled, both in Scotland and England, that the copyright of published works is protected by statute alone. [See *Hinton*, 1773, M. 8307; *Donaldson*, 1774, 4 Burr. 2408.] The rule is different with respect to unpublished works, which are property at common law. [Such literary property is conveniently embraced within the present article (see *infra*); but the term copyright more correctly denotes the statutory right in published works. In the leading statute (5 & 6 Vict. c. 45), copyright is construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is applied in the act (§ 2).

[*Copyright in Books, &c.*—The first statute on this subject was 8 Anne, c. 19, by which it was provided that the author of any book should in future have the sole liberty of printing it for fourteen years, [and, if alive at the end of that period, for another term of fourteen years.] By 54 Geo. III. c. 156, the author's right was extended to twenty-eight years absolute, and to the end of the author's life. [These acts were repealed by the Copyright Act, 1842 (5 & 6 Vict. c. 45), which contains the existing law. In this act, "book" means and includes every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published; § 2. And the statute enacts that the copyright of every book published in the lifetime of its author shall endure for his natural life, and for the further term of seven years from his

[death, and shall be the property of such author and his assigns; provided always, if the said term of seven years shall expire before the end of forty-two years from the first publication of the book, the copyright shall in that case endure for such period of forty-two years; and that the copyright of every book published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns; § 3. Provision was made by § 4 for copyrights subsisting at the commencement of the act. The Judicial Committee of the Privy Council may, on complaint made to them that the proprietor of the copyright in any book after the death of its author has refused to republish or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, grant a licence to such complainant to publish such book, in such manner and subject to such conditions as they may think fit; § 5. A copy of every book published must be delivered, within certain specified times, at the British Museum; and a copy of every book published must be delivered within a month after demand, to the officer of the Stationers' Company, for each of the following libraries: the Bodleian at Oxford, the Public Library at Cambridge, the library of the Faculty of Advocates at Edinburgh, and that of Trinity College, Dublin; or copies may be delivered to the libraries, instead of at the Stationers' Company; and penalties are enacted for default in such delivery; §§ 6–10. By § 11, a book of registry shall be kept at Stationers' Hall, wherein may be registered the proprietorship in the copyright of books, and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright; the book to be open to inspection on payment of 1s. for every entry inspected; and a certified copy of any entry, stamped by the Stationers' Company, shall be given to any person requiring it, on payment of 5s., which copy shall be received as evidence in all courts, and in all summary proceedings, and shall be *prima facie* proof of the proprietorship or assignment of copyright or licence as therein expressed, but subject to be rebutted by other evidence, and in the case of dramatic or musical pieces shall be *prima facie* proof of the right of represen-

[tation or performance (see *infra*). See *Jefferys v. Kyle*, 27 June 1859, 3 Macq. 611; *Thomas*, 33 Ch. D. 292. The proprietor of copyright in any book may make entry in the register book of the Stationers' Company of the title of such book, the time of the first publication, the name and place of abode of the publisher, and of the proprietor of the copyright, or of any portion of the copyright thereof, on payment of 5s.; and every such registered proprietor may assign his interest, or any portion of his interest therein, by entering the assignment, and the name and place of abode of the assignee, on payment of the like sum; and such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed; § 13. Copyright may also be assigned by writing, without such entry in the register; *Jefferys v. Kyle*, *supra*; *Leyland*, 4 Ch. D. 419. Persons aggrieved by any entry in the book of registry may apply to a court of law in term, or judge in vacation, who may order such entry to be varied or expunged; § 14. Piracy of books, whether by printing or by importation, subjects the offender to an action of damages; and the defender in such action must give notice of any objections to the pursuer's title on which he means to rely; §§ 15, 16. No person, except the proprietor of the copyright, or some person authorised by him, shall import into any part of the British dominions, for sale or hire, any printed book first composed or written or printed and published in any part of the United Kingdom, wherein there shall be copyright, and reprinted elsewhere, under penalty of forfeiture thereof, and also of £10 and double the value; and all books so imported shall be seized and destroyed by any officer of custom or excise; § 17. (See also 10 & 11 Vict. c. 95; 39 & 40 Vict. c. 36, §§ 42, 44, 45, 152). When any person shall conduct or be proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, on the terms that the copyright therein shall belong to such proprietor or conductor, the copyright in such encyclopædia or other periodical or serial work shall be the property of such proprietor or conductor, who shall enjoy the

[same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to authors of books (provided he has made payment in terms of the agreement, see *Richardson*, 1 Sim. N.S. 336); except only that in the case of essays, articles, or portions forming part of and first published in reviews or other periodical works, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by the act; provided always, that during the term of twenty-eight years the said proprietor or conductor shall not publish any such essay, article or portion separately or singly without the consent previously obtained of the author or his assigns. But authors may reserve the right of publishing their articles in a separate form; § 18. The proprietor of the copyright in any encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts, shall be entitled to all the benefits of the registration at Stationers' Hall under the act, on entering in the said book of registry the title of such work, the time of the first publication of the first volume, number, or part thereof, and the names and places of abode of the proprietor and publisher; § 19. A newspaper is within the scope of these provisions; the proprietor, therefore, must have registered under the act before he can sue in respect of piracy of an article. See *Walter*, 17 Ch. D. 708; *Trade Auxiliary Co.* 40 Ch. D. 425; *Cate*, 40 Ch. D. 500. Books pirated become the property of the proprietor of the copyright, and may be recovered by action; § 23. No proprietor of copyright shall sue or proceed for any infringement, before making entry in the book of registry (see *M'Lean*, 23 June 1858, 20 D. 1154); but omission to make such entry does not affect the copyright, but only the right to sue in respect of the infringement thereof; § 24. Copyright is personal and moveable estate; § 25. All actions in respect of any offence under the act must be brought within twelve months; § 26; but see *Stewart*, 23 Dec. 1846, 9 D. 1026. This limitation does not extend to actions in respect of the delivery of books to the libraries above-mentioned.

[A fair use of a publication, by quotation or abridgment, *e.g.* in a review, is not an infringement of copyright. A new copyright may be created in an arrangement or abridgment, or in notes and illus-

trations to a standard work; *Lennie*, 18 Jan. 1843, 5 D. 416; *Black*, 23 Dec. 1870, 9 Macph. 341. The title of a book, magazine, or newspaper is protected as a trade name; but a common phrase or combination of words cannot be the subject of copyright; *Kelly*, 13 Ch. D. 682; *Dicks*, 18 Ch. D. 76; *Schove*, 33 Ch. D. 546; *Licensed Victuallers Newsp. Co.* 38 Ch. D. 139. Copyright in styles or forms appended to a book was sustained in *Alexander*, 27 Feb. 1847, 9 D. 748. Any person may dramatise a novel, and cause the drama to be publicly represented; but if in so doing he prints, or otherwise multiplies copies of the novel, or material portions thereof, he infringes copyright. See *Tinsley*, 1 H. & M. 747; *Reade*, 9 C.B.N.S. 755; *Toole*, L.R. 9 Q.B. 523; *Warne & Co.* 39 Ch. D. 73. In the last-cited case, a person dramatised the story "Little Lord Fauntleroy," and, for the purpose of producing his play, made four copies of it, one for the Lord Chamberlain and three for the performers, either in MS. or by the aid of a type-writer. The play contained considerable extracts, almost *verbatim*, from the original story. In respect of these, the defendant was held to have infringed the author's copyright, and the extracts were ordered to be cancelled. There can be no copyright in a publication which is immoral, blasphemous, or seditious, or which defrauds the public by bearing to be the work of one not really its author; *Wright*, 1 C.B. 893; *Macfarlane*, 16 March 1883, 10 R. 801. A foreigner residing in this country, or in a British colony, when his work is first published, is entitled to copyright under the statute; *Low*, L.R. 3 H.L. 100. In *Jefferys v. Boosey*, 4 H.L. Ca. 815, a foreigner residing abroad was held not entitled to copyright, under the earlier act of Queen Anne, in a work first published in this country. In *Low*, *supra*, Lords Cranworth and Chelmsford inclined to the view that the same should be held under the present statute; but Lords Westbury and Cairns were of the contrary opinion.

[*Dramatic and Musical Compositions.*— If these are published as books, the law of copyright in books is applicable. But there is also an exclusive right in the representation or performance of such compositions. By the Copyright Act, 1842, the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be

[the property of the author and his assigns, for the term provided in this act for the copyright of books (see *supra*); and the provisions of the act as to the property of such copyright, and as to registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, except that the first public representation or performance of any dramatic piece or musical composition, shall be deemed equivalent to the first publication of any book; provided always that in the case of any dramatic piece, or musical composition in manuscript, it shall be sufficient to register only the title, the names and places of abode of the author or composer, and proprietor, and the time and place of its first representation or performance; § 20. No assignment of the copyright of any book containing a dramatic piece or musical composition shall be holden to convey the right of representing or performing the same, unless an entry of the assignment in the register book shall express the intention of the parties that such right should pass by the assignment; § 22. Any person who, without the written consent of the author or other proprietor, represents or causes to be represented at any place of dramatic entertainment in the British dominions any dramatic piece or musical composition is liable to pay to the author or proprietor for every such representation an amount not less than 40s., or the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages; 3 & 4 Will. IV. c. 15, § 2, extended by § 21 of act of 1842; and these remedies are not prejudiced by omission of the proprietor to enter his exclusive right in the book of registry of copyrights (*supra*); 1842, § 24. See *Chatterton*, 3 App. Ca. 483; *Eaton*, 20 Q.B.D. 378. "Dramatic piece" includes every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment; § 2. A private or domestic representation, not being injurious to the author, does not infer the statutory penalties: these apply only to a public performance, *i.e.*, one "to which any portion of the public are freely admitted with or without payment;" *per* Brett, M.R. in *Duck*, 13 Q.B.D. 843. In that case a performance in Guy's Hospital, for the entertainment of the nurses, attendants, &c., without payment, was held not to come under the statute. The publication of a dramatic or musical composition,

[as a book, before it has been publicly represented, does not deprive the author of the exclusive right of representation; *Chappell*, 21 Ch. D. 232. In regard to musical compositions, the law has been modified by two recent statutes, passed for the protection of the public from vexatious proceedings for unauthorised performances. By 45 & 46 Vict. c. 40, a proprietor or assignee of copyright in a musical composition first published after passing of the act (10 Aug. 1882), who is entitled and desires to retain the exclusive right of public representation, must print on the title page of every published copy a notice to the effect that such right is reserved; § 1. If the right of performance is vested in one person, and the copyright in another, the act empowers the former to require the latter, under a penalty, to print such notice as aforesaid on every copy to be published thereafter; §§ 2, 3. By 51 & 52 Vict. c. 17, only such penalty or damages as the judge may deem reasonable (even if merely nominal) can be recovered in respect of an unauthorised performance of a musical composition; the costs are in the absolute discretion of the judge; and the proprietor or occupier of the place where such performance takes place is exempt, unless he knows the performance to be unauthorised. But this act does not apply to performance of any opera or stage play in any theatre or other licensed place of public entertainment.

[The copyright in *engravings, prints, and lithographs* endures for twenty-eight years from the first publication; the date of which, with the name of the artist, must be marked on the plate. See 8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57; 6 & 7 Will. IV. c. 59; 15 Vict. c. 12, § 14. *Paintings, drawings, and photographs* are protected during the author's life, and for seven years after his death, by 25 & 26 Vict. c. 68. See *Tuck*, 19 Q.B.D. 629. A photographer employed by a customer to take his portrait is not entitled to sell or exhibit copies without authority, express or implied; *Pollard*, 40 Ch. D. 345. As to authorship of a photograph, see *Nottage*, 11 Q.B.D. 627. The copyright of all new and original *sculpture, models, copies, and casts*, vests in the proprietor for fourteen years, with a further term of fourteen years to the original maker, if he be then living, provided the proprietor's name, and the date, have been put on every such sculpture, model, &c. before it was put forth or published; 54 Geo. III. c. 56. The copyright in *designs*, duly registered, endures for

[five years; 46 & 47 Vict. c. 57, § 47 *et seq.*; 49 & 50 Vict. c. 37. See *Walker, Hunter & Co.* 20 July 1887, 14 R. 1072; 25 May 1888, 15 R. 660; *Blank*, 39 Ch. D. 678.]

[*Unpublished Works, Lectures, Letters.*]

—As already mentioned, unpublished compositions are property at common law; and the publication of them is an invasion of the owner's right; and even when a manuscript has been given away or sold, the donee or buyer is not entitled to publish it, although he may make any other use of it. Nor is one entitled to take down the words of an unpublished play and afterwards publish it. [See *Macklin*, Ambler, 694; *Boucicault*, 5 Ch. D. 267. But as soon as a work is communicated to the public, whether orally or by the circulation of written or printed copies, the author's right of property ceases; *Jefferys v. Boosey*, *supra*. He may, however, communicate his work to others with such limitation as to numbers, or restriction as to use, as shall prevent its publication, and continue his right of property; *ib.*; *Caird*, *infra*.] Doubts having been entertained as to the right of a lecturer to prevent the publication of his lectures, this case has been provided for by statute. The author of lectures, or the person to whom a copy of lectures has been sold or conveyed for the purpose of delivering them in any school, institution, or other place, has the sole right of printing and publishing such lectures. The penalty on others publishing such lectures without leave, is the forfeiture of the copies, and one penny for each sheet. Newspaper printers publishing lectures without leave, are liable to the penalties. No person attending lectures for a fee or reward, is held to have leave to print, copy, or publish them, because of such leave to attend. The right to prevent publication ceases after expiration of the period allowed by the statutes of copyright. The protection does not extend to lectures, of the delivery of which notice has not been given in writing to two justices, living within five miles of the place of lecture, two days at least before their being delivered; nor to lectures in any university, or public school, or college, or on any public foundation, or by any individual, in virtue of or according to any gift, endowment or foundation. The law relating to such lectures remains the same as if the act had not been passed; 5 & 6 Will. IV. c. 65. [Lectures delivered by a university professor in ordinary course are not thereby published, and the professor may interdict their publication; *Caird*, 13

[June 1887, 14 R. (H.L.) 37.] Private letters cannot be published without leave of the writer. [See *Dodsley*, 1775, M. 8308; *Cadell*, 1804, M. App. Literary Property, No. 4, 5 Pat. 493; *Irvine's Report of Trial of Madeleine Smith*, 93, 305; *White*, 5 July 1881, 8 R. 896.] This rule is established on different principles in the law of England and Scotland. In England, it is held that the writer of the letters never lost the property of the letters, or, at all events, that he retains a kind of joint property in them, which would be infringed by their being published without his permission. In Scotland, again, the writer or his representatives have a right to interfere, chiefly on the ground that his reputation may be injured by the publication of confidential letters. [See *Bell's Com.* i. 111.] The English doctrine, that the right of property is the only ground on which one is entitled to interfere, produces an extraordinary result in the case of unpublished works containing libellous or dangerous matter. Such works cannot be legally published, and they are therefore held not to be property; so that when they fall into the hands of a person who prints and publishes them, the author cannot obtain an injunction.

[As to international copyright, see 7 & 8 Vict. c. 12; 15 Vict. c. 12; 49 & 50 Vict. c. 33. As to colonial copyright, see 10 & 11 Vict. c. 95; 39 & 40 Vict. c. 36, § 152; 49 & 50 Vict. c. 33; and 38 & 39 Vict. c. 53 (Canada).]

See on this subject, *Ersk.* B. ii. tit. 1, § 16; *Bell's Com.* i. 111; *Bell's Princ.* § 1356; [*Guthrie Smith on Damages*, 307; *Copinger on Copyright*; *Phillips on Copyright*; *Curtis on Copyright*; *Shortt on Law of Literature and Art*; *Stephen's Com.* ii. 35; *Williams on Personal Property*, 314; *Digest by Mr Justice Stephen*, appended to Report of Copyright Commission, 1878.]

CORN. See *Growing Corn*.

CORNAGE, *Horn-geld*, *Newt-gelt*, or *Neat-geldt*; an ancient English tenure, the service of which was to blow a horn when any invasion of the Scotch was perceived. *Tomlins' Dict. h. t.*

CORONER. [In England the coroner is an officer having both judicial and ministerial duties; the former including the duty of inquiring as to the manner of death of any person who is slain or dies suddenly, or in prison. The inquest is held before at least twelve jurymen, after viewing the dead body. If the jury return a verdict of murder or manslaughter against any

[person by name, the inquisition is equivalent to an indictment, and it is the duty of the coroner to commit the accused for trial, unless (in the case of manslaughter) he thinks fit to admit him to bail. He may also bind over any witnesses to appear at the trial. The coroner is also a conservator of the King's peace, and a magistrate by virtue of his appointment. His ministerial office is only as the sheriff's substitute in executing process where the sheriff is suspected of partiality. There are coroners (usually four in number) for every county in England, some counties being divided into districts for the purpose; and there is a coroner in every borough having a separate court of quarter-sessions; *Sweet's Law Dict.* Coroners were formerly elected by the freeholders, but their appointment was transferred to the county councils by the Local Government Act, 1888 (51 & 52 Vict. c. 41), § 5. Borough coroners are appointed either by the council of the borough, or by a joint committee of the county and borough councils; § 34. The law as to the qualifications, liabilities, &c., of coroners, and the procedure at inquests, was consolidated by 50 & 51 Vict. c. 71.]

CORONER, *Crowner*. According to Skene, the coroner is he who inquires by an inquest concerning murder and slaughter. Skene defines this word as one of those which occur in the *Regiam Majestatem*, from which it may be inferred that the coroner was a functionary at one time known in the practice of Scotland. This, however, is doubtful. See *Regiam Majestatem*; Skene, *h. t.*; Haume, ii. 24 (note).

CORPORA OF MOVEABLES; are moveable subjects which may be seen and felt, as corn, furniture, &c., or cattle, which move of themselves. In speaking of moveable property, the term *corpora* is used in contradistinction to *nomina debitorum*, or obligations of debt, which, in our law, also fall under the denomination of moveables. *Ersk.* B. ii. tit. 2, § 1.

CORPORATION. A corporation is composed of a number of persons erected by proper authority into a body politic, with certain rights and privileges. Cities, burghs, hospitals, scientific or professional associations, and the like, may be thus incorporated. Corporations cannot be legally constituted except by patent or by act of Parliament. Voluntary associations have no *persona standi in judicio*. But by special statute it is made lawful to establish societies for raising funds for the mutual relief and main-

tenance of the members or their families in old age, widowhood, sickness, or other contingency. See *Friendly Societies*. The stat. 7 Geo. IV. c. 67, authorises joint stock banks to sue and be sued in name of their manager or principal officer, on certain conditions prescribed in the statute. See *Bank*. A corporation is held in law to be one person, and being in general established for a perpetuity, the legal person never dies; for although the individuals composing it die out, yet those who come in their places, either by succession or by election, or by the nomination of the founder, according as the charter is conceived, preserve the corporation entire. In general, by the charter of erection, a corporation may sue or be sued in its corporate name; and it may hold heritable property, and contract debt, which will be effectual against the property and funds of the corporation. [As to title to sue, see *Mackay's Prac.* i. 306; and as to the terms on which a corporation is entitled to entry with a superior, see *Composition*.] Communities have also, in the ordinary case, authority under their charter to elect magistrates, directors, or other office-bearers, to represent the whole community, and to bind it in the matters which the charter of incorporation allows to be entrusted to their management. Independent of an express clause in the charter, there are certain *naturalia* of a corporation which are implied in its erection. Thus, the corporation may acquire moveable property, and be sued for the price of it; it may have a common seal; may assemble to deliberate on its affairs; and has a power to make bye-laws for the administration of the affairs of the community, provided such bye-laws are not inconsistent with the laws of the realm. [The act of the majority of the members is the act of the whole corporation, where no quorum is fixed by its constitution; but the minority cannot be bound to any proceeding beyond the powers of the corporation; *Clouston*, 14 Dec. 1865, 4 Macph. 207.] Communities are dissolved,—1. By the expiration of the time to which their constitution limits them. 2. By act of Parliament. [3. By inability to fulfil the purposes of their institution, as by insolvency of a chartered trading company.] 4. By forfeiture, when they abuse their powers; in which last case, although the members necessarily suffer in their political capacity, yet no prosecution lies against such of the individual members as have had no access to the crime. After a community is

dissolved, the individuals are not, in the general case, bound even *subsidiarie* for sums borrowed by the incorporation. The estate of the corporate body, as being the fund on the faith of which the creditor contracted, is the only one to which he can look for repayment. [But see *Joint Stock Company*. Members of a corporation are only administrators, not proprietors, of their funds, and cannot dispose of them for their own behoof; *Thomson*, 16 March 1855, 17 D. 765.] Public trading companies, incorporated by a royal grant or by an act of Parliament, are also proper corporations, which endure in continual succession during the time appointed by their charter. But private copartnerships do not fall under this description; and being intended merely for the private interests of the copartners, they may be constituted without the authority of the King or Parliament. See *Stair*, B. ii. tit. 3, § 41; *More's Notes*, clxxvi., cciii.; *Ersk.* B. i. tit. 7, § 64; *Bank*. B. i. tit. 2, § 18; *Bell's Com.* ii. 545; [*Bell's Princ.* § 2176;] *Hume*, ii. 268; *Ross's Lect.* i. 83; [*Pollock on Contract*, 112; *Grant on Corporations*; *Brice on Ultra Vires.*] See *Joint Stock Company*. *Partnership*. *Burgh*. [*Incorporation*. *Exclusive Privilege*.]

CORPOREAL AND INCORPOREAL.

Both by the Roman law and by the law of England, the subjects of rights are divided into corporeal and incorporeal. Corporeal are such as fall under the senses, and may be seen and handled, as the *ipsa corpora* of things moveable or immovable. Incorporeal, are things not subject to the senses, but which exist in law, as rights and obligations of all kinds. This distinction is not much regarded in the law of Scotland, according to which the great division of rights, and the subjects of rights, is into heritable and moveable. *Ersk.* B. ii. tit. 2, § 1. See *Heritable and Moveable*.

CORPSE. See *Dead Body*.

CORPUS DELICTI. In the criminal law of Scotland, the *corpus delicti* is the substance or body of the crime or offence charged, with the various circumstances attending its commission, as specified in the libel. It follows, that before a conviction can take place, the *corpus delicti* must be clearly made out. Thus, for example, if a person be charged with murder, it must be proved that the deceased came by his death in consequence of the injury libelled, otherwise the *corpus delicti* will not be established. *Hume*, i. 115; ii. 320, 391.

[CORPUS JURIS. See *Roman Law*.]

CORREI DEBENDI. Two or more persons, who are bound as principal debtors to pay or to perform, are termed in the Roman law *correi debendi*. Where the obligation is indivisible, e.g., an obligation for the delivery of a special subject, the co-obligants are bound *singuli in solidum*; but where the obligation is to deliver a certain quantity of corn or money, the obligation may be divided into parts, and each obligant can be sued only for his own share, or *pro rata*, unless the obligants are expressly taken bound conjunctly and severally. From this rule, however, there are excepted—1st, Contracts importing a copartnership; and 2d, Bills of exchange; in both of which cases the co-obligants are bound *singuli in solidum*, whether the obligation be so expressed or not. By the Roman law, every one of several cautioners became bound *in solidum*; and where all the cautioners remained solvent, any one of them who was sued had the equitable remedy of the *beneficium divisionis*. But where, for example, all the cautioners but one became insolvent, the solvent cautioner might be sued for the whole debt. This could not happen with us, because, if the cautioners were bound severally, they would only be liable *pro rata*; and if bound conjunctly and severally, they would be liable *singuli in solidum*, and could not claim the *beneficium divisionis*. See *Stair*, B. i. tit. 9, § 9; tit. 18, § 20; *More's Notes*, lvi., cxviii.; *Ersk.* B. iii. tit. 3, § 74; *Kames' Equity* (1825), 78; *Ross's Lect.* i. 76. See *Conjunctly and Severally*. [*Co-obligants*.]

CORROBORATION, BOND OF. See *Bond of Corroboration*.

[CORRUPT PRACTICES. See *Election Law*.]

CORRUPTION. [See *Bribery*. *Arbitration*. *Appeal to Circuit Court*. *Attainder*.]

COSTS OF SUIT. See *Expenses*.

COUNCIL AND SESSION. The Judges or Senators of the College of Justice are also called Lords of Council and Session. The "*Books of Council and Session*" is the name given to the records in which deeds, and other writs competent to be inserted in the record of that court, are registered in virtue of the clause of registration. [*Mackay's Prac.* i. 16, 18.] See *Registration*. *Session*, *Court of*.

COUNCIL, PRIVY. See *Privy Council*.

COUNCILLOR OF A ROYAL BURGH.

The municipal affairs of royal burghs are intrusted to the direction of a provost, magistrates, dean of guild, and councillors. See *Burgh, Royal*.

COUNSEL; an advocate or barrister. [An advocate has, by virtue of his office, a presumed mandate to act on behalf of the party for whom he is instructed to appear; and the party represented is liable in costs, until he recalls or disclaims the mandate. If his name has been used without authority, his remedy is against the agent. See *Wallace*, 31 May 1821, 1 S. 43; *Thomson*, 25 May 1855, 17 D. 774; *Young*, 22 Feb. 1862, 24 D. 587. Whatever is done by counsel within his proper province is held to have been done by the client himself. Hence, a counsel in the conduct of a cause is entitled to use his own discretion, even against the instructions of his client. He may abandon or compromise a case, or even consent to an adverse verdict. See *Duncan*, 6 Jan. 1874, 1 R. 329; *Batchelor*, 30 June 1876, 3 R. 914; *Swinfen*, 1860, 5 H. & N. 890; *Strauss*, 1866, L.R. 1 Q.B. 379. In *Batchelor*, Lord Pres. Inglis said:—"An advocate, in undertaking the conduct of a cause in this court, enters into no contract with his client, but takes on himself an office in the performance of which he owes a duty, not to his client only, but also to the court, to the members of his own profession, and to the public. From this it follows that he is not at liberty to decline, except in very special circumstances, to act for any litigant who applies for his advice and aid, and that he is bound, in any cause that comes into court, to take the retainer of the party who first applies to him. It follows also that he cannot demand or recover by action any remuneration for his services, though in practice he receives *honoraria* in consideration of these services. Another result is that, while the client may get rid of his counsel whenever he pleases, and employ another, it is by no means easy for a counsel to get rid of his client. On the other hand, the nature of the advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the cause without any regard to the wishes of his client, so long as his mandate is unrecalled, and what he does *bona fide* according to his own judgment will bind his client, and will not expose him to any action for what he has done, even if the client's interests are thereby prejudiced. These legal powers of counsel are seldom, if ever, exercised to the full extent, because counsel are restrained by considera-

tions of propriety and expediency from doing so." With few exceptions, pleadings in the Court of Session must be signed by counsel; and it is the duty of counsel to consider, before signing any papers, "whether they are such as he can say, on his own responsibility, are proper to be laid before the court;" *Denny*, 16 Jan. 1863, 1 Macph. 268. A party may plead his own cause orally; but the court will not hear both party and counsel; *Longworth*, 1867, L.R. 1 Sc. App. 218. For rules as to attendance of counsel in the Outer House, see A.S. 15 July 1865, and A.S. 2 Nov. 1872; see also *Default*. See *Stair*, B. i. tit. 12, § 12; B. iv. tit. 43, § 9; *Ersk.* B. iii. tit. 3, § 33; B. iv. tit. 2, § 25; *More's Notes to Stair*, cxxvi., cclxxiii., ccccxv.; *Hume*, i. 5; ii. 283; *Bell's Princ.* § 2051; *Shand's Prac.* i. 73; *Mackay's Prac.* i. 102; ii. 589. See *Advocate. Mandate. Honorarium. Retainer. College of Justice. Confidentiality. Agent and Client.*]

COUNT AND RECKONING; is the technical name given to a form of process, by which one party may compel another judicially to account with him, and to pay the balance which may appear to be due. The summons in this process calls on the defender to produce a full statement of his accounts and intromissions, so that the balance may be ascertained; and it also concludes for a random sum, as the amount of the supposed balance; for which sum a decree will be given, in case the defender fails to appear, or to render the statement required. The A.S. 22 Nov. 1711, makes various regulations for expediting the discussion of processes of this description in the Court of Session; but according to the present practice, such actions proceed according to the ordinary routine. [The usual procedure is by remit to an accountant, or proof before a Lord Ordinary. A form of summons is given by 13 & 14 Vict. c. 36, sched. (A), No. 2. With conclusions in ordinary form, the accounting is carried only to the date of citation. If an accounting down to the date of decree is desired, special conclusions are necessary, unless parties consent; see *Wauchope*, 20 Dec. 1860, 23 D. 191; *Wallace*, 20 July 1875, 2 R. 999.] See *Ivory's Form of Process*, i. 270; *Jurid. Styles*, iii. 16; [*Shand's Prac.* ii. 738; *Mackay's Prac.* ii. 89.] See *Process. Record.*

COUNTERPART. In England, when the several parts of an indenture are interchangeably executed by the several parties,

that part or copy which is executed by the granter is usually called the original, and the rest are counterparts. *Tomlins' Dict.*

COURT. The courts of Scotland have been divided into superior, inferior, and mixed. [The Court of Session, in which the Court of Exchequer is now merged, is the supreme civil court.] Its jurisdiction in all civil and revenue causes is universal over the whole kingdom; the sentences of all the inferior courts of Scotland being subject to its review, unless where special statute interposes. The Court of Justiciary is the supreme criminal court. Inferior courts are those of which the sentences are subject to the review of one or other of the supreme courts, and whose jurisdiction is confined to a particular territory, as the sheriff court, bailie court, justice of peace court. The courts formerly possessed of a mixed jurisdiction were the High Court of Admiralty, and the Commissary Court of Edinburgh, both of which had a universal jurisdiction over Scotland, by which they reviewed the decrees of inferior admirals and commissaries; but as their own decrees were subject to the review of the Courts of Session or Justiciary, they were in that respect inferior courts. These two courts are now abolished. *Ersk. B. i. tit. 2, §§ 5, 6.* See *Judges. Admiralty. Commissary. Exchequer. Justiciary Court. Session, Court of.*

COURT-MARTIAL; is a court for trying the military offences of officers, whether naval or military, of soldiers, and of sailors in the royal navy. Military courts-martial are general, [district,] or regimental. The first must consist of at least [nine] judges, all commissioned officers; [and it alone can try an officer, or sentence to death or penal servitude. A district court-martial cannot award a heavier punishment than two years' imprisonment; and a regimental court-martial cannot award more than forty-two days' imprisonment. Besides these, there are two exceptional kinds:—the field general court-martial, for trying, in countries beyond the seas, offences against the property or person of residents; and the summary court-martial, for trying offences committed on active service. The Army Act, 1881 (44 & 45 Vict. c. 58), which, with amendments made by the annual acts continuing it in force (see *Army*), constitutes the existing code of military law, classifies offences cognisable by court-martial, and fixes the scale of punishment. The procedure is regulated by rules framed under authority of the

[Army Act (§ 70).] Where these courts do not exceed their powers, no appeal lies to any other court; [*Dawkins, L.R. 5 Q.B. 94;*] the only remedy resting with the Queen, to whom their sentences are reported, before they are promulgated. But if they exceed their powers, the party injured may obtain redress in the civil court. [A person subject to military law is not on that account exempt from the ordinary law. But if a person sentenced by a court-martial is afterwards tried by a civil court for the same offence, that court shall, in sentencing, have regard to the punishment already undergone; Army Act, § 162. See *Manual of Military Law* (War Office, 1887); *Simmons on Courts-Martial*; *Hickmann on Naval Courts-Martial*; *Ersk. B. i. tit. 3, § 36*; *Guthrie Smith on Damages*, 78. See *Judge Advocate General*.]

COURTESY or CURIALITY. The courtesy of Scotland, as it is termed, is a liferent conferred by the law on the surviving husband, of all the heritage in which his deceased wife died infert, as heir to her predecessors. It is essential to the existence of this right—(1) That there shall have been a living child born of the marriage, and heard to cry, otherwise courtesy is not due, however long the marriage may have subsisted. (2) That the child shall be the mother's heir. Thus, if there be a child of the wife in existence by a former marriage, who is her heir, courtesy is not due to the second husband, while such child exists, although there be also children of the second marriage. Hence, it has been said that courtesy is due to the surviving husband, rather as the father of an heir than as the widower of an heiress. In order to confer the right, however, it is not necessary that the child survive; it is enough that it was once in existence, although it should have died immediately after its birth. The heritage, to which courtesy extends, is that to which the wife succeeds as heir of line, tailzie, or provision, to her ancestor, whether the succession opens to her before the marriage or during its subsistence. But it does not extend to conquest, that is, the heritage acquired by purchase, donation, or other singular titles, unless where the heritage has been put forward to the wife by her ancestor *præceptione hæreditatis*, in which case the courtesy extends to the property so put forward; *Primrose, 1771, M. App. Courtesy, No. 1.* [Courtesy extends to burgage subjects, and to superiorities; but not to lands held by trustees for behoof of a wife; *L. Clinton,*

[18 Dec. 1869, 8 Macph. 370.] The wife's sasine is the measure of the courtesy; hence, any real burden or infeftment, preferable to her sasine, excludes the courtesy; and as the husband enjoys the liferent of the wife's estate *titulo lucrativo*, he is considered as her temporary representative, and, as such, is liable not only for all annual burdens affecting the lands, but also for the current interest of her personal debts while his right subsists, in so far, at least, as he is *lucratus*. But he will have recourse against the wife's executors, or her heirs succeeding in such property as does not fall under the courtesy, for the personal debts which he may thus pay. In this respect, courtesy differs from the widow's terce, which is in no degree affected by the husband's personal debts. The two rights also differ in this, that a widow, whose right of terce has been declared by service, transmits to her executors the right to receive the rents falling under terce, and not drawn during her life; whereas, if a husband has not exercised his right of courtesy during his life, by drawing the rents, his executors will have no right to receive them; the courtesy being held as a privilege personal to the husband, who will be understood to have renounced it in favour of the heir, if during his life he has suffered him to draw the rents. ["All questions about courtesy depend entirely on artificial rules of law fixed by authority;" *per* L. Pres. Inglis, in *Watt*, 19 Nov. 1885, 13 R. 218; see also *L. Clinton, supra*.] The courtesy vests in the husband *ipso jure*; and immediately on the wife's death he may enter into possession of her lands, without service or any other legal formality. It has not been decided whether a liferenter by courtesy is entitled to any of the casualties of superiority. It would rather appear, however, that as the person entitled to those casualties must be infeft, the husband who is not infeft can have no right to them under the courtesy; but he is entitled to the feu-duties, although these do not fall under terce. [He is entitled to the parliamentary franchise in virtue of the courtesy liferent; 31 & 32 Vict. c. 48, § 14.] See *Stair*, B. ii. tit. 6, § 19; *More's Notes*, clxxxvii.; *Ersk.* B. ii. tit. 9, § 52; *Bank*. i. 663; *Bell's Com.* i. 60; *Bell's Princ.* § 1605, 1948; *Sandford on Heritable Succession*, ii. 117; *Kames' Equity* (1825), 86; [*Fraser on Husband and Wife*, ii. 1118.]

COVENANT; is defined, in the law of England, the agreement or consent of two or more, by deed in writing, sealed and de-

livered, whereby one of the parties promises to the other that something is or shall be done. The promiser is called the covenantor, the other party the covenantee. *Tomlins' Dict.*

COVIN; in English law, a deceitful compact between two or more to deceive or prejudice others. *Tomlins' Dict.*

CREDIT, LETTER OF. See *Letter of Credit*.

CREDULITY, OATH OF. See *Oath of Credulity*.

CREFFERA; used in the *Leges Burgorum*; a cruiffe or cruive for swine, otherwise a sty. *Skene, h. t.*

CREW. Under the contract of affreightment, the owners and master are bound to be provided with a crew of sufficient skill and strength for the voyage. *Bell's Com.* i. 599; *Bell's Princ.* § 408. [See *Charter-Party*.]

CRIME. A crime may be defined to be any act done in violation of those duties which an individual owes to the community, and for a breach of which the law has provided that the offender shall make satisfaction to the public; besides repairing, where that is possible, the injury done to the individual. Dole, or corrupt and evil intention, is essential to the guilt of any crime. It is not necessary, however, for the prosecutor to prove the intention to commit the particular offence, out of enmity to the individual injured; it is enough that the act is attended with circumstances indicating a corrupt or malignant disposition, regardless of order and social duty. Thus, it is murder if A be killed by mistake instead of B, unless the killing of B would have been justifiable or excusable. So also it is murder to fire, without legal cause, into a crowd and kill a person; *Hume*, i. 21 *et seq.* In order to constitute a crime, there must always be an act done in prosecution of the criminal purpose. This gives rise to several difficult questions, as to how far an attempt to commit a crime is punishable; and the general rule seems to be that where unequivocal acts, indicating the criminal intention, are proved, they are punishable, but not to the same extent as the completed offence; but, on the other hand, the law takes no cognisance of remote acts of preparation, even although they be pretty distinctly referable to a criminal purpose; see *Hume, ib.* See *Attempt*. Where dole is wanting, either entirely or to a certain extent, there is, in the one case, no crime at all, and, in the other, a proportional mitigation of the punishment. Thus, pupils under seven

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years of age are legally incapable of crime ; but, on the other hand, pupils above seven years of age, and minors who have reached puberty (which in this question is fourteen years of age, both in males and females), are held to be capable of dole, and are consequently punishable for the greater crimes, of the guilt of which they must be presumed to be aware. Minors under sixteen years of age, however, except in very flagrant cases, seem hardly liable to capital punishment. Insane persons are held to be incapable of dole ; [and therefore insanity is a complete defence against a criminal charge, "if it be of such kind as entirely deprives the panel of the use of reason, as applied to the act in question, and of the knowledge that he was doing wrong in committing it ;" *Alison's Princ.* 645.] But if the defect of intellect amount to mere weakness or craziness, it is not sufficient to exempt from punishment, though it may be the ground of an application for mercy. [See *Insanity*. Intoxication alone is no defence.] The defence of compulsion, where *vis major* has been used, will be sustained. See *Compulsion*. But it will be no defence, that the crime was committed by a wife or child, under the influence of subjection to the husband or father, if it be one of the greater crimes ; although such subjection may perhaps be successfully pleaded in minor delicts. The subjection of a servant to his master affords no defence whatever to the servant who has committed a crime, unless he can prove coercion, or the fear of violence, against which he had no protection at hand. Magistrates or officers of the law, acting *bona fide* in the administration and execution of the law, unless perhaps there be gross ignorance or carelessness,—and soldiers acting under the orders of their officers in the known and customary line of their duty,—are not liable to a criminal charge for acts done under such circumstances. The compulsion of extreme want is held to be no excuse for a crime ; but it may be the ground of an application for mercy. See *Hume*, i. 21 to 56 ; *Ersk.* B. iv. tit. 4 ; [*Alison's Princ.* ; *Macdonald's Criminal Law*.]

CRIMEN FALSI ; the crime of falsehood or fraudulent mutation, or suppression of the truth, to the prejudice of another. See *Falsehood*. *Forgery*. *Perjury*.

CRIMEN REPETUNDARUM. By the Roman law, all judges and magistrates who accepted bribes to pervert judgment, were said to be guilty of this crime, and punished accordingly. With us, this offence is known

by the name of *baratry* or *bribery*. See *Baratry*. *Bribery*. *Corruption of Judges*.

CRIMEN VIOLATI SEPULCHRI. See *Dead Body*.

CRIMINAL CONVERSATION ; is the technical term, in questions of divorce, applied to the criminal intercourse of the party charged with incontinence. See *Divorce*.

[CRIMINAL LAW AMENDMENT ACT, 1885 ; 48 & 49 Vict. c. 69. This act was passed "to make further provision for the protection of women and girls, the suppression of brothels, and other purposes." The following are the leading enactments:—

Procuration.—Any person who (1) procures or attempts to procure any girl or woman under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connection, either within or without the Queen's dominions, with any other person or persons ; or (2) procures or attempts to procure any woman or girl to become, either within or without the Queen's dominions, a common prostitute ; or (3) procures or attempts to procure any woman or girl to leave the United Kingdom, with intent that she may become an inmate of a brothel elsewhere ; or (4) procures or attempts to procure any woman or girl to leave her usual place of abode in the United Kingdom (such place not being a brothel), with intent that she may, for the purposes of prostitution, become an inmate of a brothel within or without the Queen's dominions, is guilty of a misdemeanour, and liable on conviction to imprisonment for two years, with or without hard labour ; § 2.

Procuring Defilement of Woman by Threats or Fraud, or Administering Drugs.

—Any person who (1) by threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connection, either within or without the Queen's dominions ; or (2) by false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without the Queen's dominions ; or (3) applies, administers to, or causes to be taken by any woman or girl any drug, matter, or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl, is guilty of a misdemeanour, and liable on conviction to imprisonment for two years, with or without hard labour ; § 3. (The last of these amounts to rape by the

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[common law of Scotland, and may still be prosecuted as such; § 16, *infra*. See *Rape*.)

Defilement of Girl under Thirteen Years of Age.—Any person who unlawfully and carnally knows any girl under the age of thirteen years is guilty of felony, and liable on conviction to penal servitude for life, or for any term not less than five years, or to imprisonment for two years, with or without hard labour. (If the girl is under twelve, the crime is rape at common law. See *Rape*.) Any person who attempts the same is guilty of a misdemeanour, and liable on conviction to imprisonment for two years, with or without hard labour. Provided that in the case of an offender whose age does not exceed sixteen years, the court may, instead of sentencing him to any term of imprisonment, order him to be whipped, as prescribed by 25 Vict. c. 18; which act shall apply, so far as circumstances admit, as if the offender had been convicted in manner therein mentioned; and if, having regard to his age and all the circumstances of the case, it should appear expedient, the court may, in addition to the sentence of whipping, order him to be detained in a certified reformatory school for a period of not less than two years and not more than five years. The court may also order the offender to be detained in custody for seven days before he is sent to such reformatory school; § 4.

Defilement of Girl between Thirteen and Sixteen Years.—Any person who unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years, is guilty of a misdemeanour, and liable on conviction to imprisonment for two years, with or without hard labour. See *Watson*, 15 Dec. 1885, 13 R. (J.C.) 6. But no prosecution may be commenced for such offence more than three months after its commission; and it is a sufficient defence if it be made to appear to the court or jury before whom the charge is brought that the accused had reasonable cause to believe that the girl was of or above the age of sixteen years; § 5. The same section makes it a misdemeanour to have, or to attempt to have, unlawful carnal knowledge of a woman or girl who is an idiot or imbecile; but such an offence is rape, or attempt to ravish, by the common law of Scotland.

Householder, &c. permitting Defilement of Young Girl on his Premises.—Any person, who, being the owner or occupier of any premises, or having, or acting or assisting in the management or control thereof—induces or knowingly suffers any girl of such

[age as is in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, (1) if such girl is under the age of thirteen years, is guilty of felony, and liable on conviction to penal servitude for life, or for any term not less than five years, or to imprisonment for two years, with or without hard labour; and (2) if such girl is of or above the age of thirteen and under the age of sixteen years, is guilty of a misdemeanour, and liable on conviction to imprisonment for two years, with or without hard labour. But it is a sufficient defence to any charge under this section, if it be made to appear to the court or jury before whom the charge is brought that the accused had reasonable cause to believe that the girl was of or above the age of sixteen years; § 6; *Webster*, 16 Q.B.D. 134.

Abduction of Girl under Eighteen with Intent to have Carnal Knowledge.—Any person who, with intent that any unmarried girl under the age of eighteen years should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally—takes or causes to be taken such girl out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her, is guilty of a misdemeanour, and liable on conviction to imprisonment for two years, with or without hard labour. But it is a sufficient defence to any charge under this section, if it be made to appear to the court or jury that the accused had reasonable cause to believe that the girl was of or above the age of eighteen years; § 7.

Unlawful Detention with Intent to have Carnal Knowledge.—Any person who detains any woman or girl against her will—(1) in or upon any premises with intent that she may be unlawfully and carnally known by any man, whether any particular man, or generally, or (2) in any brothel, is guilty of a misdemeanour, and liable on conviction to imprisonment for two years, with or without hard labour. Where a woman or girl is in or upon any premises for the purpose of having any unlawful carnal connection, or is in any brothel, a person shall be deemed to detain such woman or girl in or upon such premises or in such brothel, if, with intent to compel or induce her to remain in or upon such premises or in such brothel, such person withholds from such woman or girl any wearing apparel or other property be-

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[longing to her, or, where wearing apparel has been lent or otherwise supplied to such woman or girl by or by the direction of such person, such person threatens such woman or girl with legal proceedings if she takes away with her the wearing apparel so lent or supplied. No legal proceedings, whether civil or criminal, shall be taken against any such woman or girl for taking away or being found in possession of any such wearing apparel as was necessary to enable her to leave such premises or brothel; § 8.

Power on Indictment for Rape to Convict of Certain Misdemeanours.—If upon the trial of any indictment for rape, or any offence made felony by § 4 of this act, the jury shall be satisfied that the defendant is guilty of an offence under § 3, § 4, or § 5, of this act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid, or for the misdemeanour of indecent assault; § 9. See *Watson, supra*.

Power of Search.—If it appears to any justice of the peace, on information made before him on oath by any parent, relative, or guardian of any woman or girl, or any other person who, in the opinion of the justice, is *bona fide* acting in the interest of any woman or girl, that there is reasonable cause to suspect that such woman or girl is unlawfully detained for immoral purposes by any person in any place within the jurisdiction of such justice, such justice may issue a warrant authorising any person named therein to search for, and, when found, to take to and detain in a place of safety such woman or girl until she can be brought before a justice of the peace; and the justice of the peace before whom such woman or girl is brought may cause her to be delivered up to her parents or guardians, or otherwise dealt with as circumstances may permit and require. The justice of the peace issuing such warrant may, by the same or any other warrant, cause any person accused of so unlawfully detaining such woman or girl to be apprehended and brought before a justice, and proceedings to be taken for punishing such person according to law. A woman or girl is deemed to be unlawfully detained for immoral pur-

[poses if she is so detained for the purpose of being unlawfully and carnally known by any man, whether any particular man, or generally, and—(a) either is under the age of sixteen years; or (b) if of or over the age of sixteen years, and under the age of eighteen years, is so detained against her will, or against the will of her father or mother or of any other person having the lawful care or charge of her; or (c) if of or above the age of eighteen years is so detained against her will. Any person authorised by warrant under this section to search for any woman or girl so detained as aforesaid may enter (if need be by force) any house, building, or other place specified in such warrant, and may remove such woman or girl therefrom. Provided always, that every warrant issued under this section shall be addressed to and executed by some superintendent, inspector, or other officer of police, who shall be accompanied by the parent, relative, or guardian or other person making the information, if such person so desire, unless the justice shall otherwise direct; § 10.

Outrages on Decency.—Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, is guilty of a misdemeanour, and liable on conviction to imprisonment for two years, with or without hard labour; § 11. An offence under this section may be tried summarily before the sheriff; *Clark*, 8 June 1886, 13 R. (J.C.) 86.

Custody of Girls under Sixteen.—Where on the trial of any offence under this act it is proved to the satisfaction of the court that the seduction or prostitution of a girl under the age of sixteen has been caused, encouraged, or favoured by her father, mother, guardian, master, or mistress, it shall be in the power of the court to divest such father, mother, guardian, master, or mistress of all authority over her, and to appoint any person or persons willing to take charge of such girl to be her guardian until she has attained the age of twenty-one, or any age below this as the court may direct, and the High Court of Justiciary shall have the power from time to time to rescind or vary such order by the appointment of any other person or persons as such guardian, or in any other respect; § 12.

Suppression of Brothels.—Any person who (1) keeps or manages or acts or assists in the management of a brothel; or (2) being the tenant, lessee, or occupier of any

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[premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution; or (3) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel, is liable on summary conviction in manner provided by the Summary Jurisdiction Acts (1) to a penalty not exceeding £20, or, in the discretion of the court, to imprisonment for any term not exceeding three months, with or without hard labour; and (2) on a second or subsequent conviction to a penalty not exceeding £40, or, in the discretion of the court, to imprisonment for any term not exceeding four months, with or without hard labour; and in case of a third or subsequent conviction such person may, in addition to such penalty or imprisonment as last aforesaid, be required by the court to grant a bond of caution to be of good behaviour for any period not exceeding twelve months, and in default of granting such bond of caution, such person may be imprisoned for any period not exceeding three months, in addition to any such term of imprisonment as aforesaid. Any person on being summarily convicted in pursuance of this section may appeal to the Court of Justiciary against such conviction; § 13. (See *Disorderly House*.)

Miscellaneous.—The act does not exempt any person from any proceeding for an offence which is punishable at common law, or under any other act, so that a person be not punished twice for the same offence; § 16. Every person charged with an offence under this act, and the husband or wife of the person so charged, shall be competent but not compellable witnesses on every hearing at every stage of such charge; § 20. See *Clark, supra*; also *Henderson*, 27 Dec. 1888, 2 White, 157; and *Owen*, 1888, 20 Q.B.D. 829. Other provisions relating to evidence are contained in §§ 2, 3, and 4; but these do not alter the law of Scotland.]

CRIMINAL LETTERS. [Prior to the Criminal Procedure Act, 1887,] a criminal process might be brought into the Court of Justiciary either by criminal letters, or by indictment; [but criminal letters are now abolished, so far as public prosecutions are concerned; § 2. Prosecution at the instance of a private party, with concurrence

[of the Lord Advocate, though unknown in modern practice, is theoretically competent; and if it were to occur, it would probably be by way of criminal letters.] In form, they resemble a summons in an ordinary civil action. They run in the Sovereign's name, state the charge laid against the accused, and the conclusions founded on the charge, and conclude with the royal will, commanding the officers of the law to summon the accused party to appear on a day named, and find caution to underlie the law. [See *Hume*, ii. 154; *Alison's Prac.* 199, 211 *et seq.*; *Macdonald*, 282, 444.] See *Criminal Prosecution. Indictment.*

CRIMINAL PROSECUTION; includes the whole form of process by which a person accused of a crime is brought to trial; and the procedure will here be briefly traced from its commencement to its close in the supreme criminal court.

Arrest and Judicial Examination.—

When a crime has been committed, the first step is to arrest the supposed offender; and this may be done under authority of any sheriff, justice of peace, or other magistrate. [A constable or other officer of law may arrest any one detected by him in the commission of any felony or breach of the peace. A constable may arrest without warrant, on authority of the chief officer of police, a convict holding a licence, whom he believes to be getting his livelihood by dishonest means; see *Prevention of Crime Act*. A private citizen may arrest in case of felony, but not for mere breach of the peace, except in special statutory cases.] Magistrates may grant warrant to arrest persons charged with offences, in the trial of which they have themselves no jurisdiction. Thus, a sheriff may commit for treason, or the magistrate of a royal burgh for pleas of the Crown. The warrant for apprehension must be granted on sufficient information, written or verbal; but the oath of the informer, even where he is a private party, is not indispensable, [unless required by statute;] and when the procurator-fiscal applies for the warrant, his oath is never required. [Petitions for warrant to arrest and commit may set forth the charge in the simplified form now authorised for indictments; Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35), § 16.] The warrant must be dated, and under the hand of the magistrate in whose name it runs. It would seem that it may be general, as to the nature of the crime to be charged; but it must not be general in the description of the person or persons to be apprehended, nor leave any

discretion to the officer to arrest all suspected persons. The warrant may be, to bring the accused before either the granter of the warrant, or some other competent magistrate; and it may be addressed either generally to the officers of the magistrate who grants it, or to messengers-at-arms; or even, in case of need, to a private individual, who is thus invested, *pro hac vice*, with the powers, privileges, and protection given to an officer, provided the person intrusted with it proceed regularly in the execution of the warrant. In executing the warrant, it is necessary that the officer should attend—*1st*, Not to execute it beyond the jurisdiction of the granter, without the indorsation of a magistrate within the jurisdiction into which the offender has fled. [But a sheriff's warrant is good in any county without indorsation, if executed either by a messenger-at-arms, or by an officer of the court where it was issued; 1 & 2 Vict. c. 119, § 25.] See *Backing a Warrant*. *2d*, He must communicate to the party the import of the warrant; and if the officer be acting beyond his ordinary bounds, he must show the warrant on demand, but he is not bound to part with it. *3d*, The officer has no authority to break open doors, unless he has intimated to those within the purpose of his errand; and after that, and on refusal to open, he may break open the door, and take the party against whom the warrant is directed, or the person whom he has probable reasons for believing to be the person meant. *4th*, Having taken the person, the officer cannot, on his own authority, commit him to jail, but must take him [without delay] before a magistrate, to be dealt with according to law; except in the case where the warrant contains authority to commit *de plano*, as is the case with judiciary warrants, under which, of course, the officer is in safety to commit the accused to prison at once. [A person who is arrested on a criminal charge is entitled immediately to have intimation sent to a properly qualified law agent that his professional assistance is required, and to have a private interview with the agent before being taken to a magistrate; 1887, § 17.] When the party is brought before a magistrate for examination, it is the duty of the magistrate to see—*1st*, That the prisoner is in a fit state to undergo an examination. *2d*, That he is warned of the use which may be made of what he says. [*3d*, That he is informed (at least if the charge is a grave one) of his right to consult a law agent; *Goodall*,

[3 July 1888, 15 R. (J.C.) 82.] *4th*, That the declaration is taken down in writing in the presence of credible witnesses, who will sign it along with the magistrate and the prisoner, in order that, if necessary, they may be able at the trial to authenticate it and to swear to what passed. When the prisoner cannot or will not sign his declaration, the magistrate may sign it instead of him. [*5th*, That if the accused is re-examined (which he may be at any time before the libel is served), any declarations already taken are read over to him. See *Declaration*.]

Precognition.—Unless the magistrate see reason immediately to release the prisoner, his next step is to commence an inquiry, or *precognition*, as it is termed, concerning the grounds of suspicion, in which he will take the declarations of such persons as have cause of knowledge of the offence, and the prisoner's participation in it. This is necessary, not only in order that speedy justice may be done to the accused, but also for the information of the public prosecutor, so as to enable him to lay his charge properly. While the *precognition* is going on, the magistrate may, if necessary, commit the accused to prison for further examination, or to abide the result of the *precognition*. [But if the charge is not murder or treason, the accused may, immediately on being brought up for examination, apply to the magistrate or to the sheriff for liberation on bail. The prosecutor is entitled to be heard against such application, and the sheriff or other magistrate is entitled in his discretion to refuse it before the accused is committed until liberated in due course of law. But where the accused is admitted to bail without being so committed, it is not necessary so to commit him, and he may be served with an indictment or complaint without having been previously so committed; 1887, § 18.] The magistrate must proceed with the *precognition* without undue delay, otherwise he will be liable at common law for malversation and oppression. Witnesses may be compelled to attend the *precognition* by letters of first and second diligence; and, in extreme cases, the witnesses may be examined upon oath, although that is not usual. If the witnesses refuse to attend or to swear, they may be imprisoned. Neither the accused nor his friends are entitled to be present at the *precognition*; nor can they insist for a copy or for a perusal of the declarations of the witnesses. The *precognition* must be finished before the libel is executed, because,

after the execution of the libel, the process has commenced, and all intercourse with the witnesses after that is suspected and "utterly forbidden." In whatever way the examinations of the witnesses at the precognition are taken, whether by oath or simple declaration, they never can be used in any shape against the witnesses, who may insist on having them destroyed before they give their testimony on the trial. Articles to be founded on as proving the crime, ought to be identified at the precognition, either by the subscription of the judge and witnesses, or by some other mark, and a reference to the declaration of the witnesses. Such articles ought to be put in safe custody; [and an inventory of them should be transmitted along with the precognition. A search warrant may be granted for recovery of stolen articles, or other articles necessary for completing the precognition; see *Search Warrant*. See also *Prevention of Crime Act*.] The entire charge of conducting precognitions is now committed to the procurator-fiscal, sheriff, justices of the peace, and other inferior magistrates, although, formerly, precognitions were sometimes conducted by the Lord Advocate, in presence of the Lords of Justiciary. [In practice, the precognition in ordinary cases is taken by the procurator-fiscal alone; but when the witness is to be put on oath, it must be taken before a magistrate.] See *Precognition*. The precognition being concluded, and the facts being such as to warrant a commitment, the accused is then committed for trial, on a regular written warrant, specifying the offence for which he is committed, and proceeding on a signed information. With regard to the form of a warrant of commitment, and the steps necessary to be taken in order to obtain bail, see *Commitment for Trial*. *Bail*. [And for the provisions for prevention of undue delay in prosecutions, see *infra*, p. 264.]

Title to Prosecute.—The right to prosecute for a crime is vested, by the law of Scotland, either in the party injured, or in the Lord Advocate, who is the only prosecutor for the public interest; the popular actions of the Roman law being unknown in our practice. A criminal prosecution by the private party embraces not only the private interest and damages, but the full pains of law. But, in order to support the private instance, the party must be able to show some substantial and peculiar interest in the issue of the trial, not a mere remote interest as a

member of the community, or even as a member of a portion or class of it which has been particularly injured. It does not appear to be quite fixed, what degree of relationship to an injured party entitles a private party to prosecute; but perhaps the right is vested in the next-of-kin, however remote in degree; *Hume*, ii. 124. But, in the Court of Justiciary, every libel at the private instance must be raised with concurrence of the Lord Advocate; see *Concourse*. The Lord Advocate is the public accuser, who insists in the Sovereign's name and interest, in the execution of the law. He is vested with an uncontrolled discretion, either in commencing or in following forth a trial; and at any time in the course of it, even after the return of the verdict of the jury, he may, in the case of a capital offence, restrict the libel to an arbitrary punishment. See *Advocate, Lord*.

[*Indictment, Citation, and Proceedings prior to First Diet*.—All prosecutions for the public interest, before the High Court of Justiciary, and before the sheriff court where the sheriff is sitting with a jury, now proceed on indictment in name of Her Majesty's Advocate; 1887, § 2. See *Indictment*. *Criminal Letters*.] The indictment must be executed against the accused by serving him with a copy of the libel, with a notice attached, requiring him to appear on a certain day to take his trial; and the accused must at the same time be served with a list of the witnesses who are to be examined against him. [A list of the productions for the Crown is also appended to the indictment; and the accused is entitled to see these in the justiciary office, or the office of the sheriff-clerk of the district of the second diet (see *infra*); 1887, § 37. See *Productions*. It is not now necessary to serve any list of jurors upon the accused; but he is entitled to have a copy of the list of assize on application; § 38. See *Jury*. The clerk of justiciary or the sheriff-clerk issues the warrants of citation for persons accused, witnesses, and jurors for the High Court or the sheriff court respectively, and a signed warrant, or certified copy thereof, is sufficient authority to all officers competent; § 23. Service of indictment, with lists of witnesses and productions appended, and all notices to persons accused and citations of witnesses, for precognition or for trial, may be made or given by any macer, messenger-at-arms, sheriff-officer, or officer of police, at any place; but where the accused is in prison, service is made by the governor, deputy-governor, or a warder;

[§ 24. The list of witnesses gives the name and address of each; and it is no objection to the admissibility of a witness that he has ceased to reside at the address given before the date of the trial, if he resided there within six months; § 35. No witness, whose name is not on the list served with the indictment, except witnesses to the declaration or to previous convictions, can be examined against the prisoner; *ib.*; *Wynn*, 22 Nov. 1883, 11 R. (J.C.) 18. The list of witnesses must be signed by the prosecutor; and the copy of the list that is served on the accused must bear to be so signed; *Cameron*, 31 Jan. 1850, J. Shaw, 295. The notice served along with the indictment specifies two diets of compareance, with an interval of at least nine clear days between them, and the first diet being at least six clear days after service; § 25. The notice for the first diet cites the accused to the sheriff court nearest the prison if he is in prison, or if he is on bail to the sheriff court of the domicile for citation as set forth in the bail bond, or in any other case before the sheriff within whose jurisdiction the crime, in whole or in part, was committed. If the accused has absconded, service may be made at his last known residence. All citations at the Cross of Edinburgh, pier and shore of Leith, or head burgh of the county, are now unnecessary; § 26. If the accused gives written notice through his agent to the Crown Agent that he intends to plead guilty, he may be cited on an indictment without list of witnesses or of productions (other than previous convictions), to appear at a diet of not less than four clear days after the notice, before the sheriff before whom he would be cited under the act to a first diet; § 31. Indictments, notices, lists, &c., may be written or printed, or partly written and partly printed; and any deletion or correction of any such document requiring to be served on the accused is sufficiently authenticated by the initials of any signatory, or of the person who serves it; § 21.

[*First Diet and Proceedings prior to Second Diet.*—At the first diet, the procurator-fiscal of the district prosecutes, unless an advocate-depute or the procurator-fiscal of the district of the second diet appears; § 28. A procurator entitled to conduct proceedings in the district of the second diet may appear at the first diet and conduct the defence; § 30. Objections to the citation on the ground of discrepancy between the record and service copies of the indictment, or errors or deficiencies in

[the latter or in the notice of citation, must be stated before the accused is called on to plead; and no such discrepancy, error, or deficiency entitles the accused to object to plead, unless the sheriff is satisfied that it tended substantially to mislead and prejudice the accused; § 33. When the second diet is to be in a different sheriff court, any interlocutor disposing of a preliminary plea or adjourning the case, any plea tendered, and any sentence pronounced, are written on the record copy of the indictment; and if the plea is one of guilty to the indictment or any part of it, the accused must sign it if he can write, and in any case the sheriff appends his signature to the plea recorded; § 28. If the plea is guilty, in whole or in part, the sheriff may adjourn the case to another sitting, to consider what sentence should be pronounced; *ib.* In such case the accused is detained in custody, unless the Lord Advocate consents to bail; but there must be no unreasonable delay in bringing up the accused for sentence; § 34. If the plea is only to a part of the charge, or to a minor offence included therein, and is not accepted, or if, on a plea of guilty to the whole charge, the sheriff considers it expedient that the sentence should be determined by the sheriff of the district of the second diet, he pronounces an interlocutor adjourning the case to the second diet; § 28. Where the second diet is to be in the High Court, if the indictment is objected to on the ground of discrepancy, error, or deficiency which the sheriff holds to have tended to mislead or prejudice the accused, or on any other ground which the sheriff holds not to be frivolous, he indorses a certificate on the record copy, setting forth the objections taken, and reserving them for consideration at the second diet; § 29. Where the accused is brought up on short *induciae*, having intimated his intention to plead guilty (see *supra*), and tenders a plea which is accepted, the sheriff forthwith pronounces sentence, if the case is suitable for sentence by him. If the case is such as can only be tried in the High Court, or so aggravated that the sheriff considers that sentence should be pronounced by the High Court, he remits the case to that court; § 31. See *Lyon, infra*. If the accused, when thus brought up on short *induciae*, pleads not guilty, or tenders such restricted plea as the prosecutor declines to accept, the diet is deserted *pro loco et tempore*; *ib.* When objections are taken to the relevancy, a minute in the record, signed by the clerk of court, states whether they were sustained

[or repelled; § 32. Any special defence must be tendered and recorded at the first diet, unless cause be shown to the satisfaction of the court for its not having been lodged till a later day, which must in any case be not less than two clear days before the second diet; § 36. Notice of any witnesses or productions for the defence must be given to the procurator-fiscal of the district of the second diet in sheriff court cases, or to the Crown Agent in justiciary cases, three clear days before the day on which a jury is sworn to try the case, unless the accused show, before the jury is sworn, that he was unable to give such notice; in which case the court may give such remedy to the prosecutor by adjournment or postponement of the trial or otherwise as may seem just; *ib.* If the accused is to state any objection in respect of misnomer or misdescription of any person named in the indictment or the list of witnesses, he must give notice, at least four clear days before the second diet, to the procurator-fiscal or the Crown Agent (as the case may be), of his inability to find such person; § 53. Where a person cited to the High Court for the second diet has pleaded guilty at the first diet, any Lord Commissioner of Justiciary in chambers, and without the presence of parties, may adjourn the second diet to any other sitting of the High Court; § 49. And where so many have pleaded guilty at the first diet as to make the sitting of the High Court unnecessary, any Lord Commissioner may, on petition by the Lord Advocate, presented within three days after the first diet, and in chambers, without the presence of parties, postpone the second diets to any sitting of the High Court about to be held in any county adjacent or in the same district, or in Edinburgh, notice being forthwith served upon the accused; § 50. For rules as to lodging record copies of indictments, lists, and notices, and as to transmission of process by the clerk of the first diet to the clerk of the second diet, see §§ 27–29, 36.

[*Second Diet.*—The accused is again called on to plead, and if he pleads guilty, sentence is pronounced. Where there are more than one charge, the accused may move that they be tried separately; and it is in the discretion of the court to grant or to refuse the motion; *Pritchard*, 3 July 1865, 5 Irv. 88; *Gibson*, 5 Sept. 1871, 2 Coup. 128. And when more than one prisoner are indicted in the same libel, the court may, on cause shown, order a separation of the trials; see *Dempster*, 13 Jan.

[1862, 4 Irv. 143; *Coupland*, 14 April 1863, 4 Irv. 370; *M'Leer*, 30 Dec. 1869, 1 Coup. 390; *Marr*, 4 Feb. 1881, 4 Coup. 407; *Drever*, 2 Nov. 1885, 5 Coup. 680. Refusal to order separation is not a good ground of suspension, unless it amounts to oppression; *Law*, 18 Nov. 1861, 4 Irv. 106. See *Hume*, ii. 173–76; *Macdonald*, 465–66. In the High Court, the proceedings at the first diet may be reviewed, and if a plea of guilty have been taken to an irrelevant or incompetent charge, or under substantial error or misconception, or in circumstances tending to prejudice the accused, the court may allow it to be withdrawn or modified; in which case, if the prosecutor so move, the diet is deserted *pro loco et tempore*, or the trial postponed to a day notified to the accused in open court; § 41. But a prisoner who has pleaded guilty by his own desire, under § 31 (*supra*), cannot withdraw his plea when brought up for sentence; *Lyon*, 26 Dec. 1887, 15 R. (J.C.) 66. If the accused have given notice (*ut supra*) of any objection in respect of misnomer or misdescription of any person named in the indictment or of any witness in the list, he must state such objection before the jury is sworn, and he must show that since giving notice he has not been enabled to ascertain who such person is, or to find such witness in time to precognosce him before the trial; in which case the court may give such remedy by postponement, adjournment, or otherwise, as shall seem just; § 53. Any plea in bar of trial must also be disposed of before the jury is sworn. If, for example, insanity is proved, the court find that the accused cannot be tried, and order him to be confined till Her Majesty's pleasure be known; 20 & 21 Vict. c. 71, § 87. Other pleas in bar of trial are—want of jurisdiction; *res judicata*; indemnity granted by the public prosecutor. See *Plea in Bar*. If the case goes to trial,] a jury of fifteen persons is balloted for; the prosecutor and the accused having each of them five peremptory challenges and an unlimited number of challenges on cause shown; 6 Geo. IV. c. 22. [See *Jury*. The clerk of court then informs the jury of the charge against the prisoner, and administers the oath in ordinary form; 1887, § 54. It is not now necessary to lay before the jury copies of the indictments, or lists of witnesses or productions. Previous convictions are not laid before the jury, nor referred to in their presence before the verdict is returned; except where they are competent evidence to support the substantive charge, or where

[the accused leads evidence to prove character; § 67. See *Previous Conviction*. If a second diet is deserted *pro loco et tempore*, or where from any cause the indictment is not brought to trial at the second diet, and the diet has not been postponed or adjourned, the accused may be cited, within nine days after such second diet, by notice on another copy of the indictment, to answer to it at another diet, not less than nine days after such notice, either in the High Court or the sheriff court (if the offence can be tried there), notwithstanding that the original citation was to a different court; § 42. Where a diet is deserted *pro loco et tempore*, or postponed or adjourned, or where the trial is ordered to take place at a different place from that first given notice of, the warrant of commitment on which the accused is at the time in custody till liberated in due course of law continues in force, and no new warrant is necessary; § 52. Where two or more crimes are charged cumulatively in the indictment, it is lawful to convict of any one or more of them; and any part of what is charged, if itself an indictable crime, is separable, so as to make conviction of that part competent; § 60. Where a crime is charged as committed with a particular intent, or with particular aggravation, there may be conviction of the crime without such intent or aggravation; *ib.* Where an act charged as a statutory offence is also criminal at common law, or where the facts proved do not amount to the statutory offence, but constitute a crime at common law, it is lawful to convict of the common law crime; § 62. When the evidence sufficiently proves the identity of any person, corporation, or company, or of any place or thing, it is not a valid objection that any particulars set forth in regard thereto in the indictment have not been proved; § 68. Discrepancy between the indictment and the evidence may be cured by amendment of the indictment at any time before the case for the prosecution is closed; provided the court is satisfied that the discrepancy is not material to the merits of the case, and that the amendment will not prejudice the accused in his defence on the merits; § 70. Such amendment is sufficiently authenticated by the initials of the clerk of court; *ib.* The trial shall proceed from day to day till concluded, unless the court see cause to adjourn over a day or days; § 55. The trial takes place with open doors, except in cases of an indecent description; and even in these the doors should be opened before the verdict is

[returned. But the judge may order the court to be cleared in case of disorderly conduct or intimidation.] After the proof on both sides has been concluded, the counsel for the parties address the jury on the import of the evidence, the counsel for the accused, except in cases of treason, having the last word; *Regulations*, 1672, No. 10. The presiding judge then sums up the evidence, and states the law to the jury. [If the jury have made up their minds, they return their verdict at once; 54 Geo. III. c. 67. If they desire to deliberate, they leave the box, and are enclosed under charge of an officer of the court. Any intercourse with the jury after enclosure, unless for a necessary purpose, entitles the accused to an acquittal; 1587, c. 92; *Wilsons*, 18 Dec. 1826, *Syme*, 38. Such irregularity occurring before final enclosure of the jury, has not necessarily the same result, unless it be corrupt. When a trial is adjourned, the jury need not be secluded, except in capital cases, or where the court sees fit to order seclusion; 1887, § 55.] The verdict is returned by the mouth of the chancellor of the jury, unless the court has directed a written verdict to be returned; 6 Geo. IV. c. 22, § 20. The jury need not be unanimous in their verdict; [but where the verdict is only by a majority,] the chancellor must announce the fact in order that it may entered on the record. The verdict must be returned to the court in presence of the accused and of the whole jury. See *Verdict*. If the verdict be *not guilty*, or *not proven*, or in any other way amount to an *absolvitor* of the crime libelled, the accused is immediately dismissed from the bar. [But where the acquittal is on the ground of insanity, the panel is ordered to be detained in custody, until Her Majesty's pleasure be known. See 20 & 21 Vict. c. 71, § 88; 34 & 35 Vict. c. 55, § 2.] If the verdict be condemnatory, the prosecutor then moves the court to apply it; when, if there be no pleas stated by the accused in arrest of judgment, sentence is pronounced by the presiding judge [in open court, and entered in the record; 1887, § 57. But in certain cases, the conditional release of first offenders is permitted. See *First Offenders*. In capital cases, the sentence is signed by all the judges present, and read out from the record by the presiding judge; 25 Geo. II. c. 37, §§ 3, 4; *Acts of Adjournal*, 16 March 1773, 1 Aug. 1849. See the latter of these for other regulations anent the procedure and records of the High Court and Circuit Courts; *Adam's Acts of Sederunt*,

[&c., 176.] The sentences of the Court of Justiciary are not subject to review, or to appeal to the House of Lords; [1887, § 72;] and, unless the royal mercy be interposed, execution will follow in terms of the sentence; *Hume*, ii. 504. See *Pardon*. [*Execution of Sentence*.]

[*Jurisdiction*.—Where a crime has been committed partly in one county and partly in another, or where crimes following on one another are committed in different counties, or where several crimes, which if committed in one county could formerly have been tried under one indictment, are alleged to have been committed by any person in different counties in succession, there is jurisdiction to try the accused on all the charges, whether before the High Court or the sheriff, in such one of the counties as the Lord Advocate may determine; and if such case is tried by a sheriff, he has jurisdiction to pronounce sentence although the accused should only be convicted of an offence committed in a county outside of his ordinary jurisdiction; § 22 of act of 1887. As to the jurisdiction of the High Court generally, see *Justiciary Court. Jurisdiction*; also *Witherington*, 17 June 1881, 8 R. (J.C.) 41.] The sheriff has a very extensive criminal jurisdiction, extending to the trial of many of the higher crimes by means of a jury, and entitling him to convict summarily without the intervention of a jury, in minor offences; the privilege of summary conviction being a branch of the criminal jurisdiction of the sheriff, which he shares with justices of the peace and the magistrates of royal burghs. [See *Sheriff. Justice of Peace. Summary Prosecutions*.] With regard to those inferior jurisdictions, it may be observed in general, that, where express statute does not interfere, the criminal proceedings in all of them are subject to the review of the High Court. See *Advocation. Suspension*. The Court of Session, partly by usage and partly by statute, may take cognisance of the crimes of forgery, perjury, deforcement, fraudulent bankruptcy, contempts, &c. This court tries and punishes those offences without the intervention of a jury; and its sentences are not subject to review in the Court of Justiciary; *Hume*, ii. 509. But the criminal jurisdiction of the Court of Session is never exercised, unless where the offence has been committed or discovered in the course of proceedings in a civil action before it; and even in that case, the practice now is to remit the criminal part of the case to the Court of Justiciary. [See *Mackay's Prac.*

[i. 235.] See *Court of Session. Contempt of Court*. [*Breach of Interdict*.]

Prevention of Delay.—Under the statute 1701, c. 6, any person in custody for trial was entitled to call upon the prosecutor to bring him to trial within a reasonable period; and in the event of undue delay on the prosecutor's part, to obtain his liberty. The prisoner might *run his letters*, that is, he might apply in writing to any of the Lords of Justiciary, or other judge or judicatory competent for judging the crime or offence for which he was imprisoned; and within twenty-four hours, the judge issued precepts to intimate to the public prosecutor and party concerned, if there were such, to fix a diet for trial,—under certification, that the prisoner should be set free if a diet for trial were not fixed within sixty days. If the prosecutor failed to fix a diet, the prisoner might apply to any Lord of Justiciary or judge competent, who, on the matter being duly instructed, was bound, within twenty-four hours, to grant warrant for his release. The diet for trial before the Court of Justiciary might be any time within forty days after the expiration of the sixty days; but the whole proceedings required to be brought to a close within the forty days, so that the prisoner might not be detained beyond one hundred days in all from the date of his intimation, unless delay had taken place on the prisoner's own account and request. If the prosecutor fixed a diet within the sixty days, the additional forty days for completing the proceedings began to run from the expiry of the sixty days. If the prosecutor did not insist at the diet appointed, or did not bring the whole proceedings to an end within the time allowed, the prisoner might apply for release, which was granted, just as if the diet had not been fixed within the proper time. When the trial was before an inferior court, instead of forty days, the period within which the trial required to be concluded was thirty days. A prisoner once liberated on the ground of a diet not having been fixed, could not be recommitted on the same charge, except upon new criminal letters from the Court of Justiciary. [New criminal letters might be brought at any time, even beyond the hundred days, no limit being prescribed by the statute; see *Molyson*, 18 April 1862, 4 Irv. 180; and the prosecutor, either at executing his criminal letters, or afterwards, might have a warrant to recommit the accused, in order to his trial. But in that case the trial required to be brought to an

[issue within forty days from the time of recommitment.] If this was not done, the accused was entitled to a complete and final discharge for the offence. Refusal or delay on the part of judges or officers to give effect to this statute, made them liable to penalties for wrongous imprisonment, which were recoverable in the Court of Session. Gross and wilful disregard of the law exposed the offender to the pains of loss of office and incapacity for public trust. [Prisoners admitted to bail at their own request could not claim the benefit of these provisions; *Balfour*, 20 July 1850, J. Shaw, 377; except persons committed under the Treason Felony Act (11 Vict. c. 12, § 9).] See *Hume*, ii. 98; *Alison's Prac.* 182; [*Macdonald*, 268.]

[These provisions were repealed by the act of 1887 (which, however, does not apply to prosecutions for treason, § 75); and in lieu thereof the following were enacted by § 43:—Any prisoner who is in prison on a commitment until liberated in due course of law, and who shall not be served with an indictment within sixty days of such commitment, shall be entitled to give notice to the Lord Advocate, through the Crown Agent, that if he is not served with an indictment within fourteen days of such notice, the prosecutor will be called on to show cause before the High Court why the accused should not be released. A note being then presented to the High Court, setting forth that such notice has been given, and that no indictment has been served within the fourteen days, if cause is not shown to the satisfaction of the court, warrant is granted for release of the prisoner after three days, unless within that time an indictment be served on him. Provided always (1) that where an accused is so liberated, it shall be competent for the prosecutor to raise an indictment against him, and to obtain from the judge of the court of the second diet, or a Lord Commissioner of Justiciary, a warrant for his apprehension and recommitment to await his trial on such indictment; and in the event of the trial on such indictment not taking place at the second diet thereof, or any other day to which it may be adjourned or postponed by the court, the High Court shall, on the application of the accused, by note to the court, and after hearing parties, consider the whole circumstances of the case, and may in its discretion order the immediate release of the prisoner, or order him to be released on a day named, unless he shall on or before such day be remitted

[to the knowledge of an assize or indictment, or may decline to pronounce any order; (2) that where an accused has been incarcerated for eighty days, and an indictment is served upon him, and he is detained in custody after expiry of such eighty days, then, unless he is brought to trial, and the trial concluded within one hundred and ten days of the date of his being committed until liberated in due course of law, he shall be forthwith set at liberty, and declared for ever free from all question or process for the crime with which he was charged; (3) that where an accused has been liberated from prison after having been committed till liberated in due course of law, he shall not be detained in prison more than one hundred and ten days in all; but unless his trial is brought to a conclusion before the one hundred and tenth day of confinement subsequent to such commitment has expired, he shall be forthwith set at liberty and declared for ever free from all question or process for the crime for which he was committed. But it is competent for the High Court, in any case brought before it under this section, upon its being shown to the satisfaction of the court that the trial of an accused ought to be suffered to proceed after the lapse of one hundred and ten days as aforesaid, when the delay in prosecuting to a verdict is owing to the illness of the accused, or the absence or illness of any necessary witness, or the illness of a judge or juror, or any other sufficient cause for which the prosecutor is not responsible, to order the accused, notwithstanding the expiry of the one hundred and ten days, to be kept in custody, with a view to trial, for such further period or periods as to the court may seem just.

[On this subject generally, see *Hume*, vol. ii.; *Alison's Prac.*; *Macdonald*, 242; *Macdonald's Criminal Procedure Act*, 1887; *Jurid. Styles*, iii. 881; and as to procedure in the inferior courts, *Moncreiff on Review in Criminal Cases*; *Irons' Police Law*, 203. See also *Diet. Desertion of Diet. Evidence. Outlawry.*]

CRO; in the Scotch acts of Parliament, signifies the satisfaction or assythment for the slaughter of a man. *Skene, h. t.*

CROFT; [a small piece of ground adjoining a dwelling-house, and enclosed for pasture, tillage, or other use.] *Tomlins' Dict.*

[**CROFTERS HOLDINGS ACT**, 1886; 49 & 50 Vict. c. 29. The object of this statute, which is exceptional in nature and limited in scope, is to amend the law

[relating to the tenure of land by crofters in the Highlands and Islands of Scotland. Security of tenure, and fair rent, under certain conditions, are the main benefits which the act endeavours to confer; and the agency employed is the Crofters Commission, consisting of three members, of whom one must be able to speak Gaelic, and one must be an advocate of ten years' standing; § 17.

In this act *crofter* means any person who at the passing of the act is tenant of a holding from year to year, who resides on his holding, the annualrent of which does not exceed £30 in money, and which is situated in a crofting parish, and the successors of such person in the holding, being his heirs or legatees; *crofting parish* means a parish in which there are at the commencement of this act, or have been within eighty years prior thereto, holdings consisting of arable land held with a right of pasturage in common with others, and in which there still are tenants of holdings from year to year, who reside on their holdings, the annualrent of which respectively does not exceed £30 in money, at the commencement of this act; *cottar* means the occupier of a dwelling-house situate in a crofting parish with or without land who pays no rent to the landlord, as also the tenant from year to year of a dwelling-house situated in a crofting parish who resides therein, and who pays to the landlord therefor an annualrent not exceeding £6 in money, whether with or without garden ground, but without arable or pasture land; *holding* means any piece of land held by a crofter, consisting of arable or pasture land, or of land partly arable and partly pasture and which has been occupied and used as arable or pasture land (whether such pasture land is held by the crofter alone, or in common with others) immediately preceding the passing of this act, including the site of his dwelling-house and any offices or other conveniences connected therewith, but does not include garden ground only, appurtenant to a house; § 34. Other expressions have the same meanings as in the Agricultural Holdings Act, 1883. See *supra*, p. 35*b*. The act does not apply to any holding or building let to a person during his continuance in any office, appointment, or employment of the landlord, or of any tenant of the landlord, nor to any holding or building let at a nominal rent, or without rent, as a pension for former service, or on account of old age or poverty, nor to any

[holding or building let to a person during his tenure of any office such as that of minister of religion or schoolmaster, nor to any innkeeper or tradesman placed in the district by the landlord for the benefit of the neighbourhood; § 33.

Security of Tenure.—A crofter may not be removed from the holding of which he is tenant except in consequence of one or more violations of statutory conditions; but he has no power to assign his tenancy. The violations specified are these:—(1) Failure in due payment of rent. (2) Executing any assignation of the tenancy. (3) Persistently dilapidating buildings, or deteriorating the soil, after specific notice to desist. (4) Subdividing or subletting the holding or part thereof, or erecting a dwelling-house on it otherwise than in substitution for those already upon the holding when the act passed (25 June 1886), without the landlord's written consent. (5) Persistently violating any condition signed by him, legally applicable to the holding, and found reasonable by the Commission. (6) Becoming notour bankrupt or executing a trust-deed for behoof of creditors. (7) Obstructing the landlord, or any person authorised by him, in the exercise of his right to enter upon the holding for certain specified purposes. (8) Opening a house on the holding, without the landlord's consent, for the sale of intoxicating liquors; § 1. The purposes for which the landlord has right under this section to enter upon the holding are the following:—Mining or taking minerals, or digging or searching for minerals; quarrying or taking stone, marble, gravel, sand, clay, slate, or other workable mineral; cutting or taking timber or peats, excepting timber and other trees planted by the crofter or his predecessors in the holding, being of the same family, or that may be necessary for ornament or shelter, and excepting also such peats as may be required for the use of the holding; opening or making roads, fences, drains, and water-courses; passing and re-passing to and from the shore of the sea or any loch with or without horses and carriages for exercising any right or property or other right belonging to the landlord; viewing or examining at reasonable times the state of the holding and all buildings or improvements thereon; hunting, shooting, fishing, or taking game or fish, wild birds, or vermin. ("Game" here means deer, hares, rabbits, pheasants, partridges, quails, landrails, grouse, blackgame, capercaillie, ptarmigan, woodcock, snipe,

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[wild duck, widgeon, and teal.) The Commission may, on the application of the landlord, and upon being satisfied that he desires to resume the holding or part thereof for some reasonable purpose having relation to the good of the holding or of the estate, authorise resumption upon such conditions as they think fit, and upon adequate compensation being made to the crofter; § 2. When one year's rent is in arrear, the crofter may be removed in manner provided by § 27 of the Agricultural Holdings Act, 1883; and when two years' rent is in arrear, or when he has broken any other of the statutory conditions (see § 1, *supra*), he forfeits his tenancy, and may be removed under § 4 of A.S. 14 Dec. 1756; § 3. See *Removing*. See also *L. Abinger*, 16 March 1888, 15 R. 598.

Rent.—The rent payable as one of the statutory conditions is the rent, including money and any prestations other than money, payable for the year current at 25 June 1886, unless altered in manner provided by the act (§ 4); *i.e.*, either by agreement between landlord and crofter (§ 5), or by finding of the Commission in accordance with the following rules:—

(1) The landlord or the crofter may apply to the Crofters Commission to fix the fair rent to be paid by such crofter to the landlord for the holding, and thereupon the Commission, after hearing the parties and considering all the circumstances of the case, holding, and district, and particularly after taking into consideration any permanent or unexhausted improvements on the holding and suitable thereto which have been executed or paid for by the crofter or his predecessors in the same family, may determine what is such fair rent, and pronounce an order accordingly. (2) The rent fixed by the Commission shall be deemed to be the rent payable by the crofter as from the first term of Whitsunday or Martinmas next succeeding the decision of the Commission, and shall come in place of the present rent, and, save by mutual agreement, the fixed rent shall not be altered for a period of seven years from such term. (3) Where the Commission shall fix a rent which shall be less in amount than the present rent, the crofter shall be entitled, at the next payment of rent, to deduct from the amount of the fixed rent such sum or sums as he may have paid over and above the amount of the fixed rent in respect of the period between the date of the notice of application to fix the fair rent and the first term of Whit-

[sunday or Martinmas next following the date when such rent was fixed. (4) When an application is lodged with the Commission to fix a fair rent, the Commission may sist all proceedings for the removal of the crofter in respect of non-payment of rent till the said application is finally determined, upon such terms as to payment of rent or otherwise as they shall think fit. (5) In the proceedings on such application the Commission shall take an account of the amount of arrears of rent due or to become due before the application is finally determined, and may take evidence of all the circumstances which have led to such arrears, and shall decide whether, in view of such circumstances, the whole or what part of such arrears ought to be paid, and whether in one payment or by instalments, and at what dates the same should be paid, and the amount and dates so fixed shall be deemed to be the total amount of such arrears due by the crofter, and the terms at which the same become payable; § 6, as amended by 50 & 51 Vict. c. 24, § 4. By § 2 of the last-mentioned act (which was designed mainly to meet difficulties suggested by the case of *Fraser*, 7 Dec. 1886, 14 R. 181), the Commission may, on the application of any crofter who has applied to have a fair rent fixed, and against whom legal proceedings have been taken for payment of rent, grant an order prohibiting sale of the crofter's effects upon his holding, by virtue of any decree for payment of rent, till the application to fix a fair rent has been finally determined, if satisfied that such sale would defeat the intention of the principal act, and upon such terms as to payment of rent or otherwise as they think fit. Such application may be made at any time before expiry of the *inducie* in the action, and shall be determined summarily, after such inquiry as the Commission deem appropriate.

Renunciation of Tenancy.—A crofter may renounce his tenancy on one year's notice in writing, at any term of Whitsunday or Martinmas; § 7 of principal act.

Compensation for Improvements.—A crofter or cottar, on renunciation or removal, is entitled to compensation for any permanent improvements, provided they are (a) suitable to the holding; (b) executed or paid for by the crofter or cottar or his predecessors in the same family; (c) not executed in fulfilment of any specific agreement in writing; §§ 8, 9. The value of an improvement to an incoming tenant is the criterion in estimating compensation; but

[there must be deducted the value of any assistance or consideration given by the landlord, and the value of any deterioration committed or permitted by the tenant within the four years preceding; § 10. Permanent improvements are the following, as enumerated in a schedule:—Dwelling-house; farm offices; subsoil or other drains; walls and fences; deep trenching; clearing the ground; planting trees; making piers or landing stages; roads practicable for carriages from the holding or holdings to the public road or the seashore; all other improvements which, in the judgment of the Commission, shall add to the value of the holding to an incoming tenant. The Agricultural Holdings Act, 1883, is saved by § 31; but valuation of improvements under that act, with a view to compensation to a crofter, is to be made by the Commission, unless the landlord and the crofter otherwise agree.

Enlargement of Holdings.—The Commission are empowered, on the application of five or more crofters resident on neighbouring holdings, and after certain procedure, if satisfied that there is available land which the landlord refuses to let, and that the applicants are willing and able to pay a fair rent for it, and to cultivate and stock it, to make an order for a lease of the land or part of it. The Commission are also empowered to admit such applicants to participate in common pasture occupied by other crofters, or to confer on them rights of pasturage common as among themselves over available land; §§ 11, 12. What land is to be deemed available for these purposes is explained in § 13. The aggregate value of the land assigned must not exceed one-third of the rent or annual letting value of the farm or other holding from which it is taken, when the annual value of the holding is between £100 and £150, one-half when it is above £150 and below £300, or two-thirds when it is above £300. The enlargement must not raise the annual value of the holdings to more than £15 each; *ib.* The procedure in applications for enlargement is dealt with in § 21. The Commission may make orders as to erection and maintenance of fencing, and may decide summarily questions relating to boundaries; *ib.* The powers of the Commission with respect to enlargement are limited to five years (*i.e.*, to 25 June 1891); § 22.

Succession and Bequest.—As already stated, the definition of “crofter” in this act includes his “successors in the holding, being his heirs or legatees” (§ 34). If the

[heirs-at-law are heirs-portioners, the eldest succeeds without division; § 19. Bequest is dealt with in § 16; which enables a crofter, by will or other testamentary writing, to bequeath his right to his holding to one person, being a member of the same family (*i.e.*, his wife or any person who, failing nearer heirs, would succeed to him in case of intestacy), subject to the following provisions:—The legatee shall intimate the bequest to the landlord or his known agent within twenty-one days after the death of the crofter, unless prevented unavoidably. Such intimation imports acceptance by the legatee. Within one month after receiving intimation, the landlord may intimate objection to receive the legatee, failing which the latter comes into the place of the deceased as from the date of his death. If objection is taken, the matter is determined by the sheriff, without appeal. In the case of any legatee, or heir-at-law more distant than wife, son, grandson, daughter, grand-daughter, brother, or son-in-law, the landlord may, on his own part, or for neighbouring crofters represent that, for the purpose of enlarging their holdings, the holding ought to be added to them; and if the sheriff so determine, the heir or legatee shall have right to any claim of compensation for improvements which the deceased would have had if removed.

The Commission report annually as to their proceedings to the Secretary for Scotland, and their report is presented to Parliament; § 18. By § 19 the Commission were directed to ascertain what parishes or aggregates of parishes within the counties of Argyll, Inverness, Ross and Cromarty, Sutherland, Caithness, Orkney and Shetland, are crofting parishes (as defined by § 34, *supra*), and to determine, subject to confirmation by the Secretary for Scotland, that the act shall apply to such parishes. See *M-Nab*, 29 Feb. 1888, 15 R. 472. All the parishes in these counties, except seventeen (which are named in *Rankine on Leases*, 514 note), have been determined to be crofting parishes. The Commission may delegate their duties to one or more of their number, assisted by two valuers or assessors, subject to review by the whole three Commissioners; 51 & 52 Vict. c. 63. Any party may demand, and the Commission may order, that the evidence be taken on oath; § 24 of principal act. The decision of the Commission in regard to any of the matters committed to their determination by the act is final; § 25. An order of the Commission, or of two of their

[number, may be presented to the sheriff, and he, if satisfied that the order is in conformity with the statute and has been duly recorded, may pronounce decree conform, on which execution and diligence shall proceed; § 28. See *D. Argyll*, 24 Nov. 1888, 16 R. 139. (This provision does not seem to be affected by 51 & 52 Vict. c. 63; hence there is no authority for presenting an order to the sheriff, unless made by at least two Commissioners.) Rules issued by the Commission under § 29 of principal act, are printed in *Rankine*, 630. Landlord and crofter may agree to accept the decision of a sole arbiter mutually chosen, instead of that of the Commission, and an order of such arbiter is as effectual as an order of the Commission; § 30. The Treasury may advance to the Fishery Board such sums as Parliament may grant from time to time, for the purpose of enabling the Fishery Board to make advances by way of loan to persons engaged in the fishing industry in seaboard crofting parishes; § 32.

See *Johnston's Crofters Holdings Act*; *Rankine on Leases*, 513. See *Lease. Agricultural Holdings Act.*

[**CROP.** See *Hypothec. Waygoing Crop.*]

CROPPING. An important clause, termed the *clause of management*, is generally inserted in leases, providing, among other things, for the rotation of crops, and prohibiting the taking of certain crops in succession. It varies according to the soil, climate, and other circumstances of the farm. But even in the absence of such a clause, there is an implied obligation on the tenant to cultivate according to the rules of good husbandry; and by the common law, a tenant is restrained from deteriorating a farm by mis-labouring or over-labouring it. It is generally provided, that white corn-crops (*i.e.*, crops which are allowed to ripen) shall never be taken from the same land in immediate succession; and that a certain proportion shall be under turnips, or plain fallow, every year, and be sown to grass with the first corn-crop after turnips or fallow. This clause is usually enforced by additional rents or penalties in case of contravention; as to which the general rule is, that the tenant is not entitled to pay the penal rent, and thereupon to mis-crop. See *Bell on Leases*, i. 246; ii. 161; *Hunter's Landlord and Tenant*, i. 389; ii. 476; [*Rankine on Leases*, 364. See *Lease. Waygoing Crop. Messis Sementem Sequitur.*]

[**CROWN.** See *King.*]

CROWN AGENT. The agent or solicitor

who, under the Lord Advocate, takes charge of criminal proceedings, is usually called the Crown Agent. This functionary receives from the procurators-fiscal in the different counties the precognitions taken when crimes have been committed; lays these precognitions before the Crown lawyers, that they may determine whether the evidence is sufficient to warrant a prosecution; expedes indictments or criminal letters; and, in general, discharges the various duties of agent, in preparing for and conducting criminal trials before the High Court of Justiciary. The appointment to this agency is with the Lord Advocate for the time, and the office is not held *ad vitam aut culpam*. See *Criminal Prosecution*.

CROWN CHARTER. See *Charter from the Crown*.

CROWN DEBTS. By the English law, debts due to the Crown have a preference over all other debts affecting the personal estate; and as long, therefore, as the property remains in the debtor, the Crown's execution excludes that of a subject. The act 33 Henry VIII. c. 39, gives this preference in every case where the other creditors have not obtained judgment for their debts before the commencement of the Crown's process; and the act 6 Anne, c. 26, which established the Court of Exchequer in Scotland on the model of the English Court of Exchequer, introduced the English revenue laws, and provided that the same forms of process for the recovery of Crown debts should be followed in both countries. But this statute excepted heritable property in Scotland, as to which the Scotch law is left on its former footing, according to which, in competitions between the diligence of the Crown and the diligence of a subject, the preference is determined by the same rules which regulate competitions between subject and subject. Hence, the Crown will be altogether excluded from ranking on the heritable estate, unless the proper diligence of the law of Scotland for attaching that estate has been used; and where the Crown has used such diligence, the ordinary rules of ranking will apply. In competitions between the Crown and a landlord under his right of hypothec, it seems to be settled—1st, That the general right of the landlord, although preferable to the diligence of subjects, is not available against the Crown; and, 2^{dly}, That even after sequestration of the effects by the landlord, and a warrant to sell, there is no pledge thereby constituted in favour of the landlord; and the Crown will be preferable, if its claim be

made before the sale of the effects is reported; and the landlord's process finally closed; until which time there is not a "judgment," in the sense of the English law. [But see *Hypothec.*] But in order to secure the Crown's preference over the moveable estate of the debtor, it is necessary, under the statute of Henry VIII., that the Crown's process shall have commenced before judgment has been given in favour of the competing creditor; and, in interpreting the term "judgment" as used in that statute, it is held in Scotland to signify a final order of execution, which requires no farther judicial interference to render it complete; *Robertson*, 1802, M. 7891. Mercantile sequestration, under the Bankrupt Act, has no effect against the Crown's claims; and consequently a discharge under that statute is not effectual against the Crown; [19 & 20 Vict. c. 79, § 148.] But where, on bankruptcy, a writ of extent is anticipated, it has been suggested, as an expedient to defeat the Crown's diligence, that the Court of Session should, on application, pronounce an adjudication of the estate and effects in favour of the sheriff-clerk, with an order on the bankrupt to assign the effects; and such an adjudication, followed by a transference of the possession, it has been thought, might defeat the Crown's preference, without being exposed to any legal objection, as being a mere device to accomplish this purpose. [By the Court of Exchequer Act, 1856 (19 & 20 Vict. c. 56), writs of extent were practically abolished, and a new form of diligence for Crown debts was instituted. See *Exchequer. Extent.* But it was provided by § 42, that "nothing in this act contained shall impair, injure, or affect any preference of the Crown in competition with other creditors; and in all questions of preference or competition, the execution of any charge at the instance, or on the behalf, or for behoof of the Crown, and in the case of deceased Crown debtors to whom no such charge has been given in their lifetime, the execution of any arrestment or pointing at the instance, or on the behalf, or for behoof of the Crown, shall be deemed and taken to be equivalent in all respects to the *teste* of a writ of extent, according to the existing law and practice."] The sanctuary of Holyroodhouse affords no protection to the King's debtor; *Ersk.* B. iv. tit. 3, § 25. [The Crown's interests cannot be prejudiced by the neglect or omissions of its officials; *Meiklam*, 13 July 1860, 22 D. 1427; *Miller's Trs.* 4 July 1884, 11 R. 1046. Expenses of litigation may be awarded both

[to and against the Crown; 18 & 19 Vict. c. 90; 19 & 20 Vict. c. 56, § 24; but see *Wilson*, 19 July 1878, 5 R. 1097, 1103. See *Ersk.* B. i. tit. 3, § 31; *Bell's Com.* i. 781; ii. 40, 462;] *Bell's Princ.* §§ 1241, 1247, 2291; *More's Notes to Stair*, lxxxv.

CROWN LANDS. The annexed property of the Crown cannot be alienated unless under certain statutory limitations; see *Annexation*. The Crown's right is complete without sasine; and hence, when lands holden of the Crown fall to the Crown by forfeiture, they are *eo ipso* consolidated with the superiority. But when the Sovereign succeeds in a feudal right to any of his subjects, he must be served heir in special to the deceased—a service which, after being retoured, establishes of itself a perfect right in the Sovereign. [The Commissioners of Woods and Forests have the administration of the Crown lands. Crown lands are exempt from assessment under the Poor Law Acts; *Oliver*, 19 Jan. 1852, 14 D. 356. The exemption is founded on the maxim that the Crown is not affected by any statute unless specially named therein. This rule applies only to statutes passed since the Union; *Mags. of Inverness*, 29 Jan. 1856, 18 D. 366. It does not extend to property dedicated to public or national purposes, but only to property in the occupation of the Crown, or of persons using it exclusively in the service of the Crown. See *Univ. of Edinburgh*, 8 June 1868, 6 Macph. (H.L.) 97, and cases there referred to. The exemption was held not to apply to imperial taxes in respect of police stations; *Clerk*, 16 July 1880, 7 R. 1157; but this decision was overruled by the House of Lords, in *Coomber*, 1883, 9 App. Ca. 61. In practice the right of exemption is for the most part waived by the Treasury; *Guthrie Smith's Poor Law*, 122. See *Castle on Rating*, 95; *Browne on Rating*, 441. As to the private estates of the Crown, see 25 & 26 Vict. c. 37; 29 & 30 Vict. c. 62; 36 & 37 Vict. cc. 36, 62; 37 & 38 Vict. c. 94, § 60.] See *Ersk.* B. ii. tit. 3, §§ 14, 44; [tit. 10, § 19;] *Bell's Princ.* §§ 667, 1145; *Hunter's Landlord and Tenant*, i. 132; [*Rankine on Leases*, 26. See *Exchequer. Woods and Forests. Regalia.*]

CROWN, PLEAS OF. The crimes of murder, robbery, rape, and wilful fire-raising, according to our ancient practice, were cognisable by the justice and his deputies only, and are now cognisable by the Court of Justiciary; hence they are called the four pleas of the Crown. But

even by our ancient law, the jurisdiction of the sheriff in regard to the crimes of murder and robbery interfered to a certain extent with the exclusive jurisdiction of the Court of Justiciary in the trial of those crimes. [Robbery and fire-raising may now be tried in the sheriff court; 50 & 51 Vict. c. 35, § 56.] See *Hume*, ii. 59. See *Sheriff*. [Justiciary Court.]

[CRUELTY TO ANIMALS.] This offence is made penal by 13 & 14 Vict. c. 92, and 39 & 40 Vict. c. 77. For instances of prosecution, see *Sharp*, 23 May 1872, 2 Coup. 273; *Wilson*, 28 May 1874, 1 R. (J.C.) 16; *Cornelius*, 8 June 1880, 7 R. (J.C.) 13; *Jack*, 29 Oct. 1880, 8 R. (J.C.) 1; *Anderson*, 29 Nov. 1881, 9 R. (J.C.) 6; *Murphy*, 2 Ex. D. 307; *Lewis*, 18 Q.B.D. 532. The practice of dishorning cattle was held not to amount to cruelty, by the Court of Justiciary, in *Renton*, 1 June 1888, 15 R. (J.C.) 84. But the contrary has since been decided by the Queen's Bench Division in England, in *Ford*, 18 May 1889, 5 Times L.R. 483; and this view has commended itself to public opinion. See *Irons' Police Law*, 521; *Barclay's Digest*.]

CRUIVES AND ZAIRES; a contrivance used in salmon-fishings. They consist of an enclosure made in a river by stakes or hecks, so as to allow the young salmon or fry to pass through, and only to confine the larger fish. There is an entry into the cruive; but the salmon having once entered, are confined there, and are thus easily caught by the fishers. The width of the hecks is regulated by several old statutes; and there must be what is called the Saturday's slop; *i.e.*, the hecks must be drawn up the height of an ell from the bottom of the river from Saturday evening at sunset until Monday morning at sunrise. This mode of fishing is prohibited in that part of the river where the sea ebbs and flows. The statutes are—1424, c. 11; 1477, c. 73; 1489, c. 15; 1581, c. 111; 1685, c. 20; and the oldest of those statutes refers to preceding regulations on the same subject. [Cruives are now regulated by sched. F annexed to 31 & 32 Vict. c. 123. They may be acquired by district boards with a view to removal; § 13 of same act. A right of cruive-fishing may be acquired by express grant from the Crown, or by prescription on a grant of fishings; *L. Lovat*, 27 Feb. 1880, 7 R. (H.L.) 122.] See *Stair*, B. ii. tit. 3, § 70; *Ersk. B. ii. tit. 6, § 15*; *Bell's Princ.* § 1118; [*Stewart on Fishing*, 182; *Rankine on Land-Ownership*, 270, 789.] See *Salmon-Fishing. Stake Nets*.

CUJUS EST COMMODUM EJUS DEBET ESSE INCOMMODUM; the person who reaps the advantages ought also to be subjected to the disadvantages of any legal rule. *Kames' Equity*, 188, 210.

CUJUS EST DARE, EJUS EST ORDINARE; the bestower of gifts has a right to regulate the disposal of them. [*Broom's Legal Maxims*, 430.]

CUJUS EST SOLUM EJUS EST USQUE AD CÆLUM; a maxim importing the unlimited height to which the right of property reaches, unless restrained by a servitude *altius non tollendi*, or, within burgh, by the regulations of police. It is because letting the eavesdrop fall upon a neighbouring proprietor's ground would be an infringement of this principle, that the liberty to do so requires the constitution of the special servitude of stillicide. *Ersk. B. ii. tit. 9, § 9*. See *Altius Non Tollendi. Stillicide*.

CULPA; [fault or negligence. As a general rule, he by whose fault or neglect loss has arisen is liable for the consequences. The institutional writers, following the older commentators on the civil law of Rome, have distinguished three degrees of *culpa*. *Culpa lata* is gross neglect or omission, such as the law holds equivalent to dolo; *culpa levis* is the want of such diligence as a man of ordinary prudence uses in his affairs; and *culpa levissima*, the want of extreme vigilance. The rule of responsibility laid down under these three divisions is, "that in contracts beneficial only to the owner, as deposit or mandate, good faith alone is required in the custodian, and gross neglect only can make him responsible; that when the benefit is reciprocal, as in sale, hiring, pledge, partnership, and joint property, the care of a prudent man is expected, and responsibility will follow upon ordinary neglect; and that where a person has the custody of subjects only for his own benefit, the slightest neglect will subject him to a claim for indemnification;" *Bell's Com.* i. 483. Among modern civilians, however, the prevailing opinion rejects this plausible classification of the degrees of *culpa*, as unsupported by the original texts of the Roman law, and an invention of the commentators; and the degree of responsibility for negligence is now regarded as a jury question, to be determined according to circumstances. There are, however, clear distinctions in legal principle between different cases; *e.g.*, a paid agent may be held liable in circumstances where a gratuitous agent would be absolved. See *Mackin-*

[*tosh*, 15 July 1864, 2 Macph. 1357; *Giblin*, 1869, 38 L.J.P.C. 25; *Vaughan*, 4 Scott, 244; *Smith's L.C.* i. 220.] See also *Stair*, B. i. tit. 11, § 9; tit. 13, § 2; *More's Notes*, lxxi., lxxxv., xcv.; *Bell's Com.* i. 483; *Bell's Princ.* § 232; [*Ersk.* B. iii. tit. 1, § 21; *Mackenzie's Roman Law*, 197; *Guthrie Smith on Damages*, 23; *Rankine on Land-Ownership*, 311; *Campbell on Negligence*; *Pollock on Torts*, 17, 352. See *Damages*.]

CULPABLE HOMICIDE; [may be committed in three ways:—(1) By the intentional infliction of death, in circumstances which the law deems blameable, though not so much so as to amount to murder; *e.g.*, where there is severe provocation, or reasonable alarm from real or supposed danger. (2) By the unintentional deprivation of life, in pursuance of an intention, not to kill, but to do some inferior bodily injury, from which it was not probable that death would follow. This class includes every case of assault resulting in death, even though the violence be the most trifling, if it is done in pursuance of an illegal or improper object. Any blame, to which the fatal result is traceable, constitutes the crime. (3) Where death results from undue negligence, or want of attention, in the performance of a lawful act. This class includes every fatal accident, which is not purely fortuitous, but may be traced to some blameable conduct on the part of another. Every person placed in a situation in which his acts may affect the safety of others, is bound to take all necessary precautions to guard against the risk to them arising from what he is doing; and if a fatal accident occur through the neglect, either of recognised practice or regulations, or of such precautions as are recommended by ordinary prudence, the delinquent is liable to a charge of culpable homicide. See *Paton*, 8 Nov. 1845, 2 Broun, 533. The punishment of culpable homicide is arbitrary, varying from penal servitude for life to a merely nominal sentence. In *A.B.*, 21 Nov. 1887, 15 R. (J.C.) 30, the prisoner was dismissed without sentence. Under an indictment for murder, it is always competent for a jury to return a verdict of guilty of culpable homicide.] See *Hume*, i. 191–3, 233–52; *Alison's Princ.* 92; [*Macdonald*, 131.]

CULPRIT; in English law, a prisoner accused for trial; *Tomlins' Dict.*

CULRACH; is defined by Skene, a *backburgh* or cautioner, for the appearance of a party who has been repledged from

one court to another; the *culrach* being answerable in the event of wrongful repledging; *Skene, h. t.*

CUNNINGHARES; rabbit warrens. See *Rabbits*.

CURATORY. To persons who of themselves are incapable of managing their affairs, the law affords the means of doing so by the appointment of curators. The powers and duties of curators differ according to the nature of their appointment, and the condition of the parties to whom their curatory extends. Their several denominations may be classed under these heads,—1. *Curator to a Minor*. 2. *Curator to an Idiot*. 3. *Curator Bonis*. 4. *Curator ad Litem*.

1. *Curator to a Minor*.—A minor, until he arrives at the age of puberty, has no *persona standi in judicio*; and therefore, during his pupillarity, both his person and his property are placed under the guardianship of tutors. See *Pupil. Tutor*. At the age of puberty, which in males is fourteen, and in females twelve years, a minor, although he becomes invested with certain powers in the management of his own affairs, is still held to be a proper object of the protection of the law against deception, on account of his inexperience. The father, while alive, is the natural guardian and administrator-in-law for his lawful children who are minors; the father's guardianship comprehending the characters of tutor to his children while they are pupils, and of curator to them after they become *puberes*, and until their majority, which, in both sexes, is fixed at twenty-one years of age. The natural guardianship of the father, however, is restricted by the Scotch law to those children who are not forisfamiliarated. See *Forisfamiliaration*. It vests in the father without any form of legal process; and he is exempted from the observance of certain formalities, as well as from the strict responsibility required of other curators. 1st, He is not bound to take the oath *de fidei administratione*; nor, 2dly, to make up inventories; nor, 3dly, to find caution, unless where he is in embarrassed circumstances; and, 4thly, he is not held liable for omissions. Although the curatory of the father may, with his own consent, be superseded by the minor *pubes* making choice of other curators, in the manner to be afterwards explained, yet this cannot be done by the minor without the concurrence of his father as curator. But the father's office of administrator-in-law is excluded where property has been left to the minor

under other administrators, or exclusive of the father's administration; and upon the marriage of a daughter, the curatorial office is by law transferred from the father to the husband, if he be major, although it will revert to the father if the husband die before his wife attain majority. When the minor has a claim against his father, a curator *ad litem* may be appointed to him. The father's powers of administration were extended by the statute 1696, c. 8, by which a father is empowered, while in *liege poustie*, to name tutors and curators to act for his children after his own death. [See *Greig*, 19 Oct. 1872, 11 Macph. 20.] The powers conferred on curators so nominated are as extensive as those possessed by the father himself; but the curators accepting the office subject themselves to the same formalities and responsibilities which are required of other curators, except that they are not bound to find caution; and under the statute, their nomination may contain a declaration that they shall not be liable for omissions, nor *singuli in solidum*, but each for his own actual intromissions only. But this power of dispensation is limited by the statute to the means and estate descending from the father himself. The effect of the statute being to confer authority upon the father to delegate and continue his own curatorial power, a nomination by him precludes any choice of curators by the minor himself, unless with the consent of the curators named by his father; *Pitcairn*, 1731, M. 16339; *Drumore*, 1744, M. 16349; *Ersk.* B. i. tit. 7, § 11. A father, however, has not the same power to name curators to his natural children, who are in law regarded as strangers to him; *Wilson*, 10 March 1819, F.C. [See *Parent and Child*.]

A minor whose father has not named curators may take the management of his estate upon himself, or put himself under the direction of curators, in the manner prescribed by the act 1555, c. 35. This act, as it has been judicially interpreted, requires that the minor shall cite at least two of his nearest of kin on the father's side, and two on the mother's side, personally, or at their dwelling-places, and all others having interest, edictally, at the head burgh of the jurisdiction within which the minor's lands lie, to appear before his own judge ordinary; *Wallace*, 1674, M. 16290. In case the minor has no heritable property, the publication of the edict is made at the head burgh of his own domicile. [The action may be brought

[either in the sheriff court, in which case it commences by an edict of curatory; or in the Court of Session, in which case a summons is raised. If the next-of-kin are furth of Scotland, the action must be in the Court of Session; and in that case, though other kin are major and in Scotland, the usual practice is to present an application to one of the divisions of the Court of Session to dispense with citation of the absent next-of-kin. See *Buchan's Tutors*, 7 June 1873, 11 Macph. 662 (and report there by Mr A. Broun, P.C.S., as to practice); also *Kyle*, 15 June 1861, 23 D. 1104; *McClements*, 25 June 1867, 5 Macph. 944. On the expiry of the *inducie* (which are nine days in the sheriff court and fourteen in the Court of Session), the minor, in presence of the judge, chooses his curators, or, as is the usual practice, lodges a deed of nomination. A nomination was sustained by the Lord Ordinary on the Bills sitting in vacation, under 31 & 32 Vict. c. 100, § 93, in *Hay*, 21 Sept. 1887, 15 R. 1.] On the day of appearance, such of the curators nominated as are willing to undertake the office, sign their acceptance, take the oath *de fidei administratione*, and give security to account for their intromissions. Upon this being done, the judge interposes his authority to the appointment, and an act of curatory is thereupon extracted, which is sufficient to vest the legal powers in the curator. [If reasonable ground be shown to the court for suspecting that the minor is liable to undue influence in the choice of curators, his person may be sequestered prior to choosing. See *Wilson*, 10 March 1819, F.C.; *Grant*, 14 Dec. 1844, 7 D. 226. As to procedure in choosing curators, see *Fraser on Parent and Child*, 354; *Mackay's Prac.* ii. 293; *Dove Wilson's Sher. Court Prac.* 502.] Curators, whether nominated by the father, or chosen by the minor, are required, by 1672, c. 2, to make up a complete inventory of the minor's estate, of which inventory three copies, all signed by the curators and the next-of-kin on both sides, must be judicially produced before the minor's judge ordinary; and after being signed by the clerk of court, one copy is given to the next-of-kin by the father, another to those by the mother, and a third to the curators. See *Inventory*. In case of neglect to comply with this requisite, the statute declares,—1st, That the curators shall not be allowed credit for any expense incurred in the minor's affairs, which, by A.S. 25 Feb. 1693, has been explained to

mean such expenses as have been laid out in law-suits and legal diligence; 2*d*, That they shall be liable for omissions, a liability to which, it may be observed, they are at any rate subject at common law; and, 3*d*, That they may be removed from their office as suspect. The statute farther declares that curators shall have no power to act until the inventories be made up. Yet a payment made to a curator, who had not made up inventories, was sustained; *Logan*, 1772, cited in *Ersk.* B. i. tit. 7, § 23. When a minor names curators, he sometimes declares them exempt from liability *singuli in solidum*; but it has been held that curators cannot be so exempted from liability for omissions; *Watson*, 1773, M. 16369; and the efficacy of an exemption from any of the legal responsibilities of the office by the minor's declaration, when he appoints them, is extremely questionable.

There is still another mode by which minors, in the management of their property, may be put under the direction of administrators, which, although it does not appear to fall properly under the character of curatory, has yet been treated in our law books under that title. A person making a gratuitous conveyance of property to a minor is held to be entitled to appoint curators for him, to the effect of managing, on his behalf, the property so conveyed. Such an appointment can only infer a partial power of administration, which, although it excludes the management of ordinary curators as to the property so conveyed, is not incompatible with the existence of proper curators, either by the father's nomination or the minor's choice. A stranger has no power, either at common law or by statute, to appoint curators to a minor; but, on the other hand, any one in gifting his property is entitled to annex to the gift whatever legal conditions he may think proper as to the administration or management of it. And as the deed under which administrators appointed in this manner are to act, must itself show the extent of the property placed under their management, it seems not to be clear that curators so appointed (if they can be called curators), are bound to make up inventories, or to comply with the other statutory requisites. It rather appears that they are to be regarded as ordinary managers, liable to be called to account by the proper curators of the minor. Accordingly, it has been held that a nomination of this kind does not prevent the minor from choosing

curators for himself. This was decided in a case where the minor was a natural child, and where the nomination of administrators was made by the reputed father; *Wilson*, 10 March 1819, F.C.

Although, after curators have been appointed, their consent is essential to the validity of every act of the minor, yet a minor to whom no curators have been nominated, and who has not chosen curators for himself, may do every act which the consent of curators, if he had any, would warrant; and the interposition of curators will not protect the acts of the minor from any challenge to which they would have been liable, had they flowed from a minor without curators. Thus, in both cases, the deeds of a minor may be reduced on the head of lesion. See *Minor*. Curators, whether nominated by the father or chosen by the minor, must be governed as to their manner of proceeding by the tenor of their appointment. In general, the majority are entitled to act, unless a certain number has been declared to be a quorum, or one of the curators named *sine quo non*; and in these cases, the quorum, or *sine quo non*, must accept and continue to act, otherwise the nomination falls. [But see *Fraser on Parent and Child*, 373.] A curator *sine quo non* cannot act by himself, but he has a negative on the acts of the other curators; *Vere*, 1791, M. 16378; *Bell's Princ.* § 2074. See *Quorum. Sine Quo Non*.

The object of the curatorial office being the control and management of the minor's affairs, it is the duty of the curators to advise with the minor as to all deeds required to be granted by him, and to concur with him in such as are proper; and any deed granted, or contract entered into, without their consent, is null by way of exception, in so far as the minor is concerned; although, if beneficial for the minor, it may be held obligatory on the other contracting party. For a minor, even without the consent of his curators, may better his condition, although he may be reponed against transactions which make it worse; *Stair*, B. i. tit. 6, § 33; *Ersk.* B. i. tit. 7, § 33. On the other hand, the curators cannot act for the minor, who is himself vested in the right of his own property; they can merely authorise his acts by their consent. If, however, the minor will not act as his curators advise, they may apply for exoneration from their office. It is not the duty of curators to dispose of the minor's property, unless under circumstances of necessity, or where the transac-

tion is for the manifest advantage of the minor; and, in such circumstances, curators have frequently applied to the Court of Session for their sanction to any extraordinary step of this kind; but the court have refused to interpose their authority as "unnecessary," on the ground that "the minor and his curators could sell without judicial authority, and that no decree of the court could prevent a reduction by the minor;" *Wallace*, 8 March 1817, F.C. See *Judicial Factor*. Such is the rule of law, so far as relates to the disposal or transference of the minor's property; but, in the general management of the minor's affairs, a wider power seems to be intrusted to curators. Thus, although they cannot by themselves grant discharges for money, which has been invested on behalf of the minor, it rather appears that they may of themselves receive the interest; and further, when the money has been uplifted, they are intrusted with the disposal and reinvestment of it. In like manner, they are entitled to uplift rents falling due from the minor's estate, and even to grant leases. A distinction has been drawn, to the effect that a lease granted by curators alone, necessarily determines with their office, *Resoluto enim jure dantis resolvitur jus accipientis*; while a lease by a minor himself, with consent of his curators, will be as effectual for the whole stipulated period of endurance, as it would be, if granted after majority, provided there be no objection on the head of lesion; *Ersk. B. i. tit. 7, § 16*. [This distinction, however, is untenable, as is shown in *Fraser on Parent and Child*, 377; for no act whatever by the curators alone, without consent of the minor, is valid. Erskine's doctrine, that all leases granted by curators must expire with the office, is inconsistent with the other authorities, which settle that a lease by a minor, with consent of his curators, is effectual for the whole period, subject only to challenge on the ground of lesion. See *Bell's Com. i. 29*; *Ivory's Note to Ersk. cit.*; *Fraser, ubi cit.*; *Hunter on Landlord and Tenant*, i. 168; *Alexander*, 1813, Hume's Dec. 411.] It is the duty of curators to see that the title-deeds and writings belonging to the minor are preserved, and his titles completed. Such of his moveables as cannot be preserved must be disposed of; and the curators will be liable for any damages arising from neglect in either of those points. The curators must pay off all burdens affecting the estate of the minor, and perform the acts which the

minor is bound to perform. [With regard to investment of the minor's funds, see *Fraser*, 235.] Curators may better the minor's condition, by converting moveable debts into heritable; but they cannot, by any act in which the minor does not take a part, make any change on the nature of the succession to the minor. Such debts will remain moveable as to succession; *Ersk. B. i. tit. 7, § 18*. See also *Ross*, 1793, M. 5545; *Graham*, 1798, M. 5599; *Morton*, 11 Feb. 1813, F.C. Curators are allowed to employ, not only the annual income of the minor's estate on his education and maintenance, but, should it be requisite, they may encroach on the principal, in order to put the minor into a profession, or to establish him in life; *Ersk. B. i. tit. 7, § 24*. Curators have no control over the minor's person. A minor *pubes* may marry without the consent of the curators, but cannot make any conventional provisions by marriage-contract without their concurrence. A minor may also bequeath his moveable estate by testament, without the consent of his curators; but he cannot, even with their consent, make a settlement of his heritage; *Ersk. B. i. tit. 7, §§ 14, 33*. Curators are liable *singuli in solidum* for their intromissions and for diligence, unless where this responsibility is restricted in the manner already explained. They are entitled to no salary or allowance for their trouble; but it has been held, that they may appoint a factor with a proper salary; *Ersk. ib. § 16*; *Lord Macdonald*, 1780, M. 13437. [They cannot, however, appoint one of their own number, so as to entitle him to a salary, without express power to that effect; *Fegan*, 20 July 1855, 17 D. 1146.] In no case can a curator be *auctor in rem suam*; *Ersk. ib. § 19*. Any one of full age may competently be appointed to the office of curator, excepting married women, who, by law, are themselves placed under the curatory of their husbands; *Ersk. B. i. tit. 7, § 12*. Hence, where an unmarried woman has been nominated, and has acted, her office falls on her marriage. Procurators,—that is, persons who, without any legal title, have taken upon themselves to act in the capacity of curators,—are, by A.S. 10 June 1665, subjected to the same liability, in all points, with proper curators; *Ersk. ib. § 28*. See *Stair*, B. i. tit. 6, § 29; *Ersk. ubi cit.*; *Bank. i. 174*; *Bell's Princ. § 2088*; [*Fraser on Parent and Child, &c. 346*; *Fraser's Thoms on Judicial Factors, 243*.] See also *Minor*. [Tutor.]

2. *Curator to an Idiot or to an Insane Person.*—Idiots or insane persons are another class to whom the law of Scotland provides curators. It does not appear, however, that the parents of such persons have, *ipso iure*, any right of administration for them after they attain majority. Neither is there any instance of a testamentary nomination of such curators, although Erskine seems to think this competent in our law, as it was in the Roman law; *Ersk. B. i. tit. 7, § 49*. The next male agnate of twenty-five years of age, who is himself capable of managing his own affairs, is the person entitled to the office; 1474, c. 52, and 1585, c. 18. The guardianship of insane persons, although generally treated of under curatory, seems rather to correspond with tutory. The curator to an idiot is intrusted with the charge of the person, as well as the estate of his ward; and a person under such guardianship being incapable of will or consent, the curator must transact everything in his own name. In every other respect, the powers and duties of the office are similar to those which have been already explained in treating of curators to a minor. The persons entitled to institute proceedings for having a curator appointed to an insane person, are his next-of-kin, [or any near relation; *Larkin*, 8 Dec. 1874, 2 R. 170.] And the curator-at-law is the nearest male agnate, except where a wife is fatuous, in which case the husband, as her administrator-in-law, excludes agnates; *Haliburton*, 1791, M. 16379. [As to cognition of the insane, see *Cognition. Insanity*. The usual course in modern practice is to apply to the Court of Session for the appointment of a *curator bonis*, which is granted, without cognition; on production of medical certificates of insanity.] See *Ersk. B. i. tit. 7, § 50*; *Bell's Princ. § 2110*; [*Fraser on Parent and Child*, 522; *Mackay's Prac. i. 300*; *Thoms on Judicial Factors*, 276.]

3. *Curator Bonis.*—Where an heir is deliberating whether or not he shall enter,—or where an infant is without tutors,—or where a succession opens to one who is resident abroad,—or where a person is labouring under some temporary incapacity to conduct his own affairs,—and in other cases of a similar description,—the Court of Session may appoint a *curator bonis* to manage and preserve the property, until the person to whom it belongs is in a situation to act either for himself or by means of other managers. Curators *bonis* are also named for the management of trust-estates,

where the trustees have all declined to accept, or cannot legally do so. The office of *curator bonis* is conferred by the court, on a summary application, [presented to the Junior Lord Ordinary; and the curator so appointed is subject to the provisions of the Pupils Protection Act (12 & 13 Vict. c. 51). See *Judicial Factor*. In *Semple*, 3 July 1888, 15 R. 810, a *curator bonis* was held liable for the whole expense of rebuilding a house on his ward's estate, without special power from the court. See *Ersk. B. i. tit. 7, §§ 10, 48*; *Bell's Princ. § 2121*; *Fraser on Parent and Child*, 458, 543; *Mackay's Prac. ii. 300, 370*; *Thoms on Judicial Factors*, 243.]

4. *Curator ad Litem.*—Judicial proceedings, in which a minor is interested, may be of so serious importance to him, that, in every case, our law requires that a curator for the minor be made a party. Where the minor has already curators, they are his proper advisers in the law-suits in which he may be engaged, and must be cited along with him; *M'Turk*, 7 Feb. 1815, F.C. Where the minor has no tutors or curators, it is necessary not only that tutors and curators be cited edictally, but also, when appearance is made for the minor, that a *curator ad litem* be appointed for him; and, if this be omitted, any decree *in foro* against the minor may be opened up as a decree in absence; *Sinclair*, 15 Jan. 1828, 6 S. 336; *Dick*, 15 May 1828, 6 S. 798; 5 Feb. 1829, 7 S. 364. In like manner, if a minor be engaged in a law-suit with his tutors or curators, or a wife in a suit with her husband, a *curator ad litem* must be appointed to conduct the process. [But in consistorial causes, and petitions for protection of a wife's property under the Conjugal Rights Act, the practice is not to appoint a *curator ad litem* to the wife; *Fraser on Husb. and Wife*, i. 570; *Mackay's Prac. i. 311*. Where a father will not concur in an action raised by his minor child, a *curator ad litem* is appointed; *M'Conochie*, 2 March 1847, 9 D. 791.] The appointment is made, on the motion of either party, by the judge before whom the process depends. The appointment is confined to the particular suit in which it is made; and the *curator ad litem* appears at the bar, and takes the oath *de fidei administratione*, of which proceeding a minute is made by the clerk of court, which completes the curator's title. A *curator ad litem* having no authority to intromit with the minor's estate, is not under the necessity of finding caution.

[He is not personally liable for expenses of process; *Fraser*, 9 March 1847, 9 D. 903; but he is entitled to his own expenses, as well as to fair professional remuneration; *Robertson*, 27 June 1849, 11 D. 1201; *Collie*, 4 March 1851, 13 D. 841; *Johnstone*, 9 Jan. 1885, 12 R. 468. A father suing his pupil child is bound to provide the curator *ad litem* with funds to defend the action; *Studd*, 8 May 1883, 10 R. (H.L.) 53. A curator *ad litem* has no authority to compromise an action; *Stephenson*, 16 Jan. 1844, 6 D. 377.] Where a motion for the appointment of a curator *ad litem* is not made by either party, the judge ought to make the appointment *ex proprio motu*. [If the action goes on without such appointment being made, the proceedings are not null; but if the minor show that he suffered lesion through want of a curator, the proceedings may be set aside; *Cunningham*, 8 Jan. 1880, 7 R. 424.] See *Ersk. B. i. tit. 7, § 13*; *Stair, B. i. tit. 6, § 31*; *Bank. i. 175*; [*Fraser on Parent and Child*, 153, 326; *Shand's Prac. i. 140*; *Mackay's Prac. i. 315*.]

CURFEU; in England, a bell which rang at eight o'clock in the evening, in the time of William the Conqueror; on hearing which every person was obliged to rake up or cover over his fire, and put out his light. *Tomlins' Dict. h. t.*

CURIA; a court, civil or ecclesiastical. *Skene, h. t.*

CURIALITAS; the courtesy of Scotland. *Skene, h. t.* See *Courtesy*.

CURRENTE TERMINO; in reference to leases, means "during the currency of a term." ~ Poinding *currente termino* may be warrantably stopped by sequestration under the landlord's hypothec, unless the creditor offers consignation, or sufficient security for the hypothecated rent. [But see *Hypothec*.] In the general case, the landlord cannot apply for sequestration *currente termino*, or before the rent falls due; but he may do so on cause shown. [The furniture of a dwelling-house cannot be sold, though it may be sequestered, *currente termino*; for a dwelling-house cannot be possessed without furniture; *Wells*, 1800, *Hume's Dec.* 225.] See *Bell on Leases*, i. 369, 389; ii. 25; *Hunter on Landlord and Tenant*, ii. 391, 416; [*Rankine on Leases*, 352.]

CURSING OF GOD. See *Blasphemy*.

CURSING OF PARENTS. The statute 1661, c. 20, provides the punishment of death for every child above the age of sixteen years, who, not being distracted, shall curse or beat a parent. [But the offence

[is no longer capital; 50 & 51 Vict. c. 35, § 56.] See *Hume*, i. 324; [*Macdonald*, 162.]

CURSING AND SWEARING. The offence of profane cursing and swearing is punishable by certain pecuniary penalties, proportioned to the rank of the offender; and, on failure to pay, by imprisonment, or setting in the stocks, or, in cases of obstinate perseverance in the offence, by banishment. The statutes imposing the penalties are, 1551, c. 16, and 1581, c. 103. By more recent statutes, 1661, c. 19, and 1661, c. 38, § 25, the execution of those laws is particularly committed to justices of the peace; and, by 1696, c. 31, any person may pursue. [This offence is never prosecuted now, except as part of such disorderly conduct as is punished as a police offence.] *Hume*, i. 572; [*Macdonald*, 204.]

CURSING, LETTERS OF. Letters of excommunication were anciently termed letters of cursing. Those letters passed on the decrees of church courts; and, if the person against whom they were directed remained for forty days contumacious and unrepentant, letters of caption were issued against him at the King's instance, not on account of his failure to pay or perform in terms of his obligation, but as a punishment for his impious contempt of the censures of the church. At the Reformation, letters of cursing were abolished, along with the ecclesiastical system, of which they formed a part; and afterwards, on the establishment of the commissary courts in 1563, the place of letters of cursing was supplied by letters of horning and caption, which the Court of Session was directed by Queen Mary to award on the decrees of the commissaries. *Ross's Lect.* i. 100, 269; *Jurid. Styles*, 2d edit. iii. 570; *Balfour's Practicks*, 564. [See *Excommunication*.]

CURTILAGE; in England, "a courtyard, backside, or piece of ground lying near and belonging to a dwelling-house." *Tomlins' Dict.* See *Rankine on Land-Ownership*, 751.]

[CUSTODY OF CHILDREN. See *Parent and Child*.]

CUSTOM or CUSTOMARY LAW; is the unwritten law of the country, founded on immemorial custom, in contradistinction to the statutory or written law. Customary law derives its force from being considered as the implied ordinance of the legislative power. Uniform custom has, in some respects, the same effect with express statute; thus it will afford a rule of inter-

preting statutes contrary to the words of the enactment; and an immemorial and uniform custom to the contrary will even have the effect of abrogating a statute. *Ersk. B. i. tit. 1, §§ 30, 43; Bank. i. 24; Bell's Com. i. 456; Brown's Synop. tit. Consuetude*, and pp. 308, 1105; *Shaw's Digest, tit. Consuetude*. See also *Desuetude. Usage*.

CUSTOMS; are duties imposed by authority of Parliament on the importation and exportation of certain commodities. Those duties depend upon the particular statutes in force at the time, and vary with the exigencies of the state, or with the views of policy which may render it expedient to encourage or discourage particular exports or imports. By the Treaty of Union, the laws in relation to customs are made the same in Scotland as in England. [See the Customs Duties Consolidation Act, 1876 (39 & 40 Vict. c. 35), amended by 50 Vict. sess. II. c. 7; also *Barclay's Digest*. See *Excise. Smuggling*.]

CUSTOS ROTULORUM; the keeper of the rolls or records of the county; the

officer intrusted with the custody of the rolls of the sessions of the peace, and also of the commission of the peace. He is always a justice of the peace of the quorum of the county, and generally some person of quality. He is appointed by a writing, signed by the Sovereign, which is a warrant to the Lord Chancellor to put him on the commission. He may execute his office by deputy, and has power to appoint the clerk of the peace; *Tomlins' Dict.* This office is not now in use in Scotland, although it is mentioned in the statutes 1617, c. 18, and 1661, c. 38, and also in Cromwell's instructions to the justices of the peace. *Hutch. Justice of Peace, B. i. c. 1, § 10*.

[CY-PRÈS]. Where a person has expressed a general intention, and also a particular mode in which he wishes it carried out, but the intention cannot be carried out in that particular mode, the court will in certain cases direct the intention to be carried out *cy-près*, that is, as nearly as possible in the mode desired. *Sweet's Law Dict.* See *Burnett*, 12 June 1888, 15 R. 723. See *Nobile Officium. Trust*.]

D

DAILY COUNCIL. By the act 1503, c. 58, the power which had been formerly vested in the Session was transferred to a new court, to be named by the King, called the *Daily Council*, which was appointed to hold its sittings at Edinburgh, or where the King should direct, for the purpose of deciding in civil causes daily as they should occur. This was the court which immediately preceded the institution of the College of Justice, and from which the present court derives its title of "Council and Session." *Stair, B. iv. tit. 1, § 18; Ersk. B. i. tit. 3, § 11*. See *College of Justice. Session, Court of*.

DAMAGES. In legal phraseology, the term damages is usually applied to the pecuniary reparation due for loss or injury sustained by one person, through the fault of another. Every illegal, unwarrantable, or malicious act, whether fraudulent or not, by which another is injured, either in his patrimonial interests, or in his person or feelings, founds a civil claim for damages against the person who has caused the loss or injury. This claim may be grounded on a breach of contract, or on a crime or delict, or *quasi delict*, or on any blameable

omission or neglect of duty; the civil claim for reparation, at the instance of the private party who has suffered, not being incompatible with proceedings *ad vindictam publicam*, at the instance of the private party, or of the public prosecutor. Damages for breach of contract are due only where it is impossible to enforce specific performance; for it is not optional to the obligant to perform his obligation, or to pay damages; and even where a specific penalty is annexed to a failure in performance, so long as performance is possible, the debtor in the obligation is not entitled to pay the penalty, and so to get quit of his obligation. [See *Penalties*.] The damages cover the loss, together with the expense of the proceedings necessary for obtaining reparation; but, where there is no fraud or delinquency, remote or consequential damages will not be given. Where, for example, the claim is founded on a failure to pay a sum of money, the principal sum, with the legal interest, is all that can be demanded as damages; not the possible profit, which the creditor might have derived from the use of the money, had it been paid in terms of the obligation.